
(2016) 3 BC 283 : (2016) 2 WLC 342

RAJASTHAN HIGH COURT

Case No: Civil Writ Petition Nos. 9188 and 9186/2015

Gvpr-Dara JV
8-2-273/82/A

APPELLANT

Vs

State of Rajasthan and
Others

RESPONDENT

Date of Decision: Feb. 2, 2016

Acts Referred:

Constitution of India, 1950 - Article 14, Article 19(1) (g), Article 19(1)(g), Article 21, Article 226, Article 298, Article 299, Article 311, Article 32#Rajasthan Transparency in Public Procurement Act, 2012 - Section 14, Section 18, Section

Citation: (2016) 3 BC 283 : (2016) 2 WLC 342

Hon'ble Judges: Pratap Krishna Lohra, J.

Bench: Single Bench

Advocate: M.R. Singhvi, Senior Advocate assisted by Sunil Joshi and S.P. Joshi, for the Appellant; P.S. Bhati, Additional Advocate General and S.S. Rathore, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Pratap Krishna Lohra, J.

1. Both these writ petitions are founded on almost identical facts and the questions of law involved therein are

also common, therefore, both are heard together and disposed of by this common order.

2. For convenience, pleadings of rival parties as incorporated in S.B. Civil Writ Petition No. 9188/2015 shall be referred herein.

3. Succinctly stated the facts of the case are that petitioner a Joint Venture Company (for short "JV") having M/s. GVPR Engineers Limited with

its Registered Office at Hyderabad as first party and M/s. DARA Construction, an incorporated company having its Registered Office at Jodhpur

as second party entered into a Memorandum of Understanding for Joint Venture with effect from 03.07.2015 (Annex. 1). The requisite terms and

conditions for joint venture agreement are incorporated in the Memorandum of Understanding. In order to show the relative status of both the

parties of JV, it is averred in the writ petition that both are registered as "AA" Class Contractors with the respondent-Department with first party

being registered as "AA" Class Contractors vide order dated 02.07.2015 and the second party with effect from 03.11.2006 respectively. The

renewal of registration of the second party as "AA" Class Contractor vide order dated 23.04.2015 is also placed on record. Stressing the status

and enlistment as "AA" Class Contractor with the respondent-department of both the partners, a positive assertion is made in the writ petition that

JV is fully eligible to participate in the bidding process issued by the respondent-department. The third respondent vide its communication dated

21.04.2015 addressed to the Director, Directorate of Information and Public Relation (DIPR), Jaipur requested to arrange for

publication/advertisement of NIT-1 & 2/15-16 in one leading regional daily newspaper, two State level leading daily newspaper, two all India level

daily newspaper including financial publication and any trade general specialisation of publication of NITs and further requested to upload the soft

copy of NIT on the official website www.dipronline.org.

4. Pursuant to the aforesaid order, the respondent-department proceeded to get the above referred NIT published in the newspaper as well as by

way of updating it on the website of the department by resorting to Notice Inviting Tender (NIT Procedure) inviting contractors enlisted as "AA"

Class Contractor to participate in the said tender proceedings. The entire procedure pursuant to the NIT was made on-line on the said website

and in response to the same, besides the petitioner JV, M/s. L&T Limited, Chennai, M/s. Megha Engineering & Infrastructure Limited,

Hyderabad, M/s. NBCC Ltd. and M/s. VPRPLWABAG-JV submitted the duly filled up form on-line. Thus, in all, five entities participated in the said bidding process. In order to show its participation in the bidding process pursuant to the aforesaid NIT, the petitioner-JV has placed on record its tender document as Annex. 5.

5. For showing eligibility of the Joint Venture to participate in the tender process, detailed submissions are made in the writ petition pertaining to

fulfilling the experience criteria with a positive assertion that as both are enlisted as Class "AA" Contractor, therefore, in terms of Note-10 of the

NIT, they are required to deposit 0.5% of the estimated costs of NIT as earnest money. The requisite certificates about the experience which were

enclosed with the tender document are also placed on record by the petitioner. After issuance of advertisement dated 21.04.2015 a corrigendum

was issued by the respondent-Department extending the last date for on-line submission of tender from 15.06.2015 to 06.07.2015. After receipt

of the tender form of the petitioner-JV, the third respondent addressed a communication to it on 05.08.2015 (Annex. 8) seeking certain

clarifications. While responding to that letter, the petitioner submitted its clarification on 07.08.2015 by Annexure-9. The third respondent vide

Annexure-8 solicited clarifications from the petitioner on six points upon examination of its technical bid. Most of the clarifications sought for were

pertaining to first party of the Joint Venture. While submitting its clarification, the petitioner enclosed the bank certificates issued by Andhra Bank

and IndusInd Bank. In order to show financial stability, affidavit of authorised signatory of the first party is also enclosed besides communication

received from the Executive Engineer, KNNL, SLIS, Division No. 2, Huvinahadagali Bellary District, Karnataka alongwith work experience

certificate and work experience certificate issued to second party to JV by the Executive Engineer, PHED Dn. Banswara The petitioner has

submitted with emphasis that vide Annexure-9, it has furnished the desired clarification and documents to prove its eligibility to participate in the

tender process and that being so, it harboured a legitimate expectation that its technical bid would be evaluated for declaring responsive to

participate for price offer i.e. opening of envelope B on 25.08.2015. However, the petitioner was conveyed letter dated 25.08.2015 issued by the

third respondent whereby technical bids of only two bidders were considered responsive for opening of their envelope B - price offer namely M/s.

L&T Limited, Chennai and M/s. Megha Engineering & Infrastructure Limited, Hyderabad (Intervenors). In case of petitioner and two other

participating bidders, their technical bids were rejected by quoting the reason that they are not meeting eligibility requirement and, therefore, their

envelope B - price officer shall not be opened. It is the order - Annexure-10 which has furnished a cause of grievance to the petitioner led to this

litigation.

6. While impugning the action of the respondents in issuance of Annexure-10 as arbitrary, unreasonable and mala fide, the petitioner has also made

an affirmative attempt to castigate the action of the respondent being dehors the provisions of the Rajasthan Transparency Public Procurement Act,

2012 (for short "the Act of 2012") as well as the Rajasthan Transparency in Public Procurement Rules, 2013 (for short "the Rules of 2013"). The

petitioner has also assailed the impugned action of the respondents by asserting that they have proceeded against it in a wholly perfunctory manner

without assigning any reason or without pointing out any such criteria/requirement which the JV is lacking to fulfill the eligibility criteria. A yet

another attempt is made to buttress a ground on the anvil of Note-10 appended below Clause 6(C) of the tender documents as well as provisions

of the Act of 2012, Rules of 2013 and Rajasthan Transparency in Public Procurement (Amendment) Rules, 2015 (for short "the amended Rules of

2015") for assailing the impugned order. The petitioner has also questioned the impugned order by urging that outright rejection of its bid is a

glaring example of legal malice or malice-in-law. A specific plea is raised that rejection of its bid for unauthorised purpose is founded on certain

facts and circumstances which were wholly extraneous and irrelevant.

7. Joining issue with the respondents on inadequacy of Earnest Money Deposit (EMD) by the petitioner, it is submitted that respondents while

examining this issue have completely overlooked Rule 79F of the amended Rules of 2015 and as such insertion of Note No. 10 under the General

Note appended below Clause 6(C) and under-bidders/guidelines of Clause 14.1 is in clear negation of the amended rules which ought not to have

been pressed into service vis-à-vis the petitioner. In substance, the petitioner has made an attempt to wriggle out from the infirmity of inadequacy

of earnest money deposited by it and as such by romping Rule 79F of the amended Rules of 2015 submitted that rejection of its bid on the anvil of

inadequacy of earnest money is improper. For invoking Rule 79F of the amended Rules of 2015, the petitioner has taken shelter of corrigendum

whereby last date for submission of the tender was extended with a positive assertion that in the interregnum, Rule 79F of the amended Rules of

2015 came into force. Lastly, the petitioner has also made an attempt to categorise the impugned order as vague, cryptic and non-speaking. The

petitioner has also asserted that any administrative order is required to be scrutinized and its validity is to be adjudged on the basis of reasons

assigned therein and the reasons cannot be supplemented in the form of affidavit or otherwise. In totality, with all these grounds, the petitioner has

sought a relief of quashing the impugned order and a further direction to the respondents to include the petitioner-JV in the price bid offer

scheduled to be opened on 25.08.2015. Although in the original petition, a relief is also sought for declaring condition incorporated under Note 10

appended below clause 6(C) and also condition incorporated under Clause 14.1 of the Instructions to the Bidder, ITB as violative of Rule 79F of

the amended Rules of 2015, to be struck down but during the course of argument, the said prayer is abandoned by the petitioner-JV.

8. On behalf of the respondents, reply to the writ petition is submitted. As preliminary objection, it is specifically pleaded that against the impugned

order, statutory alternative remedy of appeal is available under Rule 83 of the Rules of 2013 and thereafter remedy of second appeal is also

available. In that background, buttressing preliminary objection with emphasis, the respondents have submitted that writ petition is not maintainable

without availing the alternative remedy. While advertent to the merits of the case, the respondents in their return acknowledged the status of first

partner of JV as "AA" Class Contractor for civil works on temporary basis and for the second partner, its status as "AA" Class Contractor for

civil work is admitted without any demur. Although the respondents have conceded on this issue but are prompt, straight forward and forthcoming

in their reply to assert that JV is not enlisted as "AA" Class Contractor of civil works with Chief Engineer (Headquarter), PHED, Jaipur. Relying

on Rule 39 of the Rules of 2013, the respondents have submitted in their return that it nowhere provides that in case of Joint Venture, either or

both partners even if enlisted as "AA" Class Contractor, the Joint Venture can be treated as "AA" Class Contractor. With this positive assertion,

the respondents have completely repudiated the contention of the petitioner JV to treat it as "AA" Class Contractor. In the reply, the respondents

have pleaded with emphasis that bid of the petitioner-JV is not fulfilling all the eligibility criteria as provided under Clause 6 of the NIT. By relying

on Clause 6(B) of NIT, the respondents have submitted in their reply that neither the petitioner-JV is having experience of three similar completed

works costing not less than Rs. 158 crores nor 2 similar completed works costing not less than Rs. 197 crores. That apart, as per the version of

the respondents, there is no proof of one similar completed work costing not less than Rs. 316 crores.

9. Advertent to the similar nature of work, the respondents have pleaded that the work carried out by the lead partner of JV for Karnataka

NEERAVARI Nigama Ltd. ("KNNL") was not part of one NIT inasmuch as two separate work orders were issued and separate agreements

were executed. It is also submitted that even tender notification was issued for above two works with distinct and separate value, earnest money

deposit, completion period, requirements about category of contractor etc. It is in that background, the respondents have denied that these two

works were part of one NIT and can be considered as work experience of JV worth Rs. 316 crores to make it eligible in terms of NIT. Likewise,

the experience of other partner of JV is also seriously disputed. As per the version of the respondents, second partner of JV undertook

construction work of RCC Overheads Service Reservoir of 2380 Killo Liter capacity under Urban Water Supply Scheme of Banswara during the

period 09.04.2007 to March 2008 and, therefore, the said experience is prior to seven years and as such in terms of NIT not worth consideration.

10. While defending their action to declare the technical bid of the petitioner-JV non-responsive, the respondents have submitted in their reply that

JV has deposited half per cent of EMD which is not envisaged under Rule 42(2) of the Rules of 2013. Quoting Rule 42 of the Rules of 2013,

respondents have submitted that as the petitioner-JV is not enlisted as "AA" Class Contractor, it was necessary for it to deposit EMD at two per

cent of the estimated cost of work. Therefore, the respondents have asserted with emphasis in their return that concessional EMD at the rate of

half per cent is admissible only to enlisted bidder which implies that bidder must be registered in appropriate class in enlistment zone to avail the

benefit of concessional EMD. In substance, the respondents have reiterated that petitioner-JV by itself is not enlisted under "AA" Class and as

such it was not eligible for any concession in the EMD. In totality, inadequacy of EMD deposit by the petitioner-JV is also cited as a reason for

declaring its technical bid non-responsive. While joining issue with the petitioner-JV on its positive assertion that respondents have evaluated the

bid at the initial stage and also sought clarification, it is submitted by the respondents that mere seeking clarification from the petitioner-JV does not

mean that it has been adjudged pre-qualified bidder inasmuch as the evaluation itself was for the limited purpose of shortlisting the bidders whose

bids are as per format and requirements. Clarifying that pre-qualified bidder means the bidder who otherwise fulfills all the requirements and

guidelines as per NIT and other provisions of law for opening its price bid. While romping in Rule 39 of the Rules of 2013, the respondents have

submitted that petitioner-JV was allowed to participate in the bid process as per NIT. To meet the challenge of the petitioner-JV on the anvil of

Rule 79F of the Rules of 2013 as amended on 05.06.2015, the respondents have specifically pleaded in their return that said rule defines swiss

challenge method of procurement for the project costing less than Rs. 50 crores and not for the process of open competitive bidding. Emphasising

that in the instant case, respondents have resorted to open competitive bidding and not for swiss challenge method of procurement and, therefore,

Rule 79F of the Rules of 2013 as amended on 05.06.2015 is totally inapplicable. The challenge laid by the petitioner-JV on the anvil of some of

the grounds are also aptly dealt with by the respondents in their return by refuting all the grounds with full emphasis.

11. After submission of reply by the respondents, the petitioner submitted rejoinder and reiterated all the averments contained in the writ petition.

In the rejoinder, the petitioner has made a positive assertion that it is possessing all the requisite eligibility criteria and the respondents cannot be

permitted to eschew the letter dated 05.08.2015 whereby only six informations are solicited from the petitioner. As per the petitioner, the

respondents cannot be allowed to assert any other deficiency in the tender documents of the petitioner beyond the recitals contained in the letter

dated 05.08.2015. It is also clarified by the petitioner that all the six informations which were solicited from the petitioner by the respondents were

furnished with supporting documents and, therefore, respondents ought to have declared the petitioner as responsive bidder. The question of

insufficiency of EMD sought to be raised by the respondents in their reply is also contested by the petitioner in the rejoinder by submitting that no

such deficiency was pointed out by the respondents in the letter dated 05.08.2015. Further hammering on the impugned order by castigating it as a

vague and ambiguous order, the petitioner has submitted in the rejoinder that order is not sustainable being bereft of any reasons. It is also pleaded

by the petitioner in the rejoinder that on the face of it, the impugned order (Annex. 10) is having an adverse effect on the petitioner and, therefore,

its validity is required to be examined with reference to the language employed therein and the respondents cannot be permitted to supplement the

reasons. The petitioner has also taken shelter of malice-in-law and malice-in-fact to strengthen its plea against the validity of the impugned order. It

is also averred in the rejoinder that when the respondents have accepted the tender bid documents of the petitioner and also evaluated the same

which is evident from the communication dated 05.08.2015 whereby certain informations were solicited from the petitioner, it pre-supposes that

respondents have conceded on the issue of eligibility requirement of the petitioner-JV. With this plea, the petitioner has also craved that

respondents are under an obligation to open envelope-B price offer bid submitted by it.

12. While joining issue with the respondents on availability of alternative remedy under Section 38 of the Act of 2012, the petitioner has submitted

in the rejoinder that remedy of appeal against the impugned order is not available to it. Dilating on the provisions of appeal under Section 38 of the

Act of 2012, the petitioner has pleaded that appeal under the aforesaid Section is subject to Section 40 of the Act of 2012 and, therefore,

cumulative reading of Sections 38 and 40 of the Act of 2012 makes it abundantly clear that order impugned is not appealable and the petitioner

cannot be nonsuited on this preliminary objection. While referring to second proviso to Section 38(1) of the Act of 2012, the petitioner has

submitted that an appeal related to the matter of financial bid can be filed only by a bidder whose technical bid is found to be acceptable.

Therefore, as per the version of the petitioner when its technical bid is not found to be responsive, the statutory remedy of appeal is not available to

it. The objection of the respondents about inadequacy of EMD tendered by the petitioner -JV is also dealt with by the petitioner in the rejoinder.

The petitioner has asserted that as both the partners of the petitioner-JV are enlisted "AA" Class Contractor and, therefore, objection of the

respondents about inadequacy of EMD cannot be sustained. According to the petitioner, there is no provision for registration of JV as enlisted

contractor of a particular category and it is also not envisaged under the tender document or provided under the Act of 2012 and the Rules of

2013. Harping on Rule 39 of the Rules of 2013, the petitioner has submitted that a statute cannot be construed in a negative manner and,

therefore, a Joint Venture is not at all required to be registered as an independent entity as "AA" Contractor. Once again the petitioner while

reiterating all the grounds urged in the writ petition has boosted its stature by asserting that it is fulfilling all the eligibility criteria as provided under

Point No. 6 as well as Point No. 6-B of NIT. On the similar work undertaken by the lead partner of Joint Venture, it is submitted that the work

undertaken was carried out under one NIT issued by Karnataka NEERAVARI Nigama Ltd. ("KNNL") and that fact is very much substantiated

by the petitioner-JV while responding to the letter dated 05.08.2015. Similarly, regarding the other partner of JV i.e. M/s. DARA also, in the

rejoinder it is specifically pleaded that it is fulfilling the requisite criteria envisaged under Point No. 6-B of the tender document. In substance, the

petitioner has pleaded in the rejoinder that it has duly tendered EMD of 0.50% as per Note (10) appended below Clause 6(C) of the bid

document and, therefore, on this count, the respondents cannot be allowed to declare technical bid of the petitioner non-responsive. The petitioner

has also made an attempt to question the objection of the respondents regarding EMD and submitted that the objection has not been substantiated

with cogent material. In totality, the petitioner's case is that the very foundation of this objection is some of the comments received from the

Finance Department and, therefore, these comments of the Finance Department are to yield before Note (10) appended below Clause 6(C) of the

bid document and Point No. 14.2 of the Guidelines and also as per the provisions of the Act of 2012 and Rules of 2013. The petitioner has also

taken shelter of estoppel to substantiate its case.

13. As the proceedings in the petition were going on, two companies namely M/s. L&T Limited, Chennai and M/s. Megha Engineering &

Infrastructure Limited, Hyderabad whose technical bids were considered responsive for opening of their envelope-B - price offer by the order

dated 21.08.2015 (Annex. 10) made endeavour for being impleaded as party respondents to the writ petition. On behalf of both the companies,

separate applications were filed for their impleadment precisely by asserting that their presence is necessary for complete and effectual adjudication

of the lis involved in the matter. The applications aforesaid of both these companies were contested by the petitioner by asserting that both of them

are neither necessary nor proper parties. The petitioner has also questioned their locus to join as party respondents on the ground that in the entire

writ petition, no relief is claimed against them. After hearing the rival parties, by the order dated 26.10.2015, the prayer of both these applicants

for being impleaded as party respondents was declined but they were allowed to intervene in the matter so as to participate in the proceedings

without filing pleading. It is in that background, the counsels representing both these intervenors have also addressed the Court on the issue

involved in the matter.

14. Learned Senior Advocate Mr. M.R. Singhvi assisted by Mr. Sunil Joshi submits that impugned order is passed by the respondents without

assigning cogent and convincing reasons, therefore, the same is unsustainable. Learned senior counsel would contend that respondents having

solicited requisite information/clarification from the petitioner pursuant to its bid vide Annexure-8, they have not made any endeavour to examine

the informations and relevant documents submitted by it while passing the impugned order in an absolutely casual and perfunctory manner.

Elaborating his arguments on the issue, learned senior counsel submits that so-called deficiency in the bid documents was clarified by the petitioner

with a documentary proof and thereafter without recording any indignation, respondents have acted to the detriment of the petitioner in want of any

valid reason, is good enough to render the impugned order vulnerable. Referring to Annexure-8 communication seeking information/clarification

from the petitioner and the clarification submitted by the petitioner - Annexure-9, learned senior counsel has urged that impugned order has per se

violated the principles of natural justice. Learned senior counsel has vehemently argued that impugned order has visited the petitioner with evil and

civil consequences but this vital aspect is completely eschewed by the respondents inasmuch as neither any notice inspiring action was given nor

cogent and convincing reasons are incorporated in the order. Learned senior counsel for the petitioner submits that impugned order has been

passed by the respondents in clear negation of Rule 41(d) of the Rules of 2013 and, therefore, impugned order which has been passed de hors the

procedure prescribed by law cannot be sustained. Canvassing his arguments on the issue, learned senior counsel would contend that it is trite that if

law prescribes a procedure for doing an act, it ought to be done in the manner prescribed by law and any other procedure is forbidden. Learned

counsel has urged that a welfare State in the guise of discretion cannot be allowed to give or withhold largesse in an arbitrary manner or at its sweet

will. Learned senior counsel has vehemently argued that discretion of the government is not unlimited as it does not stand in the same position as a

private individual. While referring to the provisions of the Act of 2012 and Rules of 2013, learned senior counsel has strenuously urged that

transparency and pragmatic approach in public procurement cannot be allowed to be sacrificed by the government officials to shuttle the provisions

of the Act of 2012 and the Rules made thereunder to narrow down the competition in the bid process by ousting a competitive bidder in an

absolutely arbitrary, unreasonable and discriminatory manner. Making scathing attack on the impugned order, learned senior counsel submits that

the whole endeavour of the respondents is to circumvent the provisions of the Act of 2012 and the Rules made thereunder by way of rejecting a

legitimate bid of a competitor at the costs of public exchequer. Mr. M.R. Singhvi, learned senior counsel has argued that the reason assigned by

the respondents in the reply for rejection of technical bid of the petitioner on the anvil of lack of requisite EMD is wholly unsustainable for the

simple reason that in the impugned order, the said reason has not been spelt out. In the alternative, learned senior counsel submits that even

otherwise, as both the partners of petitioner-JV are enlisted "AA" Contractors and there is no provision for enlisting Joint Venture as "AA" Class

Contractor, the inadequacy of EMD cited by the respondents as a plausible reason for declaring the petitioner-JV's bid non-responsive is per se

an ambitious plea of the respondents which is not sustainable. While referring to Clause 10 of the bid documents, learned senior counsel would

submit that as required under the said clause, the petitioner-JV has tendered the requisite EMD and, therefore, rejection of technical bid of the

petitioner on the anvil of this non-est ground cannot be sustained. Learned senior counsel submits that Rule 39 of the Rules of 2013 envisages

provision for eligibility of bidders and as per Clause (d) of Sub-Rule (1) of Rule 39 of the Rules of 2013, a Joint Venture under an existing

agreement is eligible to participate in the bid process by nominating a representative and it is only after acceptance of the bid of the Joint Venture,

they may form a Joint Venture Company/Firm for signing the agreement, otherwise, all the parties to the Joint Venture shall sign the agreement. By

romping in aforesaid provision of the Rules of 2013, learned senior counsel canvassed his argument that plea of the respondents about registration

of JV as "AA" Class Contractor for claiming concession in EMD is de hors the provision of law and a clear case of afterthought. In substance,

submission of learned senior counsel for the petitioner is that such a novel objection of the respondents cannot be countenanced to defend the

impugned vulnerable action of the respondents.

15. Persisting with the plea raised in the writ petition and the rejoinder that against the impugned order, remedy of appeal under Section 38 of the

Act of 2012 is not available to the petitioner-JV, learned senior counsel contends that a conjoint reading of Sections 38 and 40 of the Act of 2012

makes it amply clear that impugned order is not appealable. While dilating on the scope of judicial review in contract matters, learned counsel has

urged that a governmental action in the matter of awarding of contract and distribution of largesse is governed by the provisions of the Act of 2012

and the Rules made thereunder, therefore, it is rather difficult to comprehend that the same is immune from judicial review on the touchstone of

Article 14 and 19(1)(g) of the Constitution. Learned counsel would contend that scope of judicial review in such matters may be limited but if the

procuring entity is a welfare State which has acted arbitrarily and in complete negation of prescribed procedure, the powers of the Courts are not

loathed to interfere in the matter.

16. In support of his various contentions, learned counsel for the petitioner has placed reliance on following legal precedents:--

1. Ramana Dayaram Shetty vs. International Airport Authority of India & Ors.: , (1979) 3 SCC 489

2. Union of India vs. Mohan Lal Capoor & Ors.: , (1973) 2 SCC 836

3. Shri Kirshnan vs. The Kurukshetra University: , AIR 1976 SC 376

4. Tata Cellular vs. Union of India: , (1994) 6 SCC 651

5. New Horizons Limited & Anr. vs. Union of India & Ors.: , (1995) 1 SCC 478

6. Ganpati RV-Talleres Alegria Track Private Limited vs. Union of India & Anr. : , (2009) 1 SCC 589

7. Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors. : , (2013) 10 SCC 95

8. M/s. Zoom Developers Pvt. Ltd. Vs. State of Kerala: WA No. 1460/2008 decided on 4.12.2008 by Division Bench of Kerala High Court at

Ernakulam - Upheld by Supreme Court by the judgment reported in 2009 AIR SCW 1976

9. Reliance Energy Limited & Anr. Vs. Maharashtra State Road Development Corporation Ltd. & Ors.: , 2007 AIR SCW 6416.

17. In Ramana Dayaram Shetty (supra), Supreme Court in this authoritative pronouncement while examining role of a welfare State as regulator

and dispenser of social services and provider of a large number of benefits including jobs, contracts, licences, quotas, mineral rights etc. laid down

certain guidelines and issued a word of caution not to act arbitrarily. The Court held,-

11. Today the Government, in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits,

including jobs, contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and

licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of

traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security

benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the

State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The

power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of

many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble

subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government

owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private

corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and

range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these

forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said

that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke

it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been

slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has

developed new forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognised as rights while

others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government

discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot

give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article

on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised." The

Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey

hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the

matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

12. We agree with the observations of Mathew, J., in *V. Punnan Thomas v. State of Kerala* that:

The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government

is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down

arbitrary and capricious standards for the choice of persons with whom alone it will deal".

The same point was made by this Court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* where the question was whether black-

listing of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench

pointed out that black-listing of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance,

but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing.

It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like

any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief

Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the

Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude

any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the Government is trading with the

public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions... The activities

of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with

anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of

dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that

where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting

other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its

action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in

the matter of grant of largesse including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and

non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the

Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on

some valid principle which in itself was not irrational, unreasonable or discriminatory.

18. Dilating on the doctrine of equality embodied under Article 14 of the Constitution of India, the Court also laid emphasis that action of a welfare

State must conform to some standard or norms which is rational and non-discriminatory. The Court further held,-

21. This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in

E.P. Rayappa v. State of Tamil Nadu and Maneka Gandhi v. Union of India that Article 14 strikes at arbitrariness in State action and ensures

fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle

which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The

principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is

protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without

making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action

must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this

Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals v. State of West Bengal* (supra) where the learned Chief Justice pointed

out that

the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the

State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity

should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary

individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of black-listing

has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to

enter into advantageous relations with the Government because of the order of blacklisting.... A citizen has a right to claim equal treatment to enter

into a contract which may be proper, necessary and essential to his lawful calling.... It is true that neither the petitioner nor the respondent has any

right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods.

It must, therefore, follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to

enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and

discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of

reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified

on some rational and non-discriminatory ground.

19. In *Mohan Lal Capoor (supra)*, Supreme Court in this verdict while considering supersession of a Member of UP State Police Service in the

matter of promotion though declined to apply Article 311 of the Constitution but emphasized for conveying reasons to the superseded officer for

his proposed supersession as a minimal requirement of just and fair treatment. The Court said that this minimal requirement is necessary to enable

him to make representation against the proposal before its approval by UPSC. While defining "reason", the Court held,-

....Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is

applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the

facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and

reasonable....

20. In *Shri Kirshnan (supra)*, Supreme Court made endeavour to examine the case of a student whose candidature is cancelled by the University

and while taking note of inherent inconsistency and seemingly contradictory stand of the University declined to examine the grounds furnished by

the University which were alien to the impugned order. The Court held,-

10. Moreover, the stand taken by the respondent that as the appellant did not get the requisite permission from his superior officers, therefore he

was not allowed to appear at the examination, does not merit consideration, because the impugned order does not mention this ground at all and it

was not open to the respondent to have refused admission to the appellant to LL.B. Part III or for that matter to refuse permission to appear at the

examination on a ground which was not mentioned in the impugned order.

21. The judgment of Supreme Court in Tata Cellular (supra) deals with scope of judicial review in the matter of government contracts threadbare.

The Supreme Court has laid down certain parameters for exercising judicial review in such matters namely if the decision/action is vitiated by

arbitrariness, unfairness, illegality, irrationality or Wednesbury unreasonableness. The Court held,-

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, 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 extent of the duty to act fairly will vary from case to case. Shortly put,

the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary

of State for the Home Department, ex Brind 28, Lord Diplock refers specifically to one development, namely, the possible recognition of the

principle of proportionality. In all these cases the test to be adopted is that the court should, ""consider whether something has gone wrong of a

nature and degree which requires its intervention".

78. What is this charming principle of *Wednesbury* unreasonableness? Is it a magical formula? In *R. v. Askew*, Lord Mansfield considered the

question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences.

They gained greater value two centuries later:

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is

trusted to the College of Physicians and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their

conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much

less, warped by resentment, or personal dislike.

81. Two other facets of irrationality may be mentioned. (1) It is open to the court to review the decision-maker's evaluation of the facts. The court

will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to

one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in *Emma Hotels Ltd. v. Secretary of State* for

Environment, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was

operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court

analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see

on what basis the Secretary of State had reached his conclusion.

103. Thus, we find the argument that paragraph 2.4.7, namely, the financial projection of the proposed Cellular Mobile Cellular and the 7th

criterion having been left out of consideration cannot be accepted.

121. The criterion of experience was introduced as a ground of disqualification. If the criterion of experience of one lakh lines as a principal

condition to qualify for consideration for Bombay and Delhi was introduced uniformly then Bharati Cellular could be disqualified. Thus, a relaxation

of 80,000 with the GSM line was introduced. It is important to note the person who evolved this criterion did not consider Talkland as Bharati

Cellular's collaborator.

122. As noted above, the learned Solicitor General would submit that as on 31-12-1991 Bharati Cellular had experience of 81,085 lines of SFR

France and 1982 lines EMTEL making a total of 83,067 lines. Added to this, Talkland had an experience of 1,70,000 subscribers. The reference

to the marks awarded for comparative evaluation in this context is irrelevant. Besides, even assuming that in comparative evaluation the holding of

the licence may be given some weight; cannot be made the governing factor in determining the experience of a bidder for the purpose of its

eligibility.

137. In Poddar Steel Corpn. v. Ganesh Engineering Works, this Court observed : (SCC p. 276, para 6)

As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice

in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be

classified into two categories- those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary

with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the

other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

154. In view of the foregoing, we thus reach the conclusion that Bharati Cellular could not claim the experience of Talkland. This conclusion has

come to be arrived at on the basis of the parameters we have set out in relation to the scope of judicial review. We may reiterate that it is not our

intention to substitute our opinion to that of the experts. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable

either. Where the selection or rejection is arbitrary, certainly this Court would interfere

22. In *New Horizons Limited* (supra), Supreme Court examined State action in distribution of State largesse on the anvil of Article 14, 298 and

299 of Constitution of India and also dilated on the concept of Joint Venture Corporation. The Court also defined the term "Joint Venture".

Acknowledging status of a Joint Venture Company as an eligible bidder, the Court found that by seeing through corporate veil, the company

appearing to be in the nature of a partnership between Indian Companies and a foreign company. The experience and resources of a foreign

company can be treated as experience of the Joint Venture Company irrespective of the fact that Joint Venture Company itself is having no

experience. The Court held,-

17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person

who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article

14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the

matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or

augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be

exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the

public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government

cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the

standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is

necessary for an administrative body functioning in an administrative sphere [See : Ramana Dayaram Shetty v. International Airport Authority of

India (SCR p. 1034 : SCC pp. 505-06, para 12); Kasturi Lal Lakshmi Reddy v. State of J & K (SCR p. 1355 : SCC pp. 11-12, para 11): Fasih

Chaudhary v. Director General, Doordarshan (SCR p. 286 : SCC p. 92,); Sterling Computers Ltd. v. M & N Publications Ltd.; Union of India v.

Hindustan Development Corpn. (at p. 513)].

19. "Wednesbury principle of reasonableness" to which reference has been made in principle (5) aforementioned is contained in Associated

Provincial Picture Houses Ltd. v. Wednesbury Corpn. In that case Lord Greene, M.R. has held that a decision of a public authority will be liable

to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such

that no authority properly directing itself on the relevant law and acting reasonably could have reached it. In Tata Cellular this Court, has mentioned

two other facets of irrationality:

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could

not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision

the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes.

22. In the said notice the expressions "tenderer" and "successful tenderer" have been used. While the expression "tenderer" has been used in

paragraphs 5, 7, 11 and 14, the expression "successful tenderer" is used in paragraphs 7, 9 (a), 10 and 12. Since paragraph 10 provides for

execution of the agreement by the successful tenderer, the said expression is intended to mean the tenderer whose tender has been found suitable

for acceptance. The use of the expression ""successful tenderer"" instead of the expression "tenderer" in paragraph 12, therefore, indicates that the

documentary proof, by way of credentials of past experience, has to be submitted after the tender has been considered and is found suitable for

acceptance by the concerned authorities. This would mean that the past experience is a matter which is to be considered after the tender has been

examined and evaluated and the tenderer whose tender is found acceptable is required to submit documentary proof regarding his past experience.

In other words, a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience. This

inference is strengthened by paragraphs 8 and 11 of the notice dated 26-4-1993. In paragraph 8 it is provided that a tender is liable for summary

rejection if it is submitted without the Demand Draft of Rs. 5,00,000. Similarly in paragraph 11 it is provided that tender is liable to be excluded

from consideration if the income tax clearance certificate is not furnished with the tender. There is no similar provision for excluding from

consideration a tender" on the ground of failure to furnish with the tender the required material by way of credentials of past experience. It means

that the matter of past experience has to be considered after the tender has otherwise been found to be suitable for acceptance and a tender is not

liable to be rejected at the threshold without consideration on the ground that the tenderer lacks experience. The decision of the Tender Evaluation

Committee to exclude the tender of NHL from consideration was, therefore, not warranted by the terms and conditions for submission of tender as

contained in the notice for inviting sealed tenders dated 26-4-1993.

23. In Ganpati RV-Talleres Alegria Track Private Limited (supra), Supreme Court while reiterating the law laid down in New Horizons Limited

(supra) directed Evaluation committee to consider the bid of appellant - Joint Venture Company alongwith other selected persons and take a final

decision. The Court made endeavour to scrutinize public auction on the anvil of Articles 298, 299 and 14 of the Constitution. The Court finally

held,-

6. Another representation was made on 31-1-2008. The appellant received a letter dated 7-2-2008 intimating that in terms of para 2.8 the

appellant's commercial bid will be opened on 22-2-2008. The respondents vide its letter dated 13-2-2008 informed the three of the other bidders

whose technical bids were dis-approved and they were requested to collect their unopened commercial bids and bid guarantee bonds amounting

to rupees one crore. In continuation of the aforesaid letter another letter dated 20-2-2008 was received by the appellant informing that the opening

of commercial bid stands postponed to 3-3-2008 due to administrative reasons. Again a similar letter dated 28-2-2008 was received by the

appellant intimating that the commercial bid which was scheduled for opening on 3-3-2008 is postponed till further notice. The respondents vide

letter dated 7-3-2008 stated that appellant's offer does not meet the eligibility criteria and hence the commercial bid could not be opened.

Therefore, office letter of even No. dated 7-2-2008 issued by the respondents earlier stands cancelled. No reason for rejection was specified.

13. The concept of joint venture has been highlighted in paras 21, 22, 23, 24, 25 and 41 of New Horizon's case as follows: (SCC pp. 491-94 &

499)

.....

.....

22. In the said notice the expressions "tenderer" and ""successful tenderer"" have been used. While the expression "tenderer" has been used in paras

5, 7, 11 and 14, the expression ""successful tenderer"" is used in paragraphs 7, 9 (a), 10 and 12. Since para 10 provides for execution of the

agreement by the successful tenderer, the said expression is intended to mean the tenderer whose tender has been found suitable for acceptance.

The use of the expression ""successful tenderer"" instead of the expression "tenderer" in para 12, therefore, indicates that the documentary proof, by

way of credentials of past experience, has to be submitted after the tender has been considered and is found suitable for acceptance by the

authorities concerned. This would mean that the past experience is a matter which is to be considered after the tender has been examined and

evaluated and the tenderer whose tender is found acceptable is required to submit documentary proof regarding his past experience. In other

words, a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience. This

inference is strengthened by paras 8 and 11 of the notice dated 26-4-1993. In para 8 it is provided that a tender is liable for summary rejection if it

is submitted without the demand draft of Rs. 5,00,000. Similarly in para 11 it is provided that tender is liable to be excluded from consideration if

the income tax clearance certificate is not furnished with the tender. There is no similar provision for excluding from consideration a tender on the

ground of failure to furnish with the tender the required material by way of credentials of past experience. It means that the matter of past

experience has to be considered after the tender has otherwise been found to be suitable for acceptance and a tender is not liable to be rejected at

the threshold without consideration on the ground that the tenderer lacks experience. The decision of the Tender Evaluation Committee to exclude

the tender of NHL from consideration was, therefore, not warranted by the terms and conditions for submission of tender as contained in the

notice for inviting sealed tenders dated 26-4-1993.

14. In that view of the matter the inevitable conclusion is that the view taken by the High Court that the appellant did not fulfil the eligibility criteria

was not correct. The High Court was not justified in dismissing the writ petition. We direct the Evaluation Committee to consider the bid of the

appellant alongwith two persons who had been selected and take a final decision.

24. In Rashmi Metaliks Limited (supra), Supreme Court dilated on the judicial review of administrative action. It is observed by the Court that

impugned order must be examined with reference to the grounds set out in the order itself on which it is based and not with reference to any fresh

ground brought out subsequently. The Court held,-

13. The letter rejecting the Appellant-Company"s offer reads thus:

Subject: KMDA: Disqualify for Tender No. :01/KMDA/MAT/CE/2013-2014

Date : Monday, 22 July 2013 18:13:22 +0530 (IST)

From: tender tender@eternderwizard.com

To: sales.marketingdomestic@rashmigroup.com

Dear RASHI METALIKS LIMITED,

Important Notice:

This is to inform that your bid has been disqualified for the tender invited by KMDA

Tender No. : 01/KMDA/MAT/CE/2013-2014

Line No. : 01

Name of Work : Supply and delivery of different diameters of DISS K 7 and K 9 pipes at different location within Kolkata metropolitan area

Reason for Disqualification : Company not having submitted its latest income tax return along with its bid.

With regards

Tendering Authority

14. So far as the first point is concerned, it needs to be dealt with short shrift for the reason that the courts below have not thought it relevant for

discussion, having, in their wisdom, considered it sufficient to non-suit the appellant-Company for its failure on the second count. It has, however,

been explained by Mr. Vishwanathan, learned Senior Counsel for the appellant-Company that at the material time there was no blacklisting or

delisting of the appellant-Company and that in those circumstances it was not relevant to make any disclosure in this regard. The very fact that the

Tendering Authority, in terms of its communication dated 22-7-2013 had not adverted to this ground at all, lends credence to the contention that a

valid argument had been proffered had this ground been raised. Regardless of the weight, pithiness or sufficiency of the explanation given by the

appellant-Company in this regard, this issue in its entirety has become irrelevant for our cogitation for the reason that it does not feature as a reason

for the impugned rejection. This ground should have been articulated at the very inception itself, and now it is not forensically fair or permissible for

the Authority or any of the respondents to adopt this ground for the first time in this second salvo of litigation by way of a side wind.

15. The impugned judgment is indubitably a cryptic one and does not contain the reasons on which the decision is predicated. Since reasons are

not contained in the impugned judgment itself, it must be set aside on the short ground that a party cannot be permitted to travel beyond the stand

adopted and expressed by it in its earlier decision.

17. So far as clause (j) of the detailed notice inviting E-tender No. 01/KMDA/MAT/CE/2013-2014 dated 10-5-2013 emanating from the office

of the Chief Engineer is concerned, it seems to us that contrary to the conclusion in the impugned judgment, the clause is not an essential element or

ingredient or concomitant of the subject NIT. In the course of hearing, the Income Tax Return has been filed by the appellant-Company and

scrutinized by us. For the Assessment Year 2011-2012, the gross income of the appellant-Company was Rs. 15,34,05,627, although, for the

succeeding Assessment Year 2012-2013, the income tax was NIL, but substantial tax had been deposited.

25. In M/s. Zoom Developers Pvt. Ltd. (supra), Division Bench of Kerala High Court while examining the scope of judicial review in public

auction and the crucial issue of rejection of tender documents submitted by a bidder for construction of the International Deepwater Seaport and

Container Transshipment Terminal at Vizhinjam, Kerala formulated following issues for consideration:--

I. What should be the approach of Court in a matter of this nature?

II. Whether the decision making process adopted by the Bid Evaluation Committee, whereby the appellant's bid is found non responsive is correct

or not? If so, whether the appellant was discriminated and justifiably excluded from the zone of consideration?

III. Is the judgment of the learned single judge sustainable?

IV. Whether failure to give reasons by the administrative authority amounts to denial of justice.

26. While answering issue No. (I) to (IV), the Division Bench held,-

71. Point No I.

What should be the approach of Court in a matter of this nature?

While judicially reviewing an administrative decision that involves of a tender process or contract of this nature, the Courts are not very much

concerned about the merits of the decision, but concerned with the process of decision making. Law in this regard is well settled and need not be

reiterated. Development of law in this regard from the celebrated decision of Supreme Court in R D Shetty v. International Airport Authority AIR

1976 SC 1628 is steady and unambiguous. If the decision making is vitiated by any reason, then the Courts will interfere. (See Tata Cellular v.

Union of India , AIR 1996 SC 11 (paragraph 113); Air India Ltd. v. Cochin International Airport Ltd. , (2000)2 SCC 617 (paragraph 7) and

B.S.N Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Others , (2006) 11 SCC 548 (paragraph 66); See also Reliance Energy Ltd. & Anr

MSRDC Ltd. , (2007) 8 SCC 1; Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India , (2006) 10 SCC 1; M P Jain and S N Jain,

Principles of Administrative Law, 4th Ed (2005 Reprint) Chapter XXII).

72. Point No II.

Whether the decision making process adopted by the Bid Evaluation Committee whereby the appellant's bid is found non-responsive is correct or

not? If so, whether the appellant was discriminated and justifiably excluded from the zone of consideration?

As per the provisions of RFP, the proposed bidder has to submit its Proposal constituting an Outer Cover (covering letter, details of bidder,

power of attorney, consortium agreement, 50 million bank guarantee etc), Cover 1 (statement of qualification), Cover 2 (technical proposal) and

Cover 3 (financial proposal). Evaluation is carried out in three stages and in the 1st stage, only Outer Cover and Cover 1 will be opened and

evaluated. Only bidders who qualify this stage will be considered at the Cover 2 stage. Similarly, the financial proposal of only those bidders who

secured a minimum of 70 out of 100 marks in technical evaluation will be opened. Outer Cover of all the five bidders were opened on 31.01.2008

by the "Bid Opening Committee" constituted by the 1st respondent and found that all the "five bidders have submitted valid Proposal Security of

Rs. 50 million in the form of bank guarantee, Consortium Agreement and other documents as per RFP. Accordingly the committee opened the

Cover 1 and contents were read out". At this stage, representatives of 2nd and 3rd respondents were present.

73. The Bid Evaluation Committee (EC) constituted by the 1st respondent for the purpose of evaluating the bid, met on 25.02.2008 and found that

all the five bidders need to furnish some more details/information/documents and accordingly intimated the bidders. The EC further noted opinion

of M/s. Universal Legal, Bangalore. "legal advisers of the Project" and directed all the bidders to submit the additional

details/information/documents within ten days. With regard to the appellant's bid it is noted that "power of attorney as well as consortium

agreement is not duly stamped, it is not specifically mentioned that lead member will hold 26% equity in SPC and M/s. Peel Ports is not a member

of the consortium. Meanwhile on 03.03.2008, the 3rd respondent - Adviser to the Project, issued Exhibit P9 letter to the appellant asking them to

furnish some documents/clarifications in addition to the points sought by EC. In fact the 3rd respondent also participated in the EC meetings. In

response to Exhibit P9, the appellant issued Exhibit P10 reply essentially pointing out that - ""As you are aware our consortium agreement was

executed on 4th October 2007 and thereafter several modifications were made to the bid document. We are now required to execute a fresh

agreement incorporating these amendments along with supporting documents..."" Subsequently the appellant submitted the fresh agreement and

other documents. New Consortium Agreement was executed on 11.03.2008.

74. In the 2nd EC meeting on 13.03.2008, it is noted that three Consortium submitted the additional documents and two other Consortium(s)

including the appellant sought further time to submit the documents and accordingly time was granted. Vide Exhibit P15 letter dated 19.03.2008,

the 3rd respondent asked the appellant "to get the new consortium agreement needs to be stamped in accordance with law and all pages need to

be signed by all members. In order to obtain signatures of all the members (some of them are abroad), appellant vide Exhibit P16 dated

20.03.2008 sought time till 04.04.2008. In reply, Exhibit P17 dated 27.03.2008 was issued by the 3rd respondent granting a last chance to

appellant and cautioned them that in the event of their failure to submit the documents and/or to fulfill the requirements in accordance with the

requirements of RFP, and in accordance with law, the Government of Kerala reserves the right to proceed with the bid evaluation process based

on the submissions made by the company. Subsequently on 02.04.2008, the appellant submitted all the documents on 04.04.2008, legal advisers

of the Project furnished their opinion stating that ""further the consortium lead by Zoom Developers Ltd. has submitted a fresh consortium

agreement dated 11.03.2008 drawing reference to and superseding the Consortium Agreement submitted earlier with the original bid documents,

towards complying with the provisions of RFP. In our view, the JV/Consortium Agreement submitted as above, by the Bidders, based on the

request for the same pursuant to the decision of the Evaluation committee, complies with the requirements of RFP and appears to be in accordance

with law. The Evaluation Committee may consider the submissions in the light of above.

75. The 3rd EC meeting held on 08.04.2008 considered the documents submitted by the appellant along with the above referred legal opinion and

arrived at the conclusion that ""Portia Services themselves have signed the "Consortium Agreement" instead of "on behalf of Peel Ports Ltd" as

mentioned in the original consortium agreement"" and therefore decided to seek the opinion of Law Secretary on this point. In the said meeting, it

was further decided to open the technical bid of the three qualified bidders. Accordingly the opinion of law Secretary was sought. Opinion of law

secretary is extracted above and according to it, two major defects were pointed out with regard to the bid submitted by the appellant: 1. The new

consortium agreement dated 11.03.2008 cannot be treated as part of original proposal as it is entered into by new members (Portia Management

Services signed it without the authorisation of Peel Ports) and 2. There is no provision in the Consortium Agreement to the effect that there will be

joint and several "liability" for the members in executing the project and the appellant only used the expression "responsibility" that is different.

76. In the 4th EC meeting held on 06.05.2008, after deliberating the opinion of Law secretary it was concluded that the bid submitted by the

appellant is "non-responsive".

79. Consequence of the decision of the EC on appellant: Appellant is deprived of equal treatment/excluded from the zone of consideration/denied

a level playing field.

In Reliance Energy Ltd. v. MSRDC Ltd. , (2007) 8 SCC 1, Hon"ble Supreme Court while dealing with a similar case ruled:

36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the

proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non discrimination". However it is not a

free standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article

21 refers to "right to life". It includes "opportunity". In our view, as held in latest judgment of the Constitution Bench of nine Judges in I.R Coelho

v. State of T.N , (2007) 2 SCC 1, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level

playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is entitled to invoke the said doctrine of "level playing

field". We may clarify that this doctrine is, however subject to public interest. In the world of globalisation, competition is an important factor to be

kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution this is because

the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest.

"Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have

brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level

playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to principle of "equality" should not be

read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect

which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith,

commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty.

Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of

"reasonableness", then such an act or decision would be unconstitutional.

...Although the petitioner had no right to claim that his tender be accepted, yet he did have a right to have his tender "fairly and properly"

considered by the concerned authority...equal opportunities must be given to citizens and they must not be discriminated against in the matter of

making their offer for such contracts and of having the same considered... there cannot be any discrimination at the threshold or at the time of entry

in the field of consideration on merits...

82. In the 1st EC meeting on 25.02.2008, it is not pointed out that in the appellant's JV agreement is bad for non inclusion of ""several and joint

liability"" clause. Whereas a similar anomaly was pointed out by the EC the case of another bidder - M/s. Apollo Consortium. When such a defect

was pointed out to one of the bidders, it is not appropriate to refuse to point out such defect and later finding fault with the appellant on the same

point. Had a clarification in this regard was sought at the appropriate time, it is submitted by the appellant on record, that they would have made

necessary changes in this regard. Again, this is a curable defect of minor nature and cannot be treated as a reason to exclude the appellant from the

zone of consideration.

84. Point No. IV.

Whether the administrative decision should be reasoned? The incidental issue that requires to be considered is whether EC was obliged to give

reasons while rejecting the bid submitted by the appellant. The learned Senior Counsel Sri. Rajiv Nayyar would submit that the administrative

decisions need not be reasoned. The reliance is placed on Kumari Srilekha Vidyarthi's case , (1991) 1 SCC 212, wherein it is observed that the

expression, ""at any time"" merely means the termination may be made even during the subsistence of the term of appointment and ""without assigning

any cause"" means without communicating any cause to the appointee whose appointment is terminated. However, without assigning any cause is

not to be equated with ""without existence of any cause"". It merely means that the reason for which the termination is made need not be assigned or

communicated to the appointee. It was held in *Liberty Oil Mills vs. Union of India* that the expression ""without assigning any reason"" implies that

the decision has to be communicated, but reasons for the decision need not have to be stated; but the reasons must exist, otherwise, the decision

would be arbitrary.

85. Our attention is invited to the decision of the Apex Court in *National Institute of Mental Health and Neuro Sciences vs. Kalyan Raman*, , 1992

Supp (2) SCC 481. We failed to understand how that decision would help the respondent in the facts and circumstances of this case.

86. In *Union of India vs. E.G. Nambudiri*, , (1991) 3 SCC 38, the court has stated, that, ""Ordinarily, courts and tribunals, adjudicating rights of

parties, are required to act judicially and to record reasons. Where an administrative authority is required to act judicially, it is also under an

obligation to record reasons. But every administrative authority is not under any legal obligation to record reasons for its decision, although, it is

always desirable to record reasons to avoid any suspicion. Where a statute requires an authority though acting administratively to record reasons, it

is mandatory for the authority to pass speaking orders and in the absence of reasons the order would be rendered illegal. But in the absence of any

statutory or administrative requirement to record reasons, the order of the administrative authority is not rendered illegal for absence of reasons. If

any challenge is made to the validity of an order on the ground of it being arbitrary or mala fide, it is always open to the authority concerned to

place reasons before the court which may have persuaded it to pass the orders. Such reasons must already exist on records as it is not permissible

to the authority to support the order by reasons not contained in the records. Reasons are not necessary to be communicated to the Government

servant. If the statutory rules require communication of reasons, the same must be communicated, but in the absence of any such provision absence

of communication of reasons do not affect the validity of the order"".

87. In *Sarat Kumar Dash and others vs. Biswajit Patnaik and Others*, , 1995 Supp (1) SCC 434, the court has stated, that, ""The reasons are links

between the maker of the order or the author of the decision and the order itself. The record is called to consider whether he has given due

consideration to the facts placed before him before he arrives at the decision. Therefore, the reasons in the order or found from the record bridges

the link between the maker of the order and the order itself or decision. Therefore, the natural justice is not a rigid nor an inflexible rule. It should

be applied to a given fact situation, depending upon the background of the statutory provisions, nature of the right which may be affected and the

consequences that may entail.

27. In *Reliance Energy Limited (supra)*, Supreme Court examined the scope of Articles 14, 19(1) (g) and 21 of the Constitution of India in

contractual field. The Court further declared disqualification of the appellant as arbitrary and unreasonable in want of reasons for such a decision.

The Court held,-

35. Taking into account the above principles, it is clear that there are two methods of ""cash flow reporting"" i.e. direct and indirect. Both give

identical results in the matter of the final total. They differ only in presentation of the data. They differ only in presentation of the data contained in

the cash flows from operational activities. No reason has been given by the Consultants of MSRDC for rejecting the indirect method invoked by

KPMG, Chartered Accountants of REL/HDEC in their letter dated 12.8.2005. The said method is known as ""reconciliation method"". In this case,

as stated above, the only reason given by the Consultants of MSRDC to exclude REL/HDEC was the negative impact on the future cash flows on

account of the provisioning for doubtful debts in the accounts of HDEC for the FY 2001. If future cash impact was the basis to exclude

REL/HDEC, then the Consultants for MSRDC should have considered cash flow reporting methods, which includes Reconciliation Method. There

is no question of difference of opinion or different views as far as the application of cash flow reporting, which also falls in AS 3. There is nothing to

show whether indirect method has at all been considered by Crisil, particularly when KPMG had invoked that method. There is no reason given

for rejecting it. Lastly, in the PQ document, the referral years were three years. The criteria was that there should be NCP of not less than Rs. 200

crores. However, the opinion of the Consultants proceeds on the basis that if ""add back"" is allowed it may have future cash impact. In the

evaluation process, the Consultants were entitled to take into account future cash impact but in order to do so they had to say why the indirect

method of ""cash flow reporting"" should not be accepted and if at all the impact of the provisioning was to be seen then there was no reason for not

examining the audited accounts of 2004. There is a mix- up of two concepts here. The concept of non-compliance of financial criteria and the

impact in future years on cash flow. As stated above, the very purpose of ""cash flow reporting"" is to find out the ability of HDEC to generate cash

flow in future and if an important method of cash flow reporting is kept out, without any reason, then the decision to exclude REL/HDEC, is

arbitrary, whimsical and unreasonable. In our view, for non-consideration of the Reconciliation Method, under cash flow reporting system, the

impugned decision-making process stood vitiated.

28. Learned Additional Advocate General Dr. P.S. Bhati with Mr. Sajjan Singh appearing for the respondents submits that against the impugned

order, alternative efficacious remedy in the form of an appeal under Section 38 read with Section 40 of the Act of 2012 is available to the

petitioner and, therefore, writ petition is not maintainable. Learned Additional Advocate General would contend that Section 38 of the Act of 2012

is couched with clear and unambiguous language that any bidder or prospective bidder being aggrieved by any decision, action or omission of the

procuring agency contravening the provisions of the Act or the Rules or the Guidelines issued thereunder may prefer an appeal subject to Section

40 of the Act of 2012. Buttering his arguments on availability of equally efficacious statutory alternative remedy of appeal under Section 38 of the

Act of 2012, learned Additional Advocate General has urged that petitioner cannot maintain the writ petition without exhausting the remedy of

appeal. Learned Additional Advocate General, while stoutly defending the impugned order, submits that there is no infirmity much less legal

infirmity in the said order warranting interference in exercise of certiorari jurisdiction of this Court. Learned counsel for the respondents by laying

emphasis on Sub-section (4) of Section 25 of the Act of 2012 submits that a procuring entity is not obliged to convey reasons for non-

responsiveness of a bid because no such mandatory requirement is envisaged under the Act of 2012 and the Rules made thereunder. Elaborating

his submission in this behalf, learned Additional Advocate General has argued that there is no question of violation of principles of natural justice in

the instant case. Taking shelter of confidentiality clause - under Section 49 of the Act of 2012, learned Additional Advocate General submits that

under this clause, procuring entity is well within its right not to disclose the reasons before finalisation of any tender process and award of contract.

Learned counsel submits that procurement process which is subject matter of this writ petition has been undertaken transparently and, therefore,

plea of the petitioner about violation of principles of natural justice is not tenable. Learned Additional Advocate General further submits that

technical bid of the petitioner is declared non-responsive for not depositing the requisite EMD in terms of Rule 42 (2) of the Rules of 2013

inasmuch as the petitioner-JV is not enlisted as "AA" Class Contractor of Civil Works with Chief Engineer (Headquarter), PHED, Jaipur. Learned

Additional Advocate General would contend that concession in EMD is available to a bidder enlisted as "AA" Class Contractor but if two enlisted

"AA" Class Contractors have formed Joint Venture, their claim for concession in EMD is not tenable. In substance, the submission of learned

Additional Advocate General is that petitioner-JV was under an obligation to deposit EMD @ 2% of the estimated costs of NIT which it has failed

to deposit and, therefore, impugned decision declaring its technical bid non-responsive cannot be faulted. The learned Additional Advocate

General has laid emphasis on the lack of requisite experience possessed by the lead partner of JV and submits that lead partner of JV was lacking

requisite experience as per clause 6(B) of the bid documents. The learned Additional Advocate General has also argued that second partner of JV

was also lacking the requisite experience i.e. works related to Water Supply Schemes/Projects inasmuch as the said work was undertaken by it

not during last seven years upto submission of tenders but anterior to that. With a view to clarify the stand of the respondents, learned Additional

Advocate General submits that eligibility criteria is prescribed in the documents with clarity and precision and Clause 6(B) contemplated three

conditions to satisfy the test of experience of similar completed work/works completed by the lead partner of JV and as the petitioner -JV has

invoked Sub-clause (c) i.e. one similar completed work costing not less than Rs. 316 crores, it was admittedly lacking the work experience on the

strength of documents submitted. The learned Additional Advocate General, for this proposition, has laid much emphasis on the certificate dated

06.08.2015 issued by the Executive Engineer, KNNL, SLIS, Division No. 2, Huvinahadagali Bellary District, Karnataka which was produced by

the petitioner-JV in response to communication (Annexure-8) and submits that the recitals contained therein makes it abundantly clear that lead

partner of petitioner-JV has completed work splitted in two work orders and under two different agreements. Sum and substance of the

submission of learned Additional Advocate General is that issuance of two splitted work orders and execution of two different agreements for the

work undertaken by the lead partner of JV is sufficient to conclude that it is not meeting the requirement under Clause 6(B) of the bid documents

i.e. one similar completed work costing not less than Rs. 316 crores. Therefore, the learned Additional Advocate General has strenuously urged

that petitioner-JV was lacking the requisite experience and as such declaring its technical bid non-responsive is a just order warranting no

interference.

29. Hammering on the work experience of the second partner of JV, the learned Additional Advocate General submits that said experience of

second partner of JV i.e. construction of 2380 KL CWR, Pump House including Pumping Machinery and other works under Re-organisation of

GWSS, Banswara was completed on 19.06.2008 and as such the said experience of second partner was seven years anterior from the date of

submission of bids and, therefore, rightly not counted as work experience in terms of Note-7 of the General Note appended to clause 6(B). The

learned Additional Advocate General, therefore, emphatically submits that both the partners of JV have failed to show the requisite experience for

their eligibility to compete for technical bid and, therefore, the procuring entity on cumulative reading of all the documents has rightly declared the

technical bid of the petitioner-JV non-responsive. Lastly, learned Additional Advocate General submits that respondents have shown extra

benevolence and generosity vis-à-vis the petitioner-JV inasmuch as one more opportunity was afforded to it in making good the deficiencies and

clarifying the position and thereafter taking into account the documents submitted by the petitioner-JV with its explanation (Annexure-9), the third

respondent has passed the impugned order which, from no stretch of imagination, can be categorized as arbitrary and unreasonable and so also

violative of principles of natural justice.

30. Learned Senior Advocate Mr. M.S. Singhvi appearing for the intervenor M/s. L & T Ltd. has referred to some of the provisions of the Act of

2012 and the Rules of 2013 to defend the impugned order whereby technical bid of the intervenor is declared responsive and petitioner-JV's bid

is adjudged non-responsive. Relying on Sections 2(ii), 7, 14, 18 & 25 of the Act of 2012, Mr. M.S. Singhvi submits that Section 7 envisages

qualifications of bidder and it is prerogative of the procuring entity to determine and apply one and more of the requirements specified under Sub-

section (2) which includes any other qualifications as may be prescribed under Clause (5) of Subsection (2) of Section 7. He further submits that

Sub-section (4) envisages setting out of certain requirements by procuring entity in the pre-qualification documents or bidder registration

documents to be applied equally to all bidders. Relying on Sub-section (5) of Section 7 of the Act of 2012, learned counsel would urge that

procuring entity is required to evaluate the qualifications of bidders only in accordance with requirements specified under Section 7 which has been

pressed into service in the instant case by the procuring entity and, therefore, there is no shadow of doubt about legality and propriety of the

impugned order. Harping on Section 14 of the Act of 2012 laying down criteria for evaluation, learned counsel for the intervenor submits that

impugned order is required to be examined on the anvil of criteria for evaluation and not otherwise as contended by the petitioner. Learned counsel

for the intervenor with a view to elucidate the Scheme of the Act of 2012 has referred to Section 18 under the caption "Pre-qualification of

bidders" and buttressed his arguments that procuring entity is obliged to decide which bidder has pre-qualified in accordance with Section 7 and

the criteria set out in the pre-qualification documents. While reiterating the arguments of learned Additional Advocate General on interpretation of

Section 25 of the Act of 2012, Mr. M.S. Singhvi would contend that as per Sub-section (4) of Section 25 only decision is required to be

conveyed by the procuring entity to concerned bidder in writing and for declaring technical bid of a bidder non-responsive, reasons are not

required to be recorded. Learned counsel for the intervenor has also adopted the arguments of learned Additional Advocate General on alternative

efficacious remedy of appeal under Section 38 of the Act of 2012 and contended that petitioner is liable to be non-suited on this count alone. With

a view to emphasis efficacy of remedy of appeal, learned counsel for the intervenor has also referred to Section 39 of the Act of 2012 wherein

while hearing an appeal, appellate authority can pass appropriate order for staying of the procurement proceedings. Learned counsel has referred

to Chapter-V of the Rules of 2013 with emphasis on Rule 36 and 38 which empowers the procuring entity to disqualify a bidder on the basis of

grounds set out under clause (a) and (b) of Rule 38. In substance, learned counsel has harped on a very vital issue that procuring entity's right to

disqualify a bidder are not circumscribed as such at any stage of the procurement process before finalisation of acceptance of successful bid and

award of contract. Learned counsel submits that Rule 41 envisages conveying of reasons with promptitude by procuring entity to each bidder at

the stage of prequalification proceedings and not otherwise, as argued by learned counsel for the petitioner. For rendering assistance to the Court,

learned counsel for the intervenor has also referred to Sub-rule (2) of Rule 42 of the Rules of 2013 and contended that concessional bid security

may be taken from the registered bidders as specified by the State Government and if a bidder is not exempted or qualified for concessional bid

security, then it is obliged to furnish bid security as specified in the notice inviting bids for participating in the procurement process. Therefore,

according to the learned counsel for the intervenor, inadequate amount of bid security furnished by the petitioner has resulted in passing of

impugned order which in the overall scenario is a just decision. Learned counsel has also referred to Rule 59 to 62 of the Rules of 2013 and urged

that if the impugned order is tested on parameters set out therein, exclusion of technical bid of the petitioner cannot be categorised as infirm or

arbitrary. Though representing an intervenor Mr. M.S. Singhvi has also made an attempt to question the eligibility of the petitioner-JV by urging

that initially the last date for receipt of tender was 15.06.2015 and the lead partner of JV was registered as "AA" Contractor on 02.07.2015 i.e.

during the period the date for receipt of tenders was postponed. Mr. M.S. Singhvi has urged that as a matter of fact, on this count alone, the

technical bid of the petitioner-JV ought to have been rejected. Learned counsel for the intervenor has also questioned the eligibility of the

petitioner-JV on the anvil of available credit facility as envisaged in the bid documents and further submitted that petitioner-JV is not fulfilling the

experience criteria looking to the nature of work undertaken by the lead partner in relation to KNNL, SLIS, Division No. 2, Huvinahadagali

Bellary District, Karnataka. Mr. M.S. Singhvi has urged that the said work of lead partner of JV is not similar to the work which is insisted in the

bid documents As regards the experience of other partner of JV, Mr. M.S. Singhvi has adopted the arguments of the learned Additional Advocate

General. Learned counsel has also urged that a cumulative reading of Rule 59 & 60 of the Rules of 2013 makes it amply clear that procuring entity

can seek clarification of bids but in the guise of clarification, cannot allow a bidder to fulfill the lacunae which may unfairly affect the competitive

position of other bidders presenting responsive bids. Mr. M.S. Singhvi has also urged that a procuring entity under the aforesaid Rules is not

empowered to make substantive change to the qualifications. Learned counsel has also submitted that ineligibility of a tenderer is sufficient to non-

suit it even if the order adversely affecting it is a non-speaking order. Learned counsel for the intervenor in support of his contentions has placed

reliance on following legal precedents:--

(1) Jagdish Mandal Vs. State of Orissa & Ors.: , (2007) 14 SCC 517

(2) Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors. : , (1999) 1 SCC 492

(3) Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa & Anr.: , (2012) 6 SCC 464

(4) Sorath Builders Vs. Shreejikrupa Buildcon Limited & Anr.: , (2009) 11 SCC 9

(5) Union of India & Ors. Vs. E.G. Nambudiri: , AIR 1991 SC 1216

(6) Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.: , (1993) 4 SCC 727.

31. In Jagdish Mandal (supra), Supreme Court reiterated the ratio of the judgment in Tata Cellular (supra) on the scope of judicial review relating

to tenders or awarding of contracts. The Court held,-

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to

check whether choice or decision is made ""lawfully"" and not to check whether choice or decision is ""sound"". When the power of judicial review is

invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial

transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a

distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review,

interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be

permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a

grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business

rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by

exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay

relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or

contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible

authority acting reasonably and in accordance with relevant law could have reached.

ii) Whether public interest is affected.

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

Cases involving black-listing or imposition of penal

consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand

on a different footing as they may require a higher degree of fairness in action.

32. The Court further proceeded to consider the question relating to violation of principles of natural justice vis-à-vis action of the Committee

treating the EMD as defective and finally concluded that it was not necessary for the Committee to grant an opportunity to the tenderer to explain

the position. Further, dilating on the scope of judicial review, the Court has emphasized that decision making process requires judicial scrutiny and

not the decision of the Committee. The Court held,-

27. The learned counsel for the fifth respondent submitted that the department ought not to have acted on a complaint received against him,

without giving him an opportunity to show cause. This contention has no merit. Whether any complaint is received or not, the department is entitled

to verify the authenticity of the document pledged as earnest money deposit. Such verification is routinely done. The Committee was neither

blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore,

no need to give an opportunity to the tenderer to show cause at that stage. We no doubt agree that the Committee could have granted an

opportunity to the tenderer to explain the position. But failure to do so cannot render the action of the Committee treating the EMD as defective,

illegal or arbitrary.

28. The limited scope of judicial review by the High Court envisaged examination of the question whether there was any material irregularity in the

decision making process or whether the decision of the Committee and consequential rejection of fifth respondent's tender was irrational,

unreasonable or arbitrary. The validity of the decision of the Committee taken on the material available at the time of consideration of tenders,

cannot be tested with reference to a subsequent police enquiry report submitted in the writ proceedings. Nor can it be held that the Committee

acted arbitrarily in not accepting the passbook, on the basis of some report opining that the TD passbook is genuine. The High Court was not

sitting in appeal over the decision of the Committee. The High Court could not, therefore, by relying on a subsequent police enquiry report, the

correctness of which is yet to be established, to hold that the Tender Committee was wrong in rejecting the TD passbook. Further, the High Court

missed the issue. The question for consideration was not whether the TD passbook pledged by the fifth respondent is genuine or not. The question

for consideration was whether the committee acted arbitrarily or irrationally in rejecting the said TD passbook.

31. These decisions are of no assistance. In this case, the Committee in fact acted on a factual basis, namely, the communication from the

Superintendent of Posts that the TD passbook should not be acted upon. Even if the said information furnished by the Superintendent of Posts was

subsequently found to be incorrect, that will not invalidate the action taken by the Committee on such information. In this case, in fact, there is

nothing to show even till now that the information given by the Superintendent of Posts in his letter dated 14.3.2005 was false. We are not

expressing any opinion on the issue whether the TD pass book was really genuine or not as it does not directly arise for consideration in this case.

All that is required to be noticed is that the High Court exceeded its power of judicial review in interfering with the contracts.

33. In *Raunaq International Ltd. (supra)*, Supreme Court while examining the scope of public interest litigation under Article 226 and 32 of the

Constitution of India in the matter of government contracts laid emphasis that petitions are to be maintained only when the Court is satisfied that

there is some element of public interest involved in the petition. The Court held,-

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied

that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the

court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the

two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is

important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any

saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore,

unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not

intervene under Article 226 in disputes between two rival tenderers.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee

of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price

offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on

the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract

should be awarded. At times, a higher price for a much better quality of work, can be legitimately paid in order to secure proper performance of

the contract and good quality of work-which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

34. In *Tejas Constructions and Infrastructure Private Limited (supra)*, Supreme Court declined to interfere in the matter of evaluation of bids and

determination of eligibility of bidders examined by an empanelled consultant, a technical hand underlying the scope of judicial review in such

matters. The Court held,-

31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders Municipal Council had the

advantage of the aid & advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition

regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken

by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent

No. 2.

35. In *Sorath Builders (supra)*, Supreme Court while reiterating the scope of judicial review in the matter of contracts relied on the judgment in

Raunaq International Ltd. (supra) and held,-

17. We also find on record that the tender submitted by the appellant was the lowest and the same was accepted as the same was found to be

reasonable, tenable, plausible and valid. The High Court went beyond its jurisdiction in setting aside the decision of the University in accepting the

bid of the appellant. We are of the opinion that there is no fault or arbitrariness in the decision making process of the University. The said decision

cannot be said to be in any manner arbitrary or unreasonable. The Respondent No. 1 submitted his pre qualification documents late for which he is

only to be blamed.

18. The University has taken a specific stand before us that the price settled for the tender is neither unreasonable nor excessive in comparison with

the project. It was also stated before us that the main interest of the University is to get a good quality veterinary college within the stipulated time

because the grant out of which the payment of construction of the college is to be made would lapse on 31st March, 2009 and that the University

has already started the process of admission to the batch of students for the coming academic year. Consequently we feel that a time bound

completion of a good quality veterinary college has become a necessity.

19. We are of the considered opinion that there is definitely urgency in the aforesaid project, and therefore, the process of awarding the contract of

construction should be expedited and the same should not be stalled in between. The process which is suggested by the High Court in its judgment

and order if allowed to be gone through the same would mean prolonged delay in the completion of the project. The project is time bound and

money must be utilized by 31st March, 2009. The process of re-tendering and allotment of fresh tender would mean delay and would also be time

consuming.

27. Following the aforesaid legal principles laid down by this Court, we are of the considered opinion that the Respondent 1 was negligent and was

not sincere in submitting his pre qualification documents within the time schedule laid down despite the fact that he had information that there is a

time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within

the stipulated date. Pre-qualification documents were received by the Respondent 2 - University only after time schedule was over. The terms and

conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, the Respondent 2 - University was

justified in not opening the tender submitted by Respondent 1 on 01-12-2008, which was late by three days. According to us no grievance could

also be made by Respondent 1 as lapse was due to his own fault.

36. In E.G. Nambudiri (supra), Supreme Court while examining rejection of representation of a Section Officer in the Office of Chief Controller of

Import and Exports, Ministry of Commerce declined to adjudge the said order illegal in absence of reasons. The Court held,-

10. There is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any

statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a Government

servant against the adverse entries the competent authority is not under any obligation to record reason. But the competent authority has no licence

to act arbitrarily, he must act in a fair and just manner. He is required to consider the questions raised by the Government servant and examine the

same, in the light of the comments made by the officer awarding the adverse entries and the officer counter-signing the same. If the representation is

rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of

reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate

reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. No order of an

administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facie and it is not open to the court to

interfere with such orders merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty

to pass orders without there being any reasons for the same. In governmental functioning before any order is issued the matter is generally

considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the

competent authority to formulate its opinion. If the order as communicated to the Government servant rejecting the representation does not contain

any reasons, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority

to place the reasons before the Court which may have led to the rejection of the representation. It is always open to an administrative authority to

produce evidence alinude before the court to justify its action.

11. The President was under no legal obligation to record reasons in rejecting the respondent's representation against the adverse remarks.

Consequently, the order of the President was not vitiated in law. The Central Administrative Tribunal committed error in quashing the order of the

President as well as the order of the Ministry of commerce dated 6-1-1986. Assuming that there was some defect in the order rejecting the

respondent's representation, the Tribunal was not justified in holding that the adverse entries awarded to the respondent should be treated as

having been expunged.

37. In Managing Director, ECIL, Hyderabad (supra), Supreme Court declared that law laid down in Mohd. Ramzan Khan's case shall operate

prospectively and cannot be applied retrospectively. The Court further examined the applicability of principles of natural justice in disciplinary

enquiries against government employee who has not been furnished report of the enquiry officer before imposition of punishment. While discussing

the principles of natural justice in such matters threadbare, the Court has laid emphasis on prejudice caused to the employee for non-furnishing of

the report. The Court held,-

30[v]....The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the

individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in

fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and

circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a

perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the

guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which

in itself is antithetical to justice.

38. Mr. Sanjeet Purohit with Mr. Rajat Arora appearing for the other intervenor has adopted the arguments of learned Senior Counsel Mr. M.S.

Singhvi representing the intervenor M/s. Larsen & Toubro Ltd.

39. Mr. M.R. Singhvi, Sr. Advocate in rejoinder while questioning the locus of the intervenor submits that an intervenor cannot be allowed to

formulate any point/argument touching merits of the case or make out a new case in want of pleadings. In substance, the submission of learned

counsel for the petitioner is that in absence of pleadings of the intervenor, none of its plea on merits of the case is entertainable. Referring to the

order dated 26.10.2015 whereby the intervenor was allowed to participate the proceedings without filing pleadings, learned counsel for the

petitioner would contend that intervenor cannot be allowed to raise a plea which was not canvassed by the official respondents. To substantiate

this plea, learned counsel for the petitioner has placed reliance on following legal precedents:--

(1) M/s. Gammon India Ltd. & Ors. Vs. Union of India & Ors. : , (1974) 1 SCC 596

(2) Bharat Singh & Ors. Vs. State of Haryana & Ors.: , (1988) 4 SCC 534

(3) National Textile Corporation Ltd. Vs. Nareshkumar Badrikumar Jagad & Ors. : , AIR 2012 SC 264.

40. In M/s. Gammon India Ltd. (supra), Supreme Court while dilating on the practice and procedure held that "An intervener cannot raise points

which are not canvassed by the petitioners in the pleadings.

41. In Bharat Singh (supra), Supreme Court made distinction between pleadings under writ petition and that of under CPC i.e. Order VI Rule 2.

Laying emphasis on pleadings, the Court observed that in a writ petition or in counter affidavit, not only the facts but also evidence in proof of such

facts have to be pleaded and annexed to it. The Court held,-

13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an

abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before

us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been

sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point

which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and

prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not

pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter, affidavit, as the case may be, the court will not

entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code

of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence

are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be

pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have

entertained it to show that it is devoid of any merit.

42. In National Textile Corporation Ltd. (supra), Supreme Court while dilating on the pleadings and particulars under Order VI Rule 1 CPC

demonstrated its necessity to enable the Court to decide rights of the parties in the trial. The Court held,-

7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of

help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce

appropriate evidence on the said issue. It is a settled legal proposition that ""as a rule relief not founded on the pleadings should not be granted"". A

decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute

between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. RM N.N. Nagappa

Chettiar, , AIR 1953 SC 235; State of Maharashtra v. M/s. Hindustan Construction Company Ltd., , AIR 2010 SC 1299; and Kalyan Singh

Chouhan v. C.P. Joshi, , AIR 2011 SC 1127).

43. Learned Senior Advocate Mr. M.R. Singhvi appearing for the petitioner while reiterating his arguments on merits strenuously argued that in

response to communication (Annexure-8) of the respondents, requisite documents and the certificates produced by the petitioner are sufficient to

indicate that the petitioner was eligible as per bid documents and impugned order has been passed by the respondents without objectively

considering all these documents. Mr. M.R. Singhvi has also submitted that objection of inadequacy of EMD is not available to the respondents

inasmuch as the same did not find mention in the impugned order. Mr. M.R. Singhvi has also referred to Section 7(3) of the Act of 2012 to submit

that a procuring entity while soliciting information from the petitioner has not disclosed to the petitioner about inadequacy of EMD, therefore, the

respondents are precluded from taking shelter of this ground for defending the impugned order by applying rigour of Sub-section (3) of Section 7

of the Act of 2012. Lastly, Mr. M.R. Singhvi in rejoinder has contended that Section 25 of the Act of 2012 read with Rule 62 of the Rules of

2013 makes it amply clear that Section 25 is not applicable in the instant case inasmuch as it is a case of rejection of bid and not exclusion of bid.

According to Mr. M.R. Singhvi, rejection of a bid and exclusion of a bid have two different connotations and consequences.

44. After conclusion of arguments and reserving the order, learned counsel for the petitioner submitted an application on 16.12.2015 for taking on

record certain documents. The learned Additional Advocate General did not oppose the prayer, therefore, those documents are also considered

by the Court.

45. Heard learned counsel for the parties and perused the materials available on record.

46. Vindication of its right as a potential bidder is the cherished mission of the petitioner-JV in both the writ petitions and, therefore, annulment of

the impugned order is the main relief craved with other consequential actions to be undertaken by the respondents. The respondents, on the other

hand, have put stiff resistance to defend their action for completing the procurement process which can pave the way to accomplish their dream

projects of drinking water supply in Barmer District. The rival parties have locked the horns on various contentious issues to bring home their

points for the desired result. The intervenors whose technical bids are found responsive for opening of their envelope-B price offer have also joined

the issue with the petitioner to facilitate opening of envelope-B price offer.

47. With a view to analyse and make judicial scrutiny of various contentious issues, it would be convenient to examine them in chronological order.

A. Scope of judicial review of administrative action especially in the matter of government contracts, public auctions and the entire tender process:

48. There remains no quarrel that the scope of judicial review in the matter of government contracts and public auctions is very much limited and

power of interference in such matters is to be exercised with great care and circumspection. The law laid down by the Supreme Court in various

authoritative pronouncements on which rival parties have relied on is clear and unequivocal. For testing the State action concerning government

contracts and public auctions, it is imperative for the Court to lay emphasis on the doctrine of equality embodied under Article 14 of the

Constitution of India and adjudge the legality and propriety of the action of a welfare State on some standard or norms namely rationality,

reasonableness and prudence. It goes without saying that the government is not and should not have as free as an individual in selecting the

recipients for its largesse. A democratic government cannot lay down arbitrary and capricious standard for the choice of persons with whom alone

it will deal. Law on the subject is trite and with the passage of time, Supreme Court has set out certain parameters for exercising judicial review in

such matters viz. when a decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or Wednesbury unreasonableness. The

concern of the Court is to examine the procedural impropriety in decision making and not the decision itself. Powers of the Court in such matters

are not loathed to review decision maker's evaluation of facts. The Court may intervene where the facts taken as a whole could not logically

warrant the conclusion of the decision maker. The Court while examining the afflictions of an unsuccessful tenderer is expected to underplay with

imaginary grievances, wounded pride and business rivalry to dissuade a litigant from making mountain out of molehills. While exercising power of

judicial review in tender or contractual matters, some technical/procedural violation cannot be given precedence at the costs of adversely affecting

the public interest. For testing the process adopted or decision made by the authority, the endeavour of the Court is to see whether the impugned

action is mala fide or intended to favour some one. Therefore, in substance, the power of judicial review in contractual matters depends on factual

backdrop of an individual case and the Court is expected to objectively analyse the impugned action on the touchstone of parameters set out by

the Supreme Court as well as on the touchstone of Articles 14, 19(1)(g) & 21 of the Constitution of India.

B. Availability of equally efficacious statutory alternative remedy to the petitioner under Section 38 read with Section 40 of the Act of 2012 of an

appeal against the impugned order:

49. The Act of 2012 is a comprehensive legislation to regulate public procurement with the objectives of ensuring transparency, fair and equitable

treatment of bidders promoting competition, enhancing efficiency and economy and safeguarding integrity in the procurement process and for

matters connected therewith or incidental thereto. Upon examining the entire scheme of the Act of 2012 and some of the relevant provisions i.e.

Section 7 - Qualifications of bidders, Section 14 - Criteria for evaluation, Section-18 Pre-qualification of bidder, Section 25- Exclusion of bids

and other allied provisions, there remains no quarrel that the Act envisages two stage bidding.

50. In these two petitions, NITs were issued by the respondents for BARMER LIFT WATER SUPPLY PROJECT, PHASE II PART C, KKD,

SHEO BHADAKHA BARMER & BARMER LIFT WATER SUPPLY PROJECT, PHASE II PART D, BKG DEVIKOT SANGAR

FATEHGARH. Pursuant to both the NITs, besides the petitioner-JV, four other bidders including the intervenors submitted their tender forms on-

line. Besides the petitioner, the qualifications of other bidders were examined by the competent authority to ascertain as to whether the bidders

have qualified for participating in the procurement process on the touchstone of criteria envisaged under Sub-section (2) of Section 7 of the Act of

2012. After opening pre-qualification bid of the petitioner, it is noticed by the competent authority that petitioner's bid is lacking

information/qualification/documents and, therefore, a communication dated 05.08.2015 (Annexure-8) was addressed to the petitioner to clarify on

six points. In response to the same, the petitioner submitted its reply on 07.08.2015 by Annexure-9 with the requisite documents. After receiving

those documents, the competent authority issued the impugned order dated 21.08.2015 (Annexure-10) whereby technical bids of both the

intervenors were declared responsive for opening of their Envelope-B price offer and the petitioner with two other bidders' technical bids were

declared non-responsive. The grievance of the petitioner is essentially against the impugned order (Annexure-10).

51. If the objection of the respondents about availability of alternative efficacious remedy is examined on the anvil of Section 38 of the Act of

2012, then it would ipso facto reveal that appeal under Section 38 is subject to the provisions contained under Section 40 of the Act of 2012. A

plain reading of Section 38 of the Act of 2012 makes it amply clear that Sub-section (1) of Section 38 of the Act of 2012 is couched with a

language of wide implication. The restriction for availing remedy of appeal as envisaged under Section 40 of the Act of 2012 is of no relevance in

the present matters inasmuch as the impugned action of the respondents is not covered by the exceptions carved out therein for remedy of appeal.

The first and second proviso to Sub-section (1) of Section 38 on which great emphasis is laid by counsel for the petitioner to wriggle out from the

objection of alternative remedy, in the considered opinion of this Court, cannot come to the rescue of the petitioner.

52. Well it is true that proviso is generally intended to restrain the enacting clause and to except something which would have otherwise been within

it or in some measure to modify the enacting clause, but there is no quarrel that a proviso should be interpreted in a manner which would be in

conformity with the intention of the legislature and object of the Act. In that background, the first proviso to Sub-section (1) of Section 38 of the

Act of 2012, right of appeal is available to a bidder who has participated in the procurement proceedings after declaration of a bidder as

successful in terms of Section 27 i.e. after awarding of contract. The second proviso refers to right of a bidder whose technical bid is found to be

acceptable before opening of financial bid. Therefore, it is unthinkable that by inserting these proviso, legislature has intended to circumscribe right

of appeal of an unsuccessful bidder at the pre-qualifying stage. The recitals contained in Sub-section (1) of Section 38 of the Act of 2012,- ""...if

any bidder or prospective bidder is aggrieved that any decision, action or omission of the procuring entity is in contravention to the provisions of

this Act or the rules or guidelines issued thereunder, he may file an appeal to such officer of the procuring entity, as may be designated by it for the

purpose, within a period of ten days or such other period as may be specified in the pre-qualification documents, bidder registration documents or

bidding documents, as the case may be, from the date of such decision or action, omission, as the case may be..." are clear and unambiguous and,

therefore, on harmonious construction of the said provision, it is not possible to infer that first and second proviso to Sub-section (1) of Section 38

of the Act of 2012 are intended to restrain the aforementioned enacting clause. Reliance in this behalf can be profitably made to a decision of the

Supreme Court in the case of Virendra Kumar & Ors. Vs. Krishi Utpadan Mandi Samiti & Ors.: , (1988) 70 STC 360 (SC). Therefore,

availability of alternative efficacious remedy to the petitioner under Section 38 of the Act of 2012 cannot be ruled out in these two petitions. Be

that as it may, the fact remains that availability of an equally efficacious alternate remedy is not an absolute bar for entertaining a writ petition under

Article 226 of the Constitution. Being an extraordinary jurisdiction, the Court in a given case, can overlook objection of availability of alternative

efficacious remedy for doing substantial justice. Even otherwise, it is a self-imposed restriction followed by the Court and not mandated by our

Constitution. Moreover, in both these petitions, rival parties have addressed on merits of the case, therefore, instead of non-suiting the petitioner on

this count, I feel persuaded to examine both the matters on merits.

C. Effect/ramification of letter dated 05.08.2015 (Annexure-8) on final order i.e. impugned order (Annexure-10):

53. The petitioner has placed heavy reliance on communication (Annexure-8) seeking information/clarification from it to question the legality and

propriety of impugned order (Annexure-10) by urging that procuring entity has not noticed any other infirmity in the documents submitted by it

except spelt out in the said letter. It is also impressed upon by the petitioner that when the requisite informations were divulged by it vide

Annexure-9 with supporting documents, it can very well be presumed that procuring entity was satisfied with the requisite informations for

processing the technical bid. Therefore, in substance, the petitioner has questioned the legality of impugned order in absence of indignation of the

procuring entity vis-à-vis its explanation (Annexure-9). Besides that, the petitioner has also made an attempt to question the power of the

procuring entity to declare its technical bid non-responsive at that stage. True it is that the opening sentence of letter (Annexure-8) is not happily

worded but the reference of the letter makes it amply clear that documents furnished by the petitioner were examined at pre-qualification bid stage.

The procuring entity has exercised its powers under Section 7 read with Section 18 of the Act of 2012. Therefore, the communication (Annexure-

8) is addressed to the petitioner by the procuring entity by resorting to Section 22 of the Act of 2012. It may be observed here that on thorough

evaluation of the scheme of the Act of 2012 and the provisions made thereunder, there is no provision for seeking clarification from a bidder

except provided under Section 22 of the Act of 2012. Section 22 envisages with clarity and precision ""Pre-bid clarifications"" and as such the

ambitious plea of the petitioner that after addressing communication (Annexure-8), the procuring entity was precluded from declaring its technical

bid non-responsive is not tenable. Moreover, Rule 38 of the Rules of 2013 empowers the procuring entity to disqualify a bidder at any time by

resorting to clause (a) and (b) of the said Rule. Thus, in the considered opinion of the Court, powers of the procuring entity to disqualify or exclude

a bidder are of wide amplitude as per section 25 of the Act of 2012 and Rule 38 of the Rules of 2013. The procuring entity is not only expected to

ensure transparency, fair and equitable treatment of bidders, it is also desirable from it to enhance efficiency and economy and safeguard integrity in

the entire procurement process. Promoting competition by a procuring entity is also very much desirable as per the provisions of the Act of 2012

but not at the cost of giving go-bye to Sections 7 & 25 of the Act of 2012. In this view of the matter, while considering the matter in its entirety, I

am unable to see any effect/ramification of letter (Annexure-8) on the impugned order (Annexure-10) as canvassed by the petitioner.

D. Inadequacy of EMD:

54. A crucial question has emerged for determination in these two petitions is the legality and propriety of reason set out by the respondents in their

return for declaring petitioner's technical bid non-responsive on the anvil of inadequacy of EMD. It is an admitted fact that inadequacy of EMD for

declaring petitioner's technical bid non-responsive did not find mention in the impugned order. The relevant provision for bid security is Rule 42 of

the Rules of 2013. Sub-rule (2) of Rule 42 of the Rules of 2013 prescribes bid security at the rate of 2% or as specified by the State Government

of the estimated value of the subject matter of procurement put to bid in case of open competitive bidding. It further envisages concessional bid

security from registered bidders as specified by the State Government. Sub-rule (2) of Rule 42 of the Rules of 2013 reads as under:--

42. (2) In case of open competitive bidding, two-stage bidding, rate contract, electronic reverse auction, bid security shall be 2% or as specified

by the State Government of the estimated value of subject matter of procurement put to bid. In case of Small Scale Industries of Rajasthan it shall

be 0.5% of the quantity offered for supply and in case of sick industries, other than Small Scale Industries, whose cases are pending with Board of

Industrial and Financial Reconstruction, it shall be 1% of the value of bid. Concessional bid security may be taken from registered bidders as

specified by the State Government. Every bidder, if not exempted, participating in the procurement process shall be required to furnish the bid

security as specified in the notice inviting bids.

55. A bare perusal of aforesaid sub-rule makes it amply clear that benefit of concessional bid security can be availed only by the registered bidders

as specified by the State Government. Otherwise, in open competitive bidding, a bidder is required to furnish bid security at the rate of 2% or as

specified by the State Government of the estimated value of the subject matter of procurement put to bid.

56. Inadequacy of bid security can be considered an embargo for declaring a bid as responsive in terms of Sub-rule (5) of Rule 59 of the Rules of

2013. Sub-rule (5) of Rule 59 of the Rules of 2013 reads as under:--

59(5) The procuring entity shall regard a bid as responsive if it conforms to all requirements set out in the bidding documents, or it contains minor

deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the bidding documents,

or if it contains errors or oversights that can be corrected without touching on the substance of the bid.

57. Now, at this stage, it is worthwhile to refer to Section 7 of the Act of 2012 under the caption "Qualifications of bidders". In this behalf,

emphasis is required to be laid on clause (f) of Sub-section (2) of Section 7 of the Act of 2012 which reads as under:--

(f) fulfil any other qualifications as may be prescribed.

58. Therefore, upon harmonious construction of the provisions of Section 7 of the Act of 2012 as well as Rule 42 and 59 of the Rules of 2013,

has made it imperative for this Court to embark on the relevant provision contained in this behalf in the tender documents. In the tender documents,

Clause 6 under the caption "Eligibility Criteria" is bifurcated into three parts namely, A. Financial Criteria, B. Experience Criteria and C. Historical

contract non-performance. Note-10 appended to sub-clause (c) - Historical contract non-performance deals with earnest money. The complete

text of Note-10 reads as under:--

10- An Earnest money of Rs. 1134 Lacs shall be deposited through banker's cheque or demand draft of nationalised/scheduled bank in the name

of Chief Engineer Project, PHED, Jodhpur. However, tenderer may opt to deposit Rs. 10.00 lacs (as part earnest money) in cash/DD, as defined

above and remaining part of earnest money in the form of Bank Guarantee of any nationalised/scheduled bank in prescribed form in the name of

Chief Engineer Project, PHED, Jodhpur. Tenders received without earnest money or with part earnest money, shall be rejected out-rightly. The

enlisted contractors in class "AA" shall be required to deposit Rs. 283.50 Lacs (0.5% of estimated cost of NIT) as earnest money, while tendering

within their enlistment zone. For tendering out side of their zone, 2% earnest money shall be required to be deposited.

59. A bare perusal of Note-10 clearly and unequivocally reveals that concessional EMD at the rate of 0.5% of the estimated costs of NIT is

prescribed vis-à-vis enlisted contractors in class "AA, whereas, for others, earnest money is prescribed at the rate of 2% of the estimated costs

of NIT. The petitioner's specific case is that it is a JV and both its partners are enlisted "AA" class contractors with the Department. Therefore, it

is entitled to avail the benefit of concessional EMD.

60. The concept of JV is duly recognised by the Act of 2012 and Rules made thereunder. Rule 39 of the Rules of 2013 envisages eligibility of

bidders wherein Joint Venture is allowed to participate in the bidding process. The mode of participation of Joint Venture is also mentioned in the

aforesaid rule with clarity and precision. If the tender documents are examined in that background, then it clearly emerges out that Joint Venture is

allowed to participate in the bidding process as per Clause (5) of the tender documents which envisages "Instruction to bidders". Sub-clause (d) of

Clause (5) of the tender documents reads as under:

d. Joint Venture is allowed subject to comprising not more than 2 Indian firms/companies. The provisions of Rule 39 "The Rajasthan

Transparency in Public Procurement Rules, 2013 shall be applicable.

61. Therefore, even as per the Rules of 2013 and the tender documents, eligibility of a JV to participate in tender process is unquestionable,

however, how to determine its status to avail benefit of concessional EMD requires judicial scrutiny on the touchstone of relevant law on the

subject and the terms of NIT. There cannot be two opinions that although rival parties have made sincere endeavour to bring home the points

which they have urged but then arguments of both sides are more alluring and less substantive. The arguments in general are lacking the requisite

sting to clarify the position as to whether a JV consisting of two partners who are enlisted "AA" class contractors is entitled for concessional EMD

or not. Be that as it may, the fact remains that petitioner has participated in the bidding process as JV and has staked claim for concessional bid,

therefore, onus lies on it to substantiate that it is entitled for the benefit of concessional EMD with cogent material. Having made sincere endeavour

to examine the relevant law on the subject in conjunction with the tender documents, I am afraid, I have not been able to find any specific provision

which can be construed by the petitioner to its advantage to avail the benefit of concessional EMD. The Instructions to Bidders in this behalf are

also relevant to thrash out the matter. Instruction No. 14.1 which deals with earnest money is significant wherein there is no inkling about

concessional earnest money for a JV. Instruction No. 14.1 reads as under:--

14.1 An earnest money of Rs. 1134 lacs in Indian Rupees must accompany each bid in sealed cover out of total E.M. Rs. 10.00 lacs must be in

cash or Banker's Cheque/D.D. in the name of ""Executive Engineer (M) to Chief Engineer Project, PHED, Jodhpur"" and the remaining may be

either in form of Bank Guarantee of any Nationalized/Scheduled Bank in prescribed form (As per Annexure-2) should be deposited in physical

form with the cashier or authorised clerk prior to opening of Technical Bids. Enlisted contractor in Class ""AA"" shall required to deposit 1/2% (Rs.

278.50 Lacs) of estimated cost of work as Earnest Money while bidding within their enlistment zone. For outside their zone 2% Earnest Money

shall be required to be deposited.

Class "AA" Enlisted Tenderer, will be required to pay Earnest money @ 1/2% of the estimated cost of work) (Rs. 283.50 Lacs), in case of work

for which they are authorized to tender under Rules for enlistment of Tenderer, but the amount to the extent of full Earnest money shall be liable to

be forfeited in the event of circumstances explained in ITB clause below.

62. A conjoint reading of Rule 42(2) and Rule 59(5) of the Rules of 2013 with Note-10 appended to Clause 6(C) of the tender documents as well

as above quoted Instruction No. 14.1 makes it amply clear that a bidder who has furnished inadequate EMD is not entitled to participate in the

procurement proceedings and his tender can be rejected out rightly on this count alone.

63. Well it is true that inadequacy of EMD is not set out a reason in the impugned order for declaring petitioner"s technical bid non-responsive but

in the backdrop of facts and circumstances of the instant case, the petitioner has miserably failed to clear the decks on this issue. The procuring

entity duly recognises right of JV to participate in the bidding process but after formation of JV, I am at loss to say that even if both the partners are

enlisted "AA" class contractors, the new entity which has come into offing i.e. JV is not entitled to avail the benefits which are available to

individual partners as enlisted "AA" class contractors. Thus, this vital question i.e. inadequacy of EMD is answered in affirmative i.e. against the

petitioner.

E. Judicial scrutiny of the impugned order on the touchstone of Clause 6 of the NIT - Eligibility Criteria:

64. Clause 6 of the NIT is bifurcated into three Sub-clauses namely A., B. & C. Sub-clause (A) deals with Financial Criteria, Sub-clause (B)

highlights the Experience Criteria and Sub-clause (C) is concerned with Historical Contract Non-performance.

65. The contesting parties have essentially concentrated on Sub-clause (B) i.e. Experience Criteria and the respondents in their return have also

laid much emphasis on Sub-clause (B) by asserting that petitioner has failed to fulfill the criteria of experience as required in the aforesaid sub-

clause.

66. In order to examine this aspect with birds eye view, it is necessary to examine Sub-clause (B) of NIT thoroughly. As the procuring entity has

applied the eligibility criteria in terms of initially issued NIT dated 21.04.2015 in conjunction with subsequently issued corrigendum extending the

last date for on-line submission of tender form from 15.06.2015 to 06.07.2015, issue requires judicial scrutiny upon harmonious construction of

both NIT & Corrigendum. In the corrigendum, certain relaxations are also provided in the eligibility criteria more particularly in Sub-clause (B) of

Clause 6 of NIT. It is also an admitted fact that bids of the respective tenderers were processed in terms of eligibility criteria prescribed in the

corrigendum and, therefore, the relevant Sub-clause (B) of Clause 6 of the NIT in terms of Corrigendum is reproduced as under:--

B. EXPERIENCE CRITERIA:

The bidder should have experience of the following works related to water supply schemes/projects during last 7 years up to the date of

submission of tenders.

General Note

1. Similar work for the experience of project execution as well as for O&M of scheme/project means a scheme/project having at least 2

components viz. Pipeline and CWR/OHSR/GLSR/GLR

2. Each member of the JV shall have experience of at least one key component

3. For experience of pipeline work, the requirements of specific size and total length can be met from the same or 2 different contracts. The

experience of specific size pipeline shall be in a single contract, but the experience of total length of pipeline can be in two contracts.

4. Experience of execution and O&M may be in same contract or under different contracts of execution and O&M

5. For considering experience of the bidder, out of its experience as JV, its own works in the JV shall have to be asked with relevant

evidence/certificates.

6. Experience certificate issued by an officer not below the rank of Executive Engineer or equivalent for the work awarded by State

Governments/Central Government or their undertakings and autonomous bodies shall only be considered for the purpose of experience of work.

7. The works which have been completed and commissioned during the 7 years, though may have commenced earlier, shall be considered for

experience purpose. If single NIT for a work has been invited and work order has been given in two splitted orders, both the splitted orders shall

be considered jointly for experience purposes.

8. Experience of O&M of 2 years in an ongoing contract with scope of more than 2 yeas shall also be considered, even though not fully

completed.

67. The petitioner-JV in order to qualify the criteria and meet the requirements in this behalf has placed heavy reliance on Point No. 1 (c) of Clause

6(B) i.e. one similar completed work costing not less than Rs. 316 crore by the lead partner of JV. To substantiate its case, the petitioner has

relied upon two works of second and third lift works at Left Bank of SLIS, KNNL for Irrigation and Water Supply. For substantiating its claim,

the petitioner-JV has submitted initially the work done certificate dated 27.05.2015 issued by the Executive Engineer, KNNL, SLIS, Division No.

2, Huvinahadagali Bellary District, Karnataka with total value of work done as Rs. 433.97 crores. The procuring entity thereafter sought

clarification by issuing letter (Annexure-8). In response to letter (Annexure-8), the petitioner submitted the requisite information as well as

documents and to clarify the query No. 5 of letter (Annexure-8), submitted letter dated 06.08.2015 issued by the Executive Engineer, KNNL,

SLIS, Division No. 2, Huvinahadagali Bellary District, Karnataka. The complete text of letter dated 06.08.2015 reads as under:--

KARNATAKA NEERAVARI NIGAMA LIMITED

(a Government of Karnataka Enterprises)

=====

No. EE/KNNL/SLIS/Div-2/HH/2015-16/556

Office of the

Office of the Executive Engineer

KNNL, SLIS, Division No-2,

Huvinahadagali, Bellary (Dist).

Karnataka

Date: 6 AUG 2015

To,

The Chief Engineer,

PHED, Jodhpur

Sir,

Sub: Confirmation regarding Work Executed by M/s. GVPR Engineers Limited for SLIS
2nd & 3rd Lift.

Ref: 1) NIT No. EE/SLIS/Dn-2/Tender/2nd & 3rd Lift/2009-10/776 Dtd. 20.11.2009

2) Our Work Done Certificate No. EE/SLIS/Div-2/HH/2015-16/268 dtd. 27.05.2015 issued
to M/s. GVPR Engineers Limited.

This is to certify that single NIT vide No. EE/SLIS/Dn-2/Tender/2nd & 3rd Lift/2009-10/776
Dt. 20.11.2009 invited for the subject work, but

the work splitted into two work orders and two agreements are concluded for the single
project with M/s. GVPR Engineers Limited. Accordingly

the work done certificate vide reference 2nd cited was issued.

Yours Faithfully,

Sd/-

Executive Engineer

KNNL, SLIS, Division No-2,

Huvinahadagali, Bellary (Dist).

Karnataka

68. The contentious issue is whether the work undertaken by the lead partner of JV fulfills the requirements envisaged under Clause 6 (B) (1)(c) of

the NIT. While the petitioner is placing heavy reliance commutatively on work done certificate dated 27.05.2015 and the aforesaid letter, the

respondents, on the other hand are disputing this position precisely on the ground that two different work orders are issued of even date and

separate tender agreements were also executed between lead partner of JV and KNNL. It is on this count, the respondents have defended the

impugned order whereby petitioner's technical bid was declared non-responsive. Upon thorough examination of the relevant materials available on

record, I am at loss to comprehend that why for the same work, two separate work orders were issued of even date. That apart, why two

separate agreements were also executed between lead partner of JV and KNNL. This sort of situation cast shadow on the experience of the

petitioner for which it is harping.

69. There is yet another aspect of the matter which deserves due credence. A glance at tender agreement Nos. 01/2010-2011 and 02/2010-2011

makes it amply clear that the technical bids were approved on different dates and even amount put to tender in both the agreements are different.

In case of tender agreement No. 01/2010-2011, it is Rs. 16090.00 lacs whereas in tender agreement No. 02/2010-2011, it is Rs. 6915.00 lacs

Even contract value in both the agreements are also different. The comparative chart showing variation in both the tender agreements is reproduced

as under:--

70. The amount of EMD in case of SLIS Lift Bank 2nd Lift and SLIS Lift Bank 3rd Lift are also of different denominations i.e. Rs. 161.00 lacs

and Rs. 67.00 lacs respectively is also a relevant factor indicative of the fact that petitioner is falling short of the requirements envisaged in General

Note-7 appended to Clause 6(B) of the NIT.

71. Therefore, analysing the documents with reference to the requisite eligibility clause and General Note-7 appended with Clause 6(B) of the

NIT, there remains no room of doubt that eligibility of petitioner is under cloud vis-à-vis this criteria.

72. As regards the experience of second partner of JV namely construction of 2380 KL CWR, Pump House including Pumping Machinery and

other works under Re-organisation of GWSS, Banswara to satisfy the pipeline and Over Head Shortage Reservoir (OHSR) work, suffice it to

observe that nature of work carried out by the second partner is meeting the requirements envisaged in the NIT but the said work was completed

by the second partner of JV on 19.06.2008. This fact is clearly evident from the work experience certificate dated 06.08.2015 placed on record

by the petitioner in response to communication (Annexure-8) issued by the respondents. When this experience certificate is tested on the relevant

criteria more particularly General Note-7 appended to Clause 6(B) of NIT, then there remains no room of doubt that this experience of the second

partner of JV is more than seven years anterior from the date of submission of the tender by the petitioner in literal sense but in substance it is only

a few days anterior to seven years. The lack of experience of the petitioner-JV vis-à-vis the criteria prescribed for experience of work in OHSR

is per se an ambitious plea of the respondents which cannot be countenanced in the backdrop of peculiar facts of the instant case. Indisputably,

when the NIT was issued at the threshold, the last date for submission of tender form was 15.06.2015 and had the procuring entity carried out the

procurement proceedings, obviously, experience of the second partner of JV could have been treated as a valid experience satisfying the criteria. It

is only the postponement of last date of submission of tender form and after issuance of corrigendum that experience certificate of the second

partner of JV has gone anterior to seven years. Law on the subject is not too technical inasmuch as a litigant cannot be allowed to suffer or ill-fated

on account of a fortuitous circumstance. Therefore, to that extent, I am unable to sustain the objection of the respondents and in my view, the

experience of second partner of JV in relation to OHSR cannot be overlooked and deserves credence.

73. After churning out the materials available on record, in my considered opinion, the lead partner of JV has failed to satisfy the eligibility criteria

envisaged under Clause 6(B)(1)(c) of the NIT. The experience shown by the lead partner i.e. one similar completed work costing not less than Rs.

316 crores is not satisfying the requirements envisaged under General Note-7 appended to Clause 6(B) of the NIT. The procuring entity is

manned by technical experts and, therefore, it is not desirable for this Court to substitute its own views. It is trite that Court's power is

circumscribed in relation to technical matters and therefore it would be inappropriate that decisions of technical experts are not to be reviewed or

substituted in exercise of certiorari jurisdiction. The Court's approach in such matters is required to be pragmatic one and not pedantic and purely

idealistic. Thus, in totality, the petitioner-JV has failed to satisfy the test of eligibility criteria and it is not desirable for this Court to interfere with the

decision of technical experts.

F. Violation of Principles of Natural Justice:

74. Taking shelter of principles of natural justice, the petitioner has urged that impugned order is a non-speaking order, therefore, cannot be

sustained. The petitioner has also laid emphasis on the fact that the order impugned has visited it with evil and civil consequences, therefore, in want

of cogent and convincing reasons, the same is vitiated in law. Passing a reasoned order is one facet of principles of natural justice. In order to

appreciate grievance of the petitioner, it is worthwhile to note that tender documents submitted by the petitioner were examined at the pre-

qualification of the bid stage and certain clarifications were sought vide Annexure-8. The issuance of communication (Annexure-8) makes it amply

clear that the respondents have not acted in haste and perfunctory manner. As a matter of fact, after soliciting reply/explanation of the petitioner,

the respondents have passed the impugned order whereby petitioner's technical bid is adjudged as non-responsive. Issuance of communication

(Annexure-8) to the petitioner clearly indicates that the procuring entity has given due credence to Sections 7 & 18 of the Act of 2012 and has

resorted to Section 22 of the Act of 2012. It is also noteworthy that in response to the same, the petitioner has submitted its explanation with the

supporting documents and as such has availed the opportunity to clarify the position or to fulfill the lacunae of desired informations which were not

furnished by it earlier. Therefore, it is rather difficult to comprehend any sort of malice on the part of procuring entity. The argument of the

petitioner in this behalf appears to be quite attractive but not of substance. Moreover, in the entire pleadings, no motive has been imputed against

any officials of the respondents. The element of lack of bona fide by the respondents is conspicuously missing in the considered opinion of this

Court. It may be true that in the order impugned, detailed reasons are not assigned for declaring technical bid of the petitioner non-responsive but

then, the said order cannot be read and construed in isolation to communication (Annexure-8) addressed to the petitioner. Moreover, if the

impugned order is tested on the touchstone of Section 25 of the Act of 2012, I am at loss to say that the same cannot be categorised as infirm or

against the mandatory provisions of the Act of 2012. The object of observance of principles of natural justice is to test the fairness of procedure

adopted by the decision-maker. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals

of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be

complained of. There cannot be two opinions that principles of natural justice are not inflexible and may differ in different circumstances. The

present one is a contractual matter wherein even upon delving deep into the matter, the Court has not been able to find out any unfairness in the

decision making, therefore, by applying the limited scope of judicial review, it is not desirable to overstretch the principles of natural justice. There

is yet another aspect of the matter that when only one conclusion is possible, observance of principles of natural justice can be dispensed with in a

given case. May it be that the impugned order is not a reasoned order but on the basis of materials available on record, it is not possible to draw

an inference that the procuring entity has not examined the tender of the petitioner for declaring its technical bid non-responsive. That apart, in want

of any specific allegation against any of the officers of respondents, the proceedings undertaken by the procuring entity and recording reasons for

issuance of the impugned order cannot be doubted. This aspect also deserves examination on the anvil of lack of eligibility of the petitioner to fulfill

the eligibility criteria in terms of Clause 6(B) (1)(c) of the NIT. Therefore, I am unable to concur with the petitioner that impugned order is vitiated

in want of reasons.

G. Consideration of additional documents:

75. The petitioner has submitted an application for taking additional documents on record after conclusion of final arguments and reserving of the

judgment/order. The learned Additional Advocate General has conceded for taking those documents on record without going into the technicalities

that after conclusion of the arguments when the matter is posted for pronouncement of order, there is no hiatus so as to entertain any application or

document. Therefore, sans technicalities, the Court has made endeavour to examine the documents. The endeavour of the petitioner to place on

record these documents is to persuade this Court that lead partner of petitioner-JV is fulfilling the eligibility criteria. The documents are pertaining to

NIT floated by the Additional Chief Engineer (Project), PHED, Bharatpur. The eligibility criteria prescribed under the NIT issued by the

Additional Chief Engineer (Project), PHED, Bharatpur is different and even otherwise any decision taken by the said authority vis-à-vis lead

partner of petitioner-JV cannot be cited as a precedent. What consideration has prevailed upon the competent authority in that project cannot be

made subject-matter of judicial scrutiny in the instant petitions and these petitions are required to be examined on the basis of material available on

record. Therefore, in totality, the documents tendered by the petitioner by application dated 16.12.2015 are of no avail and consequence.

H. Right of Intervenor:

76. Though this issue is not significant touching merits of the case but the petitioner has addressed on this issue and has also placed reliance on

some of the legal precedents. Therefore, I feel persuaded to examine the rights of an intervenor. Intervenor in legal parlance can be defined as

under:--

An affected party who, with the Court's permission, participates in a lawsuit after its inception by either joining with the plaintiff or uniting with the defendant.

77. There is no quarrel that Court has permitted intervenors to participate in the proceedings with certain riders i.e. not to file pleadings but at the

same time, Court has also observed that the intervenors are not alien to the proceedings. The right of an intervenor in a proceedings cannot be

defined in a strait-jacket formula and such right varies from case to case. Any participant in the procurement proceedings who has qualified the

technical bid to compete for price offer if as an intervenor has dilated on the legal aspect or merits of the case, then in my considered opinion,

Court can examine those arguments subject to the just right of the intervenor. In these two matters, Court has taken utmost care while considering

the arguments of the intervenor and conveniently eschewed the points not canvassed by the petitioner.

I. Conclusion:

78. Finally, taking into account the findings recorded on various issues supra, in my considered opinion, the petitioner has miserably failed to make

out a case for interference within the four corners of parameters and yardsticks set out by the Supreme Court in Tata Cellular's case (supra) and

subsequent other judgments. There is apparently no reason to exercise judicial review in these matters inasmuch as I am unable to find any

arbitrariness, unfairness, illegality, irrationality or Wednesbury unreasonableness in the impugned decision.

79. Before parting, I record my appreciation for the valuable assistance rendered by learned counsels appearing for the parties in the matter.

80. The upshot of above discussion is that both these petitions fail and are hereby dismissed.

81. Costs are made easy.

82. A copy of this order be placed in CWP No. 9186/2015.