

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

**Division Bench : HON'BLE MR. JUSTICE S. C. SHARMA AND
HON'BLE MR. JUSTICE SHAILENDRA SHUKLA**

Writ Petition No.21369/2018 (O)

Tower and Infrastructure Providers Association (TAIPA)

Versus

Indore Smart City Development Limited and Others

Counsel for the Parties : Shri B. L. Pavecha, learned Senior Counsel with Shri Raghvendra Singh Raghuvanshi, learned counsel for the petitioner.

Shri Anand Mohan Mathur, learned Senior Counsel with Shri Manoj Munshi, learned counsel for the respondent No.1.

Shri Abhishek Tugnawat, learned Government Advocate for the respondent No.2 and 3 / State.

Shri Milind Phadke and Shri Aniket Naik, learned counsel for the respondent No.4.

Shri A. K. Chitale, learned Senior Counsel with Shri Akshay Sapre, learned counsel for the respondent No.5.

Whether approved for reporting : Yes

Law laid down : 1) The grant of Right of Way for establishing and maintaining the underground and overground telecom infrastructure pertain to land, which is a state subject under List-2 in the Seventh Schedule of the Constitution of India and therefore, vests with the State Government.

2) A bidder who has participated with open eyes after going through the terms and conditions of the NIT is estopped for challenging the terms and conditions of the NIT after he has been declared as unsuccessful in the open competition, specially in light of fact that he has suppressed the factum of his participation

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in the process of tender before the Court.

- 3) 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”. 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.

Significant paragraph numbers : 67, 68 and 74 to 81

O R D E R

(Delivered on this 04th day of September, 2019)

Per : S. C. Sharma, J.

The petitioner before this Court, Tower and Infrastructure Providers Association (TAIPA), has filed present petition challenging the “Request for Proposal (hereinafter referred as RFP)” bearing NIT No.25/ISCDL/18-19 issued for “Selection of Concessionaire for Implementation of Intelligent Street Pole” at six smart cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain Sagar and Satna) under “Public-private Partnership (PPP) on Design, Build, Own Operate and Transfer (DBOOT) Model”.

02- The petitioner's contention is that the respondent No.1 – Indore Smart City Development Limited has issued a NIT for the aforesaid work for Implementation of Intelligent Street Pole for Six

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Smart Cities under the Public-Private Partnership on Build, Own, Operate and Transfer Model. It has been further stated that the petitioner Association is a Society registered under the Indian Society Registration Act, 1860 and the petitioner's members include all key players in the sector i.e. ATC India, Bharti Infratel, GTL Infrastructure, Indus Towers, Reliance Infratel and Tower Vision India.

03- The petitioner has challenged Clause 2.12.1 and Clause 2.12.2 of the RFP, which prescribes that the Concessionaire / Successful Bidder will have exclusive Right of Way (ROW) rights for laying Optical Fiber Cables (OFC) within the project site and no further Right of Way will be extended to third party.

04- The petitioner's grievance is that respondent No.1, 2 and 3 have inserted stringent, arbitrary and discriminatory clauses in the RFP document and because of the aforesaid clauses, no other telecom operator other than the concessionaire will have any right ROW permission for laying Optical Fiber Cables or Intelligent Pole. The petitioner's grievance is that the respondent No.1 on 24/08/2018 issued a Corrigendum No.3 on the request of probable bidders, wherein further clarification / amendments have been made along with revised key dates.

05- The petitioner has further stated that Corrigendum does not delete the impugned clauses of the RFP and therefore, as the

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clauses are restrictive, discriminatory and prohibitive clauses, they deserve to be quashed keeping in view the fact that they are detriment to a large section of telecom industry players. The petitioners have also stated that they have submitted a letter of protest to the respondents, however, nothing has been done by them. The petitioner has further stated that being the representative body of telecom industry, it is aggrieved by the action of the respondents and the clauses prescribed in the RFP document.

06- The petitioner has raised various grounds before this Court. The first ground raised by the petitioner is that the impugned clauses are discriminatory as there is an unintelligible differentia created within the same class i.e. telecom infrastructure providers and a monopoly is going to be created in respect of the successful bidder to the exclusion of all other similarly situated persons.

07- The petitioner has also raised a ground that the action of the respondents No.1, 2 and 3 in issuing NIT will deprive all the players in the telecom industry from the business of installing Optical Fiber Cables and the exclusion of all other telecom players will amount to blacklisting of other companies or will amount to civil death of such companies.

08- The third ground raised by the petitioner is that the impugned clauses have been carved out to ensure that a monopoly is created in favour of concessionaire since no other operator will be

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permitted to carry on the business of installing OFC once a contract is awarded under the RFP to the successful bidder and therefore, the action of the respondents is violative of Article 14 of the Constitution of India. The petitioner has also contended by raising a ground that the action of the respondents No.1, 2 and 3 is violative of Article 19(6) of the Constitution of India as it guarantees constitutional rights to all operators including the member of the petitioner Association to carry out business.

09- The another ground raised by the petitioner is that the existing operators will not be able to engage in fresh installation of Optical Fiber Cable, leading to a stagnation of their business, which would ultimately lead to the commercial death of their business. It will also effect the economy as a whole in the country. The petitioner has further stated that the action of the respondent is arbitrary, unreasonable and capricious and the impugned clauses restrict the Right of Way for laying Optical Fiber Cable and intelligent pole to other persons and the right shall be vested exclusively with the concessionaire / successful bidder.

10- The petitioner has also raised a ground stating that such stringent, disproportionate and arbitrary clauses of the RFP document, which are anti-competitive shall be creating monopolistic environment in the State of Madhya Pradesh and therefore, the clauses deserves to be quashed. The petitioner has raised another

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ground and has stated that the condition impugned in the present writ petition can be challenged before this Court keeping in view the judgment delivered by Hon'ble Supreme Court in the case of **Cellular Operators Association of India Vs. Telecom Regulatory Authority of India** reported in **(2016) 7 SCC 703**. It has been argued that the restrictions under the impugned clauses are not at all reasonable restrictions and therefore, NIT itself deserves to be quashed.

11- The another ground has been raised stating that the action of the respondent No.1 is violative of constitutional rights guaranteed to the petitioner Association under Article 14 and 19 (1) (g) of the Constitution of India keeping in view the judgment delivered in the case of **Global Energy Ltd. Vs. Adani Exports Ltd.** reported in **(2005) 4 SCC 435**, the impugned clauses deserves to be quashed and the tender can be subjected to judicial scrutiny by this Court. Other grounds have also been raised, however, they all relate to the alleged monopoly which the petitioner feels is going to be created in favour of the concessionaire / successful bidder.

12- Learned Senior Counsel for the petitioner, though a ground has not been raised in the present writ petition, has also argued before this Court that for six cities the tender has been issued by respondent No.1 – Indore Smart City Development Limited (hereinafter referred as “ISCDL”) and ISCDL is a Company

registered under the Companies Act for the purposes of developing smart city at Indore and it cannot issue tender for other cities and therefore, the NIT deserves to be quashed.

13- He has also taken a ground while arguing the matter that the State Government or respondent No.1 doesn't have the power to issue NIT for laying of Optical Fiber Cable and for installation of Smart City Pols and it is the Union of India, which is jurisdictionally competent to issue such a NIT. It has been argued that the State Government in respect of a matter, which is under the Union List has issued instructions and respondent No.1 again, which is a Company owned by Government has encroached upon the Union List subject. The petitioner in the writ petition has prayed for following reliefs:-

- i. Issue a writ, order or direction in the nature of certiorari quashing the Clause 2.12.1 and 2.12.2 in the impugned RFP dated 16.07.2018 (Annexure P/1) insofar as they restrain ROW rights of the members of the Petitioner and other telecom entities other than the Concessionaire / successful bidder.
- ii. Issue any other writ, order or direction that this Hon'ble Court may deem fit to grant in the interests of justice, equity and good conscience in favour of petitioner in facts of the of the present case."

14- This Court *vide* order dated 22/10/2018 has permitted impleadment of Union of India and also later on has permitted impleadment of Reliance Jio Infocomm Limited (RJIL) who is a successful bidder.

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15- A reply has been filed by respondent No.1 – ISCDL and a preliminary objection has been raised by the respondent No.1 that the petitioner does not have a *locus* to file the present petition. It has also been stated in the return that no violation of any right under Article 14 and 19 (1) (g) of the Constitution of India has taken place. The respondent No.1 has also stated that the RFP (NIT) has been issued inviting bid for selection of concessionaire to design, develop, implement, manage operation and maintenance of Smart Pole Services that delivers benefits to the citizen and provide seamless integration of smart services and solutions. It has been further stated that Intelligent Street Poles which are to be installed shall provide Telecom Services, WiFi Services, Surveillance Cameras, Smart / Digital Bill Boards, Environmental Sensors. Public Address System and LED based Smart Lights.

16- The respondent No.1 has also stated that the NIT has been issued in respect of six cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain Sagar and Satna) under the PPP on DBOOT Model and the NIT has been issued by respondent No.1 as the respondent No.1 is Nodal Agency in respect of all the aforesaid smart cities. The respondent No.1 has also stated that there is no monopoly created in favour of concessionaire. It has been stated that the NIT was issued on 16/07/2018 and a subsequent Corrigendum was issued to ensure that other telecom operators are

also permitted to provide telecom services. The object of issuing Corrigendum was to ensure that no monopoly is created in favour of one particular Company. The condition of RFP and the conditions after issuance of Corrigendum have been reproduced in the return filed by respondent No.1 and the same reads as under:-

“Project: Selection of Concessionaire for Implementation of Intelligent Street Pole at Six Smart Cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain, Sagar and Satna) under PPP on DBOOT model

NIT No.25/ISCDL/18-19, Dated: 16th July 2018 (Online Tender No.148)

| S No. | Conditions as per RFP | Conditions as per this Corrigendum 5 |
|--------------|--|---|
| 1 | Section 6, Clause 2(d), The Concessionaire will charge lease rentals from various telecom operators on non-discriminatory basis, as per the business model of the Concessionaire for using these services. | The Concessionaire will charge lease rentals from various telecom operators on non-discriminatory basis, as per the business model for using these services at the rates approved by the committee to be constituted by the Authority(ies) comprising of experts of the field, representative of Service provider and User associations and other stakeholders. |
| 2 | Section 6, Clause 2.12.1(b) The Fiber laid in this ROW can be monetized by the Concessionaire at his discretion and at rates which the Concessionaire deems fit, on non-discriminatory basis. | The fiber laid in this ROW can be monetized by the Concessionaire at his discretion of non-discriminatory basis as per the business model for using these services at the rates as approved by the committee to be constituted by the Authority(ies) comprising of experts of the field, representative of Service provider and User associations and other stakeholders. |
| 3 | Section 6, Clause 2.12.2(c) Authority(ies) shall endeavour that all telecom sites presently owned by telecom service providers | In case the Concessionaire fails to provide services to any telecom service operator for any reason within the period of 8 weeks from the date of requisition, then telecom operator |

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| without the requisite approval(s) will be shifted to Intelligent poles / telecom sites deployed by the concessionaire, Authority(ies) shall endeavour that no further permission is issued by any statutory authority to any third party on account of any new telecom site/infrastructure within the Project Site as long as requirement can be met by Concessionaire. | may approach Authority(ies) to direct the Concessionaire to provide services to the concerned telecom operator within the period of 30 days and in case of failure of concessionaire to comply the directions of Authority(ies) in this regard the concerned telecom operator may apply for permission for separate ROW which shall be granted by the Authority(ies) on merit of the case. |
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Note- The Concessionaire will be required to sign Non-discriminatory agreement.”

17- The respondent No.1 has stated that *vide* Corrigendum dated 11/09/2018, they have withdrawn the freedom given to the concessionaire exclusively and the freedom to charge the lease rent as per his wisdom and now the other telecom operators will also be able to use the services and a committee has also been constituted by the authority comprising of experts of the field, representatives of the service provider and user associations as well as other stakeholders for fixing the rate for the purposes of using the services.

18- Shri A. M. Mathur, learned Senior Counsel along with Shri Manoj Munshi, has vehemently argued before this Court that the scope of judicial review in commercial matter is quite limited and in the present case, no case for review is made out in the matter keeping in view the judgment delivered in the case of **Afcons**

Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. reported in **(2016) 16 SCC 818**. Reliance has also been placed upon a judgment delivered in the case of **Reliance Telecom Ltd. and Ors. Vs. Union of India and Ors.** reported in **(2017) 4 SCC 269** and again it has been argued that the NIT has been prepared and issued based upon the feedback received from technical experts and it has been issued keeping in view the larger public interest.

19- Reliance has been placed upon a judgment delivered in the case of **Tata Cellular Vs. Union of India** reported in **(1994) 6 SCC 651** and it has been argued that the terms and conditions of the NIT are not open to judicial review. Reliance has also been placed upon the judgments delivered in the case of **Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors.** reported in **(1999) 1 SCC 492**, **Monarch Infrastructure (P) Ltd. Vs. Ulhasnagar Municipal Corpn. and Ors.** reported in **(2000) 5 SCC 287**, **Cellular Operators Association of India and Ors. Vs. Union of Indian and Ors.** reported in **(2003) 3 SCC 186**, **Union of India Vs. International Trading Co. and Anr.** reported in **(2003) 5 SCC 437**, **Directorate of Education Vs. Educomp Datamatics Ltd. and Ors.** reported in **(2004) 4 SCC 19**, **Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Ors.** reported in **(2005) 1 SCC 625**, **Global Energy Ltd. and Anr. Vs. Adani Exports Ltd. and**

Ors. reported in **(2005) 4 SCC 435, Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. and Anr.** reported in **(2005) 6 SCC 138, Michigan Rubber (India) Ltd. Vs. State of Karnataka and Ors.** reported in **(2012) 8 SCC 216** and **Census Commissioner and Ors. Vs. R. Krishnamurthy** reported in **(2015) 2 SCC 796.**

20- Learned counsel for respondent No.1 has placed reliance upon the aforesaid judgments and has argued that no case for interference is made out in the matter. Para-wise reply has also been filed in the matter by respondent No.1 and again it has been stated in the para-wise reply that no legal right of any member of the petitioner's Association has been violated. In respect of Clause 2.12.1 and 2.12.2, suitable Corrigendum has been issued on 11/09/2018 and the grievance of the petitioner has been addressed by respondent No.1 and therefore, the writ petition deserves to be dismissed.

21- It has also been argued that no clause under the RFP is arbitrary or discriminatory and it was open for everyone to participate in the process. It has also been argued that there cannot be any blacklisting of any cellular operator and the concessionaire shall provide the services to other telecom operators and other telecom operators can also use the services on non-discriminatory basis at the rates to be approved by the Committee comprising of

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the experts of the filed, representatives of the service provider and users association as well as other stakeholders. It has been also stated that RFP has taken care of all kind of contingencies and exigencies to ensure that there will be no discrimination with the users of the services by the concessionaire.

22- It has also been stated that the RFP keeping in view the modifications done *vide* Corrigendum dated 119/09/2018 does not run *de-hors* and in violation of Indian Telegraph Act, 1885 (hereinafter referred as “Telegraph Act”) read with Indian Telegraph Right of Way Rules, 2016 (hereinafter referred as “Right of Way Rules”). It has been stated that no condition is being imposed / no restriction of any kind has been imposed upon any other operator, who has been granted licence under Section 4 of the Telegraph Act. It has also been stated in the return that similar kind of RFP was issued by Smart City Authority, Bhopal in which the respondent No.5 Reliance Jio Infocomm Ltd. as well as M/s. Bharti Infratel Limited have participated in the year 2016. It has been stated that M/s. Bharti Infratel Limited is also a member of the petitioner Association and in respect of similar contract, when RFP was issued by Smart City Authority, Bhopal, one of the member M/s. Bharti Infratel Limited has participated along with Reliance Jio Infocomm Ltd. and the work of installation of intelligent poles has been awarded to the M/s. Bharti Infratel Ltd. M/s. Bharti Infratel Limited has already

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started installation of intelligent poles and laying of Optical Fiber Cables for common use in the city of Bhopal.

23- The respondent No.1 has further stated that in respect of NIT issued, which is impugned in the present writ petition, M/s. Bharti Infratel Ltd. and respondent No.5 – Reliance Jio Infocomm Ltd. did participate by submitting their bids and the bid of Reliance Jio Infocomm Ltd. has been accepted. The present petition has been filed at the behest of M/s. Bharti Infratel Ltd., who is a member of petitioner Association, meaning thereby, a member of the Association after participating in the process is now challenging the process i.e. conditions of the NIT. The same conditions were the conditions in respect RFP issued by Smart City Bhopal Authority, Bhopal and only because M/s. Bharti Infratel Ltd. was unsuccessful in respect of the NIT issued by the answering respondent, the present petition has been filed, which is nothing but a sponsored litigation by, M/s. Bharti Infratel Ltd. and therefore, the petition deserves to be dismissed on this count alone.

24- It has also been stated by the respondent that a pre-bid meeting took place on 31/07/2018 and the answering respondent has invited all the prospective bidders to participate therein and to raise any query or to seek any clarification with respect to any of the terms and conditions of the RFP. It has been stated that none of the participants has raised any such issue and the respondent No.1 *suo*

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motu modified Clause 2.12.1 and 2.12.2 suitably to regulate the rates to be charged by concessionaire and also to provide ROW to any other user in case of failure of concessionaire to provide requisite service to the users.

25- It has also been stated that the sole object to file this present petition is to somehow obstruct the process of selection of the concessionaire for implementation of Intelligent Street Poles and laying of Optical Fiber Cables, which are being laid to provide common services to various users and also to help the police authorities to control the crime by surveillance and to maintain law and order effectively. A prayer has been made for dismissal of the writ petition.

26- A voluminous rejoinder has been filed by the petitioner in order to improve the pleadings made in the main writ petition. It has been stated that the Corrigendum dated 11/09/2018 has not at all remedied the grievance raised by the petitioner *qua* the impugned clauses. It has been stated that the impugned clauses completely debar and curtail the rights of the members of the petitioner to lay Optical Fiber Cable and to install new Mobile Towers within the six cities as named in the subject tender notification.

27- It has been stated that the members of the petitioner Association shall be at the mercy of the concessionaire, even after the Corrigendum has been issued and the impugned clauses in the

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NIT are completely discriminatory and arbitrary and also are in violation of Article the Telegraph Act read with Right of Way Rules. It has also been stated that the petitioner does have *locus* to file present petition as the petitioner Association is a registered society under the Societies Registration Act, 1860 and its members are engaged in the business of providing telecom infrastructure. Memorandum of Association has been brought on record along with the rejoinder. It has been admitted in the rejoinder that the members of petitioner Association were invited in pre-bid meeting on 31/07/2018 and the same establishes that they are aggrieved in the matter and they do have a *locus*. In the rejoinder, it has been stated that rights guaranteed to the petitioner under Article 19(1)(g) of the Constitution of India are being infringed and therefore, they do have a *locus* in the matter.

28- It has also been stated that the respondent No.1 is a Government Company registered under the Companies Act, 2013. It was incorporated as a Special Purpose Vehicle (SPV) by the Madhya Pradesh Urban Administration and Development Department as well as Indore Municipal Corporation and it is at the best the extension of the State Government and it can never assume the powers of the Central Government under the Telegraph Act read with Right of Way Rules. It has been stated that it is only the Central Government, which is empower to perform legislative

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functions *qua* telecom and not the State Government or any other Company owned and controlled by the State Government.

29- It has also been stated that the Department of Telecommunication, Government of India has supported the petitioners by writing various letters from time to time and the stand of Government of India is that the subject matter clearly falls within the domain of Government of India and the Government of India has objected in respect to the tender issued by respondent No.1.

30- Intervention application has also been filed by Reliance Jio Infocomm Ltd. and Reliance Jio Infocomm Ltd. has also been impleaded as one of the respondent i.e. respondent No.5. They have filed a detailed reply and in the matter and it has been stated that the respondent No.5 is a successful bidder / concessionaire in respect of the "Request For Proposal" document bearing NIT No.25/ISCDL/18-19, dated 16/07/ 2018 for "Selection of Concessionaire for Implementation of Intelligent Street Pole at Six Smart Cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain Sagar and Satna) under PPP and DBOOT Model".

31- It has been stated that their intervention application was allowed on 22/10/2018 and they are one of the respondent. It has been stated that the alleged right to claim non-exclusive Right of Way as claimed by the petitioner is a no way in conflict with the provisions of Telegraph Act or in conflict with the Right of Way

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Rules. It has been further stated that Right of Way pertains to land, which is undisputedly a State Subject under Schedule-VII of the Constitution of India and therefore, vested in the State Government and otherwise also, in terms of the Indian Telegraph Right of Way Rules, 2016, the Right of Way rights are vested in the appropriate authority having control or management over immovable property.

32- It has been further stated that the rights under the Act or Rules are limited to obtaining licenses for provision of telecom services or telecom infrastructure. Neither the Act nor the Rules vest any absolute right in the “licensee” to provide telecom services or telecom infrastructure simply upon grant of such license. Central Government, State Government and the local authorities have been specifically empowered to put reasonable conditions with respect to implementation of such rights, if required. The respondent No.5 has further stated that if at all such rights are available to the petitioner, they would be subject *inter alia* to the permission granted by appropriate authority.

33- The respondent No.5 has also stated that the respondent No.1 has been established as Special Purpose Vehicle by the State Government and Indore Municipal Corporation to implement Central Government's Smart City Mission and by virtue of its responsibilities as provided in its Articles of Association, the respondent No.1 holds the power to regulate infrastructure

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development within the prescribed territorial limits. As such, it qualifies to be an “Appropriate Authority” under the Rules and it is therefore, well within its authority and competence to issue the RFP document, for the purposes of choosing one of such licence holders as Concessionaire, to implement Intelligent Street Poles in a uniform manner.

34- It has been further stated that grant of such concession is no manner curtails the rights of licensees in general, as alleged or at all. It has been stated that the action of the respondents are well safeguarded under the reasonable restriction allowed by the Act, by the Rules as well as by the Constitution of India. It has also been stated that the impugned Clauses are in noway violative of any statutory provisions of law. The respondent No.5 has stated that the Corrigendum 11/09/2018 takes care of the grievances raised by the petitioner Association and after the Corrigendum, no case for interference is made out in the matter and the provisions of impugned Clauses fall within the definition of “reasonable restriction” as contemplated under Article 19(6) and the fundamental right provided under Article 19(1)(g) of the Constitution of India. Respondent No.5 prays for dismissal of the writ petition.

35- A reply has been filed by the respondent No.4 – Union of India and the respondent No.4 has placed reliance upon statutory provisions as contained under the Telegraph Act as well as the

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Rules framed thereunder. It has been contended that the Central Government is having exclusive privilege for establishing, maintaining and working telegraphs and the Central Government is also empowered to grant licence to any person in respect of telecom / telegraph services. It has been further stated that in terms of Section 10 (c) of the Act, the telegraph authority as far as establishing and maintaining telegraph in respect of the property vested in the control of any local authority is concerned, the telegraph authority has to seek the permission of the local authority.

36- It has been further stated that as per Section 12 of the Act any permission given by the local authority under Section 10 (c) of the Act is subject to reasonable conditions as the authority thinks it reasonable and proper. It has been further stated that in case of any dispute, keeping in view Section 15, has to be resolved by an officer appointed by Central Government and its decision shall be final. It has been further stated that the Central Government *vide* notification dated 19/06/2017 has already designated the officers for the purpose of referring disputes in respect of all States in Union Territories and response from the Madhya Pradesh to nominate an Officer for dispute resolution is still awaited.

37- The Union of India has stated that keeping in view the Telegraph Act and the Rules framed thereunder, each license Telephone Service Operator has right to seek way - leave from the

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owner of the immovable property to establish, maintain and work telegraphs in their respective licensed service area on non-exclusive basis. However, ISCDL *vide* NIT dated 16/07/2018 read with Corrigendum dated 11/09/2018 has framed certain Clauses, which are contrary to the provisions of the Telegraph Act.

38- It has also been stated that the issue of exclusivity of Right of Way in the RFP was brought to the notice of Chief Secretary *vide* letter dated 29/08/2018 and it was also brought to his notice that the conditions shall be disturbing the level playing field amongst the licensed telecom service providers. The respondents have also stated that the Corrigendum issued subsequently tries to bring in some procedural modifications, however, still the a monopoly has been crated in favour of the concessionaires. It has been further stated that Department of Telecommunication *vide* letter dated 25/09/2018 to the Chief Secretary of the State of Madhya Pradesh has informed that the State Government cannot abrdige or restrict in any manner, the right of licensee to seek Right of Way permission from concessionaire.

39- It has been stated that the Chief Secretary *vide* letter dated 22/10/2018 has informed the Government of India that the conditions impugned does not curtail the Right of Way of any stakeholder as all eligible bidders were entitled to participate in the bid and sole objective of the project is to harmonies the various

facilities through Smart Intelligent Pole and the Appropriate Authority was well within its powers to issue NIT keeping in view Section 317-A of the M. P. Municipal Corporation Act, 1956.

40- The respondent No.4 in their return has stated that State Government has no statutory authority to establish a telegraph infrastructure on exclusive basis under any concession. All licensed telecom service provider have the right to seek permission for Right of Way for establishing and maintaining telegraph infrastructure and it cannot be denied to them on the ground of existence of exclusive concessionary right.

41- A rejoinder has been filed on behalf of the petitioner to the reply filed by the respondent No.5 and it has been stated that by issuing Corrigendum dated 11/09/2018, the respondent has not at all remedied the impugned Clauses and impugned Clauses completely debar and curtail the rights of the members of the petitioner Association to lay Optical Fiber Cable and to install new Mobile Towers within six cities as named in the tender notification.

42- It has been reiterated that that the impugned Clauses impose an arbitrary and discriminatory ban on telecom infrastructure providers from carrying on further / business and the imposition of such restriction by way of impugned Clauses is not only arbitrary and discriminatory but is also in clear violation of the Indian Telegraph Right of Way Rules, 2016.

43- It has also been stated that the respondent No.1 is not the appropriate authority as stated by the respondent No.5 and the respondent No.1 is not the Central Government and by no stretch of imagination the Right of Way can be denied to the members of the petitioner Association. It has also been stated that the Government of India, Department of Telecommunication has also objected in the matter and the correspondence with the State Government and Government of India has also been brought to the notice of this Court.

44- The respondent No.1 Reliance Jio Infocomm Ltd. has also filed reply / objection to the submissions made by the Government of India. It has been stated by the respondent No.5 that license to establish and maintain telecom infrastructure is granted by Central Government, however, the grant of Right of Way for establishing and maintaining the underground and overground telecom infrastructure (ROW) pertain to land, which is undisputedly a State subject under List-2 in the Seventh Schedule of the Constitution of India and therefore, vests in the State Government. It has been further stated that in terms of Right of Way Rules framed under the Telegraph Act, the Right of Way rights are vested in the appropriate authority as defined under rule 2(b) there to, having control or management over immovable property. It has been further stated the Telegraph Act or the Right of Way Rules cannot, as such,

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be construed as conferring any absolute right upon licensee to claim non-exclusive Right of Way. It has been stated that despite being State subject the use of land in any event will be subject to rights and discretion of owner of the land and will be exercised in public interest. It has been stated by the petitioner that the petitioner is not a licensee under the Telegraph Act and therefore, the provisions of Telegraph Act nor the Rules made thereunder are applicable to the petitioner or its members.

45- A reply has also been filed on behalf of the respondents No.2 and 3 (State of Madhya Pradesh) and it has been stated that the petition has been filed on misconstrued grounds without there being any cause of action available to the petitioner Association. It has been stated that there is no violation of any constitutional rights guaranteed under Article 14 and 19 of the Constitution of India and the Right of Way to lay Optical Fiber Cable has to be given to the successful bidder selected through a fair, just and reasonable process, which open to all bidders. It has also been stated that the M.P. Nagar Palika (Installation of Temporary Tower / Structure for Cellular Mobil Phone Service) Rules, 2012 and the provisions of the Telegraph Act and the Right of Way Rules have been misconstrued by the petitioner.

46- It has been further stated that Rule 2(b) of the Indian Telegraph Right of Way Rules, 2016 defines "Appropriate Authority"

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and in the present case respondent No.1 is "Appropriate Authority". The respondent No.1 is a Company incorporated under the Companies Act, 2013 having majority of shares, which are owned by the State Government. It has been stated that ISCDL under the instructions of the State Government, Directorate of Urban Administration and Development, designed the bid process for smart poles for Indore as well as other cities excluding Bhopal and the highest bidder was selected in a transparent manner. It has also been stated that the telecom industry was consulted on two occasions during pre-bid meeting and no objection was raised by anyone including Mobile Tower Infrastructure Companies in respect of the scope of work or Right of Way.

47- The RFP was also shared with all of them, including the members of the petitioner Association and the sole aim and object of the petitioner is to create hurdles and to delay the implementation. It has been further stated that the guidelines have been issued in respect of Smart City Mission by Government of India and based upon the guidelines and instructions issued by the Government of India, the development work of smart cities are being carried out by Special Purpose Vehicle and the respondent No.1 is a Special Purpose Vehicle incorporated under the Companies Act by the State Government. It has been stated that after issuance of NIT in order to ensure that no monopoly is created in favour of concessionaire, a

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Corrigendum was issued on 11/09/2018 and the respondent No.5 was the successful bidder.

48- The smart poles, which are being installed by respondent No.5, not only provides for telecom services but also include other features of public utility like Smart and Energy efficient LED lighting, CCTV with motion detection, Illegal Parking detection and informing user through audio guidance, Vehicle Speed Detection, Vehicle number plate recognition, Crime Monitoring and Detecting, Environment Pollution Reporting, Robust IT connectivity through WiFi and also a facility to Push and Manual Notification buttons to report crime, accident and other calamities.

49- In the reply filed by the State, it has also been stated that at present in the State of Madhya Pradesh, the telecom operators are erecting mobile towers by obtaining permission under the Madhya Pradesh Nagar Palika (Installation of Temporary Tower / Structure for Cellular Mobile Phone Service) Rules, 2012 and the revenue of Rs.334 Crores is being generated by allotment of Right of Way to the concessionaire, which is much higher than the revenue, which is being presently generated. It has been stated that new system of allotment of Right of Way rights is in public interest as also in the interest of State exchequer.

50- It has also been stated that in addition to the aforesaid revenue, which is going to be generated, the concessionaire shall

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also invest approximately Rs.240 Crores by installing 1217 Intelligent Smart Poles, which is a huge cost for establishing altogether new infrastructure using latest technology and making it available for the authority for next 30 years, on which the concessionaire shall also incur operations and maintenance cost.

51- Reliance has been placed upon a judgment delivered by the apex Court in respect of scope of interference by this Court. It has also been stated that the Clause 2.12.2(a) protect the interest of existing infrastructure providers and the same provides that Right of Way of existing operators will remain. It has also been stated by the State Government that Right of Way is not being allotted exclusively to respondent No.5 and the same is evident from the Corrigendums issued from time to time and the basic object of the RFP is to install Intelligent Street Poles and the respondent No.1 is merely regulating the process of allotment of Right of Way in larger public interest. A prayer has been made for dismissal of the writ petition.

52- The Union of India has again filed a short reply on 04/05/2019 and it has been reiterated that the respondents No.1, 2 and 3 are required to ensure that legal provisions under the Telegraph Act and Right of Way Rules are complied with and there cannot be any absolute Right of Way. They have also referred to the correspondence made by the State Government from time to time and it has been stated that a licensee telecom service provider will

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have to approach the concessionaire at the first instance to seek No Objection Certificate for using the Right of Way and the NIT abridges or restrict the right of telecom licensee to seek Right of Way permission to establish telegraph infrastructure in the smart city areas.

53- It has been stated that the provisions even in the amended RFP are not fair and just. It is creating conflict of interest and prejudice to the existing license holders. It has also been stated that telecom is a subject matter of exclusive privileges of the Central Government under Section 4 of the Telegraph Act. The violation of law of the land i.e. Indian Telegraph Act, 1885 and the Indian Telegraph Right of Way Rules, 2016 by the State of M.P. is not justified at all and no restriction can be imposed upon the licensed telecom service providers which are having licenses granted to them under the Telegraph Act.

54- The petitioner has also filed a rejoinder on 04/05/2019 to the reply filed by the State Government and once again it has been stated that Clauses under the NIT are violative of Article 14 and 19(1)(g) of the Constitution of India. It has also been stated that Union of Indian only enjoys authority under the Telegraph Act read with the Indian Telegraph Right of Way Rules, 2016 to grant permission to the telecom infrastructure providers from carrying on business and the impugned clauses are imposing unreasonable

restrictions. A prayer has been made for allowing the writ petition.

55- Heard learned counsel for the parties at length and perused the record. With the consent of the parties, the matter is being disposed of after hearing learned counsel for the parties and after going through the record, at motion hearing stage itself.

56- The petitioner before this Court Tower and Infrastructure Providers Association (TAIPA) is a society registered under the Indian Society Registration Act, 1860 having a Registration Certificate dated 13/01/2011. The petitioner's members include ATC India, Bharti Infratel, GTL Infrastructure, Indus Towers, Reliance Infratel and Tower Vision India. The petitioner Association has filed this present petition being aggrieved by Request for Proposal bearing NIT No.25/ISCDL/18-19 issued by ISCDL for "Selection of Concessionaire for Implementation of Intelligent Street Pole" at six smart cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain Sagar and Satna) under "PPP on DBOOT Model".

57- The respondent No.1 – ISCDL is a Company registered under the Companies Act fully owned and controlled by the State Government. That under the concept of Establishment of Smart City through out the country, Indore was also selected to be one of the smart city for development project and for the purposes of erection of Intelligent Street Poles at six smart cities of Madhya Pradesh, Indore Smart City Development Ltd. (ISCDL) is a nodal agency.

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58- One of the member Association of the petitioner namely M/s. Bharti Infratel Ltd. and respondent No.5 Reliance Jio Infocomm Ltd. (RJIL) have submitted their bid pursuant to RFP dated 16/07/2018 and Reliance Jio Infocomm Ltd. was a successful bidder under the RFP and has been awarded concession in terms thereof. The petitioner Association has filed the present petition challenging Clause 2.12.1 and 2.12.2 of the RFP dated 16/07/2018 on the ground that it is creating a monopoly and embargo on the rights of other telecom service providers and thus, it is violative of Article 19(1)(g) of the Constitution.

59- The respondents after having deliberations with the various service providers have issued a Corrigendum dated 11/09/2018 and has withdrawn the freedom of the concessionaire to charge the lease rental and other charges unless the same has been approved by the Committee to be constituted by the authority comprising of experts of the field, representatives of the service provider and user associations as well as other stakeholders. The terms and conditions of the NIT, which are subject matter of the present writ petition as well as the Corrigendum issued by the respondents are detailed as under:-

“Project: Selection of Concessionaire for Implementation of Intelligent Street Pole at Six Smart Cities of Madhya Pradesh (Indore, Gwalior, Jabalpur, Ujjain, Sagar and Satna) under PPP on DBOOT model

NIT No.25/ISCDL/18-19, Dated: 16th July 2018 (Online Tender

No.148)

| S No. | Conditions as per RFP | Conditions as per this Corrigendum 5 |
|-------|--|--|
| 1 | <p>Section 6, Clause 2(d), The Concessionaire will charge lease rentals from various telecom operators on non-discriminatory basis, as per the business model of the Concessionaire for using these services.</p> | <p>The Concessionaire will charge lease rentals from various telecom operators on non-discriminatory basis, as per the business model for using these services at the rates approved by the committee to be constituted by the Authority(ies) comprising of experts of the field, representative of Service provider and User associations and other stakeholders.</p> |
| 2 | <p>Section 6, Clause 2.12.1(b) The Fiber laid in this ROW can be monetized by the Concessionaire at his discretion and at rates which the Concessionaire deems fit, on non-discriminatory basis.</p> | <p>The fiber laid in this ROW can be monetized by the Concessionaire at his discretion of non-discriminatory basis as per the business model for using these services at the rates as approved by the committee to be constituted by the Authority(ies) comprising of experts of the field, representative of Service provider and User associations and other stakeholders.</p> |
| 3 | <p>Section 6, Clause 2.12.2(c) Authority(ies) shall endeavour that all telecom sites presently owned by telecom service providers without the requisite approval(s) will be shifted to Intelligent poles / telecom sites deployed by the concessionaire, Authority(ies) shall endeavour that no further permission is issued by any statutory authority to any third party on account of any new telecom site/infrastructure within the Project Site as long as requirement can be met by Concessionaire.</p> | <p>In case the Concessionaire fails to provide services to any telecom service operator for any reason within the period of 8 weeks from the date of requisition, then telecom operator may approach Authority(ies) to direct the Concessionaire to provide services to the concerned telecom operator within the period of 30 days and in case of failure of concessionaire to comply the directions of Authority(ies) in this regard the concerned telecom operator may apply for permission for separate ROW which shall be granted by the Authority(ies) on merit of the case.</p> |

Note- The Concessionaire will be required to sign Non-

discriminatory agreement.”

60- The respondent No.4 – Union of India has filed its submissions in respect of the petition, supporting the stand of the petitioner substantially on the ground that under the Telegraph Act and Right of Way Rules, licensed TSPs have a right to seek way-leave/Right of Way from the owner of the immovable property to establish, maintain and work telegraphs on a non-exclusive basis. Clause 2.3 pertaining to WiFi services in hotspot and Clause 2.4.1 pertaining to the description of the IT network to be set up by the concessionaire, Clause 2.12.1 pertaining to OFC, Clause 2.12.2 pertaining to Intelligent Pole and Clause 2.12.3 pertains to WiFi Access Point, provide for exclusivity in favour of the concessionaire, which is contrary to the provisions of the Telegraph Act.

61- It has been stated by Union of India that the provisions of Clause 2.12.2 of the RFP take away the time-to-market advantage of other TSPs inasmuch as they are required to approach the concessionaire for grant of access to infrastructure set up by it, thus disturbing the level playing field. It has been contended that under Clause 317-A(3) of the M. P. Municipal Corporation Act, 1956, the powers of the Municipal Corporation to grant Right of Way over its property under Section 317-A shall not affect any provision of the Telegraph Act and the power to make laws on telegraph, wireless and other forms of communication is within the exclusive

domain of the Union under Entry 31, List-I of the Schedule-VII read with Article 246 of the Constitution of India. The State Government has no statutory authority to establish telegraph infrastructure on an exclusive basis under any concession.

62- Respondent No.5 – RJIL has filed its detailed counter affidavit in respect of the writ petition, rebutting the contentions set out therein. Respondent No.5 has established *inter alia* that the amendments made to the RFP (as it originally stood) *vide* Corrigendum No.1004/ISCDL/18-19 dated 11/09/2018 issued by respondent No.1, substantively and completely address the purported concerns raised by the petitioner as well as respondent No.4. Respondent No.5 – RJIL has filed separate reply/objection dated 21/01/2019 in respect of the reply filed by respondent No.4. Respondent No.4 has filed a rejoinder dated 20/02/2019 to this reply/objection dated 21/01/2019 filed by respondent No.5 – RJIL, essentially reiterating the grounds already set out in its previous pleadings.

63- Respondents No.2 and 3 (State of Madhya Pradesh) through ISCDL have also filed their reply dated 28/03/2019 in respect of the writ petition stating that it was open for all the members of the petitioner Association to participate in the tender and the tender has been awarded in a fair, transparent and reasonable manner. Thus, allegations of discrimination etc. are

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untenable. ISCDL is an “Appropriate Authority” as defined under Rule 2(b) of the Right of Way Rules, and has powers to grant or reject an application for Right of Ways thereunder. The tender process was fair and transparent – RFP was shared with all stakeholders including members of TAIPA. Industry consultation meetings were held on two occasions and none of the mobile tower infrastructure companies raised any concerns either during said consultation, or during the pre-bid meetings. The alleged concerns raised now are an afterthought, obstructing the award process.

64- Interest of petitioner was already taken care of by Clauses 2.12.2(a) and 2.12.1(b) prior to amendment. Furthermore, by way of Corrigendum No.5, ISCDL has ensured that concessionaire will charge lease rentals on non-discriminatory basis at rates approved or by Committee comprising all stakeholders. Corrigendum No.5 has, in addition, incorporated further beneficial clauses for the petitioners. At present, the telecom operators erect mobile towers by obtaining permission under the M. P. Nagar Palika (Installation of Temporary Tower / Structure for Cellular Mobile Phone Service) Rules, 2012. The amount of Rs.334 Crores which will be generated by awarding Right of Way to the concessionaire is much more than the revenue presently being generated. Further, under the tender, the concessionaire is required to invest approximately Rs.240 Crores on 1217 intelligent poles, thus,

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creating huge infrastructure for benefit of all. The tender is thus, in public interest and in the interest of increasing public revenue.

65- The impugned clauses are aligned to the basic concept of Intelligent Street Poles, and if removed from the RFP, the very purpose of installing such poles is defeated. Cost of erecting such pole is very high, and concessionaire will be able to recover the same only by monetizing the fiber laid in the Right of Way. If concessionaire is not given exclusive right of Right of Way, entire project is rendered un-viable. ISCDL is merely regulating the process of allotment of Right of Way in larger public interest. After allotment of Right of Way to concessionaire, other operators will be able to avail the Right of Way through the concessionaire on payment of the charges which will be decided in a non-discriminatory manner. No rights of the petitioner are thus being violated.

66- It has been vehemently argued by the petitioner that a license granted under the Telegraph Act for establishing a Mobile Network empowers the licensee to carry out business in the licensed area. The petitioner is in fact mixing the issue of grant of licence under the Telegraph Act and license to obtain Right of Way. The rights of a licensee under the Telegraph Act are limited to obtain licenses for providing telecom services or telecom infrastructure. There is no absolute right in the licensee to provide telecom

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services or telecom infrastructure simply upon grant of such license. Under the Right of Way Rules, Central Government, State Government and the Local Authorities have been specifically empowered to put reasonable conditions with respect to implementation of such rights, if required.

67- In the State of Madhya Pradesh, the State Government has framed Rules known as M.P. Nagar Palika (Installation of Temporary Tower / Structure for Cellular Mobil Phone Service) Rules, 2012 and under the Rules Right of Way is being awarded to the concessionaire and the total amount of revenue, which will be generated, is Rs.334 Crores. The total revenue so generated is much higher than the revenue which is being presently generated. Under the new infrastructure, which is being provided for grant of Right of Way Rights is in public interest and also in the interest of State Government. In addition to the revenue, the concessionaire will have to invest approximately Rs.240 Crores on 1217 number of Intelligent Smart Poles, which is huge cost for creating all kind of infrastructure using latest technology and for making it available for the next 30 years, the concessionaire shall also incur Operations and Maintenance Cost. Not only this, the Rights of Way shall also be granted to other Telecom Service Providers, who have obtained license under the Telegraph Act.

68- The Right of Way for establishing and maintaining

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underground and overground telegraph infrastructure pertains to “land”, which is undisputedly a State subject under Entry 18 in List-II in Schedule-VII of the Constitution of India and therefore, vested in the State Government. Under the Right of Way Rules, the Right of Ways are vested in the “Appropriate Authority” as defined under Rule 2(b), having control or management over immovable property. Under the Right of Way Rules Appropriate Authority under Rule 6(2) and 10(3) may even refuse the application of licensee for grant of Right of Way for the reasons to be recorded in writing, after hearing the applicant. Thus, in short Telegraph Act or the Right of Way Rules cannot be construed as conferring any absolute right upon licensee to claim non-exclusive Right of Way.

69- It has been argued at length that RFP in fact is establishing a parallel telegraph infrastructure. The RFP does not purport to establish a parallel telegraph infrastructure, but only seeks to rationalize the use and deployment of infrastructure for the benefit of all the licensees / Telecom Service Providers. Section 4 of the Telegraph Act confers upon the Central Government (respondent No.4) a privilege in respect of telegraphs and power to grant licenses. The RFP document is not granting any licence to establish telegraph infrastructure but is only selecting a person already licensed by the Central Government to establish the infrastructure in the most cost effective manner for the benefit of all

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licensees / Telecom Service Providers.

70- Grant of concession under the RFP document, does not violate Section 4 of the Telegraph Act or the provisions of the licenses issued by the Department of Telecom, Government of India. The said provisions do not cast any mandatory obligation to grant Right of Way to all licensees / deemed licensees but only to permit them to provide their services subject to reasonable conditions. It is evident from the bare perusal of the conditions, which is under challenge, that the RFP document does not prohibit Right of Way to all licensees / deemed licensees under the Telegraph Act, and rather specifically preserves the existing Right of Way of the infrastructure providers / service providers. The object thereof is to rationalize the deployment and use of infrastructure like OFC and telecom sites.

71- These days we are witnesses mushrooming of telecom towers constructed over residential buildings, over offices, even on heavy crossings on the traffic island and in order to avoid mushrooming of such telecom towers which are also hazardous to human beings, a very novel scheme has been framed by the respondent No.1 – ISCDL and the object is to rationalize the deployment and use of infrastructure like OFC and telecom sites.

72- It has also been argued that terms and conditions of the RFP are discriminatory and arbitrary. The Right of the concessionaire under the RFP are subject to fulfillment of the

requirements of other licensees / Telecom Service Providers. Various safeguards have been provided under the RFP itself to protect the interest of stakeholders and they are detailed as under:-

- (a) Clause 2 (c) provides that the provision of RoW / Site will be exclusive in respect of new / additional requirements, *subject to the concessionaire serving the needs of the telecom operators or any other business*, which clearly depicts that the concession did not purport to grant exclusivity in favour of the concessionaire, even before the issuance of Corrigendum No.5.
- (b) Clause 2.4.1 of the RFP cited by Respondent No.4 merely sets out the specifications of the IT network to be created by the Concessionaire, and in no manner curtails the rights of other Licensees or telecom service providers.
- (c) Clause 2.12.3 of the RFP cited by respondent No.4 provides for exclusivity in favour of the concessionaire only in respect of right of installation of Wi-Fi Access Points (in numbers as necessary) on smart poles, on city corporations-owned street-light poles and on other street-light poles, after obtaining permissions as necessary. The same does not interfere with the right of other licensees/TSPs to install such Wi-Fi Access Points on other locations/installations, after seeking the necessary permissions.
- (d) Even otherwise, the amendments effected in Clause 2.12.1 and 2.12.2 of the RFP by Corrigendum No.5 (*counter-affidavit of Respondent No.2 and 3*) substantively and completely address the concerns

raised by the petitioner and respondent No.4.

- (e) Clause 2.12.1 – The amended Clause 2.12.1 explicitly provides for non-discriminatory access to all service providers to the Optical Fiber Cable (OFC) laid by the concessionaire, thus optimising the use of the OFC, and relieving each service provider from the need to invest capital in laying their own OFCs.

The aforesaid amendment enables all other service providers (other than the Concessionaire), to avail of non-discriminatory access to OFC laid by the Concessionaire at lease rentals to be prescribed by a committee of experts and all stakeholders (including parties like the petitioner). As such, a role is envisaged for all stakeholders, including the members of the petitioner to participate in the procedure for fixation of lease rental for availing the OFC, to ensure fairness, transparency and non-discrimination.

- (f) Clause 2.12.2 – Clause 2.12.2, even prior to amendment, did not disturb RoW of existing operations qua Intelligent Poles, and furthermore, casts an obligation upon the concessionaire to deploy poles/masts, based on the requirement of telecom providers, subject to approval of the concerned Authority(ies).

Post amendment, clause 2.12.2(c) stipulates an additional safeguard to protect service providers, by mandating an 8-week period for the concessionaire to provide services relating to intelligent poles/masts, and provides for a redressal mechanism in case of failure on the part of the concessionaire in this regard. The clause

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additionally provides for grant of separate RoW to an aggrieved service provider in the event of a Concessionaire failing to comply with the directions of the Authority in this regard, within a stipulated time period of 30 days.

Thus, Clause 2.12.2 provides for fair access to all service providers to the intelligent poles/masts to be installed by the Concessionaire , with adequate safeguards to ensure non-discrimination and transparency.

73- The RFP also does not take away the time advantage (time to market) of any licensee and is not at all disturbing the level playing field between licensees. The amendments in the RFP safeguards monetisation of OFC laid by the concessionaire for all service provides on non-discriminatory basis, at lease rentals to be decided by a Committed of experts involving participation of all stakeholders. If the entire RFP is looked into along with Corrigendum, it is beneficial to the other license holders / Telecom Service Providers as they will not be required to set up a parallel network and they can use the infrastructure created by the concessionaire.

74- The most astonishing aspect of the case is that one of the member of the petitioner Association has participated with open eyes namely M/s. Bharti Infratel Ltd. by submitting a bid and the bid of respondent No.5 has been accepted. The petitioner has not

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furnished details in respect of the aforesaid and has deliberately concealed the aforesaid fact before this Court. Not only this, one of the member of the petitioner Association is carrying out the same kind of work in respect of Bhopal Smart City and therefore, the present petition is nothing but a sponsored litigation in order to create hindrance in a public project of great paramount importance.

75- The apex Court has time and again dealt with the issue of interference in the matter of award of contract. The apex Court in the case of **Manohar Lal Sharma Vs. Narendra Damodardas Modi** (Writ Petition (Criminal) No.225 of 2018, decided on December 14, 2018) in paragraphs No.7 and 8 has held as under:-

“7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In **Jagdish Mandal vs. State of Orissa and Ors. 1** this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the decision making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers. [See **Maa Binda Express Carrier & Anr. Vs. NorthEast Frontier Railway & Ors .2**]

8. Various Judicial pronouncements commencing from **Tata Cellular vs. Union of India 3**, all emphasise the aspect that scrutiny should be limited to the Wednesbury Principle of Reasonableness and absence of *mala fides* or favouritism.”

The apex Court has held that it is well settled

preposition that matters pertaining to the award of contract, being essentially a commercial transaction, have to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers.

76- The apex Court in the case of **Air India Ltd. Vs. Cochin International Airport Ltd.** reported in **(2000) 2 SCC 617** in paragraph No.7 has held as under:-

“7. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for *bona fide* reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by *mala fides*, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”

The apex court in the aforesaid case has observed that decision taken by the authorities is not amenable to the judicial review and the same can be interfered if it is found vitiated by *mala fides*, unreasonableness and arbitrariness.

77- The apex Court in the case of **Tata Cellular Vs. Union of India** reported in **(1994) 6 SCC 651** has again dealt with the issue of interference in respect of contractual matter. Paragraph No.94 of the aforesaid judgment reads as under:

“94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the *invitation* to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case

since they commend to us as the correct principles.”

78- In the case of **Jagdish Mandal Vs. State of Orissa and Others** reported in **(2007) 14 SCC 517** again scope of judicial review has been looked into. It has been held by the apex Court that power of the power of judicial review cannot be invoked to protect private interest at the cost of public interest, or to decide contractual disputes, and such interference, either interim or final, may hold up public work for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. The Court before interfering in tender or contractual matters in exercise of power of judicial review, should restrict its inquiry to whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have taken it; and whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226.

79- A similar view has been taken by the apex Court in the case of **Central Coalfields Ltd. Vs. SLL-SML Joint Venture Consortium and Others** reported in **(2016) 8 SCC 622**. Paragraph No.43 of the aforesaid judgment reads as under:-

“**43.** Continuing in the vein of accepting the inherent

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

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

This Court then laid down the questions that ought to be asked in such a situation. It was said: (*Jagdish Mandal case*, SCC p. 531,

para 22)

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

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

or

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

(ii) Whether public interest is affected.

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

In light of the aforesaid case, as the impugned Clauses are neither arbitrary nor *mala fide* in any manner, the question of interference by this Court does not arise.

80- The tender process itself has not been challenged and the members / constituents of the petitioner Association were free to participate and submit their bids. One of the member M/s. Bharti Infratel Ltd. has also participated in the matter and the aforesaid fact was not disclosed.

81- The petitioner Association includes M/s. Bharti Infratel Limited as one of its members. M/s. Bharti Infratel Limited has participated in the tender process, hence after playing the game unsuccessfully, the rule of the game cannot be challenged and therefore, this Court does not find any reason to interfere with the

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process of tender initiated by the respondent No.1 ISCDL. In the present case, the tender was issued on 16/07/2018 and the petition was filed on 07/09/2018. The petitioner Association has delayed the project, which is of great public importance by a period of one year and therefore, as the petitioner has delayed the project of public importance for a period of one year, one of the member has already participated in the process and the fact of participation by one of the member was not brought to the notice of this Court, the petition not only deserves to be dismissed but deserves to be dismissed with costs.

82- Resultantly, the writ petition is dismissed with a cost of Rs.1 Lakh to be paid to the High Court Legal Services Authority.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

(SHAIENDRA SHUKLA)
J U D G E

Tej