Sr. No. 01

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on:-19.07.2024
Pronounced on:- 05.08.2024

Case:-WP(C) No. 1347/2024
CM No. 3662/2024

1. R6 Technologies Private Limited Through its Managing Director/Chief Executive Officer-Riyaz Amin Malik, Age 63 years, S/o Late Mohammad Amin Malik, R/o H. No. 15 Shadab Avenue, Sector-6, Gulberg Colony, Hyderpora, Srinagar. .....Petitioner(s)

Through: Mr. Danish Majid Dar &
Mr. Bhat Shafi, Advocates.

Vs

HIGH COURT
MU & KASHMIR AND
DAKH
सत्यमेव जयते

1. UT of J&K Through its Chief Secretary, Civil Sectt., Srinagar;

2. Commissioner Secretary to Govt., Science and Technology Deptt., Tawanai Ghar, S.D.A. Colony, Bemina, Srinagar;

3. Mr. Prithvi Raj Dhar, Chief Executive Officer, J&K Energy Development Agency Tawanai Ghar, S.D.A. Colony, Bemina, Srinagar.

..... Respondent(s)

Through: Mr. S.S. Kala, AAG.

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The instant petition has been preferred by the petitioner being aggrieved by the Tender bearing No. JKDA-SLR0RTS/6/2024/8517 dated

12.06.2024 (*for short, '**the impugned tender'***) issued by the respondent No. 3, the Jammu and Kashmir Energy Development Agency (JAKEDA),whereby e-bids for the supply, installation and commissioning of grid connected rooftop solar photovoltaic power plants on Government buildings in the UT of J&K were invited.

2. The petitioner though the medium of the instant petition has sought the following reliefs:-

> ***(i) Issue an appropriate writ, order or direction of Certiorari quashing the impugned Tender bearing C No. JKDA-SLRORTS/6/2024/8517 dated 12.06.2024 issued by the respondent No. 3;***
>
> ***(ii) Issue an appropriate writ, order or direction of mandamus to the respondent No. 3 commanding him to re-issue the tender with fair, rational and inclusive eligibility criteria, ensuring equal participation opportunities for all local vendors;***
>
> ***(iii) Issue an appropriate writ, order or direction directing the respondent No. 3 to take a final decision on the respondent dated 19.06.2024 of the petitioner and until such time, the tender process initiated pursuant to the impugned tender bearing C No. JKDA-SLRORTS/6/2024/8517 dated 12.06.2024 issued by respondent No. 3 shall not be finalized;***
>
> ***(iv) Any other relief which this Hon'ble Court may deem fit and proper in the attending circumstances of the case be issued in favour of the petitioner and against the respondents in the interests of justice."***

OF JAMMU & KASHMIR AND
HIGH COURT

BRIEF FACTS OF THE CASE

3. Before going into the genesis of the controversy in hand, it is necessary to get overview of the *scheme,* which has outlined the basis of the tender, which is impugned in present case. The origin of the impugned tender

started with the union budget for the fiscal year 2024-25, released in February, 2024, wherein the Government of India had allocated a specific budget of Rs. 150 Crores for renewable energy projects in the UT of J&K. This significant budgetary provision underscores the Union of India's commitment to promote renewable energy initiatives and addressing climate change issue comprehensively.

4. Since India is committed to several key international treaties aimed at combating climate change including the United Nations Framework Convention on Climate Change (UNFCCC), ITS Kyoto Protocol (KP) And Paris Agreement (PA), these international commitments obligate India to undertake substantial measures to mitigate greenhouse gas emissions and promote sustainable development. In alignment with these obligations, a detailed roadmap for maximizing energy harvesting from alternate energy sources, particularly, focusing on renewable energy such as **solar power**. This initiative is crucial for meeting both national and international climate goals and ensuring sustainable energy development. These schemes aim to harness solar energy for both residential and Government sectors, thereby significantly contributing to the national and international climate goals.

5. The record reveals that under the direction of Prime Minister Office (PMO), various meetings were held from time to time for ***saturating the rooftop solar power plants*** on all Government buildings with a strict deadline for completion of said projects before December, 2025 in respect of large States/UTs and December, 2024 in respect of small States/UTs, respectively. These, Rooftop Solar Schemes (RTS) have been launched at both Central and

State/UT levels to achieve the said targets and commitments towards climate change mitigation and progress of these scheme are monitored under the Ministry of Home Affairs (MHA), Government of India for ensuring the speedy installation of the solar panels across the States and Union Territories in a time bound manner.

6. A decision/initiative was taken that the Jammu and Kashmir Energy Development Agency (JAKEDA) shall implement a ***70 MW Rooftop Solar Projects*** for covering 8792 Government buildings under the CAPEX mode and, thus, the impugned Tender is an outcome of this initiative.

7. On 12.06.2024, Respondent No.3 (JAKEDA) issued tender which is impugned in the instant petition on the JK Tenders Portal for the Request for Selection (RFS) of bidders for the supply, installation and commissioning including warranty and Comprehensive Maintenance Contract (CMC) for five years, of **Grid-Connected Solar Rooftop Photovoltaic Power Plants** on Government buildings in the UT of J&K. Pertinently, the tender document provides the capacity category for the solar PV Plants, which are as follows:-

OF JAMMU & KASHMIR AND
HIGH COURT
JAMMU

Category "A"	**2 KW**
Category "B"	**3 KW**
Category "C"	**>3 KW upto 10 KW**
Category "D"	**>10 KW upto 100 KW**
Category "E"	**>100 KW upto 500 KW**

8. The total tentative project capacity is envisaged as 70 MW, which may increase or decrease by 25% depending on the availability of the funds received by the agency from different sources.

SUBMISSIONS ON BEHALF OF THE PETITIONER:-

9. Learned counsel for the petitioner submits that the petitioner's primary contentions revolve around the arbitrary, discriminatory and unreasonable nature of the technical eligibility criteria, the lack of transparency in the tender process and the exclusion of local venders, which contradict the principle of equality.

10. Further, it is the case of the petitioner that the impugned tender has arbitrary eligibility criteria, as it sets a minimum cumulative experience requirement of 2.5 MW for all the participating vendors, which has disproportionately excluded 31 out of 32 local vendors in Union Territory of Jammu and Kashmir, including the petitioner, who have demonstrated capability installing smaller rooftop solar systems.

11. The further case of the petitioner is that the tender issued by JAKEDA is in gross violation of the advisory issued by Secretary, Government of India, Ministry of New and Renewable Energy (MNRE) vide office Order reference DO No. 318/331/2017-GCRT dated 21.12.2021, wherein it has been observed as under:-

OF JAMMU & KASHMIR AND
HIGH COURT
JAMMU

> ***"It has been observed that vendors are often not willing to work in the entire area of the DISCOM/State. We would, therefore, request that vendor empanelment may be done district-wise or division-wise. The number of vendors should be sufficient to cover the entire district or division and also ensure that consumers have a choice and there is fair competition."***

It is a specific case of the petitioner that by not adopting a district-wise or division-wise approach, the tender process fails to ensure comprehensive coverage and fair competition, contrary to the MNRE's guidance. As per the petitioner, the exclusion of 31 local vendors from participating in the tender not only affects their businesses, but also has broader implications for the local

economy and the achievement of renewable energy goals. Their exclusion undermines the Government's objectives of fostering local entrepreneurship, promoting renewable energy initiatives, and generating employment opportunities.

12. It is the contention of the petitioner that the instant tender's total tentative project capacity is envisaged as 70 MW, however, the number of buildings falling under each respective category has not been provided, which indicates lack of transparency and hinders the clear understanding of the volume and distribution of respective categories, leading to potential confusion and misallocation of resources.

13. It has also been urged by the learned counsel for the petitioner that the eligibility criteria requiring a minimum cumulative experience of 2.5 MW for all participating vendors is discriminatory, particularly, against smaller local vendors, who have demonstrated their capability in installing rooftop solar systems upto 10 KW. This blanket criterion disregards the varied capacities of power plants specified in the tender, ranging from 2 KW to 500 KW and unfairly disadvantages vendors who have specialized in smaller installations. The exclusion of the local vendors is not based on any reasonable classification and lacks an intelligible differentia, thereby violating the principles of equality and non-discrimination enshrined in Article 14 of the Constitution.

14. It is also the case of the petitioner that the impugned tender contravenes the objectives and spirit of various National and State renewable energy initiatives and the substantial budget allocation for renewable energy projects in J&K by setting exclusionary eligibility criteria, which undermines

the Government vision of fostering local entrepreneurship, promoting renewable energy and boosting the local economy, thereby defeating the purpose of these budgetary location and policy initiatives.

15. Mr. Danish Majid Dar, Learned counsel for the petitioner has strenuously argued that the impugned tender process lacks transparency, particularly, regarding the number of buildings falling under each respective capacity category. The total tentative project capacity is envisaged as 70 MW with the provision to increase or decrease by 25% depending on availability of funds. However, the tender document does not specify the number of buildings in each category, which is critical for potential bidders to make informed decision.

16. It is the further case of petitioner that the evaluation method indicated by respondent No. 3 in the impugned tender suggests that the impugned tender proposes to empanel ten (10) vendors in each of the five categories based on L-1 rates, which clearly demonstrates that the impugned tender is not intended to be awarded to a single bidder, therefore, it is ex-facie without any rational basis to have provided for a threshold of 2.5 MW for eligibility and such a threshold unnecessarily restricts competition and is not aligned with the object of impaneling multiple vendors. The impugned tender, as per the petitioner, fails to adopt inclusive measures that would ensure equal participation opportunities for all local vendors.

17. The further stand of the petitioner is that the inclusion of the experience of agriculture solar pumps in the technical eligibility criteria is discriminatory, as the design, technical and perform dynamics of rooftop solar

systems differ significantly from those of agriculture solar pumps and these criteria appears to favour certain vendors/firms, excluding competent local vendors who specialize in rooftop solar installations.

18. It is also the stand of the petitioner that the impugned tender contravenes the objectives and spirit of various national and State renewable energy initiatives, particularly, the PM Surya Ghar Muft Bijli Yojana and the tender process undermines the Government's vision of fostering local entrepreneurship, promoting renewable energy and boosting the local economy.

19. Lastly, the counsel for the petitioner submits that the capacity of proposed solar power plant should be classified into three categories instead of five to ensure fair participation. According to the counsel for petitioner, minimal financial criteria for categories, 1 and 2 including relaxation for MSME should be set to facilitate the local vendors' participation without unnecessary complication and hurdles.

OF JAMMU & KASHMIR AND
HIGH COURT

Category "1"	**1 KW to 10 KW**
Category "2"	**>10KW to 100 KW**
Category "3"	**>100 KW to 500 KW**

SUBMISSIONS ON BEHALF OF LEARNED COUNSEL FOR THE RESPONDENTS

20. Learned counsel for the respondents submits that the impugned tender was pursuant to the meeting notice issued by the Prime Minister's office (PMO) for "Saturation of Rooftop Solar" in UTs. In this regard, series of meeting were held from time to time for the review of solarization by a Steering Committee chaired by Union Cabinet Secretary. Accordingly, a tender document of 70 MW was issued, which has been categorized into five categories (2 KW, 3 KW, 3-10

KW, 10-100 KW and 100-500 KW) for obtaining of rates, which is in conformity with the MNRE guidelines/orders. The categorization of power plant capacities and associated eligibility thresholds are aligned with MNRE and CVC guidelines with the overreaching objective of achieving uniform standards in solar installations. In order to implement the project on fast track basis, the Agency cannot rely on a single vendor to execute a project of such a huge magnitude, as such empanelment of multiple vendors becomes imperative for successful, smooth and timely implementation of the project. Further, as per GFR 2017 (Rule 143) the instant case comes under Purchase of Goods and the NIT is in consonance with GFR Rule 151(i) which reads as,

> ***"For goods and services not available on GeM, Head of Ministry/ Department may also register suppliers of goods and services which are specifically required by that Department or Office, periodically. Registration of the supplier should be done following a fair, transparent and reasonable procedure and after giving due publicity.***
> ***Also the credentials, manufacturing capability, quality control systems, past performance, after-sales service, financial background etc, of the supplier(s) should be carefully verified before registration.***
> ***As per the CVC guidelines issued vide No.12-02-1-CTE-6 dated 17th December, 2002 the pre-qualification criteria for store/purchase contracts shall be based entirely upon the capability and resources of prospective bidders to perform a particular contract satisfactorily, taking into account their (i) experience and past performance on similar contracts for last two years (ii) capabilities with respect to personnel, equipment and manufacturing facilities (iii) financial standing through latest I.T.C.C., Annual report (balance sheet and Profit & Loss Account) of last 3 years. The quantity, delivery and value requirement shall be kept in view, while fixing the PQ criteria.***

21. Learned counsel for the respondents also submits that as per evaluation methodology prescribed in the NIT, the L-1 rates would be offered to other technically/financially qualified participating vendors for their empanelment upto a number of 10 vendors, subject to acceptance of the L-1 rates, so that the execution of work could be made on fast track basis, as the

timeline for completion of the project has been fixed as December, 2025 by MNRE, GoI, whereof respondent has to solarize more than 22000 Government buildings in CAPEX & RESCO modes. Accordingly, in the instant case, the work could be allotted to maximum of 10 vendors out of which L-1 would be considered for allotment of 25% work based on the performance and the remaining work would be allotted amongst the other 09 vendors. As such, the work of 17-18 MW aggregate capacity could be offered to L-1 bidder and the remaining 52-53 MWs to 9 other bidders with a capacity of around 5-7 MW to each bidder, in case they accept the L-1 rates, depending on their financial capacity for implementation of the project to meet the envisaged targets.

22. Learned counsel for the respondents further submits that normally, an eligibility criterion of around 30-40% of the quantum of work to be executed by each bidder is being kept as a work experience in such contracts. In the instant case, a work of around 18 MW is to be executed by lowest bidder, as such, work experience of 7.5 MW of similar nature has been kept for the bidders, which has been further relaxed to 2.5 MW for the Local MSMEs as per the MSME policy which says that the procuring Agency may relax the condition of prior turnover and prior experience. Also the bidders, other than L-1, will get the work of 5-7 MW capacity only, as such, the relaxed work experience is proportionate to the allotted capacity. Further, this will also ensure wider participation of the prospective bidders. However, for more participation of the vendors the EPC contractors installing Mega Scale Solar Power Plants have also been allowed to participate with higher installed capacity and past experience of 15 MW. A good numbers of UT of J&K are also eligible to participate who are

OF JAMMU & KASHMIR AND
HIGH COURT
सत्यमेव जयते

working in the solar sector from last twenty years. The respondents maintain that all eligibility criteria are formulated in accordance with statutory regulations and MNRE guidelines, ensuring consistency and fairness in vendor selection. Respondent's adherence to establish procurement rules and guidelines underscores its commitment to fair and transparent practices. The Petitioner's assertion that this criterion lacks rational basis is unfounded, as it ensures that vendors possess requisite experience commensurate with the project's scope whereas, R6 Technologies Private Limited (petitioner herein) has past experience of 111 kW, representing a mere 0.15% of the project capacity which does not demonstrate the capability to manage such a substantial undertaking.

23. Mr. Satinder Singh Kala, Learned AAG has vehemently argued that most of the buildings in the remote areas are either unmetered or having very less sanctioned connected load, which is not in commensurate with their actual energy consumption due to which the actual capacity of the solar power plant cannot be proposed accurately. According to him, there may be also various buildings, which may not be feasible due to multiple issues like non-availability of shadow free space, structural issues, poor grid reliability etc. In this scenario, such buildings are to be covered under the benefit of ***'Virtual Net Metering'***, wherein a higher capacity solar power plant can be installed on a particular feasible building of a particular department and the benefit of surplus solar energy generated thereof could be passed over to the other non-feasible building, which will also be cost effective, as such, the tender cannot be segregated/bifurcated into individual categories.

24. Learned counsel for the respondents has further argued in vehemence that the variability in project requirements necessitates a flexible approach in specifying the exact number of buildings initially. JAKEDA adheres to national practices to ensure project feasibility and timely implementation, thereby addressing the logistical challenges posed by the extensive geographic spread of Government buildings in J&K.

25. With a view to buttress his arguments, he has placed reliance on Rule 149 (iii) of General Financial Rules-2017 (*in brevity*, **GFR-2017**), which envisages that *'a demand for goods shall not be divided into small quantities to make piecemeal purchases to avoid procurement through L-1 Buying/bidding/reverse auction on GeM or the necessity of obtaining the sanction of higher authorities required with reference to the estimated value of the total demand*.'

OF JAMMU & KASHMIR AND
HIGH COURT

26. He has further placed reliance on Rule 157 of GFR-2017, which envisages that '*a demand for goods should not be divided into small quantities to make piecemeal purchases to avoid the necessity of obtaining the sanction of higher authority required with reference to the estimated value of the total demand.'* Another aspect which has been brought to the notice of this Court by the learned counsel for the respondents is para-10 of the NIT in scope of Work, which envisages that '*the work is to be carried out as per the terms and conditions of the contract which includes survey of the site for its feasibility considering the shadow free space, sanctioned load of the beneficiary by the DISCOM etc'*.

Thus, according to learned counsel for the respondents, the categorization of power plant capacities and associated eligibility thresholds are aligned with GFR-2017 and MNRE guidelines and the overarching objective of achieving uniform standards in solar installations. Contrary to the petitioner's claim, this approach facilitates equitable participation and optimized project outcomes, as evidenced by previous execution challenges faced by local vendors in meeting allocated targets.

27. Another aspect argued by the learned counsel for the respondents is that the Surya Ghar Muft Bijli Yojana and instant tender serve distinct objectives, with the latter targeting Government buildings rather than domestic consumers. The eligibility criteria including financial prerequisites as designed to ensure the successful implementation of a project valued at Rs. 400 crores, emphasizing the need for robust financial capability and operational scale. The aggregate capacity of the tender document is 70,000 KW costing around Rs. 400.00 crores, while the petitioner has executing projects of 111 KW costing Rs. 55.00 lacs only. Thus, according to the respondents, the petitioner cannot claim to execute such a huge project costing Rs. 400.00 crores, as the petitioner does not fulfill the basic eligibility criteria and cannot invoke the writ jurisdiction of this Court.

OF JAMMU & KASHMIR AND
HIGH COURT
सत्यमेव जयते

28. In support of his arguments, learned counsel for the respondent has placed reliance on the Manual for Procurement of Goods, 2017, Para 8.4 (vii), which provides that "*past experience, capacity and financial strength of a supplier is an important determinant of quality, after sales support of the Capital Goods; such procurements are a fit case for Pre-qualification bidding.*"

According to the learned counsel, the firms that are not financially sound and could not execute at least 5-6 MW aggregate project capacity will struggle to provide the after-sales services, as it requires a significant cash flow from the vendor side to maintain the after sale service centers. Also, when the respondent releases 15% of the payment (3% annually) over a period of five years to ensure proper after implementation service and so far as petitioner is concerned, it has a turnover of Rs. 50.00 lacs only, which is not sufficient to execute such a large project.

29. The respondents have taken a specific stand in the reply affidavit that JAKEDA has invited rates of different categories and at present, it is not possible to provide the list of 320000 buildings with specific capacities as most of the buildings are not metered properly and, as such, actual capacity of the particular building vis-à-vis its energy consumption and availability of space could not be ascertained accurately at this juncture and the scope of the same has been kept in the NIT with respective qualified vendors. It is beyond comprehension that a vendor who executed 100 to 200 KW capacity only in a period of two years would be able to execute 70,000 KW during next one year, as huge cost is involved in the project. According to Learned counsel for respondents, the tender document is categorized as per the MNRE guidelines and for each capacity a separate tender cannot be floated, as the capacity of the Solar Power Plant could not be ascertained in advance and the tender document is for a cumulative capacity of 70,000 KW (70 MW). This practice is being adopted throughout the country. Further, splitting the quantum of work to be

OF JAMMU & KASHMIR AND
HIGH COURT
JAMMU
सत्यमेव जयते

tendered out to accommodate vendors with lesser technical and financial eligibility and vice versa, is against the standard tendering norms.

30. The further stand of the respondents is that both solar rooftop and solar pumps are of similar nature and generate electricity from solar energy. The solar rooftops are installed on the roof of the building, while as solar pumps are being installed on ground. The inclusion of agriculture solar pumps experience in eligibility criteria is consistent with CVC Guidelines and MNRE's broader renewable energy strategy, aimed at leveraging diverse solar expertise for comprehensive project delivery and to have larger participation base of the technically and financially sound firms executing solar projects across the country.

31. It is the further stand of the respondents that in the instant NIT, as around minimum of ten vendors are proposed to be empanelled, who can execute around 7 MW Capacity each valued at around Rs. 40 Crores. As such, the average financial turnover of Rs. 15.00 Crores has been kept during the last three financial years (around 30%), which has further been relaxed for local MSMEs to Rs. 4.00 Crores for wider participation of the bidders and in case, the average financial turnover criterion is relaxed further, it will risk the implementation and timely execution of this high visibility project.

OF JAMMU & KASHMIR AND
HIGH COURT

LEGAL ANALYSIS

32. Heard learned counsel for the parties at length and perused the record.

33. With the consent of learned counsel for the parties, the instant petition is taken up for final disposal.

34. With a view to decide the controversy in question, this Court deems it proper to define and emphasize the enlarged role of the Government in economic activity and its corresponding ability to give economic '*largesse*' which was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality which is being observed by the Constitutional Courts today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender as it has happened in the instant case, seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (PIL) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

OF JAMMU & KASHMIR AND
HIGH COURT
LADAKH

35. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that the Apex Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fide*. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by the principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

36. This Court cannot lose sight of the fact that a tenderer or a contractor with a grievance can always seek damages in a civil Court and, thus, "attempts by unsuccessful tenderers not fulfilling the criteria with imaginary grievances, wounded pride and business rivalry, to make mountains out of the 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."

37. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. The Court should always keep in mind while deciding tender matters, the public interest should not be affected, which is paramount consideration to decide matters involving tenders.

38. In the aforesaid backdrop and having considered the whole spectrum and counter arguments addressed by the learned counsel appearing for the parties, this Court is of the view that the decision in this petition hinges on determination of the following issues:-

I. ***What is the scope of judicial review in tender matters?***

II. ***Whether a right is accrued to a party being ineligible to challenge the terms and conditions of the tender and whether the terms and conditions of the said tender can be tailor-made at the behest of that party to suit eligibility?***

III. ***Whether it is permissible to bifurcate the terms and conditions of a tender costing around Rs. 400 crores for execution of a project involving cumulative capacity of 70,000 KW at the behest of a party, who is not financially***

capable to execute such project and lacks eligibility criteria to compete?

IV. ***The scope of interference by the Constitutional Court in a tender involving huge public interest and whether individual interest has to be given due weightage over and above public interest?***

ISSUE No. 1. What is the scope of judicial review in tender matters?

39. In the present case, the primary ground of challenge by the petitioner revolves around the arbitrary, discriminatory, and unreasonable nature of technical eligibility criteria of the impugned tender, in view of which, this Court before examining the case on merits, finds it essential to discuss the scope of judicial review, which is available with the Courts while examining the matters of tenders.

OF JAMMU & KASHMIR AND
HIGH COURT

40. In the case of *"Tata Cellular vs Union of India*(1994) 6 SCC 651", the Supreme Court reviewed the entire case law on the subject and laid down the following principles for application to cases involving judicial review in tenders/contractual matters. The relevant paragraph of the said judgment is reproduced as hereinunder:-

"…..94. ***The principles deducible from the above are:-***

(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 principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fide.

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

OF JAMMU & KASHMIR AND
HIGH COURT
सत्यमेव जयते

The element of transparency is always required in such like tenders, as the tender in question because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in the Tata Cellular's case (supra) and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

41. Also, in "***Michigan Rubber (India) Ltd v. State of Karnataka***, *(2012) 8 SCC 216*, the Hon'ble Supreme Court in paras-23 & 24 being relevant in the instant matter are reproduced hereunder:-

> ***"……23. From the above decisions, the following principles emerge:-***
>
> ***(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;***
>
> ***(b) fixation of a value of the tender is entirely within the purview of the executive and Courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;***
>
> ***(c) 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 unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;***
>
> ***(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and***
>
> ***(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."***
>
> ***24. 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"; and***
>
> ***(ii) Whether the public interest is affected.***
>
> ***If the answers to the above questions are in negative, then there should be no interference under Article 226".***

42. Similarly, the decision of the Supreme Court in "***Directorate of Education and Ors. v. Educompdatamatics Limited & Ors.,*** *2004 (4) SCC 19*" reiterates the said position. The Hon'ble Apex Court in that case was examining a tender notice, which stipulated a turnover of Rs. 20.00 Crores as a condition of eligibility and held that the Government must have a freehand in stipulating the terms of the tender and that it must have reasonable play in the joints as a concomitant necessary for an administrative body in administrative sphere. The Apex Court at para-12 observed as under: -

> ***"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. it must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down 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. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."***

43. Also, the law in this regard has been settled in case titled, "***BTL EPC Ltd. Vs. Macawber Beekay Pvt. Ltd. and ors***." passed by the Hon'ble Apex Court in Civil Appeal No. 5968/2023, wherein in paras-35 & 48, following has been held:-

> ***"…..35. It is settled law that in contracts involving complex technical issues, the Court should exercise restraint in exercising the power of judicial review. Even if a party to the contract is 'State' within the meaning of Article 12 of the Constitution, and as such, is amenable to the writ jurisdiction of the High Court or the Supreme Court, the Court should not readily interfere in commercial or contractual matters. This principle has been reiterated in a recent judgment of this Court. Justice J B Pardiwala, speaking for the Bench in Tata Motors Limited v. BEST held:-***

> ***"48. This Court being the guardian of fundamental rights is duty- bound to Interfere when there Is arbitrariness, irrationality, mala fide, and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters This Court Is normally loathe to Interfere In contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or Irrationality is made out One must remember that today many public sector undertakings compete with the private industry The contracts entered Into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless Interference in commercial matters can cause. In contracts Involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical Issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give fair play in the Joints' to the Government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.***"

44. This view has been further considered by the Supreme Court in case titled, "***Directorate of Education and ors. Vs. Educomp Datamatics Ltd. and ors.***, reported in *(2004) 4 SCC 19*", wherein, at para-12, it has been held as under:-

> ***"……12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down 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. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."***

45. Again, in case titled, "***Tata Motors Limited Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and ors***., rendered by the Hon'ble Apex Court in Civil Appeal No. 3897 of 2023, what has been held at paras-48 & 52, being relevant to this case is reproduced as under:-

> ***"…..48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the Government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.***
>
> ***…….52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the***

> ***tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind."***

46. This Court is also fortified with the judgment of Hon'ble Apex Court delivered in case titled, ***"Silppi Constructions Contractors Vs. Union of India,*** *reported in (2020) 16 SCC 489*", wherein at paras-19 & 20, following has laid down:-

> ***"…...19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the Government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.***
>
> ***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 court's interference should be minimal. The authority which floats the contract or tender, and has authored 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. With this approach in mind we shall deal with the present case.***"

47. From the aforesaid legal position and enunciation of law, it is clear that the scope of judicial review in tender/auction process is extremely limited. Admittedly, the Court cannot adjudge the soundness of a decision and it must concern itself only with the manner in which the decision was made. The Government and other public authorities have the freedom of contract and in the absence of manifest unreasonableness, patent arbitrariness or clear *mala fide* and bias, the Court should show due deference to the decision of the public authority. Consequently, the scope of interference by the Court in matters like these is exceptionally minimal.

OF JAMMU & KASHMIR AND
HIGH COURT

CONCLUSION OF ISSUE No. 1

48. Keeping in view the law discussed above, it is clear that the Court being the guardian of fundamental right is duty-bound to interfere when there is a strong foundation of arbitrariness, irrationality, *mala fide* and bias. However, in the instant case, the petitioner has failed to make out a case under the ambit of the above four conditions and, thus, the Issue No. 1 is answered against the petitioner and in favour of the respondents.

ISSUE No. 2 Whether a right is accrued to a party being ineligible to challenge the terms and conditions of the tender and whether the terms and conditions of the said tender can be tailer-made at the behest of that party to suit eligibility?

49. In the aforesaid background, *let us examine the right of the ineligible party to challenge the said terms and conditions.* In the case at hand, the petitioner has alleged that the threshold of minimum cumulative experience requirement of 2.5 MW is without any rational basis and such a threshold unnecessarily restricts competition and is not aligned with the object of impaneling multiple vendors. However, the perusal of record suggests otherwise, making it clear that the said experience criteria is based on sound reasoning keeping in mind the huge capacity of 70,000 KW and project cost of 400.00 crores and, as such, selecting only those contractors having sound financial capacity as well as past experience of undertaking such colossal project would be in the interest of general public. In view of the same, the right to throw challenge to the terms and conditions of the impugned tender, which a party *ab intio* fails to qualify, has been discussed in catena of judgments.

OF JAMMU & KASHMIR AND
HIGH COURT

50. The Apex Court has categorically held in the case of ***Meerut Development Authority Vs. Association of Management Studies and Anr***. *(2009) 6 SCC 171*, wherein it is held that:-

> ***"It is cited in support contention that if the terms of invitation of tender are so tailor-made to suit convenience of a particular person with a view to eliminate all others from participating in the bidding process, judicial review will be available. In paragraph 26 to 29 the Apex Court held as under:-***
>
> ***"26. 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. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the biding process.***

> ***27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.***
>
> ***28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.***
>
> ***29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."***

51. The Apex Court in the case of "***Maa Binda Express Carrier Vs. North-East Frontier Railway,*** reported in *(2014) 3 SCC 760",* para-8 whereof is relevant, has held as under:-

> ***"……8.The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject***

> ***to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."***

52. In view of the above-mentioned judicial pronouncements, it is made clear that the scope of judicial review is very limited and is available in cases, where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any ***particular person*** with a view to eliminate all others from participating in the bidding process, whereas the perusal of record in the instant case transpires that nothing of such sort has happened. The record in the instant case further reveals that the entire work of the tender would be allotted to maximum of 10 vendors in each category on the basis of their cumulative work experience, which is provided in Clause 03 of (***Technical criteria***) of the terms and conditions of the impugned tender, which terms and conditions are reproduced as under:-

OF JAMMU & KASHMIR AND
HIGH COURT

> ***"The bidder should have:-***
> ***Experience of having successfully Commissioned cumulative Capacity of 15 MW solar power plants.***
> ***OR***
> ***Experience of having successfully commissioned an aggregate capacity of 7.5 MW in the range of 1KW – 500KW capacity, with the scope of work as Solarization of Rooftop On-Grid/Hybrid and Agriculture Solar Pumps.***
> ***For vendors registered/incorporated in UT of J&K, a cumulative capacity of experience shall be minimum 2.5 MW with the scope of work as solarization of rooftop On-Grid/Hybrid and Agriculture Solar Pumps."***

Thus, from a bare perusal of above mentioned Clause (3) of ***"Technical criteria",*** it is evident that cumulative capacity for the bidders of UT of Jammu and Kashmir has already been relaxed as 2.5 MW in comparison to the other bidders, who required 7.5 MW as aggregate capacity of experience.

Therefore, the terms and condition outlining eligibility criteria is based on sound reasoning of the Government, which are not to be changed as per the convenience of the bidders who are ineligible to compete. Be that as it may, the scope of judicial review is very limited and is available in cases, where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any ***particular person*** with a view to eliminate all others from participating in the bidding process. However, in absence of a clear-cut case of arbitrariness or *mala fide* or bias or irrationality being perpetuated, writ Courts cannot intervene in tender matters.

53. The record reveals that the capacity of the power plant to be installed on a particular building depends upon the exact roof space available and the connected load, which may vary from building to building. The empanelled vendors have to carry a survey of the buildings in the allotted area before placement of supply orders, as such, the exact number of buildings cannot be indicated in the NIT. The same practice is being followed across the country and respondents have also been executing the projects in the same pattern, otherwise it may take years together to finalize the capacity of power plant to be installed on a particular building, as there are approximately more than 32000 Government buildings in the UT of J&K, which are scattered across the length and breadth of the UT. The variability in project requirements necessitates a flexible approach in specifying the exact number of buildings initially. The respondents adhere to national practices to ensure project feasibility and timely implementation, thereby addressing the logistical

OF JAMMU & KASHMIR AND
HIGH COURT

challenges posed by the extensive geographic spread of Government buildings in Jammu & Kashmir.

54. The record further reveals that Surya Ghar Muft Bijli Yojna and the instant tender serve distinct objectives, with the latter targeting Government buildings rather than domestic consumers. The eligibility criteria including financial prerequisites, are designed to ensure the successful implementation of a project valued at Rs. 400 crores, emphasizing the need for robust financial capability and operational scale. As such, both are the distinct issues, which are having different objectives. For local vendors, the empanelment is open under Surya Ghar Muft Bijli Yojana, whereunder they can install rooftop power plants in the domestic sector for which MNRE has fixed the benchmark prices and, accordingly, the empanelled vendors can execute the projects at mass level. Further, the guidelines of the scheme provide advance payment benefit to the vendors, whereas in the instant case, the vendor should have financial capability as the payments are being released in scattered manner over a period of 5 years, as they have to maintain the systems for five years period. Further, the bidder shall mandatorily provide Application Programming Interface (API) of the data logger installed with inverter to fetch the data on respondents' platform/dashboard and under Comprehensive Maintenance Contract after Sales Service, the successful bidder has to meet various parameters, which includes establishing "***After Sales Office/Service Centres***" in Jammu & Kashmir regions to cater to the maintenance needs of beneficiary institutions.

As per Manual for Procurement of Goods 2017, Para 8.4 (vii) "past experience, capacity and financial strength of a supplier is an important

determinant of quality, ***after sales support of the Capital Goods****; such procurements are a fit case for Pre-qualification bidding."*

Based on the above, firms that are not financially sound and could not execute at least 5-6 MW aggregate project capacity will struggle to provide the after-sales service as it requires a significant cash flow from the vendor side to maintain the after sale service centres. The record further reveals that the respondents releases 15% of the payment (3%) annually over a period of 5 Years to ensure proper after implementation service, provided to the beneficiary institution by the concerned vendors. As such, the participating firms should be financially sound which the petitioner does not fulfill to execute the instant project. The petitioner has a turnover of Rs.50.00 lakhs only and it is not clear how the petitioner could execute such a large project.

55. Thus, it emerges from the record that the capacity ranges specified in the tender are based on MNRE directives and are intended to standardize project execution criteria. In the instant NIT, as around minimum of ten (10) vendors are proposed to be empanelled, who can execute around 7 MW capacity each valued at around Rs 40 Crores. As such, the average financial turnover of Rs.15.00 Crores has been kept during the last three financial years (around 30%), which has further been relaxed for local MSMEs to Rs.4.00 Crores for wider participation of the bidders.

56. This Court is of the view that in case, the respondents relax the average financial turnover criterion further, they will risk the implementation and timely execution of this high visibility project which is in public interest. Thus, it can safely be concluded that in case, the average financial turnover

criterion would have been relaxed, it would have risked the implementation and timely execution of such high visibility project. Thus, the decision of the respondents in laying down such conditions in the impugned tender notice cannot be termed to be arbitrary, *mala fide* or perverse, which could be a basis for interference for this Court.

CONCLUSION OF ISSUE No. 2

57. In light of what has been discussed hereinabove, this Court is of the view that the conditions of the tender cannot be tailor-made at the behest of a party, who is ineligible to compete having no unfettered legal right. It is within the domain of the tender making authority having expertise both on technical side and administrative side to frame the conditions of a tender in a particular manner and Courts having no expertise cannot direct the tender making authority to frame the condition of the tender in such a manner to suit the eligibility of ineligible tenderer. If the same is permitted, it would be in flagrant violation of the law laid down by the Hon'ble Apex Court in catena of judgments.

OF JAMMU & KASHMIR AND

This Court is of the considered opinion that in the instant case, the conditions of the tender are logical, rational, reasonable based on intelligible differentia with the object sought to be achieved and in tune with the principles enunciated by the Hon'ble Apex Court, wherein, it has been held that the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder and must not interfere, where such interference will cause unnecessary loss to the public exchequer. ***Accordingly,***

the Issue No. 2 is decided in favour of the respondents and against the petitioner."

ISSUE No. 3 **Whether it is permissible to bifurcate the terms and conditions of a tender costing around Rs. 400 crores for execution of a project involving cumulative capacity of 70,000 KW at the behest of a party, who is not financially capable to execute such project and lacks eligibility criteria to compete?**

58. With a view to answer this question, it would be apt to analyze the law laid down by the Hon'ble Apex Court in this regard. This Court is fortified with the judgment passed by the Apex Court rendered in case titled, "***Raunaq International Limited Vs. I.V.R. Construction limited,*** *reported in (1999) 1 SCC 492*, wherein it has been observed as under:-

> ***"In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfill the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfill the requisite criteria seems to be misplaced. Even if the criteria can be relaxed both for M/s Raunaq International Ltd. and M/s I.V.R. Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfill the requisite criteria itself and whose offer is higher than the offer which has been accepted."***

59. This Court is also supported by the law laid down by the Hon'ble Apex Court in case titled "***Afgons Infrastrure Limited Vs. Nagpur Metro Rail Corporation Limited and Anr.,*** reported in (2016) 16 SCC 818, wherein, at para-15, it has been observed as under:-

> ***"….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."***

60. This Court is also fortified with the landmark judgment of "***Trollope & Colls Ltd. Vs. North West Metropolitan Regional Hospital Board,*** reported in *[1973] 2 All ER 260*, wherein, at para-19, the House of Lords has observed as under:-

> ***"……..19.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 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."***

61. Again, in "***Montecarlo Ltd. Vs. NTPC Ltd.***, reported in *2016 (15) SCC 272*", the Hon'ble Apex Court at para-26 being relevant to the instant case, has held as under:-

> ***"……26.We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and***

> ***sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of fair play in the joints."***

62. In the present case, the petitioner company has not been found eligible as per the terms and conditions of the impugned tender, as it lacks the eligibility criteria of possessing cumulative work of 2.5 MW. The author of the document is the best person to understand and appreciate its requirements. The tender making authority, who has authored the tender document 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 *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 interference. The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of Association. The Court cannot introduce terms to make it fairer or more reasonable as the Court is only concerned to discover what the instrument means.

63. Therefore, keeping in view the law discussed hereinabove, coupled with the fact that the petitioner has no indefeasible right to challenge the terms and conditions of the impugned tender on account of ineligibility, no relief can be granted to the petitioner on this count.

CONCLUSION OF ISSUE No. 3

64. In the instant case, the respondents being the author of the tender document have carefully designed the categorization of power plant and associated eligibility threshold as per GFR and MNRE Guidelines, in order to achieve uniform Solar Standards in solar installation, which is based on *intelligible differentia*. Pursuant to the record, it further reveals that the respondents require flexible approach to ascertain the exact number of buildings initially due to non-availability of information, such as exact roof space available and suitability of the buildings. In order to reduce the risk of non-implementation of timely execution of project, an average criteria is opted by the respondents and further relaxation has been granted as per MSME Guidelines. As such, the Courts have to particularly look only into the understanding and appreciation of nature of work and the purpose it is going to serve. Besides, expert evaluation of particular tender in technical issues cannot

UT JAMMU & KASHMIR AND HIGH COURT BENCH सत्यमेव जयते

be second guessed by writ Court. Thus, it is evident that the instant petition is a similar attempt, wherein technicalities, which are solely in realm of experts of tender document have been challenged. However, in the light of the law laid down by the Hon'ble Apex Court, this Court exercises the restraint to interfere into such technicalities having no expertise. ***Accordingly, the Issue No. 3 is decided against petitioner and in favour of the respondents.***

65. Thus, in the aforesaid backdrop, the Court cannot assume the role of a tender issuing authority and cannot issue a direction to bifurcate/alter/change the terms and conditions of tender at the behest of a party who is ineligible and has no right to compete. In the instant case, it transpires from the record, which has been examined by this Court meticulously that time is the essence of the instant project '***Solarization of Rooftop on Grid/Hybrid'*** and the terms and conditions of impugned tender cannot be modified/altered at the whims of the petitioner.

OF JAMMU & KASHMIR AND
HIGH COURT

ISSUE No. 4 **The scope of interference by the Constitutional Court in a tender involving huge public interest and whether the individual interest has to be given due weightage over and above public interest?**

66. The Hon'ble Apex Court in "***Jagdish Mandal v. State of Orissa,*** (2007) 14 SCC 517 has been pleased to observe as under:-

> ***"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "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"; 14 (ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting 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." (pages 531-532)***

OF JAMMU & KASHMIR AND

67. It is also advantageous to give reference of the judgment rendered by the Hon'ble Apex Court in case titled, "***M/S Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. M/S New J.K. Roadways, Fleet Onwers and Transport Contractors & Ors.*** *reported in (2021) 16 SCC 808"*, wherein at para-14, following has been held:-

> "…..***14.In a series of judgments, The Apex Court has 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. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818, this Court held:-***
>
> > ***"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."***

68. Again, in "***National High Speed Rail Corporation Vs. Montecarlo Limited and Anr.***, reported in *(2022) 6 SCC 401*", the Hon'ble Apex Court at para-48 being relevant to the instant case, has held as under:-

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

HIGH COURT

69. In view of aforesaid law discussed, it is apparent that the author of the tender documents/authority, which floats the tender is the best person to understand and appreciate its requirement and, therefore, even if more than one such interpretation is possible, then the interpretation of author must be accepted by the Court.

70. The law relating to award of contract by the State and public sector corporations has also been reviewed by the Hon'ble Apex Court in case titled, "***Air India Ltd. Vs. Cochin International Airport Ltd.,*** reported in *(2000) 2 SCC 617*", wherein at para-7, following has been held:-

> ***"……7. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial***

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

71. It would be also advantageous to give reference of the judgment delivered by the Apex Court in case titled, "***N.G. Projects Ltd. Vs. Vinod Kumar Jain***, reported in *2022 (6) SCC 127*". In this judgment, what has been said by the Hon'ble Apex Court at Para-23, reads as follows:-

> ***"……23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present- day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after com- plying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek dam-ages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the***

> ***State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."***

72. In case titled, "***The Bharat Coking Coal Ltd. and ors. Vs. AMR Dev Prabha & ors."***, decided by the Hon'ble Apex Court in Civil Appeal No. 2197 of 2020", at para-34, following has been held:-

> ***"…...34.Such conscious restraint is also necessary because judicial intervention by itself has effects of time and money which if unchecked would have problematic ramifications on the State's ability to enter into contracts and trade with private entities. Further, it is not desirable or practicable for court to review the thousands of contracts entered into by executive authorities every day. Courts also must be cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on ''public interest' has been evolved by this Court."***

73. In "***Airport Authority of India Vs. Centre of Aviation Policy, Safety & Research (CAPSR) & others***, *reported in 2022 SCC Online SC 1334*, what has been held by the Hon'ble Apex Court at para-14, which is relevant to the case in hand, reads as under:-

> ***"……14. It is submitted that the aforesaid conditions have been incorporated keeping in mind the commercial considerations and commercial expediency and the tender making authority is well within its rights to formulate conditions based on its commercial wisdom. 3.6 It is submitted that as per the settled position of law, setting of terms and conditions of invitation to tender are within the ambit of the administration/policy decision of the tender making authority and as such are not open to judicial scrutiny unless they are arbitrary, discriminatory or mala fides. Reliance is placed on the decisions of this Court in the case of Maa Binda Express Carrier v. North-East Frontier Railway, (2014) 3 SCC 760 (para 8); Directorate of Education v. Educomp Datamatics Limited, (2004) 4 SCC 19 (para 12); Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171 (paras 26 & 27); and Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216 (paras 23 & 35)."***

74. This Court is also fortified with the judgment of the Hon'ble Supreme Court rendered in case titled, "***UFLEX Ltd. Vs. Government of Tamil Nadu & Ors.***, reported in (2022) 1 SCC 165", wherein at paras-1, 2, 3 & 4, following has been held:-

> ***"1. The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.***
>
> ***2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.1***
>
> ***3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517. 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."2***
>
> ***4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not***

affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka3 as under:-

"23.From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is Id.

(2012) 8 SCC 216 proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) 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 unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d)Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

75. This Court is further fortified with the judgment of the Hon'ble Supreme Court rendered in case titled, "***Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.,*** reported in (2005) 6 SCC 138", wherein at para-59, following has been held:-

> ***"……15. The law relating to award of contract by State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd. 2000 (2) SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers 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 interfere."***

CONCLUSION OF ISSUE No. 4

76. The entire gist of the arguments, which have been advanced by the learned counsel for the petitioner in the instant case seems to be that as if the petitioner is projecting the cause of other thirty one (31) other tenderers, who are not before this Court and according to the petitioner have been ousted from the consideration zone of participation, when the admitted position as per the record is otherwise. The petitioner by no stretch of imagination can advance the cause of thirty one tenderers through the medium of the instant petition filed under Article 226 of the Constitution by expanding the scope of jurisdiction of this Court, more particularly, when no such grievance has been raised by those tenderers, either before this Court or before the respondents. The petitioner is not holding the brief on behalf of those parties who are not before the Court and by *no stretch of imagination,* can project the cause of other tenderers/parties who are not before this Court. Had there been any grievance to those tenderers/parties, who according to the petitioner, have been ousted from the

consideration zone of participating in the tender notice, they ought to have approached either the respondents or filed a petition, which has not happened in the instant case and on this ground alone, the plea of the petitioner which is contrary to record cannot sustain the test of law and liable to be rejected.

77. The petitioner through the medium of the instant petition is estopped under law to espouse the cause of public at large, as the petitioner has not filed the instant petition in public interest, where he can plead the cause of public at large or behalf of those, who are not parties before this Court. In a huge project involving 400.00 crores, which relates to 70,000 KW, the criteria which has been laid down by the respondents is in conformity with the guidelines, i.e., MNRE and CVC guidelines cannot be termed as arbitrary. The reasoning for laying down such criteria is with the sole object that the project, which is in public interest should not hamper and is executed in a timely manner by the party, who has resources to complete the project within the stipulated period. Awarding the contract to a party like the petitioner, who has a limited financial capacity is not sustainable in view of the high costs involved in the tender. In that view of matter, ***the Issue No. 4 is answered against the petitioner and in favour of the respondents***.

78. This Court will be failing in its duty, in case if the judgments cited by the petitioner are not referred to. The petitioner has referred to the judgment of Hon'ble Apex Court delivered in case titled, "***Tata Cellular vs. Union of India***(1994) 6 SCC 651", which has been followed by catena of judgments, wherein the scope of judicial intervention in administrative action has been limited to the grounds of arbitrariness, irrationality, unreasonableness, bias and

mala fide. However, the case law referred by the learned counsel for the petitioner has been meticulously examined by this Court and the same advances the case of the respondents and not of the petitioner. Accordingly, this Court does not find any plausible reason to interfere in the instant case.

79. It is no more *res integra* that the power of the judicial review will not be permitted to be invoked to protect the private interest at the cost of the public interest, or to decide a contractual dispute. Importantly, even if a case for interference is made out, the Hon'ble Supreme Court has sounded a caveat that Courts should always keep the larger public interest in mind in order to decide whether an intervention is called for or not. Only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene. But insofar as the present case is concerned, this Court is of the view that no overwhelming public interest is involved, however, the only interest, if any, is private in nature and the reasons do not compel this Court to interfere in the matter which, if be done will be at the cost of public interest. Thus, the challenge thrown by the petitioner to the impugned tender is ill founded and devoid of any merit.

OF JAMMU & KASHMIR AND
HIGH COURT
सत्यमेव जयते

80. Another aspect which must be borne in mind before judicial interference is done in matters concerning tenders is the financial implication on the public exchequer that the State may have to meet with, if the Court directs afresh tender notice. To say the least, it would not be in public interest to set at naught the entire tender process.

81. In the facts of the present case, even if the grievance raised by the petitioner is taken at face value, it does not amount to a clear-cut case of

arbitrariness, perversity, *mala fide* or bias that would warrant judicial interference.

82. In any event, nothing specific has been brought to the attention of this Court that would reveal *mala fide* or favoritism with respect to certain parties at the cost of the petitioner in absence of details thereof. No such foundation has been laid down in the instant petition. In such a situation, this Court is duty bound not to delve into the technicalities or to scrutinize the terms and conditions of the tender with a magnifying glass. It must accord "*fair play in the joints*" to the Government in such a matter.

83. Even pragmatically, in light of the fact that the impugned tender is a way towards the betterment of the country as a whole and not for the interest of certain individuals, therefore, it would not be fit case for judicial interference and, thus, the challenge thrown by the petitioner is liable to be rejected.

OF JAMMU & KASHMIR AND
HIGH COURT

CONCLUSION

84. Thus, in light of what has been discussed hereinabove, coupled with the rival submissions of the parties and settled legal position, this Court observes as under:-

(i) The scope of interference by the Constitutional Courts in tender matters is minimal and confined to the extent when there is arbitrariness, irrationality, unreasonableness, *mala fide* or bias. However, in the present case, the case of the petitioner does not fall within these exceptions carved out in light of the law laid down in ***Tata Cellular's case*** (*supra*) and followed subsequently by the Apex Court. The Hon'ble Apex Court has even gone to the extent of observing that even if the case of a party falls within these parameters, the Court shall refrain from interfering in case such interference would impede public interest. In the aforesaid backdrop, this Court is

not inclined to interfere in the instant case in absence of any strong foundation on these exceptions carved out by the Hon'ble Apex Court.

(ii) This Court is of the view that the conditions of the tender cannot be tailor-made to suit the eligibility of a party who is not eligible and such a party has no right to challenge the terms and conditions of the tender being ineligible. The best person to frame the terms and conditions of the tender is the tender making authority having technical and administrative expertise, after considering all the relevant facts. The Court having no expertise cannot direct the tender making authority to frame the conditions in a particular way to suit the eligibility of a particular party who is being ousted from the consideration zone by virtue of being ineligible. Laying down the turnover and to test the financial viability of a party falls within the realm of the tender making authority and in the instant case, the terms and conditions, which have been prescribed, are logical and sound in nature. In view of this, the execution of such huge project should not be hampered and the public at large should not suffer. Thus, no fault can be found with respect to the terms and conditions of the impugned tender and the challenge thrown to the same by the petitioner being ineligible is ill founded, devoid of any merit and liable to be rejected.

(iii) This Court is also of the view that the terms and conditions of the tender cannot be bifurcated with a view to suit the eligibility of an ineligible party having lesser capability and work experience.

(iv) This Court has to weigh the public interest viz. a viz. the private interest while exercising the power under Article 226 in tender matters. In this context, the power under Article 226 is discretionary which has to be exercised only in furtherance of interest of justice and not merely for making out a legal point. In the matter of allotment of contracts for public purpose having ramifications, the interest of justice and public interest coalesce. Once a project of public importance has to be executed. As such, tinkering with the process of allotment of contract or the terms and conditions of the tender will not be in larger public interest. Thus, this Court cannot direct the respondents to effect a change in the tender conditions to suit the interest of a private party who is ineligible to compete. Private interests have to give way to larger public interest. Particularly, in this

case, the petitioner has not been successful in making out a case on merit, either on facts or law.

(v) This Court further holds that the petitioner cannot plead the cause on behalf of 31 other bidders, who according to the petitioner, have been ousted from the consideration zone, which is also factually not correct. The petitioner through the medium of the instant writ petition cannot espouse the cause of those bidders, who are not parties in the instant petition, as this petition cannot be given the colour of Public Interest Litigation, whereby the petitioner can be given a right to project the public cause on behalf of those, who have not raised any grievance before any fora or ever authorized the petitioner to project their cause. In absence of any specific challenge by those parties or authorization to plead their cause, the plea of the petitioner is not sustainable in the eyes of law and is liable to be rejected.

85. In view of the above, this Court holds that the challenge of the petitioner to the impugned notice inviting tender (NIT) dated 12.06.2024 is ill-founded and the writ petition being devoid of any merit is liable to be dismissed and ***the same is accordingly dismissed*** alongwith all connected applications, if any. As a necessary corollary, the respondents are at liberty to proceed ahead with the tender in question and the interim direction, if any, passed by this Court shall stand ***vacated***.

OF JAMMU & KASHMIR AND

86. The writ petition is, accordingly, ***dismissed*** alongwith connected application.

(Wasim Sadiq Nargal)
Judge

Jammu
05.08.2024
Ram Krishan

Whether the judgment is speaking? Yes
Whether the judgment is reportable? Yes