

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF APRIL, 2024

PRESENT

THE HON'BLE MR. N.V. ANJARIA, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE KRISHNA S DIXIT

WRIT APPEAL NO.381 OF 2024 (GM-RES)

BETWEEN:

LARSEN AND TOUBRO LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF
COMPANIES ACT, 2013
BEARING CIN: L99999MH1946PLC004768
HAVING REGISTERED ADDRESS AT
L&T HOUSE
N.M. MARG, BALLARD ESTATE
MUMBAI - 400 001
REPRESENTED MR. SURESHKUMAR S.

... APPELLANT

(BY SRI UDAYA HOLLA, SENIOR ADVOCATE A/W
SRI LOMESH KIRAN N, ADVOCATE &
MS. SAMHITA MEHRA, ADVCOATE)

AND:

1. KARNATAKA POWER CORPORATION LIMITED
A GOVERNMENT OF KARNATAKA ENTERPRISE
HAVING ITS ADDRESS AT
NO.3, 1ST FLOOR
GREEN BUILDING
DRUG CONTROLLER DEPARTMENT PREMISE



PALACE ROAD
BENGALURU - 560 001
EMAIL - ccedbng@gmail.com

2. M/S MEGHA ENGINEERING AND
INFRASTRUCTURES LIMITED,
HAVING ITS REGISTERED OFFICE AT S-2
TECHNOCRAT INDUSTRIAL ESTATE
BALANGAR
HYDERABAD - 500 037
HAVING ITS REGIONAL OFFICE AT
10, 3RD MAIN ROAD
GD PARK EXTENSION, WARD NO.5
KODHADRAPURAM
BANGALORE - 560 003

... RESPONDENTS

(BY SRI SHASHI KIRAN SHETTY, ADVOCATE GENERAL /
SENIOR ADVOCATE A/W
SRI AJAY J.N., ADVOCATE FOR C/R-1,
SRI K.G. RAGHAVAN, SENIOR ADVOCATE &
SRI K. VIVEK REDDY, SENIOR ADVOCATE A/W
SRI AJAY, ADVOCATE &
SRI VARDHAN REDDY, ADVOCATE FOR R-2)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE
KARNATAKA HIGH COURT ACT, 1961, PRAYING TO SET ASIDE
THE ORDER DATED 06TH MARCH 2024 PASSED IN WRIT PETITION
No.5304/2024 PASSED BY THE LEARNED SINGLE JUDGE OF THIS
HON'BLE COURT AND ETC.

THIS WRIT APPEAL HAVING BEEN HEARD AND RESERVED,
COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY,
CHIEF JUSTICE DELIVERED THE FOLLOWING:

JUDGMENT

Whether an intending bidder could ask and insist that he should be allowed a particular timeline to submit his bid; whether in the facts and circumstances of the case, the appellant-bidder could have any right to call in question the condition in the tender regarding the time period within which the bid-offer was required to be submitted; whether there exists in law any right such as right to bid in particular way and whether the condition in the tender prescribing the time period for submission of the bid would fall within the breath of judicial review by the court – are few of the questions of the kind and nature, that have arisen for consideration in this appeal.

The Challenge

02. Preferred under Section 4 of Karnataka High Court Act, 1961 by the original petitioner, the challenge in this writ appeal is addressed to the judgment and order dated 6th March 2024 of learned Single Judge whereby the petition came to be dismissed, and the

Tender Inviting Authority was permitted to take the tender to its logical conclusion.

2.1 In the writ petition filed by the appellant-petitioner under Article 226 of the Constitution, it was prayed to declare that the last date for submission of bid document stipulated to be 23rd February 2024 in the Notice Inviting Tender as modified by the corrigendum dated 17th February 2024 was unreasonable, arbitrary and violative of Article 14 of the Constitution. A direction was sought for against the respondent No.1-Karnataka Power Corporation Limited to revise, amend and modify the said condition in the Notice Inviting Tender (NIT). It was further prayed to direct the Tender Inviting Authority to provide the last date and time for submission of bid documents as 3rd May 2024 upto 17.30 hours or such other date the court may deem appropriate.

2.2 The condition by which the petitioner company was aggrieved was in Clause 17 at page 10 of volume I, part-I of the NIT dated 2nd February 2024, as modified in the Corrigendum. It provided twenty one days time for the prospective bidders to submit

their offers. The case of the petitioner in nutshell was that having regard to the size, volume and nature of the tender work, period of 21 days was too short.

Basic Facts

03. Noticing the facts, on 7th January 2024, that the respondent-Karnataka Power Corporation Limited (hereinafter referred to as 'Corporation') published a draft Notice Inviting Tender for the Sharavathy Pumped Storage Project. Suggestions were invited from the prospective bidders. The tender was floated on 2nd February 2024. The tender was in respect of "Sharavathy Pumped Storage Hydro Electric Project (8x250mw) Upper Dam (Shimoga) and Lower Dam (Uttara Kannada) District, Karnataka".

3.1 The tender work was described as "Design, Engineering, Manufacturing, testing at manufacturer's works before dispatch, Supply, transportation, storage at site, intra-site transportation, 10 insurance (transit, storage cum erection testing & commissioning), erection, testing and commissioning of 8 nos. Vertical Francis Reversible Pump-Turbines and synchronous Motor-Generator sets

each of 250MW capacity along with all associated auxiliary and ancillary equipment, 420KV GIS, Pothead yard & Power evacuation Structures including civil works and hydro-mechanical works of Sharavathy Pumped Storage Project on EPC (TURN KEY) basis at Upper dam (Shimoga) & Lower dam (Uttara Kannada) District, Karnataka”.

3.1.1 The project was estimated to be value of Rs.8005 crore to be completed within the contract period of five years. Admittedly, the project involved the civil work combined with electro-mechanical and hydro-mechanical works. It was the common case that in view of the specialised technical work of electro-mechanical (E&M) and hydro-mechanical (HM) which was inseparable part of the project execution, the bidder would have required a tie-up and Memorandum of Understanding (MoU) executed with expert-player in the field as a part of capacity building for becoming successful bidder. It was to be completed on turn-key basis. The project was a decade long dream. It is conceived to be the largest pumped storage project to be tendered in India.

3.1.2 In the tender, it was initially stipulated in Clause 17, volume-I, part-I, that the time for submission of bids was upto 21st February 2024, which deadline was revised in the Corrigendum dated 23rd February 2024, as a result of which, total time of twenty one days was given, extending by two days to submit the bids. As per the time schedule of the tender process, NIT was issued on 2nd February 2024, submission of bid initially stipulated was 21st February 2024, which was revised to 23rd February 2024 in the Corrigendum, as stated above. The pre-bid meeting was held on 14th February 2024. The answers to bidders' queries were published by the respondent on 17th February 2024. The petition came to be filed on 20th February 2024.

Case Pleaded

3.2 It was the case of the petitioner *inter alia* that the project was complex and highly technical comprised of civil, electro-mechanical and hydro-mechanical works of specialized nature and that in view the scope and complexity of the project, the timeline of twenty one days provided for bid submission was insufficient.

According to the petitioner, such short period was restrictive in nature and stifling for the competition. As per the case of the petitioner, the condition was arbitrary and it would prevent the capable and reputed bidders from participating in the tender process, to result into sub-optimal bid.

3.2.1 It was the petitioner's case that after the draft Notice Inviting Tender received on 9th January 2024, it had raised objections by e-mail dated 17th January 2024, to tell the Tender Inviting Authority that the period made available for submission of bids was short, and that minimum ninety days were needed for preparation of the bid. On 5th February 2024, stated the petitioner, it addressed a letter to the respondent again emphasizing that the condition in question was unjustified and it was suggested in the said communication that minimum period of 120 days was necessary to be provided for the project of such magnitude. No response was received, said the petitioner.

3.2.2 It was the further case that a pre-bid meeting was held on 14th February 2024, in which also, though the issue was

considered, extension of only two days was granted by way of Corrigendum. The last date for submission of the bid was made as 23rd February 2024. It was stated that such facts and circumstances, gave cause of action to the appellant-petitioner to approach this Court by filing writ petition.

3.2.3 The appellant-petitioner stated that it is a public listed Company under the Companies Act, 2013 and a reputed Indian multinational conglomerate operating worldwide, carrying on business in engineering, construction, manufacturing, technology and financial services, it was claimed that the petitioner had completed successful projects of public importance. It was stated by the petitioner that as the project involved electro-mechanical and hydro-mechanical work also, in addition to the civil works, and that since the petitioner-company was predominant in civil work, it was required to have a tie-up with the expert agency who could execute along with the petitioner the electro-mechanical and hydro-mechanical part of the project work.

3.2.4 The appellant stated in the following averments in paragraph 23 of the petition that without such tie-ups, it was not possible to execute the project work,

“The Respondent has taken *bona fide* efforts to endeavour to submit the Techno-Commercial Bid within the grossly inadequate timeline stipulated in the NIT. However, the scope of work set out in the NIT requires both civil works and electromechanical (E&M) and hydromechanical (HM) works to be carried out on a turnkey basis. There are two separate service lines, viz., civil works on the one part and E&M and HM works on the other.”

3.2.5 The appellant-petitioner would need expert collaboration, it was added,

“As such, a civil contractor (such as the petitioner as well as other capable and competent bidders) would be required to avail the services of and partner with an E&M company to be able to carry out the complete scope of work contemplated in the NIT. Since the project is to be completed on a turnkey basis, without getting a firm techno-commercial offer from E&M agencies, an EPC would not be in a position to submit its bid. Accordingly, a tie-up with and relevant inputs from an E&M company willing to take on the

project would be required for a bidder to be able to submit a complaint bid.”

3.2.6 In the writ petition, the appellant-petitioner highlighted the terms and conditions of the tender to reiterate that infeasible and unreasonable condition regarding timeline to submit the bid would prevent the petitioner from participating in the tender process. The petitioner, in paragraph 15 of the petition, detailed the different time-slots such as for site survey, preferring design of the civil components, negotiating with electro-mechanical (E&M) manufacturers and hydro-mechanical (HM) agencies, which were required to be given according to it.

3.2.7 It was further averred that a report was prepared by M/s. WAPCOS by conducting investigative studies from January 2018 to October 2020. The WAPCOS is a Government of India Undertaking under the Ministry of Jal Shakti. After analysis, the report was submitted to the respondent in November 2021. It was the case that despite that survey, several key stretches remained unexplored, and that the report was made available belatedly,

therefore, the bidder would require to independently carry out geo-technical study of the site, which also would be time consuming.

3.2.8 It was the contention raised that the mandatory requirement in Rule 17 of the Karnataka Transparency in Public Procurement Rules, 2000, was given a go-by.

Stand of Respondent-Corporation

3.3 In reply-cum-statement of objections filed by respondent-Corporation, it was, *inter alia*, contended that case of the petitioner about insufficient time period was entirely misplaced and not believable inasmuch as, immediately upon the draft tender notification was issued on 09.01.2024, the representative of the petitioner one Mr.Srinivas visited the office of the Corporation several times from 18.01.2024. He started collecting information about the proposed tender work. It was stated that the said person met the engineering team and had a detailed discussions on 23.01.2024 and 24.01.2024 in relation to the geotechnical investigation.

3.3.1 The said representative of the petitioner company requested for permission for a site visit, and that the respondent arranged for the same. It was stated that the proposed pump storage plant was located in the interiors of the Western Ghats for which special permission was required to be obtained, which permission was arranged for the petitioner's representative. He visited the area on 01.02.2024 and 02.02.2024. The said factual averments were fortified by the production of copy of visitor's pass on record.

3.3.2 It was next contended that in addition to the said visit, the representative of the petitioner was recommended also to visit the Varahi Power Station which was also an underground power station, 70 kms. away from the proposed plan, whereat similar site conditions prevailed. The respondent contended that this was suggested to the petitioner so that it could have better understanding of the entire geotechnical aspects. It was thus, contended that in view of the above, the petitioner could not have taken a stance that it was taken by surprise on 02.02.2024 when the Notice Inviting Tender

was issued to know that insufficient time was granted for submitting the bid.

3.3.3 The case that about 90 to 120 days would be needed for submitting the bid for the project as the petitioner was required to carry out geotechnical investigation, was refuted by stating that it was not possible for any person to carry out any kind of survey in the Western Ghats without obtaining forest approvals and other approvals from the competent authorities. The entire case was erected on a false premise, it was seriously contended. The Corporation further stated that it had obtained a detailed project report regarding geotechnical investigation prepared by a Government of India Undertaking - WAPCOS Limited. The investigations were carried out in consultation with the Geological Survey of India and detailed specifications were provided, the Corporation stated, and that it was these specifications were sufficient data for the purpose of preparation of the bid. Respondent-Corporation further stated that the petitioner was

furnished the report prepared by WAPCOS Limited which contained the entire geotechnical investigations.

3.3.4 It was further contended by referring to the technical specifications in the tender document that the geotechnical investigation and services were part of the tender work itself, therefore only the person to whom the tender is awarded, would have to carry out such additional geotechnical investigations. In other words, it was contended that such investigations were to be the post-award exercise, and not the pre-award engagement. It was next pointed out that the appellant-petitioner had insufficient time to engage a partner for electro-mechanical works, was only a time passing stand, for which the petitioner went on sending self-serving emails of no consequences.

3.3.6 It was then contended that averments by the petitioner about the time to be consumed in the discussion to be conducted with foreign buyers and expert agencies in relation to the electro-mechanical works and hydro-mechanical contract was not well-founded as the petitioner had carried out similar works and could

have acted to obtain quotations from such parties for the project. It was stated that it was not unique project as the petitioner sought to self-servingly make out. The case of the petitioner was denied that the project tender consolidation of all project components was a single EPC contract was a departure from previous project. It was contended that there were four to five E&M players operating in the country including TOSHIBA and with any of them, the petitioner could have entered into a tie-up contract.

3.3.7 The contention that the time limit prescribed under Rule 17(2) of the Rules was violated, was denied by submitting that under sub-Rule (2), the reasons were given by the authority superior to the Tender Inviting Authority which were valid reasons to curtail the period.

3.3.8 During the hearing of the appeal, respondent-Corporation placed on record a copy of the status of the wildlife and forest clearance showing that such clearances were granted.

Aspects Weighed with Learned Single Judge

3.4 In considering the controversy and dismissing the petition, two grounds found favour with learned Single Judge, firstly there was compliance of Rule 17 of the Rules, and secondly the petitioner having not participated in the tender, could not seek the prayers. On the basis of the Note of the respondents on the files, which was elaborately considered by learned Single Judge, he found that reasons were recorded under Rule 17(2) of the Rules to provide the time for submission of bids for less than thirty days.

3.4.1 The second part of the reasoning applied by learned Single Judge not to grant relief to the petitioner was that the petitioner was one who did not participate in the tender process. It was held that once the petitioner sat outside the tender process by not participating, it cannot challenge any clause of the tender. Learned Single Judge relied on decision of the Supreme Court in **National Highways Authority of India vs. Gwalior-Jhansi Express Ltd. [2018 (8) SCC 243]** to emphasize the proposition that a tenderer who had not participated, cannot question the tender, observing

with reference to facts of the instant case, “all that cannot be entertained at the instance of a tenderer who does not participate in the tender, stays outside and wants to throw a spanner into the spoke of the tender”.

3.5 At this stage, it may be stated that when the judgment and order of learned Single Judge was brought under challenge in this writ appeal and when the appeal came up before the court for the first time on 11th March 2024, the same was not accompanied by the copy of the judgment and order impugned, and that the court did not have the benefit of the judgment of learned Single Judge. Since copy of the judgment was awaited, an order to ensure that either party is not prejudiced and both the sides would have opportunity to contend their respective case on merits, order was passed on 11th March 2024 and the arrangement operated during the currency of the writ petition was ordered to be continued and the parties were directed to maintain *status quo*, till the next date of posting. In course of consideration of the writ petition, by order dated 20th February 2024, learned Single Judge had directed to defer

the opening of the technical bids which were slated for 26th February 2024 and the said order was extended on 26th February 2024, 1st March 2024 and 4th March 2024.

3.6 Learned counsel appearing for both the sides canvassed their contentions in the writ appeal almost on the similar lines as were advanced before the learned Single Judge. Respondent No.2 who was the successful bidder, came to be joined as party-respondent No.2 in the appeal.

Submissions of the appellant-petitioner

04. Assailing the judgment and order of learned Single Judge, learned Senior Advocate Mr. Udaya Holla assisted by learned advocate Mr. N. Lomesh Kiran for the appellant, vehemently submitted that learned Single Judge erred in not appreciating the following:

(i) The obligation on the part of the respondent-Corporation, which is a 'State' under Article 12 of the Constitution, to act in fair, reasonable and transparent manner would extend also

to the area of inviting offers in the tender process by not subjecting the dealers to arbitrary conditions.

(ii) The condition granting twenty one days time for submission of the bid, incorporated in the tender did not stand valid on the touchstone of reasonableness. It was a restrictive condition and would discourage the genuine participants.

(iii) The timeline contemplated was grossly insufficient and failed to acknowledge the extensive nature and magnitude of the project, including that the project involved electro-mechanical and hydro-mechanical executions, for that the petitioner was required to coordinate the project work with expert agency by entering into Memorandum of Understanding (MoU).

(iv) The usual practice of public sector undertakings is to provide 120 days for submission of techno-commercial bids. NSPC Ltd. recently awarded tender for 850 MW hydro project, in which a period of sixty two days was granted and further extended, for submission of bid. Similarly, another public sector undertaking

NPCIL Ltd., initially gave eighty seven days to enlarge it to 155 days for submission of bid.

(v) The suggestions given by the appellant time and again and in communications dated 5th February 2024 were not paid heed to, and were not considered by the respondent-Corporation.

(vi) Clause 1.4 (e) of Volume I Part I of the Notice Inviting Tender mentioned that several clearances including the environmental clearance and wildlife clearance are under process. Also Clause 1.43 of the notice mentioned that the letter of intent would be effective only on fulfillment of environmental clearance and such approvals which were under process. When the necessary clearances were under process, even if the tender process is completed in the timeline stipulated, commencing of the project work would not be possible for several months given the nature of clearances.

(vii) The bidder is required to undertake a geotechnical survey of the site, which would not permit preparation of the bid within the short time as granted.

(viii) The WAPCO investigation report was old and even otherwise furnished to the bidder very late.

(ix) The time stipulation of twenty one days does not hold reasonable and fair on the test of Principle of Wednesbury reasonableness. Extraneous grounds are imported and relevant consideration are omitted in deciding to impose the condition of such unreasonable nature.

(x) The requirement of tying up with expert agencies for the electro-mechanical and hydro-mechanical work in the tender project was permissible to be done even after the bids were finalized and the contract was awarded. Therefore, the counter by the respondents that the petitioner-appellant was ineligible or was incapable of submitting bid for want of Memorandum of Understanding with such expert agents is without any basis.

(xi) In any tender, the dominant consideration is to secure the most suitable bidder, therefore, sufficient timeline should be provided to enable all the intending bidders to participate in the tender.

(xii) The condition of twenty days for submission of bid would restrict the entry of a number of bidders, to ultimately work against public interest.

4.1 In order to support his submissions, learned Senior Advocate relied on the decision of the Supreme Court in **Ramana Dayaram Shetty vs. International Airport Authority of India and others [(1979) 3 SCC 489]**, in particular the observations in paragraph 9 of the judgment to submit that the Supreme Court negated the contention that it could not be said that the appellant had no locus to maintain the writ petition since no tender was submitted by him and that he was a stranger. It was submitted that once the differential treatment is shown, it would breach the right to equality, as he was precluded from submitting the tender.

4.1.1 From the decision, also of Supreme Court, in **LIC of India vs. Consumer Education and Research Centre [(1995) 5 SCC 482]**, observations in paragraphs 19 and 53 of the judgment, were pressed into service to highlight that the action of the 'State instrumentality' having public element must be just, fair and reasonable. It was sought to be canvassed that the court has power to set aside the tender condition if it is discriminatory or disproportionate, the decision in **ICOMM Tele Limited vs. Punjab State Water Supply Board [(2019) 4 SCC 401]** was referred to for observations in paragraphs 9, 23 and 28.

4.1.2 In **ICOMM Tele Limited** (*supra*), it was Clause 25(viii) in the tender notice which fell for consideration of the Apex Court; it was provided that in order to avoid frivolous claims, the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten per cent of the amount claimed and such amount shall be kept in deposit till the announcement of the award. It was held that such condition peremptorily to be imposed

had no direct nexus to the filing of frivolous claims, as it applied to all claims frivolous or otherwise made on the threshold. In the facts of the case, the Supreme Court found the said Clause 25 (viii) in the Notice Inviting Tender to be arbitrary and severable from the rest of the Clause of 25 to set aside the same.

4.1.3 For the proposition that the Courts have set aside the tender conditions relating to minimum timelines prescribed for bid submission under statutory acts and procurement policies, the decision of this Court in **Jayaraj vs. The State of Karnataka and others (ILR 2005 KAR 4159)** was relied on. Next relied on was the decision in **Karnataka Power Corporation Limited vs. Prodigy Hydro Power (P) Limited (2015 SCC Online KAR 1388)**.

4.1.4 The decision in **Karnataka Power Corporation Limited** (*supra*) related to non-compliance of time limit set out in Rule 17 of the Rules. The Managing Director had not assigned any reasons in the tender notification to reduce the time. In both the decisions **Jayaraj** (*supra*) and **Karnataka Power Corporation Limited** (*supra*),

tender condition was found to be invalid on the ground of non-compliance of Rule 17 of the Rules.

4.1.5 Further relied on was the decision of the Apex Court in **Erusian Equipment and Chemical Limited vs. State of West Bengal and another**, [(1975) 1 SCC 70]. It was a case of blacklisting. Relying on the observations in paragraph 12 made by the Supreme Court, learned Senior Advocate submitted that while executive function of the State shall extend to the carrying of any trade and also in respect of disposal of property and entering into contracts, the exercise of such functions in the trade by the State is to be governed by the tenets of equality. It was submitted that equality of opportunity applied to the matters of public context and the State while undertaking a trade has to observe the equality.

4.1.6 What was held in **Erusian Equipment (supra)** was that a person who was otherwise regularly dealing with the Government has legitimate interest and expectation that he will be dealt with fairly and equally. It was held that before blacklisting, an opportunity of representing ought to have been given.

4.1.7 It was next submitted by learned Senior Advocate for the appellant that the fair treatment to the participant bidders would include giving a practical period to enable them to actively participate in the sale. For this proposition, the observations in paragraph 18 by the Supreme Court in **SJS Business Enterprises (P) Ltd. vs. State of Bihar and others**, [(2004) 7 SCC 166] were relied on that adequate publicity to ensure maximum participation of bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale.

Submissions on behalf of Corporation

4.2 Learned Advocate General Mr. Shashikiran Shetty assisted by learned advocate Mr. Ajay J.N. appearing on behalf of respondent No.1-Karnataka Power Corporation Limited, opposed the appeal, to raise the following contentions in addition to what was incorporated in the affidavit-in-reply,

(i) The prayer of the appellant is that the last date of submission of bids be fixed to be 3rd May 2024. Such a prayer cannot

be granted in exercise of powers under Article 226 of the Constitution.

(ii) The contention with regard to non-compliance of Rule 17 was misconceived in as much as sub-Rule (2) of Rule 17 permits the reduction in the minimum time and the competent authority so empowered has provided the reasons for reducing the time from thirty days to twenty one days.

(iii) All the grievances of the appellant-petitioner about it requiring to undertake the geotechnical work before submitting the bid and to undergo the survey on investigation, are all factually misplaced. All these works are part of scope of work after the award of tender,

(a) Site survey and investigation provided under the tender document are to be done before starting detailed undertaking the engineering works. Clause 2.2 and 2.4.2 of the tender were referred to, to submit that the Corporation is to hand over all basic survey prior to the contractor commencing the survey work.

- (b) Basic design has already been carried out by the Corporation and overall dimensions of excavations, hydraulic structures, layouts, etc., are finalized.
- (c) The question of seeking opinion of E&M agencies on the design does not arise as the design is available with detailed engineering work done.
- (iv) Tender was hotly contested by three bidders. The difference between the bids was less than 15%. There is no element of favouritism. All other bidders could submit their bid within twenty one days.
- (v) The appellant was not an eligible bidder, who did not participate and did not have a joint venture partner for the purpose of submission of technical bid. The e-mail correspondence demonstrated that intention of the appellant was to stall the tender in guise that the appellant had been holding discussion with the possible E&M partners.
- (vi) During the pendency of the petition, offer was given to the appellant that it could submit the bid even on 3rd March 2024,

when the petition was being heard. Concession was made to the petitioner to submit its bid even after the expiry of bid period, when more than thirty days had already become available to the appellant. The appellant did not chose to submit its bid even though given an opportunity.

(vii) Learned Single Judge has elaborately analysed the office note in paragraphs 10 to 13 in the impugned judgment, to categorically record that the reasons furnished reflected application of mind.

4.3 Learned Advocate General relied on decision of the Supreme Court in **Association of Registration of Plates vs. Union of India [(2005) 1 SCC 679]**, in which case the tender was for supply of high security registration plates for motor vehicles. Principle laid down in paragraph 38 of the judgment was highlighted wherein it was observed that in the matter of formulating conditions of a tender document of the nature, greater latitude is required to be conceded to the State authorities. The contention and allegation were that the condition was incorporated to keep away the indigenous

manufacturers. Laying down that the condition did not violate equality clause under Article 14, nor encroached upon the fundamental rights.

4.3.1 The statement of law was observed by the Apex Court that “Unless the action of the tendering authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable.” In the facts of the present case, the above principle squarely applies to render the appellant – petitioner disentitled to any relief.

4.4 Another decision also of the Supreme Court in **Balaji Ventures Private Limited vs. Maharashtra State Power Generation Company Limited [2022 SCC Online 1967]** was pressed into service. In that case, condition No.1.2 (v) of the tender floated by the Maharashtra State Power Generation Company Limited for transportation of raw coal against Road-cum-Rail allocation from various mines of Western Coalfields Ltd., to the thermal power station to its principal power station, was sought to be called in question, which provided that the bidder should have permission

and consent of private siding owner to operate the Vimla siding for dispatch of coal to TPS of Mahajan Co. and the permission / consent of Vimla Siding Owner to operate the siding, should be submitted along with the bid, failing which the bid will not be considered.

4.4.1 Negating the challenge, the Supreme Court observed,

“now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.” (para 9)

4.5 Decision in **Raunaq International Limited vs. IVR Construction Limited [(1991) 1 SCC 492]** was relied on to submit that where the tender project has public law elements and public interest is involved, the Court should be loath to interfere. It was submitted on the basis of decision in **Union of India vs. International Trading Company [(2003) 5 SCC 437]** that merely because the tender condition operates harsh to a party, that cannot be a valid ground to challenge the same.

Submissions on behalf of respondent No.2

4.6 Learned Senior Advocate Mr.K.G Raghavan and learned Senior Advocate Mr. K.Vivek Reddy assisted by learned advocates Mr.Ajay and Mr.D.Vardhan Reddy for respondent No.2 relied on the statement of objections-affidavit in reply filed on behalf of respondent No.2 to highlight their submissions thus,

(i) There is a veiled attempt by the appellant to manipulate the tender process. Respondent No.1-Corporation granted time to the appellant to submit bid as on 04.03.2024 but, it refused.

(ii) It is the consistent stand of the appellant-petitioner that it was in negotiation with the expert agencies who were four players only, that is BHEL, GE Group, Voith Group and Andritz Group. Seven agencies participated in the pre-bid meeting and subsequently the respondent No.2 could enter into MoU with one of the E&M partners and submitted its bid on 23rd February 2024.

(iii) The appellant's grievance regarding submission of bid requiring detailed engineering is unfounded as the investigation and topographical survey are to be the part of performance of the contract, not relevant at the stage of submission of bids. Relevant clauses in the NIT were relied on.

(iv) The motive of the appellant in seeking extension was to secure a commercially viable tie-up with E&M partner, which could not be done, which is clear from the correspondence between the appellant and such agencies.

(v) The Pre-tender Scrutiny Committee published draft notice on 09.01.2024 inviting tender. It was since that juncture that

the petitioner was aware and even addressed a letter dated 17.01.2024 to the Pre-tender Scrutiny Committee. The execution of tender work required collaboration with a party who could execute the tender work for its electro-mechanical and hydro- mechanical area.

(vi) The appellant remained ineligible to bid as it could not find a requisite electro-mechanical partner as on the date of bid submission. The record showed that the appellant was engaged in the correspondence with the capable partners but, failed to enter into Memorandum of Understanding with any of them. Having failed, the petition was filed.

(vii) As the appellant was unsuccessful in above, its eligibility to submit bid itself remains doubtful till the end. The appellant could not establish that he was eligible and equipped. Even the subsequent offer given to the appellant during the pendency of the petition, to submit the bid was not acceptable.

4.6.1 Learned Senior Advocate pressed into service the decision in **Association of Registration of Plates (Supra)** for its paragraphs 28 and 38. On the basis of **Tata Cellular vs. Union of India, [(1994) 6 SCC 651]**, it was highlighted that but for the *Wednesbury* unreasonableness, the Court cannot interfere. It was submitted that the fixation of the bid conditions was commercial prerogative of the Corporation.

Tender and Judicial Review

05. Having noticed the controversy and the compass of contentions raised by the parties, before proceeding further, it would be useful to recollect the principles and parameters set down by umpteen number of decisions of the Supreme Court on the scope and extent of intervention by the courts in exercise of judicial review power in the matters of tenders and contracts and while dealing with the cases involving challenge to the conditions in the tender.

(i) Extent of intervention

5.1 The pervasive principles came to be reiterated as a code by the Apex Court in **Tata Cellular (supra)** with regard to the

limitations as to the scope of judicial review of administrative decisions and exercise of powers awarding contracts. The following principles were deduced,

“(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

However, the decision must not only be tested by the application of *Wednesbury [Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)]* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.” (para 94)

5.2 In **Jagdish Mandal vs. State of Orissa and others**, [(2007) 14 SCC 517], the Supreme Court stated,

“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.” (para 22)

5.2.1 It was added,

“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. ...” (para 22)

5.2.2 It was observed that the power of judicial review will not be permitted to side the private interest at the cost of public interest and that the tenderer or contractor can always seek damages in the civil court. In the very paragraph, it was observed by the Supreme Court that,

“ ... 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. ...”

5.2.3 In **Jagdish Mandal (supra)**, the Supreme Court observed that while dealing with the contractual matters to exercise the judicial review power in relation thereto these, questions should be addressed. (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.

5.3 In **Michigan Rubber (India) Ltd. vs. State of Karnataka [(2012) 8 SCC 216]**, the Supreme Court elucidated the circumstances under which the judicial review may be warranted. It was inter alia observed that certain preconditions or qualifications for tenderers have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. The interference by the Court, it was observed, has to be very restrictive since no person can claim a fundamental right to carry on business with the government.

5.3.1 In **Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd. [(2016) 15 SCC 272]**, it was observed that the Tender Inviting Authority is the best person to understand and appreciate its requirement in the tender documents. In **Silppi Constructions Contractors vs. Union of India [(2020) 16 SCC 489]**, it was observed similarly that the court must realize that its interference should be minimum as the authority which has

authored the tender document is the right judge. It is only in the cases of gross arbitrariness or irrationality that the courts may venture to interject.

5.4 In **State of Punjab vs. Mehar Din [(2022) 5 SCC 648]**, the Supreme Court referred to the principles in **Tata Cellulars (supra)** and **Jagdish Mandal (supra)** to express itself thus,

“The exposition of law on the subject has been consistently followed by this Court even in the later decisions holding that superior courts should not interfere in the matters of tenders, unless substantial public interest was involved or the transaction was malafide. It was consistently stressed by this Court that the need for overwhelming public interest should always be kept in mind to justify judicial intervention in contracts involving the State and its instrumentalities and while exercising power of judicial review in relation to contracts, the Courts should consider primarily the question whether there has been any infirmity in the decision-making process.”

(ii) Commercial element and public interest attribute

5.5 A tender is a commercial transaction. The contours of judicial review power in respect of tender disputes would be

accordingly determined. At the same time, the project contemplated in the tender work more often than not would be subserving the public interest, which aspect too would be governing consideration for the court.

5.5.1 In **Air India Ltd. vs. Cochin International Airport Ltd. And others**, [(2000) 2 SCC 617], the Supreme Court observed,

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it.
...” (para 7)

5.5.2 Thus, it was highlighted that the State is free to choose its own selection methods and stipulated conditions to invite offers from the prospective bidders is the exclusive domain of the Tender Inviting Authority. It's right to decide as to upon what terms and conditions it would prefer to enter into contractual obligation and to

issue work order for any tender based project, the freedom and the space-in-the-joint in prescribing the conditions of tender is necessary to be accorded to the tendering authority.

5.6 When it comes to dealing with the challenges to the tender contracts relating to projects of public importance or involving public interest, the Supreme Court has asserted that the public interest element should not be allowed to be sacrificed or discounted at the promotion of parties who have private commercial interest. In **Air India Ltd. (supra)**, the Supreme Court observed that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

5.6.1 Again in **Raunaq International Limited (supra)** where the tender floated by the Maharashtra State Electricity Board was in respect of erection and commissioning of a thermal power station unit, the Supreme Court underlined the need to safeguard public interest to insulate the public good from the litigation by which the

parties seek to derive commercial gain. While saying that the award of any contract by a private party or a public body is a commercial transaction, the Supreme Court observed that since the State or a public body or agency of the State enters into such a contract, there could be any element of public law or public interest involved even in such commercial transaction.

5.6.2 The Court enlisted the factors which may suggest presence of public interest. These elements, as enlisted by the Supreme Court, are relevant to be noted in the context of the facts of the instant case which involves the power project,

“(1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes

or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation. (para 10)

5.6.3 The Supreme Court mentioned about the delay in commissioning a power project, and further observed that it would lead to power shortage, retardation of industrial development and cost escalation. These are the very grounds being urged by the respondents to submit that the petitioner is only an obstructive litigant.

5.7 Similar observations are found in **Air India Ltd.** (*supra*) that mere making some legal point would not be a ground to disregard the larger public interest involved,

“Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in

order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.” (para 7)

5.8 The approach of the writ court while dealing with the tender matters and the challenges to the conditions of the tender, will have to be guided by the above principles laid down by the Supreme Court. The commercial element in the tender and tender conditions would dissuade the court from interfering in the tender process unless manifest perversity or arbitrariness is demonstrated. It is therefore that the Supreme Court has observed that every aberration will not provide a ground for the court to interpose itself, nor some legal point arising will be a consideration to intervene and upset the tender process. The public interest attribute in the subject matter of the tender and the project envisaged to be materialized, are to be the overriding consideration.

Rule 17 complied with

06. Even as learned Single Judge found that the competent authority had recorded reasons under Rule 17(2) of the Karnataka

Transparency in Public Procurement Rules, 2000, therefore the requirement of said Rule was complied with, the mandatory nature or otherwise of Rule 17(1) was made subject matter of rival submissions before this Court also. Framed in exercise of statutory powers, Rule 17 provides for minimum time to be made available for submission of bids. It was again sought to be contended on behalf of the appellant that the prescription of minimum time period of thirty days in Rule 17, was a mandatory requirement, not adhered to.

6.1 Rule 17 reads as under:

“Minimum time for submission of tenders:-

(1) Tender Inviting Authority shall ensure that adequate time is provided for the submission of tenders and a minimum time is allowed from the time of the publishing in the Karnataka Public Procurement Portal and the last date for submission of tenders. This minimum period shall not be less than the period mentioned below,

(a) for tenders upto rupees two crores in value, fifteen days; and

(b) for tenders in excess of rupees two crores in Value, thirty days

(2) Any reduction in the time stipulated under sub-rule (1) has to be specifically authorised by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing by reduced time shall not be less than seven days.

(3) The last date for submission of tenders, so fixed, shall be on the working day and time shall be mandatorily between 10.00 hours and 17.30 hours only.”

6.1.1 A reading of the aforementioned Rule would indicate that the Tender Inviting Authority has to ensure that adequate time for submission of tenders is available, it shall not be less than fifteen days in respect of the tender involving value of less than Rs.Two crore, and not less than thirty days where the tender is in excess of Rs.Two crore in value. Sub-rule (2) is to be noticed while appreciating the contention that the time limit prescribed in sub-Rule (1) is mandatory. As per sub-Rule (2), reduction in the time stipulated under sub-Rule (1) is possible and by recording reasons, the authority superior to the Tender Inviting Authority may reduce the time not to be less than seven days.

6.2 In the present case, the Managing Director who is the authority superior to Tender Inviting Authority recorded the reasons for issuing tender for twenty one days. The reasons were recorded in the files on 2nd February 2024, which were part of the office note and the same figures on record herein. The said reasons are extracted for ready reference,

“No.:KPCL/SPSP/
Date: 02.02.2024

Sub: Implementation of the Sharavathy Pumped Storage Project (2000 MW) - Approval for Notice Inviting Tender - reg.

Discussed with FD and TD.

The State is facing severe power crisis this year. Government has been procuring power from all sources, and has also issued notification under section 11 to ensure power produced in the State accrues to the State. To achieve self-sufficiency in power for an RE - rich State of Karnataka, we need to kick start this pumped hydro project at the earliest.

The Board has noted earlier on 20.10.2023 that this plant was chalked out more than 5 years back. It could not be pursued thereafter for various reasons, including delay in preparation of technical report and DPR, and delay in getting requisite clearances.

Considering the necessity and importance of the project and to expedite the implementation, the Board has on 01.02.2024 has approved for calling short term tender for 21 days. Hence, para 34 proposal is approved.

Sd/-
02/02/24"

6.3 It is useful to refer to the decision of this Court in **Chamundi Motors vs. Principal Secretary to the Government of Karnataka**, which was **Writ Petition No.5608 of 2018** decided on 2nd August 2018, in which the aforesaid Rule 17 was considered as per the following observation by the Court, extracting from paragraph 33,

“A bare reading of Rule 17 would clearly indicate that tender inviting authority should ensure that adequate time is provided to the bidders for submission of their tender and the minimum time to be allowed between the date of publication and notice inviting tender while publishing the same either in the bulletin or in the e-portal. Clause (a) of sub- rule(1) of Rule 17 would prescribe 30 days as the minimum time for tenders value up to two crores and 43 tenders in excess of two crores, the time prescribed is 60 days. However,

sub-rule (2) enables the authority superior to the tender inviting authority to reduce the time stipulated under sub-rule (1) and while undertaking such an exercise, the tender inviting authority has to record reasons in writing. Sub-rule (2) of Rule 17 does not indicate that reasons by the superior authority should be elaborate. ...”

6.3.1 It was viewed by the Court, once the reasons are accorded and noting in the files discloses the application of mind, it would meet the test,

“... In other words, if the order or the noting in the file would disclose that there is due application of mind by the superior authority for reducing the time stipulated under sub-rule (1), it would meet the test prescribed under sub-rule (2). Thus, there cannot be any straight jacket formula prescribed for the manner in which the reasons are to be recorded by the superior authority to reduce the time prescribed under sub- rule (1) of Rule 17. ...”

6.3.2 The Court observed that there might be complex situations and myriad circumstances under which the superior authority may exercise the power for reducing the time.

6.4 This, very aspect incorporated in sub-Rule (2) of Rule 17 of the Rules permitting the departure from the minimum period prescribed by recording reasons, is an indication about the flexibility of the application of Rule, in particular, the timeline prescribed therein. Where the Legislature allows flexibility, it cannot be said to be insisting the mandatory application of a provision. In contrast to sub-Rule (1), sub-Rule (3) expressly uses the word 'mandatorily' for what it provides and mandates. A comparative reading of Rules 17(1), 17(2) and 17(3) in juxtaposition gives enough room to view and construe Rule 17(1) not to be mandatory for prescription of time limit. The provision gets explained and qualified by sub-Rule (2). However, in the present case, since reduction in period is by reasons recorded that are found to be proper, any further adverting to the issue is not necessary.

6.4.1 It is a well recognized principle in the realm of interpretation of statute that when one more thing has to be done in particular class is expressly provided for that particular class, it would mean that for the rest of the part or class such requirement is

silently excluded. It is not possible to accept the contention that the minimum time period of thirty days mentioned in Rule 17(1) of the aforesaid Rules is invariably a mandatory requirement for the Tender Inviting Authority. Even otherwise, the Tender Inviting Authority has to be given a leeway to adjust itself in providing for time for submission of bids by the proposed parties, having regard to the requirements of the tender. It has to be within the discretionary domain of the Tender Inviting Authority that it could specify the time limit below thirty days if circumstances do warrant. The reduction in the time period stipulated in the Rule may become necessary having regard to the type and nature of the tender work, the urgency for completion of work and other considerations which may attend the given case. A host of factors become relevant. It would not be prudent to construe it in straight-jacket.

6.4.2 The Tender Inviting Authority is the best to judge as to what time should be prescribed in the tender conditions for submission of bids by the tenderers, depending upon the exigencies

of the tender work, though in all ordinary cases, it may abide by the time limit mentioned in Rule 17 of the Rules.

Decisional Process

07. The trite principle that while examining any administrative decision or action, the judicial review power is to be confined to the examination of decision making process and not the decision itself, was reiterated by the Supreme Court in **Sterling Computers Ltd. vs. M & N Publications Ltd., [(1993) 1 SCC 445]** in following words,

“While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the ‘decision-making process’. ... the courts can certainly examine whether ‘decision-making process’ was reasonable, rational, nor arbitrary and violative of Article 14 of the Constitution.” (para 18)

7.1 Along with reply filed by the respondent-Corporation, copy of the entire office note relating to tender and the Board resolutions are produced, which reflect the decision making process undertaken on the part of the respondent and the considerations

which have gone into in the decisional process (Annexure-R2, page 504 onwards). It was stated that the Sharavathy Pumped Storage Project which was awaited long for its implementation was meant to mitigate the energy fluctuations in the grid due to high infiltration of solar and wind energy in the State.

7.1.1 In order to overcome such need that the project was mooted by the Karnataka Power Corporation Limited. It was next stated that 255th Board meeting gave approval on 20th October 2016 for awarding the work of Preparation of Detailed Project Report to M/s. WAPCOS. Approval was granted by the State Government on 7th December 2017 for enhancing the installed capacity from 900 megawatt to 2000 megawatt. The consultant carried out the investigational studies, it was mentioned, and submitted draft report, which was reviewed by the Technical Committee in the meeting dated 15th May 2022.

7.1.2 Thereafter, in the 288th Board meeting of the Corporation held on 22nd December 2022, in-principle approval for detailed project report was accorded, and thereafter the process was

started to obtain clearances such as environmental clearance, forest clearance and wildlife clearance. The notings made by the Corporation further reflect that it was decided to entrust the work of preparation of tender documents to M/s. WAPCOS on 9th October 2023. The document prepared by M/s. WAPCOS was placed before the Committee for perusal.

7.2 In the proposed bid document, the eligibility criteria, the technical criteria, the qualifying requirement for bidders, financial criteria and all such other requirements were recommended. It was mentioned as part of technical criteria that “Bidder should have capacity for design office backup and field backup having experience in Hydro Electric Power Project/Pumped Storage Project/Lift Irrigation Projects including Hydro Mechanical (HM), 400 KV Gas Insulated Switchgear (GIS) and Civil works or should have MoU with such firm having experience.” They suggested that electro-mechanical and hydro-mechanical work were part of project work and that the bidder should have capacity to execute the total

work either by itself or should have MoU with such firms which have experience.

7.3 The detailed notice took into account various aspects and criteria to further mention, “to expedite the implementation of the Sharavathy PSP, it is proposed to invite short tender by adopting the observations of SPTSC.” The Managing Director thereafter recorded reasons extracted hereinabove, while dealing with the aspect of compliance of Rule 17 of the Rules to provide that the tender for twenty one days was approved to be called for.

7.4 The final decisions relating to tender were arrived at after necessary spadework. In the background of decision making process, also could be said to be part thereof, was the report got prepared by M/s. WAPCOS. The said document showing the investigative data provided the base for the project work. The tender document was prepared by M/s. WAPCOS on 3rd January 2024. The pre-tender Scrutiny Committee published draft NIT after going into the relevant aspects and submitted its observations. The reasons were documented on 2nd February 2024 after deliberations.

The tender contents and conditions were finalized and the NIT was issued.

7.5 There is no gainsaying that in the present case at the appropriate hierarchy of the Corporation, the decision making process leading to the decision to invite tender was undertaken and preceded the final decision on tender including the decision as regards the timeline condition. For the aspects taken into consideration, and for the reasons recorded, it was decided to fix time limit of twenty one days for inviting the bids, which was in order to meet the urgency in implementation of the project. It could be well said that the aspects taken into consideration were relevant and germane. Learned Single Judge noticed in detail the aforesaid aspects emerging in the decisional process.

7.6 The court would indeed not sit in appeal over the decision, once the decision making process is found to be reasonable and attended by the considerations relevant to the subject matter of decision. Even otherwise, it could hardly be concluded that the time-period of twenty one days given for submission of bids was

unreasonably less to be preventive in nature. Other bidders participated to be able to tender their bids within such time stipulated by the Tender Inviting Authority. That being the position, the fact that others too had sought for elongation of the timeline pales into insignificance.

7.7 In the matters of examining condition of the tender contract, the Court is neither to sit in appeal nor to substitute its view, stated the Supreme Court in **Michigan Rubber (India) Limited (supra)**,

“The Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.” (para 35)

7.8 In **Tata Cellular (supra)**, the Supreme Court stated to reiterate that power of judicial review cannot be converted into an appeal and the court cannot replace its own decision. “It is not the function of a judge to act as a superboard, or with the zeal of a

pedantic school master substitute its judgment for that of the administrator.”

7.9 When there is nothing on record of the present case, rather as noted above, the decision making process leading to incorporation of the condition of timeline of twenty one days’ for submission of bids underwent examination of the committee and also with due application of mind, only because the appellant could not qualify to submit the tender or was not in position to submit a comprehensive bid, the tender condition regarding timeline to submit the bid could hardly be treated as discriminatory or arbitrary.

Peddling Commercial Interests

08. Even on facts, it is not possible to accept the contention that the appellant had no opportunity or had no time to examine the details of the project and to prepare the bid. The admitted facts go to show that the petitioner-Company was in swift action soon after the draft tender notice was published by the Corporation on 9th January 2024. It is a matter of record that the representative of the appellant-

Company one Sri. Srinivas visited the company officials and also inspected the site by going there. He also gathered the necessary details prior to actual floating of the tender notice. The petitioner's representative had visited the offices of the respondent, had discussions with regard to the details of the project as well as the geotechnical investigation. He visited the site of the project also. The Drill hole samples of the project area components were shown to the representative of the petitioner during his site visit on 02.02.2024, as stated in the affidavit-in-reply. It is therefore difficult to accept the plea that the appellant had no knowledge about the tender project work.

8.1 It was an emphatic argument advanced on behalf of both the respondents that the appellant had not acquired the eligibility to submit the bid and that it was ineligible for, the petitioner could not enter into a tie up agreement with E&M and HM specialized agencies. The electro-mechanical and hydro-mechanical work was admittedly an integral part of the project and the petitioner, being only civil contractor, was not eligible to perform the work unless it

could find association of the specialized agency. The submission that the appellant was unable to enter into contract with any of such agencies, finds factually justification, for the petitioner could not show that it had an expert agency as partner to enter into the Memorandum of Understanding.

8.2 The contention that the appellant-petitioner, in complaining about the insufficient timeline allowed for submission of bid and seeking extension of it to 90 days-120 days from 21 days, was only peddling its commercial interest, could not be brushed aside lightly. On one hand the undisputed facts go to suggest that from the initial time of publication of draft tender notice itself, the representative of the petitioner had been visiting the site, surveying the project requirement and taking stock of the steps to be taken for bidding the project. Appellant-petitioner participated in pre-bid meeting also. On the other hand, after the issuance of tender notice on 02.02.2024, the petitioner did not submit bid. It could be fairly viewed that it was probably because the appellant had failed to strike a tie-up agreement with the expert partners.

8.3 The petitioner attempted to rely on e-mail correspondence to project that the negotiations were underway. Nothing was shown to be fructifying, nothing brought fruitful, except saying that the expert agency had also conveyed that minimum ninety days could be required for preparing bid. Failure of the petitioner to have a tie-up was decorated with good excuses, it was submitted before the court.

8.4 The above position is succinctly indicated from the two letters dated 05.02.2024 addressed by the petitioner to the Corporation. While in the second letter, as already stated, the petitioner wanted to consider its request for more than one qualified equipment supplier in each category of E&M and HM, the contents of the other-the first letter dated 05.02.2024 showed the kind of admission on the part of the petitioner despite several rounds of discussions with the major E&M manufacturers, further time would be needed, before the Memorandum of Understanding could be entered into with them. In paragraph 5(i), it was stated so by the petitioner itself. On the above basis, it could be successfully

submitted by the respondents that since the petitioner was unable to acquire the capability to execute the contract by tying up with the expert agency, only to safeguard and that it was unable to equip itself within the time provided to submit the bid, it wanted enlargement of time which indeed was in furtherance to only commercial consideration.

No Right to Bid

09. While all the afore-discussed factual and peripheral facts and aspects operate against the appellant-petitioner, the weightier principles of law to be applied would govern in the ultimate analysis to disentitle the petitioner to any relief.

9.1 There exists no right in law with the intending or prospective bidder to get his bid received and accepted. A mere floating of tender by the Tender Inviting Authority does not create any interest, much less any right for the parties who may be willing to participate in the tender process. As there is no right to get one's bid accepted at the conclusion of the tender process, there is no right even to bid as such. A party may have right, at the best, to get

considered in accordance with law is of which he may make in response to the tender invitation. That an intending bidder cannot claim by way of right to seek acceptance of its bid or to be able to enforce the bid condition in the tender as per its desire or choice, becomes an absolute proposition in the context of the facts and circumstances of this case.

9.2 At the pre-acceptance stage of the tender, any right does not arise, either for the party who has submitted the tender, or for one who has not responded to the tender notice, to call in question the tender by contending that his offer should have been accepted. Facts in the present controversy travel far ahead when the petitioner seeks to contend that time limit for submitting the bid was inadequate to render it incapable of submitting its offer. Such a challenge would hardly lie.

9.3 Broadly speaking whatever rights which may arise and accrue for the offerers-participants are during the tendering process. If the stages in tendering process are irrationally envisaged or acted upon in arbitrary manner, the participating bidder may assert its

right or equality and equal treatment founded on Article 14 of the Constitution. In other words, the rights of the tendering parties, at the best, arise during the process of considering their bids which are treated in relation to fairness and rationality in the decision making process. It is not possible to conceive in law any pre-bid rights for the party which intends to make its offer pursuant to a tender.

Against Basic Tenets

10. The case and challenge sought to be raised by the petitioner that the timeline of twenty one days prescribed in the tender condition for submission of bid was insufficient and the prayer in the petition seeking alteration and modification by the Tender Inviting Authority to enlarge the time, militate against, and is contrary to the basic legal tenets in the realm of contractual jurisprudence. The stage commencing from the issuance of tender notice till acceptance of tender and award of work order to the successful bidder is the process of entering into and creation of a contract. Award of tender is a contract entered into between the

Tender Inviting Authority and the bidder whose bid is found entitled to be accepted.

10.1 It is a fundamental law that when the Tender Inviting Authority floats the tender, it is only an invitation to offer. The invitation to offer may be accompanied by the terms and conditions which the Tender Inviting Authority would like to act upon against the prospective bidders. It is for the prospective bidder or the intending party who may submit its offer as to whether to accept the tender conditions or not. In cases of unwillingness or inability to go with the tender condition, the offer itself may not be submitted.

10.2 When the intending party responds to the invitation to offer namely, the tender notice, it is not permissible for such party to put forth its own conditions and seek variance in the conditions of tender. It is entirely the domain of the Tender Inviting Authority as to which conditions are to be attached with the tender notice and with which conditions it would accept the offers from the intending bidders. When any intending bidder puts forward its own term in disagreement with the term or condition in the tender, it will amount

to conditional offer which is not permissible. It becomes a counter offer when the offerer comes out with his own offer or with different and varied conditions. Nor it is permissible for the intending bidder to dictate its own term to the Tender Inviting Authority.

10.3 The Supreme Court in **Meerut Development Authority vs. Association of Management Studies [2009 (6) SCC 171]** observed,

“A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.” (paragraph 26)

Petitioner Did Not Participate

11. In the entire process leading to filing of the writ petition and raising challenge against the condition of timeline to submit the bid, it became suggestive that the petitioner-appellant acted as a fence-sitter. The petitioner gathered information by visiting the site,

went on to correspond with the Corporation showing interest in the bid submission and giving its own suggestions about the conditions including the time-period for submission of the bid, showing that it had been negotiating with the expert partners for the technical part of the project, however at the end, the petitioner did not submit the bid and kept itself away from participating in the tender.

11.1 A party which does not participate in the process, would lose right to challenge the process. Such a person stands as a stranger in the matter of deriving locus to lay a challenge. Therefore, it could be argued by the respondents that the appellant having not participated, cannot challenge the tender process or the tender condition. This submission stands supported by the statement of law laid down by the Supreme Court in **National Highways Authority of India (supra)**, in which the Supreme Court observed,

“Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not be challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender

notice can be allowed to make grievances about the non-fulfillment or breach of any of the terms and conditions of the tender documents concerned. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions.” (paragraph 20)

11.2 The following observations in the more recent judgment of the Supreme Court in **Airport Authority of India vs. Centre for Aviation Policy, Safety and Research (2022 SCC Online 1334)**, also lay down the law succinctly, to observe that the High Court committed an error in entertaining the petitioner at the instance of respondent No.1 therein challenging the tender conditions who had not participated in the tender process,

“At the outset, it is required to be noted that respondent No.1 claiming to be a non-profit organisation carrying out research, advisory and advocacy in the field of civil aviation had filed a writ petition challenging the tender conditions in the respective RFPs. It is required to be noted that none of the GHAs who participated in the tender process and/or could have participated in the tender process have

challenged the tender conditions. It is required to be noted that the writ petition before the High Court was not in the nature of Public Interest Litigation. In that view of the matter, it is not appreciable how respondent No.1 - original writ petitioner being an NGO would have any locus standi to maintain the writ petition challenging the tender conditions in the respective RFPs". (paragraph 26)

Conduct of the Appellant

12. While the principal grievance put forth by the petitioner was about insufficient time given to submit bids, the record bears out the undisputed aspect that in course of the proceedings of writ petition before learned Single Judge, the respondent-Karnataka Power Corporation Limited offered an option to the petitioner that its bid could be accepted. At the juncture when such offer was made, the period of twenty one days originally contemplated was over and thirty days had passed.

12.1 In the order dated 26.02.2024, which was the date of opening the technical bids, the Court recorded statement of learned Advocate General appearing for the respondent-Corporation,

“Learned Advocate General appearing for the respondent-Karnataka Power Corporation Limited submits that three bidders have already submitted their bids. It is open for the petitioner also to submit his bid, by the next date of hearing.

The crux of the petition is whether time of 30 days should have been granted or not under Rule 17 of the Karnataka Transparency in Public Procurement Rules for a tender which is beyond Rs.2.00 crores. Admittedly, the tender in the case at hand is beyond Rs.2.00 crores that the learned AG would submit that the justification is already supplied in the statement of objections, to which, a rejoinder is also filed.”

12.2 The offer was not accepted by the petitioner, as reflected in the very order, which reads as under,

“Since the pleadings are complete and the insistence of learned Senior counsel appearing for the petitioner that the matter be heard instead of him being permitted to participate in the tender, list this matter on 01.03.2024 at 2.30 p.m. for ‘Further Hearing’.

12.3 No explanation is offered by the appellant even before this court, as to why the said concession was not accepted. In

examining as to any relief needs to be moulded and granted, the conduct of party-the tenderer assumes relevance.

13. In view of above, neither on factual considerations, nor in law, the appellant has any case on merits. Learned Single Judge has rightly held the petitioner-appellant not entitled to any relief.

13.1 For the foregoing discussion and reasons supplied by this court, in addition to what is recorded by learned Single Judge, the dismissal of the writ petition by learned Single Judge does not book any error whatsoever. The challenge thereto fails.

14. The present writ appeal is dismissed. No costs.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

ahb

ORDER

After pronouncement of judgment, learned advocate Mr.A.Sharan Kukreja appearing for learned advocate Mr.N.Lomesh Kiran for the appellant requested to stay the present judgment to enable the appellant to approach the higher forum.

In the facts and circumstances of the case and in view of what is held by the Court in the judgment, it is not possible to accede to the request of the appellant. Accordingly, the request is rejected.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**