(2016) 07 BOM CK 0150

In the Bombay High Court

Case No : Writ Petition No. 1745 of 2016 and Writ Petition No. 1746 of 2016

M/s. Mana Constructions APPELLANT

Vs

Agricultural Produce Market Committee, Katol RESPONDENT

Date of Decision : 07-07-2016

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2016) 5 AIRBomR 129 : (2017) 3 ALLMR 255 : (2016) 5 BCR 131

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Shri. A.A. Naik, Advocate, for the Petitioner; Shri. D.V. Chauhan, Advocate, for the Respondent No. 1; Shri. H.D. Dangre, Advocate, for the Respondent No. 2

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.—The same petitioner challenges allotment of works to same Respondent No. 2 in tender floated by Respondent No. 1 - Agricultural Produce Marketing Committee (A.P.M.C.).

2. In Writ Petition No. 1745 of 2016, Respondent No. 2 has submitted lowest offer while the petitioner is at Sr. No. 4. Rates of respondent Nos. 3 & 4 stand at Sr. Nos. 2 & 3 respectively. The tender has been invited for construction of Grain Auction Hall Nos. 3 & 4, Entrance Gate and Compound Wall in the Principal Market Yard (Orange) of A.P.M.C.

3. In Writ Petition No. 1746 of 2016, Respondent No. 2 has submitted lowest offer while the petitioner is just above it. That tender is for construction of Traders Shop No. 7 + 7A and 8 + 8A in the Principal Market Yard (Orange) of A.P.M.C.

4. In both these matters, this Court has issued notice on 10.03.2016 and though the respondents were allowed to complete other procedural formalities, issuance of work order has been stayed. This interim order continues to operate even

today. We have, at request of the parties, heard the matters finally by issuing Rule & making it returnable forthwith.

5. The principal bone of contention between the parties is whether compliance with Condition No. 9(6), (10) & (11) of NIT (notice inviting tender) is mandatory or whether substantial compliance therewith is sufficient. Clause No. 9 is about tender schedule and on next page of NIT documents to be put in first envelop or envelop No. 1 are stipulated. At Sr. No. 6 is the list of machinery available with the tenderer with ownership document (scanned from original) which will be exclusively made available on this work. Document at Sr. No.10 is Scanned from original of successfully completed minimum single work of Building costing not less than Rs. 384.00 lacs during last three financial (2012-13, 2013-14, 2014-15) years. (Such certificate to be obtained from the Officer not below the Rank of Ex. Engineer or equivalent). Petty contracted or subleted work will not be considered. (Completed work carried out in Govt./Semi Govt. Bodies will only be considered, no private work will be considered; and document No. 11 is Scanned from original of satisfactorily executed the minimum quantities of following item during last three (2012-13, 2013-14, 2014-15) years. (Such certificates are required to be obtained from the Officer not below the Rank of Ex. Engineer or equivalent). Completed work carried out in Govt./Semi Govt. Bodies will only be considered.

(i) Concrete of grade M20 - (600 Cu.m. (minimum)

(ii) TMT Bar Reinforcement - 100.00 Mt. (minimum)

(iii) Brick Masonary (230 mm wide)—400.00 cu.m. (minimum)

(iv) Structural Steel work - 100 Mt.

(v) G.I. precoate dmeta colour sheet of 0.50 mm thick - 3000.00 sq.m.

6. We have heard Shri. A.A. Naik, learned counsel, on behalf of the petitioner in both the petitions, Shri. D.V. Chauhan, learned counsel for respondent No. 1 - A.P.M.C. and Shri. H.D. Dangre, learned counsel for respondent No. 2 - successful bidder.

7. Shri. Naik, learned counsel invites attention to Condition No. 7 to show that while considering the technical bid, documents in envelop 1 are to be perused and contractors need to be shortlisted for financial bidding process. The shortlisted contractors are to be intimated accordingly by email. The petitioner never received any such email. He further states that as per NIT, single work of building in Document No. 10 should have been completed during last three financial years as stipulated therein and its value cannot be less than Rs. 384.00 lac. Respondent No. 3 does not possess this qualification. As such, its technical bid needed to be rejected and his financial bid could not have been opened. It is further submitted that as per Clause Nos. 10 and 11, completion is to be certified by an officer not below the rank of Executive Engineer or of equivalent rank. The documents submitted by the petitioner are certified by an officer who is superior

in rank to the Executive Engineer while the documents of Respondent No. 2 are certified by an Architect, who cannot be compared with the Executive Engineer and, therefore, can not be said to be holding any post or an equivalent post.

8. To substantiate his contention, he has invited our attention to various documents on record. He has relied upon some judgments to which we will make reference during the discussion at appropriate place.

9. Inviting attention to reply affidavit filed on behalf of Respondent No. 1 - A.P.M.C., he states that there effort is to point out that certificates submitted by the petitioner are also not signed by the Executive Engineer and proof of ownership of machinery was not submitted by him. He contends that in comparative chart prepared for the purpose of processing the bids after the stage of opening of first envelop, these defects are not noted. Similarly, the letter of Architect dated 11.02.2016 pointing out absence of ownership documents was also not uploaded on website. The petitioner has along with rejoinder placed documents to show that the Engineer issuing certificates in its case was much above the rank of Executive Engineer. Similarly, the defect of not uploading ownership documents is urged to be not fatal. The learned counsel submits that the petitioner is Class ''A'' contractor registered with State Public Works Department (P.W.D.) and it is, therefore, apparent that he owns necessary vehicles and can make it available.

10. In the alternative and without prejudice to all his contentions, he submits that if this Court is not satisfied and tender cannot be awarded to the petitioner, a fresh tender must be directed to be called for, as the respondent No. 2 is not eligible.

11. Shri. Chauhan, learned counsel appearing on behalf of the A.P.M.C. submits that in contractual matters, there cannot be any challenge to a decision to award contract to the lowest bidder unless some material fault in decision making process is pointed out. Since 2009, the efforts were being made to commence and complete these works and hence in 2015, it had become a pressing need. The cost of construction was rising upwards and hence urgency shown by the A.P.M.C. cannot be questioned. He points out that there are no allegations of malafides against the officer or office bearers of A.P.M.C. The benefit of power of relaxation was extended to all participants due to this urgency.

12. He adds the data on the basis of which comparative chart for evaluating technical bids was prepared, was already uploaded on 08.02.2016 and though the petitioner was aware of it, still it chose to approach this Court on 08.03.2016 i.e. after some delay. There is no explanation therefor and in tender matters, the contractor like the petitioner must show due diligence.

13. The chart prepared by the Architect, on the basis of which the petitioner has advanced his arguments, does not look into all documents of Respondent No. 2 and hence all arguments based upon it are misconceived. Respondent No. 2 has also furnished the documents signed by the Executive Engineer and those

documents show that it satisfies necessary eligibility conditions. The said respondent has done work of construction with Local bodies, A.P.M.C. and an aided recognised educational society. These bodies do not have post of Executive Engineer and hence certificate issued by the competent equivalent person, who has supervised the work of Respondent No. 2 on their behalf is treated as a certificate issued by the Executive Engineer. The contents of this certificate are known to everybody and the petitioner has never disputed those contents or its correctness. He, therefore, submits that in such situation, submission that Respondent No. 2 did not submit necessary certificate issued by the Executive Engineer is ill-founded.

14. The petitioner also did not submit documents supporting ownership of vehicles and the Architect of A.P.M.C. has pointed out this defect on 11.02.2016. Shri. Chauhan, the learned counsel submits that the petitioner was permitted to cure the lacuna & place those documents on record later on.

15. The judgment of the Hon''ble Apex Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors., reported at (2006) 11 SCC 548, is pressed into service by him to urge that all participants must be treated equally and Article 14 of the Constitution of India cannot be violated. The petitioner has not shown absence of either the expertise or capacity in Respondent No. 2 and has not argued that Respondent No. 2 is handicapped in completing the tendered work. He submits that the conditions of NIT of which violation is alleged by the petitioner are not essential conditions but only incidental one. According to him, there is no stipulation in NIT (notice inviting tender) that failure to submit such documents or certificates would result in rejection of offer or an opportunity to participate.

16. The report prepared by the A.P.M.C. on 10.02.2016 is relied upon by him to demonstrate that so called technical breaches have been overlooked while processing the offers. The tender process continued through various stages on prescribed dates as earlier informed and the petitioner was aware of the date on which financial bids were to be opened. The petitioner has not pointed out any prejudice caused to it in the matter. Shri. Chauhan, learned counsel relies upon the judgment of the Hon''ble Apex Court in the case of AIR India Ltd. v. Cochin International Airport Ltd. & Anr., reported at (2000) 2 SCC 617, to state the scope of intervention available to writ court in contractual matters.

17. Shri. Dangre, learned counsel, on behalf of Respondent No. 2 - Contractor, in both the matters, submits that proper reading of clause 1.7 shows that it places emphasis on cost and quality of work done by the contractor to find out his expertise. He wants to read a coma mark (",") in said clause 10 prescribing the certificate of Executive engineer after the word "costing" to substantiate his argument. He contends that there is no need for contractor to demonstrate that he has completed single work of Rs.384.00 lac in previous three years. Similarly, as the experience demanded is not only of Government but also of Semi-Government and other Bodies, contention that the certificate must be issued by

the Executive Engineer, is erroneous. He submits that word "equivalent" used after the word "Executive Engineer" needs to be construed by correlating the same with Government body or Local body or other institutions whose work is completed by the contractor bidding in the process. The person issuing certificate must have Technical expertise and capacity as also competency to issue it on behalf of Body for whom work is done by the Contractor. He invites attention to the provisions of The Architects Act, 1972, to urge that the Architects are independent and statutorily recognised persons with necessary expertise and competency. Respondent No. 1 - APMC has verified documents furnished by Respondent No. 2 beforehand and after filing of matter before this Court. The Architect who has issued certificate to Respondent No. 2 is found competent and certificates issued by him are genuine. Hence, opening of financial bid of Respondent No. 2 on the basis of said certificates is as per law. He relies upon the judgment of the Hon''ble Apex Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Anr., paragraph 66 (supra). He further submits that even certificates uploaded by the petitioner are not issued by the Executive Engineer. Though the petitioner has filed rejoinder on record, it has not explained status of the officers, who has issued certificate or then status of Director General, who has issued the work order. Only first page of work order dated 05.08.2014 has been uploaded to avoid its further verification.

18. The reply affidavit filed by Respondent No. 2 on an affidavit is relied upon to urge that necessary certificates and documents are placed on record by Respondent No. 2. The additional documents are also provided by him and the Architect of Respondent No. 1 while preparing comparative chart has looked into only said additional documents. He has taken us through relevant certificates issued by the A.P.M.Cs. to urge that as contents thereof are not in dispute and Respondent No. 1 - A.P.M.C. has, after orders of this Court dated 14.06.2016, conducted verification again, the challenge to those certificates issued by the Architect is misconceived. He adds that chart prepared by the Architect of A.P.M.C. is not primary evidence and basic documents made available on site since 27.01.2016, when technical bid was opened, needed to be perused. The petitioner did not object to these documents from 27.01.2016 till 22.02.2016 & filed writ petition only after it learnt about rejection of its offer and did not refer to original documents deliberately.

19. To explain the approach to be adopted in such matters, he relies upon the judgment in the case of A 2 Z Maintenance and Engineering Services Ltd., Gurgaon v. Maharashtra State Electricity Distribution Company Ltd., Mumbai & Anr., reported at 2010 (5) Mh. L.J. 794; Indian Railway Catering and Tourism Corporation Ltd. & Anr. v. Doshion Veolia Water Solutions Private Ltd. & Ors., reported at (2011) 13 SCC 364 and Tejas Constructions and Infrastructure Pvt. Ltd. v. Municipal Council, Sendhwa & Anr., reported at (2012) 3 SCC 464. He concludes his arguments by submitting that through the exercise undertaken by Respondent No. 1 - A.P.M.C., offer of Respondent No. 2, which is 11% below, has been accepted. Retender would result in extra costs and said 11% below offer of

Respondent No. 2 which is about one year back, is now still more on lower side, when compared with the present rates. Considering the fact that the cost of construction has gone up, retender would not be in public interest.

20. Shri. Naik, learned counsel, in reply arguments invites attention to sequence of events to urge that as per programme, the petitioner ought to have been informed that his technical bid was cleared and the financial bid would be opened on 22.02.2016. This was never done and no email was forwarded to it. Respondent No. 1 - A.P.M.C. obtained orders on 18.02.2016 and then opened financial bids on 22.02.2016. The petitioner raised its objections on 24.02.2016 and thereafter on 25.02.2016. However, the same have been conveniently overlooked.

21. Respondent No. 2 was always aware that it was not satisfying eligibility condition of single completed building worth Rs. 384.00 lac, hence, it relied upon certificates issued by the Architect as also by the Executive Engineer. This shows that the certificates issued by the Executive Engineer or then by the Architect were not adequate and Respondent No. 2 had knowledge of it. He relies upon the judgment of the Hon''ble Apex Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Anr. (supra), to urge that essential conditions cannot be relaxed and certificate issued by the Executive Engineer showing completion of single work at least worth Rs. 384.00 lac cannot be and could not have been ignored. He also draws support from the Division Bench of this Court in the case of A 2 Z Maintenance and Engineering Services Ltd., Gurgaon v. Maharashtra State Electricity Distribution Company Ltd., Mumbai & Anr. (supra).

22. Inviting attention to the certificates submitted by the petitioner, completion of work worth Rs. 458.28 lac is pressed into service to urge that by itself is sufficient to qualify the petitioner. Strong reliance is placed upon the said certificate dated 02.05.2015 and another certificate issued by the very same authority on 20.01.2016 and the certificate issued by Visvesvaraya National Institute of Technology (V.N.I.T.), Nagpur, dated 12.08.2014 to show that these documents conclusively establish eligibility of the petitioner. The declaration placed on record by the Chief (Civil) of Manganese Ore (India) Limited (M.O.I.L.) on 10.03.2016 about his expertise status is also heavily relied upon.

23. The documents relied upon by Respondent No. 2 are questioned by urging that data contained only in relation to last three years i.e. 2012-13, 2013-14 and 2014-15 can be looked into in those certificates. The documents are in relation to dam and not about building construction, hence, these documents do not qualify it at all. He relies upon the judgment dated 18.11.2015 in Writ Petition No. 5356 of 2015 (M/s. B. Ganga Transport and Sai Trade Link Joint Venture v. M/s. Western Coalfields Limited & Anr.), to which one of us (B.P. Dharmadhikari, J.) is a party, to submit that compliance with this essential condition was must.

24. By way of abundant precaution, he adds that if the conditions were to be relaxed, a fresh advertisement ought to have been issued to enable all those who

had similar experience & produced the certificates issued by the authorities other than the Executive Engineer or then who had not completed single work worth Rs. 384.00 lac in the last three years; to participate.

25. The Hon''ble Apex Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors., (supra) has considered a tender invited by Maharashtra State Power General Company Ltd. (MAHAGENCO) for coal liaisoning, quality and quantity supervision. Contending that the appellant before the Hon''ble Apex Court did not fulfil conditions 1.5(ii), 1.5(v) and 1.5(vii) of notice inviting tender, a Writ Petition was filed before this Court and it was allowed. The conditions are reproduced by the Hon''ble Apex Court in paragraph 8 of its judgment. Condition No. 1.5(ii) required bidder to execute the work of total minimum quantity of 5 million Metric Tons (MT) per year for preceding five years and execution of work of total quantity of 10 million MTs in any of the preceding five years. As per clause (v), the bidder was required to possess professionally competent staff and must have on its own roll minimum manpower (strength) of 100 employees. As per condition (vii), the bidder should not have been declared defaulter from any Electricity Board/Government/Semi-Government/Public Power Utility Companies during the last three years. Consideration in paragraph 66 shows that adherence to essential conditions is must. If body inviting tender has no power of relaxation, it can not be exercised and principle of strict compliance needs to be applied where it is possible for all the parties to comply with all such conditions fully. However, if a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation are not permitted to take a different stand in relation to compliance with another part of tender, particularly when such party was not in a position to comply with all the conditions. This is subject to rider that Court should not find any relaxation of a condition essential in nature. Such relaxation would be wholly illegal and without jurisdiction. In the facts before it, term regarding employment of 100 workmen was found to be satisfied on the number of payment of PF contribution during the last financial year and financial year looked into by PF authorities was accepted as proper. Further, the compliance of work of 15 million MT in one of the years in preceding five years was also accepted as valid. Hon''ble Apex Court found that appellant handled far more coal cumulatively than required in preceding 5 years though it was not more than 5 MT in each year.

26. The Division Bench of this Court in A 2 Z Maintenance and Engineering Services Ltd., Gurgaon v. Maharashtra State Electricity Distribution Company Ltd., Mumbai & Anr., (supra) considers the contentions that notarization of Power of Attorney was not an essential condition. It is not necessary for this Court to look into the merits of said discussion. However in paragraph 37, after relying upon the judgment of the Hon''ble Apex Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors., (supra), the Division Bench has found that essential conditions of eligibility need to be scrupulously complied with. In paragraph 39, it has observed that whenever condition stipulated in the tender

requires an act to be done in a particular manner and further lays down consequence of not doing so, as disqualification to participate, such stipulation constitutes an essential condition and compliance therewith is mandatory. The Division Bench has found that failure to furnish notarized Power of Attorney did not result in rejection of tender itself and other participant was given an opportunity to produce it while opportunity was declined to the petitioner. Thus, on account of this, a relaxation of a condition was perceived and discrimination was proved.

27. In Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa & Anr., (supra), the Hon''ble Apex Court has found that though audited balance sheet or its certified copies were not produced, but the bidder had produced turnover certified by the Chartered Accountant in the year 2010-11. The appellant before the Hon''ble Apex Court never disputed correctness thereof. The Hon''ble Apex Court also noted that year 2010-11 was immediately preceding year and audit of bidder company for that year was not completed. Thus, in absence of allegations of any malafides or arbitrariness, contention of the appellant that there was breach of essential condition was negated.

28. In Indian Railway Catering and Tourism Corporation Limited & Anr. v. Doshion Veolia Water Solutions Private Limited & Anr., (supra), the price quoted was required to be lump sum, inclusive of all duties and taxes. The vendor was required to indicate total excise duty amount included in the price of plants and equipments. Consequence of not doing so was not indicated. The Hon''ble Apex Court in this situation has viewed the condition as not an essential one.

29. In AIR India Ltd. v. Cochin International Airport Ltd. & Anr., (supra), the Hon''ble Apex Court has held that the State Government, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even if some defects are found in the decision making process, great caution should be exercised while using discretionary powers under Article 226 of the Constitution of India. It is pointed out that the larger and overwhelming public interest must be kept in mind.

30. In Writ Petition No. 5356 of 2015 decided on 18.11.2015, this Court found that certificate regarding availability of access to credit mandated by tender condition was not issued by a Scheduled Bank. The certificate produced by the petitioner was issued by a Chartered Accountant and it only pointed out working capital available. The Division Bench of this Court, therefore, found that it only satisfied partially the essential condition.

31. It is in this background that we have to evaluate the pressing situation.

32. The absence of certificate issued by the Executive Engineer in favour of Respondent No. 2 and no completion of single work of building costing not less than Rs. 384.00 lac are the vices alleged in the bid of Respondent No. 2. Not supplying ownership documents of machinery, to be made available exclusively for tender work, is the defect alleged in the bid of present petitioner. The scheme

of relevant clauses is already stated by us above. Respondent No. 1 - A.P.M.C. has submitted that it has relaxed these conditions for all as the work was getting delayed hopelessly and needed to be completed urgently.

33. Though A.P.M.C. has urged urgency, no particular prejudice as such has been pointed out and reasons for needing such type of construction urgently are also not pleaded. The fact that work is scheduled to be executed since long, cannot by itself be the reason to make it urgent. Respondent No. 1 - A.P.M.C. being public body and State within the meaning of Article 12 of the Constitution of India, cannot disregard the provisions of law. It can not act arbitrarily & has to preserve transparency.

34. The language of clause 6 reveals that first envelop has to contain list of machinery which tenderer agreed to keep reserved exclusively for the tendered work. He has to furnish ownership documents scanned from original in that envelop. Thus, Respondent No. 1 has insisted upon production of proof of ownership of machinery to be provided exclusively by tenderer for its work. The emphasis that such document must be scanned from original shows that Respondent No. 1 - desired bidder to make available its own machinery and not to depend upon the machinery taken on hire or procured from some other source. Its insistence that such machinery must be made available "exclusively" for tender work, again highlights this aspect.

35. The successful completion of minimum single work of building costing not less than Rs. 384.00 lac during financial years 2012-13, 2013-14 and 2014-15 is again emphasised by interposing the word "minimum" which qualifies the word "single". Employing these two words together shows a definite intention of the employer i.e. authority inviting tenders. Hence, bidder has to show at least one completed "building" of not less than Rs. 384.00 lac during these three financial years. The word "building" has not been used here as adjective but as a noun. The work has to be of a building & no other structure. Hence, more than one such work completed during this period cumulatively costing not less than Rs. 384.00 lac do not qualify for consideration. Similarly apart from the "building", the other construction works will also not qualify. We are unable to read any "," i.e. coma mark in this clause as urged by Adv. Dangre.

36. Page No. 11 of the NIT vide clause 1.7 points out the procedure for opening of tenders. Petitioners as also Respondents are aware of it. As per its sub-clause ''A'', every tenderer is informed that its envelop No. 1 would be opened on line to verify its contents. If the documents contained in the first envelop do not meet requirements of A.P.M.C., accordingly, tender opening authority will make a note and envelop No. 2 of such tenderer would not be considered further. It is also mentioned that said decision of tender opening authority is final and binding on the contractors. Thus, consequence, if the documents do not satisfy the stipulations in relation thereto, prescribed by Respondent No. 1, are also prescribed in Tender form itself. Envelop No. 2 is to be opened immediately after opening of envelop No. 1. The requirement of note 7 appearing at page No. 9 of

Tender form needs to be perused in this background. It mentions that tendering authority has to first open Technical bid documents of all contractors and after scrutiny thereof, it has to shortlist the contractors eligible for financial bidding process. The shortlisted contractors are to be intimated by email. Thus, on line process mentioned at page 11 in clause 1.7 and procedure stipulated vide clause 7 both show that contractors who do not meet clause 6 are eliminated while the others march further in the process.

37. In the light of language employed in Tender form, it is evident that those conditions of eligibility are essential conditions. The bidder has to show that he has completed at least one building during financial years 2012-13, 2013-14 and 2014-15. Additional requirement is value of such completed building cannot be less than Rs. 384.00 lac. Similarly, while furnishing list of machinery available with him, which is to be deployed exclusively for tendered work, bidder has to also submit proof of ownership of those vehicles. In order to avoid possibility of any interpolation in the certificates issued by the competent authority about completion of building or then in ownership documents of vehicles, Respondent No. 1 - A.P.M.C. has inserted the condition that such documents must be scanned from the original. The certificate to be issued by the Executive Engineer or equivalent authority has to be in relation to completion of a work of "building". Hence, such certificate produced by the tenderer must not be in relation to other work and cost thereof cannot be less than Rs. 384.00 lac. Caution & precaution taken by the APMC bring forth a full proof scheme & show that both these conditions are essential eligibility conditions to verify the creditability of bidder. Respondent No. 1 - A.P.M.C. has cautioned tenderers that it would first verify their documents, get itself satisfied about it and thereafter only steps to open envelop No. 2 of those who clear this scrutiny, would be taken.

38. The Architect of Respondent No. 1 has on 08.02.2016 prepared a comparative chart analysing the documents produced by the petitioner, Respondent No. 2, Respondent No. 3 and Respondent No. 4. Insofar as the documents submitted by Respondent No. 2 are concerned, he has put a remark that said respondent has attached a certificate signed by the Sub-Divisional Engineer, Public Works Department, Anjangaon Surji. We find that this certificate is in fact a handing over note of construction of residential school building at Pandhari, Tahsil - Anjangaon Surji. The Sub-Divisional Engineer has handed over School building to the Head Master of that residential school. The administrative approval for said work is given by the Department of Social Welfare & Justice on 17.02.2012 and its value is Rs. 4,42,00,212/-. The revised administrative approval date for excess amount of Rs. 2,30,01,000/- as shown in it is 19.10.2010. Thus, this date is prior to the date of administrative approval mentioned supra. The amount put to tender is disclosed to be Rs. 3,59,19,092/-. The agreement date is not mentioned but its number is of the year 2012-13 and date of work order is 15.10.2012. Date of completion is stated to be 31.12.2013 while drawing is adopted on 10.11.2014. The total expenditure on this work is shown to be Rs. 672.00 lac. There is a completion certificate also in relation to

this work issued by the Sub-Divisional Engineer only. The other document produced by Respondent No. 2 is about construction of RCC pavement at Main yard of A.P.M.C., Anjangaon Surji. The total cost of this work is Rs. 1,18,74,723/- and this certificate is issued by the Architect. There is a space on it earmarked for signature of Chairman or Secretary of A.P.M.C., Anjangaon Surji, but that space is left blank.

39. Said certificate of architect or the other documents produced by Respondent No. 2 do not show completion of single/one work of "a building" valued at Rs. 384.00 lac in three financial years as required by the tender documents. We need not, therefore, dwell more upon these documents. If the respondent No. 2 was satisfied with the certificate issued by the sub divisional engineer, it was not necessary for it to file certificates issued by the architects about his contractual works with APMC, Anjangaon Surji. If respondent No. 1 APMC was satisfied with certificate issued by the sub divisional engineer in favour of respondent No. 2, it was not necessary equally for it to ascertain correctness or otherwise of the other certificates issued by the architect. Respondent No. 1 tender inviting authority does not state that it verified the certificates issued by the sub divisional engineer & found it proper. In the light apparent anomalies in the said certificate, we find that respondent No. 2 did not qualify for the participation in tender process.

40. This brings us to the documents submitted by the petitioner. It is not in dispute that the petitioner did not provide the ownership documents of the vehicles which it offered exclusively for the work of respondent No. 1 APMC. It has supplied the same later on and not in envelop 1. Question whether the certificate of completion of building signed by the Chief (Civil) of MOIL used by the petitioner or the alleged supremacy of said Chief (Civil) over the Executive Engineer, therefore need not detain us here.

41. The NIT itself envisages the works completed by the contractor with the various departments or authorities like that of State Government or other authorities which may qualify as the semigovernment bodies. Work done with private bodies are not eligible. Word "semigovernment bodies" is wide enough to include the Municipal Corporations, Municipal Councils, Zilla Parishads, APMCs, University etc. which are "State" within Article 12 of the Constitution of India. Even MOIL qualifies as such. All of these may have an Engineer or an Architect on their role to undertake or to supervise the construction work. But his designation may not be always the same. The terms & conditions of employment also vary due to difference in financial resources or staff approval. But then the responsible technical officer with them who has supervised the job will be competent to issue the certificate in relation thereto. Such an officer may be their salaried employee or contractual one, working on job work or piece work. Hence in cases where the executive engineer is on role, the certificate must be essentially issued by him. But if such an officer is not there, the certificate may be issued by officer with any other designation but with same powers qua the

work mentioned in that certificate. Word "equivalent" here means not an officer with same salary or same status in society, but an officer exercising the same powers qua the certified work. Here, the respondent No. 2 could have produced the certificate of the Executive Engineer about work of construction of a residential school building. Certificate issued by the Sub-Divisional Engineer to it is found to be not free from doubt. Respondent No. 2 has not explained why it could not get the certificate of Executive Engineer and Respondent No. 1 also has not pointed out whether it got the anomalies therein mentioned supra, clarified. Though the tender inviting authority viz. Respondent No. 1 APMC has filed an affidavit explaining why it became essential for it to relax the conditions for all the participants and pointing out that it made due inquiries and got itself satisfied about the correctness of the certificates issued to Respondent No. 2 by the Architect, it has not made any such statement about the handing over note and the certificate issued by the Sub-Divisional Engineer to the respondent No. 2.

42. It is seen that the financial bid was opened on 22.02.2016. Technical bid was opened on 27.01.2016 itself. Hence list of qualifying bidders needed to be drawn immediately thereafter. It can be seen that after downloading the technical bid documents, the same were sent to its architect by respondent No. 1 APMC. Said architect Shri. Chichmalatpure submitted his evaluation report dated 10.2.2016. As disclosed by the respondent No. 1 in paragraph 4 of its reply, said architect separately on 11.02.2016 submitted a letter about absence of ownership documents with the tender of Petitioner. Thus till then, no shortlisting of eligible contractors could have been done. It appears this short listing was not done at all & it is not pointed out by respondent No. 1. Document at Annex. R5 filed by APMC reveals that due to directions of the Chairman of respondent No. 1 APMC, all the financial bids were decided to be opened. This document Annex. R5 is the resolution No. 5 of the Board of Directors of respondent 1 APMC passed on 29.02.2016. It does not refer to the date on or the proceedings in which the relaxation was ordered by the Chairman. In any case, the shortlisting was not done immediately, was not & could not have been notified on 8.02.2016 or before 11.02.2016. It appears from the stance of the respondent No. 1 APMC that the stage of shortlisting itself was dispensed with. Tender Summary Report print out dated 24.02.2016 obtained by the respondent No. 2 from Eprocurement system of the Government of Maharashtra shows that technical bid file was downloaded on 27.01.2016 & thereafter, the technical summary details are uploaded on 22.02.2016 at 02.00 PM while scheduled time of opening of financial bid was declared to be 02.05 PM i.e. just five minutes thereafter. Thus not a single bidder was given advance notice of opening of the financial bids that too by waiving any condition. No decision of Board Directors of respondent No. 1 APMC relaxing any of the conditions before the opening of the financial bids is either pleaded or produced. Office note dated 10.02.2016 does not reveal any consideration of failure of all bidders to qualify or them need of relaxation in the interest of APMC. Note does not contain any material to draw inference of any relaxation or conscious consideration of need therefor by the Chairman of the

respondent No. 1 APMC. He has on 16 or 18.02.2016 only ordered all bids received to be opened. Relaxation from any condition of eligibility is a serious matter and that exercise must be performed by the competent authority after understanding the entire background. Application of mind by it must show the basis therefor & need of such relaxation or deviation. Respondent No. 1 APMC has failed to place on record any such data. Architect Shri. Chichmalatpure has not recommended any such relaxation & no office note suggesting that course of action after due evaluation of the situation exists.

43. Respondent No. 2 does not have any certificate which shows completion of minimum one work of building costing not less that Rs. 384.00 Lacs in years 2012-13, 2013-14 & 2014-2015. Petitioner did not submit in envelop No. 1 the ownership documents of vehicles which it proposed to use exclusively for the work of the respondent No. 1 APMC. We have found both these eligibility conditions essential. Respondent No. 1 has urged that on 18.2.2016, it evaluated the minor or technical lacunae in all tenders and its urgent requirement. Therefore, it decided to overlook these lacunae and to open the financial bids of all the participants. We have held that there was no such pressing need to condone the lacunae. We also find absence of any such self speaking decision reaching process on record. We have also construed these conditions in NIT and held that the same are not the ancillary conditions but essential conditions of eligibility. The conditions as imposed are neither arbitrary nor irrelevant. The purpose or object behind it is to secure the best possible bid and safe execution of its work. In absence of essential application of mind, the entire procedure followed by the respondent No. 1 APMC is faulty and bad. If none of the bidders was complying fully with the prescribed terms and conditions, the Respondent No. 1 APMC ought to have issued notice to all the bidders that it had granted relaxation and was going to open the financial bids on 22.2.2016. It should have given an email to all the bidders to remain present on that date so that they cold have objected to the relaxation given to each other. Not issuing such email to the all (short listed) contractors also renders the act of accepting the bid of respondent No. 2 here, unsustainable. Respondent No. 2 has not urged that it could not have procured the certificate of the Executive Engineer in relation to single completed building work or did not point out why it could not comply with that condition. In any case, it could have requested respondent No. 1 APMC to give it time to produce the same. Petitioner also has also not explained why the documents of ownership were omitted in first envelop. It has not even pleaded an inadvertent omission. As there was no urgency and no eligible bidder, public interest demanded that notice inviting fresh tender with new or relaxed conditions and indicating the possibility of relaxation if no bidder fulfils the terms, ought to have been published again. In any case, if APMC knew that the work was of urgent nature, likelihood of relaxation of conditions as per law, should have been previously published for the benefit of all. It is not the case that subject NIT was 2nd or 3rd attempt on the part of respondent No. 1 - APMC.

44. We, therefore, find that the entire processing of NIT by the respondent No. 1

APMC from the stage of opening of envelop 1 is vitiated and unsustainable. Neither the tender of petitioner nor that of respondent No. 2 can be accepted. The respondent No. 1 APMC has to publish fresh notice inviting tenders with stable modifications and also communicating to all that it may relax few terms & conditions, if the situation so warrants.

45. We, therefore, quash and set aside the acceptance of both the tenders of respondent No. 2 by the respondent No. 1 APMC. Similarly, prayer of petitioner to allot the works to is also rejected. It is open to respondent No. 1 APMC to issue fresh NIT on suitable terms and conditions as per law.

46. Both the writ petitions are thus partly allowed by making the rule absolute accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

