2020 INSC 686

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4002 OF 2020
(ARISING OUT OF SLP (C) NO. 8496 OF 2020)

THE STATE OF MADHYA PRADESH & ANR. …APPELLANTS

VERSUS

U.P. STATE BRIDGE CORPORATION LTD.
& ANR. ...RESPONDENTS

WITH

CIVIL APPEAL NO. 4003 OF 2020
(ARISING OUT OF SLP (C) NO.8738 OF 2020)

WITH
CIVIL APPEAL NOS. 4004-4005 OF 2020
(ARISING OUT OF SLP (C) NOS.9539-9540 OF 2020)

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. These appeals pertain to a notice inviting tender [“**N.I.T.**”] dated 02.12.2019 by the State of Madhya Pradesh, Public Works Department [“**PWD**”]. The N.I.T. was for the construction of an Elevated Corridor (Flyover) from LIG Square to Navlakha Square (Old NH 3) A-B Road in Indore district in the State of Madhya Pradesh of a length of 7.473 kilometers. The work was for an

estimated cost of Rs. 272.66 crores, to be completed within a period of 24 months including the rainy season. Various parts of the N.I.T. are important and are referred to hereunder:

3. Under Section - 2, entitled “INSTRUCTIONS TO BIDDERS”, under clause A, entitled “GENERAL”, sub-clause 2.1.4 reads as follows:

> “**2.1.4** The BID shall be furnished in the format exactly as per Appendix-I i.e. Technical Bid as per Appendix IA and Financial Bid as per Appendix IB. BID amount shall be indicated clearly in both figures and words, in Indian Rupees in prescribed format of Financial Bid and it will be signed by the Bidder's authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.”

Clause 2.2.2.2(ii) reads as follows:

> “**2.2.2.2** Technical Capacity
>
> xxx xxx xxx
>
> **(ii)** For normal Highway projects (including Major Bridges/ ROB/ Flyovers/ Tunnels):
>
> Provided that at least one similar work of 25% of Estimated Project Cost Rs. 68.17 Crores (Rs.Sixty Eight Crores Seventeen Lakhs only) shall have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 25% of the estimated project cost. If any Major Bridge/ROB/Flyover/Tunnel is (are) part of the project, then the sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall necessarily demonstrate additional experience in

construction of Major Bridge/ROBs/Flyovers/Tunnel in the last 5 (Five) financial years preceding the Bid Due Date i.e. shall have completed at least one similar Major Bridge/ROB/Flyover having span equal to or greater than 50% of the longest span of the structure proposed in this project and in case of tunnel, if any, shall have completed construction of at least one tunnel consisting of single or twin tubes (including tunnel(s) for roads/ Railway/ Metro rail/ irrigation/ hydroelectric projects etc.) having at least 50% of the cross-sectional area and 25 length of the tunnel to be constructed in this project."

Clause 2.2.2.5 states as follows:

"**2.2.2.5** Categories and factors for evaluation of Technical Capacity:

(i) Subject to the provisions of Clause 2.2.2 the following categories of experience would qualify as Technical Capacity and eligible experience (the "Eligible Experience") in relation to eligible projects as stipulated in Clauses 2.2.2.6(i) & (ii) (the "Eligible Projects"). In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:

Category	Project/Construction experience on Eligible Projects	Factors
1	Project in highways sector that qualify under I Clause 2.2.2.6 (i)	1
2	Project in core sector that qualify under Clause 2.2.2.6 (i)	0.70
3	Construction in highways sector that qualify under Clause 2.2.2.6(ii)	1
4	Construction in core sector that qualify under Clause 2.2.2.6(ii)	0.70

(ii) The Technical capacity in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Experience Score for such Eligible Project."

Under clause 2.6.2(a), the authorities reserved the right to reject any bid, *inter alia*, on the following grounds:

"**2.6.2** The Authority reserves the right to reject any BID and appropriate the BID Security if:

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

Under Section - 3, entitled "EVALUATION OF TECHNICAL BIDS AND OPENING & EVALUATION OF FINANCIAL BIDS", clauses 3.1.6.1 and 3.1.6.2 state as follows:

"**3.1.6.** Tests of responsiveness
3.1.6.1 As a first step towards evaluation of Technical BIDs, the Authority shall determine whether each Technical BID is responsive to the requirements of this RFP. Technical BID shall be considered responsive only if:

(a) Technical BID is received online as per the format at Appendix-IA including Annexure I, IV, V and VI (Bid Capacity format);
(b) Documents listed at clause 2.11.2 are received physically on CPPP as mentioned;
(c) Technical Bid is accompanied by the BID Security as specified in Clause 1.2.4 and 2.20;
(d) The Power of Attorney is uploaded on e-procurement portal as specified in Clauses 2.1.5;
(e) Technical Bid is accompanied by Power of Attorney for Lead Member of Joint Venture and the Joint Bidding Agreement as specified in Clause 2.1.6, if so required;

(f) Technical Bid contains all the information (complete in all respects);
(g) Technical Bid does not contain any condition or qualification; and
(h) Copy of online receipt towards payment of cost of Bid document of Rs 30,000.00 (Rupees Thirty thousand only) in favor of Chief Engineer PWD Bridge Const. Zone Bhopal is Received;

3.1.6.2 The Authority reserves the right to reject any Technical BID which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such BID."

Under Section - 4, entitled "FRAUD AND CORRUPT PRACTICES", clause 4.1 read with the definition clause contained in clause 4.3(b), read as follows:

"**4.1** The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the Agreement. Notwithstanding anything to the contrary contained herein, or in the LOA or the Agreement, the Authority may reject a BID, withdraw the LOA, or terminate the Agreement, as the case may be, without being liable in any manner whatsoever to the Bidder, if it determines that the Bidder, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Authority shall be entitled to forfeit and appropriate the BID Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or the Agreement, or otherwise."

xxx xxx xxx

"**4.3** For the purpose of this Section 4, the following terms shall have the meaning hereinafter respectively assigned to them:

xxx xxx xxx

(b) "fraudulent practice" means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process"

Appendix IA consists of the letter comprising the technical bid addressed to the Office of the Chief Engineer, Bridge Construction Zone - Bhopal, which has to be filled up in a particular format. Paragraphs 11 and 13 of this letter are important and are set out hereinbelow:

"**11.** I/We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Joint Venture or any of our/their Joint venture member have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.

xxx xxx xxx

13. I/We further certify that no investigation by a regulatory authority is pending either against us/any member of Joint Venture or against our CEO or any of our directors/ managers/ employees."

Appendix IB consists of the letter comprising the financial bid, which is also in a particular format, paragraph 2 of which reads as follows:

> “**2.** I/We acknowledge that the Authority will be relying on the information provided in the BID and the documents accompanying the Bid for selection of the Contractor for the aforesaid Project, and we certify that all information provided in the Bid are true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.”

Annex I, entitled “Details of Bidder”, contains, in clause 7, the following:

> “**7 (a)** I/We further certify that no investigation by a regulatory authority is pending either against us/any member of Joint Venture or our sister concern or against our CEO or any of our directors/managers/employees.
>
> **(b)** I/We further certify that no investigation by any investigating agency in India or outside is pending either against us/ any member of Joint Venture or our sister or against our CEO concern or any of our directors/managers/employees.
>
> A statement by the Bidder and each of the Members of its Joint Venture (where applicable) disclosing material non-performance or contractual non-compliance in current projects, as on bid due date 'is given below (attach extra sheets, if necessary) w.r.t. para 2.1.14.”

4. Eleven companies bid for the aforesaid project, including U.P. State Bridge Corporation Limited [“**UPSBC**”], Rajkamal Builders Infrastructure Pvt. Ltd. [“**Rajkamal Builders**”] and Rachana Construction Co. Insofar as UPSBC is concerned, the State of Madhya Pradesh rejected its bid on the ground that the bidder suppressed information required under paragraph 13 of Appendix IA

and clause 7(b) of Annex I. Hence, the aforesaid bid was considered to be non-responsive. Likewise, insofar as Rachana Construction Co. is concerned, it did not fulfil the criteria under clause 2.2.2.2(ii) of the N.I.T. for “one similar work” of 25% of the estimated project cost, and was also therefore considered non-responsive. Pursuant to the rejection of the technical bid of UPSBC in the Technical Evaluation Committee’s meeting held on 13.03.2020, Writ Petition No. 6681 of 2020 was filed by UPSBC and by an interim order dated 17.03.2020, the financial bid of UPSBC was ordered to be opened.

5. On the opening of the financial bids, it was found that UPSBC had bid for a sum of Rs. 306.27 crores and Rajkamal had bid for Rs. 315.80 crores. Being disqualified, Rachana Construction Co.’s bid for Rs. 293.25 crores was not under consideration.

6. By the impugned judgment dated 15.06.2020 in Writ Petition No. 6681 of 2020 filed by UPSBC, it was held that as on the date of submission of the technical bid, since no investigation was pending within the meaning of clause 7(b) of Annex I, there was no suppression of facts by UPSBC, despite the fact that an FIR dated 15.05.2018 had been lodged against it in respect of a particular bridge constructed by it at Janpad, Varanasi which had collapsed, killing 15 persons and injuring 11 persons. The investigation in this case resulted in a charge sheet being filed. After the trial

commenced, the High Court of Judicature at Allahabad, by an order dated 30.07.2019, stayed the trial. Despite these facts not being stated in the bid document submitted by UPSBC, the High Court found that there was no suppression of facts, as clause 7(b) of Annex I only required details as to investigations that were pending, and as "investigation" as defined under the Code of Criminal Procedure ["**Cr.P.C.**"] was different from inquiries and trials, there was no need to disclose the FIR and its aftermath, as there was no "investigation pending" strictly speaking, as it had culminated in a charge sheet. The High Court was also swayed by the fact that there was a difference of Rs. 9 crores between the financial bids of UPSBC and Rajkamal. Public interest therefore demanded that the rejection of UPSBC's technical bid be set aside. The State of Madhya Pradesh was therefore directed to issue a letter of intent ["**LOI**"] in favour of UPSBC for the financial bid of Rs. 306.27 crores within a period of 30 days from the date of the judgment.

7. Meanwhile, Rachana Construction Co. also filed Writ Petition No. 8404 of 2020 challenging the rejection of its technical bid by the State of Madhya Pradesh. By the impugned judgment dated 02.07.2020, the High Court adverted to the judgment dated 15.06.2020 in UPSBC's writ petition and thereafter went on to examine whether Rachana Construction Co.'s bid had been rightly

rejected. Insofar as Rachana Construction Co.'s bid was concerned, the High Court referred to clause 2.2.2.2(ii) in paragraph 9 of its judgment and held that there was nothing wrong with the State of Madhya Pradesh's rejection, as follows:

> "9. Even on merit also the petitioner has no case because as per Clause 2.2.2.2(ii) all the tenders as also the petitioner were required to submit the proof of completion of **one similar work** and the value of the executed work was to be at least 25% of the value of the work in the present tender. Said Clause 2.2.2.2(ii) is reproduced below:
>
> > "2.2.2.2(ii) **For normal Highway projects**
> >
> > (including Major Bridges/ ROB/ Flyovers/ Tunnels):
> >
> > Provided that at least one similar work of 25% of Estimated Project Cost Rs.68.17 Crores (Rs. Sixty Eight Crores Seventeen Lakhs only) shall have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5.
> >
> > For this purpose, a project shall be considered to be completed, if more than 90 % of the value of work has been completed and such completed value of work is equal to or more than 25% of the estimated project cost. If any Major Bridge/ROB/Flyover/Tunnel is (are) part of the project, then the sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall necessarily demonstrate additional experience in construction of Major Bridge/ROBs/Flyovers/Tunnel in the last 5(Five) financial years preceding the Bid Due Date i.e. shall have completed at least one similar Major Bridge/ROB/Flyover having

span equal to or greater than 50% of the longest span of the structure proposed in this project and in case of tunnel, if any, shall have completed construction of at least one tunnel consisting of single or twin tubes (including tunnel(s) for roads/Railway/Metro rail/irrigation/hydro-electric projects etc.) having at least 50% of the cross-sectional area and 25% length of the tunnel to be constructed in this project."

The aforesaid Clause specifically provides that for Highway projects including Major Bridges/ROB/Flyovers/Tunnels, at least **one similar work** of 25% of Estimated Project Cost Rs.68.17 Crores shall have been completed. The petitioner has place reliance on the certificate issued by DFCCIL, Ahmedabad, which reveals that the petitioner is undertaking construction work of 2 No. of road overbridges of the total contract value Rs.76,87,90,595.00, therefore, the construction of one road overbridge would be half of the total contract value. Though the petitioner might have signed one contract for two overbridges, but the cost of one overbridge would be less than 68.17 Crores which is 25% of the present work. Hence, the Evaluation Committee has not committed any error while declaring the petitioner as non-responsive. Thus, even on merits, the petitioner has no case.

10. Learned counsel appearing for the petitioner concluded his arguments by submitting that the petitioner has quoted the rates of Rs.293.25 Crores as compared to L-1 i.e. 3,06,27,00,000/- thus, Rs. 13.00 Crores can be used for other valuable projects. As held above, once the petitioner has been declared non-responsive, then its financial bid and the rates quoted by the petitioner are immaterial."

8. In addition, the High Court also held that Rachana Construction Co., despite knowing that UPSBC had filed a writ petition, neither

intervened in the said writ petition nor filed an independent writ petition on its own until much later. Considering that the UPSBC had been declared as L-1 by a judgment dated 15.06.2020, UPSBC should have been arrayed as a respondent in the writ petition and not being so arrayed, the petition also suffered from non-joinder of a necessary party and therefore had to be dismissed.

9. Shri Saurabh Mishra, Additional Advocate General, took us through the N.I.T. and relied upon several clauses thereof. His principal argument was that the expression "investigation pending" cannot be taken to be in the sense of the Cr.P.C., as otherwise the said clause would be rendered otiose. "Investigation pending" would necessarily include within its scope all subsequent steps towards criminality of an accused, as a result of which clause 7(b) of Annex I required UPSBC to disclose material facts. He also relied upon the clause dealing with "fraudulent practice" and stated that the omission of a material fact would amount to a fraudulent practice, and this being a most material fact, as a particular bridge constructed by UPSBC had collapsed resulting in an FIR being lodged against it, not being disclosed by UPSBC, would be fatal under the fraudulent practice clause also.

10. Shri Dhruv Mehta, learned Senior Advocate, appearing on behalf of UPSBC, relied heavily on the judgment in **Caretel Infotech Ltd. v.**

Hindustan Petroleum Corpn. Ltd., (2019) 14 SCC 81 [“**Caratel Infotech**”], for the proposition that where a tender was in a particular format, nothing beyond the information that is required by that format need be given, and since no investigation was in fact pending against his client, clause 7(b) of Annex I could not have been invoked to non-suit his client. He also relied upon the judgment in **Secy., Deptt. of Home Secy., A.P. v. B. Chinnam Naidu, (2005) 2 SCC 746**, in which case the petitioner concerned had to fill up a recruitment form in which previous convictions had to be stated. Since merely being arrested would not amount to a previous conviction, it was held that the petitioner could not be said to have suppressed the fact of his being convicted. He then argued that in any case if there is any ambiguity in the clause the rule of contra proferentem applies, as a result of which the literal interpretation, which is a possible interpretation, ought to prevail, and for this he cited **Bank of India v. K. Mohandas, (2009) 5 SCC 313**. He was at pains to point out that no ground other than clause 7(b) of Annex I could now be taken, as the ground of fraudulent practice, which was sought to be argued by the State of Madhya Pradesh in this Court, was not a ground on which UPSBC’s bid was rejected. He also pointed out that public interest would require that the financial bid be accepted, being Rs. 9 crores less than that of Rajkamal.

11. Shri Anupam Lal Das, learned Senior Advocate appearing on behalf of Rachana Construction Co. assailed the impugned judgments dated 02.07.2020 and 04.08.2020 by relying upon the Contract Agreement dated 23.08.2017 between his client and the Dedicated Freight Corridor Corporation of India Limited [“**DFCCIL**”] for the work of construction of two nos. of road over bridges for an amount of Rs. 76.87 crores, 95% of which had been completed, for which a payment of Rs. 68.71 crores had been received. This being so, and this being above 25% of the estimated cost of the present tender (fixed at Rs. 68.17 crores), he stood technically qualified. It was wholly incorrect for the authorities to have bifurcated one project awarded under one tender into two, merely because two road over bridges had to be built. He also stated that non-joinder of a necessary party could not be held against him as all the facts were known and UPSBC could have intervened in Rachana Construction Co.’s matter.

12. Shri Puneet Jain, learned counsel appearing on behalf of Rajkamal, attacked the judgment in UPSBC’s case and supported the judgment in Rachana Construction Co.’s case, stating that quite apart from the clauses referred to and relied upon by the State of Madhya Pradesh, it was clear that Appendix IA had not been properly read, as paragraphs 11 and 13 had to be read together.

Clearly paragraph 11 indicated that if UPSBC were "indicted" in a criminal case, which would cast doubt on its ability to undertake the project, this would be sufficient to reject UPSBC's bid. Insofar as Rachana Construction Co. is concerned, he referred to and relied upon clause 2.2.2.2(ii) and in particular, the latter part of the clause, which required that the bidder would have to demonstrate additional experience in respect of the bridge to be constructed in the present tender and would have to show that it had completed at least one similar major bridge of a span equal to or greater than 50% of the longest span of the structure proposed in this project. He adverted to the two road over bridges that were constructed under the agreement dated 23.08.2017 by Rachana Construction Co. for DFCCIL, both being of a length of 2380 meters when taken together. This would fall woefully short of 50% of 7.473 kilometers, which would amount to 3.736 kilometers, and on this additional ground also, Rachana Construction Co.'s bid ought to be rejected.

13. We have heard all the learned counsel for the parties. The parameters of judicial review in matters such as the present have been well stated in many decisions of this Court, beginning with the celebrated **Tata Cellular v. Union of India, (1994) 6 SCC 651**, in which a 3 judge bench of this Court laid down the following principles:

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

(pages 687-688)

14. Likewise, in **Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517**, this Court held:

"**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";

(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)

15. In **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622**, this Court held as follows:

"**47.** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the

employer. As held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] .

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 [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] . 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."

(page 638)

16. **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818**, puts the proposition extremely well when it states:

"**14.** We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana

> Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.
>
> **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."

(page 825)

17. This view of the law has been subsequently reiterated and followed in **Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272** (see paragraph 25 at page 287) and **Caratel Infotech** (supra) (see paragraphs 38-39 at pages 92-93).

18. Judged by these parameters, it is clear that this Court must defer to the understanding of clauses in tender documents by the author thereof unless, pithily put, there is perversity in the author's construction of the documents or mala fides. As against this, Shri Dhruv Mehta is also correct in drawing our attention to **Caratel Infotech** (supra), and in particular, to paragraphs 4, 9, 22 and 23, which are set out hereinbelow:

“**4.** The appellant submitted the bid in respect of the e-tender on 19-12-2017. In terms of Clause 20 extracted aforesaid, a format had been provided for the declaration to be made, which is as under:

“DECLARATION NON BLACKLISTED/NON BANNED/NON HOLIDAY LISTED PARTY

We confirm that we have not been banned or blacklisted or delisted or holiday listed by any government or quasi-government agencies or public sector undertakings

Date: __________

Name of Tenderer: _______________

Place: __________

Signature & Seal of Tenderer: _____________

Note: If a bidder has been banned by any government or quasi-government agencies or public sector undertakings, this fact must be clearly stated with details. If this declaration is not given along with the unpriced bid, the tender will be rejected as non-responsive.”

The appellant submitted the declaration in terms aforesaid i.e. stating that the appellant had not been blacklisted by any government or quasi-government agency or public sector undertakings.”

(page 85)

“**9.** The decision of the High Court is predicated on two facts—firstly the non-disclosure of the factum of the show-cause notice issued to the appellant amounted to violation of the undertaking. Linked to this issue is that Clause 20(*iii*) of the tender provided for an integrity pact “ensuring transparency and fair dealing” and that integrity pact had been duly signed and submitted by the appellant. Secondly, the Division Bench doubted the compliance, by the appellant, of Clause 8 read with Clause 10(*g*) of Section 4 of the tender. This controversy pertains to the clause dealing with the business continuity and the requirement of submitting a valid ISO certificate for the purpose of securing the tender. The relevant clauses read as under:

“**8. *Business continuity***

OMCs currently have an agreement for inbound calls with a service provider based in different

regions. The successful bidder has to submit the transition plan to migrate to new platform and facility with “zero” disruption of services with respect to the following areas:
(*a*) Toll-free services.
(*b*) IVRS based call handling.
(*c*) Diversion of call traffic at the successful bidder's premises.
(*d*) Trained operators at the time of Go-Live date.
***
10. ***Other mandatory requirements***:
***
(*g*) Valid ISO Certification 27001 for security and ISO 2301 for business continuity.””

(page 86)

“**22.** It is no doubt true that Clause 20 does provide for four eventualities, as submitted by the learned counsel for Respondent 3. The present case is not one where on the date of submission of the tender the appellant had been banned, blacklisted or put on holiday list. The question before us, thus, would be the effect of an action for blacklisting and holiday listing being initiated. The declaration to be given by the bidder is specified in Clause 20(*ii*), which deals with the first three aspects. The format enclosed with the tender documents also refers only to these three eventualities. It is not a case where no specific format is provided, where possibly it could have been contended that the disclosure has to be in respect of all the four aspects. The format having been provided, if initiation of blacklisting was to be specified, then that ought to have been included in the format. It cannot be said that the undertaking by the appellant made it the bounden duty of the appellant to disclose the aspect of a show-cause notice for blacklisting. We say so as there is a specific clause with the specific format provided for, requiring disclosures, as per the same.

23. It may be possible to contend that the format is not correctly made. But then, that is the problem of the framing of the format by Respondent 1. It appears that Respondent 1 also, faced with the factual situation, took a considered view that since Clause 20(*i*) provided for the four eventualities, while the format did not provide for it, the

> appellant could not be penalised. May be, for future the format would require an appropriate modification!"

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19. It is clear that Shri Dhruv Mehta is right when he refers to and relies upon the aforesaid judgment for the proposition that where there is a format which had to be strictly complied with, his client was justified in going by the literal reading of the aforesaid format, which only required a disclosure of pending investigations under clause 7(b) of Annex I of the N.I.T. However, as has correctly been pointed out by Shri Saurbh Mishra and Shri Puneet Jain, clause 7(b) of Annex I, which is in terms similar to paragraph 13 of Appendix IA, must be read together with paragraph 11 thereof, which, as has been pointed out hereinabove, requires the bidder to certify that in regard to matters other than security and integrity of the country, the bidder has not been convicted by a court of law or indicted. Clearly in the facts of the present case, though the investigation is no longer pending and though there is no conviction by a court of law, UPSBC has certainly been "indicted", in that, a charge sheet has been filed against it relatable to the FIR dated 15.05.2018 in which a trial is pending, though stayed by the High Court. Also, Shri Saurabh Mishra is correct in stating that "fraudulent practice", as defined in clause 4.3(b) of the N.I.T., would include an omission of facts or disclosure of incomplete facts in order to influence the

bidding process. In the facts of the present case, there is clearly an omission of a most relevant fact and suppression of the same fact, namely that an FIR had been lodged against UPSBC in respect of the construction of a bridge by it, which had collapsed, and in which a charge sheet had been lodged.

20. This being the case, **Secy., Deptt. of Home Secy., A.P. v. B. Chinnam Naidu, (2005) 2 SCC 746** is clearly distinguishable, as in the facts of that case, the expression “convicted” could not have possibly included the factum of arrest which was pre-conviction. On the facts of the present case, we have seen as to how UPSBC has indulged in a fraudulent practice and has suppressed the fact that it was indicted for offences relatable to the construction of a bridge by it, which had collapsed. Equally, paragraphs 12 to 18 of the judgment in **Vinubhai Haribhai Malaviya v. State of Gujarat, (2019) 17 SCC 1**, which distinguish between investigation, inquiry and trial in a criminal case, are also of no avail to UPSBC in view of the finding hereinabove. Equally, the well-known rule of contra proferentem as expounded in **Bank of India v. K. Mohandas, (2009) 5 SCC 313** (at paragraph 32) is also of no avail, given the fact that there is no ambiguity whatsoever insofar as the fraudulent practice clause and paragraph 11 of Appendix IA are concerned.

21. Adverting to Shri Dhruv Mehta's argument that his client has been non-suited only on application of clause 7(b) of Annex I, a reference to the Technical Evaluation Committee's order dated 13.03.2020 declaring UPSBC's bid non-responsive shows that it also refers to Appendix IA comprising the technical bid and paragraph 13 thereof, in particular. We have already held that paragraph 13 has to be read along with paragraph 11, which clearly states that a person who is "indicted" for a criminal offence has to disclose the factum of indictment. A technical objection based on the rejection order cannot be allowed to prevail in the face of the suppression of a most material fact, that is of an FIR pertaining to the construction of a bridge by UPSBC, which has collapsed.

22. Coming to the public interest factor, and the fact that the financial bid of UPSBC is about Rs. 9 crores less than that of Rajkamal, the sting has been removed inasmuch as Shri Puneet Jain readily accepts that if, as a result of UPSBC being disqualified, his client is to be awarded the tender, he will do so at the same amount as the financial bid of UPSBC. For all these reasons, the impugned judgment dated 15.06.2020 is set aside.

23. We now come to Rachana Construction Co.'s case. Insofar as Rachana Construction Co. is concerned, it will not be open for a constitutional court, in accordance with all the decisions cited hereinabove, to substitute their view of the view of the tendering authority, when it reads clause 2.2.2.2(ii) in the manner that has been done. Suffice it to say that the expression "at least one similar work" could possibly mean only one such work, namely, the construction of one such bridge and not two such bridges, even if two bridges were to be constructed under the same tender document. It is not possible, therefore, for this Court to say that the construction of the aforesaid clause by the tendering authority is an impossible one rendering it perverse. Also, Shri Puneet Jain's argument, though made here for the first time, does support the State of Madhya Pradesh, in that the two road over bridges that have been constructed under the agreement between DFCCIL and Rachana Construction Co. have a span of only 2380 meters taken together, which is certainly less than 50% of 7.473 kilometers. For these reasons, we dismiss Rachana Construction Co.'s SLP and uphold the judgment dated 02.07.2020 and the review judgment dated 04.08.2020.

24. Given the lapse of time taken in court proceedings, the State of Madhya Pradesh is directed to issue a LOI as soon as is practically possible to Rajkamal insofar as the present tender is concerned at the same financial bid as that of UPSBC. All the appeals are disposed of accordingly.

……………….......................... J.
(ROHINTON FALI NARIMAN)

……………….......................... J.
(K.M. JOSEPH)

New Delhi;
December 08, 2020.