IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 14657 OF 2022

Adani Ports and Special Economic Zone Limited	**}**	**Petitioner**
Versus		
The Board of Trustees of Jawaharlal Nehru Port Authority and Ors.	**}**	**Respondents**

Mr. Ravi Kadam, Senior Advocate with Mr. Vikram Nankani, Senior Advocate, Mr. Sumeet Nankani, Mr. Prashant Asher, Ms. Bulbul Rajpurohit, Mr. Shadab Jan and Mr. Siddharth Manek i/b. M/s. Crawford Bayley and Co. for the petitioner.

Mr. Venkatesh Dhond with Mr. Saket Mone, Mr. Rohan Kelkar, Mr. Abhishek Salian and Mr. Devansh Shah i/b. Vidhi Partners for respondents 1 and 2.

CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

RESERVED ON : - JUNE 21, 2022
PRONOUNCED ON : - JUNE 27, 2022

JUDGMENT: (Per the Chief Justice)

Facts:

1. For upgradation, operation, maintenance and transfer of Jawaharlal Nehru Port Container Terminal (JNPCT) through Public Private Partnership (PPP), Jawaharlal Nehru Port Trust (hereafter "JNPT", for short) on 23rd August 2021 floated Request For Qualification (hereafter "RFQ", for short) document under Tender No. JNP/TRAFFIC/MCB/PPP/2021/01. Applications were invited from interested parties to facilitate,

inter alia, shortlisting of eligible bidders subject to national security clearance.

2. The bid process under the RFQ is a 2 (two) step process for selection of a bidder for awarding of the tender. The first stage involves a process to identify the qualified bidder and upon such identification, the second stage would commence with the participation in the bidding process by the qualified bidders comprising Request for Proposals (hereafter "RFP", for short).

3. After the RFQ was issued, addenda dated 14th September 2021 and 19th October 2021 were issued by the JNPT. *Inter alia*, clause 2.2.6 of the RFQ was broken up into two parts and numbered 2.2.7 and 2.2.8.

4. The petitioner, as an interested applicant, submitted papers and documents with the JNPT on 1st November 2021 at 13.10 hours. Thereafter, *inter alia*, the petitioner was called upon by the JNPT to submit accepted addendum IV and V and declaration for legal matters. Draft declaration was provided to the petitioner by email dated 4th December 2021. In response thereto, the petitioner promptly provided duly signed addendum IV and V along with declaration for legal matters.

5. By a communication dated 24th December 2021, JNPT informed the petitioner that its application dated 1st November 2021 in response to the RFQ had qualified for submission of the RFP. Accordingly, the petitioner was requested to remit an amount of Rs.4,24,800/- towards the cost of the RFP within 7 (seven) working days. Such request was duly complied with by the petitioner.

6. There were certain prior incidents which were not disclosed by the petitioner in its application dated 1st November 2021. One of such incidents is extremely relevant for a decision on this writ petition, which we shall presently notice in very brief. Adani Vizag Coal Terminal Private Limited (hereafter "AVCTPL", for short) is undoubtedly a subsidiary of the petitioner and an 'associate' within the meaning of the term as defined in the RFQ. It is a fact admitted by the petitioner that AVCTPL was in a contractual relationship with Vishakhapatnam Port Trust (hereafter "VPT", for short) since 2011. During the pandemic, AVCTPL had intended termination of the concession agreement by invoking the *force majeure* clause. VPT did not agree, whereafter AVCTPL terminated the concession agreement on 21st October 2020 w.e.f. 19th January 2021. On 30th November 2020, the disputes and differences between AVCTPL and VPT were referred to arbitration by AVCTPL. The arbitral tribunal, comprising of three former Judges of the Supreme Court, is seized of the same. It is alleged in the writ petition that as a counterblast, VPT by a notice dated 26th December 2020 had terminated the concession agreement with AVCTPL to be effective after 90 (ninety) days. The reason assigned for such termination appears to be an alleged failure of AVCTPL to achieve the Minimum Guaranteed Cargo for three years between 24th October 2016 and 23rd October 2019.

7. The other incident which needs to be briefly referred to is this. VPT had floated a tender dated 4th October 2021, in response whereto the petitioner had submitted its application. VPT disqualified the petitioner from participating in such

tender for non-disclosure of termination of the concession agreement between VPT and AVCTPL by the former. A challenge was mounted to the order disqualifying the petitioner before a learned Judge of the Andhra Pradesh High Court in its writ jurisdiction. By a judgment and order dated 3rd March, 2022, the writ petition stood dismissed. For the record, we consider it appropriate to refer to pendency of a writ appeal against the judgment of dismissal of the petitioner's said writ petition with an assurance given to the Division Bench by VPT that it will not proceed further till the appeal is decided.

8. It is such termination of the concession agreement by VPT on 26th December 2022, which was not disclosed by the petitioner while responding to the RFQ, that JNPT took serious exception. Also, dismissal of the petitioner's writ petition by the Andhra Pradesh High Court led JNPT to take exception. These two incidents triggered actions, which we propose to note immediately hereafter.

9. On 11th April 2022, JNPT sought to convey to the petitioner as follows: -

> "*****
>
> However, it has come to our knowledge that in connection with tender No. I'M&EE/MOF/MECH-WQ-8&8/2021 issued by VPT, 'For mechanization of WQ7 and 8 births (sic, berths)', the proposal submitted by your company was rejected on account of termination dated 26.12.2021 issued by VPT in previous contract relating to 'Development of East Quay-I (EQ-I) berth by replacing the existing EQ-I berth and part of EQ-2 berth for handling of steam coal in the inner harbour of Visakhapatnam Port DBFOT basis'. Further the Writ Petition no. 455/2022 filed by you against the above disqualification/dismissal by VPT, the Hon'ble High

Court of Andhra Pradesh vide its order dated 3.3.2022 has dismissed the above writ petition upholding the decision of VPT rejecting your proposal.

Accordingly, you are hereby called upon to submit your response within 7 days from the receipt of this letter as to why you should not be disqualified from above tender process floated by JNPT (Now JNPA) being in violation of clause 2.2.8 (earlier clause 2.2.6 of the RFQ of the subject/captioned Tender floated by JNPT (Now JNPA)."

10. The petitioner responded by its letter dated 16th April 2022, seeking to explain that termination of the concession agreement by VPT vide notice dated 26th December 2020 was illegal. Not satisfied with the response of the petitioner, the Chief Manager (Traffic), JNPT conveyed to the petitioner by a letter dated 2nd May 2022 that it was disqualified from participating in further stages of the subject tender process.

The Challenge:

11. The Chief Manager (Traffic), JNPT having conveyed to the petitioner that it has been disqualified, the said letter dated 2nd May 2022 is the subject matter of challenge in this writ petition dated 4th May 2022. The concluding paragraph of the letter dated 2nd May 2022 reads as follows: -

" *****

12) From the documents submitted by you and as stated above, it is amply clear that VPT (which is a public entity) has issued termination notice dated 26/12/2020 to your company which is valid and existing as on date and hence, the same attracts disqualification contained in part (d) of clause 2.2.8 of the subject tender. In your response/submissions, you have also admitted the fact of issuance of the termination notice dated 26/12/2020 by VPT. It is further to mention that no stay order / order quashing termination notice dated 26/12/2020 issued by VPT has been furnished by you to

> JNPA till date. Hence, your company attracts the disqualification as contained in clause 2.2.8 of the Tender, viz '***nor have any contract terminated by any public entity for breach by such Applicant, Consortium Member or Associate***', as the termination letter dated 26/12/2020 issued by VPT exists and its effect has not been stayed by the Hon'ble High Court/Arbitral Tribunal/Competent Authority. Accordingly, as per clause no. 2.2.8 of RFQ, you are hereby disqualified from participating further in the Tender No. JNP/TRAFFIC/MCB/PPP/2021/01, dated 23/08/2021 issued by JNPA for 'Upgradation, Operation, Maintenance and Transfer of Jawaharlal Nehru Port Container Terminal through PPP'."
>
> (emphasis in original)

Prayers:

12. The petitioner has, *inter alia*, prayed that: -

(a) clause 2.2.8 of the RFQ be declared unconstitutional and ultra vires Article 14 of the Constitution of India and to quash the same.

(b) the petitioner's disqualification be declared as illegal and wrongful and/or that the petitioner's disqualification be revoked.

(c) the respondents be ordered to forthwith withdraw and/or cancel the impugned communication and to permit the petitioners to participate in the bidding process as well as to open and evaluate the petitioner's bid.

The Question Arising for Decision:

13. Whether, within the contours of the RFQ, the incident of termination of the concession agreement by VPT on December 26, 2020, on the face of a prior termination of the same agreement by AVCTPL on 21st October 2020, could have afforded reason to JNPT to disqualify the petitioner to participate in the further process of the RFQ, is the question that we are tasked to decide on this writ petition.

Submissions on behalf of the petitioner:

14. Mr. Kadam and Mr. Nankani, learned senior counsel for the petitioner, advanced diverse contentions in course of hearing. A 'Note on Submissions' was also placed on record, albeit after the time fixed therefor. We permitted the note to be taken on record. It is considered relevant and appropriate to first note the contentions that are raised therein.

A. The first contention that has been advanced is that purposive construction has to be supplied to clause 2.2.8 (earlier 2.2.6).

   Clause 2.2.8 has 3 limbs. The first and the third limb assume significance, for the purposes of the present proceedings.

   First limb: pertains to non-performance and requires the imprimatur of an "*arbitral or judicial authority/ pronouncement*". Admittedly, there is no such imprimatur as on date.

   Third limb: pertains to termination and/or breach, which termination/breach cannot be said to have attained finality when the validity thereof is pending adjudication. If the arbitral award invalidates VPT's termination, the petitioner's loss of opportunity to partake in the present tender would not be restituted. Accordingly, JNPT's unilateral act in disqualifying the petitioner citing clause 2.2.8, on the basis of mere "*issuance of the termination notice dated 26/12/2020 by VPT*", is tantamount to JNPT usurping the role of an arbitral tribunal comprising of three former Judges of the Supreme Court.

Moreover, JNPT's interpretation of the third limb would render the first limb otiose, as the phrase "failure of performance", is no different from "breach". These phrases are to be understood for what they mean in law, and the RFQ would have to be read in such manner so that meaning is supplied to each part thereof.

The only way to harmoniously construe the first and the third limb is to apply the third limb in cases where the termination has either been accepted/unchallenged, or where the termination (by a public authority) has attained a judicial stamp of approval in the last 3 years.

Therefore, termination for breach cannot be taken as an absolute proposition, as sought to be contended by JNPT, especially when the validity of such termination is squarely in issue and *sub-judice* before an arbitral tribunal. This is more so in light of the fact that JNPT has not taken any view or determination on the correctness of the termination effected by JNPT.

JNPT has placed heavy reliance on paragraph 4 of the impugned letter (Vol II of WP: page 745) to justify its arbitrary act. It contends that "*it was decided*" to give the petitioner "*an opportunity for submitting the RFP*" since it was at the "*initial stages of scrutiny*". It bears noting that the application for pre-qualification dated 1st November 2021 is referred to by JNPT in its communication dated 24 December 2021. *Ex facie* and on JNPT's own showing, therefore, there was a "scrutiny" of the petitioner's application for pre-qualification dated 1st November 2021 together with all Annexures and

Appendices thereto, and there was a "decision" made pursuant to such scrutiny. For JNPT to then claim ignorance and allege non-disclosure smacks of patent arbitrariness and falls foul of Article 14 of the Constitution.

B. Further, it has been contended that JNPT's interpretation of clause 2.2.8 is unreasonable and burdensome.

a) JNPT asserts that the mere issuance of a termination letter, by any public authority, howsoever perverse or patently illegal it may be, is sufficient to disqualify the bidder. The interpretation of clause 2.2.8, as propounded by JNPT, defies logic. According to it, the first limb of clause 2.2.8, i.e. "*failure to perform*", has a much lower threshold than the drastic action of termination or breach, which is covered by the third limb. To that effect, therefore, the first limb is independent and/or disjunctive of the third limb. Such an interpretation itself renders clause 2.2.8 arbitrary, because for mere failure to perform, for which, even according to JNPT, there is a requirement of a judicial imprimatur, but for the drastic action of termination or breach, which has a much higher threshold, the requirement of a judicial imprimatur is dispensed with.

b) Furthermore, such an interpretation or import of clause 2.2.8 would also be unreasonable and burdensome since it would result in not only the petitioner (who is the largest port operator in India operating approximately 67 berths/container terminals), but also its 14 associates (who operate ports all over

India) being disqualified from such tender processes and/or from existing/ongoing projects. Needless to add, such acts would result in catastrophic consequences, not only for the petitioner and its associates, but also for the State and the public at large.

c) Therefore, clause 2.2.8 (as interpreted by JNPT) is violative of Article 14 of the Constitution. In **Atlanta Limited v. Union of India**, reported in 2018 SCC OnLine Del 8269, the Delhi High Court, faced with a similar factual matrix, has already held such clauses to be unreasonable (paras – 19, 22 & 25). In fact, this Court in **Sarku Engineering Services v. Union of India**, reported in 2016 SCC OnLine Bom 5233, has held that bidders cannot be blacklisted on the basis of eligibility criteria (paras – 52, 55 & 65).

C. The decision in **Tata Cellular vs. Union of India**, reported in (1994) 6 SCC 651, it has been submitted, continues to hold the field. **Tata Cellular** (supra) upholds judicial intervention in circumstances where there is arbitrariness in the decision-making process (para 70). The *factum* of shortlisting the petitioner, after having full knowledge and duly considering all material clarifications and disclosures, including in respect of the nature of the dispute between AVCTPL and VPT, as well as the pendency of the resultant arbitration between them, only to then for the very same reasons subsequently disqualify/blacklist the petitioner, amounts to patent arbitrariness in the decision-making process (para 74). Resultantly, this Hon'ble Court can intervene

by either holding that clause 2.2.8 is arbitrary or by reading the same down in the manner propounded by the petitioner.

D. It has further been contended that clause 2.2.8 is not a pre-qualification criterion. There is no reference to clause 2.2.8 in "**Section 3 – Criterion for Evaluation**" (Vol. I of WP: page 86) of the RFQ. Clauses 3.1.1 and 3.5.1 thereof only refer to clauses 2.2.2, 2.2.3 and 2.25. Objective of every public entity is to maximize revenue for the State. Hence, clause 2.2.8 is not a mandatory pre-qualification condition, but only general and consequently waivable in nature. Para 14 of **G.J. Fernandez vs. State of Karnataka**, reported in (1990) 2 SCC 488, supports this contention.

E. The next contention is that there has been no case of non-disclosure.

a. Despite having all the material knowledge and facts in respect of the issue of alleged non-disclosure much prior to shortlisting the petitioner, it has been raised by JNPT as a ground to disqualify the petitioner for the first time in its reply affidavit dated 12th May 2022. The same was neither raised in the show-cause notice dated 11th April 2022 (Vol. II of WP : page 710), nor in the impugned letter dated 2nd May, 2022 (Vol. II of WP : page 744).

b) JNPT cannot traverse beyond the grounds, as set out in the said show-cause notice and the impugned letter, for the purposes of disqualifying and/or blacklisting the petitioner. Reliance is placed on paras

100-102 of the decision in **63 Moons Ltd vs. Union of India,** reported in (2019) 18 SCC 401, and para 8 of the decision in **Mohinder Singh Gill vs. Chief Election Commissioner**, reported in (1978) 1 SCC 405.

c) Without prejudice to the above, it is contended that:

i) The pendency of arbitration between AVCTPL and VPT was disclosed in the application for pre-qualification dated 1st November 2021 (Vol. II of WP : page 322);

ii) JNPT was fully aware about the pending dispute between AVCTPL and VPT, which pertains to the validity of both, AVCTPL and VPT's termination of the Concession Agreement dated 1st August 2011. This fact is evinced by JNPT's letter dated 8th December 2021 (Vol. II of WP : page 374);

iii) A comprehensive explanation of the dispute with VPT, as aforesaid, was indeed given by the petitioner vide letter dated 9th December 2021 (Vol. II of WP : page 375);

iv) Vide letter dated 13th December 2021 (Vol. II of WP : page 378), JNPT went a step further and sought certain clarifications with respect to AVCTPL and its shareholding. Such clarifications were duly furnished to JNPT on the very next day (Vol. II of WP : page 379);

v) After having not only known, but also having duly received all the relevant disclosures and/or information and/or clarifications from the petitioner, JNPT shortlisted the petitioner for the RFP stage and

intimated the petitioner about the same vide its letter dated 24th December 2021 (Vol. II of WP : p. 381);

vi) This was followed by JNPT forwarding the RFP and DCA to the petitioner, under cover of its letter dated 30th December 2021 (Vol. II of WP : page 383);

vii) The show-cause notice came to be issued on 11th April 2022 (Vol. II of WP : p. 710), i.e., almost four months after comprehensive clarifications/disclosures were given by the petitioner to JNPT in regard to the dispute with VPT. Curiously, however, the show-cause notice makes no reference to the issue of alleged non-disclosure, as contended by JNPT in these proceedings. That is only because the clarifications/disclosures provided by the petitioner with respect to the pendency of the arbitration between AVCTPL and VPT – where, *inter alia*, a declaration as to the validity of VPT's termination has been sought by VPT – came to be accepted by and were to the satisfaction of JNPT;

viii) By reason of the foregoing, the alleged non-disclosure on the part of the petitioner did not even feature as a ground for the petitioner's disqualification in the impugned letter dated 2nd May 2022 (Vol. II of WP : page 744);

ix) The above leads to the irresistible conclusion that JNPT's case on alleged non-disclosure is a mere afterthought which smacks of arbitrariness and *mala fides*, is discriminatory, and contrary to the petitioner's rights enshrined under Article 14 of the Constitution of India. Paras 107, 167, 170, 176, 183, 186 of the

decision in **Natural Resources Allocation, in Re: Special Reference No. 1 of 2012**, reported in (2012) 10 SCC 1, has been cited in this behalf.

d) JNPT's reliance on, *inter alia*, clauses 2.7.2 and 2.17.6 of the RFQ, as also JNPT's "*right to reject the bid at any stage*", as provided for in the declaration dated 6th December 2021 (Vol. II of WP : page 372), to contend that there is no fetter, in terms of time, on such right to reject the petitioner's bid, is wholly misplaced. Principles of fairness and business-efficacy would warrant that such right be exercised in situations where *subsequent* developments and/or circumstances warrant the exercise of such right, and not on JNPT's mere *ipse dixit.* In the case at hand, no such subsequent developments/circumstances have emerged.

e) JNPT's reliance on clause 7 of the application for pre-qualification dated 1st November 2021 (Vol. II of WP : page 322), particularly the last three lines thereof, to contend that in a clandestine attempt to suppress the issuance of the termination notice dated 26th December 2020, the petitioner has suggested that all pending arbitrations pertain to "contractual disputes", is rather misleading. The petitioner verily believed that adequate disclosure has been made by it by declaring that all pending disputes are contractual in nature for the following reasons:

i) *First*, the petitioner has, in its letter dated 9th December 2021, categorically "rejected" VPT's termination (Vol. II of WP : page 375-377; at para 4

p. 376).

ii) *Second*, the inclusion of the word "termination" could be seen as amounting to an implied acceptance thereof.

iii) *Third*, the validity of the termination is itself *sub-judice.*

iv) *Lastly*, it cannot be gainsaid that the issuance of termination notices by both sides is entirely premised on contractual disputes between them.

F. Finally, it has been contended that the order of the Andhra Pradesh High Court is irrelevant for decision making of JNPT.

a) As aforesaid, there was no change in circumstances between 24th December 2021 (date of JNPT's qualification letter) and 11th April 2022 (the date of issuance of the show-cause notice), except for the issuance of the order dated 3rd March 2022 by the learned Judge of the Hon'ble Andhra Pradesh High Court.

b) Notwithstanding the pendency of an appeal therefrom, the order dated 3rd March 2022 has no bearing on the present case. It dealt with non-disclosure. That is not the case here, as submitted hereinabove. The present writ petition impugns the petitioner's arbitrary disqualification on pre-disclosed facts, after having declared/shortlisted the petitioner eligible for the RFP stage.

c) That apart, the petitioner verily believes that there is a strong likelihood of its appeal being allowed, for the simple reason that VPT's allegation of the so-called "non-

disclosure" is simply untenable. VPT cannot be heard to allege non-disclosure of a "termination notice" which was addressed by none other than VPT itself.

d) In any event, unlike in the case before the Andhra Pradesh high Court, in this case, JNPT, *after* having known about VPT's termination notice dated 26th December 2020, and being duly apprised about the fact that AVCTPL's termination preceded VPT's termination, went ahead and shortlisted the petitioner, by asking petitioner to pay the fees for the RFP and DCA, which documents were furnished to the petitioner under cover of letter dated 30th December 2021 (Vol II of WP : page 383).

15. Apart from the contentions raised in the note, a couple of other contentions were also raised in course of hearing and we briefly refer to the same now.

16. It was contended that the petitioner had participated in the tender process as a single entity and did not seek to rely upon or take advantage of the credentials of any of its associates including AVCTPL. Having regard to the fact that the petitioner was seeking to participate in the process as a single entity, termination of the concession agreement by VPT could not have been viewed as an ineligibility for the petitioner to participate in the tender process.

17. Further, it was contended by referring to AVCTPL's prior termination of the concession agreement that there cannot be termination of a terminated contract and the petitioner did not render itself ineligible to participate in the tender by reason of the termination effected by VPT.

18. The other contention was that the petitioner was singled out and the declaration dated 6th December 2021 was obtained only from it without the other bidders being called upon to submit similar such declaration. The complaint is of discriminatory treatment to which the petitioner was subjected by JNPT.

19. Based on the aforesaid contentions, it has been prayed that relief claimed may be granted by the Court.

Submissions of Mr. Dhond, learned Senior Advocate for JNPT:

20. Per contra, Mr. Dhond, learned senior counsel representing JNPT contended that the petitioner has been disqualified in a manner that is legal, proper, fair and reasonable.

21. Our attention has been invited to the petitioner's statements/certification as well as the declaration, which were made/submitted.

22. In support of the contention that the petitioner is ineligible to participate in the tender process, our attention has further been drawn to the relevant clauses in the RFQ, which laid down eligibility criteria and also preserved the right of JNPT to disqualify an applicant even before signing of the concession agreement or after its execution and during the period of subsistence thereof. Strangely, the petitioner, while furnishing information, did not state facts correctly. To buttress such contention, our attention was invited to various pages of the writ petition to which we propose to advert a little later.

23. Referring to the stage at which the petitioner has been disqualified, it has been urged that the power of disqualification has been exercised according to the terms and conditions of the RFQ and the question of JNPT having waived its right to disqualify the petitioner merely because JNPT had declared the petitioner as qualified previously does not and cannot arise.

24. Insofar as the allegation that the petitioner was singled out to submit a declaration and that no other applicant/bidder was required to so submit, it has been pointed out that such an allegation has been levelled across the bar without any pleading to that effect in the writ petition. Even otherwise, such declaration was required to be submitted by all other applicants/bidders and such requirement, which was insisted upon, was not beyond the scope of the terms and conditions of the RFQ. A correct view of the matter has been taken and not a mere plausible view.

25. To counter the contention that the petitioner had sought to participate as a single entity, our attention was invited by to a document contained in Annex-I titled "Details of Applicant", where the petitioner referred to the other services provided by its associates at various parts of the country. While so referring, the petitioner referred to Vizag Coal Terminal without, however, mentioning that the concession agreement stands terminated. In any event, JNPT is bound by the terms and conditions of the tender not only to consider the antecedents of the petitioner, but also antecedents of, *inter alia*, its associates. Should the associate be found to have suffered termination of a contract by any public entity

during the last 3 (three) years, notwithstanding that the petitioner may not have suffered any termination of contract by a public entity, the termination qua the petitioner's associate would render the petitioner ineligible; hence, the contention raised on behalf of the petitioner is unsustainable in law.

26. Referring to the right that a party can claim to carry on trade or business with the State, it was contended that no party has a fundamental right in that behalf. Further, the tendering authority, being the best person to understand and appreciate its requirement, has to be satisfied that a bidder, upon responding to a tender, satisfies all the terms and conditions for taking further part in the process. A lot of factors are required to be considered, including, *inter alia*, the consequences of non-performance by a selected bidder. The power of the Court is limited to examining the process of decision making and since the Court does not have the expertise to examine technical issues, law has been laid down by the Supreme Court that principles of equity and natural justice have no application and that the Courts must stay at a distance. It has also been contended that even if the Court finds that there is total arbitrariness in selection of a bidder or that the tender has been granted *mala fide*, still, the Court should refrain from interfering and relegate the aggrieved party to seek damages for a wrongful exclusion in a duly constituted suit rather than to injunct execution of the contract. Interference with tender terms and conditions is bound to derail the services meant for the larger public good and bearing in mind the freedom that the tendering authority

has to choose and finalise the party with whom it would enter into a relationship, any iota of doubt in the mind of tendering authority that the prospective party has a record of default with any other public authority could give rise to a reasonable cause to disqualify such party in the sole discretion of the tendering authority. JNPT having acted in strict compliance with the terms and conditions of the RFQ and the petitioner having been granted sufficient opportunity to defend itself, question of any *mala fide* or bias or arbitrariness having crept in, in the decision-making process, does not arise.

27. Reliance was placed on several decisions by Mr. Dhond, viz. (i) **G. J. Fernandez** (supra);

(ii) **All India Power Engineer Federation Vs. Sasan Power Limited**, reported in (2017) 1 SCC 487;

(iii) **Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Limited**, reported in (2019) 1 SCC 81;

(iv) **Bharat Coking Coal Limited and Ors. Vs. AMR Dev Prabha**, reported in (2020) 16 SCC 759;

(v) **Agmatel India Pvt. Ltd. Vs. Resoursya Telecom**, reported in 2022 SCC OnLine SC 113;

(vi) **UFLEX Limited vs. Government of Tamil Nadu**, reported in 2022 SCC OnLine 165;

(vii) **National High Speed Rail Corporation Ltd. Vs. Montecarlo Limited**, reported in 2022 SCC OnLine SC 111;

(viii) **NICCO Corporation Ltd. Vs. Cable Corporation of India Limited**, reported in 2008 (1) CHN 567, being a decision of the Division Bench of the Calcutta High Court; and

(ix) **BVG India Ltd. Vs. State of Maharashtra**, reported in 2021 SCC OnLine Bom 412, being a decision of a coordinate Bench of this Court.

28. While concluding, Mr. Dhond contended that absolutely no case for interference had been set up and the writ petition be dismissed with costs.

Decision with reasons:

29. A plethora of decisions of the Supreme Court in relation to tender matters rules the field from which guidance can be drawn by this Court to test the communication dated 2nd May 2022, whereby the petitioner has been disqualified to participate in the further process of the tender floated by JNPT. Before we proceed to consider the rival submissions advanced on behalf of the parties, it would be profitable to take note of the principles of law laid down by the Supreme Court in some of such decisions cited at the bar and some which are referred to therein for dealing with a challenge of the present nature.

30. **G. J. Fernandez** (supra) rules that a party issuing the tenders has the right to punctiliously and rigidly enforce them; therefore, if the party responding to the tender does not strictly comply with the requirements thereof, it is open to the party issuing the tender to decline to consider the party for the contract and if such party comes to Court seeking a prohibitory order, the Court will decline relief.

31. The decision of the Supreme Court **Tata Cellular** (supra) contains an enlightening discussion on the scope of judicial review. The salient principles noticed from such decision are as follows: -

> "70. *** The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that

power will be struck down.

*****

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

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

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

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

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. *****"

32. In **Jagdish Mandal vs. State of Orissa and Ors.**, reported in (2007) 14 SCC 517, the Supreme Court held as follows: -

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of

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

> (*i*) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> OR
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';
>
> (*ii*) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships

> and franchises) stand on a different footing as they may require a higher degree of fairness in action."

33. The decision of the Supreme Court in **Michigan Rubber vs. State of Karnataka**, reported in (2012) 8 SCC 216, noted various principles emerging from the decisions cited for consideration and one of such principles is to the effect that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities; and, unless the action of the tendering authority is found to be malicious and in misuse of its statutory powers, interference by Courts is not warranted. It has also been held in the said decision that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding a contract, interference by Court is very restricted since no person can claim fundamental right to carry on business with the Government.

34. In **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Limited**, reported in (2016) 16 SCC 818, the Supreme Court held as follows:

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

35. Nabha Power Ltd. vs. Punjab State Power Corporation Ltd., reported in (2018) 11 SCC 508, is a further decision of the Supreme Court where the discussion on the legal principles for interpretation of a commercial contract are formed in paras 33 to 48. The word of caution is found in para 72 reading as follows: -

> "72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavor of commercial courts to look into implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any "implied term" but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

36. The Supreme Court in **Caretel Infotech Limited** (supra), after taking note of its previous decisions, observed as follows:

> "43. We have considered it appropriate to, once again, emphasize the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every

> contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

37. While so observing, the Court took note of the decision in **Trollope and Colls Ltd. vs. North West Metropolitan Regional Hospital Board**, reported in (1973) WLR 601 (HL), reading as follows: -

> "…the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."
>
> (emphasis in original)

38. The Supreme Court in its decision in **Silppi Constructions Contractors vs. Union of India**, reported in 2019 SCC OnLine SC 1133, held as follows: -

> "20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the

> decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements, and therefore, the courts interference should be minimal. The authority which floats the contract or tender, and has authorized the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity."
>
> (emphasis ours)

39. In **Bharat Coking Coal Limited** (supra), the Court noted the settled position of law that constitutional Courts are concerned only with lawfulness of a decision and not its soundness while exercising judicial review powers in disputes arising out of tenders. Phrased differently, the Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, rationality and procedural impropriety, if proved, would be ground for the Court to assume jurisdiction and remedy such ills. Caution has been sounded that the person seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. This decision further emphasizes that in interpreting contractual terms, the Courts ought to show deference to the authorities' interpretation of contractual terms since judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting

statutes (emphasis ours) and also because the author of the tender terms and conditions is better placed to appreciate the requirements and interpret them.

40. **Afcons Infrastructure Ltd.** (supra), **Silppi Constructions Contractors** (supra) and **Bharat Coking Coal Limited** (supra) were again considered by a bench of three learned Judges of the Supreme Court in **M/s. Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. M/s. New J.K. Roadways, Fleet Owners and Transport Contractors**, reported in 2020 SCC OnLine SC 1035. It was held in para 14 that in a series of judgments the Court had held that the authority that authors the tender document is the best person to understand and appreciate its requirements and, thus, its interpretation should not be second-guessed by a court in judicial review proceedings.

41. **Agmatel India Pvt. Ltd.** (supra), highlights that interference by the High Court would not be justified when no case of *mala fide* or bias is found. Every decision of the administrative authority which may not appear plausible to the Court cannot, for that reason alone, be called arbitrary or whimsical.

42. The decision in **National High Speed Rail Corporation Limited** (supra) relies on the principle which is more often applied to challenges laid by unsuccessful candidates to selections made in course of recruitment processes. The principle that one who takes a chance of selection having accepted the terms and conditions of the advertisement inviting applications, cannot turn around and question the

same if the result of selection is not palatable to him, appears to have been applied in paragraph 88 of the decision. Paragraph 88 is quoted below for facility of appreciation: -

> "88. Now so far as the view taken by the High Court in the impugned judgment and order that Clauses 28 under Clause (e) of Option A Section 1 and Clause 42.5 of ITB are patently illegal, inasmuch as they seek to curtail the right of the bidders to challenge the rejection of their bid in a multi-stage bidding process at the earliest, and before the award of the contract is concerned, at the outset, it is required to be noted that as such the aforesaid clauses of the ITB were not under challenge before the High Court. Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 of ITB were well within the knowledge of the original writ petitioner at the time of participating in the tender process. The aforesaid clauses of the ITB were put to the knowledge of all the participants/bidders and the same applied to all. Despite the above clauses in the ITB, original writ petition participated in the tender process. Therefore, one having accepted the terms and conditions of the tender process with the full knowledge, thereafter, it was not open for the original writ petitioner to make a grievance with respect to such clauses."
>
> (emphasis ours)

43. Our understanding of the law, drawing guidance from the decisions noticed above, is that the terms and conditions of a tender are not to be read and interpreted in the same manner a statute is read and interpreted. The legislatures make laws actuated with some policy to curb public evil or to effectuate public good. As and when an issue arises before them, it is the duty of the constitutional courts to interpret the law and declare what the law is. If the Courts find gaps in the working of the law while interpreting and declaring what the law is, it is not precluded from ironing out the creases by appropriate technique of interpretation to infuse life into the

law; but it is impermissible for the Courts to alter the material of which the law is woven. Such ironing out of the creases, *inter alia*, is generally premised on the Court's perception of what the legislative intent was. In so doing, the Courts are entitled to interpret and declare the law without consulting the legislature to explain what was intended while enacting the law. Legislative functions come to an end once the law is passed. When the constitutionality of a law is challenged or when the Court is otherwise required to interpret and declare what the law is, the parties opposing/supporting the law are only heard. However, in regard to interpretation of tender terms and conditions, the perspective is completely different and such an exercise, as can be taken recourse to in interpreting a statute, would be impermissible. Terms and conditions in a tender are set which would advance the tendering authority's interest. When the terms and conditions of a tender fall for consideration and the need arises for the Court to understand what is meant by a particular clause or what is the requirement of a particular clause in such tender, the tendering authority's version has to be heard by the Court. If such version of what it intended by inserting the relevant clause appears to the Court not to be manifestly unfair, utterly unreasonable, totally arbitrary, or thoroughly unjust, the Court cannot substitute its view of what would have been a better course for the tendering authority to follow to achieve the object of the tender. Deference to the view of the tendering authority by the Courts is the general rule. The adverbs in the preceding sentence would signify a level higher than, what in one's perception, the requirement of a clause

would amount to being seen as unfair, unreasonable, arbitrary or unjust. When a party invokes the Court's jurisdiction and claims that a clause in the tender ought to be read in the manner he/it reads it, in such a case, the tender terms and conditions have to be read by the Court and understood in the language they are plainly expressed. Even if any particular clause is ambiguous and upon a query being raised by the Court as to what the clause precisely means or what is its requirement, the meaning that the tendering authority gives has to be accepted without reservation unless, of course, such meaning contravenes a constitutional right. This is because of the freedom that has to be conceded to the tendering authority to choose with whom it would like to enter into a contractual relationship and the allowance of certain measure of 'free play in the joints', which is a necessary concomitant for an agency working in the administrative sphere as in the present case.

44. Resting on such understanding of ours, it is now time for us to analyze clause 2.2.8, which is part of clause 2.2 titled "Eligibility of Applicants". Clause 2.2 is again part of Part 2 titled "Instructions to Applicants". It is considered appropriate to reproduce below the relevant clauses from the RFQ for fair and proper appreciation of what the tendering authority, i.e., JNPT intended.

Relevant clauses of the tender notice:

2.2. Eligibility of Applicants

***

2.2.8 An applicant including any consortium member or associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced

by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the applicant, consortium member or associate, as the case may be, nor has been expelled from any project or contract by an public entity nor have had any contract terminated (sic, by) any public entity for breach by such applicant, consortium member or associate.

***

2.7 Right to accept or reject any or all Applications/Bids

2.7.1 Notwithstanding anything contained in this RFQ, the Authority reserves the right to accept or reject any Application and to annul the Bidding Process and reject all Applications/Bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.7.2 The Authority reserves the right to reject any Application and/or Bid if:

(a) at any time, a material misrepresentation is made or uncovered, or

(b) *****

2.7.3 In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Applicant, or the Applicant has made material misrepresentation or has given any materially incorrect or false information, the Applicant shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Applicant/SPV has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFQ, be liable to be terminated, by a communication in writing by the

> Authority to the Applicant, without the Authority being liable in any manner whatsoever to the Applicant and without prejudice to any other right or remedy which the Authority may have under this RFQ, the Bidding Documents, the Concession Agreement or under applicable law.
>
> 2.7.4 The Authority reserves the right to verify all statements, information and documents submitted by the Applicant in response to the RFQ. Any such verification or lack of such verification by the Authority shall not relieve the Applicant of its obligation or liabilities hereunder nor will it affect any rights of the Authority thereunder.
>
> *****"

45. A conjoint reading of the aforesaid clauses, i.e., 2.2 and 2.2.8, leaves none in doubt that an applicant, including any consortium member or associate, would not be eligible to participate in the tender if in the last 3 (three) years any of the 3 (three) eventualities has occurred, viz. (i) a failure of the applicant, including any consortium member or associate, to perform any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the applicant, consortium or associate, as the case may be; (ii) expulsion of the applicant, including any consortium member or associate, from any project or contract by any public entity; or (iii) termination by any public entity of any contract for breach by such applicant, consortium member or associate.

46. It cannot be and has not been disputed before us that AVCTPL is an associate of the petitioner, within the meaning of the term "associate" as defined in the tender notice.

47. Having read clause 2.2.8 without adding/subtracting any word thereto/therefrom, it is clear that the ineligibility

referred to in its third limb would be attracted if an applicant, or for that matter, its associate, has suffered termination of a contract for breach by a public entity in the last 3 (three) years. The relevant clause has to be construed as the author would like it to be construed. The underlying idea behind insertion of such a clause in the tender terms seems to be that, JNPT does not wish to enter into any relationship with a party who earlier had entered into a relationship with a public entity and such public entity, for breach, has terminated the contract. It is immaterial for the present purpose as to whether the termination has received the imprimatur of the arbitral Tribunal/Court or not. If one considers clause 2.2.8 in its entirety, it would be found that the necessity of a judicial imprimatur is specifically referred to in its first limb. If indeed the author of the tender intended that after termination of the contract for breach by a public entity, such termination, if challenged in duly constituted proceedings before an arbitral tribunal/Court, would open up the window for the applicant to pass through and participate in the tender, it could have well provided therefor. However, it has not so provided. Also, there is no overlapping of the limbs. To attract the first limb of clause 2.2.8, there need not be a case of termination of contract. Even though the contract might have been worked out, any breach of the terms of the contract could give rise to proceedings and the judicial imprimatur referred to in the first limb would be attracted in such a case of breach of a contract, which has been fully worked out and penalty is imposed; whereas, the third limb is attracted when a contract is terminated by a public entity for breach of its terms. In this

particular case, having noticed that a judicial imprimatur is made a part of the first limb and not the third limb, it would amount to a rewriting of the tender terms and conditions by us if we were to read clause 2.2.8 with incorporation of words as proposed by the petitioner. What the petitioner urges the Court to do would amount to weaving a new texture or to change the texture of which the RFQ is woven. Since it is not open to the Court to read words in a clause forming part of a tender, which are not used by the author, we have no hesitation to hold that the contention is misplaced and untenable.

48. Moving further, it is noticed that while submitting the tender papers, the petitioner in the letter comprising application for pre-qualification dated 1st November 2021 certified as follows: -

> "5. We certify that in the last three years we or our Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part."

(emphasis ours)

49. The petitioner, it appears from the tenor of its defence as taken in the response to the show-cause notice, did know that the concession agreement that its associate, i.e., AVCTPL had entered into with VPT had been terminated by VPT for alleged breach of the terms and conditions thereof, i.e., failure to achieve the Minimum Guaranteed Cargo for a consecutive period of 3 (three) years for the period from 23rd October 2016 to 23rd October 2019. Whether or not there has been a

failure to achieve the Minimum Guaranteed Cargo, being the ground for termination of the contract by VPT, is a matter to be decided by the arbitral tribunal. However, AVCTPL having suffered the termination, we fail to comprehend as to how the petitioner could certify that none of its associates had any contract terminated by any public authority for breach on its part. It is, therefore, a misstatement that was made in paragraph 5 quoted above.

50. The contention that there cannot be termination of a terminated contract does not advance the case of the petitioner any further. That is again a point, which might arise in the arbitration proceedings for decision. JNPT desired to know whether any other public entity had terminated any contract for breach committed by the applicant or its associate. The petitioner could not have answered in the negative, on the face of the termination dated 26th December, 2020. For a fair consideration of its bid, the petitioner ought to have been candid that VPT had terminated the contract, but for reasons that it would have liked to assign, such termination should not impede consideration of its bid. Every relationship, and that does not exclude a contractual relationship, is founded on reliability, trust and confidence. The candour that was expected of the petitioner is sadly missing. The petitioner having failed to inspire reliability, trust and confidence of JNPT at the inception of entering into a relationship, JNPT cannot be compelled to revoke the impugned order for making way for the petitioner to enter into the zone of consideration.

51. There is much more to say, looking at page 322 of the

writ petition. The contents of paragraph 7 read as follows:

> "**7. A statement by the Applicant or any of their Associates disclosing material non-performance or contractual non-compliance in past projects, contractual disputes and litigation/ arbitration in the recent past is given below (Attach extra sheets, if necessary):** (bold in original)
>
> The following arbitrations are pending.
>
> 1. Adani Ennore Container Terminal Pvt Ltd. v. Kamarajar Port Limited.
> 2. Adani Vizag Coal Terminal Pvt Ltd. v. Visakhapatnam Port Trust.
> 3. Adani Vizhinjam Port Pvt. Ltd. v. Government of Kerala
> 4. Mormigao Port Trust v. Adani Murmugao Port Terminal Pvt Ltd.
>
> It may be kindly noted that all the pending arbitrations are related to contractual disputes and not owing to the reasons mentioned in Clause 2.2.6 of the RFQ i.e. (i) any malfeasance on part of Bidder and/or its Associates, (ii) any willful default or patent breach of the material terms of the relevant contract; (iii) any fraud, deceit or misrepresentation in relation to such contract or (iv) any rescinding or abandoning of such contract."
>
> (emphasis ours)

52. It is true that the petitioner did refer to pendency of arbitration proceedings between AVCTPL and VPT, but represented that the arbitration was not owing to the reasons mentioned in clause 2.2.6 (renumbered clause 2.2.8) of the RFQ. In fact, by stating that the arbitration proceeding pending before the arbitral tribunal is not owing to breach of the material terms of the relevant contract and that there has been no 'rescinding' of contract, the petitioner did in fact try to conceal facts from JNPT.

53. What surprises us more is the declaration dated 6th

December 2021 submitted by the petitioner. It reads as follows: -

"**DECLARATION**

We, Adani Ports and Special Economic Zone Limited, a company incorporated under the laws of India, have submitted our bid in response to the Request for Qualification (RFQ) for "Upgradation, Operation, Maintenance and Transfer of Jawaharlal Nehru Port Container Terminal (JNPCT) through Public Private Partnership" (Tender No. JNP/TRAFFIC/MCB/PPP/2021/01 dated 23.08.2021) and that the bid documents are submitted are as per the terms and conditions of the RFQ.

We further confirm and declare that as stated in the Clause 2.2.6 of the RFQ, we are not –

a) An entity which has been barred by the [Central/State Government, or any entity controlled by it,] from participating in any project (BOT or otherwise), and the bar subsists as on the date of Application, would not be eligible to submit an Application, either individually or as member of a Consortium; or

b) An Applicant including any Consortium Member or Associate, in the last 3 (three) years, which failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against an Applicant, Consortium Member or Associate, as the case may be; or

c) An Applicant including any Consortium Member or Associate that has been expelled from any project or contract by any Public entity; or

d) An Applicant including any Consortium Member or Associate that has had any contract terminated by any public entity for breach by such Applicant, Consortium Member, or Associate.

We also confirm that in case if aforestated declaration is discovered to be false and/or incorrect, then Jawaharlal Nehru Port Trust (JNPT) has a right to reject the bid at

> any stage; and in such an event, the bid security shall be liable to be forfeited. JNPT will also be entitled to recover any additional damage that it may suffer if the tendering process is prejudiced in any manner and the Project under the aforementioned Tender is delayed.
>
> Furthermore, if any infirmity in the aforestated declaration is discovered after signing of the contract, then JNPT has a right to terminate the contract at our cost."
>
> (emphasis ours)

54. The petitioner ought to have realized at the stage of submission of the declaration that JNPT had obtained information of termination of the contract awarded in favour of AVCTPL by VPT and was suspecting something adverse against it. Even then, the petitioner did not come out clean and insisted that none of its associates had any contract terminated by any public entity for breach committed by such associate. The least we wish to observe is that the petitioner must have been oblivious of the age old saying 'discretion is the better part of valour', which still holds good in modern times, and went on defending the indefensible.

55. Exception has been taken by the petitioner to the stand taken by JNPT in its reply affidavit that the false declaration given by the petitioner in the declaration dated 6th December 2021 is one of the reasons for disqualifying it from the tender process based on para 8 of the decision in **Mohinder Singh Gill** (supra). The contention advanced, requiring our consideration, is that validity of an order, which is under challenge in the proceedings, must be tested on the basis of the reason/ground assigned in it in support thereof; and any additional reason/ground, to support the order under

challenge, cannot be allowed to be raised in the reply affidavit or in course of arguments. What was held in **Mohinder Singh Gill** (supra) appears to have been inspired from a principle of law laid down by the Supreme Court in its decision in **Commissioner of Police, Bombay vs. Gordhandas Bhanji**, reported in AIR 1952 SC 16.

56. **Mohinder Singh Gill** (supra) has been considered by the Supreme Court in **All India Railway Recruitment Board vs. K. Shyam Kumar**, reported in (2010) 6 SCC 614, where it has been held that the principle laid down in **Mohinder Singh Gill** (supra) is not applicable where larger public interest is involved and in such situations, additional grounds can be looked into, to examine the validity of an order. To the same effect is the decision in **PRP Exports vs. State of Tamilnadu**, reported in (2014) 13 SCC 692. However, **K. Shyam Kumar** (supra) and **PRP Exports** (supra) have been considered in **63 Moons Technologies Ltd.** (supra) and it has been held in para 102 that there is no broad proposition that the law laid down in **Mohinder Singh Gill** (supra) will not apply where larger public interest is involved. The decision in **K. Shyam Kumar** (supra) and **P. R. P. Exports** (supra) were distinguished on the ground that the Court had proceeded to consider subsequent materials that had emerged for the purpose of validating the order under challenge.

57. We, however, find the contention of the petitioner based on the law laid down in **Mohinder Singh Gill** (supra) and **63 Moons Technologies Ltd.** (supra) to be without any substance. Neither **Gordhandas Bhanji** (supra), nor

Mohinder Singh Gill (supra) and **63 Moons Technologies Ltd.** (supra) has/have laid down the law that the writ court must look at only the order under challenge and not look at anything else. Such decisions do not lay down any law restricting the power of a writ court from looking beyond the order under challenge for ascertaining from evidence aliunde, whether the order can be upheld. Suppose, the order under challenge were based on two reasons/grounds and the Court forms an opinion that the said two reasons/grounds are legally untenable, does it follow that the Court may not consider anything else? The answer to this question, to our mind, has to be in the negative. The Court would be justified in looking into the documents annexed to the writ petition, or if the records pertaining to the order under challenge are called for, to look into such records. If from the documents annexed to the writ petition and/or the records pertaining to the order under challenge the Court finds that the order under challenge could be supported on another reason/ground, which is not stated in the said order, does the Court not have the power/authority to conclude, of course after putting the party at the receiving end on notice, that validity of the order under challenge can be upheld based on such third reason/ground and, therefore, the order is sustainable? We are inclined to the view that the writ court has such plenary power/authority and the same is not curbed by the decisions under consideration. **Gordhandas Bhanji** (supra), **Mohinder Singh Gill** (supra) and **63 Moons Technologies Ltd.** (supra) cannot be read as precedents precluding a writ court from sustaining an administrative order of disqualification dehors

the reasons/grounds stated therein, but based on any reason/ground appearing in the records or from the pleaded case of the party challenging such order.

58. Without even looking into the reply affidavit of JNPT but on consideration of the application dated 1st November 2021 as well as the declaration dated 6th December 2021 of the petitioner, we have no hesitation to hold that there has been a material misrepresentation on the petitioner's part and the same was indeed an additional reason for which its disqualification was attracted in terms of the sub-clauses of clause 2.7 extracted above.

59. Insofar as the contention that the petitioner was singled out and the declaration obtained only from it, we find Mr. Dhond's objection that there is no pleading to that effect to be unexceptionable. A contention which does not have the foundational fact to rest on ought not to have been advanced. In the absence of the relevant pleading, the contention stands outrightly rejected.

60. We now deal with the contention that clause 2.2.8 is not a mandatory pre-qualification condition, but only general and consequently waivable in nature. It has been noted above that clause 2.2.8 is part of the main clause 2.2. titled 'Eligibility of Applicants'. The crux of clause 2.2.8 is that an applicant would not be entitled to participate in the process if any of the ineligibility factors therein is present. Since para 14 of **G. J. Fernandez** (supra) has been relied upon by the petitioner, we have considered it and failed to find the materiality thereof for deciding the present dispute. To our mind, this contention is one advanced in desperation and, therefore, stands rejected.

61. The next contention of the petitioner that once JNPT had declared it as qualified for submission of RFP and, thus, it has waived its right to subsequently disqualify it, in our opinion, has also been urged to be rejected.

62. **Sasan Power Ltd.** (supra) reaffirms the position that waiver is spoken of in the realm of contract and it is section 63 of the Contract Act, 1872 that governs; however, it is important to note that waiver is an intentional relinquishment of a known right and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. Caution was sounded that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest.

63. Bearing in mind the aforesaid dictum, let us examine the plea of waiver. Clause 2.7.3 has been extracted above. The right of JNPT to disqualify any bidder on account of any pre-qualification condition not being met by it or it having made a material misrepresentation or it having given materially incorrect or false information, if found even after the execution of the concession agreement, is expressly preserved by clause 2.7.3. In such view of the matter, it is futile to argue that once declared qualified prior to commencement of the second stage of the process and with the remittance of Rs.4,24,800/-, the petitioner acquired an indefeasible right of participation.

64. The decision in **Sarku Engineering Services** (supra) has also been perused. The respondent no. 2 had banned the petitioner from all future business dealings with the

respondent no. 2 on the ground that an inquiry officer, who was internally appointed by the respondent no. 2, had come to the conclusion that the petitioner was responsible for the delayed completion of the project. It would, therefore, appear that the impugned order was passed after the parties had entered into a contractual relationship and upon detection of acts of commission/omission on the part of the petitioner leading to adverse consequences. The decision deals with blacklisting of a contractor, which is not the case here.

65. In this connection, we hold that the decision relied upon by Mr. Dhond in **B. V. G. India Ltd.** (supra) is more apposite. The questions arising for decision were captured in paragraph 18. In view of the discussions in paras 19 to 25, the first question was answered by holding that the respondent corporation was entitled in law to impose a pre-qualification criteria that 'the contractors whose work contract is terminated due to unsatisfactory services, are not eligible to participate in the tender'. Based on the discussions in paragraphs 27 to 30, the Court also rejected the contention urged on behalf of the petitioner that the impugned pre-qualification criteria amounted to its blacklisting. We share the views expressed in the decision in **B. V. G. India Ltd.** (supra).

66. The impugned letter has been sought to be assailed on the ground that interpretation of clause 2.2.8 by JNPT is unreasonable and burdensome. We have indicated above, in some measure of detail how a clause in a notice inviting tender is to be read and interpreted. One of the basic postulates of a valid contract is meeting of minds of the

parties. As the tendering authority, JNPT has provided the terms and conditions on the fulfilment whereof it would like to enter into a relationship with an applicant/bidder who is eligible in terms of the RFQ. We are informed that 7 (seven) applicants/bidders have been found eligible in the first stage of the process. Security clearance in respect of one applicant/bidder is awaited. There is, thus, sufficient competition amongst the eligible applicants/bidders. It is not the case of the petitioner that the terms and conditions of the tender are tailor-made to oust it or any particular applicant/bidder. Without any plea having been set up that the terms and conditions are either onerous or so tailor-made so as to exclude the petitioner, the contention that the manner in which JNPT is interpreting clause 2.2.8 is unreasonable and burdensome does not commend to us to afford sufficient reason to interdict in the process.

67. Mr. Dhond is also right in his contention that the petitioner having submitted its application/bid dated 1st November 2021 without any reservation *qua* the restriction that clause 2.2.6 (original), since renumbered 2.2.8, imposed in regard to eligibility to participate in the tender, it is not open to the petitioner to seek an order from this Court to declare clause 2.2.8 as unconstitutional. Reliance placed by Mr. Dhond on the decision in **National High Speed Rail Corporation Limited** (supra), which impliedly affirms **NICCO** (supra), is apposite. If a party takes a chance of selection without protest but remains unsuccessful on merit, it cannot be permitted to challenge the process of selection after the result of selection is not favourable to it. The decision of the

Division Bench of the Delhi High Court in **Atlanta Limited** (supra) clearly turns on its facts, which are quite dissimilar to the facts at hand. The said decision does not, therefore, advance the cause of the petitioner.

68. What remains is the contention that the petitioner had submitted its application/bid as a single entity and therefore, termination of the concession agreement by VPT did not provide justification for JNPT to exclude the petitioner from the zone of consideration. We have noted Mr. Dhond's counter to this contention in para 25 (supra) and are of the clear view that the same deserves acceptance. It is not only the petitioner who must have a clean record, but it's associates are also required to keep a clean record. This is an insistence of JNPT which, this Court, in its writ jurisdiction, cannot tinker. The terms and conditions of the RFQ are meant to govern all prospective applicants/bidders and even though a particular applicant/bidder may apply as a single entity, it does not acquire a right of being considered if any of its associate/s' contract has been terminated by a public authority during the last 3 (three) years. This contention too, therefore, fails.

69. Apart from any illegality committed by JNPT, it is found that JNPT has been rather generous in granting sufficient opportunity to the petitioner to make a full and fair disclosure of the disputes between AVCTPL and VPT. JNPT had derived knowledge at least in December 2021 that VPT had terminated the contract between it and AVCTPL by notice dated 26th December 2020. This is evident from its letter dated 8th October 2021. Despite an incorrect statement made by the petitioner in paragraph 7 of its response dated 9th

December 2021, it was conveyed by letter dated 24th December 2021 to the petitioner that it had qualified for submission of the RFP. JNPT could not have, in view of the information that it had received and the response of the petitioner that was available with it, proceed to declare the petitioner as qualified. However, having received information of dismissal of the petitioner's writ petition by the Andhra Pradesh High Court, JNPT embarked upon the exercise of objectively deciding whether the petitioner should be disqualified, and upon forming an opinion that clause 2.2.8 was attracted, proceeded to disqualify it. The decision of JNPT to disqualify the petitioner after having once declared it as qualified, to our mind, conforms to the settled law that JNPT was bound by the tender terms and conditions, which amounts to a representation to the public, and that any deviation therefrom would have amounted to a fraud on public, unless JNPT reserved unto it a power of relaxation of an eligibility criterion. No such power of relaxation has been brought to our notice. For the reasons prompting VPT to terminate the contract by the notice dated 26th December 2020, JNPT was rightly of the view that clause 2.2.8 of the RFQ was attracted, which left JNPT with no other alternative but to disqualify the petitioner from participating in the further process of the tender. In so disqualifying, the JNPT did not act illegally or irrationally or contrary to any procedure warranting judicial intervention.

Conclusion

70. For the foregoing reasons, the question formulated in para 13 above is answered in the affirmative. We find no

merit in any of the contentions urged on behalf of the petitioner. Accordingly, the writ petition stands dismissed.

71. Since the petitioner brought an unmeritorious case for adjudication, it shall bear costs of this proceeding, assessed at Rs. 5,00,000/-.

72. Since the petitioner has remitted to JNPT an amount of Rs. 4,24,800/- and by the impugned letter such amount has not been forfeited by JNPT, we permit JNPT to retain such amount and also direct the petitioner to pay the balance amount of Rs. 75,200/- within a month from date.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**

Later on:

73. Mr. Nankani, learned senior advocate for the petitioner prays for maintenance of *status quo* as on date. The prayer is opposed by Mr. Dhond, learned senior advocate for JNPT.

74. Upon consideration of the prayer, we find no reason to accede to the request of Mr. Nankani. The prayer is refused.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**