(2017) 11 UK CK 0035

In the Uttarakhand High Court

Case No : 2191 of 2017

Pratap Trading Company APPELLANT

Vs

The State of Uttarakhand & others RESPONDENT

Date of Decision : 17-11-2017

Acts Referred:

Constitution of India, Article 226, Article 19(1)(g) - Power of High Courts to Issue certain writs - Protection of certain rights regarding freedom of speech, etc

Citation : (2017) 11 UK CK 0035

Hon'ble Judges : Manoj K. Tiwari

Bench : Single Bench

Advocate : Arvind Vashisth, Subhash Upadhyaya, S.R.S. Gill, ?S.K. Mandal, Shiv Pande, S.N. Babulkar, Paresh Tripathi

Final Decision : Dismissed

Judgement

1. In this batch of writ petitions, challenge has been made to the tender process for award of contract in respect of Fishing Rights over Baigul Reservoir and Dhaura Reservoir in District Udham Singh Nagar. All the petitioners in these writ petitions are aggrieved by rejection of their Technical Bids for non-fulfillment of one condition or the other of the notice inviting tender.

2. Uttarakhand State Fisheries Development Board (from hereinafter referred to as "Board"), which is a Government Agency, issued a notice inviting tender on 04.08.2017 for grant of Fishing Rights over two reservoirs in District Udham Singh Nagar, namely, (i) Baigul and (ii) Dhaura. According to the said notice, contract was to be granted for a period of five years and the minimum reserve price was also indicated as (i) `63.35 Lakh for Baigul Reservoir and (ii) `23.49 Lakh for Dhaura Reservoir. According to the said notice, tenders could be submitted till 04:00 pm on 26.08.2017 and the tenders were to be opened at 04:30 pm on the same day i.e. 26.08.2017.

3. In the tender notice, General conditions of contract are common for both the

reservoirs, however, main conditions of contract have been enumerated separately. According to the tender notice, tenders were to be submitted in two bid system, i.e. the bidders were required to submit Technical Bid and Financial Bid separately. It was further provided that Financial Bid will be opened only when Technical Bid of a bidder is found to be in order. In other words, only those bidders, who fulfill all the conditions of eligibility and furnish requisite documents mentioned in the notice inviting tenders, would be permitted to go to the second round of tender process, namely, opening of Financial Bid. WPMS No. 2191 of 2017

4. Petitioner (M/s Pratap Trading Company) responded to the notice inviting tender, issued by the Board, and submitted a bid for Baigul Reservoir. His Technical Bid was rejected for non-fulfillment of the condition mentioned in Clause 3(3) of the main conditions of contract, which requires every bidder to submit audited balance-sheet and profit & loss account with certificate of a Chartered Accountant regarding minimum annual turnover of `5 crores during last three financial years. 3

5. According to Mr. Subhash Upadhyaya, learned counsel for the petitioner, Technical Bid submitted by the petitioner was complete in every respect and petitioner had also enclosed balance-sheet for three years with certificate of Chartered Accountant and further that the tender committee while opening Technical Bids on 26.08.2017 did not find any deficiency in the Technical Bid of the petitioner. However, when tender committee met again on 28.08.2017 for evaluating the Technical Bid, then the deficiency in Technical Bid of the petitioner was noticed. He further submits that specific allegation has been made in para 19 of the writ petition regarding foul play in the matter.

6. A careful perusal of para 19 of the writ petition indicates that although Technical Bids were opened on 26.08.2017, however, evaluation of Technical Bids was done on 28.08.2017 and 29.08.2017. Shortcoming, if any, in a Technical Bid cannot be noticed immediately upon opening of Technical Bid and such shortcoming can be noticed only after close scrutiny of Technical Bids. Therefore, the allegation of foul play made in para 19 of the writ petition appears to be baseless. Moreover, petitioner has not named any person, who according to him, is responsible for such foul play.

7. Even otherwise also, there is no reason to believe that a multi member body like the tender committee will act against a bidder in the manner alleged in the writ petition. Moreover, the allegation made in para 19 of the writ petition gets belied by the statement made in para 27 of the writ petition, where it is stated that petitioner after coming to know about the deficiency pointed out by the tender committee in his Technical Bid "tried to persuade them to the effect that they can see his entire balance-sheet through online process and for that purpose he can provide code to them then and

there so that his bid may be declared responsive." The statement made in para

27 of the writ petition indicates that petitioner did not make any protest before the tender committee regarding removal of documents from his Technical Bid.

8. A reasonable person, whose Technical Bid is rejected due to some foul play, is not expected to behave in the manner stated in para 27 of the writ petition. Such person will assert that he had submitted all requisite documents with his Technical Bid and will not meekly surrender by requesting that his balance-sheet may be seen online. Moreover, removal of documents from Technical Bid is a serious matter and there is no averment in the writ petition that the matter was reported by the petitioner to the Superior Departmental Authorities or to the Police Station concerned.

9. Learned counsel for the petitioner has made two more submission, which are as follows:- (i) According to him, a condition of contract, namely submission of no dues certificate issued by District Magistrate, was relaxed in favour of another bidder, whereas condition contained in Clause 3(3) of the main conditions of contract was strictly enforced against the petitioner.

(ii) Additional Legal Remembrance and Chartered Accountant were permitted to participate in the meeting of the tender committee, which changed the composition of the tender committee.

10. Regarding first submission, learned counsel for the petitioner has relied upon Government Order dated 09.08.2012. According to him, the said Government Order holds the field and in para 6 thereof provides that in addition

to no dues certificate, character certificate and solvency certificate must be issued by the District Magistrate.

11. According to the petitioner, the condition that no dues certificate issued by District Magistrate alone would be admissible in the Technical Bid was relaxed in favour of some other bidders. Thus, it is the contention of the petitioner that if one of the essential conditions of tender is being relaxed in favour of other bidders, then petitioner is also entitled for relaxation in respect of Clause No. 3(3) of the conditions of contract. Fair copy of the Government Order dated 09.08.2017 has been brought on record as annexure CA No. 2 to the counter affidavit filed by respondent No. 2.

12. A careful perusal of para 6 of Government Order dated 09.08.2017 would reveal that "character certificate" and "solvency certificate" alone are required to be issued by District Magistrate, while there is no such requirement regarding "no dues certificate". Petitioner is trying to read the requirement of no dues certificate issued by the District Magistrate, which is contrary to the language used in the Government order.

13. In the present writ petition, there is no challenge to the conditions of contract mentioned in the notice inviting tender on the ground that it is contrary to the Government Order dated 09.08.2017. Petitioner unconditionally submitted bid in response to the notice inviting tender, therefore, he cannot now rely upon

the Government Order dated 09.08.2017 for reading some condition in notice inviting tender, which is not mentioned therein. Moreover, a bidder is bound by the conditions of the tender notice and not by something mentioned elsewhere.

14. Clause 3(5) of the main conditions of contract for Dhaura Reservoir and Clause 5(6) of the main conditions of Contract for Baigul Reservoir do not provide that no dues certificate has to be obtained from District Magistrate. Therefore, the grievance regarding hostile discrimination raised by the petitioner is without any substance. Since there is no relaxation given to other bidders, therefore, the contention of unfair treatment raised by the petitioner is not tenable in the eyes of law.

15. The second submission made by learned counsel for the petitioner that Additional Legal Remembrancer and Chartered Accountant participated in the proceedings of tender committee which vitiates the entire tender process, is also unsustainable. According to the respondents, advice of Legal Remembrancer and Chartered Accountant engaged by respondent No. 2 was sought due to dispute raised by certain bidders on certain issues on 28.08.2017 and they did not participate in the deliberations of the tender committee. The Board is a Government undertaking, therefore, there is nothing wrong if advice is sought from Additional Legal Remembrancer on contentious issues.

16. In the absence of any material on record to show that Additional Legal Remembrancer and Chartered Accountant participated in the deliberations of the tender committee, the contention made by petitioner cannot be sustained. Thus the allegation that composition of tender committee was changed to favour the private respondents is without any substance.

17. Learned counsel for the petitioner lastly submits that the condition mentioned in Clause 3(3) of the conditions of contract ought to have been relaxed in favour of the petitioner, as it is an ancillary condition and not an essential condition of contract. This submission is also without any force, as in exercise of power of judicial review, this Court does not sit in appeal over the decision of the employer and primacy has to be given to interpretation given by tender inviting authority, as held by Hon''ble Supreme Court in JSW Infrastructure Limited & another Vs Kakinada Seaports Limited & others reported in (2017) 4 SCC 170 and Central Coalfields Limited & another Vs SLL-SML (Joint Venture Consortium) & others reported in (2016) 8 SCC 622.

18. Even otherwise also in contractual matters, scope of judicial review is very limited as held by Hon''ble Apex Court in Tata Cellular Vs Union of India reported in (1994) 6 SCC 651; Jagdish Mandal Vs State of Orissa & others reported in (2007) 14 SCC 517; Michigan Rubber (India) Ltd. Vs State of Karnataka & others reported in (2012) 8 SCC 216 and Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corporation Ltd. & another reported in (2016) 16 SCC 818.

19. For the same reason, the contention made by learned counsel for the petitioner that the conditions contained in Clause 3(5) and 5(5) in the main

conditions of contract are relaxable cannot be accepted.

20. Since petitioner has not been able to demonstrate that interpretation of conditions of contract by the employer suffers from mala fide or perversity, therefore, there is no scope of interference in the matter. The writ petition deserves to be dismissed and is hereby dismissed. Interim order dated 31.08.2017 stands vacated. No order as to costs. WPMS No. 2060 of 2017

21. Petitioner in this case is a cooperative society, who is aggrieved by condition Nos. 6 and 10 of the General conditions of contract. Condition No. 6 provides that one must have minimum turnover of `5 crores during the last three financial years and further that every bidder shall be required

to submit audited balance-sheet and profit & loss account with certificate of Chartered Accountant. Condition No. 10 provides that every bidder will be required to submit his Provident Fund and Employees State Insurance registration along with return of last three months. Since petitioner does not fulfill these conditions, therefore, petitioner has challenged condition No. 6 and 10 of the conditions of contract by the present writ petition. He has also sought mandamus directing the respondents to permit the petitioner to participate in the tender process.

22. After filing the writ petition, petitioner submitted his bids (Technical and Financial) and his Technical Bid was rejected due to non-fulfillment of the conditions specified in Clause Nos. 6 and 10 of the General conditions of contract. According to petitioner, requirement of minimum turnover of `5 crores during the last three financial years is arbitrary and unjust. According to him, in the year 2012, highest price fetched in respect of Baigul Reservoir was `50,50,000/- and similarly for Dhaura Reservoir the highest price fetched was `30,01,000/- in the year 2012. Thus, according to the petitioner, there is no rationale for imposing such condition, which has the effect of restricting competition.

23. According to the petitioner, the endeavour of the Board should be to fetch highest price while settling Fishing Rights and this object is defeated by imposing the condition regarding annual turnover. Learned counsel for the petitioner submits that it is not a works contract or contract for supply of goods, where financial stability of a bidder may be relevant. Thus, according to him, having regard to the nature of activity, the condition regarding annual turnover cannot be sustained.

24. In support of his contention, learned counsel for the petitioner has placed reliance upon a judgment rendered by Hon''ble Supreme Court in the case of Om Prakash Sharma Vs Ramesh Chandra Prashar & others reported in (2016) 12 SCC 632. Para 12 of the said judgment is extracted below:-

"12. In the present case, the site in question was to be sold on outright sale basis. The advertisement or the stipulations therein did not contemplate creation and or continuation of any relationship between the parties calling for continued existence of any particular level of financial parameters on part of the bidder, except the ability to pay the price as per his bid. The condition was not an essential condition at all but was merely ancillary to achieve the main object that was to ensure that the bid amount was paid promptly. The advertisement contemplated payment of bid amount whereafter the sale deed would be executed and not a relationship which would have continued for considerable period warranting an assurance of continued ability on part of the bidder to fulfill his obligations under the arrangement. Nor was this condition aimed at ensuring a particular level of financial ability on part of the bidder, for example in cases where the benefit is designed to be given to a person coming from a particular financial segment, in which case the condition could well be termed essential. The idea was pure and clear sale simpliciter. As a matter of fact, the appellant did pay the entire bid amount within the prescribed period and the sale deed was also executed in his favor. In the circumstances, the relevant condition in the advertisement would not fall in the first category of cases as dealt with by this Court in Poddar Steel Corporation. The authorities could therefore validly deviate from and not insist upon strict literal compliance. The discretion so exercised by the authorities could not have therefore been faulted. Thus, the assessment made by the High Court that the condition in question was an essential condition for non-compliance of which, the bid furnished by the appellant was required to be rejected, in our view was not correct."

25. In my humble opinion, the aforesaid judgment relied upon by the petitioner is distinguishable on facts. In the said case, the site in question was to be sold on outright sale basis and no long-term relationship was to be created between the parties. In the present case, Fishing Rights are granted for a period of five years, therefore, financial stability of a bidder becomes relevant.

26. The justification offered in the counter affidavit filed by respondent is that during in the past, successful bidders who are given contract of Fishing Rights, were unable to complete the entire term of five years, resulting in huge losses to the Board and also in unnecessary delay and wasteful expenditure in re-tendering the work.

27. In the case of Directorate of Education & others Vs Educomp Datamatics Ltd. & others reported in (2004) 4 SCC 19, the Hon''ble Supreme Court repelled challenge to a similar condition by a person, who was unable to meet the condition of annual turnover. Para 12 of the said judgment is extracted below:- "12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called

for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

28. Hon''ble Supreme Court in the case of Central Coalfields Ltd. Vs SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622 has summarized the legal position in para 47 and 48 of the said judgment, which are extracted below:- "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 "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of 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."

29. It is not the case that the condition regarding turnover is being enforced only against petitioner. Since the said condition is applicable across the board to all bidders, therefore, it cannot be termed as mala fide or intended to favour someone.

30. It is settled position in law that award of a contract is commercial activity, therefore, State and its instrumentalities are given more freedom in setting terms and conditions of the tender. An interference is called for only when terms and conditions of the tender are arbitrary, discriminatory, mala fide or actuated by bias, as held by Hon''ble Supreme Court in Michigan Rubber (India) Ltd. Vs State of Karnataka & others reported in (2012) 8 SCC 216.

31. In the case of Siemens Public Communication Networks Private Limited & another Vs Union of India & others reported in (2008) 16 SCC 215, the Hon''ble

Apex Court held as under:- "40. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court''s interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters

relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna."

32. Similarly the condition mentioned in clause 10 of the General conditions of contract, which requires a bidder to submit his Provident Fund and Employees State Insurance registration with return of last three months, has been challenged as unjust and improper. According to the petitioner, without having a minimum number of employees one cannot be registered with Provident Fund and Employees State Insurance. Thus, it is the submission of the petitioner that he does not have the required number of employees, which are needed for registration under Provident Fund and Employees State Insurance. It is the contention of the petitioner that condition No. 10 has been inserted to favour big businessmen from other parts of the country at the cost of local bidders.

33. Respondent has defended condition No. 10 by submitting that fishing is highly labour intensive activity and huge work force is needed for carrying out fishing operations, especially in big reservoirs like Dhaura and Baigul. Therefore, to protect the interest of the labourers and to save them from exploitation at the hands of contractor and also to ensure compliance of different Labour Laws, this condition has been added, which cannot be treated as arbitrary.

34. It is common knowledge that there is a tendency amongst entrepreneurs to under report the number of labourers in any industry/enterprise to avoid statutory liability under different Labour Laws. Therefore, in the opinion of this Court, condition added in Clause 10 of the General conditions of contract by the Board cannot be termed as arbitrary or unjust. In fact, as instrumentality of State, the Board has a duty to ensure strict compliance of various legislations enacted for the benefit of labourers.

35. Petitioner has further contended that respondent has issued another advertisement for settling Fishing Rights over Naukuchiyatal Lake, where there is no such condition regarding annual turnover, and moreover, cooperative societies of fishermen and Mahila Mangal Dal, Nav Yuvak Mangal Dal and fishermen, who are engaged in fishing for the last ten years alone are eligible to participate. Thus, it is the contention of the petitioner that respondent has imposed different conditions in respect of different reservoirs.

36. A careful perusal of the tender notice issued in respect of Naukuchiyatal Lake

indicates that it has been issued by the Directorate of Fisheries, Uttarakhand and not by the Board. The said tender is open only for cooperative societies and self-help groups in terms of the Government policy.

37. Petitioner has not been able to make out any case for interference under Article 226 of the Constitution. The writ petition is liable to be dismissed and is hereby dismissed. No order as to costs. WPMS No. 2243 of 2017

38. By means of this writ petition, petitioner has sought following relief:-

"(a) Issue a writ order or direction in the nature of Mandamus directing the respondent to open the financial bid of the Petitioner and read the draft attached along with it as part of the technical bid."

39. According to the petitioner, his Technical Bid was complete in each and every respect and when he went to submit his bid in the office of Secretary, Fisheries Department, he was unable to drop the envelope containing Financial Bid and Technical Bid in the box due to small size of its mouth. In para 11 of the writ petition, petitioner has stated that on the suggestion of some Officer of respondent No. 2, petitioner separated the envelopes containing Technical Bid and Financial Bid and dropped them in two separate boxes meant for the purpose. According to the petitioner, he subsequently realized his mistake that the bank draft, which was to be submitted with Technical Bid has been enclosed with the Financial Bid. Petitioner''s Technical Bid having been rejected on the ground that it is not accompanied with bank draft, petitioner filed this writ petition.

40. In the counter affidavit filed on behalf of respondent No.2, it is stated that as per condition No. 2 of the main conditions of contract, Financial Bid of only those bidders would be opened whose Technical Bids are found to be in order. Condition No. 3(2) of the main conditions of the contract provides that besides acceptance letter each bidder would be required to submit earnest/security money with his Technical Bid. Condition No. 3 further provides that any Technical Bid, which is not supported by the documents specified in condition No. 3(1) to 3(10) will be treated as non- responsive and shall not be considered. Condition No. 6 provides that the bidder, whose Financial Bid is accepted, will be required to immediately deposit 25% of his bid amount. In

the event, successful bidder does not deposit 25% of the amount of bid then his earnest money/security money shall be forfeited.

41. From the pleadings made in the writ petition it is apparent that petitioner himself is to be blamed for putting earnest money/security money, in the shape of a bank draft, in a wrong envelope. As per the conditions of tender notice, the bank draft was to be submitted with Technical Bid and Financial Bid of only those bidders is to be opened who qualify in the first round of bidding process. Petitioner is trying to shift blame to Officer of respondent No. 2, as is apparent from para 11 of the writ petition. But there is inherent contradiction in the

statement made in para 11 of the writ petition. In the first sentence, it has been alleged that there was only one box to collect bids submitted by the bidders in which the big envelope containing two envelopes, having Technical Bid and Financial Bid, was to be dropped. In the second sentence, however, it is stated that there were two separate boxes for collecting Technical Bid and Financial Bid meaning thereby Technical Bids have to be dropped in one box and Financial Bids have to be dropped in another box. This statement is contrary to the statement made in first paragraph, where it has been stated that there was only one box to collect the bids.

42. Clause 3(2) of the main conditions of contract provides that earnest money/ security money has to be enclosed with the Technical Bid. Clause 5 further provides that earnest money amounting to `2.349 lakh has to be submitted through bank draft of a Nationalized Bank in favour of Secretary of the Board. Thus, submission of bank draft with Technical Bid is an essential condition of the tender document.

43. From the pleadings it is apparent that before visiting the Office of Secretary, Fisheries Department,

petitioner had sealed Technical and Financial Bids in separate envelopes. This indicates that he had kept the bank draft in the envelope containing Financial Bid, before reaching the Office of Secretary, Fisheries Department, as there is no pleading that he opened the envelope containing Technical Bid which led to this mistake. Thus, petitioner alone is responsible for this mistake and any attempt by the petitioner to shift the blame to the Officer of respondent No. 2 does not appear to be correct.

44. Now, the only question falls for consideration of this Court is whether respondent No.2 was justified in rejecting petitioner''s bid due to bona fide mistake on the part of the petitioner.

45. Since submission of Bank draft with Technical Bid is an essential condition of the tender document and without bank draft, a Technical Bid is liable to be rejected, therefore, in my humble opinion, there is no illegality or infirmity committed by respondent No. 2 in rejecting petitioner''s Technical Bid.

46. In a case like present one, where bids are invited in two-bid system, the envelope containing Financial Bid can be opened only when a Technical Bid is declared responsive. In other words, a bidder can go to the second round of bidding process only when he qualifies in the first round. Under no circumstance, Financial Bid of a bidder can be opened before completion of first round of bidding process and if Financial Bid is opened before completion of first round, it would violate secrecy of the bid and shall be treated as serious irregularity.

47. Since validity/responsiveness of the Technical Bid of the petitioner has to be assessed on the basis of documents enclosed with the Technical Bid and any document enclosed with the Financial Bid cannot be read in support of Technical

Bid, therefore in my humble opinion, rejection of petitioner''s bid by respondent No.2 does not suffer from any infirmity or illegality whatsoever.

48. For the aforesaid reasons, the relief sought in the writ petition cannot be granted. The writ petition is liable to be dismissed and is hereby dismissed. No order as to costs. WPMS No.2190 of 2017

49. By means of this writ petition, petitioner has sought following reliefs:- i) Issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to accept the tender of the petitioner for technical and financial bid for the contract of Dhaura Dam situated in Tehsil Kichha, District Udham Singh Nagar/Kumaon Mandal for the financial year 2017-18 to 2021-22 five years period in pursuance of the tender notice dated 04.08.2017 (contained in Annexure No. 1 to this writ petition)

ii) Issue a writ, order or direction in the nature of mandamus calling the record from the office of the respondent no. 1 & 2 and examined the same and set aside the illegal order of rejection.

50. In the present case, petitioner had submitted bid in response to tender notice dated 04.08.2017 for Dhaura Reservoir. Clause No. 5 of the main conditions of contract provided that earnest money has to be deposited through bank draft issued by a Nationalized Bank. Clause 3(2) of the conditions of contract provided that earnest money has to be submitted with Technical Bid. Petitioner submitted earnest money through bank draft which was not issued by a Nationalized Bank but was issued by Axis Bank, which is admittedly not a Nationalized Bank. Therefore, petitioner''s Technical Bid was rejected which led to filing of this writ petition.

51. There is no dispute that the bank draft submitted by the petitioner is not in accordance with the condition contained in Clause No. 5 of the main conditions of contract. Respondent No. 2 is the best person to decide which condition is essential and which condition is relaxable. Scope of judicial review in such matters has been considered by Hon''ble Supreme Court in the case of Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corporation Ltd. & another reported in (2016) 16 SCC 818. Para 15 of the said judgment is extracted below:- "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."

52. Similar view has been expressed by Hon''ble Supreme Court in the case of Central Coalfields Ltd. Vs SLL- SML (Joint Venture Consortium) and others

reported in (2016) 8 SCC 622.

53. Respondent No. 2 has issued the tender notice and has authored the tender document, therefore, he is the best person to understand and appreciate his requirement and also to interpret the document. In the absence of any mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions, this Court must defer to the understanding and appreciation of tender document by respondent No. 2. Merely because the authorities have strictly enforced condition No.6 of the main conditions of contract will not be a sufficient ground for this Court to interfere in the matter. No case of mala fide or perversity in the application of the terms of tender document has been made out in the writ petition.

54. In such view of the matter, there is no scope for interference in exercise of power under Article 226 of the Constitution of India. The writ petition, therefore, is liable to be dismissed and is hereby dismissed. No order as to costs.

WPMS No.1990 of 2017

55. By means of this writ petition, petitioner has sought following reliefs:- i) Issue a writ, order or direction in the nature of certiorari quashing the general condition no. 06 of advertisement dated 04.08.2017 issued by respondent no. 2 (contained as Annexure no. 1 to this writ petition)

56. Petitioner in this case has challenged Clause No. 6 of the General conditions of contract in the tender notice dated 04.08.2017. Clause No. 6 provides that a person who fulfills requirement of minimum turnover of `5 crores during last three financial years alone shall be entitled to participate in the tender process. The said condition has been challenged on the ground that it violates Fundamental Right guaranteed to every citizen under Article 19(1)(g) of the Constitution. It is further contended that this condition restricts competition resulting in loss of revenue to the Board. It is further contended that this condition is contrary to Uttarakhand Procurement Rules 2008.

57. The issue raised in the writ petition is no longer res integra. Hon''ble Apex Court in the case of Michigan Rubber (India) Ltd. Vs State of Karnataka & others reported in (2012) 8 SCC 216 has held that (a) in the matter of formulating conditions of a tender document, greater latitude is required to be conceded to the State authorities (b) 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. In the said judgment, it has further been held in para 23 that no person can claim Fundamental Right to carry on business with the Government.

58. Even otherwise, the right guaranteed under Article 19(1)(g) of the Constitution is not an absolute right. Qualifications, if any, prescribed in a tender notice do not violate the right available to the petitioner under Article 19(1)(g) of the Constitution.

59. In WPMS No. 2060 of 2017 also, condition regarding annual turnover of `5 crores during last three financial years has been challenged and similar arguments against clause No. 6 have been repelled, therefore, for the same reasons, the challenge to clause 6 made in this writ petition is unsustainable.

60. The submission that condition contained in clause 6 of the main conditions of contract is de-hors the Uttarakhand Procurement Rules, 2008 is also without any substance, as the said Rule is not an exhaustive code regarding the conditions which may be inserted in a tender document, and it does not limit the power of the Competent Authority to impose a stringent condition of eligibility in appropriate cases. Moreover, having regard to the scheme and title of the Rules, no definite opinion is being expressed at this stage regarding applicability of the said Rules to the tender process in question.

61. In such view of the matter, the present writ petition is without any force, which is liable to be dismissed and is hereby dismissed. No order as to costs.

62. Let certified copy of this order be placed in all the connected matters.