

(2014) 12 BOM CK 0085

In the Bombay High Court

Case No : Writ Petition No. 1914 of 2014

J.M. Mhatre Infra Private Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 2 BC 648 : (2015) 2 BomCR 54

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : C.G. Gawanekar and G.S. Hiranandani, Advocate for the Appellant;
S.R. Rajguru and S.V. Bharucha, Advocate for the Respondent

Judgement

P.D. Kode, J.—By this petition, filed under Article 226 of the Constitution of India, the petitioner has prayed for-

(aa) issuing a Writ of Mandamus or a Writ or direction in the nature of Mandamus calling for records and proceedings from Respondent No. 2 regarding decision arrived for re-inviting the Tender in Second Call for the subject work and quash and set aside the same.

(bb) directing the Respondents not to take further steps including issuing the fresh tender as decided and conveyed by the Communication dated 27th February, 2014, pending the hearing and final disposal of the Petition.

2. Mr. C.G. Gawanekar, learned counsel for the petitioners urged that paragraph 7-B of tender notice originally issued on the website of respondent No. 2 for the "work the provision of extension and up-gradation of runway with allied operation infrastructure at CGAS, Ratnagiri at the estimated cost of Rs. 73 Crores" required experience of having successfully completed similar work. The said paragraph further recorded that "the similar work" means construction of runway work and pavement quality control concrete flexible and rigid pavement for highway using PQC flexural strength 44 kg/cm² DBM Glass Grid bitumen

PMB-40 DLC WMM, Gsb of similar magnitude. It also contained clause 18 of usual nature to the effect that "accepting officer does not bind to accept lowest or any tender to give any reasons for not doing so".

3. It was urged that on 20th January, 2014 petitioner submitted the tender along with Earnest Money Deposit of Rs. 11,04,000/-. After opening the bids on 21st January, 2014, the petitioner's bid of Rs. 63,60,08,015.30/- was found to be lowest and as such he was listed as L/1.

4. It was further urged that the respondent No. 2 vide letter dated 28th January, 2014 pointed out that rates quoted for certain items mentioned in the list appended with said letter were freak high and requested to reconcile and offer revised rates and accordingly the petitioner vide letter dated 3rd February, 2014 submitted the revised reduced rates for approval and necessary action. It was urged that inspite of it, as the petitioners did not receive letter of acceptance from respondents No. 2, expected by them due to occurring of such events, wrote letter dated 17th February, 2014 requesting respondent No. 2 for issuing the letter of acceptance in their favour.

5. It was urged that from the delay occurred the petitioner apprehended that the respondent No. 2 may not issue letter of acceptance and hence filed the present petition amongst other mainly for the relief of "(a) That this Hon'ble Court be pleased to issue a Writ of mandamus or a Writ or direction in the nature of Mandamus calling for records and proceedings from Respondent No. 2 regarding work of Extension and Up-gradation Runway along with Allied Operational Infrastructure at CGAS, Ratnagiri; (b) Pending the hearing and final disposal of the present Writ Petition, this Hon'ble Court be pleased to direct the Respondents not to allot the said Tender Work to Third Party;". After filing of the writ petition as petitioner was informed by the respondents that tender for the said work was re-invited, they amended the petition for challenging said intimation.

6. It is urged that, on 12th June, 2014 respondents filed an affidavit in reply relying upon Clause No. 18 in the tender notice and further claimed that engineer in Chief MES Head Quarter, New Delhi had decided to reissue a notice inviting tenders from the contractors who have executed runway work earlier and claimed that accordingly fresh notice was issued inclusive of the note therein that similar work means "resurfacing construction/construction of Runway works only".

7. The learned counsel urged that issuance of such notice deprived the petitioner in participating in response to said second call as they were lacking experience in constructing runway.

8. It was urged that the respondent No. 2 in their affidavit in reply did not ascribe any reason for re-inviting the tender by issuing the second notice. It is urged that according to the petitioner said modification made in second notice was malafide as pointed by the petitioner in the affidavit in re-joinder dated 23rd June, 2014, as while issuing tender notice dated 18th February, 2014 such clause

was not introduced by Airport Authority of India, Mangalore International Airport for construction of runway at said airport.

9. It was urged that further affidavit dated 19th July, 2014 filed by the petitioner pointed that their work experience in constructing various express ways, highways was identical to the nature of the work mentioned in the tender notice issued by the respondent No. 2 for constructing runway at Ratnagiri. It was urged that the comparative chart annexed to said affidavit denotes that nature of work executed by the petitioner were identical with work proposed to be carried out at Ratnagiri highway.

10. It was urged that since the respondent No. 2 after finding out that the bid of the petitioner was lowest had invited the petitioner for further negotiation for reducing the rates submitted as per the tender of the petitioner, the respondents ought to have given valid reasons for rejecting the original tender submitted by the petitioner. It was urged that no such reasons were spelt out from the letter dated 27th February, 2014 sent by respondent No. 2 and hence while taking such decision the authority (respondent No. 2) exceeded powers and committed an error of law. It was urged that as no reasonable tribunal could have arrived at such a decision and as such the decision taken by the respondent No. 2 was illegal.

11. The learned counsel in support of his submission placed reliance upon the decision of the Apex Court delivered in the case of Tata Cellular Vs. Union of India, " and particularly upon paragraphs No. 77, 80, 81 and 93 to 95 therein and invited attention to the principles summarized therein after considering earlier decisions given by the Apex Court.

12. It was further contended that the decision arrived by the respondents to re-invite the tender is thus arbitrary and in breach of above referred decision of the Apex Court. It was urged that such decision taken by amending "work experience" and particularly the note of similar works, was only for the purpose of excluding the petitioner from participating in the further tender invited and as such mala fide. It is urged that the reliance placed by the respondent No. 2 upon clause 18 of tender notice pertaining to right of rejection and further reliance upon the purported decision of engineer in Chief, Delhi purported to be based on the CVC guidelines for construction of runways is misplaced in as much as no such guidelines were attached with the affidavit in reply nor the same were placed before the Court for the perusal.

13. It was urged that petitioner along with their affidavit of rejoinder, produced at page No. 50 to 53 the tender notice dated 18th February, 2014 issued by Airport Authority of India, Mangalore, International Airport which had invited the tenders for construction of runway retaining definition of similar work in said notice. It is urged that the same was contrary to the amended tender notice issued by the respondents for re-inviting the tender for the work at Ratnagiri. It was urged that runway work to be carried out by said Airport Authority were

bound to be in consonance with CVC guidelines, if at all there existed any such guidelines, as contended by the respondents. It is urged in such eventuality Airport Authority of India, Mangalore could not have issued the tender notice dated 18th February, 2014 i.e. a notice without seeking the experience of similar work as sought by respondent in the notice issued for re-inviting the tenders for the work at Ratnagiri. The learned counsel reiterated that the letter dated 27th February, 2014 addressed to the petitioner does not give any reason as to why such a decision to re-invite tender was taken and hence in absence of any such reason in said letter now substitution cannot be made by incorporating such reason in the affidavit in reply or in correspondence annexed with the affidavit in reply. In the said context, the reliance was placed upon the decision dated 6th December, 2013 of this Court in "Writ Petition No. 5245 of 2011 in the case of Shishir Realty Private Limited and Another vs. The Vice Chairman and Managing Director, City and Industrial Development Corporation of Maharashtra and 3 Others" and particularly upon paragraph No. 15 therein.

14. Learned counsel thus prayed for allowing the petition and quashing and setting aside the decision of the respondent No. 2 to re-invite the tenders on the count of it being arbitrary and malafide and issued with a view to exclude the petitioner for participating in spite of petitioner being found suitable and qualified for bidding and being listed as L/1 as per the original notice.

15. Mr. S.R. Rajguru, the learned counsel for the respondents submitted that after the opening of the bids on 21st January, 2014 for 6 tenders submitted inclusive of that of the petitioner and preparing comparative statements of the tenders, the same were put before accepting officer on 6th February, 2014. It is urged that on the same day the said officer recorded a note to that effect that petitioner has no previous work experience of the work mentioned in the tender to be carried out in respect of runways as required as per the Central Vigilance Commission guidelines (CVC guidelines). It was urged that said report along with the signed papers were forwarded to the engineer in Chief at New Delhi for further direction. The said directions were received vide letter No. 13600/SC/PQC/77/E8 dated 18th February, 2014 (Annexure Exhibit-II). It was urged that therein it was recorded that Director General (work) has decided that the tender shall be reissued with revised notice inviting tender only to those contractors who had executed runway work earlier and hence directed to issue fresh notice inviting the tender in newspaper and also on MES website regarding the said requirement.

16. The learned counsel for the respondent urged that in said premises respondents vide letter dated 27th February, 2014 annexure Exhibit-C informed the petitioner that the tender for the relevant work at Ratnagiri was re-invited.

17. It was urged that as per the CVC guidelines (Annexure Exhibit-IV) any runway work costing more than Rs. 30 crores selection of the tenders should be as per pre qualification criteria "PQC" in respect of the work mentioned in NIT should be entrusted to the contractor who has got the experience of doing similar

work.

18. It was urged that fresh notice for inviting tender was issued on 15th March, 2014 (Annexure Exhibit-V) in which it was specifically mentioned that experience of having successfully completed similar work during last 7 years i.e. completion of 3 similar work in respect of contract costing not less than Rs. 2920 lakhs or completing two similar works costing not less than 50 % of the estimated cost i.e. each work costing not less than Rs. 3650 lakhs or completing one similar work costing not less than 80 % of the estimated cost i.e. work costing not less than Rs. 5840 lakhs. It was urged that the note provided that similar work means, re-surfacing/construction/extension of runway works only.

19. It was urged the petitioner filed the petition on 21st February, 2014 for setting aside the tender issued by the respondent regarding the work of extension and upgradation of runway at CGAS Ratnagiri and introduced amendment on 10th March, 2014 amending the prayer for setting aside of the decision for re-inviting the tender (as pr Respondent's letter dated 27th February, 2014) alleging in paragraph 18A to 18D of the petitioner that reasons for said decision were not communicated that experience of the work in the re-invited tender was substantially changed, and hence it was malafide, arbitrary and illegal decision suffering from error of law and breach of principles of natural justice and results in bias so as to exclude the petitioner who was listed as L/1 in course of opening of tender on 21st January, 2014.

20. The learned counsel thereafter by pointing the affidavit in reply dated 12th June, 2014 urged that as per the tender provisions the decision was to be taken by either parties to accept or reject the tender within 60 days from the date of the receipt and opening of tender i.e. valid until 21st March, 2014 and as such was not valid for acceptance after 22nd March, 2014. It was urged that the tender work costing Rs. 73 crores was based on pre qualification criteria mentioned in CVC guidelines and hence by letter dated 18th February, 2014 directions were issued for re-inviting the tenders and accordingly fresh NIT was published by letter dated 15th March, 2014. It was submitted that although there is no specific rejection of the tender, the tender of the petitioner stood rejected so far earlier inquiry is concerned and accordingly the petitioners were informed about it by letter dated 27th February, 2014.

21. It was urged that the allegations regarding the malafide due to abandonment of earlier tender are not valid because the said tender was not floated as per CVC guidelines. It was urged that the chief engineer (Navy), Mumbai had put an endorsement that L/1 tenderer i.e. the petitioner has no previous experience of doing runway work which was necessary because runway work is not similar to the work which is done for highways and other roads. It is urged, hence the petitioner's contention of his having similar experience is wholly incorrect.

22. It was urged that Court can take notice of the fact that if the runway work is not carried out properly then there is every possibility of it resulting into

occurring of an accident.

23. By placing reliance upon the decision in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , it was urged that said decision reveals that financial rating cannot be said to be sole criteria inviting the tenders from experienced companies for ground handling facilities at New Airport and accepting the limited global bidding norms and recommending another contractor on the last date of inviting final offer on the ground that it would be in a position to bring more traffic is not arbitrary or illegal.

24. By placing reliance upon the decision in case of Cama Hotels Ltd. and Another Vs. Airports Authority of India and Another, , it was urged that said decision reveals that abandonment of tender notice was not proved to be malafide and hence mere apprehension of the petitioner that the authorities were acting in favour of business rival is no ground to interfere with bonafide and genuine action taken by the authorities in public interest.

25. Lastly, it was contended that since CVC has laid down guidelines in public interest in order to avoid accidents in runways at which aircraft were going to land and take off, abandonment of an previous tender and decision to invite the second tender being in public interest, the petition deserves to be dismissed.

26. Anxious considerations were given to the submissions advanced by rival parties and the record and so also the decisions relied by them were carefully considered to ascertain merits therein. As a result thereof, for reasons recorded hereinafter, we are unable to find any merit in the petition preferred.

27. The reference to the original tender notice supports the submission canvassed by the learned counsel for the respondents of it containing condition No. 6 to the effect that decision was to be taken to accept or to reject the tender by either of the parties within sixty days from the date of receipt and the opening of tender and condition No. 18 to the effect that the accepting officer does not bind himself to accept the lowest or any tender to give any reason for not doing so.

28. Now considering said condition No. 18 and the act of petitioner of submitting tender, we find it extremely difficult to accept the submission canvassed that it was a general condition or that any right had crystallized in favour of the petitioner without respondent No. 2 issuing a letter of acceptance of offer of petitioner. On the contrary, within the period stipulated by condition No. 6 respondent No. 2 having intimated to the petitioner vide letter dated 27-2-2014 of the decision taken of re-inviting tenders no right can be said to have crystallized in favour of the petitioner. We are of such a view as the condition No. 6 referred herein above makes it amply clear that it was open for either of the parties to accept or reject the tender within sixty days from the date of receipt. Needless to add, it is undisputed that bids submitted by the petitioner and other five bidders were opened on 21-1-2014. Thus, it was open for either of the parties to accept or reject, as the case would be, the tender within sixty days

from the said date, i.e. 21-3-2014. Having regard to the same, and admittedly, no letter of acceptance being issued by respondent No. 2 makes it difficult to accept that any concluded contract had arrived at, in between the parties merely due to the fact of the petitioner being found and listed as the lowest bidder or that thereafter, as contended by the petitioner, respondent No. 2 having invited him and negotiations had taken place for submission of reduced revised rates for certain items.

29. With regard to the latter aspect, it can be further added that even accepting that such an event has taken place, still same having taken place before expiry of sixty days, as stipulated in the tender notice and prior to respondent No. 2 intimating about the letter of re-inviting the tender within the span of sixty days, no right can be said to have accrued in favour of the petitioner, as canvassed.

30. In the same context, we further add that we find it extremely difficult to accept that merely because the petitioner was found to be the lowest bidder and marked as L-1 or such an event having taken place, a conclusion can be reached of concluded contract having arrived at in between the parties in spite of notice of tender containing the express stipulation of right of either parties to accept or reject the tender within sixty days. At the cost of repetition, it is added that respondent No. 2 had not issued any letter of acceptance and on the contrary had issued the letter or re-inviting tenders within the stipulated period i.e., before expiry of the period of sixty days from the date of opening the bids. In the light of the said position, we find it difficult to accept the submission canvassed that due to being marked as L-1 tenderer and/or being called for negotiations for such reduction of rates, the petitioner could have expected issuance of letter of acceptance on the part of respondent No. 2, as canvassed on behalf of the petitioner. As a matter of fact, having due regard to the said express stipulation, and no letter of acceptance being issued and hence no right of whatsoever nature being crystallized in favour of the petitioner, makes it difficult to accept that the said conduct on the part of respondent No. 2 can be said to be amounting to promissory estoppel, as tried to be canvassed on behalf of the petitioner. The same is obvious because of the above referred express stipulation in the tender notice and the further act of respondent No. 2 of communicating the decision of re-inviting tenders.

31. Now with regard to the further grievance of the petitioner of the letter dated 27-2-2014, issued by respondent No. 2, not informing him of the rejection of his bid/offer, we are afraid that such a submission can be entertained after considering said letter as a whole. It is obvious as by the said letter respondent No. 2 had expressly communicated of the arrived at decision of re-inviting tenders. It needs no saying that said communication itself denotes rejection of the bid of the petitioner due to the decision taken of re-inviting the tender, i.e. abandonment of earlier notice.

32. Similarly, having due regard to condition No. 18, recited hereinabove from the tender notice, we also do not find any substance in the submission canvassed

that respondent No. 1 failed to assign the reason in said letter intimating about re-inviting tenders and thus for rejection of tender of the petitioner. Respondent No. 2 while inviting the tenders having expressly stipulated regarding their right of rejecting the bids and/or for not accepting the bid of the lowest bidder, without assigning any reason, makes it difficult to accept that respondent No. 2, in the letter dated 27-2-2014, were bound to communicate reasons for rejection of the bid of the petitioner.

33. In the context of the aforesaid reasoning and about the rights of L-1 tenderer we find it appropriate to make reference to the decision delivered by the Division Bench of Delhi High Court, in the case of *Era Infra Engineering Limited Vs. Delhi Development Authority and Another*, " wherein some sort of similar issues akin to the issues in the present case were involved.

34. The perusal of the said decisions reveals that in said case the petitioner, also marked as lowest L-1 for concerned project, has prayed for quashing the letter dated 3-2-2009 and 5-2-2009 whereby Delhi Development Authority had informed the said petitioner that his tender was rejected and they have decided to recall the tender.

35. The perusal of the said decision further reveals that after considering the landmark judgment delivered by the Apex Court in the case of *Tata Cellular Vs. Union of India*, (also relied by the petitioner in support of his case) regarding law pertaining to the tender and few more decisions about the same aspect, regarding the rights of lowest bidder and highest bidder and about the aspect of communicating the reasons to reject the bid and calling the fresh bids, Apex Court has observed in paragraph No. 38 as under:

"Para 38-Appling the above principles, it is obvious that the petitioner cannot claim any enforceable right to be awarded the contract merely because it happens to be the lowest bidder. Normally, the lowest bidder or the highest bidder, as the case may be, ought to be awarded the contract. But this is not an absolute rule and the governmental authority can deviate from this and award the contract to someone other than the lowest or highest bidder, as the case may be. But, there must be good and valid reasons for this departure. The government body or authority may decide not to award the contract to the lowest bidder/highest bidder or to anyone else and may decide to scrap the tender and/or call for fresh tenders. However, once again, there must be good reasons for doing so. In the present case, the petitioner's lowest bid has been rejected and the tender has been recalled. The DDA has acted well within its power having done provided there exist reasons, which are clearly discernible from the record, justifying the DDA's decision to reject the petitioner's bid and to call for fresh bids. It is not necessary that the reasons must be communicated to the petitioner at the outset, but it is sufficient, if the reasons exist. It is also clear that if the reasons are palpable and are not so outrageous in the *Wednesbury*" sense, there would be no scope for judicial interference."

(emphasis supplied)

36. The said decision further reveals that ultimately in paragraph Nos. 45, 46 and 47 it was observed that,

"Para 45-The final aspect of the matter which remains to be considered pertains to the contention of the petitioner that the financial bids as per clause 3(d) of PWD-6 of the NIT were to be opened only if the persons were found to be technically qualified and since the financial bid of the petitioner was opened this clearly implies that the petitioner was technically qualified. We are unable to accept this contention for the simple reason that the financial bids were opened in the circumstances which were totally different to what were contemplated under the original bid documents. In the meeting of the technical evaluation committee held on 05.08.2008, all the tenders had arrived at a general consensus that a detailed scrutiny of the technical bids be dispensed with in order to save time. Thus, having agreed on the dispensing with of a detailed scrutiny, the petitioner cannot rely on the fact that because its financial bid was opened, it was technically qualified."

Para-46-"In any event, this argument on behalf of the petitioner is a well recognized propositional fallacy known as affirming the consequent" and occurs when the antecedent in an indicative conditional is claimed to be true because the consequent is true; if A, then B; B, therefore A. An example of such a fallacy is:

1. If it's raining then the streets are wet.
2. The streets are wet.
3. Therefore, it's raining.

The streets maybe wet because they may have been watered by tankers or a sewage manhole may have overflowed. There may be many reasons for the streets to be wet, one of them being rain. So, while the streets do get wet when it rains and the streets, as a fact, may be wet, it does not necessarily follow that it is raining. The argument of the learned counsel is also in similar vein. It runs as follows:-

1. If the technical bid is compliant then the price bid is opened.
2. The price bid is opened.
3. Therefore, the technical bid is compliant.

As in the previous example, the conclusion is fallacious. The price bid may have been opened for other reasons, as in this case it was decided to skip the detailed technical scrutiny and change the datum and to consider revised price bids without going in for any fresh technical evaluation. Consequently, the fact that the price bid of the petitioner was opened does not necessarily mean that his technical bid was compliant".

Para-47-"The result of the foregoing discussion is that the writ petition is liable to be dismissed. It is dismissed. But, we leave the parties to bear their respective costs."

(emphasis supplied)

37. We also feel that it would be an advantageous to make a reference to another recent decision delivered by the Apex Court in the case of Rishi Kiran Logistics Pvt. Ltd. Vs. Board of Trustees of Kandla Port Trust and Others, for appreciating the fallacy of further submission canvassed on behalf of the petitioner as we find useful observations are made therein by the Apex Court regarding scope of a judicial review of the decisions taken by a public body that it need not go further ahead with tender process.

38. In the said decision the Apex Court considering the question of competing claim in between private interest and public interest observed in paragraph No. 18 to the effect.

Para-18-"When competing claims are private interest v. public interest, then in the case of disposal of public property the question would be whether the right of the person, who has earned the right to the public property in a public auction, is to be preferred over the right of the public in ensuring that valuable public assets were not disposed of except for a fair price and in a fair and transparent manner. Whether this court should, in judicial review, sit in judgment over the decision of a public body which is of the view that it need not go further ahead with the tender process. It is true if such a decision is taken without any reasons to support it or mere ipse dixit it would be arbitrary. In this case there are reasons. The High Court analysed the reasons and has taken the view that those reasons are valid. In our view in matters particularly to the disposal of valuable assets by the State when the State seeks to explore the possibility of getting higher price."

(emphasis supplied)

39. Similarly with regard to the aspect of malafide the Apex Court in the same decision observed in paragraph No. 22 to the effect:

Para-22-"In so far as argument of malafides is concerned, apart from bald averment, there are no pleadings and there is not even a suggestion as to how the aforesaid decision was actuated with malafides and on whose part. Even at the time of arguments Mr. Vikas Singh did not even advert to this aspect. In fact, the entire emphasis of Mr. Vikas Singh was that since there was a concluded contract between the parties, cancellation of such a contract amounted to arbitrariness. As already pointed out above that can hardly be a ground to test the validity of a decision in administrative law. For the sake of argument, even if you presume that there a concluded contract, mere termination thereof cannot be dubbed as arbitrary. A concluded contract if terminated in a bonafide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract. However, on the touch stone of parameters

laid down in the administrative law to adjudge a decision as are arbitrary or not, when such a decision is found to be bonafide and not actuated with arbitrariness, such a contention in administrative law is not admissible namely how and why a concluded contract is terminated".

(emphasis supplied)

40. Similarly, with regard to the question of arrival of concluded contract or otherwise, the Apex Court observed in paragraph No. 24 to the effect.

Para-24-"Again, we clarify at the outset that even the principle of PROMISSORY estoppel is in the field of administrative law and while entertaining the arguments and discussion on this issue, the question Has to whether there was a concluded contract or not to be kept aside. Precisely this was done in Kisan Sahkari Chini Mills Ltd. and Others Vs. Vardan Linkers and Others, . The Court dealt with the issue of legitimate expectation etc. separating it from the issue pertaining to conclude contract and made following pertinent observation in the process"

41. Similarly, with regard to the question of the decision of Port Trust respondent in the said case being arbitrary, unreasonable or malafide and applicability of promissory estoppel the Apex Court observed in paragraph No. 29 and 30 to the effect:

Para-29-"It thus stands crystalised that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element".

Para-30-"We have already held that the impugned decision of the Port Trust was not arbitrary, unreasonable or malafide and further that the doctrine of promissory estoppel has no application in the present fact situation".

42. All the said observations/propositions set out in the above referred decision are so eloquent that the same needs no further dilation. Needless to add that in light of the said observations, none of the submissions canvassed on behalf of the petitioner in support of the case of petitioner and recited hereinabove in detail and running contrary to the said observations will not survive and as such the petitioner cannot be said to be entitled for the relief claimed.

43. Now in the wake of the aforesaid decisions and the observations made therein, reverting to the further submissions canvassed, we are unable to find any substance in the submissions canvassed that there was delay on part of respondent No. 2 in issuing the letter of acceptance, affording a reason for the petitioner to rush to the Court to file present writ petition for the relief's as claimed by them initially i.e. prior to the amendment made later on. At the cost of repetition, it can be added that the respondent No. 2 were well within their rights to take decision about acceptance/rejection of the tender up till the expiry

of sixty days from the date of opening of tender on 21-1-2014, i.e. up till 21-3-2014. Hence, it makes difficult to accept that merely because the petitioner was marked as L-1 and/or thereafter respondents had negotiations with him, any right can be said to have accrued to them to have the decision of respondents about the said aspect prior to 21-3-2014. As a matter of fact, respondent No. 2 vide their letter dated 27-2-2014 having communicated the decision of re-inviting tenders-indicating abandonment of earlier notice, clearly reveals the petitioner then having unnecessarily rushed to the Court. Needless to add that only in the event of respondent No. 2 having not communicated anything to the petitioner about the acceptance or non-acceptance of tender up till 21-3-2014, it might have afforded some reason for the petitioner to rush to the Court and not otherwise. Such a conclusion is obvious in light of the observations recited hereinabove from the paragraph No. 38 of decision in a case of ERA Infra Engineering Limited (Supra)

44. Now considering the condition No. 18 of the tender notice and the dilation made about it earlier, squarely revealing that respondent No. 2 was not bound to give reasons for rejection/re-inviting tenders, we do not find any substance in the submission canvassed that the act of respondent No. 2 of not ascribing any reason in the letter dated 27-1-2014 or in the affidavit in reply dated 12-6-2014 leads to the conclusion that there was no such reason for rejecting the tender of the petitioner or for re-inviting the tender. For the same reason, we do not find any substance in the submission canvassed that the reason advanced by respondent No. 2 later on along with written submissions dated 13-10-2014 or in the correspondence annexed with it that such a decision was arrived in view of the pre-qualification of the work experience stipulated in original tender notice being not as per CVC guidelines is got-up reason advanced with malafide purpose for defeating the claim of the petitioner. We also do not find any substance in the submission canvassed that merely because even with the affidavit in reply dated 12-6-2014 such a CVC guidelines being not annexed, leads to the conclusion of there existing no such guidelines and an afterthought, fictitious reason being later on articulated for defeating the claim of the petitioner. Even support to such a reasoning given by us is found in the observations made in paragraph No. 38 of the decision in a case of ERA Infra Engineering Limited (Supra).

45. We are of such a view as the reference to the initial affidavit dated 12-6-2014, filed by the respondents (prior to the amendment) makes it clear of it being for the limited purpose for opposing grant of ad-interim relief and admission and respondent No. 2 therein having specifically reserved the right to file further affidavit. We further add that under condition No. 18 the respondents being not required to assign the reason for the decision taken and also the decision being taken within the time period given under condition No. 6 makes it difficult to accept that the conclusion as canvassed on behalf of the petitioner can be drawn from the said act of respondent No. 2 either of not disclosing the said reason in the affidavit dated 12-6-2014. The same would be equally applicable for the further submission canvassed that CVC guidelines were non-existent or

did not contain any such stipulation. Hence we do not find substance in the submission canvassed that such reasons are advanced later on by respondent No. 2 for malafide purpose for defeating the claim of the petitioner. For similar reasons, we also do not find any substance in the grievance made that the CVC guidelines were not annexed with affidavit in reply dated 12-6-2014 or now even with the written submissions, submitted on 13-10-2014 fortifies such a stand of the petitioner or further stand of the work experience, as claimed in the submissions being not the stipulation as per the CVC guidelines. In the said context at the cost of the repetition, we add that the earlier referred observation in paragraph No. 38 in the decision of ERA Infra Engineering Limited (Supra) are self eloquent regarding the aspect of non-communication of the reason for re-inviting tender or for scraping the tender to L-1 tender. We further add that the said decision in terms reveals only the necessity of existence of valid reason and in the event of the reasons being palpable and not outrageous in Wednesbury sense, then there existing no scope for judicial interference in decision arrived by public body due to it.

46. We also do not find substance in the submission canvassed on behalf of the petitioner regarding there being no stipulation in CVC guidelines regarding the works for which the tender notice was issued. We are of such a view as the petitioner has not placed any concrete material in support of his submission of either there being no CVC guidelines or CVC guidelines do not stipulate the work experience for runways work costing Rs. 30 crores as stated in the second notice of re-inviting tenders, issued by respondent No. 2 on 15.03.2014. Needless to add that as observed by us and having due regard to the stipulation of condition No. 18 not requiring to assign the reason, as canvassed by the petitioner, the conclusion of nature as canvassed by the petitioner cannot be drawn from the act of respondent No. 2 not disclosing the reason either in the affidavit in reply dated 12-6-2014 or from not annexing CVC guidelines even with it or even not annexing it in entirety with the written submissions, canvassed without petitioner placing any material before us either about non existence of CVC guidelines or said guidelines not stipulating the work experience as stipulated in the second notice of inviting tenders issued by respondent No. 2. As a matter of fact, we find that respondent No. 2 with the written submissions had annexed relevant part of the CVC guidelines at annexure Exhibit-IV. The perusal of the same clearly supports the submission canvassed by the learned counsel for the respondent of the work of runway costing more than Rs. 30 crores selection of the tenders as per pre qualification criteria "PQC" in respect of work mentioned in NIT should be entrusted to the contractor who has got the experience of doing similar work (runway work and not that of highways). Needless to add that glance at the said document annexed by the respondent No. 2 repels the submission canvassed on behalf of the petitioner about non-existence of CVC guidelines and so also the same not containing the work experience as contained in the second notice of inviting tenders issued by respondent No. 2 on 15.03.2014.

47. In the context of CVC guidelines not containing the work experience, as

stipulated in the second notice for the work of runways, the reference made by learned counsel for the petitioner to notice dated 18-2-2014, issued by Airport Authority of India, Mangalore International Airport for construction of runway at the said airport clearly appears to be misplaced. At the first blush it can be said that no conclusion can be drawn of either about non-existence of CVC guidelines or the said CVC guidelines not prescribing such work experience because the same being not stipulated in the said tender notice issued by the said Airport Authority. The same is obvious as the said notice was issued on 18-2-2014, i.e. prior to taking of decision of re-inviting tenders in the instant case. Hence, we find it extremely difficult to accept the said submission on the said count.

48. In the context of existence of the rational reason for re-inviting the tender and question of malafide on the part of respondent No. 2 for taking such a decision, reference to the documentary evidence produced by respondent No. 2 along with the written submissions clearly reveal that after opening the tender on 21-1-2014 and preparing the comparative statement of the tender, it was put before the accepting officer on 6-2-2014. It further reveals that on the same day the said officer had recorded a note to the effect that petitioner had no previous work experience of the work mentioned in the tender to be carried out in respect of runways as per CVC guidelines. It reveals that the said report along with the signed papers were forwarded to the Engineer-in-Chief at New Delhi for further direction and the said directions were received vide letter No. 13600/SC/PQC/77/E8, dated 18-2-2014. It reveals that by the said direction the Director General had decided that tenders shall be re-issued with revised notice inviting tenders only to those contractors who had executed runway works earlier and hence directed to issue fresh notice inviting tenders in newspapers and also on MES website. Reference to the said written submission reveals that the noting sheet containing such a remark along with a chart to such an effect has been produced by the respondent No. 2 in support of the said submission at Exhibit-I. Similarly, the letter dated 18-2-2014 received to such effect is produced at Exhibit-II. The relevant part of CVC guidelines for the work costing more than Rs. 30 crores for runway has been produced at Exhibit-IV.

49. The perusal of all said documents in terms support the stand of the respondent No. 2 regarding the circumstances which have led of taking a decision of re-inviting tender and in turn repels the contrary submission canvassed on behalf of the petitioner to the effect of non-existence of CVC guidelines, or CVC guidelines not requiring experience for the work of runways costing more than Rs. 50 crores or not containing the stipulation of work experience as contained in second notice of tender issued on 15.03.2014.

50. In the same context the submission canvassed that in the second notice the act of the respondents modifying the definition "work experience" and restricting it for the experience of construction of runways being malafide on the count of it being only for the sole purpose of excluding the petitioner due to himself not having an experience of runway work or the further submission of bias of

respondents towards petitioner canvassed, we do not find any substance in light of the matters narrated hereinabove and established by the respondents regarding the circumstances which have led to the conclusion of re-inviting the tender. We are of such an opinion as said circumstances reveal that after opening the bids and preparing comparative chart and the note, the officer had clearly pointed that the petitioner was not having experience for runway work of such a costs as per the CVC guidelines. It further reveals thereafter directions were sought from the authority at Delhi and as per the directions received the original tender notice was abandoned and notice of re-inviting tenders specifying the work experience in consonance with CVC guidelines and as directed by the said authority were issued. It also reveals that prior to issuing the notice, the petitioner was duly intimated about the decision taken of re-inviting the tender. Thus, considering all the said events occurred, it is difficult to accept that said decision was taken for malafide purpose, or due to bias, as canvassed on behalf of the petitioner. Needless to add that the observations pointed earlier clearly reveals that if the existence of valid reasons are well-spelt in the *Wednesbury*'s sense, then there would be hardly any scope for reviewing the administrative decision in the petition under Section 226 of the Constitution of India.

51. In the same context an attempt was made by learned counsel for the petitioner by drawing attention to the chart of his work experience annexed with the affidavit dated 19-7-2014 and canvassing that the same being of identical work for which the tender notice was issued for the work at Ratnagiri. We are afraid to entertain the said submission as it is well-settled law that prescribing of the conditions, including that of work experience being within the sole domain of the authority inviting the tender, the same cannot be permitted to be substituted by entertaining such a submission. Needless to add, the question would be whether the tenderer falls/satisfies the criteria stipulated in the tender notice or otherwise. Thus, on the said count also we are unable to accept the submission that the decision was taken either malafide or arbitrarily, as tried to be canvassed.

52. We do not find any substance in the submissions canvassed that as the bids were opened, it implies that the petitioner was technically qualified and as such in spite of themselves being marked as L-1 tenderer, to deprive the benefit to which they were entitled, the exercise was performed of amending, work experience. The decisions cited earlier in terms reveal that merely because of the bids are opened, the same does not imply of the concern being technically qualified. Apart from it, in the instant case original tender notice being required to be abandoned due to same being not issued as per the guidelines prescribed by CVC for the work for which tender notice was issued and fresh notice being issued as per the said guidelines, the said aspect clearly appears to be redundant in facts and circumstances of the present case. We further add that considering such reason which warranted of re-inviting tender, neither the said aspect is of a significant value in the instant case nor it justifies submission canvassed that fresh notice being issued for depriving the petitioner, the benefit accrued due to

themselves being marked as L-1 tenderer. As a matter of fact, the petitioner being not qualified for the relevant work as per the CVC guidelines, the aspect of themselves being marked as L-1 or being pre-qualified as per the earlier notice, clearly appears to be inconsequential.

53. Lastly, with regard to the decision relied by the learned counsel for the petitioner in the case of Tata Cellular (supra) and observations made in paragraph Nos. 77, 80, 81 and 93 to 95 therein, we only add that though no quarrel can be entertained about the proposition laid therein by the Apex Court, particularly in paragraph No. 94, still question being whether the case of the petitioner would be covered within them and as we have found that there was a valid reason for taking decision of re-inviting tenders, and the same being taken and communicated within time, as stipulated in Clause 6 of the tender notice and the petitioner having failed to establish malafide or bias behind taking such a decision, the decision relied cannot be said to be of any assistance to the petitioner.

54. Similarly, even the reliance placed by the petitioner upon the decision of this Court in Writ Petition No. 5245 of 2011 (supra) and particularly, the observations made therein in paragraph No. 15 also clearly appears to be misplaced. We are of such a view as the facts and circumstances involved in said case are altogether different than the one involved in the present case. Needless to add that the decision relied reveal that in said case lease already granted in favour of the petitioners was sought to be cancelled by giving notice, and that too, after a considerable lapse of time and in the meanwhile, petitioners therein having taken further steps, and also on the count of the petitioners having violated statutory conditions and the action of CIDCO in granting the permission being ultra vires of the Act. Needless to add that grant of lease by CIDCO was not question in dispute in the said case. It also involves the question whether the conduct of the respondents therein amounted to promissory estoppel. No such question being involved in the present case and the tender being abandoned within the period provided under the notice, the observations made in the said case in different fact situation would be also of no assistance to the petitioner in the present case for supporting or advancing their case.

55. Lastly, in the context of the decisions relied by the learned counsel for the respondents in the case of Air India Limited v. Cochin International (supra) and of Cama Hotel Limited v. Airport Authority of India (supra), we find that the same fully supports the submission canvassed by him on basis of it. However, upon same principles about the relevant aspect ourselves having considered the present matter, we find it unnecessary to make threadbare discussion about principle proposition set out in the said decisions.

56. As a net result of the aforesaid discussion, we reiterate that as we find that no right of whatsoever nature having crystallized in the favour of the petitioner merely due to being marked as L-1 tenderer, or being called for the negotiations, no concluded contract being arrived at in between the parties, the respondents,

in the large public interest for which the CVC had issued guidelines having abandoned earlier tender notice not issued in conformity with said CVC guidelines and thus for rational reasons having taken the decision of re-inviting tenders, and the petitioner having failed to establish such a decision being taken arbitrarily or with malafide, and even the said decision being taken within the stipulated time within which it was permissible for the respondents to accept or reject the offer given in response to the tender notice, we do not find any merit in the challenge to the decision taken.

57. In our view, there being no case made out warranting our interference with the administrative decision taken by the respondents for valid reason in larger public interest, we dismiss the petition.