The High Court Of Madhya Pradesh: Jabalpur

(DIVISION BENCH)

Writ Petition No. 21126/2017

MEIL Prasad (JV) ……. PETITIONER

Versus

State of Madhya Pradesh & Another ..… RESPONDENTS

WITH

Writ Petition No. 1473/2018

MEIL-KBL (JV) ……. PETITIONER

Versus

State of Madhya Pradesh & others ..… RESPONDENTS

CORAM :

Hon'ble Mr. Justice Hemant Gupta, Chief Justice

Hon'ble Mr. Justice Vijay Kumar Shukla, Judge

Appearance:

Mr. Sourav Agrawal, Mr. Ishaan Chhaya and Ms. Rashi Goswami, Advocate for the petitioners.

Mr. Amit Seth, Government Advocate for the respondents/State

Mr. Arpan J. Pawar, Advocate for the respondent No.2 – Narmada Valley Development Authority.

Whether Approved for Reporting: Yes

Law Laid Down:

- ✓ Mere pendency of dispute raised by the petitioners before the competent Arbitral Tribunal against the decision that they have defaulted in performance of contract would not mean that they have not incurred disqualification as per the tender condition particularly when the tender conditions are being applied in a transparent and in a non-discriminatory manner. In any case, this Court in judicial review cannot hold that such condition is beyond the jurisdiction of the respondents.

- ✓ Whether a contractor is suitable to carry out the works on behalf of the State, the decision is of the State or its agencies or instrumentalities. A contractor cannot claim any right that even though his security deposit has been forfeited, the State is bound to consider him eligible and in the event, he is the lowest tenderer, to award contract.
- ✓ The forfeiture of earnest money without performing any part of the contract, at the stage of consideration of grant of contract, would stand on a materially different footing when security amount is forfeited on account of failure of the contractor to complete the project, as awarded.
- ✓ The past experience of a contractor is a relevant consideration for the State to take into consideration whether the State should enter into contract with such contractor whose performance is not considered satisfactory by the respondents. There is no allegation that such policy decision is actuated by malice. Thus, no right accrues to the petitioners to invoke the writ jurisdiction by this Court so as to declare the petitioners to be not disqualified.

Significant Paragraph Nos. : 4,5,9,10, 13 to 17, 20 to 24

Heard on: 03.07.2018

O R D E R

(Passed on this 10th day of July, 2018)

Per : Hemant Gupta, Chief Justice:

This order shall dispose of two writ petitions raising identical questions of law and facts. One petitioner is MEIL Prasad (Joint Venture) whereas the other writ petitioner is MEIL-KBL (Joint Venture). The petitioner in W.P. No.21126/2017 [MEIL Prasad (JV) vs. State of M.P. & Another] was granted contract for Upper Narmada Irrigation Project in the year 2013 whereas the petitioner in W.P. No.1473/2018 [MEIL-KBL (JV) vs. State of M.P. and others] was granted contract for construction of Khargone Lift Canal in the year 2011.

2. Though the two contracts are for different projects but the arguments raised is identical that on account of disqualification clause in the subsequent Notice Inviting Tender (NIT), the petitioners stand disqualified from

participating in the tender process. As per the petitioners, 11 tenders have been issued in the year 2018-19 so far. However, the condition in the Notice Inviting Tender that a contractor whose contract has been terminated and security deposit forfeited, stands disqualified from participating in the tender, seriously affects the rights of the petitioners to carry out their business, therefore, it violates the provisions of Articles 14 and 19(1)(g) of the Constitution of India.

3. The petitioners have disputed the action of the respondents in forfeiture of the security deposit and enforcement of the Bank Guarantee and that such question is pending before Madhya Pradesh Arbitral Tribunal (for short "the Arbitral Tribunal") constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 and/or in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act").

4. The condition of disqualification is identical in all the tenders which have been issued but for facility of reference, the relevant disqualification clause is quoted from Prequalification Document (Volume I) Tender No.7734 of NIT No.502/2016-17/ENC/etendering dated 06.02.2017 (Annexure P/25 to W.P. No.1473/2018) issued by the Government of Madhya Pradesh, Water Resources Department, Chief Engineer, Projects, Bhopal (M.P.) for the supply of water from left bank rising main system and delivering at farmers' field indicated in the index map for Left bank Micro Irrigation system under Mohanpura Major Project. The relevant clause reads as under:-

> "**2. Disqualification**
>
> Even though the bidder satisfies the above requirements they are subject to be disqualified -
>
> (a) If the design submitted by the bidder does not fulfill the criteria in general, his offer is liable for disqualification.

(b) If they have made untrue or false representations or hidden the material information in the forms, statements and attachments required in the prequalification documents.

(c) If any Department of GoMP including Municipal Corporation, Development Authority, Corporation of Society has, in consequence of some penal action, during last five years:-

(i) Cancelled or suspended the registration of the firm.

(ii) Registration was cancelled or suspended before five years and not revoked up to the date of bid submission.

(iii) Black listed the Contractor

(iv) Debarred the Contractor for participating in future tendering.

(v) Termination of contract due to default of contractor.

(vi) *Forfeiting of full or partial SD for poor performance. (including cases where the forfeiting has been done in last 5 years) though the contract period/case may be older than 5 years provided the above said penal action was in force on the last date of submission of the bid.*

(Emphasis Supplied)

In case of JV all the partners shall be required to submit an affidavit giving full information of above facts."

5. The argument of the learned counsel for the petitioners is that forfeiture of the security deposit or encashment of performance Bank Guarantee is a matter, which is pending before the statutory Arbitral Tribunal or in proceedings under Section 9 of the Act. Therefore, till such time there is legal adjudication of the issues between the parties, the petitioners cannot be said to be disqualified from participating in future tender processes. It is argued that the forfeiture of security deposit and to disqualify a tenderer from participating in the tender process is nothing but a deemed blacklisting of the contractor, which cannot be resorted to so as to oust the petitioners from consideration of future contracts. Learned counsel for the petitioners relies upon a Single Bench decision of Jharkhand High Court reported as **2006 SCC OnLine Jhar 825 (Ripley and Company Limited, Ranchi vs. Central Coalfields Limited, Ranchi and others**) and a Division Bench decision of Punjab & Haryana High Court

reported as **2017 SCC OnLine P&H 166** (**M/s R.S. Labour and Transport Contractor vs. Food Corporation of India and others..**etc.) rendered in Civil Writ Petition No.21863 of 2016 and connected writ petition, to contend that such clause is wholly arbitrary, unreasonable which ousts the petitioner from being considered for tender though the petitioner satisfies all eligibility conditions.

6. On the other hand, learned counsel for the respondents submitted that the condition of disqualification is not introduced in recent tenders published, but, in fact, a similar condition was in existence in which the petitioners were successful tenderers. Reference is made to a communication dated 29.07.2015 (Annexure R/2A) issued by the Narmada Valley Development Authority where the disqualification condition was sought to be incorporated as mentioned in the said communication. The said condition is now a standard condition in all the Notice Inviting Tenders. The relevant extract from the said document (Annexure R/2A) reads as under:-

> "**2**. The vague conditions of disqualification clause such as poor performance and delay, are hereby clearly defined and amended as under:-

Existing Provision regarding Poor performance and delay	**Amended Provision**
Volume-1 Clause Disqualification (c) Record of poor performance in works department of Govt. of M.P. such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failure.	Volume-1 Clause Disqualification The bidder shall be disqualified if he has not shown satisfactory performance in contract with any department of Govt. of Madhya Pradesh or its undertaking, including Municipal Corporations/ Development Authorities and any other Corporation/society under the Govt. of Madhya Pradesh.

	Satisfactory performance shall mean:- The bidder should not have a history of poor performance in last 5 financial years. Poor performance mean:- (i) Termination of contract due to default of contractor. (ii) Forfeiting of full or partial SD for poor performance (including cases where forfeiting has been done in last 5 years though the contract period/case may be older than 5 years) The bidder should have to submit an affidavit giving full information of above facts. If any false information relating to poor performance found, then the bidder will be disqualified.

7. It is also argued that the conditions of tender as to in what circumstances a tenderer has to be disqualified is a decision of the employer and such decision, unless it is actuated by malice or misuse of statutory powers, cannot be interfered with in exercise of power of judicial review by this Court. Reference was made to certain decisions of the Supreme Court reported as **(1996) 10 SCC 760 (Shapers Construction (P) Ltd. & Another vs. Airport Authority of India & Another**); **(2004) 4 SCC 19 (Directorate of Education and others vs. Educomp Datamatics Limited and others**); **(2005) 1 SCC 679 (Association of Registration Plates vs. Union of India and others**); (**2005) 4 SCC 435 (Global Energy Ltd. And Another vs. Adani Exports Ltd. And others**); **(2010) 6 SCC 303 (Shimnit UTSCH India Pvt. Ltd. & Another vs. West Bengal Transport Infrastructure Development Corporation Ltd. & others**)

and (**2012) 8 SCC 216 (Michigan Rubber (India) Ltd. vs. State of Karnataka and others**).

8. Before we consider the respective arguments raised by the learned counsel for the parties, it is pertinent to mention that in W.P. No.1473/2018 the petitioner could not complete the project within the originally stipulated period of 36 months i.e. on or before 27.03.2014 and applied for extension of time on 22.04.2014. The reason for seeking extension, *inter alia*, was that total land acquisition was not complete and broad concept layout plan was not approved by the respondents. The request of the petitioner was accepted when extension of time up to 27.06.2015 was granted. The petitioner again applied for second extension on 26.06.2015, *inter alia* for the reason that the villagers of certain villages are not allowing access to the petitioner to the site. The petitioner was granted second extension up to 30.06.2016. The petitioner applied for third extension *inter alia* on the ground that the petitioner has completed more than 80% of the total value of the work, therefore, the petitioner is entitled to third extension as well. The petitioner relies upon a work completion certificate dated 02.07.2016 (Annexure P-6) issued by the Narmada Valley Development Authority but still the petitioner's security deposit was forfeited. A sum of Rs.20303.00 Lacs was imposed as penalty limited to 10% of contract value i.e. Rs.55,08,89,900.00. Out of the said amount, Rs.2,08,24,088.00 was retained from the running bills whereas the remaining amount of Rs.53,00,65,812.00 was said to be recoverable. By a subsequent letter dated 12.09.2016 (Annexure P/18), a sum of Rs.10.00 Crore deducted from the running bills was forfeited. The petitioner was served with another notice on 12.09.2016 (Annexure P/19) to

complete the work within seven days otherwise action as per relevant clause of the agreement including blacklisting of the petitioner will be taken.

9. In W.P. No.21126/2017, the stand of the petitioner is that the work on site was stalled due to law and order problem because of large scale protest by the villagers but instead of mitigating the problem, a notice was issued on 09.05.2014 (Annexure P-8) alleging that the petitioner has breached the tender condition and the petitioner should take corrective action within 15 days. As per the petitioner, a penalty of Rs.40.28 Crore, as maximum of 10% of the tender value, was imposed on 09.09.2015 (Annexure P-12) and that the petitioner has invoked the jurisdiction of the Arbitral Tribunal disputing the action taken against the petitioner. The request of the petitioner for waiver of the penalty and interest on the mobilization advance was rejected and a Bank Guarantee of Rs.20.14 Crore was invoked on 04.03.2016 (Annexure P-15). The petitioner remitted the balance sum of Rs.20,01,91,236.00 from the amount of mobilization advance given to the petitioner. The three Bank Guarantees were released and only one performance Bank Guarantee was enforced. Vide letter dated 20.06.2016 (Annexure P-20), the petitioner was informed that the respondent has decided not to continue the Upper Narmada Project further. In view of the said fact, the petitioner claims that it is deemed to be discharged from all contractual obligations, therefore, sought release of the performance Bank Guarantee.

10. The issue of encashment of Bank Guarantee is pending in the proceedings under Section 9 of the Act whereas the petitioner has invoked the jurisdiction of the Arbitral Tribunal under the Act challenging the action of the respondents including forfeiture of performance security deposit as also filed its

claim for unpaid bills and damages caused to the petitioner. Since the disputes arising out of two contracts are pending, we proceed to decide the question raised that petitioner cannot be disqualified only for the reason that security amount stands forfeited without commenting upon merits of respective contentions of the parties.

11. The stand of the respondent No.2 in the return filed, is as under:-

> 5(i) It is submitted that the impugned "disqualification clause" is not new and has existed in the Standard Bidding Document of the answering respondent since the year 2007. In fact, the clause, originally was quite subjective and is reproduced as under:
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> > "Record of **poor performance** such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failure."
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> Since the aforesaid clause for **poor performance** was quite subjective and its scope was very wide with ample discretion, the answering respondent amended it on 29.07.2015 as follows to make it more objective and only for extreme cases-
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> > **"Forfeiting the full or partial SD for poor performance (including cases where the forfeiting has been done in last 5 years though the contract period may be older than 5 years)"**
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> As can be seen that the **"poor performance"** in the earlier clause has now been absolutely objective and only for extreme cases; and without discretion with the mandate that it will now come into force only in such cases where the poor performance has come to such level that the bank guarantee has come to such level that the bank guarantee or security deposit of the contractor has to be encashed. It means that in such cases the contractor has not done any work and hence there is either no pending payment or the pending payment is less than the amount of penalty sough to be recovered and penalty has mounted to such an extent that the department has no choice but to encash the Bank guarantee to recover the said amount. The impugned disqualification clause is much objective and considerate than the earlier one and adds disqualification only in **extreme cases of poor performance.** Upper Narmada is a fit case under this principle where the petitioner in the allotted three years time for a project of Rs.402.80 Crores could carry out only the survey work of Rs.1.72 crores. The inordinate delay and poor

> performance attracted a penalty of 10% of the contract amount under clause 113.6 & 115 of the contract agreement upon the petitioner. Obviously, as the petitioner had done absolutely nothing, it was impossible to recover the penalty from his bills and the only way to recover the penalty amount was to encash the bank guarantees. Hence in the present case the petitioner invited the disqualification by his own deeds and cannot blame the "disqualification clause" in the subsequent NIT's….."

12. With this factual background, the argument of the learned counsel for the parties needs to be examined.

13. The judgment of learned Single Bench of Jharkhand High Court in **Ripley and Company Limited (supra)** is in the context of rejection of bid of the petitioner on account of poor performance in an earlier contract. The condition in the Notice Inviting Tender is as under:-

> "**5.4.3** Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:
> (a) made misleading or false representation in the forms, statements and attachments submitted in proof of the qualification requirements, and/or
> (b) record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failure etc.

Considering the said clause, it was held that the Government must have a free hand in setting the terms of the tender. It was held that refusal to consider the petitioner for award of contract on account of its alleged earlier non-completion and abandonment of contract is a stigma on its credibility. The relevant extract from the said decision reads as under:-

> "**18**. That the 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: The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. 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. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.
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> *** *** ***
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> **23**. No doubt, performance and non-performance of a contract relates to the mutual contractual obligations, arising out of any contract. But when non observance of a contractual obligation or even a breach of a contractual stipulation becomes an impediment for a contracting party for award of future contract, it is not simplicitor a case of performance or non-performance of certain contractual obligations but has its impact on a long way. *To deny the right of participation to a tenderer in future contracts on account of one or the other breach in an earlier contract, definitely not only casts stigma and black mark on it but clearly amounts to blacklisting, notwithstanding whether it is said so in so many words or not. The validity of the action is to be examined on the basis of its overall impact on a person. If any action indicates a penal consequence for its past acts in future, it cannot be but a penalty*.
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> *** *** ***
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> **25**. Now coming to the question whether the invocation of Clause 5.4.3(b) debarring the Petitioner from future participation even though it is fully qualified and eligible in all respect, amounts to blacklisting. Even though the word "blacklisting" has not been used either in Clause 5.4.3 or in the note of Respondent or the minutes of the Tender Committee, *but in sum and substance, the action amounts to blacklisting and casts stigma. That being the situation, such an action without observing the principles of natural justice has to be set aside and annulled.*
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> *(Emphasis supplied)*

14. On the other hand, a Division Bench of Punjab & Haryana High Court in **M/s R.S. Labour and Transport Contractor (supra)** was examining the two writ petitions. The bid of the petitioner in the first writ was rejected on the ground of cartelisation. It was found that the petitioner was blacklisted on account of forfeiture of earnest money. It was found that forfeiture of earnest money is not on the ground of breach of the contract whereas it was a case where the party was prevented from being considered for the contract itself.

Therefore, the rejection of bid of the petitioner on alleged ground of cartelisation was found to be untenable. The relevant extracts from the said decision are reproduced as under:-

> "**16**. CWP No.21863 of 2016 admits of no difficulty. The petitioners must succeed. The first respondent did not merely forfeit the EMD but refused to consider the petitioners' bid altogether solely on the ground that they had formed a cartel with M/s Sushil & Co. The petitioners were, therefore, in effect, debarred from participating in the tender process altogether, although they were otherwise qualified to do so.
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> *** *** ***
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> **20**. The first respondent was bound to follow the principles of natural justice relating to blacklisting a party including affording him an opportunity of dealing with the grounds of the proposed blacklisting. The action of respondent No.1 impugned in CWP No.21863 of 2016 is, therefore, unsustainable."

However, in respect of other petition, the Court found that there is no reason for rejection of the bid of the petitioner for Safidon etc. The bid of the petitioner was rejected for the reason that earnest money of the petitioner was forfeited on the ground of forming of cartelisation that is the first case. It was held that disqualification of tenderer on account of forfeiture of the earnest money would have disastrous consequences of blacklisting. The relevant extracts from the judgment read as under:-

> "**24**. There are cases where government organisations and the State include a term in the notice inviting tenders that a party, though otherwise qualified, will not be entitled to submit a bid if it is blacklisted and/or its EMD has been forfeited by any other party such as another government or government agency or instrumentality of the State. Those cases are different and require different considerations. We do not intend expressing any view about the validity of such clauses and the manner in which the issue of blacklisting in such cases ought to be dealt with. The case before us is one where such a clause is included by the same organisation that forfeits the EMD in one contract and makes that the basis for disqualifying the party

> from participating in its other activities. There is less complication in such cases.
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> **25**. If the respondents are permitted to disqualify a party from submitting a tender in respect of a contract merely on account of the EMD of such a party having been forfeited in another contract, it would have the disastrous consequences of blacklisting the party without affording it an opportunity of being heard or dealing with the order of blacklisting in any manner whatsoever. This cannot be permitted. A term in a notice inviting tenders which disqualifies absolutely a party from submitting its bids merely on account of its EMD having been forfeited in another contract, is illegal being unreasonable, arbitrary and violative of the principles of natural justice. If the term merely confers a right upon the party inviting tenders or gives it the discretion to disqualify a party whose EMD had been forfeited in another contract, it would be valid. However, in such a case, the party inviting tenders would have to grant the party sought to be disqualified an opportunity of showing cause against the proposed disqualification. Call it by any name, such a term, in effect, debars a party from participating in the tender process and must, therefore, have read into it the principles of natural justice as applicable to cases of blacklisting."

15. The forfeiture of earnest money without performing any part of the contract, at the stage of consideration of grant of contract, would stand on a materially different footing when security amount is forfeited on account of failure of the contractor to complete the project, as awarded.

16. However, in the present case, it is not forfeiture of earnest money which is the basis of disqualification but invocation of performance Bank Guarantee and/or security deposit on account of failure of the petitioners to complete the awarded work. Whether such decision of the respondents is fair and reasonable or what consequences will follow from such decision is yet to be adjudicated upon by a statutory Arbitral Tribunal but it cannot be said that though the performance of the petitioner was found to be wanting in two contracts, the respondents have to treat the petitioners as qualified/eligible bidder and that

clause of the tender that forfeiture of the security deposit should not be taken into consideration, will be in fact introducing a clause in the tender document, which is not in existence. Both the judgments of the High Courts referred to by the learned counsel for the petitioners are in different context altogether, therefore, have no application in the present cases.

17. On the other hand, the Supreme Court in **Educomp Datamatics (supra)** has held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitation. The 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. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. 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. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

18. In **Global Energy Ltd. (supra**) the Supreme Court held that 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. The relevant extract from the judgment is reproduced as under:-

> "**9**. In Tata Cellular v. Union of India (1994) 6 SCC 651, a Three Judge Bench has explained what is a tender and what are the requisites of a valid tender. It has been held that the tender must be unconditional and must

conform to the terms of the obligation and further the person by whom the tender is made must be able and willing to perform his obligations. It has been further 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. In Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617 the same view was reiterated that the State can fix its own terms of invitation of tender and that it is not open to judicial scrutiny. Whether and in what conditions the terms of a notice inviting tenders can be a subject matter of judicial scrutiny, has been examined in considerable detail in Directorate of Education v. Educomp Datamatics Ltd. (2004) 4 SCC 19. The Directorate of Education, Government of National Capital Territory of Delhi had taken a decision to establish computer laboratories in all Government schools in NCT area and tenders were invited to provide hardware for this purpose. For the final phase of 2002-03, tenders were called for 748 schools and the cost of project was approx. Rs.100 crores. In view of the difficulty faced in the earlier years where the lowest tenderers were not able to implement the entire project, a decision was taken to invite tenders from firms having a turnover of Rs.20 crores or more for the last three financial years ending with 31.3.2002, as it was felt that it would be easier for the department to deal with one company which is well managed and not with several companies. Some of the firms filed writ petitions in Delhi High Court challenging the clause of the NIT whereby a condition was put that only such firms which had a turnover of Rs.20 crores or more for the last three financial years would be eligible. It was contended before the High Court that the aforesaid condition had been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and monopolize the same for big companies. The writ petition was allowed and the clause was struck down as being arbitrary and irrational. In appeal, this Court reversed the judgment of the High Court basically on the ground that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in settling the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the Court cannot order change in them.

10. 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."

19. In **Shimnit UTSCH India Pvt. Ltd. (supra),** the Supreme Court held that the Government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective in the context of tender conditions. The relevant extracts of the said decision read, thus:-

> "**52**. We have no justifiable reason to take a view different from the High Court insofar as correctness of these reasons is concerned. The courts have repeatedly held that government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.
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> **53**. In Assn. of Registration Plates vs. Union of India, (2005) 1 SCC 679, this Court while dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the

nature of ensuring the supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable.

54. On the contentions advanced, this Court examined the impugned conditions and did not find any fault and overruled all objections raised by the petitioners therein in challenge to these conditions. This Court has neither laid down as an absolute proposition that manufacturer of HSRP must have the foreign experience and a particular financial capacity to fulfill the contractual obligations nor it has been held that these conditions must necessarily be insisted upon in the NIT.

55. The judgment of this Court in Association of Registration Plates (supra) cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial review and recognized the right of the States in formulating tender conditions. In our opinion, there is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having TAC from the approved institutes without compromising on the quality and specifications of HSRP, as set out, (The specifications of HSRP may be ascertained by a combined reading of Rule 50 of the 1989 Rules and Clause 4 of the 2001 Order) in Rule 50 (sic), Order 2001 and Amendment Order, 2001.

56. Mr. F.S. Nariman, learned senior counsel heavily relied upon a decision of this Court in S. Nagaraj & Ors. v. State of Karnataka & Anr., 1993 Supp (4) SCC 595 and submitted that the decision of this Court in Association of Registration Plates (supra) was binding on all States and the said judgment has to be enforced and obeyed strictly and any deviation from those conditions by the States on their own is impermissible."

20. In a judgment reported as **(2016) 8 SCC 622 [Central Coalfields Ltd. and another vs. SLL-SML (Joint Venture Consortium) and others]**, the bidder wanted the employer to deviate from the terms of Notice Inviting Tender. It was held that 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. The Supreme Court held as under:-

> **"38.** In *G.J. Fernandez* v. *State of Karnataka, (1990) 2 SCC 488* both the principles laid down in *Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489* were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable". Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in *Ramana Dayaram Shetty* (supra) sense.
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> **46.** It is true that in *Poddar Steel* Corporation v. Ganesh Engineering Works and others, (1991) 3 SCC 273 and in *Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95* a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in *Bakshi Security and Personnel Services (P) Ltd.* v. *Devkishan Computed (P) Ltd., (2016) 8 SCC 446* through a reference made to *Poddar Steel (supra)*. In that case, this Court held a particular term of NIT as essential (confirming the view of the employer) and also referred to the "admonition" given in *Jagdish Mandal vs. State of Orissa, (2007) 14 SCC 517* followed in *Michigan Rubber (India) Ltd.* v. *State of Karnataka, (2012) 8 SCC 216*. Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.
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> **47.** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty (supra)* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular v. Union of India, (1994) 6 SCC 651* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the

decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal (supra)* followed in *Michigan Rubber (supra)*."

21. In a recent judgment reported as **(2016) 16 SCC 818 (Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another**), the Supreme Court held as under:-

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

12. In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293 it was held that the constitutional Courts are concerned with the decision making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517 as mentioned in Central Coalfields.

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

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

22. As per the information given by the petitioners, one contract i.e. Narmada Kshipra Samastha (Link) has been completed by the petitioners whereas 10 other contracts in other parts of the country have been completed. May be the petitioner has completed the projects for which tenders were invited by the other States but the question remains that in respect of Upper Narmada Irrigation Project and Khargone Lift Canal, the security deposited, stands forfeited for the reason that petitioners have defaulted in performance of the contract. The decision to arrive at that the petitioners have defaulted in performance of contract is subject matter of adjudication before the competent Arbitral Tribunal but that does not mean that even though the security deposit has been forfeited, which fact is not disputed, the petitioners cannot be said to have not incurred disqualification as per the tender conditions. Such tender condition is being applied in a transparent and in a non-discriminatory manner, therefore, it cannot be said that such condition is not proper. In any case, this Court in judicial review cannot hold that such condition is beyond the jurisdiction of the respondents.

23. The poor performance, as considered by the Jharkhand High Court in **Ripley and Company Limited (supra)** is subjective over the conditions in the Notice Inviting Tender issued by the State and/or Narmada Valley Development Authority prior to 2015. The earlier clause based on subjective satisfaction has been substituted and now disqualification clause is dependent upon a fact as to whether security deposit has been forfeited or not. By such disqualification clause, no stigma is cast to the tenderer as the only consequence is that such tenderer is not permitted to participate in a tender process issued by the respondents. Whether a contractor is suitable to carry out the works on behalf of the State, the decision is of the State or its agencies or instrumentalities. A contractor cannot claim any right that even though his security deposit has been forfeited, the State is bound to consider him eligible and in the event, he is the lowest tenderer, to award contract.

24. The past experience of a contractor is a relevant consideration for the State to take into consideration whether the State should enter into contract with such contractor whose performance is not considered satisfactory by the respondents. There is no allegation that such policy decision is actuated by malice. Thus, no right accrues to the petitioners to invoke the writ jurisdiction by this Court so as to declare the petitioners to be not disqualified.

25. In view of the above, we do not find any merit in the present writ petitions. The same are **dismissed**.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
J U D G E

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