A CENTRAL COALFIELDS LIMITED & ANR.

v.

SLL – SML (JOINT VENTURE CONSORTIUM) & ORS.

(Civil Appeal No. 8004 of 2016)

B AUGUST 17, 2016

[MADAN B. LOKUR AND R.K. AGRAWAL, JJ.]

Contract: Bidding process – Terms of NIT – Deviation from, permissibility – Held: Whether a term of NIT is essential or not is a C *decision taken by employer which should be respected – Even if the term is essential, the employer has inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders – However, if the term is held by the employer to be ancillary or subsidiary even that decision should be respected – In the instant case, the employer prescribed a particular format of* D *bank guarantee to be furnished – In such case, bidder ought to have submitted bank guarantee in that particular format only and not in any other format.*

Administrative law: Administrative action – Judicial review, scope – Held: There must be judicial restraint in interfering with E *administrative action – Ordinarily, the soundness of the decision taken by the authority ought not to be questioned but the decision making process can certainly be subject to judicial review.*

Doctrines/Principles: Privilege-of-participation principle – Applicability of.

F **Allowing the appeals, the Court**

HELD: The deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination. It was held in *_Ramana case_ that if other bidders were aware that non-fulfill- G **ment of the eligibility condition would not be a bar for consideration, they too would have submitted a tender but were prevented from doing so due to the eligibility condition. In the instant case, the other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the**

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bank guarantee was not mandatory or that some other terms of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by re-arranging the goalposts, they were denied the privilege of participation. [Paras 36, 38] [899-E, H; 900-A, E]

2. The decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound. [Para 44] [904-A-B]

******Ramana Dayaram Shetty v. International Airport Authority of India* **(1979) 3 SCC 489 : 1979 (3) SCR1014;** *G.J. Fernandez v. State of Karnataka* **(1990) 2 SCC 488 : 1990 (1) SCR 229;** *Tata Cellular v. Union of India* **(1994) 6 SCC 651 : 1994 (2) Suppl. SCR 122;** *Jagdish Mandal v. State of Orissa* **(2007) 14 SCC 517 : 2006 (10) Suppl. SCR 606;** *Michigan Rubber (India) Limited v. State of Karnataka.* **(2012) 8 SCC 216 : 2012 (8) SCR128;** *Nazir Ahmad v. King Emperor* **AIR 1936 PC 253 – relied on.**

Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority **(2013) 10 SCC 95 : 2013 (17) SCR 345 – Distinguished.**

Poddar Steel Corporation v. Ganesh Engineering Works **(1991) 3 SCC 273 : 1991 (2) SCR 696;** *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd.* **(2007) 14 SCC 517 : 2006 (10) Suppl. SCR 606 – referred to.**

Case Law Reference

1991 (2) SCR 696	referred to	Para 25
2013 (17) SCR 345	distinguished	Para 25
1979 (3) SCR 1014	relied on	Para 35
1990 (1) SCR 229	relied on	Para 38
1994 (2) Suppl. SCR 122	relied on	Para 42
2006 (10) Suppl. SCR 606	relied on	Para 42
2006 (10) Suppl. SCR 606	referred to	Para 46
2012 (8) SCR 128	relied on	Para 46
AIR 1936 PC 253	relied on	Para 52

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8004 of 2016.

From the Judgment and Order dated 26.10.2015 of the High Court of Jharkhand at Ranchi in L. P. A. No. 625 of 2015

WITH

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C. A. No. 8005 of 2016.

Mukul Rohatgi, AG, Jagdeep Dhankhar, Dhruv Mehta, Dr. A. M. Singhvi, Sr. Advs., Rajiv S. Roy, Avrojyoti Chatterjee, Abhijit S. Roy, Aditya Mehrotra, Pranab Kumar Mullick, M. R. Sukumar, M. Chandola,
C Rajesh Kumar, Ananya Kumar, Divyam Agarwal, Ms. Sneha Sheth, Akhil Bhardwaj, M. C. Dhingra, Kaushik Poddar, Deepak Sabharwal, Chandra Shekhar Biswas, Advs. for the appearing parties.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The first appeal is that of the Central
D Coalfields Limited. The first respondent in the appeal is SLL–SML a Joint Venture Consortium whose bid in response to a Notice Inviting Tender issued by the Central Coalfields Limited was rejected.

2. The second appeal is by PLR-RPL-SMASL a Joint Venture whose bid was the lowest in response to the same Notice Inviting Tender
E issued by the Central Coalfields Limited and that bid was accepted.

3. Both the Central Coalfields Limited and PLR-RPL-SMASL are aggrieved by judgment and order dated 26th October, 2015 passed by the Division Bench of the Jharkhand High Court whereby the rejection of the bid of SLL-SML by Central Coalfields Limited was set aside.

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4. The question for our consideration is generally whether furnishing a bank guarantee in the format prescribed in the bid documents is an essential requirement in the bidding process of the Central Coalfields Limited and specifically whether a bid not accompanied by a bank guarantee in the format prescribed in the bid documents of the Central
G Coalfields Limited could be treated as non-responsive in view of Clause 15.2 of the General Terms and Conditions governing the bidding process. The answer to the general and the specific question is in the affirmative.

The facts

5. On 5th August, 2015 the Central Coalfields Limited (for short

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CCL) issued a Notification Inviting Tenders (for short NIT). The name of the work was: "Out sourcing for Overburden Removal (1050.00 L. CuM) and Coal Extraction (975.00 L. Te) and transportation by deploying surface miner at Ashok OCP, Piparwar Area for a period of 8 years." A

6. The notice mentioned that for details of the NIT and online submissions, an interested person could visit https://eps.buyjunction.in. B

7. On a visit to the aforesaid website, details of the e-tender were made available including further details of the work. It was stated that tenders could be submitted by experienced contractors having a Digital Signature Certificate issued from any agency authorized by the Controller of Certifying Authority, Government of India. This is being mentioned because anybody having a Digital Signature Certificate cannot be computer illiterate. C

8. Clause 3 of the e-tender carried the heading "Deposit of EMD" and the relevant portion of this reads as follows:

> "Earnest Money can be deposited in the form of Demand Draft (DD)/Banker's Cheque (BC)/Banker's payorder (BPO) from any scheduled Bank drawn in favour of "Central Coalfields Limited" payable at "Ranchi". D
>
> EMD can also be deposited in the form of irrevocable Bank Guarantee (BG) from any scheduled Bank in the format given in the bid document. Bank guarantee issued by outstation bank shall be operative at their local branch i.e. at Ranchi. The validity of such BG should be minimum 90 days beyond the validity of the bid. BG shall be acceptable only when value of Earnest money (EMD) exceeds Rs. 5.00 Lakhs." E F

9. What is of significance from the above is that the earnest money deposit was required to be made in the form of an irrevocable bank guarantee from any scheduled bank "in the format given in the bid document".

10. Clause 4 of the e-tender mentioned that for a clarification of the bid, a bidder may seek clarification on-line from the Service Provider M/s mjunction services limited whose address, contact person and email were given in the document. G

11. The General Terms and Conditions (for short GTC) for the NIT were also made available to a visitor and prospective bidder on the H

website. The GTC bore the heading "Governing Hiring of Equipment for removal of Overburden, Extraction of Coal, Transportation and loading in Areas of Central Coalfields Limited".

12. In paragraph 11 of the GTC it was specifically mentioned that the bid security of earnest money was required to be deposited in the appropriate form and in paragraph 15.2 thereof it was specifically stated that any bid not accompanied by an acceptable bid security/earnest money deposit shall be rejected as non-responsive.

13. According to CCL it received 11 bids in response to the e-tender including that of SLL–SML a Joint Venture Consortium (for short JVC). One of the bids was apparently rejected. Nine of the bidders submitted a bank guarantee strictly in accordance with the *pro forma* provided in the GTC. A bank guarantee was provided by JVC - not in the prescribed *pro forma* but in another format in respect of some other contract provided in the GTC of which bore the heading "Governing Contractual Transportation & Loading in Areas of Central Coalfields Limited".

14. Under the circumstances, an email was sent on behalf of CCL on 11th September, 2015 to JVC rejecting its bid on the ground that the documents were incomplete. JVC was informed that it would not be allowed to participate in the price bid opening.

15. In response, JVC sent an email on 15th September, 2015 to CCL that all documents as prescribed under the NIT had been submitted. Therefore, JVC was unable to understand the reason for rejection of its bid. The email was replied to on behalf of CCL on the same day in which it was stated that the bid given by JVC was cancelled as the bank guarantee submitted was not in the format given in the NIT read with the GTC.

Proceedings before the learned Single Judge

16. Feeling aggrieved by the rejection of its bid and CCL's response, JVC preferred a writ petition in the Jharkhand High Court being W.P (C) No.4559 of 2015. By a judgment and order dated 7th October, 2015 a learned Single Judge of the High Court dismissed the writ petition.

17. Before the learned Single Judge two submissions were made on behalf of JVC. They were:

(i) The NIT did not prescribe a format for the bank guarantee.

Moreover, the bank guarantee *pro forma* for earnest money deposit/bid security in the GTC is almost similar to the bank guarantee furnished by JVC and therefore, its bid was wrongly rejected by CCL.

(ii) The bank guarantee format and the condition in Clause 3 in the e-tender mandated that the bank guarantee should be irrevocable and payable at Ranchi and the minimum validity period should be beyond 90 days. These conditions were met by JVC.

18. It was also contended that not only was the bank guarantee in conformity with the basic requirements but that its terms were stricter than the bank guarantee prescribed by CCL. It was further contended that in any event furnishing a bank guarantee in the prescribed format was a non-essential condition of the contract and therefore the rejection of JVC's bid only on the ground that the bank guarantee was not in the prescribed format was arbitrary and unreasonable.

19. The learned Single Judge considered the submissions of JVC and concluded that furnishing a bank guarantee in a different format other than the one prescribed would cause multiple problems and this was certainly not advisable.

20. It was also held by the learned Single Judge that it was necessary to adhere to the strict terms of the NIT as well as the prescribed format for the bank guarantee.

21. With regard to the contention that the NIT did not prescribe any format, the learned Single Judge was of the view that if JVC had any doubt in this regard it should have sought a clarification as mentioned in the NIT. Since JVC did not do so, it was too late in the day to raise an objection about any doubt relating to the format of the bank guarantee.

22. Considering all the submissions of JVC, the learned Single Judge held that there was sufficient reason to dismiss the writ petition.

23. Feeling aggrieved, JVC preferred a Letters Patent Appeal before the Division Bench of the High Court being L.P.A. No. 625 of 2015. By the impugned judgment and order dated 26th October, 2015 the Division Bench of the Jharkhand High Court allowed the appeal.

Proceedings before the Division Bench

24. It was contended by JVC before the Division Bench that the NIT is ambiguous and that there was no clarity with regard to the format

A in which the bank guarantee was required to be furnished. Additionally, it was contended that in any event there was substantial compliance with the essential terms of the bank guarantee as required by CCL. In this regard, it was submitted that there were five requirements for the bank guarantee to be acceptable to CCL and JVC met all these requirements. The requirements, as submitted by JVC in the High Court were:

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(a)The bank guarantee should be irrevocable.

(b)The bank guarantee should be from any scheduled bank.

(c)The bank guarantee should be payable at the local branch of the issuing bank, that is at Ranchi.

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(d)The validity of the bank guarantee should be minimum 90 days beyond the validity of the bid.

(e)The bank guarantee shall be acceptable only when value of Earnest Money Deposit exceeds Rs. 5 lakhs.

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25. The High Court concluded, reversing the view of the learned Single Judge that the submission of the bank guarantee in the prescribed format was a non-essential term of the NIT. Reliance was placed by the High Court on ***Poddar Steel Corporation v. Ganesh Engineering Works***[1] and ***Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority***[2] to conclude that since the submission of the bank guarantee in the prescribed format was a non-essential term of the NIT, the bid of JVC ought to be entertained.

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26. Additionally, it was held that since there was substantial compliance with the requirement of the bank guarantee being in the format prescribed by CCL, the rejection of JVC's bid was unjustified. This was more so since the bank guarantee furnished by JVC had stricter terms than the bank guarantee in the form prescribed by CCL.

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27. In view of the above considerations, the High Court was of opinion that the learned Single Judge had erred in dismissing the writ petition filed by JVC. The High Court also quashed the communications sent by CCL rejecting the bid of JVC and permitted it to participate in the reverse bidding process.

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[1] (1991) 3 SCC 273

H [2] (2013) 10 SCC 95

28. It is under these circumstances that the present appeals have been filed before us. A

Discussion

29. What is extraordinary about this case is that the employer, that is CCL, seeks to adhere to the terms of the NIT and the GTC issued by it, but the submission of JVC is that CCL should actually deviate from the terms of these documents so as to benefit JVC. Indeed, in spite of a specific requirement that the bank guarantee should be submitted in the prescribed format, JVC claims an entitlement to a deviation in this regard on the ground that the prescribed format was a non-essential term of the NIT and the GTC. Who is to decide this issue of essentiality? Does CCL with whom the contract has to be entered into by the successful bidder have no say in the matter? Before adverting to this, it is necessary to get clarity on some circumstances. B C

30. The first and the foremost aspect of the case that must be appreciated is that, as mentioned above, JVC was certainly not computer illiterate. Like every bidder, it was required to have a Digital Signature Certificate which clearly indicates that any bidder (including JVC) had some degree of comfort with e-tenders and the use of computers for bidding in an e-tender. It is this familiarity that enabled JVC to access the "incorrect" format of a bank guarantee. Under these circumstances, it is extremely odd that JVC was not able to access the correct and prescribed format of the bank guarantee. The excuse given by JVC that the NIT was vague and that it was not clear which was the prescribed format of the bank guarantee appears to be nothing but a bogey. A simple reading of the GTC and the terms of the bank guarantee would have been enough to indicate the correct prescribed format and the "incorrect" format. D E F

31. Secondly, the heading mentioned in both the GTCs was different. The correct GTC bore the heading "Governing Hiring of Equipment for removal of Overburden, Extraction of Coal, Transportation and loading in Areas of Central Coalfields Limited" while the not relevant GTC bore the heading "Governing Contractual Transportation & Loading in Areas of Central Coalfields Limited". There is a substantial difference between the two GTCs and anyone bidding for the work "Out sourcing for Overburden Removal (1050.00 L. CuM) and Coal Extraction (975.00 L. Te) and transportation by deploying surface miner at Ashok OCP, G H

A Piparwar Area for a period of 8 years" could immediately see which GTC is relevant and which is not.

32. In this context and thirdly, it is important to note that if JVC had any doubt with regard to the format of the bank guarantee to be furnished, it could have and ought to have sought a clarification from the concerned B authority as mentioned in the NIT. Moreover, JVC could have and ought to have at least made a representation to CCL that the prescribed format for the bank guarantee was either not available or that the NIT was ambiguous or that it lacked clarity with regard to the prescribed format of the bank guarantee. JVC neither sought any clarification nor did it make any representation to CCL. It is difficult to understand the C conduct of JVC in the situation presented before us, particularly with reference to a contract for about Rs. 2000 crores for eight years.

33. We were informed by the learned Attorney General that 9 of the 11 bidders furnished a bank guarantee in the prescribed and correct format. Under these circumstances, even after stretching our credulity, D it is extremely difficult to understand why JVC was unable to access the prescribed format for the bank guarantee or furnish a bank guarantee in the prescribed format when every other bidder could do so or why it could not seek a clarification or why it could not represent against any perceived ambiguity. The objection and the conduct of JVC regarding E the prescribed format of the bank guarantee or a supposed ambiguity in the NIT does not appear to be fully above board.

34. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of the NIT and the GTC prescribed by it while dealing with bids furnished by participants in F the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

35. In ***Ramana Dayaram Shetty v. International Airport G Authority of India***[3] this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

"It is a well-settled rule of interpretation applicable alike to

H [3] (1979) 3 SCC 489

documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable." A B C

In that case, the expression "registered IInd Class hotelier" was recognized as being inapt and perhaps ungrammatical; nevertheless common sense was not offended in describing a person running a registered II grade hotel as a registered II Class hotelier. Despite this construction in its favour, respondents 4 in that case were held to be factually ineligible to participate in the bidding process. D

36. It was further held that if others (such as the appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of respondents 4. This resulted in unequal treatment in favour of respondents 4 – treatment that was constitutionally impermissible. Expounding on this, it was held: E

"It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle **it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.**" (Emphasis given) F G

Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or H

A that some other term(s) of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by re-arranging the goalposts, they were denied the "privilege" of participation.

37. For JVC to say that its bank guarantee was in terms stricter B than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinize every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be re-arranged or asked to be re-arranged during the bidding process to affect the right of some or deny C a privilege to some.

38. In ***G.J. Fernandez v. State of Karnataka***[4] both the principles laid down in ***Ramana Dayaram Shetty*** were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party D approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable." Therefore, deviation from E the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in the ***Ramana Dayaram Shetty*** sense.

39. ***Poddar Steel*** was a rather interesting case and added a new dimension to the discourse. The decision of the Allahabad High Court F records that the relevant clause in the NIT gave the bidder the option of depositing the earnest money in cash or by a "demand draft drawn on DLW Branch of SBI in favour of Assistant Chief Cashier, DLW/-Varanasi."[5] As many as 21 parties had responded to the NIT, but 8 of them had not deposited any earnest money at all and the remaining 13 bidders had "deposited the earnest money by one mode or the other but G not necessarily in the manner provided in the NIT except perhaps a few." The Tender Committee deviated from the terms of the NIT and considered the bids of these 13 bidders and accepted the bid of Poddar

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[4] (1990) 2 SCC 488

H [5] Ganesh Engineering Works v. Union of India and others, 1990 All. LJ 1140

Steel, who had given the earnest money not by cash or a demand draft but by "a loose cheque drawn on its C/D account in the Union Bank of India, Sonarpura, Varanasi." On the issue of discriminatory treatment, the contention of the employer was that since all the 13 bidders who had made the earnest money deposit were treated equally, there was no issue of any discriminatory treatment.

40. However, the High Court took the view, following ***Ramana Dayaram Shetty*** and the privilege-of-participation principle, that it was possible that if those who did not deposit any earnest money had known that a crossed cheque (drawn on a bank other than SBI) towards earnest money was acceptable to the employer, they too could have been in the fray. Under these circumstances, the High Court held that excluding them from competition, through this unannounced deviation affecting bidders and potential bidders alike, rendered the bidding process unfair. The High Court introduced an "essential term" concept and held that the clause in the NIT relating to deposit of earnest money was an essential term thereof and could not be deviated from. The Allahabad High Court held:

> "The mere fact that all the tenderers who had deposited the earnest money, whether in terms of Clause 6 or not had been treated alike cannot make any difference. It is quite possible to visualise that the parties who had failed to deposit the earnest money may also have been in the fray had they known that earnest money through cheque was also acceptable. Thus they have obviously been deprived from competing with others and this makes the action of Respondents 1 to 5 unfair when condition No. 6 of the NIT so specifically points out that deposit of earnest money in any other mode except in cash or by demand draft would not be acceptable. It leads us to think that this was an essential precondition for submitting tenders and the Respondents were not entitled to deviate from this. All tenders which were not accompanied by deposit of earnest money strictly in the manner indicated in the NIT deserved to be rejected. We reject the contention of the Respondents that the earnest money could be accepted even when it was deposited by some mode other than those in NIT. We also hold that Clause 6 of NIT is not merely ancillary or subordinate condition but in view of the language in which is couched the same was a crucial and essential terms of the tender which could not be deviated from."

41. In appeal, this Court accepted the theory of essential and non-essential or ancillary or subsidiary terms of an NIT. It was held that the cheque of the Union Bank of India issued by Poddar Steel (though a deviation from the terms of the NIT) was sufficient for meeting the conditions of the NIT, the condition being ancillary or subsidiary to the main object to be achieved by the condition and that the employer could waive the "technical literal compliance" of the earnest money clause of the NIT "specially when it was in its interest not to reject the said bid which was the highest." In other words, this Court concluded that an essential term of the tender document could not be deviated from but an ancillary or subsidiary or non-essential term could be deviated from, and that the deviation could be without any reference to potential bidders.

42. Unfortunately, this Court did not at all advert to the privilege-of-participation principle laid down in ***Ramana Dayaram Shetty*** and accepted in ***G J. Fernandez***. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in ***Poddar Steel***.

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in ***Tata Cellular v. Union of India***[6] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, *mala fide* or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following ***Tata Cellular***) in ***Jagdish Mandal v. State of Orissa***[7] in the following words:

> "Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made

[6] (1994) 6 SCC 651

[7] (2007) 14 SCC 517

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

This Court then laid down the questions that ought to be asked in such a situation. It was said:

"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."

A 44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

B 45. ***Rashmi Metaliks*** was a comparatively different case inasmuch as clause (j) of the NIT was the subject matter of consideration. This clause required a bidder to submit "Valid PAN No., VAT No., copy of acknowledgment of latest income tax return and professional tax return." The employer interpreted this to be an essential term for qualifying in the bidding process. This view was upheld by a learned Single Judge C and the Division Bench of the Calcutta High Court. This Court reversed in the following words:

> "We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was D attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to E the notice of the appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different."

Essentially therefore, this Court substituted its view for that of the employer who interpreted this term of the NIT to be mandatory for F compliance. ***Rashmi Metaliks*** followed ***Poddar Steel*** and apparently overlooked the dictum laid down in ***Ramana Dayaram Shetty***, ***G. J. Fernandez***, ***Tata Cellular*** and ***Jagdish Mandal*** and must be confined to its own peculiar facts. In any event, this decision does not advance the case of any of the parties before us.

G 46. It is true that in ***Poddar Steel*** and in ***Rashmi Metaliks*** a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in ***Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd.***[8] through a reference made

H [8] 2016 (7) SCALE 425

to ***Poddar Steel***. In that case, this Court held a particular term of the NIT as essential (confirming the view of the employer) and also referred to the "admonition" given in ***Jagdish Mandal*** followed in ***Michigan Rubber (India) Limited v. State of Karnataka***.[9] Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in ***Ramana Dayaram Shetty*** the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in ***Tata Cellular*** there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or *mala fide* or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in ***Jagdish Mandal*** followed in ***Michigan Rubber***.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in ***Ramana Dayaram Shetty***. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the Courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby re-write the arrangement, it could lead to all sorts of problems including the one that we are grappling with.

[9] (2012) 8 SCC 216

A For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any Bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive." Surely, CCL *ex facie* intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the B GTC. From the point of view of CCL the GTC has been impermissibly re-written by the High Court.

50. Yet another problem could be faced by an employer (such as CCL) if the language used in the terms of the NIT or the GTC is not adhered to and its plain meaning discarded. A problem could be faced by C an employer if every bidder furnishes a bank guarantee in a different format or one that it is comfortable with. In such a situation, CCL would have to scrutinize each bank guarantee to ascertain whether it meets with its requirements and the NIT and the GTC. Apart from the text of the bank guarantee, minor changes could be made by a bidder such as D enforceability in a place other than Ranchi (but in Jharkhand) etc. This would place an avoidable and undue burden on the employer particularly if there are a large number of bidders.

51. Not only this, any decision taken by the employer in accepting or rejecting a particular bank guarantee in a format not prescribed by it E could lead to (avoidable) litigation requiring the employer to justify the rejection or acceptance of each bank guarantee. This is hardly conducive to a smooth and hassle-free bidding process.

52. There is a wholesome principle that the Courts have been following for a very long time and which was articulated in ***Nazir Ahmad v. King Emperor***[10] namely "Where a power is given to do a certain F thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." There is no valid reason to give up this salutary principle or not to apply it *mutatis mutandis* to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading G up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in ***Nazir Ahmed*** that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that

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H [10] AIR 1936 PC 253

particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

53. ***Nazir Ahmed*** has been followed in dozens of decisions rendered by this Court and by other constitutional Courts in the country. The Central Vigilance Commission has accepted this principle in a modified form as a guiding principle in its circular dated 31st December, 2007 wherein it is mentioned that all organizations ought to evolve a procedure for acceptance of bank guarantees that is compatible with the guidelines of banks and the Reserve Bank of India. One such requirement is that the bank guarantee should be in a proper prescribed format and should be verified verbatim on receipt with the original. Adherence to this principle of verbatim verification would not only avoid undue problems for the employer but would also virtually eliminate subjectivity on the part of the employer.

54. In this context, and in the present times, it is important to note that the World Bank has ranked India extremely low in matters relating to enforcement of contracts and ease of doing business. Out of 189 countries worldwide, India is ranked 178 in the matter of enforcement of contracts and 130 in the matter of ease of doing business[11]. One of the possible reasons for this extremely low ranking given to our country is the failure of all parties concerned in strictly adhering to the terms of documents such as the NIT and the GTC. In so far as the present case is concerned, the NIT was floated on 5th August, 2015 and one year later, we are still struggling with the issue of acceptance of a bank guarantee for a contract of about Rs. 2000 crores – certainly not a small sum.

Conclusion

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

[11] www.doingbusiness.org/rankings (World Bank Group)

A 56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever.

57. The impugned judgment and order passed by the Division Bench of the Jharkhand High Court is accordingly set aside and these appeals are allowed.

C Devika Gujral Appeals allowed.