

(2023) 07 DEL CK 0213

In the Delhi High Court

Case No : Civil Writ Petition No. 9238 Of 2023, Civil Miscellaneous Application
No. 35174, 35175 Of 2023

Shreejikrupa Project Limited

APPELLANT

Vs

Telecommunication Consultants India Limited & Ors.

RESPONDENT

Date of Decision : 26-07-2023

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 226

Citation : (2023) 07 DEL CK 0213

Hon'ble Judges : Satish Chandra Sharma, CJ; Sanjeev Narula, J

Bench : Division Bench

Advocate : K.K. Rai, Sreoshi Chatterjee, Medha Tandon, Sanjeev Sahay, Karan Deep Singh, Shagun Saproo, Pankaj Kr. Singh, Ranjan Kumar

Judgement

Satish Chandra Sharma, CJ

1. The Petitioner before this Court, a company, incorporated under the Companies Act, 1956 has filed the present petition for issuance of an appropriate writ, order or direction, declaring the Respondent No.2 as technically unqualified bidder and to quash the order dated 24.06.2023 issued by Respondent No.1 to the extent that it declares Respondent No.2 as Techno Commercially Qualified.

2. The facts of the case reveal that the Respondent No.1 Telecommunications Consultants India Ltd. (TCIL) is a Government of India undertaking established in the year 1978 under the administrative control of the Department of Telecommunications (DOT), Ministry of Communications, Government of India. The Respondent No.1, on 28.04.2023, issued a Notice Inviting Tender (NIT) for construction of Tura Medical College Phase-II for extension of Existing Tura Civil Hospital 230 beds at Tura, Meghalaya on EPC Mode-III. The total estimate cost of the same is Rs. 136.10 crores.

3. The Petitioner, Respondent No.2 and two others also submitted their response to the NIT and a corrigendum was also issued on 19.05.2023. The Petitioner

raised a query with respect to minimum 3 star rated green building and a subsequent corrigendum was issued on 25.05.2023. The Petitioner's contention is that the Respondent No. 2 who has also submitted its tender, has not submitted the certificate, duly certified by Green Rating for Integrated Habitat Assessment (GRIHA) which is the body which certifies that a building is a 3 star rated green building and, therefore, as the Respondent No. 2 has not submitted a certificate certified by GRIHA, the Respondent No.2 should not have been declared as techno commercially qualified.

4. The Respondent No. 1, vide letter dated 24.06.2023 has declared Respondent No. 2 as techno commercially qualified and the grievance of the Petitioner is that even though the Respondent No.2 does not have any GRIHA certificate, it has been declared as techno commercially qualified and in those circumstances the Petitioner has preferred the present Writ Petition with the following prayers :

"a.) Issue an appropriate writ, order, or direction in the nature of any other writ and quash the order dated 24.06.2023 issued by respondent no.1 to the extent it declares respondent no.2 as "Techno Commercially Qualified".

b.) Pass such other and further orders as this Hon'ble court may consider fit, proper, and necessary in the interest of justice. "

5. Learned Senior counsel for the Petitioner has drawn the attention of this Court towards the eligibility conditions as prescribed in the NIT. The same is reproduced as under:

"Memorandum

"16. GRIHA Rating - GRIHA Minimum 3 Star rating compliance to be done".

Section-3: Scope of Work

2. "GRIHA - As the building is to be constructed as per GRIHA norms and intended for minimum 3 Star rating, the contractor has to comply all the specific requirement at their own cost The contractor should extend their all-out support to GRIHA Team as and where required for achieving the desired GRIHA rating. The contractor has to get the project registered with GRIHA on behalf of TCIL and complete the all the compliances of as per GRIHA requirement for achieving minimum 3 Star Rating. It is the responsibility of contractor to get the final GRIHA certification for the project".

Section-4 Special Conditions of Contract (SCC)

"1.23. This Project is to be designed & executed for achieving min. GRIHA 3 star rating Certifications as per latest version stipulated by GRIHA (Green Rating for Integrated Habitat Assessment) Council. Accordingly, the contractor is required to adhere to the various environment friendly and GRIHA compliance aspects of construction as well as documentation with respect to use of Materials, Manpower, Machinery and other relevant mandatory requirements. Nothing extra shall be payable over and above the quoted rates as per the financial bid to

comply with such requirements.”

6. Learned Senior counsel has vehemently argued before this Court that as per the terms and conditions of the NIT, a tenderer was required to fulfil the essential additional condition i.e. he should have constructed a building and the building should be of minimum 3 star rated green building. The relevant condition is reproduced as under:

“Additional condition: - The bidder should have successfully completed at least one number building project of at least G+4 storey or more or building height of 17 mtrs. or more excluding basement , if any of minimum built up area of 9600 Sqmtrs with HVAC , plumbing , fire fighting , electrical , etc. all complete in last seven years at the time of submission of bid . The building should be of minimum 3 Star Rated Green Building. Successfully completed in last 7 years (Will mean 7 years ending last day of month previous to the one in which NIT is invited)”

7. Learned senior counsel for the Petitioner has argued before this Court that the Respondent No.2 submitted a letter issued by GRIHA evaluator on 01.06.2023 certifying that the Respondent No.2 has constructed a GRIHA 3 star rated building and a clarification was sought from Respondent No.3/ GRIHA whether the building constructed by Respondent No.2 i.e. Residential Staff Quarters Complex for Central Board of Indirect Taxes Project was having GRIHA rating or not. In response to the query raised by the Petitioner, the Respondent No.3 has informed that GRIHA rating was not awarded to Respondent No.2. The Petitioner’s contention is that the Respondent No.2 has been erroneously declared as Techno Commercially qualified bidder.

8. Learned counsel appearing for Respondent No.1 has vehemently argued before this Court that the Petitioner himself has not enclosed any certificate issued by GRIHA or by any consultant accredited by GRIHA in his favour and his harping upon the fact that the Respondent No.2 has not filed a certificate in respect of GRIHA rating. He has stated that the Petitioner as well as Respondent No.2 were declared techno commercially qualified and the Respondent No.2 has constructed a green building fulfilling the eligibility criteria of 3 star rating. A certificate to that effect was also filed, issued by National Projects Construction Corporation (NPCC).

9. This Court, when the matter was being argued has categorically asked a question to the Petitioner that whether the Petitioner has submitted any certificate relating to GRIHA certification or not. Learned Counsel for the Petitioner was fair enough in stating before this Court that the Petitioner has not submitted any GRIHA certification in respect of any building. Thus, in short, the Petitioner who himself does not have a GRIHA certification in respect of the building constructed by him, is harping upon the fact that Respondent No.2 does not have a certificate issued by GRIHA in respect of a building having 3 star green rating, successfully completed in the last 7 years. On the contrary, the certificate submitted by Respondent No. 2 makes it very clear that the

Respondent no.2 did submit a certificate issued by NPCC – certifying that they have constructed a 3 star rated building in the last 7 years. The certificate issued in favour of Respondent No.2 has been filed along with writ petition and the same is reproduced as under:

“ National Projects Construction Corporation Limited

Ref: 336/ NW2JCBIC/2147 Date: 18.03.2023

PERFORMANCE CERTIFICATE

Details of Works executed by: M/s S.K. INTEGRATED CONSULTANTS 280 , Deepali Enclave, Pitampura, New Delhi-110034.

1.

Name of work

Construction of Residential Complex and Allied Works for Central Board of Indirect Taxes & Customs Department, Plot No. IH-1 at Sec -9, Dwarka , New Delhi (Against fixed price on EPC basis).

2.

Brief Scope of work

Construction of Two basements and G+12 to G+17 building blocks with RCC framed structure and finishing including structural glazing, Internal Electrical and Plumbing works, False ceiling, Lifts. External Electrical works , Automatic Fire fighting system, CCTV, Building management system, DG sets, HT/LT panels, Substation, Rain water harvesting works, Solar system, HVAC system with VRV, External sewerage, STP, Signage, Landscaping and Horticulture works. Building conforms to Green building norms GRIHA 3 Star rating

3.

Agreement No. and date

LOI No: 336/DZ/CED/653, Dated 22.10. 2018

4.

Date of commencement of work

22.10.2018

5.

Work completed by Agency dated 28.02.2023.

Total Rs. 192 Crores (Approx.) including Civil = 147.1 Cr. Plumbing & Fire Fighting= 10.2 Cr., Electrical Heating Ventilation and Air Conditioning= 12.17 Cr, DG sets, Substation & Lifts= 10.42 Cr. and Ancillary Systems, Services & Development works=10.8 Cr.

6.

Name and address of the authority under whom works executed

ZONAL MANAGER NPCC LTD. North Western Zone (Delhi Zone), Plot No. 148, Sector-44, Gurgaon, Haryana.

7.

Performance

Very Good

Note:- This certificate is being issued on the request of M/s S K Integrated Consultants for tendering purpose only . This document is not valid for any legal/ Arbitration proceeding/ claim in respect of above work and contract.

-sd-

Rishin Manas Das

(Zonal Manager)”

10. The tendering authority based upon the aforesaid certificate has arrived at a conclusion that the Respondent No.2 has constructed a 3 star rated green building, and, therefore, Respondent No.2 has rightly been declared as techno commercially qualified by Respondent No.1.

11. In the considered opinion of this Court, once NPCC has issued a certificate certifying that Respondent No.2 has constructed a 3 star rated green building, the Respondent No.2 was rightly declared as techno commercially qualified by Respondent No.1.

12. The most important aspect of the matter is that there were total 4 participants in the tendering process and out of the 4 participants, 3 have qualified for a technical bid. The offer of Respondent No. 2 was Rs. 121 crores whereas the offer of the Petitioner is Rs. 128 crores. The financial bids were opened on 04.07.2023 and work was awarded to Respondent No.2 who has also commenced the construction activities.

13. It is unfortunate that the Petitioner does not have a green rating for integrated habitat assessment certificate to his credit and is harping upon the fact that the Respondent No.2 should have a GRIHA certification to his credit. In the considered opinion of this Court, the Respondent No.2, has filed a certificate dated 18.03.2023 which establishes that the Respondent No.2 has constructed 3 star rated green building. The certificate issued by NPCC was rightly taken into account and the question of cancelling the order dated 24.06.2023 in the peculiar circumstances of the case does not arise.

14. It is well settled proposition of law that scope of interference in a tender process is quite limited. The Hon’ble Supreme Court in Silppi Constructions

Contractors v. Union of India and Another, 2020 16 SCC 489, in paragraphs 13,14, 19 and 20 has held as under:

"13. In Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] it was held: (SCC p. 531, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

14. In Michigan Rubber (India) Ltd. v. State of Karnataka [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] it was held that if the State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the courts would not normally interfere in policy decisions and in matters challenging award of contract by the State or public authorities.

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19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the

Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

15. It is also well settled proposition of law that the author of the tender is the best person to give interpretation to the terms and conditions of the tender. The Hon'ble Supreme Court in *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*, (2016) 16 SCC 818 has held in paragraph 15 as under:

"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."

16. The Hon'ble Supreme Court in the case of *Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759 in Paragraph Nos. 29 to 35 has held as under:

"29. This position of law has been succinctly summed up in *Tata Cellular v. Union*

of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] , where it was famously opined that:

(SCC pp. 677-78, para 77)

"77. ... Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] unreasonableness.

(iii) Procedural impropriety."

30. But merely because the accusations made are against the State or its instrumentalities does not mean that an aggrieved person can bypass established civil adjudicatory processes and directly seek writ relief. In determining whether to exercise their discretion, the writ courts ought not only confine themselves to the identity of the opposite party but also to the nature of the dispute and of the relief prayed for. Thus, although every wrong has a remedy, depending upon the nature of the wrong there would be different forums for redress.

31. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.

32. Such a proposition has been noticed by this Court even earlier in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne

in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

(emphasis supplied)

33. Such conscious restraint is also necessary because judicial intervention by itself has effects of time and money, which if unchecked would have problematic ramifications on the State's ability to enter into contracts and trade with private entities. Further, it is not desirable or practicable for courts to review the thousands of contracts entered into by executive authorities every day. Courts also must be cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on “public interest” has been evolved by this Court. [Jagdish Manda v. State of Orissa, (2007) 14 SCC 517, para 22]

34. It is thus imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1) (g), public interest too is demonstrated before remedy is sought. Although the threshold for the latter need not be high, but it is nevertheless essential to prevent bypassing of civil courts and use of constitutional avenues for enforcement of contractual obligations.

35. In the present case, although it is clear that the Division Bench of the High Court was cognizant of these principles surrounding scope of judicial review, however, it failed to effectively evaluate whether larger public interest was being affected. On the contrary, we feel that the interest of Respondent 1 was purely private and monetary in nature.”

17. The Hon’ble Supreme Court in the aforesaid case has reiterated the principles regarding interference of Writ Courts in a contractual matter.

18. In the present case, the Respondent No.2 does have a certificate to establish that he has constructed a 3 star green rated building, and, no case for arbitrariness, illegality/ discrimination under Article 14 or encroachment of freedom under Article 19(1)(g) of the Constitution of India or public interest, has

been established before this Court, and, therefore, this Court does not find reason to interfere with the award of contract for construction in favour of Respondent No.2. The Hon'ble Supreme Court in the case of Agmatel India (P) Ltd. v. Resoursys Telecom, (2022) 5 SCC 362 in Paragraph Nos. 24 to 30 has again dealt with scope of judicial review in contractual matters. The Paragraph Nos. 24 to 30 are reproduced as under:

"Interpretation of tender document : Relevant principles

24. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject-matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the three-Judge Bench decision of this Court in Galaxy Transport Agencies [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] wherein, among others, the said decision in Afcons Infrastructure [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment.

25. This Court referred to various decisions on the subject and stated the legal principles as follows : (Galaxy Transport Agencies case [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , SCC paras 14-20)

"14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held : (SCC p. 825, para 15)

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

15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha [Bharat Coking Coal Ltd. v. AMR Dev Prabha, (2020) 16 SCC 759] , under the heading "Deference to authority's interpretation", this Court stated : (SCC p. 776, paras

50-52)

"50. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent 1 seeks to only enforce terms of NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

51. In the present facts, it is clear that BCCL and C1-India have laid recourse to clauses of NIT, whether it be to justify condonation of delay of Respondent 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818]

52. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality."

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] , this Court held as follows : (SCC pp. 501-02, para 20)

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the NIT For this reason, the Division Bench's conclusion [New JK Roadways v. State (UT of J&K), 2020 SCC OnLine J&K 733] that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least

5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say:"the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops,

grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

19. Similarly, in *Montecarlo Ltd. v. NTPC Ltd.* [*Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272] , this Court stated as follows : (SCC p. 288, para 26)

“26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own.”

(italicised matter emphasised in the original; emphasis in bold italics supplied)

26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance

with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.

Application of relevant principles to the case at hand

27. Applying the aforesaid principles to the case at hand, we are clearly of the view that the impugned order [Resoursys Telecom v. Navodaya Vidyalaya Samiti, 2021 SCC OnLine Del 4532] cannot be sustained.

28. In relation to the contention that the tender inviting authority was the best judge to interpret the conditions of tender and the Court should not interfere, the High Court referred to an observation by this Court in Reliance Energy [Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd., (2007) 8 SCC 1] that when tenders are invited, terms and conditions must indicate norms and benchmarks with legal certainty. In that case, the said observations came in the backdrop of the facts that in the eligibility conditions of the tender before the Court, one of the criteria had been of the consortium net cash profit of Rs 200 crores but, the State had not specified the accounting norms with clarity for calculation of net cash profit; and one of the two acceptable methods of calculation of net cash profit was not taken into account without any reason. In the given facts, the decision of the authority concerned was found to be arbitrary, whimsical and unreasonable.

29. The said decision in Reliance Energy [Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd., (2007) 8 SCC 1] has no direct application to the facts of the present case and even otherwise, it has not been the finding of the High Court that the term stated by the tender inviting authority—NVS was lacking in certainty. However, beyond this, as to which particular product was to be treated as similar category product, could not have been a matter of interpretative exercise by the Court, particularly when the view taken by the tender inviting authority and its Evaluation Committee has not been shown to be absurd or irrational or suffering from mala fides.

30. It has also rightly been pointed out by the appellants, with reference to the decision in Afcons Infrastructure [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] (as extracted in the quotation hereinabove), that an interpretation by owner or employer of a project to the tender document may not be acceptable to the constitutional courts but that, by itself, would not be a reason for interfering with the interpretation given. In the aforesaid view of matter, the long-drawn exercise by the High Court on the dictionary meaning of the words and on semantics, in our view, had been entirely unnecessary.”

19. In light of the aforesaid judgment as the Hon’ble Supreme Court has held that the authority that authors a tender document is a best person to understand

and appreciate its requirement and, thus, its interpretation should not be second guessed by a Court in judicial reviewing proceedings.

20. In the present case, technical evaluation has been done by the authors of the tender document. The Respondent No.2 has constructed a 3 star rated green building, and in support of which the certificate was filed. It has been held to be a valid certificate issued by the NPCC, hence the question of interference in the peculiar facts and circumstances of the case does not arise.

21. Hon'ble Supreme Court in the case of Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617 in Paragraph 7 has held as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] , Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India [(1981) 1 SCC 568], CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , Tata Cellular v. Union of India [(1994) 6 SCC 651], Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134] and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But 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 the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

22. In the aforesaid case, the Hon'ble Supreme Court has held that in case some defect is found in decision making process, the Court must exercise its discretionary power under Article 226 of the Constitution of India with great caution and should exercise it only in furtherance of public interest and not

merely on the making of legal point.

23. The Petitioner has not been able to make out a case of interference in the decision making process, and, therefore, this Court in light of the aforesaid judgment does not find any reason to interfere in the peculiar facts and circumstances of the case.

24. Hon'ble Supreme Court in the case of National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., (2022) 6 SCC 401 in Paragraph Nos. 27 and 47, 48 has held as under:

"27. At the cost of repetition, it is to be noted that under the contractual obligation, it was not open for the appellant Corporation and/or even the Republic of India to deviate from any of the terms and conditions of the loan agreement and/or the decision of JICC/JICA. Therefore, in the absence of any allegation of mala fides/arbitrariness and/or favouritism, we are of the opinion that the High Court has committed a grave error in interfering with a conscious decision taken by JICC/JICA, which has been followed by the appellant.

28. At this stage, few decisions of this Court on the interference by the courts in the tender matters are required to be referred to:

28.1. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court in paras 11 to 13 and 15 has observed and held as under : (SCC pp. 824-25)

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] , it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia & Sons v. Port of Bombay [Dwarkadas Marfatia & Sons v. Port of Bombay, (1989) 3 SCC 293] , it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in

interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , as mentioned in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*], (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] .

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

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

28.2. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* [*B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548] , after considering the various decisions of this Court on the point enumerated in para 66, this Court has observed and held as under : (SCC pp. 571-72)

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

- (i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds

relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

28.3. In *Michigan Rubber (India) Ltd. v. State of Karnataka* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216] , after considering various other decisions of this Court on the point, more particularly, after considering the decisions in *Jagdish Mandal* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] and *Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa* [*Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa*, (2012) 6 SCC 464] , in paras 23 and 24, this Court has observed and held as under : (*Michigan Rubber case* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216] , SCC p. 229)

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

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

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

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

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

execute the work; and

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

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

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

28.4. In *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] , it is specifically observed and held by this Court that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. It is further observed that whether a term of NIT is essential or not is a decision taken by the employer, which should be respected and soundness of that decision cannot be questioned by Court. In the case before this Court, the bid was rejected for non-furnishing of bank guarantee in prescribed format. While submitting EMD by furnishing bank guarantee in format prescribed by GTC of another tender and the bidder took the plea that bank guarantee format of present tender was ambiguous.

28.5. Rejecting the claim of the bidder and upholding the decision of the employer of rejection of bid for non-compliance of submitting the bank guarantee in prescribed format, this Court in paras 31 to 38, 42 to 44, 47 to 49, 52, 55 and 56 has observed and held as under : (*Central Coalfields case* [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] , SCC pp. 632-36 & 638-40)

"31. We were informed by the learned Attorney General that 9 of the 11 bidders furnished a bank guarantee in the prescribed and correct format. Under these circumstances, even after stretching our credulity, it is extremely difficult to understand why JVC was unable to access the prescribed format for the bank guarantee or furnish a bank guarantee in the prescribed format when every other bidder could do so or why it could not seek a clarification or why it could not represent against any perceived ambiguity. The objection and the conduct of JVC regarding the prescribed format of the bank guarantee or a supposed ambiguity

in NIT does not appear to be fully above board.

32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

33. In *Ramana Dayaram Shetty v. International Airport Authority of India* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] , this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage : (SCC p. 500, para 7)

"7. ... It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable."

34. In *Ramana Dayaram Shetty case* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] , the expression "registered IInd Class hotelier" was recognised as being inapt and perhaps ungrammatical; nevertheless common sense was not offended in describing a person running a registered IInd grade hotel as a registered IInd class hotelier. Despite this construction in its favour, Respondent 4 in that case were held to be factually ineligible to participate in the bidding process.

35. It was further held that if others (such as the appellant in *Ramana Dayaram Shetty case* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489]) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4— treatment that was constitutionally impermissible. Expounding on this, it was held : (SCC p. 504, para 10)

"10. ... It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government

must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.”

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the “privilege” of participation.

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

38. In *G.J. Fernandez v. State of Karnataka* [*G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488] , both the principles laid down in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) “has the right to punctiliously and rigidly” enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the “changes affected all intending applicants alike and were not objectionable”. Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] sense.

42. Unfortunately, this Court in *Poddar Steel Corpn. v. Ganesh Engg. Works* [*Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273] did not at all advert to the privilege-of-participation principle laid down in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] and accepted in *G.J. Fernandez* [*G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488] . In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in *Poddar Steel* [*Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273] .

43. Continuing in the vein of accepting the inherent authority of an employer to

deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651]) in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517]] in the following words : (*Jagdish Mandal case* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , SCC p. 531, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said : (*Jagdish Mandal case* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , SCC p. 531, para 22)

"22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

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* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] 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* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] 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* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216] .

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* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] . 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.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction

between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held [SLL-SML (Joint Venture Consortium) v. Central Coalfields Ltd., 2015 SCC OnLine Jhar 4819] that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in Nazir Ahmad v. King Emperor [Nazir Ahmad v. King Emperor, 1936 SCC OnLine PC 41 : AIR 1936 PC 253 (2)] , namely : (SCC OnLine PC)

"... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

There is no valid reason to give up this salutary principle or not to apply it mutatis mutandis to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in Nazir Ahmad [Nazir Ahmad v. King Emperor, 1936 SCC OnLine PC 41 : AIR 1936 PC 253 (2)] that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, insofar as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to

adhere to the requirements of NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever.”

(emphasis in original)

28.6. In *Maa Binda Express Carrier v. North-East Frontier Railway* [*Maa Binda Express Carrier v. North-East Frontier Railway*, (2014) 3 SCC 760] , this Court had an occasion to consider the scope of judicial review in the matters relating to award of contracts by the State and its instrumentalities. In paras 8 to 10 this Court has observed and held as under : (SCC pp. 764-65)

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn. of Management Studies* [*Meerut Development Authority v. Assn. of Management Studies*, (2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803] and *Air India Ltd. v. Cochin International Airport Ltd.* [*Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617])

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] , *Raunaq International Ltd. case* [*Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492] and in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] besides several

other decisions to which we need not refer.”

29. Thus, from the aforesaid decisions, it can be seen that a court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? And

(ii) Whether the public interest is affected?

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

30. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when a conscious decision was taken by JICC/JICA holding the bid submitted by the original writ petitioner as non-responsive/non-compliant to the technical requirements of the bidding documents and suffering from material deviation, we are of the opinion that the High Court has erred in interfering with the tender process and interfering with the decision of JICC/JICA rejecting the bid submitted by the original writ petitioner at technical stage.

31. At the outset, it is to be noted that the bid submitted by the original writ petitioner was rejected at the first stage on the ground of material deviation/non-responsive and having found that the tender submitted by the original writ petitioner was not found to be as per the terms and conditions of the tender document. However, the High Court by the impugned judgment and order [Montecarlo Ltd. v. National High Speed Rail Corpn. Ltd., (2021) 3 HCC (Del) 494] has set aside the conscious decision taken by JICA, JICC and the appellant by observing that the bid submitted by the original writ petitioner can be said to be in substantial compliance and on the ground that though the other bidders were given opportunity to correct their errors/defects, however, the original writ petitioner was not afforded the same opportunity and therefore the decision not to give opportunity to correct the defects/errors can be said to be discriminatory and violative of Article 14 of the Constitution of India.

X x x x x x x x x

48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the

decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advice, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved."

25. The Supreme Court in the aforesaid case has also dealt with the scope of judicial interference in contractual matters. The Hon'ble Supreme Court relying upon catena of decisions has held that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. It has been further held that interference is permissible only when the decision making is mala fide or is intended to favour someone. It has been held that a decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no respondent authority acting reasonably and in accordance with law could have reached.

26. In the present case the decision is not perverse, neither faulty nor incorrect nor erroneous. The petitioner who himself has not submitted any certificate issued by GRIHA in respect of construction of a 3 star rated green building has filed this present writ petition and no grounds are made out for quashing the award of contract in favour of Respondent No.2.