

(2024) 01 OHC CK 0063

In the Orissa High Court

Case No : Writ Petition (C) No.10434 Of 2023

M/s. Maa Sarala Aqua Industries Vs Union Of India ?

Date of Decision : 09-01-2024

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2024) 01 OHC CK 0063

Hon'ble Judges : Dr. B.R. Sarangi, ACJ;M.S. Raman, J

Bench : Division Bench

Advocate : Swapna Kumar Ojha, Sushant Kumar Nayak, Debaraj Mohanty, Abhilash Mishra, Beda Prakash Panda, Debasish Behera, Biswajit Pattnayak, Saroj Kumar Das, B.C. Pradhan, Spandan Mohanty, Kaveri Pattanaik, Abhishek Pal

Final Decision : Disposed Of

Judgement

Murahari Sri Raman, J.—

THE CHALLENGE BY THE PETITIONER:

1. The petitioner, a small scale industrial unit engaged in manufacturing packaged drinking water having Certification of Bureau of Indian Standards, Licence from the Food Safety and Standards Authority of India, and UDYAM registration certificate from the Ministry of Micro, Small and Medium Enterprises, approached this Court by way of filing the present writ petition invoking provisions of Articles 226 and 227 of the Constitution of India beseeching following relief(s):

“Under the circumstances, it is prayed that the Hon’ble Court may graciously be pleased to issue rule NISI calling upon the opposite parties to show cause as to why writ in the nature of certiorari shall not be issued quashing the letter/communication dated 17.03.2023 (Annex.11)

And further directing the opposite party No.4 to cancel the Tender so also consequential decision in respect of opposite party No.5 as he is not fulfilling the essential condition for participation in tender process

And further direction to be issued to award the contract to the petitioner who is the second highest bidder.

If the opposite parties failed to show cause or show insufficient cause, the rule may be made absolute.

And further be pleased to pass any other order(s) as deemed fit and proper for the ends of justice;

And for this act of kindness, the Petitioner shall as in duty bound to ever pray."

FACTS:

2. Brief facts leading to filing of the writ petition by the petitioner is narrated herein infra.

2.1. The Indian Oil Corporation Limited (Refineries Division) invited bids for "supply of packaged drinking water (20 litres bottles) at various locations at Paradip Refinery, Paradip, Odisha" being Tender No.PDO1C22234 through GeM, i.e., Government e-Marketplace for "two years from date of handing over the services to the site with a provision for extension by another year or part thereof on mutual consent at the same rate, terms and conditions" vide BID No. GEM/2022/B/2762179, dated 21.11.2022 (Annexures-4 and 5), which contained details about the scope of work and other instructions and conditions by specifying 5th December, 2022 as the last date for submission of tender consisting of technical and commercial bid.

2.2. In response thereto, though four numbers of bidders participated in the tender process including the petitioner, two bidders were eliminated in evaluation of technical bid as they failed to satisfy the requisite eligibility in terms of specifications contained in the tender documents.

2.3. Thus, it is the claim of the petitioner that even if the opposite party No.5 did not satisfy minimum required eligibility condition as specified in General Condition of Eligibility prescribed in GeM as well as Special Conditions of Contract in the Technical Bid, his price bid was considered along with that of the petitioner and consequently, the opposite party No.5 is declared as L-1.

2.4. As the objection to the effect that the opposite party No.5 had no licence concerning quality, purity and taste of water certified by the Bureau of Indian Standards/Indian Standards Institute was not paid any heed to, finding no alternative, the petitioner had to bring it to the notice of this Court by way of application being W.P.(C) No.6316 of 2023, which came to be disposed of on 02.03.2023 with the following Order:

3. The present Writ Petition has been filed with the following prayer:

'Under the circumstances, it is prayed that the Hon'ble Court may graciously be pleased to issue rule Nisi calling upon the opposite parties to show cause as to

why writ in the nature of certiorari shall not be issued directing the opposite party No.4 to cancel the Tender submitted by the opposite party No.5 as not fulfilling the essential condition of the tender notice and further direction to be issued to award the contract to the petitioner who is the second highest bidder.”

4. In course of hearing, learned counsel for the petitioner states that highlighting his grievances, the petitioner has made a representation to opposite party No.4 vide Annexure-9 and the same may be directed to be considered within a stipulated time, to which learned Central Government Counsel has no objection.

5. As agreed by learned counsel for the parties and after going through the records, this Court, without expressing any opinion on the merits of the case, disposes of the writ petition directing opposite party No.4 to consider the representation filed by the petitioner vide Annexure-9, and pass appropriate order in accordance with law within a period of three months from the date of production of certified copy of this order.”

2.5. In obedience to said direction of this Court, the Senior Manager (EMS) & Engineer in-Charge while rejecting the representation of the petitioner issued Letter Ref.: PDR/EMS/ Drinking Water/2023, dated 17.03.2023, Annexure-11, which contained the following:

“To

Ms. Subhasmita Sahoo

M/s. Maa Sarala Aqua Industries

At: Nimidhi, P.O.: Paradeepgarh

PS: Paradeep Lock, Paradip

District: Jagatsinghpur – 754 141

Ref: Tender No. PDO1C22234

(Bid Number: GEM/2022/8/2762179)

Sub: Regarding submission of BIS certificate (L1 bidder) at the time of Tendering.

Dear Ma’am,

Vide your complaint letter dated 20.02.2023 (copy enclosed as Annexure A), regarding submission of BIS certificate (L-1 bidder) at the time of tendering, our submission is as follows:

1) As per pre-qualification criteria, the referred point was not a deciding factor for awarding of tender. However it was a part of Special Conditions of Contract.

2) The tender was floated in GeM portal as Custom Bid and L1 bidder has complied with the requirement as per tender terms & conditions.

It is once again reiterated that Tender No: PDO122234 ‘Supply of packaged

drinking water (20 Ltrs bottles) at various locations at Paradip Refinery, Paradip, Odisha' has been floated in open market GeM tendering for fair bidding between the interested parties.

Thanking You.

For & on behalf of

Indian Oil Corporation Ltd

Paradip Refinery

Sd/- 20.03.2023

Ajay Luhach

Senior Manager (EMS) &

Engineer In-charge"

2.6. Questioning legal sanctity of the reason(s) assigned by the opposite party No.4 that for award of tender it is not essential pre-condition for the seller/service provider to have BIS Licence notwithstanding the admitted fact that the tender for procurement/supply of water was floated in GeM portal, the petitioner has preferred to invoke extraordinary jurisdiction by way of the instant writ application.

REPLIES OF THE OPPOSITE PARTIES TO THE CONTENTS OF THE WRIT PETITION:

3. Justifying the decision to consider the opposite party No.5 as L-1 bidder, the opposite party Nos.2 to 4 in their affidavit asserted that it is implied from the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 that it is "only applicable after execution of the agreement/contract with L-1 bidder and same is not pre-qualification/eligibility criteria for selection of a bidder (in technical bid and financial bid)". It has also been asserted that the L-1 bidder having fulfilled pre-qualification eligibility criteria specified in Clause 10 of the Notice Inviting GeM Tender; and the General Terms and Conditions of the Contract as well as the Special Terms and Conditions of the Contract being applicable after acceptance of the contract, "BIS/ISI standard is required when the L-1 bidder commences supply of the packaged water to the answering opposite parties".

3.1. Denying to have shown favouritism to any of the parties, the opposite party No.2 to 4 affirmed that they have acted in tune with terms laid in Clause 10 of the Notice Inviting GeM Tender. Accordingly, the opposite party No.5 having been declared L-1 bidder, "work order has been issued in his favour".

4. Contending that while M/s. Shree Sai Traders-opposite party No.5 quoted Rs.38,01,000/- and M/s. Maa Sarala Aqua Industries-petitioner quoted Rs.43,98,933/-, reply has been filed by asserting that Indian Oil Corporation Limited has correctly declared the former as L-1 bidder and issued Work Order

bearing No.28603392, dated 20.02.2023 as referred to in Letter dated 24.02.2023. In pursuance thereof, the opposite party No.5 entered into agreement on 02.02.2023 with M/s. Nilakantheswar Food Products, Plot No.1423, 1415, Kaduapada, Jagatsinghpur – 754106, having BIS Licence No. CM/L-5200113976 for procurement of 20 litres bottles.

4.1. The opposite party No.5 has been candid to admit in its counter affidavit dated 21.09.2023 that on 27.04.2023 it has applied for obtaining BIS Licence bearing Application No.52000887.

4.2. Refuting the allegation that the opposite party No.5 was not satisfying the minimum General Condition of Eligibility prescribed under GeM and Special Condition of Contract, the opposite party No.5 sailed with the opposite party Nos.2 to 4 by stating that “the BIS licence may be in the name of the bidder or in the name of the manufacturer. Again it is only applicable after execution of the agreement/contract with L-1 bidder and thus same is not pre-qualification/eligibility criteria for selection of a bidder (in technical bid and financial bid)”.

4.3. It is submitted that comparing the price bid quoted by the petitioner and the opposite party No.5, the latter is the L-1 and, thereby the Indian Oil Corporation Limited has not shown any favouritism inasmuch as it has correctly evaluated in terms of Notice Inviting GeM Tender vide Clause 10— “Pre-qualification Criteria (PQC)”, i.e., “the intending tenderers shall have to furnish proof of their pre-qualification and experience along with the Part-I (Techno-commercial bid)”. This Notice Inviting GeM Tender does not comprehend the fulfillment of General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022, whereby it is one of the requirements to have BIS Licence.

5. By way of filing rejoinder affidavit, the petitioner strongly opposing assertions and averments of the opposite parties laid much stress on item (ix) of sub-clause A of Clause 3— “Role, Responsibility and Obligations of Seller/Buyer” and item (x) of sub-clause (xiii) of Clause 4— “Enabling provisions of Rule 149 of General Financial Rules, 2017” and urged that the essential condition for supply of quality, safe and pure drinking water the supplier/service provider is required to have BIS Licence, in absence of which the opposite party No.5 was to be declared disqualified.

5.1. The petitioner made reference to the effect that after the opposite party No.5 was declared L-1 bidder, it submitted “application on 27.04.2023 before the BIS Authority for the licence. As per the procedure, time limit is 45 days from the date of application either the licence is to be granted or the application is to be rejected. However, in the present case, on thorough inquiry made by the petitioner, it is revealed that the application appended (being No.52000887) to the counter of opposite party No.5 is forged one and no such application has ever been submitted before the BIS Authority during the period from 27.04.2023 to till the date of inquiry made by the petitioner, i.e., on 27.09.2023”.

HEARING OF WRIT PETITION BEFORE THIS COURT:

6. This matter was on board on 04.01.2024 for "admission". It is conceded by counsel for the respective parties that the pleadings have been completed and as this writ petition relates to tender matter, the counsel for both sides insisted for disposal at the stage of admission itself. Therefore, this Court heard Sri Swapna Kumar Ojha, learned Advocate for the petitioner; Sri Debaraj Mohanty, learned Advocate for the opposite party Nos.2 to 4; and Sri Saroj Kumar Das, learned Advocate for the opposite party No.5.

SUBMISSIONS AND ARGUMENTS OF RESPECTIVE PARTIES:

7. Sri Swapna Kumar Ojha, learned Advocate for the petitioner submitted that conjoint reading of terms of Notice Inviting GeM Tender and the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 makes it abundantly clear that in order to participate in the tender process a bidder has to have BIS Licence and it has been specified in item (x) of sub-clause (xiii) of Clause 4—"Enabling provisions of Rule 149 of General Financial Rules, 2017" that "in case the bid requires availability of BIS licence, bidder has to upload currently valid and operative BIS Licence copy (Valid on the date of bid opening) to be considered eligible". It is urged by Sri Swapna Kumar Ojha, learned Advocate that since the opposite party No.5 has placed on record in its counter affidavit that it applied for grant of licence to use the standard mark to the BIS Authority on 27.04.2023, it is manifest that on the last date of submission of tender it had no valid licence; whereas the petitioner, small scale industrial unit, being seller/supplier of packaged drinking water to Indian Oil Corporation Limited pursuant to Work Order No.26312355 (Tender No.PDO1R19120), dated 12.02.2020, is in possession of not only BIS Licence in conformity with the Bureau of Indian Standards Act, 2016, but also Licence issued under the Food Safety and Standards Act, 2006 and UDYAM registration certificate.

7.1. Advancing argument further Sri Swapna Kumar Ojha, learned Advocate referred to the Bureau of Indian Standards Act, 2016 and Manual for Packaged Drinking Water (First Issue), circulated with Doc. No.SM/IS14543/01, January, 2005, and strenuously urged that certification for packaged drinking water has been made mandatory by virtue of the Prevention of Food Adulteration (Amendment) Rules, 2000 came into force with effect from 29.03.2001, vide Notification GSR No.760 (E) published in Gazette Notification No.510, dated 29.09.2000. It is contended that as per the Quality Control Order issued under the Prevention of Food Adulteration Rules, 1955, Bureau of Indian Standards has formulated the following Indian Standards which provide quality norms for packaged water:

- (i) IS 14543:2004 Packaged drinking water (other than natural mineral water) (First Revision);
- (ii) IS 13428: 2005 Packaged natural mineral water (Second Revision).

Such being the basic eligibility requirements in tune of statutory provisions, the Indian Oil Corporation Limited, the author of the tender, ought not to have and

could not have omitted or ignored to adhere to such mandatory requirement.

7.2. Stemming on the document enclosed to the counter affidavit of the opposite party No.5 it is asserted by the counsel for the petitioner that the Notice Inviting GeM Tender having required participant to have BIS/ISI certification, the opposite party No.5 could not be declared to be L-1 bidder; rather it should have been nipped in the bud as admittedly it did not have such certification on the last date of submission of bid documents. No document showing BIS Licence is made available to this Court even as the opposite party No.5 filed its counter affidavit.

8. Per contra, Sri Debaraj Mohanty, learned counsel appearing for the opposite party Nos.2 to 4 submitted that Clause 10 of the Notice Inviting GeM Tender (Tender No.PDO1C22234 under the Heading Pre-Qualification Criteria fixed that "the intending tenderers shall have to furnish proof of their pre-qualification and experience along with the Part-I (Techno-commercial bid)". Nevertheless there is no requirement for having BIS/ISI certification at the time of participation in the bid. As such a condition is requirement at the time of supply in terms of "Special Conditions of Contract— Part-II), there is no wrong committed by the opposite party Nos.2 to 4 in awarding the contract to the opposite party No.5 who had quoted the lowest price among the participants.

8.1. Supporting the stand taken by Sri Debaraj Mohanty, Advocate for the opposite party Nos.2 to 4, Sri Saroj Kumar Das, counsel for the opposite party No.5 made valiant endeavour to justify the award of work to it. Reiterating the stance taken in the counter affidavit, Sri Saroj Kumar Das, learned Advocate for the opposite party No.5 has submitted that the petitioner has misconceived and misdirected himself by contending that in addition to Pre-Qualification Criteria as specified in Clause 10 of the Notice Inviting GeM Tender, the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 are also required to be complied with.

8.2. Amplifying respective submission, Sri Saroj Kumar Das, learned Advocate along with Sri Debaraj Mohanty, learned Advocate for the opposite parties urged that terms and conditions stipulated in the General Terms and Conditions mentioned supra would come into play while making supply and such certification of BIS/ISI does not necessarily of the supplier; rather it can be of the manufacturer. Since the opposite party No.5 has stated to have entered into agreement with M/s. Nilakantheswar Food Products, a manufacturer of the packaged drinking water having BIS Licence, the petitioner cannot impute infirmity in the action of acceptance of bid of Shree Sai Traders by the Indian Oil Corporation Limited. Therefore, both the counsel for the opposite parties urged for dismissal of the writ petition.

DISCUSSIONS AND ANALYSIS:

9. Pertinent factual matrix obtained on the record demonstrates that the petitioner, small scale industrial unit, has inter alia BIS Licence, whereas the opposite party No.5, declared as L-1, has no such licence. Nonetheless, it has

claimed to have applied for BIS Licence on 27.04.2023 after issue of Work Order vide Ref. PDR/EMS/Drinking Water/2023, dated 24.02.2023 by the Indian Oil Corporation Limited.

9.1. Aforesaid Work Order placed at Annexure-C to the counter affidavit filed on behalf of the opposite party No.5 stands thus:

"Ref. PDR/EMS/Drinking Water/2023 Date 24.02 2023 Sub.: Site hand over for 'Supply of packaged drinking water (20 ltrs bottles) at Various locations at Paradip Refinery, Paradip, Odisha'.

Dear Sir,

Please refer to Work Order No 28603392 dated 20.02.2023 (GeM Contract No. GEMC-511687775165967 dated 20.02.2023) awarded to you for the job of 'Supply of packaged drinking water (20 ltrs bottles) at various locations at Paradip Refinery, Paradip, Odisha'.

You are hereby requested to supply packaged drinking water (20 ltrs bottles) as per list of locations mentioned in Special Conditions of Contract and in other locations as directed by undersigned, w.e.f. 01.03.2023.

Thanking You.

For & behalf of

Indian Oil Corporation Ltd.

Paradip Refinery

Ajay Luhach

Senior Manager (EMS) &

Engineer In-charge"

9.2. Rule 2.3.14.(17) of the Food Safety and Standards (Prohibition And Restrictions on Sales) Regulations, 2011 prohibits as follows:

"No person shall manufacture, sell or exhibit for sale packaged drinking water except under the Bureau of Indian Standards Certification Mark."

9.3. Admitted fact on record reveals that while the petitioner is a manufacturer of packaged drinking water having BIS certification, the opposite party No.5 has no BIS certification/licence. But the latter is only stated to have applied for licence on 27.04.2023. On the date of hearing of the writ petition except stating that it had applied for grant of BIS certificate/licence on 27.04.2023, nothing is placed on record to suggest that it has been granted with required licence.

9.4. Product Code: IS 14543:2016 titled "Packaged Drinking Water (other than Packaged Natural Mineral Water)" as reflected in Product Manual for Packaged Drinking Water published in May, 2020, clearly stipulates as follows:

"This Product Manual shall be used as reference material by all Regional/Branch Offices & licensees to ensure coherence of practice and transparency in operation of certification under Scheme-I of Bureau of Indian Standards (Conformity Assessment) Regulations, 2018 for various products. The document may also be used by prospective applicants desirous of obtaining BIS certification licence/certificate."

9.5. It is not disputed, rather admitted and apparent from the face of the Notice Inviting GeM Tender that the packaged drinking water in question is required to be procured and supplied in terms of the GeM (Government e-Marketplace). Therefore, the contention of the opposite parties that the opposite party Nos.2 to 4 have confined to the criteria stipulated in Clause 10 of said Notice is only essential condition; but not the General Terms and Conditions on GeM 4.0 (Version 1.5) is liable to be repelled.

9.6. The maxim *ex praecedentibus et consequentibus optima fit interpretation* fits to the present context. The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. The sense and meaning of the parties in any particular part of instrument may be collected '*ex antecedentibus et consequentibus*'; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. The document, i.e., Notice Inviting GeM Tender must be read as a whole in conjunction with the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the document.

9.7. It is trite that in construing a contract, the Court must look at the words used in the context unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the Court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. Reference may be had to *Provash Chandra Dalui Vrs. Biswanath Banerjee*, AIR 1989 SC 1834.

9.8. In *Delhi Development Authority Vrs. Durga Chand Kaushish*, AIR 1973 SC 2609 it has been clearly laid down that the meaning of the word '*document*' or of a particular part of it is to be sought for in the document itself. That is, undoubtedly the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect with certain exceptions contained in Sections 95 to 98 of the Act. The document is to be read as a whole and not piecemeal.

9.9. So understood, it is but natural corollary to have regard to not only Clause 10 of Notice Inviting GeM Tender, but also the General Terms and Conditions on GeM, dated 09.10.2022. Besides compliance of Pre-Qualification Criteria mentioned in Clause 10 of Notice Inviting GeM Tender, the General Terms and Conditions on GeM requires the following conditions to be fulfilled:

"3. Role, Responsibility and Obligations of seller/buyer:

(ix) Eligibility of Sellers in terms of Turn Over / Past Performance/Profitability etc. and also their eligibility for availing various benefits/advantages in terms of various Govt. Policies/Guidelines/Acts/ Laws etc. shall be determined solely on the basis of data fetched/validated or verified through external agency/owner of that set of database such as Income Tax/PAN Data Base, MCA 21, Udyam Registration/Udyog Aadhaar (as validated by Government from time to time), GSTN, Certifying Agencies such as BIS, BEE etc. In case of any discrepancy in data available in these databases, Seller has to get the same updated in the corresponding validating database before updating the same on GeM. Till such time only the existing validated information shall be used to decide seller's eligibility on GeM. Any default in sellers updating their data on partner sites/ validating databases and any fall out of the same impacting adversely any transaction on GeM, shall entirely and exclusively be Seller's responsibility. GeM shall not be responsible for any consequential impact on any GeM transaction due to data discrepancy and/or suspension of seller account due to data discrepancy. Seller will be solely responsible for the same.

4. Enabling provisions of Rule 149 of General Financial Rules, 2017:

Enabling provisions of Rule 149 of General Financial Rules, 2017 as amended vide Ministry of Finance OM dated 02.04.2019 regarding procurement through GeM and necessary guidelines and terms and conditions thereon:

GeM portal may be utilized by the Government buyers for online purchases as under:

(xiii) e-Bidding and Reverse Auction (RA) on GeM:

(x) Determination of eligibility in case of products requiring BIS License:

In case the bid requires availability of BIS License, bidder has to upload currently valid and operative BIS License copy (Valid on the date of bid opening) to be considered eligible. Submitted BIS License may be in the name of Bidder/OEM or in the name of the Manufacturer to whom the OEM has outsourced manufacturing of his brand of product. The name of the Brand of the offered product should be mentioned in the BIS License. BIS certificate issued under

Compulsory registration Scheme for electronic products to OEM/Brand owners for the products marketed under their brand name wherein their products are manufactured at third-party manufacturing unit is valid and is allowed for participation in the bids floated on GeM. The Manufacturer's Authorization in all such cases wherein the manufacturing is done by a third party shall be issued by the Brand owner/OEM and not by the third-party manufacturing unit mentioned in the BIS certificate."

9.10. Aforesaid clauses manifest that BIS certificate issued under Compulsory Registration Scheme for electronic products to OEM/Brand owners for the products marketed under their brand name wherein their products are manufactured at third-party manufacturing unit is valid and is allowed for participation in the bids floated on GeM. It is also a stipulation that the Manufacturer's Authorization in all such cases wherein the manufacturing is done by a third party shall be issued by the Brand owner/Original Equipment Manufacturer and not by the third-party manufacturing unit mentioned in the BIS certificate. But in the case at hand, the product required to be supplied is "packaged drinking water". As stated by the opposite party No.5 in its counter affidavit that it has entered into agreement with M/s. Nilakantheswar Food Products (third party) which has BIS certification with regard to "packaged drinking water".

9.11. This Court is inclined to accede to the contention of the petitioner that these conditions are to be strictly adhered to while considering the bids of the participants. Since admittedly there is absence of BIS certification with regard to packaged drinking water qua the opposite party No.5, mere entering into agreement with M/s. Nilakantheswar Food Products for supply of such product would not clothe the sanctity of terms and conditions attached to the Notice Inviting GeM Tender. As the opposite party Nos.2 to 4 have floated tender by adopting modalities of GeM portal and the petitioner as well as the opposite party No.5 participated in the tender process knowing fully well that it is titled "Notice Inviting GeM Tender". Now, the opposite parties cannot wriggle out by denying adherence to the conditions attached to purchases made from GeM portal.

10. Elaborating further as argued by Sri Swapna Kumar Ojha, learned counsel for the petitioner that in case of GeM tenders with respect to sale of packaged drinking water, in terms of Clause 3(x) of the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 specifically prescribed determination of "eligibility of sellers in terms of turnover/past performance/ profitability" and also "their eligibility for availing various benefits/advantages in terms of various Government policies/Guidelines/Acts/Laws, etc." "solely on the basis of data fetched/validated or verified through external agency/owner of the set of database such as income tax/PAN data base ... Udyam Registration/Udyog Aadhar (as validated by Government from time to time), GSTN, Certifying Agencies such as BIS, BEE, etc."

10.1. It is apparent from the above that aforesaid condition employed the word

"solely" which has got much significance. It may be noteworthy to have reference to *New Noble Educational Society Vrs. Chief Commissioner of Income Tax*, (2022) 18 SCR 1082, wherein the term "solely" has illuminatingly been expounded with the following words:

"50. The basic provision granting exemption, thus enjoins that the institution should exist 'solely for educational purposes and not for purposes of profit'. This requirement is categorical. While construing this essential requirement, the proviso, which carves out the exception, so to say, to a limited extent, cannot be looked into. The expression 'solely' has been interpreted, as noticed previously, by other judgments as the 'dominant/predominant/primary/ main' object. The plain and grammatical meaning of the term 'sole' or 'solely' however, is 'only' or 'exclusively'. P. Ramanath Aiyar's *Advanced Law Lexicon* explains the term as, "'Solely' means exclusively and not primarily". The *Cambridge Dictionary* defines 'solely' to be, "Only and not involving anyone or anything else". The synonyms for 'solely' are "alone, independently, single-handed, single-handedly, singly, unaided, unassisted" and its antonyms are "inclusively, collectively, cooperatively, conjointly etc."

51. It is, therefore, clear that term 'solely' is not the same as 'predominant/mainly'. The term 'solely' means to the exclusion of all others. None of the previous decisions— especially *American Hotel and Lodging Association Vrs. Central Board of Direct Taxes*, (2008) 10 SCC 509 = (2008) 8 SCR 117; *Queen's Education Society Vrs. Commissioner of Income Tax*, (2015) 8 SCC 47 = (2015) 3 SCR 838— explored the true meaning of the expression 'solely'. Instead, what is clear from the previous discussion is that the applicable test enunciated in *Additional Commissioner of Income Tax Vrs. Surat Art Silk Cloth Manufacturers' Association*, (1980) 2 SCC 31, i.e., the 'predominant object' test was applied unquestioningly in cases relating to charitable institutions claiming to impart education. The obvious error in the opinion of this court which led the previous decisions in *American Hotel* (supra) and in *Queens Education Society* (supra) was that *Surat Art* (supra) was decided in the context of a society that did not claim to impart education. It claimed charitable status as an institution set up to advance objects of general public utility. The *Surat Art* (supra) decision picked the first among the several objects (some of them being clearly trading or commercial objects) as the 'predominant' object which had to be considered while judging the association's claim for exemption. The approach and reasoning applicable to charitable organizations set up for advancement of objects of general public utility are entirely different from charities set up or established for the object of imparting education. In the case of the latter, the basis of exemption is Section 10(23C)(iiiab), (iiiad) and (vi). In all these provisions, the positive condition 'solely for educational purposes' and the negative injunction 'and not for purposes of profit' loom large as compulsive mandates, necessary for exemption. The expression 'solely' is therefore important. Thus, in the opinion of this court, a trust, university or other institution imparting education, as the case may be, should necessarily have all its objects aimed at imparting or

facilitating education. Having regard to the plain and unambiguous terms of the statute and the substantive provisions which deal with exemption, there cannot be any other interpretation.”

10.2. Attention of this Court is brought to Clause 4 of the General Terms and Conditions on GeM 4.0 (Version 1.5) that the credentials of the sellers/service providers holding BIS Licence for the Primary Product Category are validated through BIS database and uploaded supporting documents. It is also submitted at the Bar that said Terms and Conditions also provided for bidder to upload “currently valid and operative BIS Licence copy (Valid on the date of bid opening)”, which is an essential factor to be considered for determination of eligibility. At this juncture, Sri Swapna Kumar Ojha, learned Advocate for the petitioner has taken this Court to definitions of “buyer” and “seller/service provider” as reflected at Clause 2: General Terms and Definitions contained in the General Terms and Conditions on GeM 4.0 (Version 1.5), which are extracted herein below for ready reference:

“(f) ‘BUYER’ is the Contract placing Authority, which includes Central/State Government Ministries/ Departments including its attached/subordinate offices, Central/State Public Sector Units (PSUs) and Autonomous Bodies acting through its authorized officer(s) for and on behalf of President of India/Governor of the State/PSU/Autonomous Bodies, as the case may be, for purchase of Goods/ Services offered by Sellers on GeM.

(g) ‘SELLER/SERVICE PROVIDER’ on GeM shall mean any legal entity such as firm(s) of Proprietorship/ Partnership Firm/Limited Liability Partnership/ Private Limited/Limited company/ Society registered under Society’s Act/Statutory Bodies etc., registered on GeM to sell its Good(s)/Service(s) to the Buyers registered on GeM.

The ‘Seller on GeM’ will be either OEM (Original Equipment Manufacturer*) or Seller having authorization to sell products manufactured by the OEM in open market or Licensed manufacturer under Drugs & Cosmetics Act, 1940.

* OEM is the owner of the Brand / Trademark of the product being offered or in case of un-registered brand's products/products with own brand, the actual manufacturer of the final product. To be recognized as an OEM on GeM, seller has to get Vendor Assessment Report from designated agency (unless exempted as per GeM VA policy) as per due process of vendor assessment notified on GeM portal (which would include production of documentary evidences and demonstration of manufacturing facilities and/or capabilities as required).

In case of Services related to Goods, Service Provider on GeM will be either OEM or Service Provider having authorization to Service products manufactured by that OEM in open market. In respect of other Services, Service Provider on GeM will be any legal entity offering its services.

By registering on GeM portal, Seller/Service Provider hereby agrees to be bound

by these General Terms and Conditions for Sale/Purchase of Goods and or Services (GTC);

Product/Service Specific Special Terms and Conditions (STC) and Service Level Agreements (SLAs) for various Services; and Additional (Bid Specific) Terms and Conditions (ATC) as applicable. For the purpose of this document and transactions on GeM, Seller as well as Service Provider will be referred to as 'Seller'."

10.3. Returning to the case at hand, on affirmation by way of counter affidavit the opposite party No.5 vide paragraph 10 thereof stated that "contract manufacturing agreement was executed between M/s. Shree Sai Traders and Nilakantheswar Food Products having BIS No.5200113976 on 02.02.2023 for procurement of 20 litres bottles and which has been supplied to IOCL". Scrutiny of documents enclosed to counter affidavit of the opposite party No.5 reveals that BIS Licence granted in favour of M/s. Nilakantheswar Food Products was from 22.03.2022 to 21.03.2023 and nothing is placed on record to suggest that such certificate of licence has been extended at any point of time in favour of the opposite party No.5 even though said counter affidavit is stated to have been sworn to and filed before this Court on 21.09.2023. Furthermore, the document dated 27.04.2023 at Annexure-E to the counter affidavit of the opposite party No.5 merely shows application for licence to use the standard mark made to the BIS Authority. Such application dated 27.04.2023 does not clinch the necessity of satisfying possession of valid BIS Licence even on the date of filing of counter affidavit on 21.09.2023 before this Court.

10.4. As the subject-tender is floated by the Indian Oil Corporation Limited using GeM portal, the bidder, falling within the scope of definition of the term "seller/service provider" as per clause 2(g) of the General Terms and Conditions on GeM, is bound by the expression contained therein, which is to the effect,

"By registering on GeM portal, Seller/Service Provider hereby agrees to be bound by these General Terms and Conditions for Sale/Purchase of Goods and or Services (GTC)".

Therefore, the contention of the opposite parties through respective counsel Sri Debaraj Mohanty and Sri Saroj Kumar Das that the successful bidder-opposite party No.5 is not bound by the General Terms and Conditions on GeM, dated 09.10.2022 at the time of submission of bids deserves to be repelled.

10.5. This Court is, therefore, of the considered view that inasmuch as GeM portal has been utilized for the purpose of tender by the Indian Oil Corporation Limited, it is incumbent upon it to take into account not only the conditions laid down in Notice Inviting GeM Tender being Tender No.PDO1C22234 with Bid No.GEM/2022/ B/2762179), but also the General Terms and Conditions on GeM 4.0 (Version 1.5).

10.6. It may not be out of place to remind here that the intention of the author

who floated the tender is presumed to be aware of various facts and circumstances and relevant and related requirement of law. To put it this way, it is Indian Oil Corporation Limited which floated the tender via GeM. This itself is presumptive of the fact that the parties are well aware of the General Terms and Conditions on GeM, dated 09.10.2022, which requires seller/service provider to have BIS/ISI Licence with Food Safety Certification under the Food Safety and Standards (Prohibition And Restrictions on Sales) Regulations, 2011. Therefore, the intention of the author is to be culled out on harmonious construction of these documents. Such an understanding makes the reading of documents like Notice Inviting GeM Tender being Tender No.PDO1C22234 with Bid No.GEM/2022/ B/2762179 and the General Terms and Conditions on GeM 4.0 consistent whole and eschews inconsistency between these two documents.

10.7. Looking at the matter on a different angle, it would transpire that the L-1 bidder, which participated in the tender process, is the opposite party No.5, but not M/s. Nilakantheswar Food Products (third party, not related to tender process). The opposite party No.5 may have privity of contract with M/s. Nilakantheswar Food Products, but the latter has no privity of contract with the Indian Oil Corporation Limited. It is, hence, the opposite party No.5 only who is to abide by the terms of Contract with Indian Oil Corporation Limited. Inasmuch as learned counsel for the opposite party No.5 has not placed before the Court any material to indicate that the opposite party No.5 has in possession BIS certificate/ licence, the consideration of its bid by the opposite party Nos.2 to 4 is arbitrary, capricious and whimsical.

11. With respect to exercising power of judicial review this Court wishes to notice view expressed by the Hon'ble Supreme Court of India.

11.1. This Court bears in mind the scope of judicial review as streamlined by the Hon'ble Supreme Court of India in Indian Oil Corporation Ltd. Vrs. Ajit Kumar Singh, (2023) 5 SCR 447, which is reproduced herein below:

"The views expressed by this Court on the scope of judicial review in Deputy General Manager (Appellate Authority) Vrs. Ajai Kumar Srivastava, (2021) 2 SCC 612, are extracted below:

'24. It is thus settled that the power of judicial review, of the constitutional courts, is evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary Authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary Authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be

issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of Authority as a matter of fact.

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28. The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at those findings and so long as there is some evidence to support the conclusion arrived at by the departmental Authority, the same has to be sustained .’

Similar view was expressed in the later judgment of this Court in Ex-Const/Dvr Mukesh Kumar Raigar Vrs. Union of India, (2023) SCC Online SC 27.”

11.2. Further in yet another case, the said Hon’ble Court in the case of Tata Motors Limited Vrs. The Brihan Mumbai Electric Supply & Transport Undertaking (BEST), 2023 LiveLaw (SC) 467 laid down as follows:

“This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias.

However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges’ robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give ‘fair play in the joints’ to the Government and Public Sector Undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: Silppi Constructions Contractors Vrs. Union of India, (2020) 16 SCC 489).

Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates Vrs. Union of India and Others*, reported in (2005) 1 SCC 679.

The law relating to award of contract by the State and Public Sector Corporations was reviewed in *Air India Ltd. Vrs. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

As observed by this Court in *Jagdish Mandal Vrs. State of Orissa and Others*, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

11.3. In the case of *Michigan Rubber (India) Limited Vrs. State of Karnataka*, (2012) 8 SCC 216, it has been propounded as follows:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act

validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering Authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. 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’? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.”

11.4. See also National High Speed Rail Corporation Limited Vrs. Montecarlo Limited, (2022) 12 SCR 810 for similar view being expressed by the Hon’ble Supreme Court of India.

11.5. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. Vrs. Ganesh Engg. Works, (1991) 3 SCC 273 it has been held as under:

‘6. *** The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others

which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the Authority issuing the tender may be required to enforce them rigidly. In the 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.'

***"

11.6. Very much relevant here to have reference to Vidarbha Irrigation Development Corporation Vrs. Anoj Kumar Agarwala, (2019) 2 SCR 493, where the Hon'ble Supreme Court of India considered the exercise of power of judicial review in tender matter and observed as follows:

"14. However, learned counsel appearing on behalf of the appellant strongly relied upon Afcons Infrastructure Ltd. Vrs. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty Vrs. International Airport Authority of India, (1979) 3 SCC 489 was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance.

In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

15. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

11.7. Taking cue from the aforesaid perspective of judicial review when the facts of the present case with documents available on record are analysed it transpires that the Indian Oil Corporation Limited while considering the bids apparently

ignored statutory compliance required to be made by the bidders, especially the opposite party No.5 which is declared L-1. In the first place the tender is about supply of packaged drinking water. "Product manual for Packaged Drinking Water (other than Packaged Natural Mineral Water) according to IS 14543:2016" vide PM/14543/2, May 2020, has been used as reference material by all Regional/Branch Offices and licensees to ensure coherence of practice and transparency in operation of certification under Scheme-I of the Bureau of Indian Standards (Conformity Assessment) Regulations, 2018 for various products. The document may also be used by prospective applicants desirous of obtaining BIS certification licence/certificate. It is stated that the First Edition of Manual for Packaged Water, which provided internal guidelines to BIS Certification Officers for certification of Packaged Drinking Water (Other Than Packaged Natural Mineral Water) (PDW) and Packaged Natural Mineral Water (PNMW) was issued in 2005 and certain changes are being made in the standard and on the basis of feedback obtained during certification, the Second and Third Editions of the Manual were issued in 2007 and 2013, respectively.

11.8. Whereas the term "seller/service provider" has been defined in Clause 2 of the General Terms and Conditions on GeM 4.0 (Version 1.5), and interdiction has been prescribed under Rule 2.3.14.(17) of the Food Safety and Standards (Prohibition And Restrictions on Sales) Regulations, 2011 with respect to sale or supply of such goods/products, the same could not be ignored and stated by the opposite parties that they are inessential conditions. Not conceding such averment, even if the statement made in the counter affidavit of the opposite party Nos.2 to 4 to the effect that such conditions are "only applicable after acceptance of the contract" and "BIS/ISI standard is required when the L-1 bidder commences supply of the packaged water to the answering opposite parties" is considered, there is nothing on record to show that after issue of Work Order No.28603392, dated 20.02.2023, as referred to in Letter dated 24.02.2023 vide Annexure-C to the counter affidavit of the opposite party No.5, the said L-1 bidder is in possession of BIS/ISI Licence. When there is statutory prohibition under the Food Safety and Standards (Prohibition And Restrictions on Sales) Regulations, 2011 and non-compliance of BIS/ISI standard may attract coercive measures under the Bureau of Indian Standards Act, 2016, merely because the opposite party No.5 has entered into agreement with M/s. Nilakantheswar Food Products, and the latter has BIS licence valid up to 21.03.2023, cannot be said to be compliant of tender conditions. This apart, simply making statement that the opposite party No.5 has made application for grant of BIS Licence would not suffice. This Court takes cognizance of the fact that even though the opposite party No.5 has got work order to supply packaged drinking water with effect from 01.03.2023 vide Annexure-C referred to above, neither M/s. Nilakantheswar Food Products is shown to have valid BIS Licence after 01.04.2023 nor is it the case of the opposite party No.5 that it has possessed BIS Licence even though it filed counter affidavit on 21.09.2023.

11.9. At this juncture, it is relevant to refer to Objective of Indian Standards Bill,

2015, as placed before this Court by Sri Swapna Kumar Ojha, learned counsel for the petitioner, which inter alia reads as follows:

"The main objectives of the legislation are:

To enable the Government to bring under the mandatory certification regime for such articles, processes or service which it considers necessary from the point of view of health, safety, environment, prevention of deceptive practices, consumer security, etc. This will help consumers receive ISI certified products and will also help in prevention of import of sub-standard products."

Having received assent of President on 21.03.2016, the Bureau of Indian Standards Act, 2016 being promulgated, it is, thus, understood that the primary purpose of product certification is to ensure that a product is safe, reliable and compliant with relevant quality and safety standards. It provides consumers with confidence that the product they are purchasing meets established criteria and has been independently tested and evaluated. For such reason it is fallacious on the part of the opposite parties-Indian Oil Corporation Limited to say that the statutory requirement of certification would be applicable post-bid acceptance.

Nevertheless, the statutory requirements being ignored from the consideration of eligibility criteria, the decision making process of the Tendering Authority of the Indian Oil Corporation Limited is flawed, which attracts indulgence by exercise of power under Article 226 of the Constitution of India.

11.10. In exercise of the delineated scope of judicial review as articulated by the Hon'ble Supreme Court, this Court is inclined to entertain the writ petition by examining that the reason(s) assigned by the Senior Manager (EMS) & Engineer In-charge of the Indian Oil Corporation Limited vide Annexure-11 are perverse and arbitrary being sans rationale.

CONCLUSION & DECISION:

12. In the light of discussions made in the foregoing paragraphs, as it is found that the reasons ascribed in the Letter dated 17.03.2023 issued by the Senior Manager (EMS) & Engineer In-charge for and on behalf of Indian Oil Corporation Limited (Paradip Refinery) vide Annexure-11 in connection with consideration of representation of the petitioner pursuant to direction of this Court vide Order dated 02.03.2023 passed in W.P.(C) No. 6316 of 2023 are unreasonable, untenable in the eye of law and bereft of rationality. On the anvil of the principles spelt out by the Hon'ble Supreme Court, as enunciated in the above cited cases, it appears that they are inconsistent with the conditions stipulated in Notice Inviting GeM Tender being Tender No.PDO1C22234 with Bid No.GEM/2022/B/2762179) read with the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022.

12.1. With respect to the first reason ascribed to discard the point of objection

raised by the petitioner that the opposite party No.5 (declared as L-1) has no BIS Certification/Licence from the competent Authority that "as per pre-qualification criteria, the referred point was not a deciding factor for awarding of tender" and "it was a part of Special Conditions of Contract" does not withstand judicial scrutiny inasmuch as the author-Indian Oil Corporation Limited was required to first scrutiny the eligibility of intending supplier/service provider in terms of the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 for there has been no dispute or denial that it has floated tender in GeM portal.

12.2. Qua the reason that "the tender was floated in GeM portal as custom bid and L-1 bidder has complied with requirement as per tender terms and conditions" as found mentioned regarding the second objection of the petitioner, it can be said that the L-1 bidder falling within the connotation of the term "seller/service provider" given at Clause 2(g) of the General Terms and Conditions on GeM 4.0 (Version 1.5), dated 09.10.2022 was required to satisfy the terms and conditions pertaining to eligibility stipulated therein.

12.3. As it seems from the Letter dated 17.03.2023 (Annexure-11), no discussion has been made nor has detailed reason been assigned while considering representation of the petitioner; rather attempt has been made to cover up lacunae by supplementing reason by way of the counter affidavit.

12.4. In Sical Logistics Ltd. Vrs. Mahanadi Coalfields Ltd., 2017 (II) ILR-CUT 1035, this Court has held as follows:

"9. It is well settled principle of law laid down by the Apex Court time and again that the authority should pass reasoned order. Reasons being a necessary concomitant to passing an order, the authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference.

11. It is well-settled principle of law laid down by the Apex Court in Mohinder Singh Gill and another Vrs. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851 that:

'When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.'

In Commissioner of Police, Bombay Vrs. Gordhandas Bhanji, AIR 1952 SC 16, the Apex Court held as follows:

'Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to

do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.’

Similar view has also been taken in *Bhikhubhai Vithalbhai Patel and others Vrs. State of Gujarat and another*, (2008) 4 SCC 144 as well as in *M/s. Shree Ganesh Construction Vrs. State of Orissa*, 2016 (II) OLR 237 = 2016 (II) ILR-CUT 237.

In the case of *State of Punjab Vrs. Bandeep Singh*, (2016) 1 SCC 724 the Apex Court held that the validity of administrative orders/decisions/ executive instructions/orders/circulars must be judged by reasons stated in decision or order itself. Subsequent explanations or reasons cannot be accepted to sustain decision or order.”

12.5. Gleaned through the provisions contained in Section 16 and Section 17 of the Bureau of Indian Standards Act, 2016, the restriction on manufacture and sale of goods requiring to maintain defined standard can well be couched in the language. For ready reference provisions of Section 16 and Section 17 are reproduced hereunder:

“16. Central Government to direct compulsory use of Standard Mark.—

(1) If the Central Government is of the opinion that it is necessary or expedient so to do in the public interest or for the protection of human, animal or plant health, safety of the environment, or prevention of unfair trade practices, or national security, it may, after consulting the Bureau, by an order published in the Official Gazette, notify—

(a) goods or article of any scheduled industry, process, system or service; or

(b) essential requirements to which such goods, article, process, system or service, which shall conform to a standard and direct the use of the Standard Mark under a licence or certificate of conformity as compulsory on such goods, article, process, system or service.

Explanation.—

For the purpose of this sub-section,—

(i) the expression “scheduled industry” shall have the meaning assigned to it in the Industries (Development and Regulation) Act, 1951 (65 of 1951);

(ii) it is hereby clarified that essential requirements are requirements, expressed in terms of the parameters to be achieved or requirements of standard in technical terms that effectively ensure that any goods, article, process, system or service meet the objective of health, safety and environment.

(2) The Central Government may, by an order authorise Bureau or any other agency having necessary accreditation or recognition and valid approval to certify

and enforce conformity to the relevant standard or prescribed essential requirements under sub-section (1).

17. Prohibition to manufacture, sell, etc., certain goods without Standard Mark.—

(1) No person shall manufacture, import, distribute, sell, hire, lease, store or exhibit for sale any such goods, article, process, system or service under sub-section (1) of Section 16,—

(a) without a Standard Mark, except under a valid licence; or

(b) notwithstanding that he has been granted a license, apply a Standard Mark, unless such goods, article, process, system or service conforms to the relevant standard or prescribed essential requirements.

(2) No person shall make a public claim, through advertisements, sales promotion leaflets, price lists or the like, that his goods, article, process, system or service conforms to an Indian standard or make such a declaration on the goods or article, without having a valid certificate of conformity or licence from the Bureau or any other Authority approved by the Central Government under sub-section (2) of Section 16.

(3) No person shall use or apply or purport to use or apply in any manner, in the manufacture, distribution, sale, hire, lease or exhibit or offer for sale of any goods, article, process, system or service, or in the title of any patent or in any trade mark or design, a Standard Mark or any colourable imitation thereof, except under a valid licence from the Bureau.”

12.6. As per Rule 2.3.14.(17) of the Food Safety and Standards (Prohibition And Restrictions on Sales) Regulations, 2011, no person is allowed to manufacture, sell or exhibit for sale packaged drinking water except under the Bureau of Indian Standards Certification Mark.

12.7. Fulfilment of statutory requirement is sacrosanct, which goes without saying that it is essential pre-requisite condition. Such requirement constricted by the statute is necessary concomitant to the eligibility condition(s) laid in the Notice Inviting GeM Tender by the Indian Oil Corporation Limited.

12.8. Both the reasons assigned by the Senior Manager (EMS) & Engineer In-charge of the Indian Oil Corporation Limited vide Letter dated 17.03.2023 (Annexure-11) cannot withstand judicial scrutiny, as they are bereft of rationality and smacks arbitrariness. In order to conceive the decision as plausible and construe the decision making process as transparent, the reason assigned must be speaking one, as reasons are the links between the materials on which certain conclusions are based and the actual conclusions.

12.9. In *Sical Logistics Ltd. Vrs. Mahanadi Coalfields Ltd.*, 2017 (II) ILR-CUT 1035, it has been succinctly laid down that:

“17. In *South Delhi Municipal Corporation Vrs. Ravinder Kumar and another*,

(2015) 15 SCC 545 the Apex Court held that the Government being guardian of public finance it has right to refuse lowest or any other tender bid or bids submitted by bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of Constitution of India.

Similarly, in State of Assam and others Vrs. Susrita Holdings Private Limited, (2014) 11 SCC 192, the Apex Court held the validity of tender process has to be considered in the light of fairness and reasonableness and of being in the public interest.

In Rajasthan Housing Board and another Vrs. G.S. Investments and another, (2007) 1 SCC 477, similar view has also been taken by the Apex Court. ***"

12.10. In Broom's Legal Maxims (1939 Edition, Page 97) there can be found a useful principle, Cessante Ratione Legis Cessat Ipsa Lex, that is to say, 'Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself'.

12.11. At this stage this Court takes note of direction contained in Order dated 02.03.2023 passed in W.P.(C) No.6316 of 2023, wherein in the presence of learned Deputy Solicitor General of India, Sri Prasanna Kumar Parhi, it was directed that the Executive Director of Indian Oil Corporation Limited would "consider the representation filed by the petitioner" and "pass appropriate order in accordance with law". However, reading of Letter dated 17.03.2023 vide Annexure-11, which is impugned in the present writ application, does not reveal consideration of the representation in proper perspective.

12.12. In Ram Chander Vrs. Union of India, AIR 1986 SC 1173, it was held that the word 'consider' occurring in the Rule must mean the Authority shall duly apply its mind and give reasons for its decision. The duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the Authority must act in accordance with natural justice and give reasons for its decision.

12.13. "Consideration" does not mean incidental or collateral examination of a matter by the Authority in the process of assessment/adjudication/determination. There must be something in the order to show that the Authority applied his mind to the particular subject-matter or the particular source of information with a view to arriving at its conclusion. See, Additional Commissioner of Income Tax Vrs. Gurjargravures Pvt. Ltd., AIR 1978 SC 40.

12.14. The word 'consider' is of great significance. Its dictionary meaning of the same is, 'to think over', 'to regard as', or 'deem to be'. Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term 'consider' postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory Authority should reflect intense application of mind with reference to the material on record. The order of the Authority should reveal such application of mind. The Authority cannot simply

adopt the language employed in the document before it and proceed to affirm the same. [Vide, Chairman, LIC of India Vrs. A. Masilamani, (2013) 6 SCC 530; Nilamani Jal Vrs. Collector, 2016 (II) OLR 190 (Ori)].

12.15. It is felt apposite to refer to Kranti Associates (P) Ltd. Vrs. Masood Ahmed Khan, (2010) 9 SCC 496 wherein the Hon'ble Supreme Court of India has summarised the legal position as follows:

"47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial Authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial Authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor, (1987) 100 Harvard Law Review 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija Vrs. Spain, (1994) 19 EHRR 553 EHRR, at 562 para 29 and Anya Vrs. University of Oxford, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, 'adequate and intelligent reasons must be given for judicial decisions'.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'."

12.16. In *Abhiram Caretaking & Expert Services Vrs. Bharat Sanchar Nigam Limited*, 2017 (II) ILR-CUT 1029 the importance of assigning reason in detail has been emphasized with the following observations:

"10. Franz Schubert said:

'Reason is nothing but analysis of belief.'

In Black's Law Dictionary, reason has been defined as a—

'faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions.'

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

10.1 In *Union of India Vrs. Mohan Lal Capoor*, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in *Uma Charan Vrs. State of Madhya Pradesh*,

AIR 1981 SC 1915, Patitapaban Pala Vrs. Orissa Forest Development Corporation Ltd., 2017 (I) OLR 5; and Banambar Parida Vrs. Orissa Forest Development Corporation Limited, 2017 (I) OLR 625.

11. In S.N. Mukherjee Vrs. Union of India, (1990) 4 SCC 594 the Apex Court held that keeping in view the expanding horizon of principles of natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which governs exercise of power by administrative authorities. Except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority is required to record reasons for its decision.

12. In Menaka Gandhi Vrs. Union of India, AIR 1978 SC 597 the Apex Court observed that the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could, with impunity, be set at naught by an obdurate determination to suppress the reasons."

12.17. Decision bereft of reason renders the decision making process arbitrary. The Hon'ble Supreme Court of India in the case of State of Punjab Vrs. Bhag Singh, (2004) 1 SCC 547, observed as follows:

"6. Even in respect of administrative orders, Lord Denning, M.R. in Breen Vrs. Amalgamated Engg. Union, (1971) 1 All ER 1148 = (1971) 2 QB 175 = (1971) 2 WLR 742 (CA) observed:

'The giving of reasons is one of the fundamentals of good administration.'

In Alexander Machinery (Dudley) Ltd. Vrs. Crabtree, 1974 ICR 120 (NIRC) it was observed:

'Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.'

Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The 'inscrutable face of a sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance."

12.18. Given the aforesaid principles regarding assignment of "reasons"

and “consideration” by the Authority to discern application of mind while taking decision and conspectus of cases relating to scope of judicial review in tender matters, this Court is not persuaded with the arguments advanced by the learned counsel Sri Debaraj Mohanty, learned Advocate for the opposite party Nos.2 to 4 and Sri Saroj Kumar Das, learned Advocate for the opposite party No.5 that the Indian Oil Corporation Limited has complied with the direction of this Court vide Order dated 02.03.2023 passed in W.P.(C) No.6316 of 2023. The terse reasons that “the referred point is not a deciding factor for awarding of tender” as it “was a part of Special Conditions of Contract” and “L-1 bidder has complied with the requirement as per tender terms and conditions” as culled out supra do not indicate application of mind of the Authority concerned.

13. Such reasons being not in consonance with the principles set forth by the Courts, there is no other option left but to hold that the Letter Ref.: PDR/EMS/ Drinking Water/2023, dated 17.03.2023 issued by the Indian Oil Corporation Limited vide Annexure-11 deserves to be set aside.

14. Under aforesaid premises, the Letter dated 17.03.2023 vide Annexure-11 is hereby set aside with further direction to the opposite party No.4/Senior Manager (EMS) & Engineer In-charge of Indian Oil Corporation Limited to reconsider the representation of the petitioner and take appropriate decision within a period of six weeks from today keeping in view the observations made supra and pass necessary order.

15. In the result, the writ petition stands disposed of with the observations and directions as aforesaid, but in the circumstances without any order as to costs.

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