

(2012) 02 BOM CK 0010

In the Bombay High Court

Case No : Writ Petitions No's. 735, 738 of 2011

Ultracon Constructions Pvt. Ltd. and Another

APPELLANT

Vs

The State of Goa and Others

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 21, 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 17

Citation : (2012) 4 ALLMR 169

Hon'ble Judges : U.V. Bakre, J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : A.N.S. Nadkarni and Mr. H.D. Naik, for the Appellant; S.S. Kantak, Advocate General and Mr. A. Kamat, Addl. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—Since common questions of facts and law are involved and since the petitions were heard together, both these petitions are disposed of by common judgment. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this petition under Article 226 of the Constitution of India, the petitioners are impugning a decision of the respondents contained in the letter dated 18th November, 2011 intimating that the Tender form for the work, viz. Anti Sea erosion and Beach protection measures in the State of Goa under Golden Jubilee package, regarding anti sea erosion and protective measures at Keri Beach, cannot be issued as the petitioners are not fulfilling the eligibility requirement mentioned in the tender notice of having satisfactorily completed similar works. The contents of this letter read thus:

With reference to above cited letter, you have not been issued the tender form for the above said work "as you are not fulfilling the eligibility requirements as mentioned in above tender notice of having satisfactorily completed similar

works.

3. The petitioners have, therefore, essentially impugned the decision and have also challenged the eligibility criteria and the notice inviting tender to the extent of the stipulation and definition of "Similar Work" as being arbitrary, discriminatory, unjust and unreasonable. Although allegations of malafides are made in the writ petition, during the course of arguments, the challenge is restricted to the above term and condition in the notice inviting tender.

4. We are concerned in this case with a tender notice, a copy of which is at page (39C) of the paper book of writ petition No. 735/2011 dated 11.10.2011, wherein the Executive Engineer, Works Division - I, Water Resources Department, on behalf of the Governor of Goa, invited online tender in two envelopes system from firms and contractors of repute for the work of anti sea erosion and beach protection measures in the State of Goa under Golden Jubilee package regarding anti sea erosion and protective measures and particularly in relation to the Keri Beach, in Pernem Taluka. The estimated costs of this work is Rs. 11,42,87,765/-. The other conditions are not material for our purposes, save and except, the condition prescribed at clause 1(a), which reads, thus :

1. The Contractors registered in appropriate Class and Categories with Water Resources Department (Hydraulics and Marine Works) of Goa State/PWD Goa State or from those registered contractors in CPWD/MES/Railways and other State and UT of the Indian Union and firms of repute who fulfill the following requirements shall be eligible to apply. Joint ventures are not accepted.

(a) Should have satisfactorily completed three similar works costing equal to or more than Rs. 460 lakhs or two similar works equal to or more than Rs. 690 lakhs or one in similar work costing equal to or more than Rs. 910 lakhs of above nature, during the last five years ending last day of the month September, 2011.

Similar work :- Shall mean of Construction of sloping apron/revetment structure for coastal protection and Anti Sea Erosion measures. The said work should be composite work of a sloping revetment comprising geo-textile filters & or geo-textile bags and granitic/basaltic stone revetments of various sizes to form filter as core and casting and laying Tetrapods and concrete blocks both of weight 1 tonne and above laid in tidal condition of the sea from more or equal to (-) 0.5m to (+) 5.5m level, including construction of parapet and aesthetically component's etc.

5. Petitioners No. 1 in both the writ petitions are companies incorporated under the Companies Act, 1956 and Class (I-A) contractors, registered with the Water Resources Department of Government of Goa under category of Water Resources Works, including hydraulics and marine works. In para 2 of the petition, the petitioners state thus :

... The Petitioner No. 1 has in the past, undertaken and successfully completed numerous Contracts relating to hydraulics and marine works, including (i)

providing of irrigation to High Command of R.B.M.C. of Tilari Irrigation Project in Villages Nagzar and Varkhand in Pernem Taluka (involving an amount of Rs. 3,85,06,511); (ii) providing irrigation to High Command of R.B.M.C. of Tilari Irrigation Project in Villages Casarvarnem, Nagzar and Ozorim in Pernem Taluka (involving an amount of Rs. 3,88,53,337); (iii) constructing B6 distr. from ch. 8220 km. to 9.630 km. of R.B.M.C. of TIP at Village Ugve, Amberm in Pernem Taluka (involving an amount of Rs. 4,81,57,810) etc. The Petitioners state that the performance of the Petitioner No. 1 in all the aforementioned Projects have been acknowledged by the Respondent No. 2 to be "Outstanding" whether it be on the parameters of Technical Proficiency or Financial Soundness or Mobilisation of adequate T & P and Manpower. Further, the quality of work (grading) of the Petitioner No. 1 in respect of the aforementioned Works has also been acknowledged as being "Very Good" by the Respondent No. 2.

6. It is stated that presently petitioner No. 1 Company is executing the works of providing and laying RCC Canal Lining for strengthening of distance D2-D3 combined of Salauli Irrigation Project having an aggregate tender costs of over Rs. 2,60,00,000/-. It is the case of the petitioners that the respondents on 12th October, 2011 invited the subject-tenders from Class I-A category contractors and the Keri works were to be executed within a period of 360 days. The contractor was required to have an average annual financial turnover of Rs. 571 lakhs or more on works during the last three years ending 31st March, 2011. It is the case of the petitioners that they satisfied all the terms, save and except, the above-quoted condition with regard to "similar works".

7. It is the case of the petitioners that having completed satisfactorily several projects in the field of hydraulics and marine works, they would become ineligible from bidding for the Keri works only if the eligibility condition of "similar works" and definition thereof provided in clause (a) of the Notice Inviting Tender ("NIT" for short) is given effect to. It is stated that eligibility condition dealing with "similar works" is illegal and arbitrary inasmuch as simultaneously, with the issuance of NIT in respect of the Keri works, respondent No. 2 also issued another NIT for undertaking anti sea erosion and beach protection measures at Anjuna Beach, Anjuna, Goa (hereinafter referred to as "Anjuna works"), involving an estimated costs of Rs. 8,62,59,844/- and the works were to be executed within a time limit of 240 days from the date of award of the tender. The tender process relating to both the works was to be executed as per CPWD Manual.

8. The petitioners state that in respect of Anjuna works also the intending bidders were required to possess almost similar eligibility criteria as for the Keri works. This was so because the scope and nature of works in both the tenders is similar and identical. It is stated that the contractor was required to satisfy the criterion with regard to experience even in the case of Anjuna works. However, the bidders in relation to Keri works are required to have satisfactorily completed similar works. That is a condition carved out in case of Keri works. However, the same has absolutely no nexus with the work that is required to be performed and

carried out. Keri and Anjuna works are similar and identical in relation to terrain, topography, climate, environmental conditions, etc. Even the scope of works at both the places is the same. There was, therefore, no reason to prescribe the eligibility criterion, creating a further sub-classification, defined as "similar works" out of broader category of hydraulics and marine works.

9. The petitioners in para 22 of the writ petition have averred that on 17th November, 2011, the second petitioners sought inspection and copies of the files pertaining to the approved NIT in respect of both the works. An application was made under the Right to Information Act, 2005. Pursuant to the said application, files were made available to the petitioners. Section I of Eligibility Document of the NIT pertaining to Anjuna and Keri works, deals with type of work and climate. Perusal and analysis thereof, reveals that there is no difference/distinction whatsoever in the type of works and the climatic conditions prevailing at Keri and Anjuna. Perusal of the file, including the notings thereon would indicate that there is absolutely no indication therein that either the terrain or the topography or tidal conditions or some other distinguishing technical or environmental conditions exist at Keri Beach which warrant insertion of such a specific technical eligibility criterion over and above what is prescribed in respect of Anjuna beach. Reliance is placed upon Exhibit H collectively to support this argument.

10. Then a reference is made in para 23 of the writ petition to the Schedule of Bill of Quantities of the Anjuna and Keri works and it is contended that the description of items of works is substantially similar and/or identical in both the cases. Although in respect of Keri works certain other minor works were involved such as supplying and spreading of geo-fabric filter layers and/or geo-textile of polypropylene and laying filters of nylon bags filled with stones etc., that is not forming part of the Anjuna works. This work does not require any kind of technical and other expertise. The aforesaid extra works are in the nature of supply and laying of certain items readily available in the open market. The extra works did not even exceed 2 % of the total cost of tendered works at Keri.

11. Without prejudice to what is stated in this para and in any event of the matter, the respondents had not held the petitioners to be ineligible on this ground. The petitioners, therefore, submit that by fixing an unduly high benchmark of eligibility criteria in a completely arbitrary, unreasonable, illegal manner and without there being any basis in support thereof, the respondents have violated the mandate of Articles 14, 19(1)(g) and 21 of the Constitution of India. The action has resulted in violation of "level playing field" amongst the bidders who possess necessary experience in the field of hydraulics and marine works from participating and competing in the bidding process in respect of Keri works.

12. Reliance is then placed upon file notings, copies of which are annexed as Annexure I to urge that the additional eligibility criterion is stated to be inserted since the Keri work is for a sum of more than 10,00,00,000/- and, therefore, the

additional eligibility criterion is stated to be in tune with the provisions of CPWD Manual. This reason is also frivolous, unsustainable, and indefensible, because, CPWD Manual and particularly Clause 15.2.1 (3) of the same deals with "similar works". All that it says is that this term should be properly defined and properly indicated in the tender documents by the NIT approving authority. The petitioners allege that considering the provisions of CPWD Manual, respondent No. 2 has appropriately defined "similar work" to mean "work relating to hydraulic and marine category" in respect of said Anjuna works. The petitioners submit that in respect of identical and/or similar works to be undertaken at Keri beach, respondent No. 2 have carved out a further specific eligibility criterion i.e. the need to have satisfactorily completed "similar works" as defined in Clause (a) of the NIT.

13. Terming the said criterion as irrational and intangible, what has been urged is that it is couched in such a manner which would ensure that certain bidders would get qualified and the bidders like the petitioners would be ineligible to bid for the Keri works altogether. This has resulted in creation of a monopoly and stifling of free and fair competition amongst all eligible bidders. It is on such grounds the petitioners stated that firstly they tried to raise the issue with the authorities, but finding that there is no response to the same, they have approached this Court in writ jurisdiction.

14. In answer to this writ petition and after a copy of the same was served, respondents filed an affidavit of one Shri Pramod Badami, Executive Engineer, Works Division - I, Water Resources Department, Government of Goa, stating therein that the eligibility requirement has been inserted with some specific purpose. It is stated that the work is highly specialised and skilled, requiring measures to be taken for preventing sea erosion and beach protection. The said work should be composite work of a sloping revetment comprising geo-textile filters and/or geo-textile bags and granitic/basaltic stone revetments of various sizes to form filter as core and casting and laying tetrapods and concrete blocks both of weight of one tonne and above laid in tidal conditions of sea. It is stated that anti sea erosion structure at Keri is for protection of shore from further erosion, restoration and formation of the beach. The structure is a sloping revetment structure designed to dissipate wave energy and to facilitate beach formation.

15. In paras 6 and 7 of the affidavit-in-reply, this is what is stated:

6. I say that the anti sea erosion structure at Keri is for protection of the shore from further erosion, restoration and formation of the beach. I say that the structure is a sloping revetment structure designed to dissipate wave energy, and to facilitate beach formation. I say that the construction of the structure includes various items of work as follows :-

(a) Making subsurface in sandy foundation. (b) To provide geo-fabric filter layer of geo textile of poly propylene multifilament woven filter bed for base.

(c) To provide sub surface filter by geo bags.

(d) To provide graded granitic revetment filter of various sizes in the core of the body of the structure for article retention.

(e) To provide toe protection with piles and concrete blocks at level - 0.50 met to arrest erosion.

(f) Providing and laying concrete blocks and tetrapods over the granitic core filter material to make them competent to sustain the wave energy and facilitate beach formation.

7. I say that the work is highly specialised and needs to be executed in the following stages:

(i) Preparation of subsurface of the beach for launching of geo-filter

(ii) Placing of geo fabric filter layer with proper overlaps strictly as per shape and pattern in tidal conditions.

(iii) Placing of filter of nylon bags filled with stone grits in proper line and level in tidal conditions.

(iv) Providing and laying secondary layer of granitic stones in required line, level, slope and section.

(v) Providing and laying granites or basaltic stone in double layer in required line level slope and section.

(vi) Providing and driving of wooden piles for the toe of the section.

(vii) Providing and laying cement concrete blocks at the toe line to arrest scouring.

(viii) Providing and laying of tetrapods on the core of the sloping revetment in required line, level, slope and section in tidal conditions.

I say that all the above activities are required to be started and completed in small stretches of 5 to 10 metres at a time within the tidal interval of 3 to 4 hours maximum. I say that if all the above activities are not completed within the tide interval then the work will be disturbed and will not meet the designed criteria and the whole exercise will need to be done all over again.

I therefore submit that this work requires expertise of executing similar type of work.

16. Consistent with these statements what has been pointed out is that if the condition which is impugned and challenged is seen in the backdrop of the nature of work that is to be performed, it would be imminent that there is no similarity between the two works, i.e. at Anjuna and Keri. It is argued that the anti sea erosion work at Anjuna is to prevent erosion of cliff and protecting the structures thereon; whereas at Keri the entire beach has to be protected and measures

taken so as to save it. It is stated that the work has to be carried out on sandy foundation and delay would be fatal. Technical difficulties which would be faced in execution of the work require high level expertise. That is why the NIT was worded in the manner thought fit by the expert i.e. Chief Engineer, Water Resources Department. The contentions that the two works are similar have been denied specifically. It has been stated that both the works are categorised as anti sea erosion works, and consolidated estimate for the various beaches and affected coastal stretches was prepared, because they are to be carried out under a single package made available by the Central Government entitled "Golden Jubilee Package". The name of the combined work reads as "Anti sea erosion and beach protection measures in the State of Goa under Golden Jubilee Package" approved at the cost of Rs. 85,67,16,410/-. In this combined estimate, there are 8 locations at various places in Goa at which these works are to be undertaken. Each site is different and as per the site conditions, site specific solutions are evolved by the consultant Central Water & Power Research Station, Pune, a Government of India institute. Therefore, they may be categorised as anti-sea erosion works, but the works at Anjuna and Keri are vastly different works in terms of solutions, implementation, purpose and expertise level required for executing the same.

17. In para 12 of the affidavit-in-reply, it is explained that the work of anti sea erosion structure at Anjuna is to be taken up on the rocky foundation to protect the shore and the houses from further erosion caused by the sea waves. The beach at Anjuna has almost been washed away and the rocky foundation is completely exposed and the structure at Anjuna would be of a hard structure, designed to dissipate the wave energy and work as redundant for the cliff erosion. This work is only for further protection of the shore and does not involve beach formation. The work involved is to provide single size granites trap stone as core over the rock foundation and providing and laying concrete blocks and tetrapods over the granitic core material to make them competent to take the wave energy and to protect the eroding cliff. This work demands casting and laying tetrapods, concrete blocks over the granitic core and is purely placing of the materials as per drawing which does not require much expertise. That is how paragraphs 12 to 14 of the affidavit-in-reply would read. By annexing photographs of the two beaches, pointing out dissimilarity between the nature of works, it is contended that the argument that these works are similar in nature would show that the petitioners are not acquainted with the nature of work to be carried out at Keri and the level of expertise required for completing it. The petitioners have referred to certain works that have been carried out earlier and which were of identical nature, however, the contractor who has carried out the same and who has been paid according to the petitioners for the works done, has not done a proper and complete job. Therefore, requiring the same measures to be undertaken by the State, is a plea which, according to the respondents, supports the arguments of the respondents and would go to show that if the respondents can improve upon the conditions and set up a higher benchmark,

then, that is justified on account of the past experience of the respondents. In all these matters, certain latitude is available to the respondents and they are the best judge of the situation. It is not, according to the respondents, for this Court to substitute its views and opinion when the experts have applied their mind and have taken a decision to insert a condition in the NIT. There is certain immunity as far as challenge to the term and condition in the NIT and that is enjoyed for good reasons inasmuch as the Court is not called upon nor can seek justification as to why the condition was inserted. All that the Court is required to undertake is an exercise of judicial review to find out whether that term is arbitrary, discriminatory and malafide. For all these reasons, it is submitted that the petition be dismissed.

18. A rejoinder affidavit is filed by the petitioners in which the petitioners have disputed the statement of the respondents that the two works are distinct and dissimilar and assuming that they are not so, even then the reason for insertion of the illegibility criterion "similar works" is untenable. Reference is made to a notice inviting tender dated 25th June, 2008 from the Water Resources Department inviting applications from Class I-A contractors registered with the Water Resources Department under the category "hydraulics and marine" for executing anti-sea erosion protection works from Ajoba Temple to Ferry ramp at Keri Beach. The location which forms part of the present Keri works is exactly the same as that of the earlier works. In the earlier Keri works, the second respondent had not prescribed any such special eligibility criterion with respect to "similar works", experience although the location for executing the anti-sea erosion and beach protection measures were the same, as that of the present Keri works. The respondents had even issued the tender documents in respect of earlier Keri works to the petitioners, without insisting upon the necessity of possessing "similar works" experience. The earlier Keri works were successfully completed by the successful bidder. In these circumstances, the justification now provided and particularly that Keri works are of complicated and specialised nature is frivolous and unsustainable. For identical works in the past, when the petitioners were considered to be eligible, then, by standards professed by the respondents the petitioners should be held to be eligible even at this stage.

19. The petitioners have also pointed out that the CPWD Manual and the paragraphs thereof would show that it was not open to the Authority to mention the "similar work", without mentioning the required number of years' experience. Therefore, the NIT is not in terms of the provisions of the CPWD Manual. It is then sought to be argued that the Central Water and Power Research, Pune's recommendations or report do not form part of the file pertaining to the approved NIT, nor it is annexed to the affidavit-in-reply. This so called recommendations or the report have not been placed before the Court either. Therefore, the reason now stated that on account of the recommendations of the consultant the condition was inserted, cannot be accepted.

20. Alternatively and without prejudice, it is urged that assuming such

recommendations are on record, still the insertion of this condition is impermissible in law as it is arbitrary and discriminatory in nature. One M/s R. B. Chauhan is closely connected to the consultant of the respondents and, therefore the eligibility criterion relating to "similar works" has been recommended to be inserted by the consultants. For all these reasons and other reasons, it is stated in the affidavit-in-rejoinder that the stand taken in the affidavit-in-reply by the respondents should not be accepted and while reiterating the contentions and grounds in writ petition, it is submitted that the petition be allowed.

21. It is on the above material that we have heard the learned Senior Counsel appearing for the parties.

22. Mr. Nadkarni, learned Senior Counsel appearing on behalf of the petitioners has contended that the eligibility criterion "similar works" is wholly arbitrary and discriminatory in nature and violates the mandate of Article 14 of the Constitution of India. Our attention has been invited to a copy of the NIT relating to earlier Keri works annexed at page 198 of the petition paper book to urge that Class I-A contractors registered with Water Resources Department, under category "hydraulics and marine" works were allowed to bid. Once the location of both the works, i.e. the one covered by earlier NIT and the present NIT is identical, then, in the submission of Mr. Nadkarni, insertion of such a criterion or condition is impermissible in law. He submits that the term "similar works" is not defined and now reasons given for insertion of the same and particularly that the works are of technical and specialised nature are wholly frivolous and unsustainable in law. The petitioners, therefore, have brought enough material according to Shri Nadkarni to prove that such a condition or criterion could not have been inserted and the same is having no nexus with the contract that is to be performed and the work to be carried out at site.

23. It is next contended by Shri Nadkarni that the work of executing anti-sea erosion and beach protection measures is not a specialised work, as contended by the respondents. He submits that the provisions of CPWD Manual which the respondents have purported to follow does not enumerate anti-sea work as a specialised item/job for civil works. From the nature of the work, as well as the provisions of CPWD Manual, it is apparent that the work of anti-sea erosion and beach protection measures is not at all a specialised work/job. Apart from urging before us that if there is any dispute with regard to the fact that the work is of a specialised or routine, an authority or body which is impartial in nature be appointed by this Court to ascertain this position. It is urged that the petitioners are Class I-A contractors, registered with the Department for identical works. Once they have undertaken the works in the category of hydraulics and marine works, costing up to any amount, then, there is no logic in not giving even the tender forms on the ground that the petitioners do not satisfy the "similar works" criterion.

24. Alternatively, Shri Nadkarni submits that the list of the specialised items/jobs for civil works is enumerated in Annexure I, section 17 of the CPWD Manual and

does not include the work in question. The reason for it, according to Shri Nadkarni, is obvious. Supplying and spreading of geo-fabric filter layer of geo textile and providing and laying filter of nylon bags is not one of listed works. It could be said to be specialised if it involves high skill and technology. In this context, it is pertinent to note that works relating to geo-fabric filters and nylon bags are in the nature of supply and laying of the items which are readily available in the open market. Even their transportation cannot be said to be a skilled or specialised work. The works do not even exceed 2% of the total cost of tendered works at Keri. If the works at Keri involve foundation/piling, casting and laying of concrete blocks, then, in all such works the petitioners have enough experience. Once such measures have already been taken for the beach in question and the instant tender also being a repetition of the same, then, the petitioners could not have been excluded from consideration and the least that was expected of the respondents was to hand over the tender forms to the petitioners. Once the petitioners have explained the nature of works and they are not of specialised or skilled nature, then, all the more the condition as imposed and impugned in the writ petition cannot be inserted and the act of the respondents in that behalf violates the mandate of Articles 14, 19, (1)(g) and 21 of the Constitution of India.

25. It is then contended that the definition of the term "similar works" is also arbitrary and discriminatory as the same is not included in the schedule of bill of quantity. It is next contended by Shri Nadkarni that the reasons now supplemented by the respondents in their affidavit for insertion of the impugned illegibility criterion are completely frivolous, unsustainable and afterthought, because none of them finds any mention or reference in the approved NIT file. It is contended by him that if the file does not refer to any document or other material pertaining to the said insertion, then, now the statements made in the affidavit-in-reply should not be accepted. That would mean that the respondents can justify their stand for reasons which are not set out in their files and records, but with reference to some other material mentioned in the affidavit. Equally, the reference to the photographs would not advance their case any further inasmuch as the works have been earlier also carried out and tendered. It is not that the concept is unique or the work is being undertaken for the first time. Throughout the country and wherever it was required in Goa, the work of anti-sea erosion measures and protection of beaches had been carried out. For all these reasons, and urging that even a term and condition in the NIT can be challenged if it is arbitrary, discriminatory and malafide, that he submits that this writ petition be allowed.

Shri Nadkarni handed over written submissions and in addition thereto summarises the contentions thereof by his oral arguments. He also contends that with regard to Anjuna works which are also identical in nature, eligibility criterion of "similar works" has not been introduced or inserted. Therefore, for one work insertion of such a condition would prove the malafides, discrimination and arbitrariness, according to him. It is submitted by him that desperate attempts to

justify insertion of such a condition would violate the mandate of not only the aforementioned Articles of the Constitution, but would not subserve larger public interest. Once having failed to make out a case of public interest, then, on that touchstone as well, this action of the respondents cannot be justified. For all these reasons, he submits that the petition be allowed.

In support of the above contentions, Shri Nadkarni relies upon the following decisions:

- (1) Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,
- (2) Mr. Mahesh Varma, Director of Michigan Rubber India Limited and Michigan Rubber India Ltd., formerly known as Betul Tyre and Tube Ind. Limited Vs. State of Maharashtra, Maharashtra State Road Transport Corporation and The General Manager (S and P), Stores and Purchase Department, MSRTC, and
- (3) Mega Kleen Vs. Union of India (UOI) and Others,

26. On the other hand, learned Advocate General, appearing for the State would urge that the petition is at the instance of a bidder who has absolutely no experience of carrying out or implementing work of anti-sea erosion or beach protection. The experience that the petitioners have indicated in the petition would show that the construction of bunds, bridges, culverts or embankment or diversion thereto cannot be compared with the works that are proposed to be carried out by the respondents. The works that are proposed is under a project which is financed by the Central Government. That project envisages taking measures so as to prevent sea erosion and protect the beaches therefrom. There is no pleading in the petition that the condition is arbitrary inasmuch as it has no nexus with the works to be carried out at Keri and Anjuna beaches. It is contended that there is no prohibition in law in setting up a higher benchmark for the works which are now proposed to be carried out at Keri and Anjuna Beaches assuming that the same is identical. The higher benchmark set up by the respondents, even on the assumption that their action cannot be immune from challenge and particularly being violative of Articles 14, 19(1)(g) of the Constitution of India. Ultimately, predominant tests in all such cases is public interest. Commercial interest or probable or possible adverse effect on one of the bidders is no ground to interfere with the NIT and condition therein, is the submission made by Shri Kantak on the basis and without giving up his first argument that there is no challenge to the condition raised anywhere in the petition. He has taken us through the petition, more particularly paras 21 to 23 thereof to support his argument that the petitioners' challenge is essentially founded on the basis that the works at both places are identical. It is not so and factually this has been pointed out by the respondents in their reply. He has invited our attention to the paragraphs which have been reproduced hereinabove and the photographs annexed to the affidavit-in-reply. To buttress his submission that the works at Anjuna and Keri cannot be said to be similar and identical, he submits that the topography and terrain is not the same. The work which is to be

carried out at Anjuna is on rock foundation to preserve and protect the cliff; whereas at Keri the beach itself has to be made and maintained. There different technology and different approach will have to be adopted. That is not something which must be seen by reading the nature and description of the work, as set out in the petition and in isolation. If all the clauses in the NIT are read as a whole and together, it will be clear that the work at Keri is of specialised nature and the respondents have learnt from their earlier experience inasmuch as it has to be carried out again within a short period because the work under the earlier contract was not of required and requisite grade and quality. Today, at several places on the beach there is complete erosion. It is a long stretch which has to be continuously built and maintained. If that is not built and maintained on the sand, then there is no way that tatrapods or other material will hold or continue for long time. These are measures and matters which are required to be undertaken, so that the beaches and the beach fronts are both maintained. In such typical situations and when the work is not to be carried out during high tide situation, then all the more experience and skill is a relevant factor. For all these reasons and when the rationality and relevancy of the terms and conditions is not an aspect which can be looked into, nor is it raised, then, no interference is permissible in writ jurisdiction with the term and condition in question. In support of his argument that the works are of specialised and skilled nature and that the terms and conditions in the NIT enjoy certain degree of immunity, the learned Advocate General places reliance on the following decisions;-

- (1) State of Bihar and Another Vs. P.P. Sharma, IAS and Another,
- (2) New Horizons Limited and another vs. Union of India and ors., reported in (1995) SCC 478;
- (3) DDA Builders Assoc. Vs. DDA,
- (4) Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others,
- (5) Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,
- (6) Association of Registration Plates Vs. Union of India (UOI) and Others,
- (7) Mega Enterprises and Others Vs. State of Maharashtra and Others,
- (8) M/s. S. S. & Company v. Orissa Mining Corporation Limited, reported in AIR 2009 SC 461;
- (9) James Electrical vs. State of Goa and ors., reported in [2010 (2) Goa L.R. 119 (Bom).];
- (10) Goa IT Business Association vs. Government of Goa, through its Chief Secretary and anr. reported in CDJ 2010 BJC 1515; and
- (11) THDC India Ltd. Vs. Voith Hydro GMBH Co. and Another,

27. With the assistance of the learned Senior Counsel appearing for the parties,

we have perused the petition and the annexures thereto, so also the affidavits placed on record. We have also perused the relevant decisions which have been brought to our notice.

28. We cannot forget that we are exercising writ jurisdiction. If the said jurisdiction does not permit us to go into disputed questions of facts and particularly when the challenge involved is to insertion of a condition and term in the NIT, then, it is well settled that the authorities are the best judge of the situation. Bearing in mind the type of work, the location at which the same is to be carried out, degree of skill and the requirement of men and materials for the same, all of which is to be determined by the authorities incharge of executing and implementing the work, then, their judgment cannot be interfered with by us, even if we have another view of the matter. The condition could have been better worded or the insertion was not necessary, without anything more, is no ground to interfere in writ jurisdiction. All these settled principles emerge from the decisions that have been brought to our notice by both sides. Within these parameters we have to deal with the arguments of the petitioners.

29. In matters of this nature, we cannot take a narrow and pedantic view and particularly one which is suggested in this case. The petitioners' contention that the term and condition which is inserted cannot be justified on materials other than what is set out in the records and the files of the Department, is difficult to accept, considering the facts and circumstances of this case. It is not a case where we can apply some rigid and abstract principle. The principles that emerge in tender matters and where commercial contracts or even works in public interest are undertaken, are somewhat distinct. The law laid down by the Hon'ble Supreme Court in the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and applied and followed in the decision in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, can have no application. The principles are best summarised in the decision of the Hon'ble Supreme Court in the case of Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others, In para 26 of this decision, this is what the Supreme Court holds:

26....The proposition that a decision must be arrived at after taking into account all relevant considerations, eschewing all irrelevant considerations cannot for a moment be doubted. We have already pointed out that relevant considerations were not ignored and, indeed, were taken into account by the Government of West Bengal. It is not one of those cases where the evidence is first gathered and a decision is later arrived at one fine morning and the decision is incorporated in a reasoned order. This is a case where discussions have necessarily to stretch over a long period of time. Several factors have to be independently and separately weighed and considered. This is a case where the decision and the reasons for the decision can only be gathered by looking at the entire course of events and circumstances stretching over the period from the initiation of the proposal to the taking of the final decision. It is important to note

that unlike Mohinder Singh Gill's case where the Court was dealing with a statutory order made by a statutory functionary who could not therefore, be allowed to supplement the grounds of this order by later explanations, the present is a case where neither a statutory function nor a statutory functionary is involved but the transaction bears a commercial though public character which can only be settled after protracted discussion, clarification and consultation with all interested persons. The principle of Mohinder Singh Gill's case has no application to the factual situation here.

Thus, these are matters where discussions have been going on over a period of time. The relevant and necessary factors have been independently and separately weighed and considered. This is a case where the decision and the reasons for the decision can only be gathered by looking at the entire course of events and circumstances stretching from initiation of the proposal to the taking of the final decision. The Supreme Court held that statutory order made by a statutory functionary cannot be allowed to be supplemented by later explanations. That principle cannot be applied in matters where the transaction bears a commercial though public character, as in such matters the decisions are taken after protracted discussion, clarification and consultation with all interested persons.

30. It is difficult to accept the arguments of the petitioners going by their averments alone and on the basis of the affidavits and statements therein that the consultant had not recommended imposition of any such condition or that the condition was recommended to be imposed, but the recommendation and proposal in that behalf having not been placed before this Court, the respondents' justification for the insertion cannot be accepted or the ultimate decision cannot be supported by the respondents. We have no doubt in our mind that decisions which involve awarding of contracts or when terms and conditions are to be inserted in the NIT or the promulgation of the tender notice itself is concerned, even if the contracts have a public element, the decision still is commercial in nature. Ultimately, whether a particular term and condition should be inserted in a tender or not, is a matter which must be decided in the facts and circumstances of each case. On the statements of the petitioners who have never been awarded any work of the nature proposed in the NIT by any Agency, nor the petitioners state that they have performed any such work, we cannot strike down a term and condition in the subject-tender. The material in this behalf is extremely sketchy. Therefore, the argument that the terms and conditions ought to have been inserted, only after the final decision is duly reflected in the records and the files, cannot be accepted at the instance of the present petitioners. It may be that in this case, all the aspects and factors have not been specifically mentioned in the files. However, so long as they are germane and relevant to the works that are proposed, we do not see how mere absence of the same in the files, would mean that the respondents are prevented from inserting the impugned term or condition. This disposes of one of the contentions of the petitioners.

31. The other contention is that the works at Anjuna and Keri are of identical nature. There is nothing which could be said to be dissimilar or distinct, justifying imposition of a term and condition of the nature imposed in case of Keri works. The argument is raised thus. Anjuna and Keri beaches are two beaches where measures of anti-sea erosion and beach protection are proposed. Both the beaches are located in the State of Goa. Ultimately, both are beaches, having sea front. If, in relation to one of the works at Anjuna there was no necessity of imposition of any condition and particularly of the nature imposed in the NIT in relation to Keri works, then, the imposition of the same in relation to Keri works alone results in arbitrariness and discrimination and, therefore, the mandate of Article 14 is violated.

32. For more than one reason, we find it difficult to uphold this contention. Firstly, it is not for this Court to find out as to whether the works are of identical nature or not. By their nomenclature in the notice and by mere reference to the NIT clauses alone it will not be possible to accept the argument of Shri Nadkarni that these two works, as described are identical in nature. Similarly, we cannot ignore the topography, location, nature of the works, technical requirement and equally the degree of skill which are all relevant factors even if the works are to be carried out at beaches or at beach fronts. This is not a matter in which this Court possesses any skill or expertise. On the basis of some statements which are made in the affidavit-in-rejoinder or on the basis of certain documents which are said to be the bills of quantity and costs and merely because single tender was issued in the past, it will not be possible for us to conclude that both works are identical. If there was any certainty in these allegations or charge of the petitioners, then, there was no necessity for them to aver in the petition and state that the works are identical and refer to the file notings. The submissions that are made before us and equally the averments and allegations in the petition are guarded. It is not as if the petitioners are making these allegations with certainty inasmuch as they are not the one who have carried out any of these works earlier. Merely because they were one of the bidders for Anjuna works and they were ready to bid for said works, will not enable them to make the allegations of the nature that have been made in the instant petition. While demonstrating that they have eligibility pursuant to their financial capacity and by their gradation, what the petitioners state in the petition is not the factual position. In para 19 of the petition, they make a reference to the works and state that petitioner No. 1 was, otherwise, eligible to bid for the said Keri works. Petitioner No. 1 was consequently also eligible to bid for Anjuna works and this is borne out from the eligibility documents. In para 20, they make a reference to the fact that the petitioners were aggrieved because in respect of Anjuna works, the eligibility criteria prescribed is that the bidders should have satisfactorily completed works in hydraulics and marine category which is the only requirement. In respect of exactly similar and/or identical works to be undertaken at Keri, a further subcategory out of said broader category of hydraulics and marine is carved out by respondent No. 2, is their allegation. It is

on that basis that they impugn the present term and condition and particularly the definition with regard to "similar works". At the same time and in the same breath they proceed on the assumption of difference in the nature of works, and urge that if at all said work is said to be distinct and dissimilar, reference is necessary to the sloping revetment comprising geo-textile filters and/or geo-textile bags and granitic/basaltic stone revetments of various sizes to form a filter as core and casting and laying tetrapods. If the term "similar works" is defined specifically and the work of both beaches was not stated to be identical, there was no necessity for the petitioners" referring to several materials and to the fact that there is really no distinction. If one of the requirements is to procure and lay down geo-fabric filter layer of geo-textile this is said to be a distinct requirement for Keri, according to the respondents, the petitioners submit that mere requirement of bringing in and laying geo-textile fabric and/or spreading of geo-textile bags would not make the work distinct or skilled or of specialised nature. This attempt on the part of the petitioners itself is enough to hold that it is not their certain and absolute case, nor could they bring any proof to prove with certainty that the two works are identical in nature.

33. An attempt is made thereafter to show that there is no specialised skill required for procuring and laying geo-textile fabric. That is a job which can be easily carried out by a contractor of the standard of the petitioners, is their submission. We are not experts in this field, nor can we be expected to hold in such a factual background and scenario that the petitioners really possess the expertise, as claimed. If the respondents have taken a decision, which is not shown to be malafide or favouring any particular contractor or individual, then we are nobody to substitute our views, assuming that we agree with the petitioners. This is not a case where in a completely arbitrary or irrational manner, a term and condition is inserted in the NIT, permitting us to intervene or interfere in writ jurisdiction.

34. We are of the opinion that insertion of the term and condition which is impugned in so far as the subject-NIT is concerned, is certainly relevant and germane. We have been shown enough materials by the respondents for us to conclude that they cannot be faulted for inserting the term and condition. They have demonstrated that what led to the insertion of the term in the NIT for Keri inasmuch as the experience that they had on earlier occasion and in cases of identical NIT when the works were tendered for the same beach earlier. The successful bidder despite assuring the respondents of the required quality, failed to take measures so as to prevent sea erosion and protect the beach. The beach has to be maintained and works must withstand the tides and pressure of the waves during all seasons, is an expectation which we do not find to be wholly unrealistic or not justified at all. If the respondents decide that in the new tender a condition by which an added assurance is given with regard to the quality of the work that is to be carried out at site and that is how they impose a condition in that behalf, we do not see how by this act alone, we can interfere in writ jurisdiction. The petitioners may have made statements to the contrary, in

rejoinder, but going by the contents of the affidavit-in-reply and particularly paras 7 to 9 which we have reproduced hereinabove, we are of the opinion that there is substance in the contention of learned Advocate General that these steps must be seen in their entirety and as a whole. We cannot pick and choose some measures or steps and hold that there is no specialised skill or technical experience required. If overall requirement of work and assured quality that is expected is such that the respondents want that the bidders should have carried out such works in the past and should possess enough experience, then, we cannot overreach or overrule their decision. These are not matters where we can intervene and interfere merely because another view is possible. If on the touchstone of public interest we are satisfied that the respondents have inserted a term and condition in the NIT which is having definite nexus with the work that is to be carried out at site, then, the contention of the petitioners must fail.

35. Equally, we do not find any merit in the contention that CPWD Manual mandates that the definition must be precise and not vague. Even if the manual is taken to be a guiding factor and has application in a case or to a contract of the present nature, we do not think that the definition is, in any way, vague or uncertain. The definition must be considered and interpreted as a whole. What the definition of "similar works" states is the construction of sloping apron/revetment structures for coastal protection and anti-sea erosion measures. These are works which ought to have been carried out and the bidders must possess experience in the same. The said works should be composite works inasmuch sloping revetments comprising geo-textile filters and/or geo-textile bags and granitic/basaltic stone revetments of various sizes to form a filter as core and casting and laying tetrapods and concrete blocks together constitute "similar works". Therefore, the works which are of this kind and which are composite in nature, are termed as "similar works" and we do not find anything in the definition which makes it ambiguous or uncertain or vague so as to give rise to any arbitrariness. If the respondents have set out nature of works with sufficient clarity in their notice and have pointed out that this was expected throughout, then, we do not see how we can strike down the term and condition on the ground of vagueness or uncertainty. Once it is not found to be vague, uncertain or ambiguous, then, there is no merit in the contention that the term and condition imposed is, in any way, arbitrary. There is nexus with the requirement at site and bearing in mind the works, so as to prevent sea erosion, maintain and preserve the beaches in the State of Goa, which is a task which has to be undertaken by the State and with the assistance of skilled and experienced persons, which is envisaged and for which special funds and packages are made available by the Central Government, then, it is but natural that the public funds are spent for public good and in public interest and works are carried out by sufficiently experienced persons. If that is the criteria and that is the reason for inserting the criterion in the NIT, then, applying the tests laid down in the decisions of the Hon'ble Supreme Court, which have been highlighted by both the learned Senior Counsel, we hold that the said condition cannot be termed as

arbitrary or discriminatory, leave alone malafide.

36. The allegation of malafides have not been seriously pressed before us. The statements in the affidavit-in-rejoinder and particularly by targeting the consultant and not the respondents or any individual, we cannot hold that the term and condition is inserted to favour any particular bidder and the bidders like the petitioners would be declared ineligible from bidding for the subject-contract only to accommodate the alleged favoured person.

37. Having dealt with each of the contentions of Shri Nadkarni as noted earlier, as also reiterated in the written notes, we are of the view that the challenge raised by the petitioners cannot be accepted. The decisions that have been relied upon by Shri Nadkarni, and particularly the decision of the Guahati High Court in the case of *Mega Kleen v. Union of India* (supra), must be seen in the backdrop of the facts and circumstances before the said Court in that decision. The passages from the decision which have been relied upon refer to the settled principles. We are unable to agree with Mr. Nadkarni that imposition of a condition or insertion of the term of the present nature in one contract and not in relation to other contract, by itself, would make the insertion arbitrary and discriminatory. Once we have turned down his submission that the works are not identical and also on facts we find that the respondents have given justification for insertion of the condition in relation to Keri works, then, the arguments based on the decision of Guahati High Court, cannot be accepted. It is well settled that terms and conditions of eligibility prescribed in the NIT can also be challenged as arbitrary, discriminatory or malafide. There is no quarrel with this settled principle, but its application to individual cases is determinative and decisive. On this aspect, even the illustrations which have been given by the Guahati High Court would definitely make the decision or the condition arbitrary and wholly discriminatory. Such is not the case before us. We have concluded that the term and condition is neither irrational, capricious and whimsical, nor actuated by bias. Once, such is the position, then, we cannot rely upon the principles which have been culled out by Guahati High Court and apply them to this case. This decision is, therefore, distinguishable on facts.

38. Equally the reliance placed on the decision in the case of *Mahesh Verma and anr.*, [2008 (4) ALL MR 352] (supra), is misplaced. In that decision what was considered by the Division Bench was a challenge to the pre-qualification criteria attached to a technical tender invited by the Maharashtra State Road Transport Corporation ("MSRTC", for short). The MSRTC required spare parts for repairing their buses. They were procuring the same from various manufacturers by floating tenders. In the year 2004, the tender condition was changed by incorporating per-qualification criteria in the technical tender, making it compulsory that the manufacturers of spares parts who were supplying their products to the Original Equipment Manufacturers were alone entitled to participate in the tender. Therefore, the manufacturer like the petitioners therein who were not original equipment manufacturer or supplier became ineligible to

participate in the tender. Challenging that criteria, that they approached this Court. The Division Bench, therefore, rightly relied upon the afore-referred principles culled out from the decisions of the Supreme Court and applied them to the case before it. It primarily applied them because arbitrariness was writ large in the action of MSRTC. The MSRTC could not produce any material to justify their action. The observations of the Division Bench, based on the factual material in paras 25 to 28 would demonstrate that there was absolutely no material before the Division Bench to show that original equipment manufacturers form a separate class and there is intelligible differentia. There the contractor or the supplier being similarly and identically placed was excluded on the basis of the terms and conditions which were found to be otherwise arbitrary and discriminatory and hence struck down by the Division Bench. In the light of the conclusion that we have reached on facts, it is not necessary for us to refer to each of the decisions that have been brought to our notice by the learned Counsel. Suffice it to note that we have applied the very decisions to the facts of this case and applying them, we find that in the subject-case, there is enough material which has been placed forward by the State that firstly, the two works are not identical, but dissimilar; secondly insertion of the term and condition in regard to Keri works was necessitated because of typical terrain and topography and considering that the beach had to be made and maintained and thirdly the works at Keri carried out earlier also were of identical nature as tendered now, but the experience was that the earlier contractor failed to maintain the required standard and his work lacked in quality, which required floating of another tender and this time the participation was restricted to such of the contractors or bidders who have experience in undertaking anti-sea erosion measures and protection of beaches. Once there is justification for insertion of the criterion considering the nature of the work as explained in the affidavit, we are of the view that the challenge must fail. Barring the facts relating to work carried out and experience gained, there is no difference in the two petitions. Thus, save and except, the constitution of the petitioners, their grievance is identical. Hence, both the petitions are dismissed. Rule is discharged in both the petitions, but there will be no order as to costs. Interim orders stand vacated.