

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE  
DIVISION BENCH : HON'BLE SHRI JUSTICE S. C. SHARMA & HON'BLE SHRI  
JUSTICE SHAILENDRA SHUKLA

Writ Petition No.25000/2019

Indermani Mineral (India) Private Limited

v/s

The State of Madhya Pradesh & Two Others

**Counsel for the Parties** : Shri Arvind Nayar, learned senior counsel along with Shri Jerry Lopez, learned counsel for the petitioner.

Shri Shashank Shekhar, learned Advocate General along with Shri R.S. Chhabra, learned Additional Advocate General and Shri Vinay Gandhi, learned Government Advocate for the respondents / State.

**Whether approved for reporting** : Yes

**Law laid down** : 1. The terms of a tender notice unless or until they are wholly arbitrary, discriminatory or actuated by malice are not subjected to judicial review.

2. The State or its instrumentalities are required to act reasonably, fair and in public interest in awarding the contract and the interference by the High Court is very restrictive since no person can claim Fundamental Right to carry on business with the Government keeping in view the judgment delivered in the case of *Reliance Telecom Limited & Others v/s Union of India & Others reported in 2017 (4) SCC 269*. A person or a company, who has not participated in the tender process is not competent to challenge the tender condition incorporated in the tender.

3. The bid / tender in response to a Notice Inviting Tender is only a, offer, which State or its agencies are under no obligation. The bidders participating in the tender process cannot insist that their bid should be accepted simply because a bid is highest or lowest.

**Significant paragraph numbers** : 46 to 82

**ORDER**

(Delivered on this 6<sup>th</sup> of February, 2020)

(S.C SHARMA)  
JUDGE

(SHAIENDRA SHUKAL)  
JUDGE

**HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE**  
**DIVISION BENCH : HON'BLE SHRI JUSTICE S.C. SHARMA &**  
**HON'BLE SHRI JUSTICE SHAILENDRA SHUKLA**

Writ Petition No.25000/2019

Indermani Mineral (India) Private Limited

v/s

The State of Madhya Pradesh & Two Others

---

Shri Arvind Nayar, learned senior counsel along with Shri Jerry Lopez, learned counsel for the petitioner.

Shri Shashank Shekhar, learned Advocate General along with Shri R.S. Chhabra, learned Additional Advocate General and Shri Vinay Gandhi, learned Government Advocate for the respondents / State.

---

**ORDER**

**(Delivered on this 6<sup>th</sup> day of February, 2020 )**

**Per : S.C. Sharma, J:**

The petitioner before this Court, a Company registered under the Companies Act, 1956 having Coal Washeries in different districts of Chhatisgarh, has filed this present petition being aggrieved by the Notice Inviting Tender (NIT) issued by the Madhya Pradesh Power Generating Company Limited inviting bids for ROM Coal Beneficiation and Managing Associated Logistics for SSTPP, Khandwa and STPS, Sarni for the year 2019 – 20.

02. It has been stated that earlier two different tenders, in respect of supply of coal to the Power Generating Plant i.e. STPS, Sarni and SSTPP, Khandwa for the year 2018 – 19, were floated independently, and now, one common

tender has been issued for both the Power Generating Plants for the purposes of coal lifting, beneficiation (through wet process), liaisoning and movement of coal.

03. The petitioner / Company is aggrieved with certain terms and conditions of the tender issued by respondent No.2. During the pendency of the writ petition various amendments have also been made in the tender (NIT). The petitioner / Company has challenged the NIT on various grounds and the main clauses, which are under challenge, are as under:-

(a) As per Clause – II of the Technical Qualification of the NIT 2019 – 20, the requisite washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum.

(b) As per Clause – II of the said NIT, a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 month from SECL command in last five years.

(c) As per Clause – III (i) of the said NIT, a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores to showcase his strong financial ability.

(d) As per Clause – II (I) of the said NIT, a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum.

04. The petitioner / Company has stated in the writ petition that for the preceding years i.e. for the year 2018 – 19, a separate NIT was issued in respect of Khandwa Power

Plant and the requirements were that the washing technology, required for the coal beneficiation plant, should not be less than 14 Lakh Metric Tonne per annum. It further provided that the bidder should possess prior experience of coal lifting, beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC / Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne per annum in 12 months' period in single stretch from SECL commant area in the last seven years. The Other conditions in respect of SSTPP, Khandwa NIT for the year 2018 – 19 provided that a bidder should possess turn over (average annual turn over of preceding three financial years) of Rs.39.50 crores. One of the prerequisites was also that a bidder should further possess a spare capacity of the washery of not less than 1.40 Metric Tonne per annum.

05. The petitioner / Company has provided comparison between the NIT, which is subject matter of the dispute and NIT of the year 2018 – 19 in respect of SSTPP, Khandwa in form of a chart and the same reads as under:-

Sl. No.	Technical Requirement	Clause as amended on 31.03.2018	Tender dated 04.11.2019
1	Minimum Bid Quality	14.00 Lakh Metric Tonne	35 Lakh per year (both plants)
2	Spare Capacity of washery	1.40 Metric Tonne per annum	Clause No.II (i) – 3.5 Metric Tonne per annum
3	Past Experience	The Intending Bidder should have executed the work of coal lifting beneficiation (through	Clause – II (ii) - Bidder should have executed the work of coal lifting beneficiation (through

		wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC / Independent Power Producer (IPPs) / Steel / Cement / Aluminium Utilities / PSUs in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne per annum in 12 months period in single stretch from SECL command area in last 7 years ending with bid opening date i.e. 20.02.2018.	wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 months from SECL command in last 5 years, ending with bid opening date in case of consortium, lead member should meet the experience criteria.
4	Turnover (average annual turnover of preceding three financial years)	39.50 Cr.	Clause – III – 175 Cr.

06. The petitioner / Company, in respect of STPS, Sarni, has furnished details of the NIT for the year 2018 – 19 and the petitioner's contention is that in respect of NIT for STPS, Sarni, the requirements were that the washing technology required for the coal beneficiation plant should not be less than 11.00 Lakh Metric Tonne per annum. It has been further contended by the petitioner / Company that one of prerequisites was that bidder should possess prior experience of coal lifting, beneficiation (through wet process), liaisoning and movement of coal by road and Railways for one or more State Power Generating Companies / NTPC / Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in Public Sector Undertaking in India (as the case may be) for 1.10 Million Tonne per annum in 12 months' period in single

stretch from SECL command area in the last seven years. It has been further stated that another prerequisite was that a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.30.74 crores. One of the prerequisite was also that a bidder should further possess a spare capacity of the washery of not less than 1.10 Metric Tonne per annum.

07. The petitioner / Company has also furnished a detail in form of comparative chart in respect of the NIT, which is impugned in the present writ petition and NIT of the year 2018 – 19 in respect of STPS, Sarni and the chart reads as under:-

Sl. No.	Technical requirement	Clause as amended on 31.03.2018	Tender dated 04.11.2019
1	Minimum bid quantity	11.00 Lakh Metric Tonne	35 Lakh per year (both plant)
2	Spare capacity of washery	1.10 Million Tonne per annum	Clause No.II (i) – 3.5 Metric Tonne per annum
3	Past experience	The intending bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC / Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in India (as the case may be) for a total quantity of not less than 1.10 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years, ending with bid	Clause No.II (i) – Bidder should have executed the work of coal lifting, beneficiation (through wet process), liaisoning with coal companies for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 months from SECL command in last five years, ending with bid opening date. In case of consortium, lead member should meet the experience criteria.

		opening date i.e. 20.02.2018.	
4	Turnover (average annual turnover of preceding three financial years)	30.74 Cr.	175 Cr.

08. The petitioner's contention is that the NIT, which has been issued, is a tailor-made NIT and has been floated with a *malafide* intent to cheat the honest bidders and to avoid *bonafide* competition and also to cause heavy loss to the State Exchequer by modifying and personalising the the tender conditions. The petitioner's contention is that impugned unreasonable and arbitrary change in the terms and conditions of the impugned NIT dated 02.11.2019 are in contravention to the settled law and practice, which in turn defeats the competitive spirit of bidding, which is the object behind issuing the public NIT. The petitioner has challenged the NIT on various grounds and the main contention of the petitioner is that it is a tailor-made NIT eliminating large number of bidders with an oblique and ulterior motive.

09. The petitioner has also raised a ground that as per Clause – II of the Technical Qualification, a condition has been imposed and the same requires that washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum. as compared to the preceding NIT year, which requires a capacity of 14 Lakh Metric Tonne per annum in SSTPP, Khandwa and 11.00 Lakh Metric Tonne per annum in STPS, Sarni. The aforesaid shift, in capacity, is more than

the double as required under the previous NIT without any rhyme and reason and is against the nature of fair contractual terms as contended by the petitioner.

10. The petitioner has further contended that as per Clause – II (ii) of the said NIT, it is provided that a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State Owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in Public Sector Undertaking in India for a total quantity of not less than 2.8 Million Tonne in span of 12 months from SECL command in last five years, which is exorbitantly high as compared to the NIT issued in the preceding year for which coal lifting, beneficiation (through wet process), liaisoning and movement of coal by road and railways for one or more State Power Generating Companies / NTPC/ Independent Power Producers (IPPs) / Steel / Cement / Aluminium Utilities / PSU's in the Public Sector Undertaking in India (as the case may be) for a total quantity of not less than 1.40 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years in SSTPP, Khandwa and 1.10 Million Tonne per annum in 12 months' period in single stretch from SECL command area in last 7 years in STPS, Sarni was required.

11. It has further been contended that the work experience being a decisive factor in a bid process wherein the experience of the Independent Power Producers was included in the preceding year, which got subsequently,



being a reasonable litmus test, has been removed with a *malafide* intention to favour few companies in the bidding process. The aforesaid changes have been incorporated with a malice intent to avoid the *bonafide* competition and to favour few individuals.

12. The petitioner has further contended that as per Clause – III (i) of the said NIT, the requirement is that a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores, which is thrice the amount as compared to the preceding NIT, which required an annual turnover of Rs.39.50 crore in SSTPP, Khandwa and Rs.30.74 crores in STPS, Sarni. The aforesaid amounts to exorbitant increase and cannot be shadowed under the garb of reasonable hike and is an unfair contractual term in the eyes of law.

13. It has further been contended that as per Clause – II (i) of the said NIT, a condition has been imposed that a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum as compared to the preceding NIT of 1.40 Metric Tonne per annum in SSTPP, Khandwa and 1.10 Metric Tonne per annum in STPS, Sarni. The spare capacity is increased to an extent whereby the companies like the petitioner and the similar situated companies have no scope to comply with and has been hiked so exorbitantly to avoid the fair bidding process and is against the basic structure of the contractual law.

14. The petitioner has contended that the exorbitant hike in various terms and conditions of the NIT as compared to the preceding year is very well within the garb

of unfair contractual terms and is liable to be set aside.

15. It has been contended that it is, apparently and unequivocally, clear upon a bare perusal of the terms and conditions of the NIT that the same have been incorporated in collusion with a handful of individual / corporate with a sole view to favour these handful of individuals / corporate, thereby encouraging cartelization. The petitioner has contended that the aforesaid onerous terms and conditions of the NIT, which have encouraged cartelization in favour of a handful of individual / corporate lies in the teeth of fair bidding process and providing a 'level playing field' to all bidders and the petitioner's contention is that the aforesaid change in the terms and conditions of the present NIT with that of the preceding NIT only portrays the reason to avoid the fair bidding process and is arbitrary in nature and is liable to be set aside.

16. It has been contended that the present NIT has been floated with a *malafide* intent to cheat the honest bidders and to avoid the *bonafide* competition and cause heavy loss to the State Exchequer by modifying and personalising the tender conditions so as to only suit or make eligible a handful of individual / corporate and is liable to be set aside.

17. The petitioner has placed reliance upon a judgment delivered in the case of *Caterpillar India (P) Limited v/s Western Coalfields Limited & Others reported in (2007) 11 SCC 32*. Reliance has also been placed upon a judgment delivered in the case of *Reliance Energy Limited & Another v/s Maharashtra State Road Development*

***Corporation Limited & Others reported in (2007) 8 SCC 1.***

18. The petitioner has prayed for the following reliefs:-

(i) That, this Hon'ble Court may kindly be pleased to quash the NIT dated 02.11.2019 (Annexure-P/3) issued by respondent No.2.

(ii) Respondents may kindly be directed to issue fresh NIT with just and fair conditions as were prevalent in past NITs and in consonance with judicial pronouncement.

(iii) Any other relief / reliefs order / orders, direction / directions which this Hon'ble Court may deem fit and proper may kindly be granted to the petitioner.

19. The respondents have filed a reply in the matter and it has been stated that the respondent No.2 is a Company Limited by share and owned and controlled by the Government of Madhya Pradesh. It has been stated that as per the norms of the the Ministry of Environment & Forest, Government of India, the coal containing more than 34% of ash cannot be supplied to Power Plants exceeding 500 km unless it is routed through washery circuit to reduce the ash content. The distance from SECL, mines to SSTPP-1, SSTPP-II & STPS is more than 500 km and the ROM coal supplied to these power houses generally contains more than 34% ash, which required coal beneficiation. This coal beneficiation is mandatory for the coal being used at these Thermal Power Stations to reduce ash content up to or below 34%. Since, the SECL has no washery unit in the mine area, tenders are being invited from the nearby private washery operators located in SECL area for the work of ROM Coal beneficiation along with its associated logistics for reduction in ash content for compliance of MOEF

norms. The contention of the respondents is that the impugned tender dated 02.11.2019 is an outcome of the aforesaid requirement.

20. The respondents have stated that petitioner's main challenge to the NIT is on the basis of alleged tailor-made conditions to favour certain persons. The respondents have stated that the prerogative to determine the minimum 'Technical and Financial Criteria for Qualification' in any particular NIT lies exclusively in the hands of the tendering authority and the tendering authority is the best judge to ensure bidders' capacity, capability and resource to execute the work and cannot compromise with the pre-qualification requirement, which is best suited to the interest of the tendering authority as generation of electricity requires regular and uninterrupted supply of coal in the instant tender. In respect of the aforesaid contention, the respondents have placed reliance upon the judgments delivered in the cases of *Larsen & Toubro Limited v/s Gujarat State Petroleum* reported in (2000) 2 GLR 1814, *Air India Limited v/s Cochin International Airport Limited* reported in (2016) 16 SCC 818 and *Eurasian Equipment & Chemicals Limited v/s The State of West Bengal* reported in (1975) 1 SCC 70.

21. It has been further contended by the respondents that in the preceding year 2018 – 19, individual tender of alike nature for SSTPP-I, Khandwa only, was issued by the respondents wherein the tendered quantity was only 28.269 Lakh Metric Tonne and the period of work was only for one year. Whereas, in the instant impugned tender dated

02.11.2019, the tendered quantity has been raised from 28.269 Lakh Metric Tonne to 280 Lakh Metric Tonne, which is ten times of the earlier one and for a period of four years in total. The respondents have stated that the earlier NIT for the year 2018 – 19 invited e-tenders from reputed established Washery Operators only for one Power Plant i.e. SSTPP-I, Khandwa, whereas, the instant NIT has been called for three Power Plants altogether i.e. SSTPP-I, SSTPP-II and STPS, Sarni. The said amalgamation has been done looking into various peculiarities and certain problems as well to ensure regular, unhindered supplies by the prospective bidders, who can assure and guarantee the same, based on the prerequisite as published in Tender Notice. Therefore, in order to provide an effective set up to deal with the same, the instant amalgamation has been done. The decision of amalgamating the projects and to call under the single NIT has been taken on the basis of past experience and difficulties faced by the respondents which are as under:-

1. Previously, each power house issued separate tenders with required separate publication and tendering process. The said tasks were to be taken up individually by an evaluation team which ultimately resulted in additional expenditure and cost which was to be borne by the tenderer out of and from the State Exchequer.
2. Previously, dealing with number of cases of a respective in nature, had an additional financial impact and as well as nature as well as it lacked to wastage of valuable resources such as manpower and time. Since similar nature of work was required to be carried out repetitively.
3. Separate tenders resulted in prevalence of different

rates with wide variation. This resulted into discrepancies and casted shadows of doubt upon the tenderers.

22. The respondents have further stated that the petitioner has further levelled allegation in the Writ Petition alleging that the prequalifying criteria, which was basically incorporated to assess the technical and Financial capability of bidder, is tailor-made in order to benefit certain blue eyed tenderers and to eliminate genuine and *bonafide* tenderers such as the petitioner. In this regard, the respondents have stated that the technical qualification and financial qualification fall under the head of prequalification requirements prescribed in the tender, which consists of primarily five major components i.e. first is Requisite Washing Technology / Spare Capacity of Washery; second is Requisite Past Experience for Bidder; third is Arrangement of Railway Siding for Transportation of Coal; fourth is Location of Washery and fifth is Requisite documents to be submitted by the bidder.

23. In respect of contract period, the respondents have stated that it was the need of the hour to extend the contract period. Such a need has arisen on account of the following factors:-

(i) Availability of coal varies as per the production of SECL. It has been the experience of the answering respondents that if coal production or availability suddenly increased then contractors failed to lift coal due to non-availability of sufficient infrastructure like fleet, spare washing capacity etc.

(ii) During discussions and conferences with bidders, who have been previously engaged and with those who are interested, suggestions have come up that if long term

associations are made with them on account of long term contracts, they can develop sufficient infrastructure to serve the organization in a better way to fulfill its requirement.

(iii) The long term associations, on account of long term contracts, are more sustainable, viable and beneficial to the interest of the answering respondents as well as to the interest of contractors.

(iv) Other power utilities like Maharashtra State Mining Department (For Mahagenco), GSECL & RVUNL are also issuing tenders with contract period of more than one year i.e. from 2 – 5 years.

24. In respect of the financial criteria incorporated in the NIT, the respondents have stated that it is the standard practice of the respondents to keep the turnover criteria variable as per the estimated cost of the Tender. It has been stated that in the previous tenders for SSTPP-I and STPS, Sarni, where tendered quantities were 28.269 and 21.67 Lakh Metric Tonne respectively for one year, the financial capability (average annual turnover) of bidders were kept as 39.5 crore and 44 crore (total 83.5 crore). Whereas, in the instant tender, where the contract is for a period of four years with tendered quantity of 280 Lakh Metric Tonne (@ 70 Lakh Metric Tonne per year) for three power houses i.e. SSTPP-I, SSTPP-II and STPS, Sarni, the average annual turnover of the bidder for the preceding three financial years is kept as Rs.175 crore. The respondents have mentioned that if the earlier practice for determining the financial criteria would have been taken into account for the proportionate quantity then the average annual turnover required in the instant tender, would have been Rs.470

crores. Whereas, in order to provide relaxation and invite maximum bidders and to keep the healthy competition and to provide level playing field, the criteria has been reduced to Rs.175 crores (i.e. less than 40%) and also to ensure sufficient experience and capabilities of the prospective bidders to meet out the requirement of the tender work, and therefore, the stand of the petitioner is false and baseless.

25. In respect of not taking into account the work experience done with independent power producers, which was earlier in existence in previous tender, the respondents have stated that in the previous tender, the experience of Independent Power Plant / Steel / Cement / Aluminium Companies have also been considered. The respondents have further contended that placing reliance on aforesaid, the petitioner has alleged that leaving out / discarding the experience of work done in IPPs is a tailor-made condition incorporated to suit the interest of certain blue eyed persons. In this regard, the respondents have stated that leaving out / discarding the experience of IPPs in the instant tender for calculating the work experience is an outcome of deliberation, consideration and application of mind in considering the past experience of the respondents in dealing with with the contractors whose work experience was in IPPs. The respondents have brought to the notice of this Court that earlier they issued a tender for Road-cum-Rail Transport (RCR) of coal bearing No.MPPGCL / EDFM / NCL / TS / 72 / 9471 / 2018 wherein, experience of IPP was considered. However, a lot of difficulties were faced in corroboration of credential of one of the bidders



due to misleading information provided by the IPP. The respondents have also stated that in the year 2019, various tenders have been issued following this bad experience and having learnt the said lesson.

26. The respondents have further contended that the exclusion of consideration of experience of work done in respect of Independent Power Producer (IPP) cannot be said to be an essential condition of the contract. Work experience is a criteria, which is necessary to arrive to a satisfaction that the contractor / bidder has undertaken work of similar nature previously and has successfully completed the same. Such credential of a contractor / bidder at the stage of technical evaluation of the bid needs to be verified from the authority who has provided him with the work experience certificate. The respondents have stated that so far as IPPs are concerned, the verification of work performed in an IPP can be quite deceptive and depends solely on the information provided by the IPP. The veracity and authenticity of the information provided by the IPP is solely based upon the information supplied by IPP and is very difficult to be cross checked. Thus, the decision taken by the respondents, in order to eliminate / discard the work experience of an IPP, is a well reasoned decision on account of due deliberation and consideration of their past experiences.

27. The respondents have further contended that the pre-qualification requirement as per the Tender provides for certain technical qualifications as well as Financial Qualifications which are essential or mandatory

requirements in terms of the dictum of the Supreme Court in *Poddar Steel Corporation v/s Ganesh Engineering Works & Another* reported in 1991 AIR 1579, wherein a distinction has been made regarding essential and non-essential conditions existing in the pre-qualification requirement. So far as the non-essential conditions are concerned, the said conditions can be done away with while awarding the contract to any bidder but, the essential conditions are *sine qua non* and they cannot be dispensed with at any cost. The respondents have stated that allegation of the petitioner with regard to the tender conditions as tailor-made are only in respect of the essential conditions and hence, in view of the dictum of the Hon'ble Supreme Court, it is evident that such conditions cannot be dispensed with. In view of the said submissions, the respondents have stated that the stand taken by the petitioner cannot be sustained.

28. In respect of the representation submitted by the petitioner to Additional Chief Secretary, Energy, the respondents have stated that the representation submitted by the petitioner is merely an eyewash and no time was given to the respondents for considering the grievances raised by the petitioner and without waiting for the reply, the present petition has been filed. It has also been stated that the corrigendum was issued on 21.11.2019, however, the corrigendum does not permit the persons, who were having experience with Independent Power Producer.

29. The respondents have further stated that the scope of scrutiny with regard to terms of the invitation to tender is

in the realm of contract and the decision to accept the tender or award the contract is reached through several tiers and such decisions are made qualitatively by experts. They have stated that the terms of invitation to tender cannot be opened to judicial scrutiny.

30. In support of the aforesaid contention, the respondents have placed reliance upon the judgments delivered in the cases of *Meerut Development Authority v/s Association of Management Studies & Others* reported in (2009) 6 SCC 178, *Michigan Rubber (India) Limited v/s The State of Karnataka & Others* reported in (2012) 8 SCC 216, *Assn. of Registration Plates v/s Union of India* reported in (2005) 1 SCC 679, *Union of India v/s Hindustan Development Corporation* reported in (1993) 3 SCC 499, *Tata Cellular v/s Union of India* reported in (1994) 6 SCC 651 and *Maa Binda Express Carrier & Another v/s North Eastern Frontier Railway & Others* reported in (2014) 3 SCC 760 and they have stated that the only criteria, which can warrant interference of this Court is the presence of arbitrariness, unreasonableness and absence of fair play, which in the instant case, is not at all present and as such, the terms and conditions of the tender, which has been issued by the respondents, are not open for judicial scrutiny, and therefore, the petition filed by the petitioner deserves to be dismissed.

31. The respondents have stated that in the cases of *Meerut Development Authority (supra)* and *Michigan Rubber (India) Limited (supra)*, it has been held that the terms of invitation of tender cannot be opened for judicial

scrutiny because the invitation of tender is in the realm of contract which favours only the respondents.

32. The respondents have further stated that placing reliance upon a judgment delivered in the case of *Tata Cellular (supra)*, it has been held in Para-46 of the judgment delivered in the case of *Municipal Corporation, Ujjain & Another v/s Bvg India Limited & Others reported in (2018) 5 SCC 462* that the terms and conditions of the tender are not open to judicial scrutiny as the invitation to tender is a matter of contract.

33. The respondents have further stated that in the judgment delivered in the case *Monarch Infrastructure (P) Limited v/s Commissioner, Ulhasnagar Municipal Corporation & Another reported in (2002) 5 SCC 287*, the Hon'ble Apex Court has held that judicial review in the matter of Tenders is limited to the same if found discriminatory in nature between similarly situated persons and is arbitrary and restriction of Courts in interfering in the matters of administrative action or changes made therein unless the same is arbitrary or discriminatory. It has been stated that present case is a case where, there is no substance in the allegations which can demonstrate any discriminatory or arbitrary action and mere allegation as such, is of no assistance to the petitioner.

34. The respondents have further stated that in the case of *Directorate of Education & Others vs Educomp Datamatics Ltd. & Others reported in (2004) 4 SCC 19*, it has been held by the Hon'ble Apex Court that the terms of initiation of tender are not open to judicial scrutiny. It has

been held that Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. It has further been observed that the Court can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Apex Court has further observed that the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

35. The respondents have further stated that in the case of *Air India Limited (supra)*, the Apex Court has held that 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 *bonafide* 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 *malafides*, unreasonableness and arbitrariness.

36. The respondents have further stated that in the case of *G.J. Fernandez v/s State of Karnataka & Others reported in (1990) 2 SCC 488*, 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 change effected 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 Sheety sense.

37. The respondents have stated that the Hon'ble Apex Court in the case of *M/s Master Marine Services (P) Limited v/s Metalfe & Hodgkinson (P) Limited & Another reported in (2005) 6 SCC 138*, has reiterated the principles that (a) State can choose its own method to arrive at a decision; (b) the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned; (c) even when some defect is found in decision

making process, Court must exercise its extraordinary writ jurisdiction with great caution and that too in furtherance of public interest; and (d) larger public interest is passing an order of intervention is always a relevant consideration.

38. The respondents have stated that if the State or its instrumentalities act reasonably, fair and in public interest in awarding the contract, the interference by the this Court is very restrictive since no person can claim Fundamental Right to carry on business with the Government. They have stated that principles stand reiterated in the cases of *Haryana Urban Development Authority & Others v/s Orchid Infrastructure Developers Private Limited* reported in (2017) 4 SCC 243 and *Reliance Telecom Limited & Another v/s Union of India & Another* reported in (2017) 4 SCC 269.

39. The respondents have stated that reasonableness of a restriction is to be determined in an objective manner and from the stand point of interests of the general public and not from the stand point of the interest of person upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable, merely because, in a given case, it operates harshly, in determining, whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing condition at the relevant time, enter into judicial verdict. Canalization of a particular business in favour of

even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. In this regard, the respondents have placed reliance upon judgments delivered in the cases of *Shree Meenakshi Mills Limited v/s Union of India* reported in 1974 AIR 366, *Hari Chand Sarada v/s Mizo District Council* reported in (1967) 1 SCR 1012 and *Krishnan Kakkanth v/s Government of Kerela* reported in (1997) 9 SCC 495.

40. The respondents have further stated that in the case of *Global Energy Limited & Another v/s Adani Exports Limited & Others* reported in (2005) 4 SCC 435, it has been held that unless terms of a tender notice are wholly arbitrary, discriminatory or actuated by malice are not subjected to judicial review. It was observed that the principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench.



41. A rejoinder has also been filed by the petitioner in the matter and it has been stated that the tailor-made NIT deserves to be quashed in light of the Judgment delivered by this Court in the case of *Caterpillar India Private Limited (supra)*. Reliance has also been placed upon a judgment delivered in the case of *Reliance Energy Limited & Another v/s Maharashtra State Road Development Corporation Limited & Others reported in (2007) 8 SCC 1* and a prayer has been made for quashment of terms and conditions of the NIT which is under challenge.

42. The respondents have placed reliance upon a judgment delivered in the case of *National Highway Authority of India v/s Gwalior Jhansi Expressway Limited reported in (2018) 8 SCC 243* and the contention of learned Advocate General is that keeping in view the judgment delivered by the Hon'ble Supreme Court, a company, who never chose to participate in a particular tender, cannot challenge the tender conditions incorporated in the tender.

43. Reliance has also been placed upon a judgment delivered in the case of *Meerut Development Authority v/s Association of Management Studies reported in 2009 (6) SCC 171* and the contention of the learned Advocate General is that in case, there is no vagueness, uncertainty or confusion with regard to reserved prices, there is no scope for judicial review.

44. The respondents have placed reliance upon a judgment delivered in the case of *Michigan Rubber (India) Limited v/s The State of Karnataka & Others*

*reported in 2012 (8) SCC 216* and it has been argued before this Court that scope of interference by Courts is quite restricted and no person can claim Fundamental Right to carry on business with the Government.

45. Heard learned counsel for the parties at length and perused the record.

46. The undisputed facts reveal that the petitioner / Company is aggrieved by the certain terms and conditions of the NIT dated 02.11.2019 (Annexure-P/3), Tender ID.2019\_MPPGC\_61325\_1 issued by the Madhya Pradesh Power Generating Company Limited. The petitioner / Company has challenged the following clauses of the NIT:-

(a) As per Clause – II of the Technical Qualification of the NIT 2019 – 20, the requisite washing technology required for the coal beneficiation plant should not be less than 35 Lakh Metric Tonne per annum.

(b) As per Clause – II of the said NIT, a bidder should possess experience in coal lifting, beneficiation (through wet process), liaisoning with coal companies and railways for any State owned Power Generating Companies / NTPC / Captive Power Utility of any PSU in India for a total quantity of not less than 2.8 Million Tonne in span of 12 month from SECL command in last five years.

(c) As per Clause – III (i) of the said NIT, a bidder should possess turnover (average annual turnover of preceding three financial years) of Rs.175 crores to showcase his strong financial ability.

(d) As per Clause – II (I) of the said NIT, a bidder should possess a spare capacity of the washery not less than 3.5 Metric Tonne per annum.

47. Learned senior counsel for the petitioner has argued

before this Court that in order to favour blue eyed persons tailor-made tender conditions have been inserted in the contract. The work experience in respect of Independent Power Producers has been deleted in the impugned NIT whereas, the same was in existence since time immemorial and for the first time, the condition of work experience in respect of Independent Power Producers has been deleted. It has also been argued that keeping in view the privatization and modernization of power projects, large number of Independent Power Producers have established their power plant and the persons like the petitioner are carrying out similar kind of work with the Independent Power Producers, and therefore, deletion of work experience criteria with Independent Power Producer is an arbitrary decision on the part of the respondents.

48. Learned senior counsel has also argued that earlier experience of Independent Power Plant, Steel Plant, Cement / Aluminium Companies were also considered. He has further argued that in case, the aforesaid condition is not declared to be an arbitrary condition, a person in whose favour the contract is awarded by a government owned company, will be receiving the work in perpetuity because a person, who does not have experience to work with the Government or with the Public Sector Undertaking will never be able to enter in the field to gain experience with Government Sector and Public Sector Undertaking. He has also argued that certain blue eyed persons were invited by respondent No.2 and after discussing the matter of contract, and terms and conditions to be formulated with those

persons, tailor-made conditions have been made in respect of quantity of work experience and in respect of period of work.

49. Learned senior counsel has drawn the attention of this Court towards the return filed by the respondents and paragraph – 13 of the return, which is duly supported by an affidavit reads as under:-

13. That, if contract period is taken into account, it was the need of the hour to extend the contract period. Such need has arisen on account of the following factors:-

(i) Availability of coal varies as per the production of SECL. It has been the experience of the answering respondents that if coal production or availability suddenly increased then contractors failed to lift coal due to non-availability of sufficient infrastructure like fleet, spare washing capacity etc.

(ii) During discussions and conferences with bidders, who have been previously engaged and with those who are interested, suggestions have come up that if long term associations are made with them on account of long term contracts, they can develop sufficient infrastructure to serve the organization in a better way to fulfill its requirement.

(iii) The long term associations, on account of long term contracts, are more sustainable, viable and beneficial to the interest of the answering respondents as well as to the interest of contractors.

(iv) Other power utilities like Maharashtra State Mining Department (For Mahagenco), GSECL & RVUNL are also issuing tenders with contract period of more than one year i.e. from 2 – 5 years.”

50. The return which is filed along with an affidavit of a Senior Officer of MPPGCL reflects that bidders, who were previously engaged with respondent No.2, were called, deliberations were made and then terms and conditions of contract were decided. This process of calling bidders to frame terms and conditions is unheard of. In all

fairness, the respondents should have issued a public notice inviting all interested parties to give their suggestions, however, the action appears to be an action taken in a close room with certain individuals.

51. This Court does not approve such an action taken by respondent No.2 of discussion and conferences with elimination of other players of the field, however, the conditions in the contract are required to be looked into independently on merits to find out whether they are arbitrary, illegal or actuated with *malafide*.

52. The first ground raised by the petitioner / Company is that the tender has been issued in respect of two power plants namely SSTPP, Khandwa and STPS, Sarni in the year 2019 – 20, whereas earlier in the year 2019 – 20, separate tenders were issued for two power plants. It is again an undisputed fact that both the power plants are owned and controlled by the State of Madhya Pradesh and they are being managed by the Madhya Pradesh Power Generating Company Limited. One tender for two power plants can always be issued and the decision of the State Government, by no stretch of imagination, can be treated as wholly arbitrary, discriminatory or actuated by malice, hence, the decision of the State Government on this ground cannot be subjected to judicial review.

53. The second ground raised by the petitioner is in respect of qualification as provided under Clause – II, which provides that the requisite washing technology required for coal beneficiation plan will not be less than 35.00 Lakh Metric Tonne per annum. The petitioner has

given a comparative statement in the same condition for the year 2018 – 19 in respect of two power plants and its contention is that in respect of SSTPP, Khandwa it was earlier 14.00 Lakh Metric Tonne per annum and in respect of STPS, Sarni, it was 11.00 Lakh Metric Tonne. The respondents have now issued a tender for both the power plants and have provided the capacity to be 35.00 Lakh Metric Tonne, and therefore, in the considered opinion of this Court, the technical qualification prescribed, as it is for two power plants of 35.00 Lakh Metric Tonne, can again be never said to be an arbitrary condition.

54. In respect of requisite past experience, keeping in view the fact that the supply of coal is being made to two power plants, it has been provided that the intending bidder should have executed the work of coal lifting beneficiation (through wet process), liaisoning and movement of coal by road and railways for any State owned Power Generating Company / NTPC / Captive Power Utilities of any Public Sector Undertaking in India for a total quantity of not less than 28 Lakh Metric Tonne in span of 12 months for SECL command area in last five years.

55. In respect of the aforesaid condition, the respondents have stated that the aforesaid tender conditions has been inserted in the tender after great discussions and deliberations to ensure regular supply of coal to power plants and the condition of having experience of supply of coal with State owned Power Generating Company / NTPC / Captive Power Utilities of any Public Sector Undertaking can never be termed as unreasonable condition. The

respondent No.2, being an instrumentality of State, has to protect the interest of the State and if in the tender a condition has been imposed in respect of past experience with the Government or Government owned company or Public Sector Undertakings, it can never be termed as arbitrary condition.

56. The petitioner has also raised a ground in respect of the contract period. In the present case, the contract period is of four years and it is for supply of 280 Lakh Million Tonne i.e. 70.00 Lakh Million Tonne per year.

57. The respondents have stated that other power utilities like Maharashtra State Mining Department, SGECL & RVUNL have also issued tender with contract period of more than one year ranging 2 to 5 year.

58. The tenure of contract depends upon the nature of work and in the present case, supply of coal is the subject matter of the contract, which is required constantly for power generation. The process of tender consumes 3 to 4 months and at times, it is delayed also, and therefore, in order to ensure that same exercise is not carried out every year, the respondents have arrived at a conclusion to award the work to successful bidder for a period of four years. Fixing a time period in a contract can never be again an arbitrary condition.

59. Much has been argued on the issue of exclusion of parties, who have done work with Independent Power Producer (private company). The present case is not a case where the respondents have inserted a tender condition, which provides that a contractor should have work

experience only with Power Generating Company owned by the State of Madhya Pradesh. The bidder, if he is having experience in respect of supply of coal for any State owned Power Generating Company / NTPC / Captive Power Utilities of any Public Sector Undertaking in India is eligible to participate. The aforesaid condition, in no way, be illegal and arbitrary condition as argued.

60. Keeping in view the facts and circumstances of the case, it can never be said that the tender conditions are tailor-made and they have been framed with a *malafide* intention to avoid *bonafide* condition and to favour few individual. The copies of various tenders issued by the electricity companies of Maharashtra and Gujarat are also on record as Annexure-R/2. They are also having similar conditions in respect of similar tenders and the petitioner has not been able to establish before this Court that the NIT has been floated with a *malafide* intention and to cause heavy loss to the State Exchequer merely because conditions are not favourable to the petitioner, they cannot be termed as arbitrary conditions.

61. The scope of judicial scrutiny has been considered by the Hon'ble Apex Court time and again. In the case of *Afcons Infrastructure Limited v/s Nagpur Metro Rail Corporation Limited* reported in 2016 (16) SCC 818, the Apex Court has held as under:-

“We may add the owner or the employer of a project, having authored the tender documents, is the best persons to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there a *malafide* or perversity in the understanding or



appreciation or in the application of the terms of the tender conditions. It is possible that the owner of employer of a project may give an interpretation to the tender documents that is no acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given”.

62. The Apex Court in the case of ***Reliance Telecom Limited & Others v/s Union of India & Others*** reported in **2017 (4) SCC 269** has again dealt with scope of interference in respect of the tender.

63. In the case of ***Tata Cellular v/s Union of India*** reported in **1994 (6) SCC 651** again the scope of judicial review has been looked into by the Hon'ble Apex Court. In the aforesaid case, it has been held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

64. The Apex Court in the case of ***Monarch Infrastructure (P) Limited v/s Ulhasnagar Municipal Corporation & Others*** reported in **2000 (5) SCC 287** was again dealing with the N.I.T. and it has been held that it cannot say whether the conditions are better than what were prescribed earlier, for in such matters, the authority calling the tenders is the best judge. The Court declined to restore *status quo ante*.

65. In the case of ***Cellular Operator Association of India & Others v/s Union of India & Others*** reported in **2003 (3) SCC 186**, the Apex Court has held that in respect of the

matters affecting policy and those that require technical expertise, the Court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues.

66. The Apex in the case of *Association of Registration Plates v/s Union of India & Others reported in 2005 (1) SCC 679* has held that formulating conditions of a tender document and awarding a contract of the nature of those for supply of HSVRPs, greater latitude is required to be conceded to the state authorities.

67. In the case of *Union of India v/s Hindustan Development Corporation reported in 1993 (3) SCC 499*, again the scope of judicial interference has been dealt with.

68. In the case of *Tata Cellular v/s Union of India reported in 1994 (6) SCC 651*, it has been held that mere power to choose cannot be termed arbitrary. The Government has an interest in selecting the best and use of such power for collateral purpose is interdicted by Article 14 of the Constitution of India.

69. In the case of *Maa Binda Express Carrier & Another v/s Northeast Frontier Railway & Others reported in 2014 (3) SCC 760*, it has been held that the bid / tender, in response to a NIT, is only an offer which State or its agencies are under no obligation to accept. It has been further held that bidders participating in the tender process cannot insist that their bids should be accepted simply because a bid is highest or lowest.

70. In the case of *Municipal Corporation, Ujjain & Others v/s BVG India Limited & Others reported in 2018*

(5) *SCC 287*, it has been held that the terms of the tender are not open for judicial scrutiny as the invitation to tender is a matter of contract.

71. In the case of *Monarch Infrastructure (P) Limited v/s Commissioner, Ulhasnagar Municipal Corporation & Others reported in 2000 (5) SCC 287*, it has been held that the best judge to determine, whether the revised terms and conditions of the tender process were better than the earlier ones, is the authority who has invited the tender and not the Court.

72. In the case of *Directorate of Education & Others v/s Educomp Datamatics Limited & Others reported in 2004 (4) SCC 19*, it has been held that the terms of initiation to tender are not open to the judicial scrutiny the same being in the realm of contract. It has been further held that the Government must have a free hand in setting the terms of the tender.

73. In the case of *Air India Limited v/s Cochin International Airport Limited reported in (2000) 2 SCC 617*, it has been held that award of a contract, whether it is by a private party or by public body or the State, is essentially a commercial transaction. It has further been held that commercial decision considerations, which are paramount, are commercial considerations and 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.

74. In the case of *Master Marine Services (P) Limited v/s Metcalfe & Hodgkinson (P) Limited & Another*

*reported in (2005) 6 SCC 138*, it has been held that the State can choose its own method to arrive at a decision and the State and its instrumentalities have duty to be fair to all the concerned. It has been further held that even when some defect is found in decision making process, Court must exercise its extraordinary writ jurisdiction with great caution and that too in furtherance of public interest and larger public interest in passing an order of intervention is always a relevant consideration.

75. In the case of *Haryana Urban Development Authority & Others v/s Orchid Infrastructure Developers Private Limited* reported in *(2017) 4 SCC 243*, it has been held that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, the interference by the Court is very restrictive since no person can claim Fundamental right to carry on business with the Government.

76. In the case of *Reliance Telecom Limited & Another v/s Union of India & Another* reported in *(2017) 4 SCC 269*, it has been held that in the matter relating to complex auction procedure having enormous financial ramification, the interference by the Courts based upon any perception, which is though to be wise or assumed to be fair, can lead to a situation which is not warrantable and may have unforeseen adverse impact.

77. In the case of *Meenakshi Mills Limited v/s Union of India* reported in *(1974) 1 SCC 468*, it has been held whether there is any unfairness involved in determining, the nature of the right alleged to have been infringed the

underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby the disproportion of the imposition, the prevailing condition at the relevant point of time, enter into judicial verdict. It has further been held that the unreasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade of business in question.

78. In the case of *Lala Hari Chand Sarda v/s Mizo District Council & Another* reported in (1967) 1 SCR 1012, it has been held that canalization of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.

79. In the case of *Krishnan Kakkanth v/s Government of Kerela & Others* reported in (1997) 9 SCC 495, it has been held that a citizen has no Fundamental Right to insist on Government or any other individual to do business with him and the Government is entitled to enter into business with any person or class of persons to the exclusion of others.

80. In the case of *Global Energy Limited & Another v/s Adani Exports Limited & Others* reported in (2005) 4 SCC 435, it has been held that unless terms of a tender notice are wholly arbitrary, discriminatory or actuated by malice, are not subject to judicial review. It has further been held that principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of

the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

81. This Court does not find any reason to interfere with the tender in the peculiar facts and circumstances of the case. The Governments and their undertakings do have free hand in setting terms of the tender and unless the terms and conditions are arbitrary, discriminatory, *malafide* or actuated by bias, the scope of interference by Courts does not arise as held in the case of *Michigan Rubber (India) Limited (supra)*.

82. In light of the aforesaid judgment, in the present case, as the petitioner has failed to establish that criteria adopted by the respondents is contrary to public interest, discriminatory or unreasonable, the question of interference by this Court does not arise.

Accordingly, the present Writ Petition stands dismissed.

Certified copy, as per rules.

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

(SHAIENDRA SHUKLA)  
J U D G E

Ravi