

(2021) 03 GAU CK 0055
In the Gauhati High Court
Case No : Writ Petition (C) No. 1373 Of 2021

Voith Hydro Private Limited	Vs	APPELLANT
Assam Power Generation Corporation Limited And 3 Ors		RESPONDENT

Date of Decision : 31-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 19, 226

Citation : (2021) 03 GAU CK 0055

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : G N Sahewalla

Final Decision : Dismissed

Judgement

1. Though this writ petition has been filed in the current year 2021, considering the urgency involved and as jointly requested by the parties, the same is taken up for disposal at the admission stage. This Court has also noted that the pleadings have been exchanged and the subject matter in question involves immense public interest.

2. To facilitate formulation of the issue raised in this writ petition, it would be convenient to state the facts of the case in brief.

3. The petitioner is a company which has put to challenge a communication dated 19.12.2021 issued vide email whereby the bid submitted by the petitioner has been rejected on the ground that the bidder could not demonstrate the actual financial resources available with the parent company through submitted Form FIN-4. The project involved is Lower Kopili Hydroelectric Project for generation of 120MW of electricity. The civil part of the work has already been allotted in a different process which has already been commenced from 01.09.2020. The present contract is in connection

with the electromechanical work and both the works are inter-related and required to be executed simultaneously.

4. It is the case of the petitioner that pursuant to a Tender E-Procurement Notice / Invitation For Bids dated 06.03.2020, the petitioner had submitted

its bid. The work in question was "Procurement of Plant-Design and Engineering, Manufacturing, Supply, Erection, Testing and Commission of

Electromechanical Equipment for 120MW Lower Kopili Hydroelectric Project". The tender was a two bids system, namely, Technical and

Financial. The petitioner contends that it had fulfilled all the requirements for being technically responsive and therefore, a duty was cast upon the

respondents-Assam Power Generation Corporation Ltd. (hereafter APGCL) to open the financial bid of the petitioner and thereafter make the final

decision. However, the bid of the petitioner was unfairly treated and in a most unreasonable manner, the bid was held to be technically non-

responsive. On the other hand, as per the respondents, the reasons / grounds for such decision are based on relevant factors which are germane to the

issue at hand and therefore, no grounds for interference is made out by the petitioner. The respondents have also contended that the writ petition is

otherwise bad for non-joinder of necessary parties, namely, the Asian Development Bank (ADB), which is admittedly the funding agency whose

approval is necessary for all final decisions. The self-imposed restrictions and dealing with contractual matters with circumspection by this Court have

also been highlighted by the respondents by contending that there is no instance of violation of any legal right of the petitioner and rather, the records

would reveal that the entire decision has been arrived at in a fair and transparent manner. The petitioner has also filed IA(C)/784/2021 for a direction

to the respondent authorities for production of the records relating to the case.

5. I have heard Shri GN Sahewalla, learned Senior Counsel assisted by Shri HK Sarma, learned counsel for the petitioner. I have also heard Shri BD

Das, learned Senior Counsel assisted by Shri P Bhowmick, learned counsel for the APGCL whereas the private respondent no. 5 is represented by

Shri TP Sen, learned counsel.

6. Shri Sahewalla, learned Senior Counsel submits that the tender in question prescribes fulfillment of various conditions. However, since the impugned

rejection is on account of financial resources, more particularly, FIN-4, the

learned Senior Counsel has focused his arguments on the relevant aspect.

Clause-2.3.3 of the Evaluation and Qualification Criteria lays down a requirement of single entities i.e., financial resources defined in FIN-3 less its

financial obligations for its current contract commitments defined in FIN-4 meet or exceed the total requirement for the subject contract of INR 200

million and the documents required to be submitted are Form FIN-3 and Form FIN-4. The availability of financial resources as per FIN-3 has to be

304,086,840 USD. The Form FIN-4, i.e., financial requirements for current contract commitments was given in a tabular form, as per which the

Monthly Financial Resources Requirement (MUSD equivalent) is 113.5. As per the aforesaid figures, the available resources would be approximately

304 MUSD minus 113.5 MUSD which will come to 190.5 MUSD. On the other hand, the requirement of the contract is INR 200 million which is

equivalent to 2.7 MUSD. It is therefore, submitted that the available resources is much more than the required resources of 200 million INR which is

equivalent to 2.7 MUSD.

7. It is submitted on behalf of the petitioner that the present is a contract of high value involving about Rs. 215 crores wherein three bidders had

participated. Out of the three bidders, one was not even considered and rejection of the tender of the petitioner at the technical stage virtually would

leave the employer with only one valid financial bid and public interest would require that the entire bidding process be done afresh. By drawing the

attention of this Court to the order dated 01.03.2021 whereby notice was issued, it is submitted that there was a further observation that no final award

be made in favour of the successful bidder till the next date. Shri Sahewalla submits that while the restrictions were only not to make the final award,

the price bid of the remaining bidder has even been opened and in this regard oblique intention has been attributed on the part of the employer.

8. The learned Senior Counsel for the petitioner submits that when there is no doubt on the financial soundness of the petitioner as its resources are

much about the required resources, disqualifying its bid at the technical stage, on that ground, is wholly unreasonable and liable for interference by this

Court. In support of his submissions, the learned Senior Counsel for the petitioner has relied on the case of BSN Joshi & Sons Ltd. Vs. Nair Coal

Services Ltd. & Ors., reported in (2006) 11 SCC 548 wherein it has been laid

down that when huge public money is involved, a public sector undertaking in view of the principles of good corporate governance, may accept such tenders which are economically beneficial to it by allowing a bidder to make good any deficiency by giving details at a later stage. Reference has also been made to the case of Central Coal Fields Ltd. Vs. SLL-SML (Joint Venture Consortium) & Anr., reported in (2016) 8 SCC 622 wherein after referring to the case of Jagdish Mandal Vs. State of Orissa, reported in (2007) 14 SCC 517, the questions to be formulated are whether the process adopted or the impugned decision is mala fide or that no responsible authority acting reasonably could have reached and secondly, whether public interest is affected. He submits that at no point of time, the objection with regard to row no. 22 in FIN-4 has been raised and by relying upon the aforesaid decision of Central Coal Fields Ltd. (supra), it is submitted that the said requirement was a curable one which ought to have been given to be rectified by furnishing all the relevant documents.

9. Reference is also made to the case of Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. & Anr., reported in (1997) 1 SCC 738 wherein in paragraph 10 it has been laid down that if it is brought to the notice of the Court that in matters of award of contract, power has been exercised for any collateral purpose, it would be a fit case for interference.

10. Shri BD Das, learned Senior Counsel for the APGCL, on the other hand submits that the writ petition in its present form is not maintainable because of non-joinder of necessary parties. The work in question is funded by the ADB and the writ petitioner in paragraph 3 of the writ petition makes a disclosure of the same with the additional information that the petitioner was qualified for all the previous ADB funded projects. Placing on record the relevant pages of the loan agreement dated 30.12.2020 between India and the ADB, Shri Das submits that Schedule-4 of the said agreement contains the overall power of supervision of the ADB. Reference is made to Appendix-I of the procurement guidelines, more particularly, Clause-2(b) and Clause-2(c), as per which the borrower is required to furnish ADB all the relevant documents prior to invitation of the bids and after such receipt and evaluation, prior approval has to be obtained from the ADB before a final decision on the award is made. The Guide on Bid Evaluation of the ADB, more particularly, Clause-1.3 of Section 1 has also been

referred whereby the satisfaction of the ADB that the objectives of economy, efficiency and fairness amongst bidders have to be met.

11. By drawing the attention of this Court to the affidavit-in-opposition filed on 15.03.2021, the learned Senior Counsel for the APGCL submits that

initially even the technically qualified bidder, namely, M/S Andtriz Hydro Pvt. Ltd. was not made a party respondent in spite of making allegations

against it and it was only as per direction of this Court made in the order dated 01.03.2021 that the said company was made a party respondent. The

learned Senior Counsel submits that the entire process was monitored by the ADB and the impugned decision to hold the bid of the petitioner to be

technically non-responsive has been approved by the ADB as would be evident by the email communication dated 19.02.2021 wherein the ADB has

stated that the evaluation of the technical bid was done transparently and in accordance with the bidding document.

12. On the merits of the case, it is submitted on behalf of APGCL that vital documents which ought to have been annexed to the writ petition have

been materially suppressed. Initially, the Forms FIN-3 and FIN-4 submitted by the petitioner were not of the same entity but one of the parent

company, namely, Voith Hydro Holding GmbH & Co. KG (in Germany) and one of the subsidiary company, namely, Voith Hydro Pvt. Ltd. (in India).

However, when it was clarified that the said Forms have to be of the same entity, such information of the bidder was given. By drawing the attention

of this Court to the initial FIN-4 Form submitted by the petitioner, in spite of the requirement to provide information on its current commitments on all

contracts that have been awarded, no details, whatsoever was given and only certain figures of outstanding contract value, remaining contract period

and monthly financial resources requirement were given. On receipt of the same, vide communication (email) dated 06.02.2021 another request was

made to the petitioner to give each details of its contract which was given by a forwarding email dated 10.02.2021. However, even on this occasion,

details of 21 works have been stated whereas against Sl. No. 22, a vague description â??various other contractsâ?? have been given with the

outstanding contract value of 1421.9 MUSD and monthly financial resources requirement of 57.9 USD have been given. It is contended that the

amount given against Sl. No. 22 constitutes 42% of the value of which details

were not disclosed. The respondents-APGCL thereafter issued communication dated 10.02.2021 to the ADB informing the same with the following noting:

On 10th February 2021, Voith emailed the FIN-4 of the parent company to APGCL (Attachment-6). While reviewing the submitted FIN-4 it is

found out that in Sl. No. 22 of the FIN-4, information w.r.t. various other contracts are not mentioned, only the outstanding contract value, remaining contract period & monthly financial resources requirement is mentioned.

It is to be noted that the amount stated at Sl. No. 22 for various contracts pertaining to outstanding contract value is MUS\$ 1421.9 (details of which are not given), which is 42% of total outstanding contract value of MUS\$ 3402 of all ongoing contracts of parent company declared in their letter dated 4th February 2021 (Refer Attachment-4).

APGCL would like to inform you that without these information it is not possible to validate and therefore the FIN-4 of Voith's Parent Company is not acceptable to APGCL in pursuant to ITB 6.4 of the bidding document.

13. The said communication was replied by ADB on 11.02.2021 that the proposed rejection of the bid of the petitioner would be in line with the provisions of the bidding documents. It appears that the petitioner had also represented to the ADB, vide representation dated 18.02.2021 which

however was rejected and consequently, vide email dated 19.02.2021, the ADB had put on record its view that the technical bid of the petitioner was

evaluated transparently and in accordance with the bidding document. In the meantime, vide email dated 18.02.2021, it was conveyed that the ADB

would not have any objection for consideration of the bid of the respondent no. 5 as it was found to be substantially responsive. The fact that the

petitioner had also approached the respondent-APGCL and the Chief Secretary, Government of Assam by filing representation has also been

suppressed in the writ petition. Another important point that the petitioner was granted an opportunity of even personal hearing as would be evident

from the email dated 20.02.2021 has been suppressed in the writ petition. The learned Senior Counsel accordingly contends that all necessary

procedural safeguards were afforded to the petitioner and the decision is based on relevant considerations wherein it has been explicitly mentioned in

the impugned communication itself that the bidder could not demonstrate the

actual financial resources available with the parent company through submitted Form FIN-4.

14. In support of his submissions, Shri Das, learned Senior Counsel has placed upon a judgment of this Court in M/S ASCON & Anr. Vs. The State of Assam & Ors., reported in 2017 SCC Online Gau 970.

15. Shri TP Sen, learned counsel for the newly impleaded respondent no. 5 has fairly submitted that as a competitive bidder, his role is a limited one, mainly to highlight the credentials of his client and the eligibility for which the contract has been decided to be awarded to the respondent no. 5.

However, since the present is an adversarial litigation, the learned counsel seeks leave of this Court to argue on the merits of the case.

16. Shri Sen, learned counsel submits that the records would reveal that the impugned decision has been arrived at on reasonable grounds after due

application of mind. By endorsing the submissions of the learned Senior Counsel, APGCL, Shri Sen submits that though the projected case of the

petitioner is that it is financially sound, the same is not the only relevant factor and what is more relevant is its capabilities to execute the work in

question and this can be assessed only on evaluation of the works undertaken or completed. However, even after a fair opportunity being granted, the

disclosure was not in accordance with the requirement and rather, there was no disclosure of majority of such works which constitutes 42% of the

total. The approach of the petitioner to the respondent, the Chief Secretary of the State and above all the ADB have been conveniently suppressed.

Most importantly, it appears from records that the respondent-Corporation has looked into the grievance of the petitioner by giving a personal hearing

and the same has also been suppressed.

17. The learned counsel for the respondent no. 5 accordingly submits that there is no violation of any legal rights, much less any constitutional rights

which would enable the petitioner to invoke the writ jurisdiction of this Court. The petitioner being a company and not a citizen, the rights under Article

19 of the Constitution of India are not available. The rights under Article 14 of the Constitution which are available to a person, is a right of equality

before the law where the decisions are tested on the grounds of reasonableness. In the instant case, it is submitted that the impugned action is

supported by reasons which appears to be bona fide and in the interest of public

service. The learned counsel also relies upon the case of Central Coal Fields Ltd. (supra) to contend that in matters involving contracts, the decision of the employer should not be normally interfered with unless the same is found to be wholly unreasonable or in defiance of logic.

18. Shri Sahewalla, learned Senior Counsel in his rejoinder submits that though the rejection appears to be on the ground of alleged non-submission of details of work, the same was never intimated and given a chance, such details could have been given to the APGCL. In any case, he reiterates that the objective being to assess the financial soundness of the bidder which was otherwise available and in fact, much more than the requirement, the impugned rejection is bad in law and would require interference by this Court.

19. The rival submissions made by the learned counsel for the parties have been duly considered and materials placed before this Court have been carefully examined.

20. Let this Court first deal with the objection of non-joinder of necessary parties which has been raised at the stage of argument. There is no doubt

that the ADB is the funding agency and it is only in pursuance of a Loan Agreement dated 03.12.2020 that the present NIT has been floated. The

pleadings made in paragraph 3 of the writ petition also make it clear that the petitioner is aware of the same. The relevant provisions of the Loan

Agreement, Procurement Guidelines, final approval of the ADB and above all, the communications, including the email dated 19.02.2021 issued by the

ADB expressing its satisfaction and granting approval to the proposed action of the respondent APGCL leaves with little option but to come to a

finding that ADB is a necessary party, whose presence would be required for a fair adjudication. However, in spite of coming to the said conclusion,

this Court has failed to notice that such objections were raised in the pleadings by the respondents. Therefore, without affording the petitioner a

reasonable opportunity to defend on this point in its rejoinder affidavit, this Court is of the view that it may not be fair to reject the writ petition on the

aforesaid ground of non-joinder. In fact, the petition was also bad for non-joinder of the bidder which was found to be technically responsive.

However, as observed above, vide liberty granted by this Court in its order dated 01.03.2021, the said bidder has been impleaded as respondent no. 5.

21. The point which now requires to be determined is as to whether the

impugned action holding the bid of the petitioner to be technically non-responsive is sustainable in law.

22. The project in question is a high value one involving utmost public importance. No issue has been raised with regard to the validity of the

requirements of the tender, including submission of Forms FIN-3 and FIN-4. On the other hand, this Court is of the opinion that such information are

essential to enable the employer to come to a prima facie conclusion regarding the capability of a bidder to execute the work in question. Where FIN-

3 is in connection with how much the financial resources the bidder has, FIN-4 is on current commitment of all contracts of the bidder so as to enable

the employer to verify the monthly contractual commitment of the bidder. At this stage, it would be beneficial to note the relevant provision of the

tender which is embodied in Clause-6.4 of Section 9 which reads as follows:

“6.4. The Bidder is expected to examine all instructions, forms, terms, and specifications in the Bidding Document. Failure to furnish all

information or documentation required by the Bidding Document may result in the rejection of the Bid.”

23. It is an admitted fact that the petitioner, at the first instance, had given information of FIN-3 and FIN-4 not of the same company but one of the

holding company of Germany and the other of the bidding company of India. In spite of the aforesaid provision of Clause-6.4 indicated above, the

petitioner was given a further opportunity to give the required information which has to be of the same company. The requirement of FIN-4, as

indicated above, is to provide information on their current commitments on all contracts. The language employed being of significant importance is

extracted hereinbelow:

“Bidders (or each Joint Venture partner) should provide information on their current commitments on all contracts that have been

awarded, or for which a letter of intent or acceptance has been received, or for contracts approaching completion, but for which an

unqualified, full completion certificate has yet to be issued.”

24. Though the emphasis is on all contracts, vide email dated 05.02.2021, the petitioner in the said Form did not give details of any of the contract and

simply filled up the last three columns, namely, Outstanding Contract Value, Remaining Contract Period and Monthly Financial Resources

Requirement. On receipt of the said Form FIN-4, a further opportunity was given to the petitioner vide email dated 06.02.2021 to provide details of

each contracts indicating all the information fulfilling the requirement of FIN-4 of the bidding document. Pursuant thereto, vide forwarding email dated

10.02.2021, the so-called details were given of

21 nos. of works whereas against Sl. No. 22 again there was a vague description of "various other contracts", the value of which has been

broadly calculated to be about 42%. It thus appear that the position which existed on submission of the FIN-4 vide email dated 05.02.2021 is almost

the same even on its re-submission vide email dated 10.02.2021 wherein 42% of the information still remained vague. It is the case projected by the

respondent authorities that such information are required not only to assess the financial soundness of the bidder but also to assess the capability to

execute the work in question. This Court is of the opinion that such requirements are not only relevant and germane but would also being within the

domain of the employer to be fully satisfied with the credentials of the bidder.

25. This Court is unable to accept the submission made on behalf of the petitioner that the petitioner was never given a chance to give the necessary

information. The materials placed before this Court would rather demonstrate that adequate opportunities were granted to the petitioner to resubmit its

FIN-4 and even after such opportunities, full disclosure was not done on the existing commitments of the petitioner. Further, a bare look at the

impugned communication vide email dated 19.02.2021 would reveal that the same contains specific reasons, namely, the petitioner not being able to

demonstrate the actual financial resources through the submitted Form FIN-4. Though much emphasis has been sought to be attached to the financial

strength of the petitioner which according to the petitioner, is much more than the required amount, the same alone would not be sufficient as the

APGCL has to come to a satisfaction with regard to the capability of the petitioner to execute the work in question which can only be done by having

all the information about the present commitments of the petitioner which have not been disclosed till now.

26. The self-imposed restrictions of this Court exercising powers under Article 226 of the Constitution of India in matters of contract are no longer res

integra. This Court while dealing with such matter has to exercise its powers with

circumspection wherein the employer have to be given certain leeway of “free play in the joints”. The requirement of this Court is to examine as to whether the decision arrived at is based on relevant materials or whether such decision is arbitrary, unreasonable and based on no materials. When this Court finds that the impugned decision is based upon the satisfaction of the employer arrived at after taking all the relevant factors into consideration, there would be hardly any scope of interference by this Court inasmuch as, this Court would not like to substitute the conclusion arrived at by the employer if the same is a plausible one. It is well settled that it is not a decision which is the subject matter of judicial review but the decision making process which is examined by a writ court in exercise of powers under Article 226. If such decision making process is not vitiated by mala fide, illegality or unreasonableness, this Court would be loath in interfering with such decision, more so when there is an element of overwhelming public interest involved in the said decision. As indicated above, the present project is of immense public importance where the funding agency, namely, the ADB is monitoring each of the decisions so as to ensure proper utilization of money and that the project is completed as per the schedule. Though a frail submission was made regarding “single bid situation”, such submission is not available to the petitioner as the rejection is not on account of “single bid” and only in an appropriate case, an aggrieved bidder whose bid has been rejected on that ground can approach the Court.

27. At this stage, let this Court examine the decisions relied upon by Shri Sahewalla, learned Senior Counsel for the petitioner. The case of BSN Joshi & Sons (supra) has been cited to buttress his submission regarding the requirement of the Court to be lenient so as to enable an otherwise eligible bidder to make good any shortcomings, more so when the contract in question involves huge amount of public money and in this connection, paragraph 69 of the said judgment has been pressed into service. For ready reference, the relevant paragraph is extracted hereinbelow:

“69. While saying so, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial

to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.â??

28. On a reading of the same, this Court is of the opinion that the observation of the Honâ??ble Supreme Court rather than coming to the aid of the petitioner would be against the case projected. The Honâ??ble Supreme Court has clearly laid down that if a party fails to comply with the requisite conditions which are essential for consideration, it cannot supply the details at a later stage and in the instant case, the petitioner was given adequate opportunities to give the details and on the representation of the petitioner, even a personal hearing was given to the petitioner.

29. As indicated above, paragraph 10 of Asia Foundation & Construction Ltd. (supra) has been relied upon by the petitioner which reads as follows: -

â??10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose.â??

The Honâ??ble Supreme Court in clear terms has laid down that interference in exercise of powers of judicial review can be made to prevent

arbitrariness or favouritism which were not present in the said case and the interference of the High Court was not proper.

30. In the case of M/S ASCON & Anr. (supra), this Court was dealing with a case of rejection of a technical bid. The challenge was however

rejected as there was no case of any fraud or collusion and there was nothing to show that the contract was secured by the respondent by dubious

means. This Court has further held that even assuming that two views were possible on the question of validity of the technical bid, interference by

this Court may not be called for.

31. The case of Central Coal Fields Ltd. (supra) has been cited by the rival parties. Therefore, it would be necessary to refer to the same and the law

laid down. The issue was in connection with the Earnest Money Deposit which was to be submitted â??in the format given in the bid documentâ??.

The relevant paragraphs are extracted hereinbelow:

â??9. What is of significance from the above is that the earnest money deposit was required to be made in the form of an irrevocable bank

guarantee from any scheduled bank ""in the format given in the bid document"".

27. What is extraordinary about this case is that the employer, that is CCL, seeks to adhere to the terms of the NIT and the GTC issued by it,

but the submission of JVC is that CCL should actually deviate from the terms of these documents so as to benefit JVC. Indeed, in spite of a

specific requirement that the bank guarantee should be submitted in the prescribed format, JVC claims an entitlement to a deviation in this

regard on the ground that the prescribed format was a non-essential term of the NIT and the GTC. Who is to decide this issue of

essentiality? Does CCL with whom the contract has to be entered into by the successful bidder have no say in the matter? Before adverting

to this, it is necessary to get clarity on some circumstances.

32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of the 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.

38. In *G.J. Fernandez v. State of Karnataka* (1990) 2 SCC 488 both the principles laid down in *Ramana Dayaram Shetty* 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 the *Ramana Dayaram Shetty* sense.

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-

introducing 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 (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 the 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*) in

Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 in the following words:

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." "â??

32. The Honâ??ble Supreme Court in the case of Silppi Constructions Contractors Vs. Union of India, reported in (2020) 16 SCC 489 has laid down

the importance of taking into consideration the aspects of overwhelming public interest in matters relating to distribution of State largesse. For ready

reference, the relevant paragraphs are extracted hereinbelow:

â??8. In Raunaq International Ltd. vs. I.V.R. Construction Ltd., this Court held that superior courts should not interfere in matters of

tenders unless substantial public interest was involved or the transaction was mala fide.

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

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

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

that the window has been opened too wide as every small or big tender is

challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and

bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while

exercising their powers of judicial review in contractual or commercial matters. This Court is normally loath to interfere in contractual

matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public

sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under

writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are

amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and

caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts

involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary

expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a

magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give a fair

play in the joints to the government and public sector undertakings in matters of contract. Courts must also not interfere where such

interference will cause unnecessary loss to the public exchequer.

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

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

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

appropriate authority; the court must realise that the authority floating the

tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.

33. This Court would also like to refer to a decision of the Hon'ble Supreme Court in *Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Ltd. & Ors.*, reported in (2019) 14 SCC 81, regarding the scope of interference in the matters regarding distribution of State largesse and also interpretation of terms of the contract. In the said case, reference was also made to the earlier decision of *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and Anr.*, reported in (2016) 16 SCC 818. For ready reference, the relevant paragraphs of the said judgment are extracted hereinbelow: -

37. In *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.*³, this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice.

38. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of respondent No.1 must prevail. Respondent No.1 itself, appreciative of the wording of clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own interpretation of the contract to be thrust on respondent No.1, or ask the Court

to compel respondent No.1 to accept that interpretation. In

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

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

34. In view of such clear guidelines laid down by the Honâ??ble Supreme Court, there is hardly any scope for this Court to interfere in the facts and

circumstances of the instant case. It has been settled that importance has to be given to the lawfulness of a decision and not to its soundness. Further,

it has been well settled that the employer cannot be faulted with on its insistence to adhere to the terms of the tender and in this case, it has been

noticed that there is failure on the part of the petitioner to comply with the same even after repeated opportunities. The overall monitoring by the

ADB, which is the funding agency, coupled with the admitted fact that personal hearing was given to the petitioner, persuade this Court to come to a

conclusion that the principles of natural justice have also been complied with and under the above facts and circumstances, no case for interference is

made out.

35. The writ petition is accordingly dismissed and the restraint put vide the order dated 01.03.2021 stands vacated.