(2024) 10 MP CK 0022

In the Madhya Pradesh High Court

Case No : Writ Petition No. 14843 of 2024

Maihar Cement Pipe Industries APPELLANT

Vs

Union Of India & Others RESPONDENT

Date of Decision : 22-10-2024

Acts Referred:

Constitution of India 1950 — Article 14, 16, 226
General Financial Rules, 2017 — Rule 149, 150

Citation : (2024) 10 MP CK 0022

Hon'ble Judges : Sushrut Arvind Dharmadhikari, J, Anuradha Shukla, J

Bench : Division Bench

Advocate : Sanjay K. Agrawal, Siddharth Sharma, Greeshm Jain, Naman Nagrath, Utkarsh Sonkar

Final Decision : Allowed

Judgement

Sushrut Arvind Dharmadhikari, J

With the consent of the learned counsel for the parties, the matter is heard finally.

2. By this instant petition under Article 226 of the Constitution of India, the petitioner has challenged the legality, validity and propriety of the Letter of Acceptance (LoA) dated 22.05.2024 (Annexure-P/7) issued by the respondent No.3 for the work of "Loading and Transportation of Coal by Payloaders & Tippers combination from East Purewa Seam (Surface Miner face) to Nigahi Wharfwall/ Spur-2 Siding, Singrauli/Hopperof new CHP in east by Contractor's tipping trucks including loading of coal in railway wagons at Nighai Wharf wall/Spur-2 Siding, Singrauli for a quantity of 90.00 Lakh Tons for a period of three years (1096 days) at Nighai Project", by which the tender has been awarded in favour of respondent No.4.

3. The brief facts of the case are that the petitioner is a proprietor ship firm carrying on the business in the name and style "Maihar Cement Pipe Industries".

The respondent no.3 floated a tender on 07.02.2024 for Loading and Transportation of Coal at Nigahi Wharf/Spur-2 Siding, Singrauli for a total quantity of Rs.90 Lacs tons for a period of three years. As per clause-25.2(B) of the Tender document, a detailed procedure has been prescribed in order to select final L-1 bidder, i.e., in case, where there are more than two lowest bidders and splitting up of work is not considered necessary. As per the aforesaid clause, it was stipulated that all the L-1 bidders are advised to submit the reduced price and final L-1 bidder may be decided on the basis of revised (reduced price) or through another mode prescribed i.e., through "Reverse Auction" amongst the L-1 bidder through Online mode.

4. The petitioner as well as the respondent no.4 submitted their respective bids through online portal i.e., Government e-market Place Online Portal (hereinafter referred to as 'GeM Portal'). In the technical evaluation, both the petitioner and the respondent no.4 were found to be L-1 bidders and were selected amongst other bidders. Thereafter, a financial evaluation was carried out and the petitioner as well as respondent no.4 submitted their final bid and both of them quoted identical lowest price i.e., Rs.64,06,56,525.60/-. As a result, the petitioner and respondent no.4 both were ranked as L-1 bidders which is evident from the abstract of financial evaluation being uploaded on the website.

5. Learned Senior Counsel for the petitioner Shri Sanjay K. Agrawal contended that the respondent authorities, instead of adopting the mechanism as provided in clause-25.2(B) of the Tender document for selecting the final L-1 bidder, where there are more than one L-1 bidders, have adopted the procedure as laid down in clause-4(xiii)(h) of the General Terms and Conditions of the GeM Portal which provides as under :-

"(h) In case, two or more acceptable bidders are found to have quoted identical lowest bid price, Buyer has to conduct Reverse Auction for the required Goods among all technically qualified bidders in case of bids for Goods. In case of Services bids, if the multiple L-1 bidders have quoted the lowest allowed price for that service, Buyer shall place the Contract by selection of a bidder amongst the L-1 bidders through a Random Algorithm executed by GeM system."

(emphasis supplied)

Clause 25.2(B)(2) of the Tender Document provides for as follows:-

"2. If there are more than one lowest Bidder & splitting up of the work is not considered necessary, L-1 may be decided as under :-

All L-1 Bidders may be advised to submit the reduced price online & final L-1 may be decided on the basis of revised (reduced) Price, OR

Through "Reverse Auction" amongst the L-1 Bidders online, if "Reverse Auction" is available in online mode. The above Principle may be followed for offline tenders also. All factual details including complaints and negotiations, if any, to be brought out and reasons for recommendation of award to be recorded in TCR in detail.”

Being aggrieved, the petitioner submitted a representation vide e-mail dated 0.05.2024 (Annexure-P/5) to the respondent authorities categorically stating that as per the update provided by the Contract Management Cell (NCL), the final L-1 bidder is being selected through lottery system. It was also categorically stated in the e-mail that the procedure adopted to select the final L-1 bidder in the project in question is unfair and contrary to the clause of the Tender documents. It was also mentioned that prior to carrying out the lottery system for final L-1 bidder, no prior confirmation or intimation was conveyed to the petitioner. The aforesaid e-mail as well as the reminder sent by the petitioner on 13.05.2024 (Annexure-P/6) did not evoke any response from the respondent authorities. The respondents have acted beyond their jurisdiction in adopting the lottery system mechanism for selecting the final L-1 bidder amongst the available L-1 bidders. Learned Senior counsel for the petitioner further submitted that any deviation from terms and conditions of the contract is impermissible. In the present case, there is an apparent deviation of the tender terms and conditions which led to arbitrariness, irrationality and discrimination amongst L-1 bidders i.e., the petitioner. Even the tender conditions do not provide relaxation in the mechanism to choose final L-1bidder amongst the available L-1 bidders who have quoted identical lowest price by adopting lottery system. Thus, the entire action of selection of respondent no.4 for award of contract deserves to be interfered with by exercising extraordinary jurisdiction under Article 226 of the Constitution of India. The order impugned also violates the Fundamental Rights of the petitioner as guaranteed under Article 16 of the Constitution of India.

Learned Senior counsel further contended that the scope of interference in judicial review of tender process and award of contract is limited. However, he submitted that in case where there is material violation of the terms relating to the scrutiny and acceptance of tender or decision is vitiated either by arbitrariness, irrationality, malafide or favouritism, then certainly the Courts can very well exercise its power under Article 226 of the Constitution of India. The present case is an example of material violation of terms and conditions of contract as well as malafides/ favouritism.

7. In support of this contention, learned Senior counsel for the petitioner relied upon the judgment of Hon’ble Apex Court in the case of Jagdish Mandal vs. State of Orissa and Others (2007) 14 SCC 517, wherein the Apex Court in paragraph-22 has held as under :-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 blacklisting 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."

8. Further, the Apex Court in the case of Ramana dayaram Shetty vs. Internation Airport Authority of India and Others (1979) 3 SCC 489 has held in para-10 and 13 as under :-

"10. Now, there can be no doubt that what paragraph of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by respondent 1 and since the respondents 4 did not satisfy this standard or norm, it was not competent to respondent 1 to entertain the tender of respondents 4. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Viteralli v. Saton 359 U S. 535, where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in A. S. Ahluwalia v. Punjab (1975) 3 SCC 503 and in subsequent decision given in Sukhdev v. Bhagatram, (1975) SCC (L & S) 101, Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as an emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's "Administrative Law", 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of Liberty" or the exposition set forth by Harry Jones in his "The Rule of Law and the Welfare State", there is as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Democracy, Equality and Freedom" "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essense of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.”

13. Now, it is obvious that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government. As early as 1819 the Supreme Court of the United States in MacCullough v. Maryland held that the Congress has power to charter corporations as incidental to or in aid of governmental functions and, as pointed out by Mathew, J., in Sukhdev v. Bhagat Ram (supra), such federal corporations would ex-hypothesi be agencies of the Government. In Great Britain too, the policy of public administration through separate corporations was gradually evolved and the conduct of basic industries through giant corporations has now become a permanent feature of public life. So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated April 6, 1948 where it was stated inter alia that "management of State enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this". It was in pursuance of the policy envisaged in this and subsequent resolutions on industrial policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should

equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty."

9. Per contra, Shri Greeshm Jain, learned counsel for the respondents no.2 and 3, vehemently opposed the prayer and submitted that the present case is a service contract which could not have been split as per the terms and conditions as also the petitioner and respondent No.4 both having unconditionally registered themselves on GeM Portal meaning thereby that they have accepted all the terms and conditions of the GeM Portal which supersedes the General Terms and Conditions of the NIT. Learned counsel contended that clause-1 of the GeM Portal i.e., "Introduction Clause" of the GeM 4.0 (version 1.14) dated 31.01.2024 specifically contains that the document is in electronic record published by GeM under the provisions of Information Technology Act, 2000 and resulting contracts shall be governed by their General Terms and Conditions unless otherwise superseded by product/service specific special terms and conditions. In view of this the General Terms and Conditions of GeM will prevail over the General Terms and Conditions of NIT, therefore, clause-25.2(B) of the General Terms and Condition of Tender would not apply to the facts and circumstances of the present case.

Learned counsel for the respondents no.2 and 3 further pointed out that the Model Tender Document for procurement of non-consultancy service published by Government of India, Ministry of Finance, Department of Expenditure, contains the clause 10.1 which is a relationship between bidder and e-procurement portal as per which in case of conflict between the provisions of the portal with that of tender documents, the provisions of portal shall prevail. Clause – 10.3.2 of the Model Tender Document (Annexure-R/3) contains the implied Acceptance of Procedure by Bidders, as per which submission of bid in response to the tender document is deemed to be acceptance of the e-procurement and tender procedure and conditions of the tender document.

It is also submitted that when the management of the answering respondent, i.e., NCL is faced with the difficulty in respect of having two L-1 bidders and finding no "Reverse Auction" procedure as contemplated in clause-25.2(B) of the NIT approached the Director/Authorities of GeM by mail. In response it was mentioned that the revised reduced prices on GeM in the subjected bid is not feasible and the system will proceed with "Run L-1 Auction." In the present case, clause-25.2(B) of the Tender terms and conditions itself provides with reverse auction amongst the L-1 bidders. Online is only possible if available in online mode. In the present case, the same is not available in the GeM Portal, therefore, there is no question to proceed with the "Reverse Auction" or L-1 may be decided on the basis of revised (reduced price).

10. Learned counsel for the respondents no.2 and 3 further submitted that "Run L-1" based on clause-4(xiii)h of the GeM Portal select the L-1 bidder through a "Random Algorithm" which is based on the "Pseudorandom Algorithm" which is

the most transparent fair software generates random numbers which are uniformly distributed. The reliance placed by the petitioner on the "NOTE" which contains on E-Tender notice dated 07.02.2024 is not applicable in the present case, as per which only the service specific special terms and conditions as applicable shall supersede the General Terms and Conditional of GeM 4.0 (version 1.9) dated 31.03.2023. In the present case, the Special Terms and Conditions of the NIT will supersede over the General Terms and Conditions of GeM as stated in clause-1 (Introduction of GeM) will be applicable and in view of clause-4(xiii) has also clause -10.1 of Model Tender Document in case of conflict between provisions of GeM Portal with the tender document, provisions of the portal shall prevail. In view of the aforesaid, the writ petition is not maintainable and is liable to be dismissed without any interference.

11. Learned Senior counsel Shri Naman Nagrath appearing for respondent no.4 has also vehemently opposed the submissions made by the learned counsel for the petitioner and submitted that notwithstanding anything contained in the terms and conditions of the contract, it is noteworthy that after the institutionalization of Government E-marketplace portal (hereinafter referred to as "GeM Portal"), all E-Tenders floated by the Central Government, State Government ,CPSUs and SPSUs are floated on the GeM Portal in light of mandatory directions of the Central and State Authorities and Rule 149, General Financial Rules, 2017.

Rule 149, General Financial Rules, 2017 provides as under :-

"DGS&D or any other agency authorized by the Government will host an online Government e-Marketplace (GeM) for common use Goods and Services. DGS&D will ensure adequate publicity including periodic advertisement of the items to be procured through GeM for the prospective suppliers.

The Procurement of Goods and Services by Ministries or Departments will be mandatory for Goods or Services available on GeM. The credentials of suppliers on GeM shall be certified by DGS&D. The procuring authorities will certify the reasonability of rates."

(emphasis supplied)

12. Learned Senior counsel further submitted that it undisputed that E-Tender in the present case was floated on GeM Portal on 07.02.2024 wherein both the petitioner as well as the answering respondents submitted their respective bids and both were found to be L-1 bidders. Any contractor or party prior to bidding or participating in an E-Tender has to register itself on the GeM Portal in light of Rule 150, General Financial Rules, 2017 wherein it subscribes to the General Terms and Conditions of the GeM Portal. These General Terms and Conditions of GeM Portal are binding on the buyer as well as the sellers who utilize the GeM Portal.

Clause -1 of the General Terms and Conditions of GeM Portal provides as under :-

"1. Introduction. This document is an electronic record published by GeM under the provisions of the Information Technology Act, 2000 and the rules made there under (as applicable) and shall act as valid agreement between Seller /Service Provider and Buyer. Further the use of GeM Portal for Sale / Purchase of Goods / Services and the resulting Contracts shall be governed by the following General Terms and Conditions (GTC) (unless otherwise superseded by Product/Service specific Special Terms and Conditions (STC), Product/Track/Domain Specific STC of Particular Service including its SLA (Service Level Agreement) and BID/ Reverse Auction Specific Additional Terms and Conditions (ATC) as applicable)."

(emphasis supplied)

7. In light of the aforementioned, it is clear that the General Terms and Conditions of GeM portal constitute a valid agreement between Seller/Service Provider and Buyer and that resulting Contracts shall be governed by the same unless it is superseded.

8. That, the petitioner is seeking to employ Note to the tender notice dated 07.02.2024 to argue that provisions of the Tender Document shall supersede the Conditions of the GeM portal. The relevant note reads as,

"NIT, Service specific Special Terms and Conditions (STC), and BID Specific Additional Terms and Conditions (ATC), as applicable, shall supersede General Terms and Conditions (GTC) of GeM as per clause no. 1 of General Terms and Conditions on GeM amended from time to time."

9. That, the aforementioned argument completely disregards Clause 4(xiii)(u) of General Terms and Conditions of GeM which provides as follows,

"(u) Bid to RA: While creating bid on GeM, Buyer shall have the provision to select Bid to RA option. If this option is selected by the Buyer at the time of bid creation, Sellers would be required to submit their Technical and Commercial bids before bid closure. After completion of technical evaluation by the Buyer, Reverse Auction would be conducted as per Bid to RA qualification rule selected by the buyer, which have been stated below:"

10. That, this RA option was not made available by NCL as is evident from Bid Document tendered by the Respondent NCL as [Annexure R/7]. Thus, the question of reverse auction does not even arise in the present matter. This bod document demonstrates that even splitting of the work is not allowed.

11. In view of the aforesaid, this writ petition moved by the petitioner is sans merit and devoid of substance. The answering respondent, thus, humbly prays that the present writ petition be dismissed with costs."

13. Heard the learned counsel for the parties and perused the record.

14. As per the NOTE mentioned in para-10 hereinabove, NOTE of E- Tender notice dated 07.02.2024 (Annexure-P/2) clearly postulate certain mandatory aspects, which would govern the E-Tender process.

“NOTE :-

1. XXX XXX XXX

2. XXX XXX XXX

3. XXX XXX XXX

4. The Contracts shall be governed by the terms and conditions of the NIT.

5. NIT, Service specific Special Terms and Conditions (STC), and BID Specific Additional Terms and Conditions (ATC), as applicable, shall supersede General Terms and Conditions (GTC) of GeM as per clause no.1 of General Terms and Conditions on GeM 4.0 (Version 1.9) dated 31st March, 2023 or as amended from time to time.”

Perusal of NOTE no.4 would reveal that the contract shall be governed by Terms and conditions of NIT. Note no. 5 further stipulates that notices inviting tender as applicable shall supersede the General Terms and Conditions (GTC) of GeM as per clause 1 of General Terms and Condition on GeM 4.0 (Version 1.9) dated 31/03/2023 or as amended from time to time. Further, as per the E-Tender Notice 07/02/2024 which specifically prescribes the overriding effect of Terms and Conditions of E-Tender Notice 07/02/2024 over any other General Terms and Conditions of GeM portal/ GeM system. Clause 1 of General Terms and Conditions on GeM 4.0 (Version 1.14) also specifically postulates that –

'the use of GeM portal for sale/purchase of goods /services and the resulting contract shall be governed by the following General Terms and Conditions (GTC) (unless otherwise superseded by product/ service specific Special Terms and Conditions (STC), Product/Track/Domains specific of particular service including its Service Level Agreement and Bid/ Reverse Auction Specific Additional Terms and Conditions(ATC) as applicable)'.

As per the above, Clause 1 of General Terms and Conditions of GeM are applicable only when the same are stated to have superseding effect over Terms and Condition of NIT/E-Tender Notice.

Note no.5 of E-Tender notice clearly stipulates that the Terms and Conditions of NIT shall supersede General Terms and Conditions (GTC) of GeM system. Moreover, contract in question is governed by Terms and Conditions of NIT as per note no. 4 of E-Tender notice dated 07/02/2024 and therefore the Terms and Conditions of NIT / E-Tender notice 07/02/2024 has an overriding effect on any specific Terms and Conditions of GeM system.

15. The procedure for selecting L-1 bidder amongst the available L-1 bidders who have quoted lowest identical price is specifically provided in the Terms and Conditions of NIT in question/E-Tender Notice 07/02/2024 vide clause 25.2(B) of NIT, wherein a specific mechanism is provided and therefore the said mechanism provided in the NIT vide clause 25.2(B) of NIT has overriding effect on any other prescribe mechanism floated vide General Terms and Conditions of GeM system

in respect of mechanism to select lowest L-1 bidder amongst available L-1 bidders. Respondents no. 2 and 3 have also relied upon Annexure – R/3 i.e Model Tender Document, in particular Clause 10.1 which stipulates aspect of relationship between Bidder and E-procurement portal. As per the respondent no. 2 and 3, Clause 10 of Model Tender Document, states that in case of any conflict between E-Tender Documents and GeM portal, the Terms and Conditions of E-Portal shall prevail.

16. In respect to Clause 10.1 of Model Tender Document (R- 3), it is submitted that specific mechanism vide clause 25.2(B) of NIT of E-Tender notice dated 07/02/2024 for selecting L-1 bidders amongst the available L-1 bidders as per Terms and Conditions of NIT, will supersede General Terms and Conditions (GTC) of GeM system. Thus, it is submitted that, Clause 10.1 of Model Tender Documents (Annexure R-3) is not at all applicable in the present case, since there is no conflict over applicability of Terms and Conditions of NIT.

17. In paras 14 and 15 of the reply dated 18/6/2024 filed by respondents no. 2 and 3, it has been asserted that the NCL authorities was left with no option available as per the GeM portal/GeM system and therefore clarification was sought from the Director, Ministry of Central Public Sector Undertaking and thus reliance has been placed on E-mail conversation, where it is stated that receiving reduced price is not feasible and GeM system will proceed with 'Run L-' option only. The aforesaid stand is not based on official record and terms of NIT.

18. In view of the above, the process of applying "Run L-1" option or selection of bidders by applying random algorithm executed by GeM system cannot supersede the specific clause/mechanism as per Clause 25.2(B) of NIT dated 07.02.2024.

19. On analysis of the aforesaid clauses of the Tender Terms and Conditions, this Court comes to the conclusion that the mechanism of "Run L-1" option and thereby choosing the L-1 bidders randomly from the available bidders leads to arbitrariness and illegality in the selection of L-1 bidders as the same is contrary to the clause of NIT where the terms and conditions of NIT supersedes the General Terms and Conditions of GeM system.

20. Accordingly, the method adopted by the respondents in deciding the L-1 bidder is arbitrary, irrational and discriminatory and appears to have been followed just to accommodate the favourable bidder and leaving other aspirant bidders who have participated in the tender process having certainly equal scores on some criterion lost the tender due to inclusion of some clause of the GeM Portal which are suitable for the respondent no.4 particularly.

21. In view of the aforesaid discussion and in light of the judgments enunciated hereinabove, we find that the procedure adopted by the respondents no.1 to 3 is discriminatory and results in arbitrary action which cannot be sustained.

22. Accordingly, this petition is allowed and the impugned Letter of Acceptance

dated 22.05.2024 issued by the respondent no.3 in favour of respondent no.4 is hereby quashed. The respondents are directed to adhere to clause -25.2(B) of the Tender Terms and Conditions and proceed with the selection afresh in respect of L-1 bidder amongst the available L-1 bidders in accordance with law. No order as to cost(s).

