(2008) 08 RAJ CK 0032

In the Rajasthan High Court

Promuk Hoffman International Ltd. APPELLANT

Vs

State of Rajasthan Ors. RESPONDENT

Date of Decision : 12-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226
Land Acquisition Act, 1894 — Section 6
Motor Vehicles Act, 1988 — Section 109, 113, 41

Citation : (2009) 1 RLW 216

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shanker Asopa, J.—Since common questions of fact and law are involved in these two writ petitions, therefore, both have been clubbed, heard and are being decided together.

2. By S.B. Civil Writ Petition No. 3134/2006, the petitioner has challenged the validity of the order dated 10.4.2006 (Anx. 11) by which the respondent No. 2 has disqualified the petitioner from participating in the financial bid. The petitioner company has prayed for production of the entire record of the said Bid and notice for invitation of bid for High Security Registration Plates (in short ''HSRP'') and quashing of the said order dated 10.4.2006 with the further prayer that the direction be issued to the respondents to treat the petitioner company as qualified and simultaneously allow it to take part in further process of tender. The petitioner company has also prayed that the respondents be restrained from proceeding further in the tender process by awarding the contract to any other party and issuing the Letter of Intent in favour of any party.

3. Briefly stated, the relevant facts of the case are that the petitioner, which is a public limited company, entered into joint venture with M/s. EHA Hoffmann KG and SIEGEM EISS, West Germany and submitted its tender for HSRP, the NIT for which was issued by the respondents on 20.4.2005. It is stated in the writ

petition that the joint venture partner has been into manufacturing and supply of HSRP for almost 40 years and have been operating in more than 30 countries worldwide. The last date for submission of the Bid was 25.5.2005; date for opening of the technical bid was the same date as that of submission of the bids i.e. 25.5.2005 and the validity of the bid was 90 days from the date of opening of the technical bid; the technical bids were opened on 25.5.2005 and the petitioner company was disqualified in the technical bid on 10.4.2006. In between, there was correspondence with the petitioner company which has been placed on record with the further averment that the documents submitted by the petitioner-company with the tender fulfilled the eligibility criteria under Clause 1.6 and Rule 50 of the Rajasthan Motor Vehicle Rules (in short ''the Rules''). The petitioner company has also stated in the writ petition that during the verification as per the check list, the respondents did not find any fault with the petitioner company as well as the bid submitted by it. However, on 6.9.2005 (Anx. 7), the petitioner was informed to explain how it was eligible for the bid as per the requirement of the bid document particularly with regard to the joint venture document executed by the constituent of the petitioner. Reply to the said letter was given on 10.9.2005 (Anx. 8) and no further enquiry was raised with regard to the said issue which clearly revealed that the respondents had accepted the explanation submitted by the petitioner company with regard to the joint venture. Further query was raised by the respondents/Tender Evaluation Committee on 12.9.2005 relating to experience certificates, reply of which was given by the petitioner on 14.9.2005 (Anx. 9) and details along with the desired invoice and translated documents and certificates in order to demonstrate that it has complied with the eligibility criteria pertaining to experience as desired in the bid document. Thereafter, suddenly on 10.4.206, the respondent No. 2 informed the petitioner company about its disqualification in technical bid for HSRP with the further information that the refund order of earnest money deposited by the petitioner along with the bid have also, been issued vide order dated 10.4.2006. Although in the order dated 10.4.2006 no specific reason has been assigned but it is stated in the writ petition that the reason is not fulfilling the experience criteria as required under the tender condition No. 1.6 and Rule 50 of the Rules.

4. By SBCWP No. 3812/2006, the petitioner M/s. Hind Industries Limited, has challenged the validity of the order dated 10.4.2006 (Anx. 4) whereby the petitioner was informed that it was not found qualified in Technical bids and prayed for setting aside the same. The petitioner has also prayed for other ancillary reliefs.

5. The facts, in brief of the aforesaid writ petition, as per the petitioner M/s. Hind Industries Limited, are that pursuant to the NIT dated 20.4.2005 the petitioner submitted its tender for High Security Registration Plates (HSRP) on 25.5.2005. On 6.9.2005 the respondent No. 2 wrote letter, to the petitioner asking to appear the duly constituted Committee on 12.9.2005 on which date the petitioner appeared in person and clarified the queries so made. On 13.9.2005, the petitioner again wrote letter to the respondents communicating them all the

facts. As aforesaid, vide letter dated 10.4.2006, the respondents rejected the technical bid of the petitioner. It is in these circumstances that the petitioner has filed the writ petition.

6. The legal issues on the basis of which the aforesaid relief has been claimed by M/s. Hind Industries Limited (SBCWP No. 3812/2006) are common, therefore, there is no need to reiterate the same again by dealing with this particular case.

7. The respondents have filed reply to the writ petition and referred to the amended Rule 50 of the Rules, Motor Vehicles (New High Security Registration Plates) Order, 2001 (in short ''Order 2001'') purported to be issued in exercise of the powers under Sub-section (3) of Section 109 of the Central Motor Vehicles Act, 1989; the guidelines dated 6.3.2002 and the mandatory requirement of the tender condition 2.19.2 to substantiate their submission stated in the reply that the petitioner company was not found to be technically qualified in evaluation process as it was not fulfilling the experience of working in the field of high security registration plates in minimum number of four countries having used at least one of the security features as mentioned in Rule 50 of the Rules and Order, 2001. Otherwise, also, the experience certificates were not duly issued by the user agency/authority in English language. The respondents have also stated in their reply that the certificates of Pakistan, Russia, Germany, Israil and Estonia were not in conformity with the aforesaid mandatory requirement and the certificates of Malta and Peru were found in order. The mandatory requirement of the tender condition No. 1.6 is that the experience certificate should have been given by the user agency/authority of at least four countries whereas the petitioner company was having experience certificates from two countries only.

8. It would be relevant to mention here that during the pendency of the writ petition, the Letter of Intent was issued on 24/25th April, 2006 in favour of Shimnit Utsch India Pvt. Ltd. (in short ''M/s. SHIMNIT UTSCH'') and an application under Article 226 of the Constitution of India read with Order 1 Rule 10 CPC was filed by the said Shimnit Utsch for impleadment. However, Shimnit Utsch was allowed to intervene in the matter. It is also further relevant to mention here that the tender process has not been finalized by awarding contract in favour of the Intervener because of the pendency of this writ petition.

9. Submission of Mr. Paras Kuhad, counsel for the petitioner company, is that the impugned order dated 10.4.2006 of holding the petitioner company disqualified for the technical bid is a non-speaking order and further no reason for rejection of the aforesaid bid is available on the record. As regards the experience certificate, the condition was not mandatory and it was open for the respondents to negotiate with the petitioner company which was done to a certain extent but subsequently on the basis of the non-fulfillment of the requirement of experience-certificate, which is not mandatory in nature, the petitioner company has been arbitrarily and unlawfully disqualified from participating in the financial bid.

10. After intervention of Shimnit Utsch, counsel for the petitioner company has

further developed his submission that the petitioner company has been disqualified with a view to favour Shimnit Utsch which was even disqualified for submission of the tender on account of conviction of the Director for serious offence of man''s slaughter although the said judgment was subsequently reversed but in the SLP filed by the State, leave has been granted and that too, on higher rate. Therefore, the tender of Shimnit Utsch ought to have been out rightly rejected. Mr. Kuhad has further submitted that the principles of natural justice have not been followed in this case by not granting an opportunity to the petitioner company to further clarify the experience certificate submitted by it. Lastly, Mr. Kuhad has submitted that the Court has orally called for the record and therefore, he may be allowed to inspect the record and then allow him to re-argue the case. In support of the aforesaid submission, counsel for the petitioner has placed reliance on the following judgments:

(A) ARBITRARINESS IN GOVERNMENT ACTIONS

1. Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,

2. Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,

3. New Horizons Limited and Another Vs. Union of India (UOI) and Others,

4. Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,

5. The Consumer Action Group and Another Vs. State of Tamil Nadu and Others,

6. Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,

7. Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others,

8. Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc.,

Assistant Collector of Customs Vs. Charan Das Malhotra,

10. Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal,

11. State of Orissa Vs. Dhaniram Luhar,

12. Indian Railway Construction Co. Ltd. Vs. Ajay Kumar,

13. Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.,

14. Workmen of Meenakshi Mills Ltd. and Others Vs. Meenakshi Mills Ltd. and Another,

15. Association of Registration Plates Vs. Union of India (UOI) and Others,

16. Bombay Dyeing and MFG. Co. Ltd. v. Bombay Environmental Action Group and Ors. Civil Appeal No. 1519/2006 SLP (Civil) No. 23040 of 2005 Decided on 7.3.2006.

17. Dove Investments Pvt. Ltd. and Others Vs. Gujarat Industrial Inv. Corporation Ltd. and Another,

18. J.P. Srivastava and Sons Pvt. Ltd. and Others Vs. Gwalior Sugar Co. Ltd. and Others,

19. Thakur Pratap Singh Vs. Shri Krishna Gupta and Others,

20. Sharif-ud-din Vs. Abdul Gani Lone,

21. Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others,

22. Laxmi Sales Corporation Vs. Bolangir Trading Company and Others,

23. Gammon India Ltd. and Others Vs. Union of India (UOI) and Others,

24. The Ahmedabad St. Xavier''s College Society and Another Vs. State of Gujarat and Another,

25. S. Shanmugavel Nadar Vs. State of Tamil Nadu and Another,

26. Hemalatha Gargya Vs. Commissioner of Income Tax, A.P. and Another,

27. Gaon Sabha and Another Vs. Nathi and Others,

28. R.K. Jain Vs. Union of India and Others,

29. People''s Union for Civil Liberties and Another Vs. Union of India (UOI) and Others,

(b) Right of Inspection of Record in Court

(1) S.P. Gupta Vs. President of India and Others,

(2) R.K. Jain Vs. Union of India and Others,

(3) People''s Union for Civil Liberties and Another Vs. Union of India (UOI) and Others,

(4) Rambhotla Ramanna by power of Attorney holder, T.V. Ramanujarao Vs. Government of Andhra Pradesh and Others,

11. Submission of learned Advocate General is that the petitioner company was not fulfilling the mandatory requirement of tender condition No. 1.6.6 and Rule 50 of the Rules regarding having experience certificates of four countries given by the user agency/authority. Although the principles of natural justice are not applicable even in case of desirable condition of the tender but keeping in view the principles of justness and fairness in the process, sufficient opportunity was given to the petitioner to prove that they fulfilled the eligibility but the eligibility conditions were not fulfilled. Otherwise also, the Tender Evaluation Committee has also considered the documents of experience submitted by the petitioner company, still the mandatory conditions were not fulfilled. Therefore, there was

nothing wrong in disqualifying the petitioner. In support of his submissions, learned Advocate General has placed reliance on the following judgments:

1. Association of Registration Plates Vs. Union of India (UOI) and Others,

2. Promuk Hoffman International Ltd. v. State of Goa and Ors. Writ Petition No. 432/2005 decided on 14.2.2006 by the High Court of Bombay at Goa.

12. Mr. A.K. Sharma has supported the submissions made by the learned Advocate General and further submitted that Shimnit Utsch, the intervener, is fully qualified as per the eligibility clause. One of the Directors of the Intervener Company Mr. Nitin Shah was convicted on 3.7.2006 and the date of notification providing disqualification of conviction is 12.6.2006 but before that the entire process was completed by issuing Letter of Intent on 24/25th April, 2006 and consequential orders were to be issued. The said conviction was set aside in appeal and Nitin Shah was acquitted on 22.2.2007. Therefore, the said conviction dated 3.7.2007 which was not the disqualification on the day of NIT i.e. 25.5.2005; date of opening of the financial bid i.e. 10.4.2006 and issuance of Letter of Intent i.e. 24/25th April, 2006 and is of no consequence. Otherwise also, the said conviction has been set aside and the Director Nitin Shah has been acquitted. Therefore, the same cannot be made the basis even for withdrawal of the Letter of Intent. Counsel further submits that the intervener company has been rightly awarded the contract.

13. I have gone through the record of the writ petition and further considered the rival submissions of counsel for the parties and the Intervener.

14. I have also gone through record of the tender proceedings produced by the respondents before me and am of the view that the ground of rejection of the technical bid of the petitioner referred in the reply to the writ petition and mentioned in the record are the same. All the relevant tender documents/other correspondence/documents have been produced by the parties and the Intervener, therefore, there is no need to even refer the record in detail except recommendation of Tender Evaluation Committee.

15. Before dealing with the submissions of counsel for the parties, with reference to the citations on relevant legal issues, it would be worthwhile to quote the relevant provisions of law.

16. Relevant portion of Rule 50 of the Central Motor Vehicle Rules, 1989 amended on 28.3.2001 and further amended on 24.9.2001 and 21.1.2004 w.e.f. 1.1.2004, is as follows:

Amended Rule 50 of the Rules, 1989 as on 1.1.2004.

50. Form and manner of display of registration marks on the motor vehicles.-(1) On or after commencement of this rules, the registration mark referred to in Sub-section (6) of Section 41 shall be displayed both at the front and at the rear of all motor vehicles clearly and legibly in the form of security license plate of the

following specifications, namely:

(i) the plate shall be a solid unit made of 1.0 mm aluminium conforming to DIN 1745/DIN 1783 or ISO 7591. Border edges and corners of the plate shall be rounded to avoid injuries to the extent of approx. 10 mm and the plates must have the an embossed bordei. The plate shall be suitable for hot stamping and reflective sheet has to be guaranteed for imperishable nature for minimum five years. The fast colouring of legend and border to be done by not stamping;

(ii) The plate should bear the letters ''IND'' in blue colour on the extreme left center of the plate. The letter should be one fourth of the size of letters mentioned in rule 51 and should be buried into the foil or applied by hot stamping and should be integral part of the plate; (iii) each plate shall be protected against counterfeiting by applying chrominum-based hologram, applied by not stamping. Stickers and adhesive labels are not permitted. The plate shall bear a permanent consecutive identification number of minimum seven digits, to be laser branded into the reflective sheeting and hot stamping film shall bear a verification inscription;

(iv) apart from the registration marks on the front and rear, the third registration mark in the form of self-destructive type, chromium based hologram sticker shall be affixed on the left hand top side of the windshield of the vehicle. The registration number, registering authority etc. shall be printed on the sticker. The third registration mark shall be issued by the registering authorities/approved dealers of the licence plates manufacturer along with the regular registration marks, and thereafter if such sticker is destroyed it shall be issued by the licence plate manufacturer or his dealer;

(v) the plate shall be fastened with non-removable/nonreusable snap lock fitting system on rear of the vehicle at the premises of the registering authority;

The licence plates with all the above specifications and the specified registrations for a vehicle shall be issued by the registering authority or approved the licence plates manufacturers or their dealers. The Central Road Research Institute, New Delhi or any of the agency authorised by the Central Government shall approve the licence plates manufactures to the above specifications.

(vi) the size of the plate for different categories of vehicles shall be as follows:

For two and three wheelers 200 ? 100 mm For light motor vehicles/ passengers cars 340 x 200 mm For medium commercial vehicles heavy commercial vehicles and Trailer/combination 340 x 220 mm

[Provided that this sub-rule shall apply to already registered vehicles two years from the date of commencement.

Provided further that the size of the registration plates for agricultural tractors shall be follows:

Front 285 x 45 mm Rear 200 x 100 mm]

(2) In the case of motor cycles the registration mark in the front shall be displayed parallel to the handle bar on any part of the vehicle including mudguard facing the front instead of on a plate in line with the axis of the vehicle].

Provided that-

(a) the registration mark exhibited at the rear of a transport vehicle shall be affixed to the vehicle on the right hand side at the distance not exceeding one meter from the ground as may be reasonably possible having regard to the type of the body of the vehicle;

(b) the registration mark shall also be painted on the right and left side on the body of the vehicle in the case of a transport vehicle;

(c) the registration mark shall also be painted and exhibited on the partition provided between the driver and the passengers, facing the passengers seats or, where there is no such partition, on the front interior or the vehicle near the roof to the left side of the driver''s seat facing the passengers seats in the case of a stage carriage or a contract carriage and in the case of a motor cab or a taxi cab it shall be sufficient if the registration mark is painted on the dash board.

(d) the letters of the registration mark shall be in English and the figures shall be in Arbic numerals and shall be shown-

(A) in the case of transport vehicles in Black colour on Yellow background; and

(B) in other cases, in Black Colour on White background;

the registration mark on the trailer shall be exhibited on the left hand side in Black colour on yellow background. In addition, the registration mark on the drawing vehicle shall be exhibited on the trailer also and this shall be done on the right hand side at the rear of the trailer or the last trailer as the case may be, in Black Colour on retro-reflective type Yellow background;

Provided that where provisions of this clause have not been complied with in respect of motor vehicles, on or before the commencement of the Central Motor Vehicles (8th Amendment) Rules, 2001, then the provisions shall be complied with,-

(i) in respect of transport vehicle, on or before 1st February, 2002;

(ii) in other cases, on or before 1st July, 2002]....

17. For notifying certain standards in respect of the new system of high security registration plates for motor vehicles and the process used by a manufacturer or vendor for manufacturing or supplying such plates with reference to the amendments made in the Central Motor Vehicle Rules, 1989 by the Central Motor Vehicles (1st Amendment) Rules, 2001, in exercise of powers conferred by Sub-section (3) of Section 109 of the Motor Vehicles Act, 1988, the Centered Government has framed the Motor Vehicles (New High Security Registration

Plates) Order, 2001.

18, The tender is in five Part-Section-I relates to Instructions to the Bidder, Section II relates to Preparation of the Bid, Section III relates to Scope of work, Section IV relates to the terms and conditions and Section V relates to the specifications of the HSRP and then Annexures.

19. To decide the present controversy, Section-I and Section II are relevant. The relevant conditions 1.2.4; 1.6.6; 2.3.1 and 2.19.2 of Section I of the notice inviting tender for high security registration plates are as follows:.

1.2.4 Since High Security Registration Plate has been introduced by the Ministry of Shipping, Road Transport and Highways, Department of Road Transport and Highways, Department of Road Transport and Highways, Government of India as a highly sensitive product for detection and prevention of crime, to check counterfeiting and duplication of Registration Plates by incorporating high security features. It is therefore, intended to select a manufacturer who would have the required experience, expertise and exposure for such complex work in India and/or abroad, so that the security objective of the scheme is not diluted or vitiated. The scheme encompasses strictest adherence to High Security features and imposes accountability on the successful bidder.

1.6.6 The bidder should have experience of working in the field of High Security Registration Plates in a minimum number of four countries having used at least any of the security features as mentioned in Rule.50 of the Central Motor Vehicles Rules, 1989 i.e.-

(i) Permanent Consecutive Identification Number to be laser branded into the reflecting sheeting.

(ii) Chromium Based Hologram applied by hot stamping

(iii) Chromium based self destructive type third registration mark hologram

sticker.

(v) Hot stamping film bearing a verification inscription.

(v) Non removable/Non usable Snap lock fitting system.

The bidder shall submit experience certificate duly issued by the user agency/ authority in English language only (duly authenticated). If the original certificates issued by user agency/authority in other than English language, then authenticated English version of the certificate shall be submitted along with the copy of original certificates.

2.3.1. Application on the letter head of the bidder as per Annexure III accompanied with enclosure Annexure IV to Annexure X as per list given below.

List of Annexures IV to X General Information Annexure IV Structure and Organisation Annexure V Details of Participation in the Joint Venture Annexure VI

Details of Turn Over Annexure VII Experience Record in the field of High Security Registration Plates Affidavit Annexure IX Undertaking Annexure X 2.19.2. Mandatory Requirements

(i) Following documents/annexures/certificate are mandatorily required with the technical bid:

1. Application in Annexure III.

2. Valid type approval certificate.

3. Experience Certificates of bidder duly issued by user agencies in the field of High Security Registration Plate for at least any one of the security features as per Clause 1.6.6 along with Annexure VIII.

4. Turn over in Annexure VII (Clause 1.6.4) along with the Certificate issued by Chartered Accountant in proof thereof.

5. Non interest bearing earnest money deposit amounting to Rs. 50.00 lac (Rupees fifty lac) only in the form of Banker''s Cheque/demand draft in favour of the "Transport Commissioner, Rajasthan" payable at Jaipur (Clause 2.3.2).

6. Bank Solvency Certificate equivalent to Rs. 50.00 Crores (Rupees fifty crores) issued by the Banker in favour of the bidder (Clause 2.3.5).

7. Copy of Income Tax return bearing Pan Number submitted to the Income Tax Officer of the concerned Circle for the previous financial year i.e. 2003-2004 (Clause 2.3.14.).

(ii) In case of any one of the above required document is not submitted/ furnished/attached by the bidder together with the Technical Bid or does not meet the requirement of the bid, bid shall be summarily rejected without asking for any clarification and without affording any opportunity for submission any of the above document/annexure/certificate. The bidder shall not be considered eligible for opening of Financial Bid. No document/annexure/certificate/in any case and under any circumstances shall be accepted after submission of bid.

(iii) Photo copy of any document shall be acceptable if attested by the person who is authorised to sign the bid document except where the attestation by gazetted officer is required in the bid document. In case of detection of any forgery, than the bid shall be summarily rejected and EMD shall be forfeited and department will also resort to legal action against the bidder.

20. Ministry of Road Transport and Highways, Government of India had called a meeting of the Secretaries (RT&H) of all the State and the minutes of the same were circulated on 6.3.2002 to frame certain guidelines to be included in the NIT. As regards, the present controversy of experience is concerned, Guideline No. 10 is relevant. The covering letter dated 6.3.2002 and Guideline No. 10 read as follows:

Government of India

Ministry of Road Transport and Highways

No. RT-1102S/3/2000-INVL

Dated 6th March, 2002

To

The Transport Secretaries/Transport Commissioners of all States UTs. Subject: Minutes of the meeting held by Secretary (RT&H) on 3.3.2002 at 10.30 hours regarding instruction of High Security Registration Plates for Motor Vehicles and other issues. Sir/Madam,

I am directed to enclose herewith a copy of aforesaid minutes for information/ necessary action. Further, as discussed in the said meeting, a copy of suggestive guidelines to help States in preparing a notice inviting tenders (NIT) documents is also enclosed for consideration.

Yours faithfully,

(Virendra Singh)

Under Secretary to the Govt. of India

Tele: 0113711472

Encl. As above

Copy with enclosure also to:

1. Home Secretary, Government of Tamil Nadu, Chennai,

2. Director, ARAI/Director (CRRI)/Director (VRDE).

Guidelines dated 6.3.2002

1. to 9....

10. The bidder must furnish proof of past experience/expertise in this area or proof of the same in respect of the collaborator. 11....

21. Before proceeding to deal with the submissions of the parties, it would be appropriate to consider the scope of judicial review in contractual matters which includes N.I.T. in the matter of supply of HSRP.

22. This Court had an occasion to consider the law of the Apex Court on the subject of judicial review in Cobra Instalaciones Y Servicios, S.A. (Asian Regional Ltd. (SBCWP No. 697/2008 decided on 8.4.2008) whereby the writ petition was dismissed on the ground that for essential conditions, no negotiation is permissible, while following the judgment of Apex Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others,

23. Paras 31 and 48 of the judgment dated 8.4.2008 in Cobra Instalaciones (supra) read as follows:

(31) The principles deduced from the above decision so far as made applicable in the present case are as follows:

1. The modem trend points out to the judicial restraint in administrative action and the Court does not sit as a Court of appeal but merely review the manner in which the decision was taken.

2. The Government or Corporation or the Government company have freedom of contract but a reasonable, just and fair procedure is to be adopted. The said principles have been referred in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, Tata Cellular (1994) 6 SCC 651 and Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,

3. The Court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

4. The qualifications referred in the tender, which is usually of two parts, are essential as well as desirable. For essential condition, no negotiation is permissible as observed in BSN Joshi (supra). However, the authorities concerned may negotiate in respect to desirable condition.

5. Where the decision has been taken purely in public interest, the Court ordinarily should exercise the judicial restraint.

(48) It is an admitted case of the petitioner company that they were called to remove the short comings and the same were removed but the case of the respondent is that Clause 3.2(i) was an essential condition, therefore, the negotiations were not permissible and the respondent has also not negotiated with M/s. Tata Projects, Hyderabad and M/s. Techno-Electric and Engg. Co. Kolkata on this Clause 3.2(i). The Supreme Court in the case of BSN Jodhi (supra) has held that no negotiation for essential condition is permissible, therefore, the respondent has not acted arbitrarily or discriminatorily or in unjust and unfair manner while not calling the petitioner company to negotiate on Clause No. 3.2(i).

24. High Court of Bombay at Goa has occasion to consider many of the judgments referred in Cobra Instalaciones (supra) and reached to the similar conclusion on the issue of judicial review. Paras No. 9 and 10 of the judgment of the Bombay High Court at Goa in Promuk Hoffman International Ltd. (supra) read as under:

9. The law on the point of scope of judicial review in tender matters is well settled. The Apex Court in the matter of Air India Ltd. v. Cochin International Airport Ltd. and Ors. reported in (2002) 2 SCC 617 , after taking note of the fact that the law relating to the award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government had been settled by the decision of the Apex Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, ,

Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , Tata Cellular v. Union of India (1994) 6 SCC 651 , Ramniklal N. Bhutta and another Vs. State of Maharashtra and others, and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , held that:

...the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by Mala fides, unreasonableness and arbitrariness. 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 power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

10. While dealing with the subject of judicial review of a decision of public authority, the Apex Court taking note of the Wednesbury''s principles of reasonableness, as was propounded in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, reported in 1947 (2) All ELR 680, it was held as under:

(1) It is open to the Court to review the decision-maker''s evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes.

25. In the matter of NIT for supply of HSRP there are two judgments out of which one is in the writ petition filed by the petitioner Promuk Hoffman in the High Court of Bombay at Goa wherein the experience issue has also been considered (i) Association of Registration Plates Vs. Union of India (UOI) and Others, and (ii) Promuk Hoffman International Ltd. v. State of Goa and Ors. Writ Petition No. 432/2005 decided on 14.2.2006 by the High Court of Bombay at Goa) relating to the dispute concerning terms and conditions of the NIT for supply of HSRP.

26. As regards HSRP, paras No. 11, 12 and 13 of the judgment of Bombay High Court at Goa in Promuk Hoffman International Ltd. (supra) wherein the Court has considered rejection of the tender of the petitioner company on two grounds - (i) that the petitioner did not disclose the required information regarding partnership with foreign company for manufactures of HSRP with necessary

details and clarity; and (ii) necessary certificates regarding work experience in the security features were not as per the requirement of tender notice. In the instant case, the first ground is not relevant. However, second ground is relevant. Paras 23, 26 and 27 of the judgment of Bombay High Court at Goa in Promuk Hoffman International Ltd. (supra) are as under:

23. As already observed above, the Promuk Hoffman''s tender has been rejected on the two grounds, firstly that the annexure VIII discloses participation of joint venture in the bid, but the relevant columns in the Annexure XII regarding information of the partners in the joint venture are left blank. The agreement between the Promuk Associates and M/s. EHA Hoffman KG, a German Company, submitted along with the tender documents discloses a joint venture between those companies for manufacture and supply of high security vehicles licence plates among other items. Being so, the annexures lack clarity about the participation and details about the role of foreign company for manufacture of high security licence plates. The said decision also relates to the absence of legal document in support of the claim relating to financial support for the expenditure of Promuk Hoffman by United Telecoms Limited in the manufacture and supply of the required product. 26. As regards the second ground of the decision for rejection of the bid of Promuk Hoffman, it relates to certificate of experience and absence of experience in all the categories of security features in terms of the requirement of tender document. The relevant clause in that regard in the tender document is to be found under clause 1.4.3 which provided that the bidder should have sufficient experience in the field of Security Registration Plates and should have been working in at least five countries for licence plates and in a minimum of three countries with licence plates having security features worldwide and the necessary credentials from the Government of such Country was required to be attached and Annexure XIII was required to be filled up. In other words, the bidder was required to have experience in the field of security registration plates while having work experience at least in five countries for licence plates and in minimum of three countries in relation to licence plates having security features. The experience in that regard had to be supported by the credentials issued by the Government of the concerned country, besides the Annexure XIII was required to be filled up with necessary information regarding work experience in security features. Clause nowhere. made any exception nor granted and exemption from the experience in relation to any particular category. The Annexure XIII to the tender document clearly reads thus:

Experience record in the same field

Name of the Bidder/JV.... .... Section ''A'' A. Name of Countries where the bidde/partner in Joint Venture has worked/working. Sr. No. Name of Country (To be Tilled, by Bidder) 1. 2. 3. 4. 5. Necessary proof in support of the work should be attached to this Annexure. Section-B

A. Details of countries where the bidder/its constituent partner has worked/been working for Security Registration Plates with Security Features (features notified by the Ministry of Road Transport & Highways, Govt. of India).

_ Security Country-1 Country-2 Country-3 Country-4 Country-5 Features _____

Laser Branded Permanent Consecutive Identification-Number _______________ Chromium Based Hologram _______________ 3rd Licence Plate Sticker _______________ Hot Stamping Foil with verification inscription _______________

Necessary proof in support of the work should be attached to this Annexure.

27. Apparently, the Annexure XIII has two sections. Section A and Section B. Section A relates to the list of countries where bidder or his partner in joint venture has worked or has been working and it should disclose such work experience in minimum five countries. Section B relates to the details of the countries where the bidder or its constituent partner has worked or has been working for Security Registration Plates with Security Features (features notified by the Ministry of Road Transport & Highways, Government of India). The columns thereunder enumerate four categories on security features viz., (i) Laser Branded Permanent Consecutive Identification Number, (ii) Chromium Based Hologram, (iii) 3rd Licence Plate Sticker, and (iv) Hot Stamping Foil with verification inscription. There are five columns for each country. However, the requirement under clause 1.4.3 discloses that the bidder or its partner should have work experience in at least five countries for licence plates and in minimum of three countries with licence plates having security features worldwide and all this information was required to be disclosed in the Annexure XIII appended to the tender document. In other words, though the work experience in minimum three countries with licence plates having security features worldwide was sufficient, such work experience had necessarily to be in all the four categories of security features. It was not left to the discretion of the bidder to have experience in either one, two or three categories of security features. Though the work experience in three countries in relation to the licence plates having security features was sufficient, the provision comprised under clause 1.4.3 read with the Annexure XIII nowhere discloses that the work experience in any three of the categories would be a sufficient compliance of the said provision. On the contrary, the Clause 1.4.3 specifically states that the Annexure XIII is required to be filled in relation to the work experience and Section B of Annexure XIII discloses requirement of such experience in all the four categories of security features. It was obvious that the bidder or his partner was required to have worked or had been working in all four categories of security features. Undoubtedly, such work experience in four categories could have been in three

different countries. It was not necessary that in each category, it was required to have experience in three countries. But though work experience could have been in three countries, at the same time, the experience of work in all four categories of security features was must and that is what is apparent from the clause 1.4.3 read with the Annexure XIII. It is an essential condition of the tender document. Here again, one is remanded of the observations of the Apex Court in Association of Registration Plates'' case (supra) to the effect that the Central Government on recommendation of its Technical Committee has devised a system of high security registration plates which will ensure public safety and security and further the relevant part of Rule 50 of the Central Motor Vehicles Rules, 1989 which had been transcribed in the said decision of the Apex Court. Considering the same, the contention on behalf of the petitioners that the work experience in any three countries irrespective of whether that such work experience is in two, or three or four categories would be sufficient compliance of tender conditions cannot be accepted, and therefore, no fault can be found with the second reason disclosed in the decision of the Committee for rejection of the bid of the Promuk Hoffman.

27. In Cobra Instalaciones (supra) some of the judgments cited by the counsel for the petitioner and the respondents have been considered along with other judgments on the issues raised in this writ petition also and the principles on the basis of the aforesaid judgments have been deduced in paras No. 31 and 48. It is now well settled that in contractual matters, the principles of natural justice are not applicable and interference is made in case of arbitrariness in the decision making process and not the decision itself. Therefore, there is no need to discuss each "and every judgment. Reference of these judgments has been given in Paras 6 to 12 of Cobra Instalaciones (supra). Reference of the said judgments along with relevant paragraph numbers is as follows:

1. Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,

2. Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr,

3. Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

4. Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others,

5. Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

6. Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,

7. Tata Cellular v. Union of India (1994) 6 SCC 651 (Paras 74 and 75).

8. LIC of India and Another Vs. Consumer Education and Research center and

Others,

9. Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.,

10. Subhash Projects and Marketing Ltd. Vs. West Bengal Power Development Corporation Ltd. and Others,

11. Association of Registration Plates Vs. Union of India (UOI) and Others,

12. B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others,

28. However, it would be appropriate to discuss other relevant judgments cited by the counsel for the petitioner on the aforesaid issue.

29. In The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, it has been held that the reasons must be recorded for exercise of the power even if the statute does not expressly enjoin upon the authority to do so. The said case relates to the town planning under the TN Town and Country Planning Act, 1971, which is a statutory enactment by the State Legislature wherein the statute required to act in a particular manner before passing order u/s 113 of the said Act. Although the Section was silent, but still the Court has held that recording of the reasons is necessary. Relevant portion of para 29 of the aforesaid judgment is as under:

Application of mind of such authority at that point of time could only be revealed when the order records its reasons. Even if the section is silent about recording of reasons, it is obligatory on the Government while passing orders u/s 113 to record the reasons. The scheme of the Act reveals that the Government is conferred with wide-ranging power. In a given case, where a new development in a rural or urban area may be required urgently and provisions under the Act and Rules would take a long procedure, it may in exercise of its exemption power exempt some of the provisions of the Act and Rules to achieve the development activity faster or in a given case, if any hardship arises by following or having not following the procedure as prescribed, the power of exemption could be exercised but each of these cases would be for furtherance of the development of that area.

In the aforesaid judgment, no law has been laid down that the communication of the reasons is necessary.

30. In the present case, the contract will not be governed by any statute. However, the principle of arbitrariness has been inducted by interpreting Article 14 of the Constitution of India, therefore, the existence of the reason is necessary but communication thereof is not necessary.

31. In Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others, the issue was with regard to the recording of reasons while issuing the declaration u/s 6 of the Land Acquisition Act wherein also it has been held that the declaration need not contain reasons. Relevant portion of para 28 of the

same reads as follows:

Although assignment of reasons is the part of principles of natural justice, necessity thereof may be taken away by a statute either expressly or by necessary implication. A declaration contained in a notification issued u/s 6 of the Act need not contain any reason but such a notification must precede the decision of the appropriate Government. When a decision is required to be taken after giving an opportunity of hearing to a person who may suffer civil or evil consequences by reasons thereof, the same would mean an effective hearing.

32. In Dove Investments Pvt. Ltd. and Others Vs. Gujarat Industrial Inv. Corporation Ltd. and Another, the issue of forged affidavit has been dealt with in para 29 for the reason that the stamp on which the affidavit was sworn was purchased subsequent to the date of swearing. The relevant para 29 reads as under:

Although as a rule, trustees must execute the duties of their office jointly, this general principle is subject to the following exceptions, when one trustee may act for all: (1) where the trust deed allows the trusts to be executed by one or more or by a majority of trustees, (2) where there is express sanction or approval of the act by the co-trustees; (3) where the delegation of power is necessary; (4) where the beneficiaries competent to contract consent to the delegation; (5) where the delegation to a co-trustee is in the regular course of the business; (6) where the co-trustee merely gives effect to a decision taken by the trustees jointly.

33. Here, in the instant case, relevancy of the said judgment has been shown to the fact of conviction of one of the Directors on 3.7.2006 whereas the process was completed by issuing Letter of Instant on 24/25th April, 2006 and the notification of disqualification was issued on 12.6.2006. Since M/s. Shimnit Utsch was qualified on the date of opening of the technical bid, financial bid and the Letter of Intent, subsequent notification will also not result in withdrawal of the Letter of Intent more particularly in view of acquittal dated 22.2.2007.

34. Supreme Court in Laxmi Sales Corporation Vs. Bolangir Trading Company and Others, has occasion to consider the terms and conditions of the tender and held that there are certain conditions which are mandatory in nature by considering the language of the same. Paras 13 and 14 of the same are as under:

12. We have heard the argument of the earned Counsel for the parties and perused the record. In our opinion, the High Court was not justified in coming to the conclusion that production of the documents mentioned herein above along with the tender form was not mandatory and the High Court was also not justified in coming to the conclusion that neither the rules and conditions governing the tender nor the advertisement calling for tender made it mandatory for an intending tenderer to produce those documents and specially proof of turnover for the relevant year 2001-02. We have already noticed from the various conditions in the tender form and annexures annexed thereto that

production of supporting documents wherever applicable in Annexure I & J was one of the requirements of the tender and Annexure J specifically required at Sl: No. 7 the proof of turnover of the firm over the last two relevant years with supporting documents. The same annexure also required the tenderer to produce proof of work experience for the last two years with full details and supporting documents and the checklist had specifically mentioned that the production of proof of turnover with latest profit and loss account dully certified by a Chartered Accountant was a mandatory requirement.

13. In this background we are unable to accept the finding of the High Court that there was no mandatory requirement of the production of the above documents. As a matter of fact the High Court erred in coming to the conclusion in para 6 of its judgment, in the writ petition that "the advertisement in Annexure-1 to the writ petition only states that for Bolangir-Bhawanipatna, a tenderer must have a turnover of Rs. 25 lakhs, but it does not anywhere state that audited profit and loss account has to be submitted by a tenderer showing a turnover of Rs. 25 lakhs". This finding of fact as noticed by us herein above is contrary to records and is an error apparent on face of the record.

35. The principles of natural justice are not to be followed by giving further opportunity to the tenderer for making the deficiency good or to allow him to produce other tender documents in case of essential/mandatory requirements. In the instant case, there is a clear mention in Clause 2.19.2. (ii) that in case of any one of the above required document is not submitted/furnished/attached by the bidder together with the Technical Bid or does not meet the requirement of the bid, bid shall be summarily rejected without asking for any clarification and without affording any opportunity for submission any of the above document/ annexure/certificate with the further mention that the bidder shall not be considered eligible for opening of Financial Bid, and that no document/annexure/ certificate in any case and under any circumstances shall be accepted after submission of tender. Therefore, the case is to be examined whether the petitioner fulfilled the eligibility under Clause 1.5.6 according to which the bidder should have experience of working in the field of High Security Registration Plates in a minimum number of four countries having used at least any of the security features as mentioned in Rule 50 of the Rules of 1989.

36. Here in the instant case considering the nature of the language of the tender conditions, more particularly, Condition No. 2.19 it would reveal that no negotiation was permissible with regard to Clause 1.6.6 as the said conditions are mandatory and non fulfillment of the same will make the tender liable to be rejected without affording any opportunity for submission of any other document.

37. The present case is slightly different from Goa case for the reason that in the instant case, the column of experience are not blank but the case of the petitioner is that it fulfilled the mandatory requirements of having ofte of the salient features of HSRP a mentioned in Condition No. 1.6.6 in respect of more than four countries as required by Condition No. 2.19.2 whereas case of the

respondents is that out of the seven countries, four countries experience certificates namely of Pakistan, Russia, Germany, Israil and Estonia the same were not as per the requirement of mandatory conditions whereas the certificates of Malta and Peru were found in order. Therefore, the case is to be examined from the aforesaid angle. The details of the five countries-Pakistan, Russia, Germany, Israil and Estonia as considered by the Tender Evaluation Committee are as under:

1. Pakistan

Consulate General of Pakistan, Frankfurt has issued experience certificate to EHA Hoffmann for supply of HSRP whereas department has asked certificate to be issued by user agency. Consulate General of Pakishan, at Frankfurt cannot be a user agency. This certificate cannot be considered proper and sufficient.

2.Russia

Russia-Original copy and translated copy bears different numbers i.e. 203 and 204 respectively both these copies are issued on 5.3.2003. Therefore, not acceptable.

3. Germany

Germany-Experience regarding any security feature not available.

4. Israel

Israel-Security feature in experience certificate is mentioned as Hot Stamping process whereas department has asked for hot stamping film bearing a verification inscription.

5. Estonia

Estonia-Security feature in experience certificate is mentioned as Hot Stamping process whereas department has asked for hot stamping film bearing a verification inscription.

38. Details of the other two countries i.e. Malta and Peru of which the experience certificates were found in order, are as follows:

1. Malta

Malta-Chromium Hologram.

2. Peru

Peru- (1) Chrom Hologram (2) Laser branded unique serial number

39. Further submission of Mr. Kuhad with regard to the user agency/authority of Pakistan and the certificates of other four remaining countries, which are said to be lacking the mandatory requirements cannot be made the subject matter of evaluation by the writ court unless the same is arbitrary and mala fide. Here, in

the instant case, the issue of negotiations on mandatory requirements is involved on which the law is settled by the Apex Court in many judgments by holding that as regards mandatory requirements, no negotiation is permissible.

40. Having considered the language of Clause No. 1.6.6 and 2.19 of the tender, I hold that the said requirements are mandatory requirements which the petitioner company was required to fulfil, and has failed to fulfil the same.

41. In my view, the Tender Evaluation Committee has not acted arbitrarily inholding that the experience certificates of Pakistan, Russia, Germany, Israel and Estonia submitted by the petitioner are not as per the mandatory requirement of Clause 1.6.6 of the NIT wherein five salient features have been mentioned with further mention of the fact that the experience certificate of four countries duly issued by the user agency/authority in English language should be submitted by the tenderer. The Tender Evaluation Committee further rightly disqualified the petitioner on account of fulfilment of the eligibility criteria only in respect of two countries i.e. Malta and Peru and not other five countriesPakistan, Russia, Germany, Israel and Estonia. Thus fall short of four countries. The recommendations of the Tender Evaluation Committee and acceptance thereof is as per the aforesaid mandatory requirements of the NIT.

42. Mr. Kuhad has touched the issue of mala fide also but there is no factual foundation of mala fide on the part of the respondents although submission with regard to alleged favour to the intervener M/s. SHIMNIT UTSCH has been raised but the said issue of favour to M/s. SHINIT UTSCH with pre-determined mind is not prima facie proved from the contents of the writ petition and further reflected from the proceedings of the tender.

43. Keeping in view the restraint of judicial review, the citations of the Supreme Court which has been considered by this Court in the case of M/s. Cobra Instalaciones (supra) and M/s. Promuk Hoffman International Ltd. v. State of Goa and Ors. (supra), I am of the view that the respondents have not acted arbitrarily and their action is not mala fide. As noticed earlier, discussion of each of the judgments referred by the counsel for the petitioner, will un-necessary burden this judgment and the said sailed position of law will remain the same. The other point of natural justice, the said issue has already been discussed by this Court in the case of Cobra Instalaciones (supra) wherein on the basis of the judgment of the Supreme Court it was decided that the principle of natural justice in totality will not apply in contract matters but the principle of reasonableness and fairness will apply. The compliance of the said principle of reasonableness and fairness is reflected from the correspondence between the parties even on the mandatory issue of experience certificates and further consideration of the same by the Tender Evaluation Committee, therefore, the said contention of Mr. Kuhad has no merit.

44. In Cobra Instalaciones (supra) it was also held that the Government is free to award the contract to any of the qualified contractor. As regards submission of

Mr. Paras Kuhad that the contract was awarded on higher rate and therefore, the same is not in public interest, is also of no consequence as it is raised by an unqualified bidder. Otherwise also, the experience is the most decisive factor which was taken into consideration by the respondents by keeping it is a mandatory requirement of four countries. Thus, this ground has also no force.

45. The last contention of Mr. Kuhad that the record was orally called by the Couk, therefore, he has a right to inspect the same and then re-argue the entire case, I would like to refer the prayer of the writ petition as well as the prayer of the application for calling the record wherein there is no specific prayer for inspection of the record. The same reads as under:

PRAYER MADE IN THE WRIT PETITION

It is, therefore, most humbly prayed by the petitioner as under that:

(A) ....

(B) by an appropriate writ, order or direction this Hon''ble Court may be pleased to direct the respondents to produce the entire record pertaining to the said Bidand Notice for invitation of bid No. F.7 (38)(64) PARI/RULES/HQ/HSRP/2004 dated 20.4.2005, for High Security Registration Plates.

(C) ....

(D) ....

(E) ....

PRAYER MADE IN THE APPLICATION DATED 19.5.2006

It is therefore most respectfully prayed in the light of the aforementioned facts and circumstances that the application of the petitioner may kindly be allowed and the entire record pertaining to the Tender No. F. 7(38)(64), Pari/Rules/HQ/HSRP/204 Dtd. 20.4.2005 for the supply of High Security Registration number plates may kindly be summoned.

46. I have already given finding on the issue that reply filed by the respondent is based on record and the parties have produced all relevant documents, therefore, there is also no need of discussing law for allowing the petitioner to inspect the record. Otherwise also, remedy under the Right to Information Act, 2005 was available to the petitioner but he did not avail of the same. The petitioner neither sought any information from the respondents under Article 19(1)(a) of the Constitution of India nor sought any information under the Right to Information Act, 2005 nor applied for inspection of record before the respondents and therefore the petitioner cannot be allowed to raise this issue more particularly when there is no contradiction in the record and the reply. Hence, there is no need to even discuss the law cited by counsel for the petitioner on the issue of nondisclosure of the information to the Court on the ground of claim of privilege. The said Judgments are not applicable in the present

case.

47. For the aforesaid reasons, no interference is called for in the impugned action of the respondents, on any of the aforesaid grounds raised by the petitioner companies and therefore, both the writ petitions are dismissed without any order as to costs.