(2018) 05 GAU CK 0156

In the Gauhati High Court

Case No : WP(C) 1950 of 2018, I.A.(Civil) 1242 of 2018

Lakhyajit Sonowal APPELLANT

Vs

State Of Assam And 5 Ors. RESPONDENT

Date of Decision : 17-05-2018

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2018) 05 GAU CK 0156

Hon'ble Judges : ARUP KUMAR GOSWAMI, J

Bench : Single Bench

Advocate : S Borthakur, T C Chutia

Final Decision : Dismissed

Judgement

1. Heard Mr. S. Borthakur, learned counsel appearing for the petitioner. Also heard Mr. A. Chakraborty, learned State counsel, appearing for

respondent Nos. 1, 2, and 3 as well as Mr. T. C. Chutia, learned counsel appearing for respondent Nos. 4 and 5, i.e., Naharkatia Town Committee and

the Chairman thereof, respectively.

2. The writ petition under Article 226 of the Constitution of India was filed by the petitioner praying for setting aside and quashing the settlement order

dated 29.03.2018, issued by the respondent No. 5, i.e., Chairman of Naharkatia Town Committee, settling the Weekly Market of Naharkatia town in

favour of respondent No. 6 for the period from 01.04.2018 to 31.03.2019 pursuant to a Notice Inviting Tender (NIT) dated 13.03.2018 by which,

amongst others, tenders were invited for settling the Weekly Market of Naharkatia town.

3. While issuing notice in this case on 04.04.2018, the impugned order of settlement dated 29.03.2018 was suspended providing that Naharkatia Town

Committee may run the said market through its own employees without associating any outside person. An Interlocutory Application, being I.A.(Civil)

1242/2018, was filed by respondent Nos. 4 and 5 for vacation of the said interim order dated 29.03.2018 and when the said Interlocutory Application

and the instant writ petition were listed on 10.05.2018, learned counsel for the parties submitted that instead of taking up the Interlocutory Application

for consideration, the writ petition can be taken up for disposal and, accordingly, the writ petition was taken up for disposal. On the request of the

learned counsel for the parties, the case was again listed on 15.05.2018 and, on 15.05.2018, the hearing having not been concluded, the case was

directed to be listed today and, accordingly, the case is listed today.

4. The case of the petitioner, as presented in the writ petition, in a nutshell, is that in response to the NIT dated 13.03.2018, he has submitted his tender

along with all requisite documents, such as Bank Draft (emphasis supplied), Income Tax Return for the previous two years, etc., as stipulated in the

NIT, quoting a rate of Rs. 21,63,672.00 and that, after evaluation of the tender papers, the petitioner was found to be the highest bidder and the

respondent No. 6 had emerged as the second highest bidder with his offered bid of Rs. 21,36,456.00.

5. It is pleaded that, at the time of opening of the bids, the tendering authority had accepted all documents submitted by the petitioner and there was no

objection by any of the tenderers regarding validity of his tender. However, bypassing and ignoring the highest bid of the petitioner, on extraneous and

irrelevant consideration, settlement order was issued in favour of respondent No. 6. The petitioner demanded a copy of the Comparative Statement

but the same was not furnished to him. It is pleaded in paragraph 9 of the writ petition that if the tendering authority is allowed to deviate from terms

and conditions on its whims, the purpose of inviting competitive bidding will become useless and that the impugned decision to settle the market in

favour of respondent No. 6 was the outcome of an unholy collusion and nexus between respondent No. 5 and respondent No. 6.

6. With the filing of affidavit by respondent Nos. 4 and 5, the pleadings in the affidavit-in-reply filed by the petitioner took a different turn which will be

noticed in a later part of the judgement. In the affidavit filed by respondent Nos. 4 and 5, it is pleaded that the Earnest Money, which was required to be deposited in the shape of Call Deposit from any Nationalized Bank or Government Undertaking Co-operative Bank, was not furnished by the

petitioner and he had submitted a Demand Draft, which had a validity of only three months. In the tender form, however, the petitioner had mentioned

that he had deposited Call Deposit. Against Column No. 7(b) of the Tender Form the petitioner had indicated that he had submitted Income Tax

Clearance Certificate, though the requirement was, as per terms of the NIT, to file Income Tax Return for the last two years. Accordingly, the

Naharkatia Town Committee had noted the deficiencies in the petitionerâ??s tender in the â??Remarksâ? column of the Comparative Statement. It

is further stated that all other tenderers, except the petitioner, had submitted Call Deposit. With regard to the allegation of the petitioner that

Comparative Statement was not furnished to him, it is pleaded that the Chairman of the Town Committee was not available and that Comparative

Statement could not have been given without the order of the Chairman. It is also pleaded that the tender of the respondent No. 6 being valid and in

conformity with the NIT, the same was accepted.

7. In the reply filed to the said affidavit of respondent Nos. 4 and 5, it is pleaded by the petitioner that even if the petitioner had submitted Demand

Draft, instead of Call Deposit having validity of three months, the respondent authorities ought not to have rejected the tender of the petitioner as the

Demand Draft could have been encashed and deposited in the Town Committeeâ??s account within the time limit attached to such Demand Draft. It

is further pleaded that the petitioner had duly submitted Income Tax Return for the last two years in appropriate format.

8. Respondent No. 6 had also filed affidavit-in-opposition stating that by settling the market, in question, in favour of respondent No. 6 by strictly

adhering to the terms of the NIT, the respondent Nos. 4 and 5 did not commit any illegality.

9. Mr. S. Borthakur, learned counsel for the petitioner has submitted that the petitioner had substantially complied with the requirement of submission

of Earnest Money, which is not an essential but an ancillary term of the NIT and, therefore, non-fulfillment of the said term in exact mode, as provided

in the NIT, ought not to have merited rejection of the tender of the petitioner. Rather, he contends that the authority ought to have exercised its discretion for settling the market in favour of the petitioner by relaxing or by digressing from the term of the NIT and such digression would not have

amounted to arbitrary exercise of discretion. It is also argued by him that the consequence of non-complying with the terms and conditions was not

mentioned in the NIT and, therefore, the petitionerâ??s tender could not have been rejected. He submits that the respondent Nos. 4 and 5 having not

pleaded that the petitioner had not submitted Income Tax Return for the last two years, even if he had indicated in the tender form that he had filed

Income Tax Clearance Certificate instead of Income Tax Return, the same will be of no consequence. In support of his submissions, learned counsel

for the petitioner has relied upon Shree Hanuman Cotton Mills and Another vs. Tata Air Craft Ltd., reported in AIR 1970 SC 1986, Harmindar Singh

Arora vs. Union of India, reported in (1986) 3 SCC 247, Villayati Ram Mittal Private Limited vs. Union of India and Another, reported in (2010) 10

SCC 532, Mega Electricals Dihang Edutech Infrastructure Private Limited (M/s) & Ors. vs. The State of Assam and Others, reported in 2012 (4)

GLT 723, Gojen Ch. Choudhury vs. Assam Fisheries Development Corporation & Others, reported in 2014 (6) GLR 751, Poddar Steel Corporation

Vs. Ganesh Engineering Works, reported in (1991) 3 SCC 273, Maula Bux vs. Union of India, reported in (1969) 2 SCC 554, Rashmi Metaliks Ltd. vs.

Kolkata Metropolitan Development Authority, reported in (2013) 10 SCC 95, Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal

and Others, reported in (2011) 1 SCC 236 and Global Associates vs. State of Assam, reported in 2016(4) GLT 491.

10. Mr. T. C. Churia, learned counsel for respondent Nos. 4 and 5 has produced the records. It is submitted by Mr. Chutia that the NIT made it

absolutely clear that the tender must be accompanied by the documents, as referred to in Clause 6 (a) to 6(h) of the NIT. The authority having invited

tenders with specific terms and conditions and having insisted upon submission of documents, as mentioned in the NIT, the ternderers are obliged to

adhere to the terms and conditions of the NIT and if an authority scrupulously observes the terms and conditions of an NIT, no fault can be attributed

to such authority and the decision making process cannot be construed to be arbitrary or illegal. He submits that it was not really necessary to indicate

in the NIT as to what would be the consequence if the documents sought for were not submitted by an intending tenderer as it is only to be understood that such a tender has to be rejected at the threshold. He has further submitted that the petitioner had misrepresented by stating in his tender form that

he had deposited Call Deposit though, actually, a Demand Draft of limited validity of three months, had been furnished. Call Deposits do not have such

limited duration of validity period and the Earnest Money deposited was to be returned only to the unsuccessful tenderers, he submits. It is submitted

by him that though the petitioner did not mention in his tender form about submission of his Income Tax Return for the previous two years, the same

would not render his tender defective as the petitioner had submitted the same. He submits that, however, it was needed and necessary to be noted in

the Comparative Statement and, therefore, the same was accordingly reflected in the â??Remarksâ? column. He urges that the court will be required

only to judge the decision making process resulting in rejection of the tender of the petitioner on the ground of depositing the Earnest Money by way of

Demand Draft, in place of Call Deposit, as required by Clause 6(a) of the Terms and Conditions of the NIT.

11. Mr. S. Banik, learned counsel for respondent No. 6, while broadly endorsing the submissions of Mr. Chutia, submits that whether a term of an NIT

is essential or not is a decision to be taken by the authority concerned, which ought to be respected. He submits that the authority issuing a tender has

a duty and obligation to punctiliously and rigidly adhere to the terms of the NIT and that is what has been done in the instant case. Adhering to the

terms of the NIT cannot be branded as a perverted decision making process and the writ petitioner, essentially, prays for a writ of mandamus to the

respondent authorities to deviate from the said terms in the NIT. It is submitted by him that the fact that Earnest Money was not required to be

returned back to the successful tenderer, in essence, only reinforces the view taken that the deposit of Earnest Money in the shape of Call Deposit is

an essential condition of the NIT. In support of his submissions, Mr. Banik places reliance upon Ramana Dayaram Shetty vs. International Airport

Authority of India and Others, reported in (1979) 3 SCC 489, Harmindar Singh Arora vs. Union of India, reported in (1986) 3 SCC 247, Kanhaiya Lal

Agarwal vs. Union of India, reported in (2002) 6 SCC 315, Jagdish Mandal vs. State of Orissa, reported in (2007) 14 SCC 517, Dhirendra Chandra

Bhattacharjee vs. State of Tripura & Others, reported in 2012 (1) GLT 271, Mega Electricals Dihang Edutech Infrastructure Private Limited (M/s) &

Ors. vs. The State of Assam and Others, reported in 2012 (4) GLT 723, Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority,

reported in (2013) 10 SCC 95, Gojen Ch. Choudhury vs. Assam Fisheries Development Corporation & Others, reported in 2014 (6) GLR 751, Central

Coalfields Ltd. vs. SLL-SML (Joint Venture Consortium), reported in (2016) 8 SCC 622, Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corpn.

Ltd., reported in (2016) 16 SCC 818, HUDA vs. Kewal Kishan Goel, reported in (1996) 4 SCC 249 and Reliance Energy Ltd. and Another vs.

Maharashtra State Road Development Corporation Ltd. and Others, reported in (2007) 8 SCC 1.

12. I have considered the submissions of the learned counsel for the parties and have perused the materials on record, including the records produced

by Mr. Chutia.

13. The terms and conditions as embodied in the Tender Documents (Annexure-B) at Clause 3 and 5 read as follows:

â??3. Tenderers must deposit 2% (two) of the estimated value as mentioned above as earnest money deposit in the shape of call deposit duly pledged

to the Chairman, Naharkatia Town Committee, Naharkatia, along with the tender.

5. The earnest money of unsuccessful Tenderers will be refunded after issue of final order of settlement.â??

14. The estimated value of each of the markets, bus stands, etc., for which the tender was invited, was indicated in the NIT itself. Clause 6(a) and (b)

of the Terms and Conditions read as under:

â??6. Tender must be accompanied by the following documents:

(a) Earnest money in the shape of call deposit from any nationalized or Govt. undertaking Co-operative Bank.

(b) Copy of Income Tax Return of last 2 (two) years.â??

15. Perusal of the records confirms that the petitioner had submitted Earnest Money by way of Demand Draft though in the tender form he had

mentioned that Earnest Money was deposited in the shape of Call Deposit.

16. At the outset, it will be necessary to state what is meant by â??Earnest Moneyâ?. In Maula Bux (supra), relying on Earl Jowitt in â??The

Dictionary of English Lawâ?, it was noted that giving an earnest or earnest money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum as a token that the parties are in the earnest or have made up their minds. The observation of the Judicial

Committee, in (Kunwar) Chiranjit Singh vs. Har Swarup, reported in AIR 1926 PC 1, wherein it was stated that Earnest Money is part of the

purchase price when the transaction goes forward and that it is forfeited when the transaction falls through, by reason of the fault or failure of the

vendee, was noted with approval.

17. In Shree Hanuman Cotton Mills (supra), the Supreme Court, having reviewed a catena of decisions, noted as follows:

â??24. From a review of the decisions cited above, the following principles emerge regarding â??earnestâ??:

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, â??earnestâ?? is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the

earnest.â??

18. In Villayati Ram (supra), the Supreme Court quoted the following observation of Hamilton, J, in Summer and Leivesley vs. John Brown and Co.,

reported in (1909) 25 TLR 745 :

â??10. â?¦â?¦.. â??Earnestâ??â?¦â?¦â?¦â?¦meant something given for the purpose of binding a contract, something to be used to put pressure on the

defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted

from the price. If the contract went off through the giverâ??s fault the thing given in earnest was forfeited.â? The aforesaid observation was also

quoted by the Supreme Court in HUDA (supra).

19. Consideration of the judgements as noted above goes to show that the purpose of taking Earnest Money is to ensure the sincerity of the tenderer

to perform the contract in case the contract is awarded to him and, in case he defaults in carrying out his part of the contract, the amount is forfeited.

The requirement of Earnest Money is a mode to signify assent to a contract by depositing a sum to demonstrate that the parties are earnest to perform

the contract. Deposit of some amount as Earnest Money is incorporated in the NIT as a normal condition of tender with the object that only such

parties, who are financially sound and are serious in getting the work or contract take part in the tender process as, otherwise, any number of persons,

who have no capacity, financially or otherwise, and have really no intention to execute the work or contract may enter into the fray by submitting

tenders.

20. In Ramana Dayaram Shetty (supra), sealed tenders were invited in the prescribed form from registered 2nd Class hoteliers having at least 5 years

experience for putting up a 2nd Class restaurant and Snack Bar at the International Airport at Bombay for a period of 3 years. The aforesaid clause

was held to be a condition of eligibility which was required to be satisfied by every person submitting tender and if he did not satisfy the said condition

of eligibility, his tender would not be eligible for consideration on the settled rule of administrative law that an executive authority must be rigorously

held to the standard by which it professed its action to be judged and that it must scrupulously observe those standards on pain of invalidation of an act

in violation of them. The aforesaid case lays down the principle that an authority inviting tender cannot act arbitrarily at its sweet will but its action

must be in conformity with the standard or norms which is not arbitrary, irrational or irrelevant and the authority cannot depart from conditions of

eligibility prescribed in the notice inviting tender.

21. In Harminder Singh Arora (supra), the Supreme Court held that if the tender forms submitted by any party is not in conformity with the conditions

of the tender notice, the same ought not to be accepted and that the State or its instrumentalities have to act in accordance with the conditions laid

down in the tender notice.

22. In Poddar Steel Corporation (supra), the bankerâ??s cheque of the Union Bank of India and not a Draft of the State Bank of India in terms of

Clause 6 of the Notice Inviting Tender was held to be sufficient towards submission of Earnest Money deposit. It was held by the Supreme Court that

as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be

classified into two categories â?" those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to

the main object to be achieved by the condition. It was held that in the first case the authority issuing the tender may be required to enforce them

rigidly and in other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in

appropriate cases.

23. In Kanhaiya Lal Agarwal (supra), it was laid down by the Supreme Court that when an essential condition of tender is not complied with, it is open

to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of

non-compliance thereto. If non-fulfillment of the requirements results in rejection of the tender, then it will be an essential part of the tender otherwise

it is only a collateral term.

24. In Afcons Infrastructure Ltd. (supra), it was held that a mere disagreement with the decision making process or the decision of the administrative

authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or

perversity must be met before the constitutional Court interferes with the decision making process. In Reliance Energy Limited (supra), the Supreme

Court held that the terms and conditions must indicate norms and benchmarks with legal certainty. If there is any vagueness or subjectivity in the said

norms, it may result in unequal and discriminatory treatment, violating the doctrine of ""level playing field"".

25. In Jagdish Mandal (supra), the Supreme Court held in paragraph 19 as follows:

â??19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to

check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is

invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction.

Evaluating tenders and awarding contracts are essentially commercial functions.

Principles of equity and natural justice stay at a distance. 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. The 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. The tenderer or contractor with a grievance can always seek

damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of

molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review,

should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions

and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial

review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority

acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving black-

listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences,

dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

26. In Dhirendra Chandra Bhattacharjee (supra), the Clause relating to Earnest Money read as follows:

â??(2) The bidder must deposit required Earnest Money as stated in 1st page of the NIT in the shape of deposit at Call/bank draft/fixed deposit in

favour of the undersigned on any â??nationalised bankâ?? of India. Without EMD in appropriate shape, the tender will summarily be rejected.

(Emphasis now supplied)â??

Having regard to the language employed, it was held by the court that the Earnest Money deposit in appropriate shape was only mandatory and that

the tenders which did not contain Earnest Money deposit in appropriate shape, i.e., Deposit at Call/Bank Draft/Fixed Deposit was only liable to be

summarily rejected in terms of Clause 2 of the General Conditions of the tender. The court held that if the Deposit at Call/Bank Draft/Fixed Deposit

was not from a nationalized bank, no fatal consequence will ensue.

27. In Mega Electricals (supra), the bid of the petitioner was rejected on the ground that Earnest Money was not deposited by the joint venture

company and in the Demand Draft that was required to be submitted, it was indicated that the same was remitted by M/s Mega Electricals, which

was one of the constituents. This court held that there was no condition in the tender document that the Bank Draft/Bankerâ??s Cheque has to be

purchased from the bank account of the joint venture or that Bank Draft/ Bankerâ??s Cheque must be in the name of the joint venture covering all

the partners of the joint venture. This court observed that if a tender is liable to be rejected for non-fulfillment of the terms of the NIT, such terms

must be clear and unambiguous and not open to various possible interpretations and, accordingly, held that the decision making process of the

tendering authority was vitiated.

28. In Gojen Ch. Choudhury (supra), there was no stipulation regarding the form in which the Earnest Money was to be deposited. However, there

was a mention in Clause 4(ka) to furnish Call Deposit number and the date as well as the name of the bank issuing such Call Deposit. In the aforesaid

context it was held by the Division Bench of this court that there was no violation of any tender condition where deposit of Earnest Money was made

by way of Demand Draft.

29. In Global Associates (supra), a single Bench of this court, relying on Poddar Steel Corporation (supra), had accepted the acceptance of a tender

by the tender committee though the whole Earnest Money was not pledged in favour of the designated authority, balance of which was allowed to be

deposited before execution of the agreement. This court observed in the facts of the case that it was in the public interest if some latitude was shown

in favour of the selected tenderer, who had been found to be a capable and competent tenderer.

30. In Rashmi Metaliks Ltd. (supra), Clause (j) of the terms and conditions of the tender required the tenderers to submit the following:

â??(j) Valid PAN No., VAT No., copy of acknowledgement of latest income tax return and professional tax return.â??

In the context of the aforesaid term, the Supreme Court analyzed the other terms and conditions of the tender and observed that Income Tax Return

would have assumed the character of essential term if one of the qualifications was either gross income or net income on which tax was deducted.

This particular feature being absent, the Supreme Court held that the filing of the latest Income Tax Return was a collateral term and, accordingly,

tendering authority ought to have brought the discrepancy to the notice of the appellant company and even thereafter if no rectification was carried

out, position would have been different and, holding so, the appeal was allowed. Thus, the court segregated essential terms forming the bulwark of the

contract, and while ensuring strict adherence of the essential terms, allowed leniency towards the compliance with collateral clauses.

31. In Commissioner of Central Excise, New Delhi (supra), the Supreme Court had observed that the doctrine of substantial compliance is a judicial

invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in

some minor or inconsequential aspects which cannot be described as essence or substance of the requirements. It was also held that acceptance or

otherwise of plea of substantial compliance depends upon the facts and circumstances of each case and the purpose and object to be achieved and the

context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation.

32. In Central Coalfields Ltd. (supra), the Supreme Court observed in paragraph 42 of the judgement as follows:

â??42. Unfortunately, this court in Poddar Steel Corporn. v. Ganesh Engg. Works (1991) 3 SCC 273, did not at all advert to the privilege-of-

participation principle laid down in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 and accepted in G.J.

Fernandez v. State of Karnataka (1990) 2 SCC 488. In other words, this court did not consider whether, as a result of the deviation, others could also

have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel.â??

33. Rashmi Metaliks Ltd. (supra), was also referred to in the said judgement at paragraph

45. Paragraph 45 reads as follows:

â??45. Rashmi Metaliks was a comparatively different case inasmuch as clause (j) of the NIT was the subject matter of consideration. This clause

required a bidder to submit ""Valid PAN No., VAT No., copy of acknowledgment of latest income tax return and professional tax return."" The

employer interpreted this to be an essential term for qualifying in the bidding process. This view was upheld by a learned Single Judge and the Division

Bench of the Calcutta High Court. This Court reversed in the following words:

â??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.â??

Essentially therefore, this Court substituted its view for that of the employer who interpreted this term of the NIT to be mandatory for compliance.

Rashmi Metaliks followed Poddar Steel and apparently overlooked the dictum laid down in Ramana Dayaram Shetty, G. J. Fernandez, Tata Cellular

and Jagdish Mandal and must be confined to its own peculiar facts. In any event, this decision does not advance the case of any of the parties before

us.â??

34. At paragraphs 46, 47, 48 and 49 of Central Coalfields Ltd. (supra) the Supreme Court observed in as follows:

â??46. It is true that in Poddar Steel and in Rashmi Metaliks a distinction has been drawn by this Court between essential and ancillary and subsidiary

conditions in the bid documents. A similar distinction was adverted to more recently in Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan

Computed Pvt. Ltd. 2016 (7) SCALE 425 through a reference made to Poddar Steel. In that case, this Court held a particular term of the NIT as essential (confirming the view of the employer) and also referred to the ""admonition"" given in Jagdish Mandal followed in Michigan Rubber (India)

Limited v. State of Karnataka, (2012) 8 SCC 216. Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and

Personnel Services ineligible to participate in the tender.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view

of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored

as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be

judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but

the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide

or intended to favour someone or a decision ""that no responsible authority acting reasonably and in accordance with relevant law could have reached

as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is

essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held

in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The

lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the

decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the Courts take over the decision-making function of the employer and make a

distinction between essential and non-essential terms contrary to the intention of the employer and thereby re-write the arrangement, it could lead to all

sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2

that ""Any Bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive."" Surely, CCL ex facie

intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that

requirement was a non-essential term of the GTC. From the point of view of CCL the GTC has been impermissibly re-written by the High Court.â??

35. A perusal of the judgement in Central Coalfields Limited (supra) goes to show that the Supreme Court observed that the principle of â??privilege

of participationâ? laid down in Ramana Dayaram Shetty (supra) was overlooked in Poddar Steel Corporation (supra) and Rashmi Metaliks Ltd.

(supra).

36. In Central Coalfields Limited (supra) a prescribed format of Bank Guarantee was given for deposit of Earnest Money. The question that had

arisen before the Supreme Court was as to whether the tendering authority was justified in rejecting a tender submitted by a tenderer who had

deposited the Earnest Money by a Bank Guarantee but not in the format given in the bid document. Argument was advanced on behalf of such

tenderer that the Bank Guarantee furnished by it was more stringent and, therefore, there was no occasion for the tendering authority to reject such

tender. The Supreme Court repelled the contention saying that it is not for the employer or the court to scrutinise every Bank Guarantee to see and

examine whether the Bank Guarantee is more rigorous than the prescribed form. The fact is that a particular format was prescribed and there was no

reason not to adhere to it. It was also observed that goalposts cannot be re-arranged or asked to be re-arranged during the bidding process to affect

the right of some or deny a privilege to some. It was also held that deviation from the terms and conditions is permissible so long as level playing field

is maintained and it does not result in any arbitrariness or discrimination. Referring to Nazir Ahmad v. King Emperor, reported in AIR 1936 PC 253,

the Supreme Court invoked the celebrated principle, namely, â??where a power is given to do a certain thing in a certain way, the thing must be done

in that way or not at all. Other methods of performance are necessarily forbidden"". It was observed that the principle enunciated ought to be applied in

contractual disputes as well and that if the employer had prescribed a particular format of Bank Guarantee to be furnished, then a bidder ought to

submit the bank guarantee in that particular format only and not in any other format. It was emphasised that the issue or acceptance or rejection of bid

or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the standpoint of the tendering authority. The

terms of the NIT cannot be ignored as being redundant or superfluous and that they must be given a meaning and the necessary significance. Whether

a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the

inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders. If the term is held to be ancillary or

subsidiary, even that decision should be respected, but that does not mean that the decision making process cannot be questioned. However, it is not

the duty of the court to take over the decision-making function of the employer and make a distinction between essential and non-essential terms

contrary to the intention of the employer and thereby re-write the arrangement.

37. It is to be noticed that in this particular case, the consequences of non-complying with the requirements while submitting tender had not been

mentioned in the NIT. But what is emphasized at Clause 6 is that â??tender must be accompanied by the following documentsâ?. The insistence of

Earnest Money to be deposited in the shape of Call Deposit from any nationalized bank or any Government Undertaking Co-operative bank has been

stated twice, once in Clause 3 and again in Clause 6. It is also to be noted again that there was no stipulation in the NIT for return of the Earnest

Money Deposit to the successful tenderer and the same was to be returned only to the unsuccessful tenderers. In absence of any stipulation of the

consequences of non-submission of the requisite documents as sought for, it cannot be countenanced that a tenderer would be at liberty to submit

documents as he wants or that he may not submit the documents as sought for. Documents are sought for the purpose of examining the eligibility and

credibility of the tenderers and, therefore, if some of the documents are not given, in absence of any stipulation of rejection, it is to be understood that

non-deposit of documents would entail rejection of the tender. After all, a contract is a commercial transaction and evaluating tenders and awarding

contracts are essentially commercial functions. If consequence by way of rejection for tender for non-submission in the manner prescribed is spelt out

in respect of some and not in respect of other documents, it will stand to reason to hold that tender will not entail rejection in respect of those

documents in respect of which consequence of rejection is not stipulated. The petitioner was aware that he was supposed to submit Earnest Money by

way of Call Deposit and, as such, in his tender form he mentioned that he had submitted Call Deposit, though factually it was a Demand Draft that

had been submitted.

38. The validity period of the Demand Draft deposited by the petitioner was, admittedly, three months. The petitioner has not placed on record any

material to demonstrate that there is no fundamental or substantial difference between Call Deposit and Demand Draft and, in absence of any

pleading to that effect, this court will not embark upon a journey to find out whether a Demand Draft and a Call Deposit stand on the same footing.

Where the requirement was for depositing Call Deposit, as held in Central Coalfields Limited (supra) it was the obligation of the intending tenderer to

comply with the requirements. It is not the case of the petitioner that it was an insurmountable condition attached by the tendering authority, which

could not have been complied with. The materials and the records produced by Mr. Chutia, which I have examined, demonstrate that all other

tenderers had deposited Call Deposit.

Therefore, the question of substantial compliance, in the facts and circumstance of the case, do not come into play. The argument of Mr. Borthakur

that limited validity of three months in respect of the Demand Draft submitted by the petitioner would not have been of any consequence if the same

was encashed and deposited in the bank account of the Town Committee, does not merit acceptance as, in the light of Central Coalfields Limited

(supra), the tendering authority cannot be compelled to undertake the exercise of encashing Demand Drafts and maintaining separate accounts for

that purpose, which is an extra burden on the tendering authority. This court, in Dhirendra Chandra Bhattacharjee (supra), had held that shape of

Earnest Money is a mandatory requirement and failure to deposit Earnest Money in the proper shape would merit rejection of the tender. Global

Associates (supra) stands on a slightly different footing where the tendering authority, in view of the credentials of the tenderer in whose favour,

eventually, the order of contract was awarded, had relaxed the condition of Earnest Money deposit by permitting him to pledge some amount of

Earnest Money at the time when the contract agreement was executed. The fundamental difference between Global Associates (supra) and the

present case is that, in the said case, the tendering authority had relaxed the mode of deposit of Earnest Money and had considered deposit of Earnest

Money at a later period, whereas, in the instant case, the tendering authority had given full meaning to the terms of the tender.

The tendering authority had treated the term relating to deposit of Earnest Money to be an essential term and that decision needs to be respected.

Applying the principles laid down in Jagdish Mandal (supra), it cannot be said that in the instant case the tendering authority committed manifest error

or acted perversely in giving full meaning to the terms and conditions of the NIT which were unambiguous and specific. In fact, the petitioner, in his

pleading in the writ petition, had emphasized, taking his tender to be wholly compliant, that the tendering authority could not have altered or diluted the

terms of the tender in the context of settlement order issued in favour of respondent No. 6. Confronted with the situation where his tender was held to

be defective on the ground that his Earnest Money deposit was not in consonance with the clause of the tender, argument is articulated that the

tendering authority could have exercised its discretionary power to relax the conditions, which the tendering authority did not do. By allotting the work

to the respondent No. 6, who is the valid highest tenderer, no preferential treatment was given to him. It is not that the tender of the petitioner was

rejected on wholly untenable grounds only to sub-serve or bestow undue favour on respondent No. 6.

39. In the facts and circumstances of the case, I am of the considered opinion that having regard to the terms and conditions with regard to Earnest

Money, as embodied in the NIT, this court ought not to issue a writ of mandamus, essentially, directing the tendering authority to deviate from the

terms of the tender to accept the tender of the petitioner.

40. Taking that view, the writ petition is dismissed. No cost.

41. Let the records produced by Mr. Chutia be returned to him.

