(2014) 12 BOM CK 0092

In the Bombay High Court

Case No : Writ Petition No. 5919/2014

Khare and Tarkunde Infrastructure Private Limited — APPELLANT

Vs

The State of Maharashtra — RESPONDENT

Date of Decision : 05-12-2014

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 1 ABR 818 : (2015) 2 ALLMR 550 : (2015) 6 BomCR 746 : (2015) 3 MhLj 668

Hon'ble Judges : V.M. Deshpande, J;B.R. Gavai, J

Bench : Division Bench

Advocate : A.A. Naik, Advocate for the Appellant; B.H. Dangre, Government Pleader and V.R. Thakur, Advocate for the Respondent

Judgement

B.R. Gavai, J.—Rule. Rule made returnable forthwith. Heard by consent of the learned counsel appearing for the parties.

2. The petitioner has approached this Court being aggrieved by the rejection of its tender at the stage of qualifying to compete in the financial bid.

3. The facts in brief giving rise to the present writ petition are as under:-

The respondents/State had invited tender for construction of High Level Bridge at 171/600 on Kahani River MSH-11 Road from State Boarder to Gondia Goregaon Sadak Arjuni Gadchiroli Chamorshi Road in Taluka and District Gadchiroli. In response to the said tender, six bidders had submitted their bids. It is the case of the petitioner that though Envelope No. 1 was opened on 21.10.2014, the petitioner was not informed about the qualification or disqualification of the petitioner. It is the case of the petitioner that for the first time on 04.11.2014 he received a communication on E-mail informing it, that it was found to be disqualified, as it had not uploaded the scanned copy of the Registration of Firm from original. It is the case of the petitioner that immediately on the next day i.e. on 05.11.2014 it had addressed the representation to the authorities. In this background, the petitioner had approached this Court praying for declaration that the petitioner is eligible to participate in the aforesaid tender and for further direction to the respondents to open the financial bid of the petitioner. The petitioner had also prayed for an interim protection.

4. The petition had come up before us for admission on 11.11.2014. On the said date, we had issued notice to the respondents and also granted ad-interim order directing the parties to maintain status quo as on the said date. On the said date itself, it was informed by the learned Government Pleader that the tender was already allotted to the lowest bidder on 04.11.2014 itself. Accordingly on the oral motion by the petitioner, respondent no. 5 was permitted to be impleaded as party respondent. The respondents have filed elaborate replies so also the petitioner has filed rejoinder.

5. It is the basic contention of the petitioner that the petitioner''s tender was rejected on hypertechnical ground. It is the case of the petitioner that the condition on which the petitioner''s tender was rejected, cannot be said to be an essential condition. The learned counsel in that respect relies on the judgments of the Apex Court in the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, ; Rashmi Metaliks Ltd. and Another Vs. Kolkata Metropolitan Development Authority and Others, ; M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, and on the judgment of the Division Bench of this Court in the case of Agrawal Roadlines Pvt. Ltd. Vs. Indian Oil Corporation Ltd. and Others, .

6. It is further contended by Mr. Naik, learned counsel appearing on behalf of the petitioner that the petitioner was in fact held to be qualified on 21.10.2014 when the envelopes were opened. However, the record has been manipulated so as to suit respondent no. 5. It is submitted that the communication informing the petitioner, that it is disqualified is sent on E-mail on 04.11.2014 i.e. the date on which respondent no. 5 was awarded the contract. He further submits that the entire manner in which the tender is allowed to respondent no. 5 shows that the authorities had made up their mind to award the contract to respondent no. 5. It is submitted that on 05.11.2014 itself the Assistant Chief Engineer informs the Executive Engineer that an approval has been granted for accepting the tender of respondent no. 5. On the same date the Executive Engineer informs respondent no. 5 that its tender has been accepted and it should deposit an amount of Rs. 16,25,000/- towards E.M.D. It is submitted that surprisingly on the same date, the fixed deposit receipt for the said sum travels from Pune to Gadchiroli and is accepted by the authorities. It is, therefore, submitted that the entire procedure adopted by the respondents-authorities cannot be said to be conforming to the norms as laid down by the Apex Court in the various judgments. The learned counsel, therefore, submits that rejection of the petitioner''s bid and denial of participation in the financial bid is not sustainable in law and a direction needs to be issued that the petitioner was qualified and is entitled to participate in the financial bid. The learned counsel makes a categorical statement that the bid of

the petitioner is a lower than the bid accepted i.e. of respondent no. 5. It is submitted that though it is the case of the respondents that the petitioner was informed on 21.10.2014 regarding its disqualification, the same is not true. It is, however, submitted that even if it is accepted for a moment that the petitioner was informed about the same on 21.10.2014, the same would not take effect, till the actual date of the communication by the respondents regarding disqualification of the petitioner. The learned counsel in that respect relies on the judgment of the Apex Court in the case of Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL), .

7. Mrs. Dangre, learned Government Pleader and Mr. Thakur, learned counsel for the successful bidder, vehemently opposed the petition. Mrs. Dangre submits that the contention regarding the submission of scanned copy of the Registration of Firm from original is an essential condition inasmuch as it is found that various companies which are not in existence participate in the tender process. It is submitted that if on account of such participation it is found that such a company does not have a credential, the entire tender process comes into difficulty thereby causing great hardship to the authorities. It is submitted that the entire process has been done in a fair, transparent manner and calls for no interference.

8. Mr. Thakur, learned counsel submits that the petitioner has taken chances. He submits that though the petitioner was aware regarding its disqualification as early as on 21.10.2014, it waited till opening of the tender of respondent no. 5 and only after the bid of respondent no. 5 became open, has chosen to approach this Court. It is submitted that the petitioner has also suppressed material facts and therefore, the petition is likely to be thrown away on this count alone. It is further submitted that the contract is in the public interest. Relying on the judgment of the Apex Court in the case of Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, , the learned counsel submits that in tender matters this Court should not interfere inasmuch as the interference would be prejudicial to the larger public interest. The learned counsel also relies on the judgment of the Apex Court in the case of Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, in support of the same proposition. The learned counsel submits that the evaluation of the tenders is a highly technical matter and this Court while exercising jurisdiction under Article 226 of the Constitution of India cannot sit in an appeal over the evaluation of the tenders by the tendering authorities. The learned counsel as well as Mrs. Dangre, learned Government Pleader, therefore, submit that the petition is dehors of merit and is liable to be dismissed.

9. The Apex Court in a recent judgment in the case of Rashmi Metaliks Ltd. (supra) has come down heavily on lengthy judgments. The Apex Court has observed that though the law has been very well crystallized, the Courts go on reproducing the judgments after judgments and make the judgments bulkier. It has been further observed that the law insofar as the judicial review in tender matters has been very well crystallized in the case of Tata Cellular Vs. Union of

India, and reference to other judgments would not be necessary. Taking the mandate of the Apex Court in the case of Rashmi Metaliks Ltd. (supra), it would be relevant to refer to the observations of the Apex Court in the case of Tata Cellular. The Apex Court in paragraph 77 observed thus:-

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind 28, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

It is thus clear that the only inquiry that would be permissible for us would be as to whether the decision making process was legal, proper, just and fair or as to whether the decision making process suffers from any illegality or not. We cannot sit in an appeal over the decision of the authorities.

10. The Apex Court in various cases including in the case of M/s. G.J. Fernandez (supra) has considered as to what are the essential conditions and what are non-essential conditions in the tender matter. In the present case, para 11 of the tender document which deals with the On Line Envelope No. 1 reads thus:-

"11. ON LINE ENVELOPE NO. 1 (Documents Required)

The first online envelope "ENVELOPE NO. 1" shall contain the following:

Scanned copy of Forwarding (Covering) Letter along with list of all documents/ forms/statements/Specifications/Conditions.

i) Scanned from original copy of Government treasury challan or Term Deposit Receipt valid for a period of one year of Rs. 8,12,000/- issued from any Schedule Bank and duly endorsed in the name of Executive Engineer Public Works Division No. 1 Gadchiroli or valid certificate of exemption from payment of earnest money if applicable and Scanned from original copy Additional (Performance) Security (if required) (copy to be submitted as per the tender Schedule).

ii) Scanned from original copy of DD/Pay Order payable towards costs of document in the name of Executive Engineer, Public Works Division No. I Gadchiroli.

iii) Scanned from original copy of Valid certificate as a Registered Contractor with the Government of Maharashtra in appropriate class.

iv) Scanned from original copy of valid VAT registration certificate from Maharashtra State Sale Tax Department (Maharashtra Value Added Tax Act 2005).

v) Scanned from original copy of list of works in hand and works tendered along with supporting certificates.

vi) Scanned from original copy of Details of the other works tendered for and in hand as on the date of submission of this tender in prescribed form No. II.

vii) Scanned from original copy of Details of wok of similar type with supporting certificates.

viii) Scanned From original copy of List of Technical Personnel of the tenderer and further likely to be appointed on this work form No. IV and in form No. VII.

ix) Scanned from original copy of affidavit regarding completeness, correctness and truthfulness of documents submitted on Rs. 100/- Stamp paper as per prescribed proforma given in Annexure I sworn before Executive Magistrate/ Notary.

x) Scanned from original copy of original Professional Tax Registration/Clearance Certificate.

xi) Scanned from original copy of Registration of firm, Partnership Deed and Power of Attorney, Notarized Joint Venture if applicable in case of a firm tendering for work.

xii) Scanned from original copy of Statements showing the similar type of bridge works executed during the last three years in prescribed form no. 1.

xiii) Scanned from original copy of Contractor own design with broad details.

xiv) The tenderer should further demonstrate availability of the Machinery/

equipments according to list of machinery mentioned in Schedule No. 1.

xv) Availability for this work following technical personnel.

(i) A project Manager having minimum qualification as B.E. (Civil) with not less than 10 years experience in construction and supervision of bridge work (information to be submitted in Form VII. The scanned copy of curriculum vitae shall be upload in Envelope No. 1.

(ii) Site Engineers-1 Number having minimum qualification as Diploma (civil) having experience of 10 years.

(iii) On supervisor having experience of 10 years and other one having experience of minimum 5 years of Bridge works. The scanned copy of curriculum vitae shall be upload in Envelope No. 1 Form VII.

xvi) Undertaking that he/they will mobilize the Concrete Mixer with integral weigh batcher with computerized and automated water dispensing arrangements within 30 days from the work order. Scanned copy from original of Certificate for having."

11. It could thus be seen that Para 11 requires documents of 16 types to be included in envelope no. 1. Clause No. (i) provides for a scanned from original copy of Government challan or Term Deposit Receipt valid for a period of one year of Rs. 8,12,000/-. Clause no. (ii) provides for scanned from original copy of DD/Pay Order payable towards cost of document. Clause No. (iii) provides for a scanned from original copy of Valid certificate as a Registered Contractor with the Government of Maharashtra. Clause No. (iv) provides for a scanned from original copy of valid VAT registration certificate from Maharashtra State Sale Tax Department. Clause No. (v) provides for scanned from original copy of list of works in hand and works tendered along with supporting certificates. Clause No. (vi) provides for scanned from original copy of details of the other works tendered for and in hand as on the date of submission of the tender. Clause (vii) provides for scanned from original copy of the details of work of similar type with supporting documents. Clause No. (viii) provides for scanned from original copy of list of Technical Personnel of the tenderer and further likely to be appointed on the work. Clause no. (ix) provides for scanned from original copy of affidavit regarding completeness, correctness and truthfulness of documents. Clause no. (x) provides for scanned from original copy of Professional Tax Registration/ Clearance Certificate. Clause No. (xi) with which we are concerned in the present petition provides for scanned from original copy of Registration of Firm, Partnership Deed and Power of Attorney, Notarized Joint Venture, if applicable in case of a firm tendering for work. Clause No. (xii) provides for the scanned from original copy of Statements showing the similar type of bridge works executed during the last three years. Clause no. (xiii) provides for scanned from original copy of Contractor''s own design with broad details. Clause No. (xiv) provides for details regarding the availability of the Machinery/equipments etc. Clause (xv) provides for availability of the technical personnel for the work. Clause No. (xvi)

provides for an undertaking that the tenderer will mobilize the Concrete Mixer with integral weight batcher with computerized and automated water dispensing arrangements within 30 days from the work order.

12. It will also be relevant to refer to the definition of the Contractor:-

"THE CONTRACTOR" shall mean the individual or firm or company whether incorporated or not, undertaking the work and shall include legal representatives of such as individual or persons composing such firm or company as the case may be."

13. It could thus be seen that the definition of the Contractor includes an individual or firm or company whether incorporated or not undertaking the work and also includes legal representatives of such as individual or persons composing such firm or company as the case may be.

14. The Apex Court after scrutinising the law on the issue as to what could be construed as essential and non-essential conditions in tender matters, in the case of Rashmi Metaliks Ltd. (supra) has observed thus:-

"13. So far as clause (j) of the detailed notice inviting E-tender No. 1/KMDA/MAT/CE/2013-2014 dated 10.5.2013 emanating from the office of the Chief Engineer is concerned, it seems to us that contrary to the conclusion in the impugned judgment, the clause is not an essential element or ingredient or concomitant of the subject NIT. In the course of hearing, the Income Tax Return has been filed by the Appellant-company and scrutinized by us. For the Assessment year 2011-2012, the gross income of the Appellant-company was Rs. 15,34,05,627, although, for the succeeding Assessment Year 2012-2013, the income tax was NIL, but substantial tax had been deposited. We think that the Income Tax Return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest Income Tax Return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellant-company and if even thereafter no rectification had been carried out, the position may have been appreciably different. It has been asserted on behalf of the Appellant-Company, and not denied by the learned counsel for the Respondent-Authority, that the financial bid of the Appellant-Company is substantially lower than that of the others, and, therefore, pecuniarily preferable."

15. In the said case, the appellant before the Apex Court was refused participation in the financial bid on the ground that the tenderer i.e. the appellant had failed to place on record the latest Income Tax and Professional Tax Returns. The Apex Court found that the Income Tax Return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. It was further observed

that in many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. It is further observed that filing of the latest Income Tax Return was a collateral term and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellant-Company and if even thereafter no rectification had been carried out, the position would have been different.

16. In the light of the aforesaid observations, we will have to consider as to whether the submission of the scanned copy of the Registration of Firm from original can be considered to be an essential condition or as to whether the same was only a collateral and non-essential condition. For that, it will also be relevant to refer to the para 12 of the tender document which reads thus:-

"12. Post Qualification criteria: To qualify for the opening of envelope No. 2 i.e. Price Bid, each bidder should have

(i) Scanned copy from original of Certificate for having achieved an average annual turnover of Rs. 1220.00 lakh during last three financial years updated to current cost (Such certificate for civil engineering works excluding private works are required to be obtained from the Chartered Accountant of Maharashtra State only). For updating to current cost please refer table at the end of this clause.

(ii) Scanned from original copy of certificate for having satisfactorily complete at least one, two lane major bridge work (River Bridge/ROB) on his own design/ PWD Design of value not less than Rs. 500.00 lakh or should have executed on his own design/P.W.D. Design at least one work of Major bridge of minimum length 150.00 mtrs. In a period of three consecutive years falling in last five years. For updating to current cost please refer table at the end of this clause. (Such certificate are required to be obtained from the officer not below the Rank of Executive Engineer. In case of worked executed in Public Limited co. then upload an original copy of certificate from General Manager countersigned by Chartered Accountant).

(iii) Satisfactorily executed minimum quantities of following items in any continuous twelve calendar months during last five year and current year. Scanned copy of original certificate to this effect should be attached/uploaded. (Such certificates including Concrete with Grade, Reinforcement, Period of execution etc. are required to be obtained from the officer not below the rank of Executive Engineer or Equivalent, in case of quantity, executed in Public Limited Co. then upload an original copy of certificate from General Manager with countersign of Chartered Accountant) and the certificate shall specially mention the period of execution as continuous twelve calendar months. (Completed Work Carried out in Govt./Semi Govt. Bodies such as MHADA, MSEB, MIDC, CIDCO etc. for Local Bodies, public limited company, inter alia will only be considered).

a) Concrete of Grade M-25 & above 4000.00 cum.

b) HYSD/TMT steel 200.00 MT.

In case of information for items 12(i) to 12(iii) the tenderer shall provide authentic proof of information given therein. This shall include a certificate from his chartered accountant for item 12(i) and for items 12(ii) & 12(iii) certificates from an officer not below the rank of Executive Engineer in envelop No. 1 only. In absence of these documents, envelope No. 2 shall not be opened. For satisfying the above criteria at Sr. No. 12(ii) to 12(iii) above work carried out in Government Organization or the Works of Semi Govt.''s Bodies such as MHADA, MSEB, MIDC, CIDCO etc. or local Bodies will be considered.

13. Bid Capacity: The Bid capacity shall not be less than the amount put to tender for which the bid is submitted. Bid capacity will be evaluated as part of post qualification in the following manners. Calculation of Bid Capacity should be required on contractor''s letter head."

17. It could thus be seen that even in the tender notice itself what shall be an essential condition for opening of envelope no. 2 i.e. Price Bid has been specifically provided for. Clause (i) of the said para provides that a scanned copy from original of Certificate for having achieved an average turnover of Rs. 1220.00 lakh during last three financial years has to be provided. Clause (ii) provides for a scanned from original copy of certificate for having satisfactorily completed at least one two lane major bridge work (River Bridge/ROB) on his own design/PWD Design of value not less than Rs. 500.00 lakh etc. Clause (iii) provides for satisfactorily executed minimum quantities like requirement of concrete of Grade M-25 and above 4000.00 cum., HYSD/TMT steel 200.00 MT etc. within a period of twelve calendar months. It could clearly be seen that the aforesaid documents are necessary to find out as to whether the participant possesses the necessary experience and capacity for carrying out the work of the nature for which the tender is floated. These documents are necessary for evaluating as to whether the tenderer is in effect having an experience of the nature of the work for which the tender is called. The said clause also provides for providing the documents to find out whether the tenderer has a bidding capacity or not. It could thus be seen that even the authorities itself, while drafting the notice inviting tender, construed that the documents pertaining to an experience of the nature of the work tendered for and the documents pertaining to bidding capacity are the essential documents which are required to be complied with by every tenderer.

18. Apart from that the definition of the Contractor itself would reveal that even a person who is an individual or firm or a company whether incorporated or not, could have submitted the tender. Undisputedly in case of an individual or in case of the incorporated company, there could be no question of original copy of the Registration of the Firm. Apart from that Clause (xi) which has been heavily pressed into service by the learned Government Pleader and Mr. Thakur, learned counsel appearing on behalf of the successful bidder, would show that the same cannot be construed to be an essential condition. The words used in Clause (xi) are "if applicable in case of a firm tendering for work". In that view of the matter

the harmonious construction of the Clause (xi) and the definition of the Contractor would clearly establish that the submission of scanned copy from original copy of the Registration of the Firm cannot be construed to be an essential condition so as to non-suit a tenderer. At the cost of repetition, the individual or an incorporated company cannot be even dreamt of submitting a scanned copy from original copy of Registration of Firm. No doubt that Mr. Thakur has tried to canvass that the petitioner also thought that the same would be an essential condition and as such had submitted the scanned copy of the xerox from original copy of Registration of Firm. It is, therefore, submitted that the petitioner having been complied with the same, it is not open for the petitioner now to say that the same is not an essential condition. With great respect we cannot construe a condition to be an essential or non-essential, as is understood by "A" party or "B" party. For deciding a question as to whether a particular condition is an essential condition or non-essential condition, we are bound by the law as laid done by the Apex Court. Applying the law which is consistently followed by the Apex Court in the case of M/s. G.J. Fernandez, Poddar Steel Corporation and in the latest judgment in the case of Rashmi Metaliks Ltd., we find that the condition cannot be said to be essential in nature so as to oust the tenderer.

19. Much is sought to be made out on the ground that the petitioner itself was aware on 21.10.2014 that he stood disqualified. Undisputedly in the list of the qualified tenderers displayed on 21.10.2014, the name of the petitioner is included. It is insisted by the learned Government Pleader as well as Mr. Thakur that the said list was of the tenderers who are qualified to participate in the tender and not of the persons who were held to be qualified. To a pertinent query to the learned Government Pleader as to whether after opening of Envelope, list of qualified tenderers which according to it were found to be qualified has been uploaded on the net or not, the learned Government Pleader fairly concedes that no such list was uploaded on the net either on 21.10.2014 or thereafter. Also to a pertinent query as to whether between 21.10.2014 and 04.11.2014 the petitioner has been communicated regarding it being disqualified to participate in the financial bid, the learned Government Pleader again fairly concedes that no such communication has been addressed to it between 21.10.2014 and 04.11.2014. Also to a pertinent query to the learned Government Pleader, as to whether on the basis of the record and on the basis of the instructions by the authorized person who is personally present in the Court, that only on 04.11.2014 the petitioner has been communicated that he stood disqualified on account of non-compliance of clause (xi) of para 11 of tender document, the learned Government Pleader fairly concedes that it is only on 04.11.2014 that the petitioner was communicated regarding his disqualification and not in earlier point of time.

20. The Division Bench of this Court in the case of Agrawal Roadlines Pvt. Ltd. (supra), the judgment authored by His Lordship Hon''ble Mr. Lodha, J. (as His Lordship then was), has observed thus:-

"7. The aforesaid law laid down by the Apex Court in Poddar Steel Corporation is squarely and fully applicable to the facts and circumstances of the present case. The only mistake committed by the petitioners was that they annexed the demand draft issued in favour of other Corporation. That was only a technical irregularity and did not in the facts of the case could be said to violate the essential conditions of the tender notice. It was only because of inadvertence that the demand drafts purchased by the petitioners got interchanged. Under the terms and conditions of the tender notice, inter alia, for the satisfaction of financial credibility of the bidder, the condition is that earnest money of Rs. 12000/- by way of crossed demand draft/pay order from the scheduled bank in favour of concerned corporation is deposited with the bid. The Corporation, viz. IOC, HPCL and BPCL ought not to have given strict construction to clause 7 of the tender which provided that the earnest money deposit as provided in clauses 5 and 6 by crossed Demand Draft/Pay Order drawn on any Scheduled Bank, be in favour of concerned Corporation like Indian Oil Corporation Ltd. (MD), Bharat Petroleum corporation Ltd. (MD) and Hindustan Petroleum Corporation (MD). The essential clause concerning an interest free earnest money deposit of Rs. 12000/- finds place in clause 6 which, of course, was required to be construed strictly, but clause 7 could not have been given effect in meticulous detail as has been sought to be given when the petitioners did purchase demand draft in favour of concerned corporation in the required sum from scheduled bank-the only mistake, these drafts got interchanged at the time of submission of tenders and this mistake reflected at all necessarily places in the tender form. The contention of Mr. Siodia that this Court should not interfere in administrative decision when admittedly there was some mistake by the petitioners in the facts of the present case does not deserve to be accepted. If an administrative decision is based on hypertechnical approach by treating a non-essential condition of the tender notice as essential condition, such administrative decision shall be ceased to be fair and lack reasonableness warranting interference in suitable and deserving cases under Article 226."

(Underlining ours)

21. In the present case, we have no hesitation to say that the decision of the authorities is based on hypertechnical approach by treating a non-essential condition of the tender notice to be an essential condition and as such the said decision will have to be deemed to be not fair and the one lacking reasonableness warranting interference under Article 226 of the Constitution of India.

22. The speed at which the State Government and respondent no. 5 have travelled in the present case, is also to be complimented. No doubt that as submitted by the learned Government Pleader and the learned counsel Mr. Thakur that this is an era of technical advancement and, therefore, nothing is impossible. This is difficult to digest. On 04.11.2014 itself the petitioner was communicated for the first time as is apparent from the record that his tender is

disqualified for non-compliance of clause No. (xi). It is further to be noted that the record itself shows that the petitioner had in fact uploaded a scanned copy of the xerox of the original copy of Registration of Company. It is not as if no document pertaining to the Registration of Company was available with the authorities. On 04.11.2014 itself the tendering committee takes a decision to award a contract to respondent no. 5. On 05.11.2014 the communication was addressed by the Assistant Chief Engineer, who has a office at Nagpur, to the Superintending Engineer, P.W.D., Gadchiroli thereby approving the award of contract to respondent no. 5. On the same day the said letter reaches Gadchiroli from Nagpur, which is at a distance of around 170 kms. On the same day, the Executive Engineer, P.W.D. Gadchiroli addresses a communication to the respondent no. 5 asking it to furnish an amount of Rs. 16,25,000/- by way of EMD. Remittance is to be made either in cash/Band Draft of the Scheduled Bank/ F.D.R./NSC. On the same day, respondent no. 5 addressed a letter to the Executive Engineer, Gadchiroli annexing along with the said letter a FDR in the sum of Rs. 16,25,000/-. It is to be noted that in the said letter in the column of reference at column no. 3 it is written as "your letter No.......... ". However, the number of the letter is not to be found there. On the same day, an EMD in the sum of Rs. 16,25,000/- issued by the Bank at Pune reaches Gadchiroli which is at a distance of around 700 kms. No doubt that taking into consideration the larger public interest the attempt of the State Government to travel at a speed is laudable. However, the State Government appears to have forgotten that at times travelling at such a breakneck speed amounts to driving in rash and negligent manner, leading to unforeseen accidents.

23. Insofar as the judgment in the case of Siemens Public Communication Networks Private Limited and another (supra), on which a heavy reliance is placed by Mr. Thakur is concerned, the tender in question involved modernisation plan of Technical Communication System for Indian Army. For evaluation of the tenders in question, the trials and technical expertise of a high degree were involved. For doing so, an expert committee which was to carry out a comprehensive evaluation for arriving at L1 bidder, was formed. Accordingly the expert committee had carried out comprehensive evaluation for arriving at the L1 bidder. In that view of the matter, the Apex Court while confirming the order of the High Court held that when the element of public interest was involved and tender was bona fide awarded, an interference by the High Court or the Apex Court was not warranted. The facts in the said case were totally different. The said contract pertained to sensitive army equipments which were urgently needed. Apart from that both the High Court as well as the Apex Court have come to the conclusion that process adopted or decision made was not such, that no responsible authority acting reasonably or in accordance with the relevant law could follow or take such a decision. In that view of the matter, we find that the judgment in the said case would not be applicable to the facts of the present case.

24. Insofar as the judgment in the case of Michigan Rubber (India) Limited

(supra) is concerned, in the said case the appellant before the Apex Court being aggrieved by a modification of the pre-qualification criteria, had approached the High Court. The learned Single Judge as well as the Division Bench of the High Court did not found favour with the contention and as such he was required to approach the Apex Court. Dismissing the appeal, the Apex Court found that in formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. It further held that unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by Court would not be warranted. In that view of the matter, the said judgment would also not be applicable to the facts of the present case.

25. We are, therefore, of the considered view that the decision making process of the State Government is vitiated on various counts, firstly when the tender notice itself provided as to what are the essential conditions for opening financial bid, the authorities have rejected the tender of the petitioner on an untenable ground. We find that the case would be covered by sub-clause (i) of para 77 of the law laid down by the Apex Court in the case of Tata Cellular. We find that the decision maker has not understood the law correctly and as such his decision has been vitiated on the ground of not understanding the law properly and passing an order in contravention of the said proposition of law. We further find that the manner in which the Department has proceeded also cannot be said to be fair and transparent. If according to the State Government, the petitioner was disqualified on 21.10.2014 itself, nothing precluded the Department from communicating the same to the petitioner from 21.10.2014 to 04.11.2014. The communication of the same on 04.11.2014 and opening of the tenders and taking a decision to award the same to the respondent no. 5 on 04.11.2014, though may be out of sheer coincidence, cannot be said to be free from doubt.

26. It was submitted by the learned Government Pleader yesterday that since the petitioner''s tender was rejected and his bid was locked and, therefore, it will not be possible for the State to open its financial bid. We, therefore, requested the learned Government Pleader to ask the Officer who is conversant with the process of technology applied in tender matters to remain present in the Court. Accordingly Mr. Shrikant Golkutwar, Assistant Engineer in Information and Technology Department of the Public Works Department, Nagpur is personally present in the Court. He has stated that it is possible to open the financial bid of the petitioner. On a specific query, he has stated that it is not possible for the petitioner to change his bid and the Department possesses the technical experience to open the financial bid of the petitioner as was submitted by it in its original tender.

27. In that view of the matter, we hold that rejection of the petitioner''s tender was on hypertechnical ground. The petitioner could have very well been called upon to submit the scanned copy from original copy of Registration of Firm. In any case perusal of Clause (xi) of Para 11 of tender document would reveal that

same is applicable only to the firms and would not be applicable to either company or an individual. The learned counsel for the petitioner, however, submits that the original copy of Registration of Company would be produced before the authorities so that they can verify that the original copy of Registration of Company exists.

28. In that view of the matter, we hold that the rejection of the petitioner''s tender was on hypertechnical ground which is not sustainable in law. We hold that the petitioner was qualified to participate in the financial bid. The respondents/authorities are, therefore, directed to open the financial bid of the petitioner. Needless to state that since the award of contract to respondent no. 5 was not in consonance with the legal position, the same is quashed and set aside. The respondent/authorities shall take decision in accordance with the law in the light of what has been observed hereinabove. Rule made absolute in the aforesaid terms. No costs.

