

(2021) 01 GAU CK 0002
In the Gauhati High Court
Case No : Writ Petition (C) No. 4621 Of 2020

M/S Tata Motors Ltd

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 05-01-2021

Acts Referred:

Constitution Of India, 1950 — Article 12, 226

Citation : (2021) 01 GAU CK 0002

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : Jyotirmoy Roy

Final Decision : Dismissed

Judgement

1. The extra-ordinary jurisdiction of this Court conferred by Article 226 of the Constitution of India has been sought to be invoked by filing the present writ petition. The subject matter of this writ petition is in connection with a tender process for procurement of Ambulances by the Assam Government wherein, the petitioner, which is a bidder, has questioned the eligibility of the respondent no. 5, a co-bidder and all consequential actions of allotting the work to the said respondent no. 5.
2. For better appreciation of the issue in hand, a brief narration of the facts of the case would be beneficial.
3. A tender notice was floated by the Mission Director, National Health Mission, Assam (NHM) dated 01.09.2020 for procurement of 100 units of Type C Ambulances-R. The said notice was uploaded in the GeM portal (Government e-Marketplace). In response to the same, the petitioner and the respondent no. 5 had submitted their respective bids. Upon evaluation, the bid of the respondent no. 5 was found to be the lowest (L1). However, it is

the case of the petitioner that upon careful examination of the credentials and testimonials of the respondent no. 5, it was detected that the respondent no. 5 had shared credentials of M/S Force Motors Ltd., including the certificate issued by the Automotive Research Association of India (ARAI) for Type C Ambulances. It is the contention of the petitioner that the respondent no. 5 having claimed to be an Original Equipment Manufacturer (OEM), it could not have shared the OEM documents of another company before the GeM in the present tender process. It is the further case of the petitioner that the discrepancy which was a major one was reported to the GeM which in its reply vide email dated 09.10.2020 was prima facie satisfied regarding the said discrepancy that the number of the ARAI certificate was of another company. The matter was accordingly requested to be lodged as an incident before the GeM so that proper action could be taken. However, the petitioner could come to know that in spite of acknowledging such discrepancy, the impugned purchase order dated 27.10.2020 was issued in favour of the respondent no. 5. Accordingly, the writ petition was filed on 02.11.2020.

4. This Court vide order dated 06.11.2020, while directing the case to be listed for motion on 18.11.2020 to enable the Department to place instructions, had ordered maintenance of status quo till the next date fixed. The said interim order was continued by this Court and is in operation till date.

5. I have heard Shri J Roy, learned counsel for the petitioner. I have also heard Shri D Saikia, learned Senior Counsel as well as Shri B Gogoi, learned Standing Counsel, Health & Family Welfare Department, Assam representing all the official respondents. Shri P Shishodia, learned Senior Counsel assisted by Shri D Baruah, learned counsel for the respondent no. 5 has advanced his arguments via Remote Video Conference. Shri Gogoi, learned Standing Counsel has also produced the records of the case.

6. Shri Roy, learned counsel for the petitioner submits that the entire process of tender for procurement of the Ambulances has been done through the GeM, before which the respondent no. 5 has declared itself to be an OEM. In view of such declaration, it was mandatory on the part of the respondent no. 5 to share its own credentials, including the ARAI certificate which admittedly was not done rendering the bid of respondent no. 5

defective and not liable for any consideration and consequently, the purchase order dated 27.10.2020 is liable to be interfered with. It is further

submitted that the particular Ambulance in question, namely, Type C Ambulance-R falls under CMS Quadrant 1 as per GeM policy. The offer has to

be made only from GeM validated OEMs. Since, the respondent no. 5 had registered themselves before the GeM as OEM, it was incumbent upon the

respondent no. 5 to share its own credentials of OEM before the procuring authority which was admittedly not done. In fact, the very participation of

the respondent no. 5 in the tender process has been argued to be in violation of the GeM policy in absence of their own credentials as OEM. It has

been submitted that in spite of the various correspondences and also in view of the admitted fact of submission of the credentials of another company

so far as the ARAI certificate is concerned, failure to take steps by the concerned authority is not only unreasonable but would also be against the

interest of public service. Shri Roy accordingly submits that it is a fit case for intervention by this Court as the decision making process itself suffers

from infirmity which, according to the petitioner, is glaring.

7. Drawing the attention of this Court to the bid documents, the learned counsel for the petitioner has submitted that there are three broad

requirements towards eligibility, namely:

- i) Experience criteria,
- ii) OEM turn-over criteria, and
- iii) Past performance.

8. It has been submitted that the respondent no. 5 does not fulfill any of the aforesaid criteria.

9. Under the heading "Bid Specific Additional Terms and Conditions" under Sl. No.3, there is a requirement for having available Service

Centres in the State.

10. By drawing the attention of this Court to a certificate dated 11.09.2020, it has been submitted that as per the same, the Service Centres are of M/S

Force Motors Ltd. and not of the respondent no. 5. By referring to the document at Annexure-4 of the writ petition read with the certificate

mentioning the ARAI certification as AAPN0026F01 14/01/20, it has been argued that the same is a conclusive proof of the veracity of the allegation

made against the respondent no. 5. By referring to Annexure-6, it has been submitted that even the experience shown is of M/S Force Motors Ltd.

and not of the respondent no. 5.

11. Shri Roy, learned counsel has led this Court to the detailed representation dated 19.09.2020 submitted to the NHM followed by the

correspondence via email in support of his submissions regarding the detection of the discrepancy and acknowledgement of the same by the

authorities. The formal incident report lodged and the prima facie view expressed on behalf of GeM in its email dated 22.09.2020 and 06.10.2020 have

also been highlighted by Shri Roy, learned counsel for the petitioner. In spite of all such glaring short comings, the purchase order has been issued on

27.10.2020 in favour of the respondent no. 5 and even in this purchase order, the ARAI Certificate mentioned is that of M/S Force Motors Ltd.

12. Shri Roy, learned counsel has also referred to the additional-affidavit dated 20.11.2020 filed by the respondent no. 5. In Annexure-F thereof, an

email dated 12.10.2020 has been annexed whereby it has been admitted that the ARAI certificate of the respondent no. 5 is a different one than the

one referred to in the bid document of respondent no. 5 and though a certificate allegedly issued by ARAI dated 26.05.2020 in favour of the

respondent no. 5 has been annexed to the said additional-affidavit, it is failed to be understood as to why such certificate was not produced or

mentioned in the bid document of respondent no. 5. Shri Roy, learned counsel for the petitioner therefore raised grave doubt on the authenticity of the

said certificate dated 26.05.2020.

13. In support of his submissions, Shri Roy, learned counsel for the petitioner has relied upon the decision of the Honâ??ble Supreme Court in the

case of Ram Gajadhar Nishad Vs. State of UP and Ors., reported in (1990) 2 SCC 48.6 In the said case, the Honâ??ble Supreme Court held that

non-compliance of a mandatory requirement of the tender notice would render a bid ineligible.

14. Reliance has also been put upon a Judgment dated 23.01.2019 of the Honâ??ble Supreme Court in Civil Appeal No.1049/2019 (Vidarbha

Irrigation Development Corporation Vs. M/S Anoj Kumar Garwala), the relevant paragraph of which is quoted hereinbelow: -

â??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 â?" 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.â??

15. Per contra, Shri D Saikia, learned Senior Counsel for the Department submits that the writ petition has been structured on the premise that the

tender in question was open to only OEMs and therefore, the principal ground of challenge is fallacious.

16. Shri B Gogoi, learned Standing Counsel supplemented the aforesaid argument by drawing the attention of this Court to the relevant portions of the

bid document. It is submitted by Shri Gogoi, learned Standing Counsel that the bid document uses two expressions, namely, â??Bidderâ?? and

â??OEMâ?? and from the perspective of the requirement of documents would also make it clear that a Bidder other than an OEM is also eligible. It

is submitted that the experience criteria makes it explicit that both Bidder or its OEM are eligible to submit bids and the requirement of past

performance also makes the aforesaid position clear. The Bid Specific Terms and Conditions also makes it explicit that both Bidder and OEM are

eligible as separate Turnover criteria are prescribed. As regards availability of Service Centres, it is specified that either the Bidder or the OEM must

have a functional Service Centres in the State of Assam. Referring to the affidavit-in-opposition dated 19.11.2020 filed by the NHM, Annexure-A to

the same regarding eligibility makes it explicit that both Bidder or its OEM are eligible. He clarifies that so far as the Bidder Turnover for the period

2019-20 for the respondent no. 5 has been stated to be â??not submittedâ??, the records indicate that the same has been submitted. In any case, the

learned Standing Counsel submits that there is a provision for calculating the average Turnover and that of the respondent no. 5 meets the eligibility

criterion.

17. Meeting the argument that the purchase order dated 27.10.2020 contains

the number of the ARAI certificate in favour of Force Motors, since the same is an auto generated one, it is natural to contain the certificate number which has been submitted by the petitioner. The learned Standing Counsel, however, makes it clear that as per instructions received, though the purchase order has been issued in favour of the respondent no. 5, the actual supplies would be allowed only on submission of the ARAI certificate in favour of the respondent no. 5.

18. By drawing the attention of this Court to the communication dated 09.10.2020 issued by NHM to GeM, certain queries were raised which were replied to vide correspondence dated 19.10.2020 by which the GeM made it clear that respondent no. 5 had offered their own brand product and hence they cannot be considered as re-sellers of M/S Force Motors Ltd. However, in view of the complaint regarding ARAI certification, the same may be verified at the end of the procuring department. The letter itself contains a hand written Note that the same has been explained and therefore, the purchase order has been duly issued. In this connection, the learned Standing Counsel has referred to the records which have been handed over to the Court.

19. Shri Shishodia, learned Senior Counsel appearing for the respondent no. 5 has raised preliminary objections on the maintainability of the writ petition apart from making elaborate submissions on the merits of the case.

20. Referring to the affidavit dated 16.11.2020 raising the issue of maintainability of the writ petition, it is submitted that the present approach has been

made as an afterthought and by the time of filing of the writ petition, seventy five numbers of Ambulances were already manufactured and twenty

five numbers were in the advance stage of completion. It has been clarified that as of present, all the hundred numbers of Ambulances are ready for

delivery. The procurement being in connection with the present pandemic of COVID 19, overwhelming public interest coupled with the delay and

laches on the part of the petitioner would require dismissal of the writ petition. The intention of the petitioner to create a monopoly and prevent a

healthy competition has been highlighted. It is submitted that an incorrect and fallacious meaning has been sought to be given to the expression OEM

only for the purpose of making out a case. The induction of the respondent no. 5

in the GeM portal as an OEM not being put to challenge by the petitioner, the present challenge is not liable to be entertained. The understanding of the petitioner that the chassis and the Ambulance are one and the

same product, which alone can be OEM is apparently fallacious as is evident from the fact that there are different sets of certification rules as per the

Central Motor Vehicles Rules, 1989 and also the fact that Ambulance is treated separately under the GST laws. In support of his preliminary

objections on the maintainability of the writ petition, Shri Shishodia, learned Senior Counsel has placed reliance in the case of Raunaq International Ltd.

Vs. IVR Construction Ltd. and Ors.

21. The Honâ??ble Supreme Court in the said case of Raunaq International Ltd. had laid down that if an interim order is passed at the instance of a

private party in a case involving public interest, the said party is required to reimburse the cost to the public in case the challenge is rejected.

22. Admitting the fact that the ARAI certificate number which has been given is that of M/S Force Motors Ltd., the learned Senior Counsel submits

that the same would not make the bid of the respondent no. 5 invalid. Rather, it is contended that while submitting the bid, the respondent no. 5 has

made candid disclosure of all the facts. It is submitted that the respondent no. 5 is not an OEM in respect of automobile but is an OEM so far as

manufacturer of Ambulance. In other words, the chassis is of M/S Force Motors Ltd. which is the OEM with ARAI Certificate No. AAPN0026F01

14/01/20 whereas the respondent no. 5 is an OEM of Ambulance with ARAI Certificate No. AAPN0322. Though it is a fact that the ARAI

certificate issued in favour of M/S Force Motors Ltd. has been mentioned in the bid document, the same cannot be a reason to find fault with the bid

of the respondent no. 5. The learned Senior Counsel has explained in categorical terms that an Ambulance is mounted on the platform of a monocoque

body (chassis). The said monocoque body (chassis) and the Ambulance are distinct and separate products having different OEM certifications issued

by the ARAI and this fact has been twisted by the petitioner only for the purpose of making out a case. It is also highlighted that the writ petitioner has

not made candid disclosure of all the material facts which were within its knowledge. The writ petition would reveal that it is an email dated

06.10.2020 issued by GeM which is relevant to the present case which has been described as the last correspondence from GeM. Though another email dated 09.10.2020 has been mentioned, the same is not relevant. However, what is required to be noted is that the writ petitioner has materially suppressed all the developments thereafter, including the fact that the incident raised by the writ petitioner, as per the dispute redressal mechanism was duly addressed and whatever confusion existed was resolved in accordance with law. In this connection, the learned Senior Counsel has drawn the attention of this Court to Annexure-L of the additional-affidavit which has been tagged with the records on 11.12.2020. The said communication dated 30.11.2020 at Annexure-L has been issued by GeM whereby it has been categorically stated that the incident lodged by the petitioner M/S Tata Motors Ltd. Was rejected as the claim raised could not be proved. Though the said rejection was intimated to the writ petitioner, no steps whatsoever, have been taken by the petitioner to bring the said fact to the notice of this Court. It is further submitted that the controversy, if any, being sorted out and finally put to rest and as a matter of fact, the allegation being rejected by the appropriate authority, the writ petition has become infructuous and no steps have been taken by the petitioner to challenge the rejection.

23. Shri Shishodia, learned Senior Counsel has endorsed the submissions of Shri Gogoi, learned Standing Counsel, Health & Family Welfare

Department regarding the fact that both Bidders and OEMs were eligible under the present tender. He, however, clarifies that the respondent no. 5 is a Bidder and also an OEM with regard to the Ambulance which has been built on the chassis manufactured by M/S Force Motors Ltd. as the OEM.

As regards the requirement of availability of Service Centres, learned Senior Counsel submits that the chassis manufacturer i.e., M/S Force Motors Ltd. has Service Centres in the State and in case of any service in connection with the functioning of the Ambulances is required, personnel of the respondent no. 5 would be available in the Service Centres of Force Motors. He, accordingly, submits that the writ petition be dismissed and the restraint order be vacated. The learned Senior Counsel reiterates that at present all the 100 numbers of Ambulances are ready to be delivered.

24. In support of his submissions, Shri Shishodia, learned Senior Counsel has relied upon the following cases:

- i) (1994) 6 SCC 651 (Tata Cellular Vs. Union of India),
- iii) (2016) 8 SCC 622 (Central Coal Fields Ltd. Vs. SLL-SML),
- iv) (2016) 16 SCC 818 (Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and Anr.)
- v) (2018) 5 SCC 462 (Municipal Corporation, Ujjain and Arn. Vs. BVG India Ltd. and Ors.)
- vi) MANU/SC/0317/2020, decided on 18.03.2020 (The Bharat Coking Coal Ltd. Vs. AMR Dev Prabha).

25. In the landmark case of Tata Cellular (supra), it has been clarified that though the power of judicial review on the contractual matters may be exercised, such review has to be restricted only to the decision making process and unless, the said process suffers from gross illegality or is ex facie unreasonable and arbitrary, the Courts should restrain from interference. The Honâ??ble Supreme Court has also laid stress on the requirement of having â??free play in the jointsâ?? by the authorities which should adhere to the interest of public service.

26. In the case of Central Coal Fields Ltd. (supra), the Honâ??ble Supreme Court discussed the subject of various requirements for a Bidder, the aspect of curable or incurable defects. After discussing the case laws operating on the field, the following has been laid down:

â??47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision â??that no responsible authority acting reasonably and in accordance with relevant law could have reachedâ?? as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of NIT is essential or not is a decision taken by

the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.â??

27. In the case of Afcons Infrastructure Ltd. (supra), the scope of judicial review in Government contracts have been reiterated. For ready reference, paragraphs 13 and 15 are quoted hereinbelow:

â??13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

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.â??

28. In the case of Municipal Corporation Ujjain (supra), the Honâ??ble Supreme Court discussed the scope of interference by the High Court in the exercise of powers of judicial review. The relaxation and freedom to be exercised by the owners in the interest of public service which requires to be given paramount importance has been highlighted by the Honâ??ble Supreme Court. For ready reference the relevant paragraphs are quoted

hereinbelow:

14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226.

15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State 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.

29. In the case of Bharat Coking Coal Ltd. (supra), the Hon'ble Supreme Court, after discussing the case laws had made the following observations:

47. With regard to other allegations concerning condonation of Respondent No. 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In Shobikaa Impex (P) Ltd.

v. Central Medical Services Society¹¹, it has been noted that:

the State 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 has been 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.â??

48. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for

courts to set aside the tender at the behest of an unsuccessful bidder.¹² This is because notice must be kept of the impact of overturning an

executive decision and its impact on the larger public interest in the form of cost overruns or delays.â??

30. The Honâ??ble Supreme Court in the case of Vidarbha Irrigation (supra) has reiterated the aforesaid observations.

31. Rejoining his submissions, Shri Roy, learned counsel for the petitioner reiterates that the respondent no. 5 does not meet the essential criteria of the

tender and even assuming that there is a separate certificate in respect of respondent no. 5 issued by the ARAI, the same is dated 22.05.2020 which

is of recent origin. It is contended that the respondent no. 5 is banking upon the credentials of M/S Force Motors Ltd. which is a distinct entity and is

therefore, not a qualified Bidder. As regards the plea of the respondents that the rejection of the incident has not been put to challenge subsequently

thereby making the present petition infructuous, Shri Roy, learned counsel submits that such rejection is without any application of mind and being a

part of the impugned decision making process, this Court can mould the relief in the interest of justice.

32. The rival contentions of the learned counsel for the respective parties have been duly considered and the records placed before this Court have

been carefully examined.

33. It appears that the edifice of the present challenge is of referring to the ARAI certificate of M/S Force Motors Ltd. by the respondent no. 5 in its

bid. The writ petition has proceeded on the premises that bids were invited only from OEM and since the credentials of M/S Force Motors Ltd. which

is a different legal entity has been sought to be relied upon by the respondent no. 5, the very consideration of the bid of the respondent no. 5 is an error

apparent on the face of the record. The aforesaid ground appears to be fallacious for more than one count. The tender document itself makes it clear

that it was open for Bidders / OEM to submit bids. All the requirements, including Experience, Turnover and Past Performance use both the

expressions Bidder and OEM. To put any controversy to rest, the "Bid Specific Terms and Conditions" makes it explicit that both Bidder and

OEM are eligible as separate Turnover criteria are prescribed. Though it appears from the records that the ARAI certificate of M/S Force Motors

Ltd. has been referred in the bid of the respondent no. 5, whether that by itself would make the bid of the respondent no. 5 ineligible has to be

considered. The pleaded case that the respondent no. 5, as an OEM has its own ARAI certificate has not been refuted by the petitioner. In any case,

such certificate is in the public domain which is open for verification by the authorities. What is important to note is that respondent no. 5 is an OEM

so far as the Ambulance built over the chassis is concerned; whereas the chassis is manufactured by M/S Force Motors Ltd. as its OEM, the

Ambulance built thereon is manufactured by the respondent no. 5 which is not in dispute. In any case, the requirement under the tender is bids from

Bidders/OEM.

34. As regards the issue of availability of Service Centres, it is specified that either the Bidder or the OEM must have a functional Service Centre in

the State of Assam and in the instant case, M/S Force Motors Ltd. admittedly having Service Centres in the State, the aforesaid ground is also not

available for the petitioner.

35. What is also to be taken into consideration that the instant challenge is by an unsuccessful Bidder, whose rates are admittedly higher than that of

the respondent no. 5. Though the said position may not be an absolute bar to present a challenge, it is required to be examined as to what are the

grounds of challenge and also the conduct of the petitioner. The petitioner had admittedly availed of the dispute redressal mechanism by raising an

incident before the appropriate authority which was also prima facie taken note of. However, the said incident was closed by rejecting the allegation

by the GeM itself and such closure has not been challenged by the petitioner. This Court exercising jurisdiction under Article 226 of the Constitution of

India is a Court of equity wherein the conduct of the parties before the Court is a

relevant consideration.

36. The decisions of the Honâ??ble Supreme Court on the present subject referred above lays down that sufficient scope should be given to the owner / authority to take a decision which is in consonance with the interest of public service. What is important and relevant to note as a reminder that the tender pertains to procurement of specialized Ambulances in view of the present pandemic of COVID 19 and any delay in the same would be wholly against the public interest.

37. The Honâ??ble Supreme Court in the case of Jagdish Mandal Vs. State of Orissa, reported in (2007) 14 SCC 517 has laid down as follows:

â??22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its

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

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

is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and

natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in

exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made

out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide

contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful

tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural

violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such

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

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

review, should pose to itself the following questions :

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

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

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

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal

consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and

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

38. Further in a recent case of Silppi Constructions Contractors Vs. Union of India, reported in 2019 SCC Online 1133 has laid down as follow:

â??18. Most recently this Court in Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others¹² observed that a writ

petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing

into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed

that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and

public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. 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 in all the aforesaid decisions 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 loath to interfere in contractual

matters unless a clearcut 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. As laid down in the judgments cited above 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 a 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.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming

public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the

opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the

appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the

court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the

best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be

accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we

shall deal with the present case.

39. The aspect of overwhelming public interest has been reiterated by the Hon'ble Supreme Court in the case of Caretel Infotech Ltd. Vs.

Hindustan Petroleum Corporation Ltd., reported in (2019) 14 SCC 81 in the following manner:

37. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited

& Anr.3 , this Court has expounded further on this

aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is

permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in

accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise

restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere

disagreement with the decision making process would not suffice.â??

On the point of interpretation of a particular Clause of the Contract, it has been held as follows:

â??38. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In

the facts of the present case, the view, on interpreting the tender documents, of respondent No.1 must prevail. Respondent No.1 itself,

appreciative of the wording of clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own

interpretation of the contract to be thrust on respondent No.1, or ask the Court to compel respondent No.1 to accept that interpretation. In

fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is

not acceptable to the Constitutional Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce

the observations in this behalf as under:

â??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 givenâ??.

40. A perusal of the records would show that the authorities in question had applied their minds before coming to the decision to issue the Purchase

Order in favour of the respondent no. 5. In fact, there is a note in the file wherein explanation was held to be accepted in view of the caveat given by

the GeM to verify. In any case, the learned Standing Counsel of the Health Department has undertaken that before the supply is actually allowed to

be made, the testimonials, including the ARAI certificate in the name of the respondent no. 5 would again be verified.

41. In view of the aforesaid facts and circumstances, this Court is of the opinion that the petitioner has not been able to make out a case for

interference by this Court in exercise of powers under Article 226 of the Constitution of India. Accordingly, the writ petition is dismissed and the

interim order is vacated. Considering that the writ petition was instituted on 02.11.2020 before the rejection of the incident lodged by the petitioner, this

Court does not deem it fit to impose any cost on the parties.