

(2015) 02 RAJ CK 0065

In the Rajasthan High Court

Case No : Civil Writ Petition No. 13872/2014 and Civil Misc. Stay Application No. 12747/2014

Jindal Saw Limited

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)

Citation : (2015) 3 CDR 1566

Hon'ble Judges : Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Kamlakar Sharma, Senior Counsel assisted by Ajay Shukla, for the Appellant; R.K. Agarwal, Senior Counsel assisted by Yogesh Pujari, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—The petitioner, Jindal Saw Limited, is a company incorporated under the Indian Companies Act and is engaged in the work of manufacture and supply of ductile pipes and ancillary items. The petitioner-company has approached this Court by way of present writ petition challenging the condition that successful bidder shall source all Ductile Iron Pipes(for short "DI pipes") from manufacturers (or any of its group Companies) having ISO:9001 certification and experience of supplying for at least ten years and whose DI pipes and fittings are in satisfactory performance for at least three years in Indian projects for which documentary evidence will have to be submitted from Government Authority not below the rank of Executive Engineer, which has been stipulated in Eligibility Criteria under Clause II(b)(h) of Technical Criteria in Notice Inviting Bid No. 03/2014-15 dated 05.08.2014 (for short "NIB") issued by the respondent-Rajasthan Rajya Vidyut Utpadan Nigam Limited(for short "the Nigam") for Design, Engineering, Manufacturing, Procurement and Construction on turnkey basis for River Water System comprising of civil, mechanical, electrical and CandI works for 2 x 660 MW Coal Based Supercritical

Chhabra Thermal Power Project, Chhabra, District Baran (Raj). It is alleged that the aforesaid condition has been tailor made to qualify Respondent No. 3, M/s. Electrosteel Casting Limited alone and to exclude all other beneficiaries including the petitioner.

2. According to assertion made in the writ petition, the petitioner-company is one of the biggest manufacturers and suppliers of DI pipes in India and is currently producing approximately 3,50,000 MT of DI pipes and is catering to Indian as well as international market. It is having ISO:9001 certification and is engaged in the business of DI pipes for more than nine and half years since the date it was granted BIS licence on 12.05.2005. The petitioner-company has supplied DI pipes worth more than Rs. 1,400 crores in State of Rajasthan to various departments such as PHED, RUIDP, JDA, UIT etc. It is averred that estimated cost of the work as per above referred to NIB was approximately Rs. 350.00 crores. Scope of the work mentioned in NIB includes supplying, laying, jointing, testing and commissioning of DI pipes of diameter 700/900/1000 mm class K7 and K9 for the length 156 KM from Lhasi and Parwan rivers to power plant site. Out of total project cost of Rs. 350.00 crores, cost of DI pipes itself amounts to approximately Rs. 250.00 crores. Since it is a turnkey project, the petitioner as well as the Respondent No. 3, who are manufacturers of pipes, themselves participate in the bid process.

3. As per the technical specifications given in the above referred to NIB under the caption "Technical Criteria", the bidder was required to possess experience of at least seven years, up to the date of submission of tender, of execution and successful commissioning either of, (i) three similar works costing not less than the amount of Rs. 140 crores each; or (ii) two similar works costing not less than the amount Rs. 175 crores each; or (iii) one similar work costing not less than the amount of Rs. 280 crores. Similar works means the works related to raw water/drinking water supply schemes/projects awarded by Government Generating Company/Water Resources Department/Irrigation Department/State Government Water Works Department, including OandM works. This was because the scope of work also included operation and maintenance of quality conveying system from Lhasi and Parwan Rivers to site plan for a period of ten years. Scope of the work has been detailed out in the document (Annexure-3) titled "Turnkey Specifications for Engineering, Procurement and Construction of River Water System" which is running into 984 pages.

4. Mr. Kamalakar Sharma, learned Senior Counsel appearing for the petitioner has argued that the impugned condition is highly arbitrary and irrational. Insertion thereof has been made for reasons of malafide and oblique considerations. While for the bidder, who has to carry out the entire work under the tender, total experience required is seven years, but it has been asked to source all ductile iron pipes and fittings from manufacturer(or any of its group Companies) having ISO:9001 certification and experience of supplying for at least ten years and whose DI pipes and fittings are in satisfactory performance for at least three

years in Indian Projects. This condition is opposed to public policy and has been tailor made to suit and qualify only Respondent No. 3 and its group Companies. Referring to Page 221 of paper book of Annexure-3, it is argued that standard of the pipes has been laid down in Clause 2.0 under heading "Codes and Standards". It has been stated therein that the bidder shall submit as Appendix-VII, a Memorandum of Understanding (MOU) between contractor/bidder and Pipe manufacturer. Apart from the condition of ten years experience, it has also been provided in the MOU that the annual manufacturing capacity of the manufacturer should be 1,00,000 MT minimum. Thus, even without providing for ten years experience, the Nigam had sufficiently ensured quality of pipes as well as capacity of the manufacturer. And this has been further ensured by giving specific design, manufacture, dimensions, tolerances, mechanical properties, internal cement mortar lining, external zinc coating along with bituminous finished layer, inspection and testing of DI water pipes complying with the latest Indian Standard and fitting should comply with IS 8329 (Centrifugally cast (spun) ductile iron pressure pipes for water, gas and sewage-specification) or equivalent international standard unless otherwise specified elsewhere in the Technical Specification and "IS 9523 (Ductile iron fittings for pressure pipes for water, gas and sewage-specification). Submission of learned Senior Counsel is that in the face of all these stringent requirements and conditions, which otherwise ensure quality of DI pipes and other items, condition of requiring the manufacturer to have ten years experience was absolutely unnecessary. It has no nexus with the purpose sought to be achieved.

5. Learned Senior Counsel would submit that impugned condition was opposed by the prospective bidders and other interested parties including the petitioner immediately after NIB was published on 05.08.2014. The petitioner submitted representation thereagainst on 11.08.2014 and 05.09.2014. Thereafter, the Nigam extended last date for submission of bid. Originally last date of submission of bid was 15.09.2014, which was extended upto 07.10.2014 vide order dated 11.09.2014 and thereafter, vide order dated 01.10.2014, such date was extended to 27.10.2014. Thereafter, vide order dated 21.10.2014, last date was further extended to 17.11.2014. In between, the petitioner again submitted representation against aforesaid illegal condition on 05.09.2014 and again on 01.11.2014. Last date for submission of the bid was finally extended upto 03.12.2014 vide order dated 13.11.2014. Although, the Nigam issued reply to the queries of the prospective bidders/contractors and corrigendum for General Condition of contract and eligibility criteria on 13.11.2014, but surprisingly, no reply regarding objection raised by the prospective bidders and necessity of having condition of ten years experience of manufacturing DI pipes has been given. Reference in this connection is made to various corrigendums including Corrigendum-2 (Annexure-8), available at page 1086-1398 of the writ petition. A Factual Report submitted by Tender Inviting Authority to the Chief Engineer (Annexure-R/1 with the reply of the Nigam), stated that there are sufficient number of DI pipes manufacturers available, who have ten years experience of

supplying DI pipes, is absolutely misleading. There are in fact only nine manufacturers of SandS, DI pipes in India having BIS licence who supply DI pipes to various Government Departments in the country. Thus, the kind of restriction put by the respondents allows only one manufacturer, i.e., Respondent No. 3, M/s. Electrosteel Casting Limited, West Bengal and its group companies, i.e., M/s. Lanco Industries Limited (Sri Kalahasti Pipes Limited)-Tirupati (AP) and M/s. Electrosteels Steels Limited. Moreover, procuring supply of DI pipes and ancillary items from Respondent No. 3-company, whose factory is situated in West Bengal would incur more transportation charges. Instead, if the petitioner is allowed to make such supply, whose factory is located in Gujarat, it would cost cheaper as that State adjoins the State of Rajasthan.

6. It is argued that the words, "or any of its group companies" have been purposely inserted so that even such group company, which does not have experience of ten years, could be accommodated for supply of DI pipes. M/s. Electrosteel Castings Limited and M/s. Lanco Industries Limited (Sri Kalahasthi Pipes Limited) started production more than ten years ago, but M/s. Electrosteel Steels Limited, being a group company of Respondent No. 3, will be benefited under the clause which allows group companies, as requirement of experience of ten years has been necessitated for the main company and not for the group companies. In fact, M/s. Electrosteel Steels Limited has the experience of only three months and thus cannot by itself qualify. It has been benefited indirectly by being a group company of Respondent No. 3. In this kind of scenario, there would be no competition whatsoever and the successful bidder will have to procure supply of DI pipes and fittings from Respondent No. 3 and its group companies. Learned Senior Counsel has submitted that the contention of the respondents that successful bidder was required to submit MOU in proforma, which is available at page 194 of the writ petition, therefore, there was no reason to doubt that any manufacturer not having experience of ten years would be allowed to make such supply is without any basis because such MOU does not include the group of companies. In this connection, reference has been made to the definition of "manufacturer" as given at page No. 47(Annexure-2) as well as page 221 of the writ petition, which includes, "or any of its group companies". It is argued that maximum work of procurement and installation of pipes is done by PHED, Government of Rajasthan, which is presently procuring DI pipes of worth Rs. 4000 crores from various EPC contractors and suppliers including the petitioner. In none of the tenders floated by PHED, is there any such obnoxious condition that the manufacturer should have the experience of supplying for ten years. Most of these tenders are valued much higher than the present tender where the petitioner is supplying DI Pipes with same specifications as in the instant case. Reference is made to documents pertaining to various turnkey contracts floated by PHED, which have been collectively placed on record as Annexure-5, each having worth of more than 400 crores.

7. Mr. Kamlakar Sharma, learned Senior Counsel has argued that though scope of judicial review in the matter of contract is limited, but in a case where terms

and conditions have been tailor made to benefit any particular person, this court can in exercise of its power of judicial review quash such condition. Reliance in support of this argument is placed upon decision of the Supreme Court in *Maa Binda Express Carrier and Another Vs. Northeast Frontier Railway and Others*, wherein it has been held that terms subject to which tenders are invited are not open to judicial scrutiny, unless the same have been tailor made to benefit any particular tenderer or class of tenderers. Another relied judgment of the Supreme Court in this behalf is in *Meerut Development Authority Vs. Association of Management Studies and Another*, wherein it was held that limited judicial review may be available in cases where it is established that terms of the invitation to tender were so tailor made as to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. Yet another relied judgment of the Supreme Court is in the case of *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, in which award of the contract to a person in whose favour monopoly was created excluding all other persons, was set aside. Lastly, decision rendered by the Delhi High Court in the case of *Gharda Chemicals Limited Vs. Central Warehousing Corpn.*, has been cited to argue that therein similar condition of three years manufacturing experience of ISI mark chemical inserted in the tender was set aside being irrational and arbitrary and having no nexus with the stated objects.

8. Learned Senior Counsel argued that the decision rendered by Division Bench of Bombay High Court (writ petition filed by the petitioner itself), which has been relied upon by the respondents is distinguishable because therein condition was that the manufacturer should have supplied DI pipes and such pipes should be commissioned and working satisfactorily for at least 10 years and similar condition of 10 years was made applicable for bidder, but in the present case, there is obvious disparity because bidder has been asked to have experience of seven years whereas required experience for manufacturer is ten years. Besides, in that case, there was no such indirect method of permitting group companies, which has been done in the present case. Lastly, learned Senior Counsel submitted that the respondents cannot raise question of locus of the petitioner to challenge the impugned condition contending that only bidders can question said condition because it for them to decide from where they procure DI pipes. By fixing condition of experience of ten years, no choice has been left with the bidders except to procure pipes from any where else except Respondent No. 3 and its group companies to the exclusion of all other manufacturers. This is contrary to spirit and intendment of Rajasthan Transparency in Public Procurement Act, 2005.

9. Per contra, Mr. R.K. Agarwal, learned Senior Counsel appearing on behalf of the Nigam has argued that tender in question is for turnkey project of river water system for Super Critical Thermal Power Plant of the Respondent-Nigam at Chhabra in Baran district. DI pipes and fittings are one of the materials to be used in this turnkey project. Undeniably, the petitioner-company could not

participate in the tender of turnkey project of river water system. It therefore cannot raise objection with regard to any of the conditions of NIB. It is for the successful bidder to source DI pipes and fittings from the manufacturer having ISO 9001 certification and experience of supplying for at least 10 years, whose ductile iron pipes and fittings are in satisfactory performance for at least three years in Indian projects. The successful bidder would have to directly negotiate rate, terms and conditions of supply etc. with DI pipe manufacturer and ensure that the manufacturer satisfies minimum experience and satisfactory performance as set out in the technical criteria. Challenge to the aforesaid condition is an exercise in futility because the bidder of a turnkey project cannot be directed or suggested by the Nigam for sourcing ductile iron pipes and fittings or any other material from a particular manufacturer. Even this Court cannot direct or suggest so. Bidders participating in the process of tender are not party to the writ petition and none of the bidders have raised any objection to the aforesaid condition.

10. Learned Senior Counsel refuted the allegation that the impugned condition has been tailor made to suit Respondent No. 3 alone. Requirement of ten years" manufacturing experience cannot be considered myopically. Its benefit may be evident directly or may be accruable in the long run. Space must be made to achieve the end result. River water system is needed for 2 x 600 MW coal based Supercritical Thermal Power Plant of the respondent Nigam at Chhabra, District Baran. Minimum life of the power plant is 30 years, which is lifeline for the power plant. The turnkey project includes operation and maintenance for ten years. Experience of supplying for at least 10 years by manufacturers of ductile iron pipe has been inserted to ensure the supply of good quality DI pipes and fittings with proven record and manufacturer having capacity and capability. It has been formulated to adjudge the capability of a particular manufacturer, who can provide a fail-safe and sustainable delivery capacity. Capacity and capability of the supplier/manufacturer are two most important criteria for framing suitable conditions for sourcing material. Technical criteria have been stipulated after due deliberation and consultation with project consultant M/s. Tata Consulting Engineers, which is an institutional mechanism for that purpose. There is no infirmity in the decision making process. The river water system under the turnkey project for conveying raw water from the rivers Lhasi and Parwan to Supercritical Thermal Power Plant at Chhabra for a stretch of approximately 45 to 60 Km evidently needs dedicated river water system on long time performance and the manufacturer like petitioner cannot advise to compromise with the technical criteria in their private interest. This criteria has purpose and object to be achieved and is in greater public interest. The condition for ten years experience of supplying DI pipes and fittings is not unprecedented. In several other tenders floated by different corporations, the criteria for ten years supplying experience or like is evident. In the case of Maharashtra Industrial Development Corporation, a turnkey project of centralized water supply scheme, the use of DI pipes in the project could be of a manufacturer, who had supplied

DI pipes and those pipes should be commissioned and working satisfactorily for at least ten years. In the tender of Kerala Water Authority for its water supply project, the tender conditions specifically provided technical criteria in regard to ductile iron pipes to be in production for ten minimum numbers of years. International standard ISO-2531 for ductile iron pipes and fittings provides that all flexible joints for ductile iron pipes shall be designed in compliance with the requirement of condition 5.2 and successfully used for a minimum period of ten years. Quality and utility of DI pipes and fittings cannot be undermined for such huge capacity system which will be for 1 lac cubic meter raw water transmission for minimum period of 30 years, which is the minimum life span of power plant. The petitioner has camouflaged constitutional grievance in a contractual matter, where the Nigam has taken all care for proper commissioning and utility of the project. The tender is for turnkey project wherein the contract price is for entire scope of contract including operation and maintenance for a period of ten years from the date of successful commissioning. Reference in this connection has been made to Clause 2.3 of the tender document which inter alia provides that lump sum price quoted by the supplier in his bid with additions and deletions as may be agreed to and incorporated in the letter of intent/formal work order for the entire scope of the contract shall be treated as the firm contract price. Thus, the tender ensures competitive price bidding for the entire scope of work including operation and maintenance as one project.

11. Mr. R.K. Agarwal, learned Senior Counsel has submitted that the expression "manufacturers (or any of its group companies)" in Technical Criteria cannot be read out of context. It has been inserted for the sake of clarity that the group companies independently having certification, experience and satisfactory performance as per Technical Criteria could also be the source of DI pipes and fittings. Requirement of furnishing MOU equally applies to the group companies as an independent supplier of DI pipes and fittings and they must stand on the same terms and conditions without any distinction. Successful bidder will be outsourcing DI pipes and fittings from the manufacturer satisfying Technical Criteria and with whom MOU has been entered into as provided in the tender document. Condition of ten years in supply of DI pipes would be applicable not only to the main supplier company but also to the group of companies. Learned Senior Counsel in this behalf has referred to the affidavit filed by the respondents clarifying that if two or more enterprises are the group companies and they are independently having ISO 9001 certification and experience of supplying for at least 10 years and whose ductile iron pipes and fittings are in satisfactory performance for three years in Indian projects, they would not be disqualified merely on the ground that they are group companies.

12. Learned Senior Counsel appearing on behalf of the Nigam, in support of his arguments, has also placed reliance upon the decisions rendered by the Hon'ble Supreme Court in the cases of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, ; Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, ; Association of Registration Plates Vs. Union of India (UOI) and

Others, ; Jal Mahal Resorts P. Ltd. Vs. K.P. Sharma and Others, ; Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, ; Jagdish Mandal Vs. State of Orissa and Others, ; decision rendered by Division Bench of the Bombay High Court at Aurangabad Bench in the case of M/s. Jindal Saw Limited v. Maharashtra Industrial Development Corporation and Others (Writ Petition No. 10300/2013 decided on 17.01.2014) and decision rendered by Kerala High Court in the case of N. Chandrasekharan v. The Government of Kerala and Others (WP (C) No. 28945/2005 decided on 24.10.2005). Learned Senior Counsel submitted that in the above-referred decisions, it has been clearly held that the terms of the invitation to tender, being in the realm of contract, are not open to judicial scrutiny. The Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision, only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere, only if the policy decision is arbitrary, discriminatory and malafide. It is argued that in the judgment delivered by the Division Bench of Bombay High Court, Aurangabad Bench in the petitioner's case, it has been held that 10 years criteria could not be faulted with. Similarly, Kerala High Court has also decided this issue against the petitioner. Writ petitions in both the cases were filed by none other than the present petitioner. Reliance has also been placed on the decision rendered by the Supreme Court in the case of Tata Cellular Vs. Union of India, to argue that principles laid down by the Supreme Court in that case are fully satisfied even in the present case work.

13. Mr. S.M. Mehta, learned Senior Counsel appearing for Respondent No. 3 has largely adopted the arguments advanced by Mr. R.K. Agarwal, learned Senior Counsel appearing on behalf of the Nigam. He cited decision rendered by the Supreme Court in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and argued that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. In the aforesaid case, contention of the petitioner was that such relaxation results in denial of opportunity to others. Yet, the Hon'ble Apex Court repelled that contention holding that relaxation has been granted to the appellant on valid principles looking to the expertise of the tenderer and his past experience. Intervention of the Court may considerably delay the project, thus escalating the cost for more than any saving which the court would ultimately effect in public money by

deciding the dispute in favour of one tenderer or the other. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the Wendensbury variety. There is no such case set up by the petitioner, nor any foundation has been laid for the same, therefore, present writ petition deserves to be dismissed. Mr. S.M. Mehta, learned Senior Counsel has also relied upon the decision in the case of Air India Ltd. (supra) wherein the Supreme Court quashed and set aside the judgment of Kerala High Court holding that Cochin International Airport Ltd. did not do any wrong in taking into consideration the fact that Air India is an airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic lines if it was awarded the contract. The State can choose its own method to arrive at a decision.

14. Reliance has also been placed upon the decision of the Hon'ble Supreme Court in the case of S.S. and Company Vs. Orissa Mining Corporation Limited, wherein also the Apex Court rejected the challenge made to amendment in the eligibility clause in Notice Inviting Tender which created bar against participation of the appellant in tender process. Amendment in the eligibility clause was alleged to be malafide being arbitrary action on the part of the Orissa Mining Corporation Limited. The Apex Court upheld the decision of the Orissa High Court dismissing the appeals of the appellants therein. Learned Senior Counsel has also placed reliance on the decisions of the Hon'ble Supreme Court in the cases of Shagun Mahila Udyogik Sahakari Sanstha Maryadit Vs. State of Maharashtra and Others, ; B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, ; and Sorath Builders Vs. Shreejkrupa Buildcon Limited and Another, .

15. I have given my anxious consideration to the rival submissions and perused the material on record and respectfully studied the judgments cited by learned Senior Counsels appearing on behalf of the parties.

16. At the outset, it would be relevant to quote the condition impugned in the present case, which reads thus:

"II Technical Criteria....

(b)h. DI Pipe Manufacturer should have minimum experience and facilities as mentioned below: The Successful Bidder shall source all Ductile Iron pipes and fittings from manufacturers (or any of its group Companies) having ISO:9001 certification and experience of supplying for at least Ten years and whose Ductile Iron pipes and fittings are in satisfactory performance for at least three years in Indian projects for which documentary evidence will have to be submitted from Govt. Authority not below the rank of Executive Engineer. A Declaration in the form of Affidavit in a non juridical stamp paper should be submitted stating clearly that on the date of submission of the tender, the manufacturer is not debarred/disallowed/delisted/blacklisted by any Govt. Deptt./Govt. Undertaking/ Statutory Body/Municipal Corporation/Municipality in any DI Pipe/Fittings supply tender in India."

17. Before advertng to the merits of the case, it would be appropriate to first analyse the decisions relied on behalf of the petitioner. First decision whereupon reliance has been placed is in the case of Maa Binda Express Carrier (supra) wherein the Supreme Court, after revisiting number of its previous judgments, held that all that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny, unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. In the matter of award of contracts, the Government and its agencies have to act reasonably and fairly at all points of time. To that extent, the tenderer has an enforceable right in the Court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.

18. In Meerut Development Authority (supra), another decision relied on behalf of the petitioner, similar line of approach was expressed by the Supreme Court that a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. But in that case, it was also held by their Lordships that the bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. They, however, cannot challenge the terms and conditions of the tender except on above stated ground.

19. In the case of Union of India v. Dinesh Engineering Corporation and Anr. (supra), a tender was floated by the Railways for supply of spare parts to be used in GE Governors and tender of the petitioner was rejected by Railway by taking policy decision in the context of sophistication, precision etc. without taking into consideration the fact that the petitioner was supplying such spare parts for over seventeen years. Petitioner was excluded from consideration for the supply of spare parts to the GE Governors on the sole ground that it does not manufacture governors by itself, whereas the company, which was allotted the work, also did not manufacture GE-Governors. The Railways were found to be making purchases without any tender on a proprietary basis only from the said company which, was in flagrant violation of Article 14 of the Constitution of India.

20. Delhi High Court in the case of Gharda Chemicals Limited (supra) was dealing with a consolidated challenge to a condition which provided that tenders for chemicals would be accepted only from the licensed technical grade manufacturers, who are actually manufacturing technical formulation and must be having experience of at least three years manufacturing of ISI marked

chemical. It was alleged that the said condition has been inserted by Central Warehousing Corporation in order to avoid competitive bidding and to ensure that the tender was awarded to M/s. Bayer Crop Science India Limited. Delhi High Court held that the imposition of the impugned condition has no reasonable co-relation with the quality of the chemical to be supplied, it rather adversely affects the need to have a fair and wide participation in a public tendering process.

21. In all the aforesaid decisions upon which the petitioner has placed reliance, the matters reached to the Courts at the instance of the bidders or tenderers. The petitioner in the present case is not a bidder by itself. What it claims is that had the condition of minimum experience of ten years of manufacturing and supplying DI pipes not been inserted, the successful bidder, whoever is awarded contract of turnkey project, would have had the option to procure DI pipes and other materials from the petitioner. That possibility has been eliminated by the respondents by putting aforesaid condition. Ratio of the aforesaid judgments cannot be therefore directly applicable to the present case. Even then, if the matter is examined from the stand point whether the aforesaid condition has been tailor made to suit Respondent No. 3 and two of its group companies namely M/s. Lanco Industries Limited (Sri Kalahasti Pipes Limited) Tirupati(AP) and M/s. Electrosteels Steels Limited, this Court is not inclined to countenance such a spacious plea in the absence of any material on record to infer malafide designs on the part of the tendering authority to favour Respondent No. 3 or for that matter, any other manufacturer, who would qualify requirement of ten years of experience.

22. The Supreme Court in the case of Association of Registration Plates (supra) was dealing with the scope of judicial review with regard to validity of pre condition/pre qualification of a tender which stipulated that for awarding work of supplying high security registration plates, which require certain level of experience, the bidders would have certain level of experience for award of such work. The Supreme Court held that such condition did not, in any manner, discriminate against indigenous manufacturers of high security registration plates. Merely because few manufacturers did not qualify to submit the tender, the terms and conditions of the tender cannot be said to be discriminatory. In the present matter, case of the petitioner stands on much weaker footings because it is not even a bidder directly, nor it can directly submit its tender. It is up to the successful bidder to decide as to wherefrom it procures supply of DI pipes and other material and on what rates. Therefore, contention that the competitive bids/ price would not be available, cannot be accepted. Moreover, the tender in the present case is for turnkey project wherein the contract price is for the entire work, which also includes operation and maintenance for a period of ten years from the date of successful completion. It would be burden of the tenderers to offer competitive pricing bid for the entire scope of work including operation and maintenance as one, single and unified project. The argument that the successful bidder would have to pay more transportation charges if the supply is procured

from the factory of Respondent No. 3 situated in the State of West Bengal cannot be accepted for the same reason.

23. The Supreme Court in the case of Tata Cellular (supra) has laid down six golden principles for ascertaining the power of judicial review of the court in contractual matters, which still holds the field. Those principles, as contained in para 94 of the report, are reproduced hereunder:

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

24. In Michigan Rubber (India) Limited (supra), it was held by the Supreme Court that in the matter of formulating conditions of a tender document, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by the Court is not warranted. In Jagdish Mandal (supra), the Supreme Court held that evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere, even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. It was held by their Lordships that power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. In Puravankara Projects Ltd. Vs. Hotel Venus International and Others, it was held by the Apex Court that tender terms are contractual and it is the privilege of the Government which invites tender and the Courts do not have jurisdiction to decide which conditions

should be framed.

25. In *Directorate of Education and Others (supra)*, it was held by the Supreme Court that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

26. In writ petition filed by the present writ petitioner itself before Bombay High Court, validity of identical condition contained in Clause No. 2.3(b) of the Tender Notice No. 22 for the year 2013-14 was challenged. Allegation of the petitioner in that writ petition was against Respondent No. 3, M/s. Electrosteel Castings Limited as also M/s. Lanco Industries Ltd. that the said condition has been incorporated in the Tender to favour them. The said condition similarly provided that the manufacturer should have supplied D.I. Pipes above 3/4 dia i.e. 675 mm dia and above and these pipes should be commissioned and working satisfactorily, for at least ten years. Allegation of the petitioner was that the aforesaid condition was incorporated with a view to unduly favour M/s. Electrosteel Castings Limited and M/s. Lanco Industries Limited. Bombay High Court rejected the contention of the petitioner on the premise that nature of contract, magnitude thereof and competence and experience required to carry out the same are all matters based on which the experts in the field frame the terms and conditions and incorporate them in the tender notice. The wisdom thereof is beyond the purview of the writ court. Argument that the condition was tailor made to suit only afore-mentioned two parties was also rejected. Besides, the contention that why ten years experience was required and why not less than that was chosen as requisite experience for the supply of DI pipes was also rejected. It has been further held that once there is no dispute that such an experience was required, then, none can insist on any particular number of years of experience being the criteria. Relevant discussion has been made in Para 11 and 12 of the judgment, which are reproduced as under:

"11. We have applied the very tests to the stated facts. Ultimately the application of the principles depends upon the facts and circumstances of each case. The nature of the contract, the magnitude thereof and competence and experience required to carry out the same are all matters based on which the experts in the field frame the terms and conditions and incorporate them in the tender notice. The wisdom thereof is beyond the purview of the writ court. The opinion in such matters of the experts has to be respected unless it is demonstrated that it is vitiated by arbitrariness or malafides. In the present case, the entire writ petition

narrates as to how the petitioner has, in the past, carried out work under several contracts of the present nature and is thus experienced. The petitioner states that it has entered the field in the year 2004 and therefore, may fall short of the requirement of ten years' experience at least. In the present case, the terms and conditions are incorporated in a contract which is of Providing, Laying and Joining work of pipeline having diameter not less than 675 mm. dia of pipeline (i.e. 3/4th of 900 mm dia) for at least 28.00 kms. of the length of pipeline and Designing, Constructing and Commissioning water treatment plant of capacity not less than 36 MLD. The Note in the Terms and Conditions and particularly for post qualification (for work experience) clarifies that to claim the contract, each contractor/tenderer, in his name, should have, in the last ten years, satisfactorily completed (from start to end) as prime contractor of similar work. Therefore, at the outset, the respondents No. 1 and 2 have mentioned that the minimum experience ought to be of ten years. That is of satisfactory completion and as a prime contractor. Therefore, it is not as if the condition of having supplied the pipes and satisfactorily for ten years is inserted only to suit or tailor made certain contractors. The certificates of the above performance have to be produced and those have to be signed by the authority/officer not below the rank of Executive Engineer of concerned Government/Semi Government or Local Bodies. The Contractor can submit the completion certificate for both the work combined or independently. He shall produce the pipe manufacturing experience and pipeline performance certificate of the pipe manufacturer and that is stipulated in the Note No. 3(a) and (b). In those clauses, one finds the requirement of ten years' experience. Therefore, it is not as if for some part of the work or some particular phase or steps therein, this requirement is inserted. One cannot find fault with the insertion of this condition, considering the nature of the contract. It is for supplying of water to industrial area. It cannot be gainsaid that the continuous supply of water to industrial area where the units and factories are located, is the obligation and responsibility of the M.I.D.C. Unless infrastructure is in place, the industries would not be functional. In the case at hand, the MIDC has to manage to draw and supply water to various industrial areas and the life of the project is of 30 years. Therefore, they desired that an expert hand and having minimum experience of ten years ought to be allotted the contract. It must not be handled by any other or inexperienced or incapable contractor. It is in such circumstances that this condition has been inserted and we do not find any material to hold that the insertion thereof is to suit only the purpose of respondent No. 3 and 4. We do not find any material to substantiate this allegation.

12. The petitioner has not contended throughout that it has experience in the field and the performance certificates, which have been issued proving satisfactory work by the petitioner, have been relied upon by the petitioner. In such circumstances, it is not as if the petitioner is unaware of the criteria of experience. That is usually inserted in such contracts and of the current magnitude. Once there is no dispute that such an experience is required, then, none can insist on any particular number of years of experience being the

criteria. Merely because that is not in their favour, does not mean that the condition of experience is per se malafide, arbitrary or discriminatory. In these circumstances, we do not find any merit in the contentions of Shri P.R. Patil, learned counsel for the petitioner."

27. Kerala High Court in the case of N. Chandrasekharan (supra) wherein also challenge was made to the similar condition of minimum two years" experience of manufacturing DI pipes. The work was relating to laying down DI pipes to be carried by Kerala Water Authority under JBIC Funded Water Supply Project. That writ petition was also preferred by Jindal Saw Limited through its Regional Marketing Head. Notice Inviting Tender in that case had a clause similar to the present one that the contractor shall procure pipes, specials, pumps and other electrical equipments from reputed manufacturers with proven experience in the supply of similar items for at least ten years. It also provided that experience of collaborators, if any, for satisfying these criteria will be acceptable, subject to documentary evidence. Subsequently, the condition of experience of ten years was reduced to five years. Discretion was given to the Engineer to waive such requirement and accept a reduced level of experience with prior approval of the employer taking into account the general reputation of the manufacturer, supply history for similar items and other relevant considerations which in any case shall not be less than two years in the case of pipes, valves, specials pumps, electrical and mechanical equipment etc. Allegation of the petitioner in that case was that even this requirement of experience of minimum two years has been meant to help one of the companies engaged in manufacturing DI pipes namely M/s. Electro Steel Casting Limited, respondent No. 3 in the present case, as that company alone would be able to supply said pipes from India. Kerala High Court relying on its previous decision in the case of State of Kerala Vs. Anoop Kumar, rejected the aforesaid argument and held in para 6 of the report as under:

"6. What are the conditions to be incorporated in a tender are all matters to be decided by a competent authority, having regard to the requirements of a particular work. In this case, the experience prescribed regarding the product standing of the manufacturer is a tender condition applicable to all products. But, the petitioner, who is a new entrant in the field of manufacturing of DI pipes, feels aggrieved by the stipulation of minimum two years experience in the manufacture of DI pipes. But, I find that the said condition has been cleared by a high level committee, consisting of Chief Secretary, Law Secretary, etc. Normally, it cannot be assumed that such a high level committee will take a decision against public interest. Further, the conditions imposed also cannot be said to be irrational or perverse. It is true, for a particular product, there may not be many competitors. But, the same will not render the said condition imposed, in public interest, illegal.... " 28. Even if, in the present case, petitioner"s experience falls short by six months or so, it cannot be made basis to contend that the condition has been tailor made to suit Respondent No. 3 and few other manufacturers and suppliers. As seen from the consistent judicial approach noticed above, freedom of choice has to be conceded to the Nigam to decide as to what particular

number of years should be fixed as the requisite experience. Whatever may be extent of required experience, it may not suit all manufacturers at all times, because some or other such manufacturers may always be short of such experience. That however cannot be the reason to hold fixation of such number of years as requisite experience bad in law or tailor made to suit those who qualify the same. Impugned condition on that basis cannot be said to violate either Article 14 or 19(1)(g) of the Constitution of India. Moreover, this argument is not available to the petitioner because similar plea raised by it has already been rejected by the Bombay High Court in the case of the petitioner itself. Distinction sought to be made on behalf of the petitioner that decision of the Bombay High Court is distinguishable from the facts of the present case because therein required experience of bidders was ten years and equal experience of ten years was required for the supplier or manufacturer, in my considered view, is without any difference because what this Court in the present matter is concerned with is the experience of manufacturer of supplying DI pipes and not that of the bidder. Requirement that successful bidder shall source DI pipes and fittings from the manufacturer having ISO:9001 certification and experience of supplying for at least 10 years, whose ductile iron pipes and fittings are in satisfactory performance for at least three years in Indian projects, is independent of the condition of bidder having experience of seven years up to the date of submission of tender. Both experiences are in different background and cannot be put side by side. One intends to ensure quality of the materials to be used and another is in regard to the experience for turnkey project of River Water System. Experience required in two different fields cannot be compared on simple mathematics overlooking the real object and purpose sought to be achieved thereby.

29. Contention that in view of averments made by Respondent-Nigam in their reply to Para 4 of the writ petition wherein they have submitted that the experience of M/s. Electrosteel Castings Limited and not of its group companies will be considered for supply of DI pipes and fittings, the condition II(b)h under the caption "Technical Criteria" in the NIB, which provides that the bidder shall only source ductile iron pipes and fittings from the manufacturer (or any of its group Companies) having ten year's experience of supplying, is an indirect method providing an escaped route to the group companies, even though they may not be having experience of supplying for at least ten years, also cannot be countenanced because this aspect has been amply clarified in the affidavit filed on behalf of the Nigam before this Court that expression "or any of its group companies" is inserted for the sake of clarity. Group companies independently having certification, experience and satisfactory performance as per the technical criteria could also be source of ductile iron pipes and fittings. It has been further clarified by the respondents in their affidavit that if two or more enterprises are the group companies and they are independently having ISO 9001 certification and experience of supplying for at least 10 years and whose ductile iron pipes and fittings are in satisfactory performance for three years in Indian projects,

they would not be disqualified merely on the ground that they are group companies. Therefore, this argument of the petitioner is also liable to be rejected.

30. Upshot of the aforesaid discussion is that the writ petition fails and is hereby dismissed with no order as to costs.

31. Stay application also stands dismissed.