

**THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH,**  
**AT JABALPUR**

**(DIVISION BENCH)**

**Writ Petition No.10786/2021**

**Shrishti Infrastructure Development Corporation Limited .....Petitioner**  
**Vs.**

***The State of Madhya Pradesh and others* .....Respondents**

**Coram :**

**Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice**

**Hon'ble Mr. Justice B.K. Shrivastava, Judge**

**Presence :**

Mr. Prashant Singh, Senior Advocate with Mr. Sanket Anand,  
Advocate for the petitioner.

Mr. Purushaindra Kaurav, Advocate General/Senior Advocate  
with Mr. S.S.Sharma, Advocate for the respondent Nos.2, 3 and 4.

Mr. Pushendra Yadav, Additional Advocate General for the  
respondent No.1.

**Law laid down:**

1. Scope of jurisdiction of the High Court in the matter of award of contracts by the Government and its instrumentalities - **Held** - evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, the courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

Interference in tender or contractual matters in exercise of power of judicial review is permissible only if: (i) the process adopted or decision made is *mala fide* or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. The purpose and scope of judicial review is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*, its purpose is to check

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whether the choice or decision is made "lawfully" and not to check whether the choice or decision is "sound".

2. Decision making process of Government or its instrumentality should exclude remotest possibility of discrimination, arbitrariness and favoritism. It should be transparent, fair, *bona fide* and in public interest. Therefore, Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is *bona fide* and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of equity and natural justice do not operate in the field of such commercial transactions.

3. Action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

4. 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. Employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable".

5. Administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. Any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. The test of proportionality is concerned with the way in which the decision maker has ordered his priorities, i.e. the attribution of relative importance to the factors in the case. It is not so much the correctness of the decision that is called into question, but the method to reach the same. If an administrative action is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review.

6. Decision of the respondents treating the bid submitted by the petitioner as technically non-responsive can neither be said to be *mala fide* nor intended to favour someone. It cannot be termed so arbitrary or irrational which no responsible body of person acting under law could on available facts arrived at. It is trite that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. A partially completed work even if its value exceeds the total value of the work for which tenders are being invited, cannot be treated as completed work.

Words used in the tender document as conditions of acceptability of technical bid have to be construed in the way the employer has used them while formulating such terms and conditions, therefore, the interpretation of the employer in that respect has to be accepted unless it is

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so obnoxious that it defies reason and logic and is not a possible interpretation of the language used in formulation of the conditions. Moreover, whether a particular condition is essential or not also is a decision to be taken by the employer. The tender inviting authorities have to be allowed greater play in the joints not only in formulating the terms and conditions of tender but also in interpreting them. No words in the tender documents can be treated as surplusage or superfluous or redundant. The decision of the employer has to be respected by the court unless it is shown to be *ex-facie* arbitrary, outrageous, and highly unreasonable. If non-fulfillment of the mandatory conditions of eligibility conditions of the terms of the NIT results in the bid submitted by a particular bidder being rendered non-responsive, the court cannot substitute the opinion of the employer by its own unless interpretation of such condition by the tender inviting authority suffers from *mala fides* or perversity.

**Reference made to:**

*Tata Cellular vs. Union of India, (1994) 6 SCC 651*  
*Air India Ltd. Vs. Cochin International Airport Ltd. & Ors., (2000) 2 SCC 617*  
*Jagdish Mandal vs. State of Orissa & Others, (2007) 14 SCC 517*  
*Siemens Public Communication Networks Pvt. Ltd. & Anr. vs. Union of India & Ors., (2008) 16 SCC 215*  
 Meerut Development Authority vs. Association of Management Studies & Anr.,(2009) 6 SCC 171  
 G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488  
 Montecarlo Ltd. vs. National Thermal Power Corporation Ltd., (2016) 15 SCC 272  
 AFCONS Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. & Anr.,(2016) 16 SCC 818  
 JSW Infrastructure Ltd. & Anr. Vs. Kakinada Seaports Limited & Ors., (2017) 4 SCC 170  
*Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680*  
*Maharashtra Land Development Corporation & Ors. Vs. State of Maharashtra & Anr., (2011) 15 SCC 616*

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**Significant Paragraphs:-** 7 to 24

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**Whether approved for reporting-** Yes.

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**Hearing convened through Video Conferencing:**

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**JUDGMENT (Oral)**  
**(30.06.2021)**

**Per: Mohammad Rafiq, Chief Justice**

1. This writ petition has been directed against the order Annexure-P/1 dated 7.6.2021 by which the bid of the petitioner submitted in response to notice inviting tender floated by the respondent-M.P. Urban Development Company Ltd. dated 25.2.2021, being technically non-responsive, has been rejected.

2. Mr. Prashant Singh, learned Senior Counsel submitted that the respondents in their tender document enclosed with the NIT Annexure-C laid down the pre-qualification criteria, which in so far as relevant for the present matter, provided that the bidder should have “experience of having sufficiently executed, completed and commissioned” “one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years.” It is contended that the petitioner submitted the experience certificate duly signed by the Project Director, Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur, which clearly stated that the petitioner has completed and commissioned, to the extent of value of Rs.328.6 crores, the work of “Survey, review the designs, redesign where necessary and build new sewerage network of about 102 km length and rehabilitation of existing small sized

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sewer and trunk sewer network of 198 km length including survey, design & construction of 2 no. of sewage pumping stations and 01 no. of lift stations and all appurtenant structures, and operation & maintenance of rehabilitated and new sewerage network and sewage pumping stations for a period of 10 years in Sewerage District -1 of Kanpur, State of Uttar Pradesh, India”.

3. Learned Senior Counsel for the petitioner submitted that the respondents have illegally rejected the bid of the petitioner as technically non-responsive on the premise that the petitioner does not have the experience of completion and commissioning of similar work as required in Annexure-C to the NIT. Learned Senior Counsel has referred to the communication issued by the Deputy Project Director (Technical) M.P. Urban Development Co. Ltd. rejecting their subsequent representation mentioning that the case of the petitioner has been reviewed in the light of their submission against the bid and the claim in their letter dated 8.6.2021. It was observed that the certificate dated 3.3.2021 of similar work claimed by the petitioner for eligibility does not mention “completion of work in totality”, hence the decision has been uploaded on the website of respondents stands confirmed without any change in the status of responsiveness of the bidders. Mr. Prashant Singh, learned Senior Counsel further argued that the conditions of the tender

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document have to be given purposive interpretation. The respondents required the similar work to have been successfully executed, completed and commissioned costing not less than the amount equal to 50% of the probable amount of contract value of the work in question for past 5 years. The petitioner not only executed, but also commissioned the work of the value of 328.06 crores, which is much more than the value of the work of which tender as has been floated by the respondents i.e. Rs.226.94 crores. It is contended that the respondent-M.P. Urban Development Company has illegally awarded the work to respondent No.4, who had quoted the bid of Rs.208 crores as against the bid amount of Rs.202 crores offered by the petitioner.

4. Mr. Purushaindra Kaurav, learned Advocate General appearing for the respondents submitted that for the purpose of examining the eligibility of the bidders in the process evaluation of the technical bid, the conditions of the tender cannot be split and one part cannot be read in isolation from another. Learned Advocate General referred to Annexure-C, the pre-qualification criteria, appended to the NIT and argued that it only intended to ensure that the bidder should have successfully executed, completed and commissioned similar work of aggregate costing not less than the amount equal to 50% of the probable amount of work in

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question. On own showing the petitioner, the certificate produced by it proves that it has not completed the work as on 3.3.2021 when the certificate was issued by the Project Director of Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur. In fact, it was also mentioned in that very certificate that it was proposed to extend the time for completion of work awarded to the petitioner by 31.3.2021. If the petitioner would have really completed the work by 31.3.2021, it had ample time to produce the certificate of completion of the work to satisfy the requirement of pre-qualification criteria, as the last date of the submission of the tender, which was originally fixed as 25<sup>th</sup> March, 2021, was extended to 17<sup>th</sup> May, 2021. The implication would be that the petitioner could not complete the work even up to 17<sup>th</sup> May, 2021.

5. Mr. Purushaindra Kaurav, learned Advocate General submitted that what amount has been quoted by the petitioner in the financial bid would be immaterial for the purpose of deciding the present matter because financial bid of the petitioner was never opened as its technical bid was found non-responsive. Secondly it is submitted that the English version of the certificate now submitted by the petitioner with IA No.6159/21 has been subsequently procured on 21.6.2021 and was never produced before the respondents. It is not in the shape of certificate, but is a mere

communication addressed to petitioner by the Project Manager of Ganga Pollution Control Unit, U.P. Jal Nigam Kanpur and therefore that document can not be looked into.

6. We have given our anxious consideration to the rival contentions and perused the record.

7. Before advertng to merits of the case, we deem it appropriate to remind ourselves of the position of law with regard to scope of jurisdiction of this Court in the matter of award of contracts by the Government and its instrumentalities. The Supreme Court in the celebrated judgment in **Tata Cellular Vs. Union of India, (1994) 6 SCC 651**, delineated the scope of interference by the Constitutional Courts in the matter of Government Contracts/Tenders by observing that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. There are however inherent limitations in exercise of that power of judicial review. Government is always the guardian of the finances of the State and it is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government, but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or rejecting a tender. There can be no question of infringement of Article 14 if the Government tries to get



the best person or the best quotation and the right to choose cannot be considered to be an arbitrary power. The judicial power of review is exercised to rein in any unbridled executive process. The Supreme Court held that it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The power of judicial review is not an appeal from the decision and therefore, the Court cannot substitute its decision since the Court does not have the necessary expertise to review. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. However, where the selection or rejection is arbitrary, certainly the Court would interfere. But it is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

**8. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors., (2000) 2 SCC 617**, while relying on its several earlier decisions on the law relating to award of contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government, the Supreme Court observed as under:

"7. .... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a

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

9. The Supreme Court in Jagdish Mandal Vs. State of Orissa & Others, (2007) 14 SCC 517, has also dealt with the scope of interference in contractual matters by the Constitutional Courts and held that while invoking power of judicial review in matters relating to tenders /contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision

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relating to award of contract is bona fide and is in public interest, the courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Tenderer or contractor with a grievance can always seek damages in a civil court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if:

(i) the process adopted or decision made is *mala fide* or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. The purpose and scope of judicial review is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*, its purpose is to check whether the choice or decision is made "lawfully" and not to check whether the choice or decision is "sound".

**10.** The Supreme Court, in the case of **Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors., (2008) 16 SCC 215** while dealing with the scope of judicial review of the constitutional courts, held that in matters of highly

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technical nature, a high degree of care, precision and strict adherence to requirements of bid is necessary. Decision making process of Government or its instrumentality should exclude remotest possibility of discrimination, arbitrariness and favoritism. It should be transparent, fair, *bona fide* and in public interest. However, the Supreme Court clearly held therein that it is not possible to rewrite entries in bid document and read into the bid document, terms that did not exist therein, nor is it permissible to improve upon the bid originally made by a bidder. Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is *bona fide* and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of equity and natural justice do not operate in the field of such commercial transactions.

**11.** The Supreme Court in the case of **Meerut Development Authority Vs. Association of Management Studies & Anr., (2009) 6 SCC 171**, held that the tender is an offer, which invites and is communicated to notify acceptance. It must be an unconditional, must be in the proper form, and the person by whom tender is made must be able to and willing to perform his obligations. The terms of

the invitation to tender cannot be open to a judicial scrutiny because the invitation to tender is in the realm of contract. Only a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tender in a transparent manner and free from hidden agenda. The authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons. The action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

**12.** Adverting now to the events of the case in hand, in order to effectively appreciate the matter, we deem it appropriate to reproduce the pre-requisite qualification criteria contained in Annexure-C appended to the NIT which reads as under :-

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**“The bidder should have :**

**Financial**

I. Experience of having successfully executed, completed and commissioned,

a) three similar works each costing not less than the amount equal to 20% of the probable amount of contract during the last 5 financial years : **or**

b) two similar works each costing not less than the amount equal to 30% of the probable amount of contract during the last 5 financial years : **or**

c) one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years:”

**13.** According to aforesaid criteria, it is required that the bidder interested in submitting the bid in response to the NIT, should have the experience of having **successfully executed, completed and commissioned**, one similar work of aggregate cost not less than the amount equal to 50% of the probable amount of during the last 5 financial years. This condition does not show that the value of the partially completed or executed work would determine the eligibility in the process of evaluation of the technical bid. What the respondents required was duly executed work which has been completed and commissioned.

**14.** The experience certificate produced by the petitioner in the required proforma submitted alongwith NIT reads as under :-

**“Work Experience**

Agreement Number & Year	Name of Work	Date of Work Order	Date of Completion	Amount of Contract	Employer’s/ Engineer in Charge Name and Address

Agreement Number: 1399/AC-11/61  Year 2017	Survey,review the designs, redesign where necessary and build new sewerage network of about 102 km length and rehabilitation of existing small sized sewer and trunk sewer network of 300 km length including Survey, design, & construction of 4 no. of sewage pumping stations and 2 no. of lift stations and all appurtenant structures, and operation & maintenance of rehabilitated and new sewerage network and sewage pumping stations for a period of 10 years in sewerage district-1 of Kanpur, state of Uttar Pradesh, India.	17/08/2017	Under progress and More than 80% completed	Work of Amount 328.06 cr. Completed successfully out of 358.33 cr.	Officer of the General Manager, Ganga Pollution Control Unit, U.P.Jal Nigam, Benajhaber Road, Kanpur – 208 002 Telephone: +91-0512-2545573
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15. What appears from the aforementioned certificate on the proforma required by the respondents is that the petitioner itself categorically stated in the column pertaining to date of completion of the work that the work that he was executing is “Under progress and More than 80% Completed”. In the column pertaining to the amount of contract, however the petitioner mentioned that the work to the extent of an amount of Rs.328.06 crore out of Rs.358.33 crore has been successfully completed. The respondents in the first letter of rejection uploaded on their website indicated the following reasons for rejection of the technical bid of the petitioner:-

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“Does not have the experience of completion and commissioning of similar work as described in Annexure C (read with amendment)”

16. Subsequently, when the petitioner again persisted in his demand to treat him eligible, the respondents have again considered his representation and rejected the same by communication dated 10<sup>th</sup> June, 2021, which reads as under :-

“The case has been reviewed in the light of your submission against the bid and the claim in your aforesaid letter dt 8.06.2021. It is observed that the certificate dt 03.03.2021 of similar works, claimed by you for eligibility issued by Project Manager of Ganga Pollution Control Unit, UP Jal Nigam, Kanpur does not mention “completion of works in totality” and hence, the decision uploaded on the website [www.mptenders.gov.in](http://www.mptenders.gov.in) stands confirmed without any change in the status of responsiveness of the bidders.

(Approved by Engineer-in-Chief, MPUDC)”

17. The Supreme Court in the case of **G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488**, relying on its earlier decision in *Ramana Dayaram Shetty (supra)* categorically held 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".



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**18. In Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd., (2016) 15 SCC 272**, the appellant participated in the tender process pursuant to the NIT issued by respondent and as the appellant did not meet with technical qualifications prescribed, his bid was treated non-responsive. The appellant approached the High Court challenging action of respondent, but the High Court declined to interfere. The Supreme Court held that judicial review of decision making process is permissible only if it suffers from arbitrariness or *mala fides* or procedure adopted is to favour one. But if decision is taken according to language of tender document or decision sub-serves purpose of tender, then courts must exercise principle of restraint. Technical evaluation or comparison by courts would be impermissible. Principles of interpretation of tender documents involving technical works and projects requiring special skills are different from interpretation of contractual instruments relating to other branches of law. It was held that the tender inviting authorities should be allowed to carry out the purpose and there has to be free hand in exercising discretion. Tender inviting authorities have discretion to enter into contract under some special circumstances and there has to be judicial restraint in administrative action. The courts do not have expertise to correct administrative decisions and if courts are permitted to review such decisions then

courts are substituting their own view without there being necessary expertise, which may be fallible. If decision is *bona fide* and is in public interest, courts would not interfere even if there is procedural aberration or error in assessment or prejudice to tenderer.

19. The Supreme Court in **AFCONS Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr., (2016) 16 SCC 818**, relying on its various earlier decisions reiterated the well settled principle of law that decision in accepting or rejecting bid should not be interfered with, unless the decision making process suffers from *mala fides* or is intended to favour someone. Interference is also permissible if the decision is arbitrary or irrational, or is such that no responsible authority acting reasonably and in accordance with law could have reached such a decision. Further, perversity of a decision making process or decision and not merely faulty or erroneous or incorrect, is one of grounds for interference by courts. Constitutional courts are expected to exercise restraint in interfering with administrative decision and ought not to substitute their view for that of administrative authority. Constitutional courts must defer to this understanding and appreciation of tender documents unless there are *mala fides* or perversity in understanding or appreciation or in application of terms of tender conditions. Different interpretation given by

authority which is not acceptable to court is no ground for constitutional courts to interfere with interpretation of authority unless it is proved to be perverse or *mala fide* or intended to favour a particular bidder. Relying on the decision of **Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489**, in paragraphs 14 and 15 of the report in **AFCONS Infrastructure Ltd.** (supra), the Supreme Court clearly observed as under:

"14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India* [*Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489*] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

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".

20. The Supreme Court in **JSW Infrastructure Ltd. & Anr. Vs. Kakinada Seaports Limited & Ors., (2017) 4 SCC 170**, has held that the words used in the NIT cannot be treated to be surplus-age or superfluous or redundant. They must be given some meaning and

weightage and courts should be inclined to suppose that every word is intended to have some effect or be of some use. Rejecting words as insensible should be last resort of judicial interpretation and as far as possible, courts should avoid construction which would render words used by author of document meaningless and futile or reduce or silence any part of document and make it altogether inapplicable. If interpretation of tender documents adopted by tender inviting authority suffers from *mala fide* or perversity then only courts can interpret documents. Interpretation given by tender inviting authority not acceptable to courts is no reason for interfering with interpretation adopted by the authority.

**21.** The famous “Wednesbury Case” *Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn.*, (1948) 1 KB 223: (1947) 2 All ER 680, is considered to be landmark in so far as the basic principles relating to judicial review of administrative or statutory direction are concerned. In the said judgment, it has been observed by Lord Greene M.R. that “It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on

a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere”.

**22.** In *Maharashtra Land Development Corporation & Ors. Vs. State of Maharashtra & Anr.*, (2011) 15 SCC 616, the Supreme Court observed that the Wednesbury principle of reasonableness has given way to the doctrine of proportionality. As per the Wednesbury principles, administrative action can be subject to judicial review on the grounds of illegality, irrationality or procedural impropriety. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. It was held by the Court that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. Any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. The test of proportionality is concerned with the way in which the decision maker has ordered his priorities, i.e. the attribution of relative importance to the factors in the case. It is not so much the correctness of the decision that is called into question, but the method to reach the same. If an

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administrative action is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review. It was further held that, the principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is advantageous and in public interest, such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred.

**23.** It is trite that an employer, who has issued the tender, is the best judge to interpret the conditions of eligibility contained therein. Unless the interpretation taken by the employer is found to be so arbitrary, perverse and erroneous that no reasonable person of ordinary prudence would take that interpretation, the Constitutional Courts in the realm of its power of judicial review would not be justified to interfere therewith. It is also trite that the governmental agencies entrusted with the task of undertaking the developmental projects have to be given freedom to not only lay the criteria of eligibility but also give them reasonable interpretation so as to determine whether or not the bidder participating in response to the

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NIT is technically sound to undertake the work. Merely because the value of the work which the petitioner completed has exceeded the total cost of the work for which the respondents have invited the NIT, does not by itself make the petitioner eligible, if the petitioner otherwise does not fulfill the criteria of “(a) three similar works each costing not less than the amount equal to 20%, (b) two similar works each costing not less than the amount equal to 30% (c) and one similar work of aggregate cost not less than the amount equal to 50% of the probable amount” of the value of the works put in NIT by the respondents in the tender. A partially completed work even if its value exceeds the total value of the work for which tenders are being invited, cannot be treated as completed work.

24. Moreover, in the fact situation obtaining in the present case, decision of the respondents treating the bid submitted by the petitioner as technically non-responsive can neither be said to be *mala fide* nor intended to favour someone. It cannot be termed so arbitrary or irrational which no responsible body of person acting under law could on available facts arrive at. It is trite that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. If as per conditions of the NIT, the bidder was required to have experience of having successfully (i) executed; (ii) completed; and (iii) commissioned, in this case, one

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similar work of aggregate cost not less than the amount equal to 50% of the value of the work in question during last five financial years, the bidder has to necessarily possess experience showing that he has not only executed and completed but also commissioned one complete work of that much value. It is settled proposition of law that the words used in the tender document as conditions of acceptability of technical bid have to be construed in the way the employer has used them while formulating such terms and conditions, therefore, the interpretation of the employer in that respect has to be accepted unless it is so obnoxious that it defies reason and logic and is not a possible interpretation on the language used in formulation of the conditions. Moreover, whether a particular condition is essential or not also is a decision to be taken by the employer. The tender inviting authorities have to be allowed greater play in the joints not only in formulating the terms and conditions of tender but also in interpreting them. No words in the tender documents can be treated as surplusage or superfluous or redundant. The decision of the employer has to be respected by the court unless it is shown to be *ex-facie* arbitrary, outrageous, and highly unreasonable. If non-fulfillment of the mandatory conditions of eligibility conditions of the terms of the NIT results in the bid submitted by a particular bidder being rendered non-responsive, the



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court cannot substitute the opinion of the employer by its own unless interpretation of such condition by the tender inviting authority suffers from *mala fides* or perversity.

**25.** In the present case, interpretation of the relevant condition taken by the respondents is a possible interpretation. Moreover, neither there is any allegation of *mala fide* on the part of any authority of the respondents nor is there any allegation of undue favour shown to the successful bidder. The matter does not call for any interference.

**26.** In view of the above, we do not find any merit in the writ petition. Accordingly, this writ petition is dismissed.

**(MOHAMMAD RAFIQ)  
CHIEF JUSTICE**

**(B.K. SHRIVASTAVA)  
JUDGE**