

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD  
SPECIAL CIVIL APPLICATION NO. 18236 of 2017  
FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

**and**

**HONOURABLE MR.JUSTICE B.N. KARIA**

=====

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ?

NO

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

NO

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NILA INFRASTRUCTURE LIMITED & 1....Petitioner(s)

Versus

SURAT MUNICIPAL CORPORATION & 1....Respondent(s)

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Appearance:

MR. MIHIR JOSHI, SR. ADVOCATE with Mr.Sandeep Singhi, Advocate with Mr. Siddharth Joshi, Advocatae FOR SINGHI & CO, ADVOCATE for the Petitioner(s)

No. 1 2

MR. MIHIR THAKORE, SR. ADVOCATE WITH MR. MAHAVIR M GADHVI, ADVOCATE for the Respondent(s) No. 2

MR. PRASHANT DESAI, SR. ADVOCATE WITH MR DHAVAL G NANAVATI, ADVOCATE for the Respondent(s) No. 1

=====

CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**

**and**

**HONOURABLE MR.JUSTICE B.N. KARIA**

**Date : 02/11/2017**

**CAV JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE M.R. SHAH)**

1.0. Rule. Shri Dhaval Nanavati, learned advocate waives service of notice of Rule on behalf of respondent no.1 and Shri Mahavir Gadhvi, learned advocate waives service of notice of Rule on behalf

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of respondent no.2. In the facts and circumstance of the case and with the consent of the learned advocates for the respective parties, present petition is taken up for final hearing today.

2.0. By way of this petition under Article 226 of the Constitution

of India, the petitioners have prayed for an appropriate writ, direction and order to quash and set aside the impugned decision of the respondent Corporation to disqualify the petitioner no.1 treating its bid as nonresponsive and ineligible on the sole ground that while submitting the bid the petitioner no.1 has not paid Goods and Services Tax (hereinafter referred to as the "GST") to the respondent with the Bid/ Document Fee.

3.0. The facts leading to the present Special Civil Application in nutshell are as under:

3.1. That the respondent Corporation has issued a Request for Proposal (hereinafter referred to as "RFP") for "Development of Integrated Group Housing Facility at Dumbhal Tenements of FP No. 18/A TPS No. 33 (Dumbhal) on PPP basis under Redevelopment of Public Housing Scheme 2016".

As per the RFP, initially the online bid was to be submitted by 29.03.2017 and the physical bid was to be submitted by 07.04.2017. However, the aforesaid deadlines came to be extended upto 22.06.2017 for the online submission and 01.07.2017 for the physical submission. One of the conditions of the FIR RFP required the bidder to make payment of Rs.18,000/towards

"Bid/ Document Fee". Pursuant to the first RFP the petitioner no.1 submitted its online bid on 22.06.2017 and the

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physical bid on 23.06.2017. It is the case on behalf of the petitioners that as per the condition of First RFP, the petitioner no.1 also made the payment of Rs.18000/towards bid / document

fee. It appears that since the petitioner no.1 was the only entity who had submitted its bid in response to the First RFP, the respondent reissued

the RFP (hereinafter referred to as 'Second RFP') on 1.8.2017 for the tender works. As per the conditions of Second RFP, the online bid was required to be submitted on 07.09.2017 and the physical bid was to be submitted by 15.09.2017. The Second RFP also required the bidder to pay Rs.18000/towards

bid / document fees, however this time the said amount was to be paid along with GST @ 18%. That as per the tender notice, time schedule was as under:

Sr.No. Event of Description Date

1 Last date of receiving queries  
online only.

21.08.2017 up to 11.00  
hrs.

2 Surat Municipal Corporation  
response to queries

Response to queries will  
be uploaded online as  
corrigendum /

amendment after pre bid  
meeting.

3 PreBid

Meeting Pre Bid meeting will be  
held on 22.08.2017 @

16.00 hrs.

Place of Pre bid meeting:

88, Conference hall, 2<sup>nd</sup>  
Floor, SMC Office,

Mugalisara, Surat,  
Gujarat, India.

4 Last date of online submission 07.09.2017

5 Opening of Bids If possible on 16.09.2017  
at 16.00 hrs in the office

of Executive Engineer,  
Solid Waste Management  
Dept., Surat Municipal  
Corporation, Surat (If  
Possible).

6 Validity of Bids 180 days from the date of  
opening of price bid.

7 Signing of Development  
Agreement

Within 15 days of issue of  
LOI.

It is submitted that pursuant to the Second RFP, the  
petitioner no.1 submitted its online bid on 07.09.2017 and the  
physical bid on 09.09.2017. It is the case on behalf of the  
petitioners that as per the condition of Second RFP, the petitioner  
no.1 also prepared a Demand Draft of Rs.18,000/for  
the payment

of Bid/ Document Fee. However, since the respondent had not

provided any details pertaining to its GST Registration / GSTIN, the Enterprise Resource Planning (ERP) system of the petitioner no.1, which is GST complaint, provided for the payment of GST @18% on reverse charge basis as per the provisions of Central Goods and Service Tax, 2017, petitioner did not deposit 18% GST.

3.2. It is the case on behalf of the petitioners that thereafter, during the internal audit of the petitioner no.1, the auditor enquired from the concerned office of the petitioner no.1 about the SAC for the service in respect of which the respondent had demanded GST @ 18% since the respondent, in case of other tenders invited by it, had demanded GST at different rates. It is the case on behalf of the petitioners that pursuant thereto, upon inquiry from the respondent Corporation, it came to be informed to the petitioner no.1 that the amount of GST @ 18% was paid along with bid / document fee. It is the case on behalf of the petitioners that in view thereof, despite having made a provision for the payment of GST on reverse charge basis as per law, the petitioner no.1 out of abundant caution, addressed a letter dated 19.09.2017 and submitted a Demand Draft No.052513 dated 19.09.2017 towards the said amount of GST as per the information provided by the respondent. At this stage, it is required to be noted that at the time of submitting bid the petitioners made the payment of Rs.18000/towards

bid / document fees, however without GST @18% as demanded as per the tender document / notice. It is the case on behalf of the petitioners that thereafter the petitioner no.1 in good faith, addressed another letter to the respondent on the very next day i.e. 20.09.2017, thereby undertaking to bear any penalty, if any, imposed for late deposit of the amount of GST. That on 21.09.2017, the petitioner no.1 was received back the cover containing the letter dated 19.09.2017 along with the Demand Draft dated 19.09.2017 with an endorsement "Not Accept" and "Refused to accept". It is the case on behalf of the petitioners that in view of the aforesaid refusal, the petitioner no.1 addressed letter dated 22.09.2017 to the Municipal Commissioner of the respondent Corporation narrating the chain of events and inter alia requesting him to grant an opportunity to the petitioner no.1 to rectify the purported technical irregularity, if any, more so since such opportunities are generally given to bidders in order to keep the competition alive and that the RFP was reissued in the form of

Second RFP to achieve the same object.

3.3. It is the case on behalf of the petitioners that thereafter, in

absence of any information about the GSTIN of the respondent Corporation, the petitioner no.1 has made the payment of GST by depositing the amount as per reverse charge mechanism on 3.10.2017 at around 12.00 p.m within the time prescribed for the said purpose under law.

3.4. It is the case on behalf of the petitioners that on 3.10.2017, at around 9.30 a.m, the petitioner no.1 checked the status of the tender on online tender portal "nProcure". According to the petitioners, at that time, the status showed that the technical bids of all the bidders were under evaluation. According to the petitioner, however, at around 1.00 p.m, the petitioner no.1 rechecked the status of the tender on nProcure and found that the petitioner no.1 had been disqualified. It is the case on behalf of the petitioners that as per the latest status of the tender process that out of the three bidders who participated in the tender process, two have been disqualified and thereby newly added respondent no.2 herein Siddhi Constructions only remained in fray.

3.5. Feeling aggrieved and dissatisfied with the impugned action of the respondent no.1 Surat Municipal Corporation – bid submitted by the petitioner disqualified at technical base solely on the ground that the petitioners had not deposited the bid/ document fee with 18% GST and thereby to that extent the petitioners were not responsive of the eligibility criteria / terms and conditions of the tender document / notice that bidder was required to deposit the bid / document fee Rs.18000/with GST

@18%, the petitioners have preferred present Special Civil Application under Article 226 of the Constitution of India.

4.0. Shri Mihir Joshi, learned Senior Advocate has appeared on behalf of the petitioners, Shri Prashant G Desai, learned Senior Advocate has appeared with Shri Dhawal Nanavati, learned advocate for the respondent Corporation and Shri Mihir Thakore, learned Senior Advocate has appeared on behalf of the respondent no.2.

5.0. Shri Mihir Joshi, learned counsel for the petitioner has vehemently submitted that in the facts and circumstances of the case action of the respondent Corporation in considering the petitioner disqualified at technical stage on the sole ground of non deposit / payment of bid / document fee of Rs.21,240/with

GST

@18% is absolutely illegal and most arbitrary.

5.1. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that as such the petitioner no.1 in fact, download the tender document / notice successful and thereafter while submitting bid not only paid the EMD of Rs.93,00,000/, the

petitioner no,1 also deposited bid / document fee of Rs.18000/.

It

is submitted that as such at the relevant time the petitioners did not deposit the bid / document fee of Rs.18,000/with 18% GST as

respondent Corporation had not provided any details pertaining to GST Registration / GSTIN. It is submitted that even otherwise as per the law with respect to GST, the payment of GST @18% on reverse charge basis was permissible which the petitioner no.1 did deposit on reverse charge basis before the relevant date of payment of GST under the provision of Central Goods and and Service Tax, 2017. It is submitted that therefore, as such neither there is a any loss to the respondent Corporation nor any consequence on non payment of GST had arisen. It is therefore, vehemently submitted that on mere non payment of GST @ 18% while making the payment of bid / document fee of Rs.18000/, the petitioners could

not have been declared disqualified at the technical bid stage, more particularly, when the amount of GST at 18@ was Rs.3520/only, against which, the petitioners, as such, paid / deposited Rs.18000/towards

the bid / document fee and Rs.93,00,000/towards EMD.

It is submitted that therefore, action of the respondent Corporation in declaring the bid submitted by the petitioner no.1 as disqualified at technical stage is unreasonable and arbitrary, which deserves to be quashed and set aside.

5.2. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that even otherwise the payment of bid / document fee or tender fees cannot be said to be a condition of the tender or the eligibility and therefore, bid cannot be held to be non responsive for non payment of tender fee (in full). It is submitted that in the present case as such full tender fees have been paid by the petitioner no.1 and then the bid is submitted.

5.3. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that even otherwise assuming without admitting

that payment of Bid / Document Fees or tender fees was a condition, non fulfillment of such conditions cannot be said to be a non fulfillment of essential conditions of the eligibility. It is submitted that requirement in the tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition. It is submitted that in the first case the authority issuing the tender may be required to enforce them rigidly, however in the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

5.4. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that even otherwise the conditions of payment of Bid/ document / tender fees can neither be said to be a condition of eligibility nor the condition for evaluation. It is submitted that the charges for production of bid document per se is unrelated to bid evaluation. It is submitted that therefore, non payment of aforesaid amount in full (with GST @18% ) cannot be said to be non fulfillment / non compliance of the essential condition relating to eligibility and / or evaluation of the bid on merits.

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5.5. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that even as per the clause 1.49 of the Tender document / General Information and Instruction which is relatable to responsive of bid / tender fee and that too non payment of GST @18% on the amount of bid / tender fee is not considered to be "Non Responsive".

5.6. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that even otherwise in the facts and circumstances of the case, more particularly, when immediately having come to know, the petitioners have initially sent the demand draft of GST @ 18% of Rs.18000/(

bid/ tender fee) and as respondent

Corporation did not accept the same, thereafter deposited the said with the appropriate authority on reverse charge basis which the petitioners deposited with the appropriate authority within the time prescribed under the relevant provision of Central Goods and Service Tax, 2017. It is submitted that as such therefore, the petitioners can be said to have substantially complied with relevant terms and conditions of the eligibility criteria.

5.7. It is submitted that even such lapse if any of non deposit of

GST @18% on the amount of Rs.18000/(bid/ document fee) can

be condoned and the bona fide of the petitioner no.1 ought to have been considered favourably by the respondent no.1 Corporation, more particularly, when there is a substantial compliance. It is submitted that even otherwise, such lapse, if any, could have been condoned and could not have resulted into rejecting the bid of the petitioner no.1 at technical bid stage.

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5.8. It is submitted that therefore, the rejection of the bid of the petitioners at technical bid is arbitrary, hyper technical, against the public interest since it eliminated competition, which deserves to be quashed and set aside.

5.9. It is further submitted by Shri Mihir Joshi, learned counsel for the petitioners that as such, such condition of deposit of bid / tender fee of Rs.18000/with GST @ 18% is not supported by law, more particularly, when the respondent no.1 itself has not given its GSTIN.

Making above submissions and relying upon the following decisions of the Hon'ble Supreme Court as well as this Court and Delhi High Court, it is requested to allow the present petition, more particularly, now subsequently only respondent no.2 herein is held to be qualified and therefore, there shall not be any competition and therefore, the public interest will suffer.

(1). G.J.Fernandez vs. State of Karnataka and Ors reported in (1990) 2 SCC 488. (para 11,14 and 15)

(2). Poddar Steel Corporation vs. Ganesh Engineering Works and Ors reported (1991) 3 SCC 273. (para 6)

(3). Rashmi Metaliks Limited and Another vs. Kolkata Metropolitan Development Authority and Ors reported in (2013) 10 SCC 95. (para 17 & 18)

(4). Om Prakash Sharma vs. Ramesh Chand Prashar and Ors reported in (2016) 12 SCC 632. (Para 10 to 12)

(5). Jal Mahal Resorts Private Limited vs. K.P. Sharma and Ors reported in (2014) 8 SCC 804. (para 108 to 116 and 138).

(6). Bakshi Security And Personnel Services Private Limited vs.

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Devkishan Computed Private Limited and Ors reported in (2016) 8 SCC 446.



(7). MHS Infra Tech Pvt Ltd vs. State of Gujarat reported in AIR 2016 (Guj) 16 (para 11).

(8). PES Installations Pvt. Ltd and Anr vs. Union of India and Anr reported in AIR 2015 (Del) 108. (para 1, 17 and 24)

(9). R.G. Holding Pvt Ltd vs. M.T.N.L & Anr reported in 2004(78) DRJ 274 (Delhi).

10. R.G. Holding Pvt Ltd vs. M.T.N.L. & Anr reported in AIR 2005 (Delhi) 134.

6.0. Present petition is vehemently opposed by Shri Prashant G Desai, learned counsel for the respondent Corporation.

6.1. It is vehemently submitted by Shri Desai, learned counsel for the respondent Corporation that admittedly the petitioners did not deposit / pay the entire bid document fee/ bid processing fee of Rs.21,240/(

Rs.18000/+

18% GST) which was the mandatory

requirement of the terms and condition of the tender notice and therefore, the same being essential conditions to be complied with, before the bid submitted by the bidder is considered, the petitioners are rightly held ineligible at the technical bid stage. It is submitted that the decision to consider the petitioners ineligible at the technical bid stage is absolutely in consonance with the relevant terms and conditions of the tender notice which is neither arbitrary nor mala fide.

6.2. It is vehemently submitted by Shri Desai, learned counsel

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for the respondent Corporation that merely because the petitioners could download the E Tender bid documents, the petitioners as such does not acquire any right in its favour to consider its bid which was submitted electronically, unless and until the petitioners comply with all other terms and conditions of the tender document / notice including that of deposit of bid document / bid processing fee.

6.3. It is vehemently submitted by Shri Desai, learned counsel for the respondent Corporation that as the entire process of inviting tender was through E Tender, if any party, who opens website of the respondent Corporation for the purpose of downloading E Tender Bid Document, then at that time , the first page which is provided to the said party in the Tender Consolidated Details in which bid document process fee is clearly mentioned as Rs.21240/.

For that, Shri Desai, learned counsel for the respondent Corporation has relied upon and drawn the attention of the copy of the “nProcure” Tender Consolidated Details produced along with affidavit in reply. It is submitted that in the said “nProcure” document, it was specifically case that the document fee and EMD Details is mandatory to be paid. It is further submitted that in the said tender, it was also specifically mentioned in Annexure A24

(Instruction to Bidder regarding Tender Fee and EMD)that submission of EMD and Tender fee is for the purpose of opening bid, i.e. offer / tender of those tenderers whose EMD and Tender fee is received electronically shall be opened. However, for the purpose realization of EMD and Tender Fee, bidder was required to send EMD as well as Tender Fee in the required format

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in original through RPAD or Speed Post so as to reach the Accounts Department within 7 days from the last date of submission of price bid. It is submitted that everybody was informed about the amount to be paid towards bid Document Fee / Bid Processing Fee i.e. Rs.21240/.

It is submitted that as the entire process of invited tender through E Tender anybody could download E Tender Bid document, however for the purpose of considering such party as bidder, such party is required to deposit bid / document fee (entire) and also bid security. It is submitted that only when the entire amount of bid document fee / bid processing fee and the EMD is deposited within the stipulated time as provided under the tender document, the receipt is generated in the record of the Corporation and on generation of the receipt, such party who had complied with all the terms and conditions at the initial stage namely deposit of entire amount of bid document fee and the EMD is considered to be the bidder / tenderer and only thereafter bid of such party / bidder is required to be considered. It is submitted that in the present case as the petitioners did not deposit the entire bid fee/ tender fee, no such receipt was generated in favour of the petitioners and therefore, the petitioners are not considered to be the tenderer itself, when technical bid was processed and thereafter the financial bid was opened. It is submitted that therefore, when the petitioners have not been considered to be tenderer itself on non deposit of the entire amount of bid fee / tender fee, there is no question of considering the petitioners as tenderer / bidder.

6.4. It is vehemently submitted by Shri Desai, learned counsel for the respondent Corporation that in the present case E Tender

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Notice was published on website of the Corporation and downloading period of the Tender Document was from 01.08.2017 to 07.09.2017 upto 17.00 hrs. It is submitted that pre bid meeting (technical) was held on 22.08.2017 @ 16.00 hrs. It is submitted that nobody remained present on behalf of the petitioners in the pre bid meeting and therefore, no query was raised even with respect to the GST and / or GSTIN number. It is submitted that therefore, the submission on behalf of the petitioners that at the relevant time the petitioners did not deposit the GST amount (Rs.18000 + GST @18%) due to non availability of GST number and / or GSTIN is nothing but an afterthought. It is submitted that every other bidders in fact initially deposited the entire amount of Rs.21,240/towards

bid document fee / bid process fees with the Corporation and within the time prescribed as per the tender document. It is submitted that even thereafter as GST rate was changed and it was reduced to 12% the difference between 18% and 12% was refunded and returned to the concerned bidder. It is submitted that therefore, when all other bidders could deposit and/or deposited the entire amount of bid document fee / bid document processing fee of Rs.21240/,

the petitioners also to become tenderer / bidder also could have and ought to have deposited the entire bid document fee/ bid processing fee. It is submitted that as per the "nprocure" document, bid document fee/ bid processing fee was stated to be Rs.21,240/6.5.

It is vehemently submitted by Shri Desai, learned counsel for the respondent Corporation that in the present case the petitioners submitted bid online on 7.9.2017 and physical bid was

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received on 14.09.2017. It is submitted that as the petitioners did not pay the full bid document fee, which was mandatory, the petitioners were never considered to be tenderer itself. It is submitted that the petitioners sent the draft of differential amount of Bid document fee after the technical bid was opened on 18.09.2017. It is submitted that therefore, when the petitioners at initial stage only not fulfilled the mandatory condition of paying

the required amount of Bid Document Fee and therefore, the respondent Corporation has never considered the petitioner as tenderer itself. It is submitted that any amount / differential amount deposited subsequently and after the relevant date as prescribed in the tender document, such payment cannot be considered to be a valid payment and / or such payment is not required to be considered at all, more particularly, in the present case the differential amount was deposited after technical bid was opened on 18.09.2017.

6.6. It is vehemently submitted by Shri Desai, learned counsel for the respondent Corporation that as such on 19.09.2017 itself the draft of differential amount was sent back / returned to the petitioners. It is submitted that the technical bid was opened on 18.09.2017 and the prebid was opened on 03.10.2017 and after the price bid was opened, the petitioners have preferred present petition on 3.10.2017. It is submitted that the petitioners did nothing, more particularly, did not approach this Court immediately after 18/19. 09.2017.

6.7. It is further submitted by Shri Desai, learned counsel for

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the respondent Corporation that since the petitioners are never considered to be tenderer because of non fulfillment of primary condition of requirement of paying bid document fee as stated in the E Tender Document itself, the question of considering the petitioners as tenderer does not arise. It is submitted that therefore, it can be said that the petitioners are not part of the tender process at all as the petitioners are not considered to be tenderer / bidder at all.

6.8. It is further submitted by Shri Desai, learned counsel for the respondent Corporation that for participation of bid, one of the essential condition was to deposit the entire bid document fee and EMD. It is submitted that therefore, the deposit of entire bid document fee / EMD is an essential condition, which is required to be complied with before tender document / bid submitted is considered and / or before the concerned party like the petitioners are considered as bidder / tenderer. It is submitted that non fulfillment of essential condition would render the concerned party ineligible and / or its bid is not required to be considered at all. In support of his above submission, Shri Desai, learned counsel for the respondent Corporation has relied upon the decision of the Hon'ble

Supreme Court in the case of Rashmi Metaliks Limited and Another vs. Kolkata Metropolitan Development Authority and Ors reported in (2013) 10 SCC 95 as well as in the case of Aksh Security And Personnel Services Private Limited vs. Devkishan Computed Private Limited and Ors reported in (2016) 8 SCC 446 as well as in the case of Central Coalfields Limited and Another vs. SLLSML (Joint Venture Consortium) And Ors reported in (2016) 8 SCC 622.

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Learned counsel for the respondent Corporation has also relied upon the unreported decision of the Division Bench of this Court in the case of P. Kavitha vs. State of Gujarat and Ors rendered in Special Civil Application No.4731 of 2017.

6.9. It is further submitted by Shri Desai, learned counsel for the respondent Corporation that the decision taken by the respondent Corporation is absolutely just, legal and absolutely in consonance with the terms and conditions of the tender document, which is neither perverse nor arbitrary and therefore, it is requested not to interfere with the same in exercise of powers under Article 226 of the Constitution of India.

6.10. On scope of judicial review in the contractual matter, Shri Desai, learned counsel for the respondent Corporation has relied upon the decision of the Hon'ble Supreme Court in the case of Michigan Rubber (India) Limited vs. State of Karnataka and ors reported in (2012) 8 SCC 216; in the case of Tata Cellular vs. Union of India reported in (1994) 6 SCC 651; in the case of Jagdish Mandal vs. State of Orissa and Ors reported in (2007) 14 SCC 517; in the case of Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another reported in (2016) 16 SCC 818 and in the case of Tamil Nadu Generation And Distribution Corporation Limited (Tangedco) Represented by its Chairman and Managing Director and Another vs. CSEPDITRISHE Consortium

Represented by its Managing Director and Another reported in (2017) 4 SCC 318.

Making above submissions and relying upon the above

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decisions, it is requested to dismiss the present petition.

7.0. Shri Mihir Thakore, learned counsel for the newly added respondent no.2 has submitted that to avoid any repetition, he

adopts the submissions made on behalf of the respondent Corporation. It is submitted that as in the present case, there is non compliance at the entry stage itself and therefore, the decision of the Corporation not to consider the petitioners as tenderer / bidder itself and consequently not opening the price bid of the petitioners is absolutely just and in consonance with the terms and conditions of the tender. Therefore, relying upon the decision of the Hon'ble Supreme Court in the case of Central Coalfields Ltd (supra), it is requested to dismiss the present petition.

8.0. In reply to the aforesaid submission, Shri Joshi, learned counsel for the petitioners has submitted that as such there is no delay at all in preferring the petition on 03.10.2017. It is submitted that the petitioner came to know only on 03.10.2017 and therefore, the present petition has been preferred on 03.10.2017. It is further submitted by Shri Joshi, learned counsel for the petitioners that as such deposit of the bid document fee cannot be said to be essential condition relatable to eligibility. It is submitted that in the present case the downloading is free of cost and therefore, non deposit of entire amount of bid document fee cannot be construed as non fulfillment of essential condition, for which, the petitioners bid is liable to be rejected outright.

Making above submission, it is requested to allow the present petition.

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9.0. Heard the learned counsel for the respective parties at length. At the outset, it is required to be noted that as such in the present case the petitioners are not considered to be tenderer at all by the respondent Corporation on non deposit of entire amount of bid document fee, which as such was required to be paid as per the terms and conditions of the tender document and “nProcure” document. It is required to be noted that as per “nProcure” document the party who submit its bid online was required to deposit / pay within the stipulated time the bid document fee/ bid processing fee of Rs.21240/which includes GST at 18%. It is an admitted position that when the petitioners submitted its bid online and thereafter in physical format the petitioners did not pay the entire amount of bid document fee/ bid processing fee of Rs.21240/and deposited only part of the bid document fee / bid processing fee i.e. Rs.18000/only.

At this stage, it is required to be noted that other two tenderers who submitted their bid, paid / deposited the entire document fee / bid processing fee i.e. Rs.21,240/.

Thus, in the tender consolidation details and “nProcure” tender consolidated details deposit of entire amount of document fee and EMD details was mandatory to be paid. Even as mentioned in Annexure A24

(Instruction to Bidder regarding Tender Fee and EMD) submission of EMD and tender fee is for the purpose of opening bid. Therefore, only those parties who paid the EMD and tender fee electronically and thereafter in the physical format within the stipulated time is required to be considered the tenderers / bidders, whose bid is required to be opened and considered on merits subject to fulfillment of other terms and conditions, if any. Thus, as per the “nProcure” tender consolidated

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details and as per the instruction to bidders regarding tender, after the tender document is downloaded which was free and while submitting the tender electronically, the concerned tenderer / bidder was required to give details with respect to payment of EMD and tender fee electronically and for the purpose of realization of EMD and tender fee, bidder was required to send EMD and tender fee in the required format in original through RPAD / Speed Post so as to reach the Accounts Department within 7 days from the last date of submission of price bid. It is required to be noted that as entire process inviting tender was through E Tender, downloading was free and if any party who open website of the respondent Corporation is allowed to download the entire tender document. However, thereafter for the purpose of considering such party as bidder / tenderer and its bid is opened and considered, such party is required to fulfill all the terms and conditions of the tender bid document. As per the procedure, after the tender documents are downloaded which as such was free of charge and thereafter the concerned parties who submits the bid, fulfills all the terms and conditions of the “nProcure” tender consolidated details including the deposit of entire bid document fee / bid processing fee and EMD within the stipulated time as mentioned in the tender document, in favour of such party / bidder receipt is generated and on generation of the receipt in the records of the Corporation, such party is considered to be tenderer / bidder and subject to

fulfillment of other terms and conditions, if any, its bid is required to be opened and thereafter considered on merits. In the present case, it is an admitted position that as the petitioners did not deposit the entire bid document fee / bid processing fee at the time

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of submitting the bid / bid document and therefore, no such receipt in favour of petitioner has been generated like in the case of other two bidders who in fact paid the entire bid document fee / EMD and therefore, the petitioners are not considered at all tenderer / bidder and therefore, its bid has not been considered at the technical bid stage. The aforesaid decision of the respondent Corporation, therefore, as such cannot be said to be either arbitrary and / or mala fide and / or contrary to the terms and conditions of the tender document, more particularly, the terms and conditions mentioned in the “nprocure” tender consolidated details. In light of the above facts and circumstance of the case, few decisions of the Hon'ble Supreme Court on the nature and scope of judicial review of the Constitutional Court / High Court in exercise of powers under Article 226 of the Constitution are required to be referred to. 9.1. In the case of Michigan Rubber (India) Limited (supra) after considering the various other decisions of the Hon'ble Supreme Court on the point, more particularly, after considering the decisions of the Hon'ble Supreme Court in the case of Jagdish Mandal (supra) and Tejas Constructions and Infrastructure (P) Ltd (supra), in para 23 and 24, the Hon'ble Supreme Court has observed and held 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 nonarbitrariness 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

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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 public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

9.2. In the case of Afcons Infrastructure Limited (supra), again the Hon'ble Supreme Court has occasion to consider the nature and scope of judicial review in the tender matter / contractual matter.

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In the aforesaid decision, it is specifically observed and held by the Hon'ble Supreme Court after referring the decision of the Hon'ble Supreme Court in the case of Dwarkadas Marfatia and Sons vs. Port of Bombay reported in (1989) 3 SCC 293; Tata Cellular (supra) and Jagdish Mandal (supra) that the Constitutional Courts are concerned with the decision making process and the decision if challenged the decision having been arrived at through a valid process, the Constitutional Courts can interfere only if the decision is perverse. It is also further observed that however, the

Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. It is further observed that mere disagreement with the decision making process or the decision of the administrative authority is no reason for a Constitutional Court to interfere. It is further observed that the threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the Constitutional Court interferes with the decision making process or the decision.

10. Now, so far as submission on behalf of the petitioners that non deposit of entire amount of bid document fee/ bid processing fee cannot be said to be an essential condition relatable to eligibility on merits and non deposit of entire amount of bid document fee / bid processing fee would not render the petitioners disqualified for considering its bid on merits is concerned, it is required to be noted that as such the respondent Corporation considered it as an essential condition. The respondent Corporation

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applied has the same unilaterally to all the bidders / persons / parties and other two bidders as such did deposit the entire bid document fee and the EMD. Not only that in the “nProcure” tender consolidated details which was available with the petitioners at the time when the petitioners downloaded the entire E Tender bid document, bid document process fee is stated to be Rs.21,240/, which also specifically provides that document fee and EMD is mandatory to be paid. Even in the Instruction to Bidder regarding Tender Fee and EMD it has been specifically mentioned that EMD and tender fee is for the purpose of opening bid. Thus, as such, deposit of tender fee and EMD can be said to be an essential condition at the entry stage itself. As observed herein above, after the E Tender bid document is downloaded which was free of cost and when concerned party who has downloaded E tender document deposits the entire amount of bid document fee / bid processing fee and the EMD would get entry for the purpose of considering its bid at technical bid stage as well as price bid stage. Unless and until, the aforesaid amount is deposited as required and within the stipulated time, such a party would not get entry at all and cannot be said to be tenderer / bidder. Therefore, as such there is no question of considering its bid as on nonfulfillment of

aforesaid terms and conditions and nondeposit of entire bid tender document fee / bid processing fee, it cannot get the entry at all and it cannot be considered to be bidder / tenderer at all whose bid is required to be opened and / or considered. At this stage, few decisions of the Hon'ble Supreme Court on the point are required to be referred to.

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10.1. In the case of the Central Coalfields Limited and Another (supra), it is specifically observed and held by the Hon'ble Supreme Court that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. It is further observed that whether a term of NIT is essential or not is a decision taken by the employer, which should be respected and soundness of that decision cannot be questioned by Court. In the case before the Hon'ble Supreme Court the bid was rejected for non furnishing of bank guarantee in prescribed format. While submitting EMD by furnishing bank guarantee in format prescribed by GTC of another tender and the bidder took the plea that bank guarantee format of present tender was ambiguous. Rejecting the claim of the bidder and upholding the decision of the employer of rejection of bid for noncompliance

of submitting the bank guarantee in prescribed format, the Hon'ble Supreme Court in para 31 to 38, 42 to 44, 47 to 49, 52, 55 and 56 has observed and held as under:

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

**[32]** The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of the NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The

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core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

**[33]** In *Ramana Dayaram Shetty v. International Airport Authority of India*, 1979 3 SCC 489 this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

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

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

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

"It is indeed unthinkable that in a democracy

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

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the

goalposts, they were denied the "privilege" of participation.

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

**[38]** In [G.J. Fernandez v. State of Karnataka](#), 1990 2 SCC 488 both the principles laid down in [Ramana Dayaram Shetty](#) were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable." Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in the [Ramana Dayaram Shetty](#) sense.

**[42]** Unfortunately, this Court did not at all advert to the privilege of participation

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Dayaram Shetty and accepted in G. J. Fernandez. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel.

**[43]** Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege of participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three judge decision in [Tata Cellular v. Union of India](#), 1994 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following [Tata Cellular](#)) in [Jagdish Mandal v. State of Orissa](#), 2007 14 SCC 517 in the following words: "Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "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  
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of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

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

"Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

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

**[47]** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or

intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.

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

**[49]** Again, looked at from the point of view of the employer if the Courts take over the decisionmaking function of the employer and make a distinction between essential and nonessential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any Bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as nonresponsive." Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a nonessential term of the GTC. From the point of view of CCL the GTC has been impermissibly rewritten by the High Court.

**[52]** There is a wholesome principle that the Courts have been following for a very long time and which was articulated in [Nazir Ahmad v. King Emperor](#), 1936 AIR(PC) 253 namely

"Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

There is no valid reason to give up this salutary principle or not to apply it mutatis mutandis to bid documents. This



principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It  
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must follow from the application of the principle laid down in Nazir Ahmed that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

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

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

10.2. In the case of Afcons Infrastructure Limited (supra) in para 50 and after considering earlier decision in the case of Central Coalfields Limited and Another (supra), Dwarkadas Marfatia and Sons (supra), Raman Dayaram Shetty vs. International Airport Authority reported in (1979) 3 SCC 489, it is observed and held that the holder / employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is further observed that 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 terms of the tender conditions. It is further observed

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that 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.

10.3. Applying law laid down by the Hon'ble Supreme Court in the aforesaid decision, to the facts of the case on hand, the decision of the respondent Corporation in not treating and / or considering the petitioners as tenderer / bidder and in holding the petitioners ineligible even prior to technical bid stage, cannot be said to be perverse and / or arbitrary and suffering from vice of favoritism. The understanding on the part of the respondent Corporation with respect to applying relevant terms and conditions of the tender document and to treat and / or consider the deposit of bid document fee / bid processing fee and the EMD before relevant date as essential condition to be fulfilled and / or complied with the at the entry stage itself cannot be said to be perverse and / or arbitrary to the terms and conditions of the tender document. At this stage, it is required to be noted that as such there are no specific allegation of mala fide and / or favoritism. The terms and conditions of the tender document are applied uniformly all other bidders had complied with the the aforesaid and have deposited the entire amount of bid document fee i.e. Rs.21,240/( Rs.18000/+ GST @18%) and EMD. At this stage, it is required to be noted that in the pre bid meeting held on 22.08.2017.

Admittedly, representative of the petitioners did not remain present in the prebid

meeting and did not raise any query with respect to the GSTIN number etc. If the petitioners had any doubt, it could

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have and ought to have sought clarification from the authority concerned as mentioned in the tender document. In the “nProcure” tender consolidated details, it has been specifically mentioned that in case bidder needs any clarifications and / or if training is required to participate online tenders, they can contact (n)Procure Support Team. Moreover, the petitioner could have and ought to have at least made representation to the respondent Corporation prior to submission of the bid that in absence of GSTIN number and as there is ambiguity, it is not possible for the petitioners to deposit the amount of GST. The petitioners neither sought any clarification nor did it make any representation to the respondent Corporation. Therefore, even the case on behalf of the petitioners so pleaded in the petition that the petitioners did not

deposit the amount of GST in absence of GST registration / GSTIN is nothing but an afterthought. At this stage, it is required to be noted that as such the petitioners was not required to deposit the amount of GST. The petitioners and others were required to deposit as such Rs.21,240/towards bid document fee/ bid processing fee which includes GST amount at 18%. Therefore, there was no question of furnishing any details of GST registration / GSTIN, as now stated by the petitioners. At this stage, it is required to be noted even at the cost of repetition that other two bidders did deposit the entire amount of Rs.21,240/and thereby complied with the relevant terms and conditions / essential conditions.

11. Now, so far as the submission on behalf of the petitioners that subsequently the petitioners in fact sent the demand draft of difference of amount of bid document fee by sending demand draft subsequently which was returned and even thereafter deposit the

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amount of GST on reverse charge basis and therefore, there is not loss to the respondent Corporation is neither here nor there. What is required to be considered as payment of entire amount of bid document fee / bid processing fee and the EMD at the relevant time and before the prescribed period mentioned in the tender document. As observed herein above, such a requirement was required to be complied with the entry stage itself. As observed herein above, unless and until, entire amount of bid document fee/ bid processing fee and the EMD is deposited the persons who submitted bid would not get entry at all and only after the aforesaid amount is deposited / paid and receipt is generated, the concerned party can be said to be tenderer / bidder whose bid is required to be considered at technical stage and thereafter on fulfillment of other terms and conditions, its price bid is required to be considered.

12. Now, so far as submission on behalf of the petitioners that such condition cannot be said to be essential condition is concerned, considering the aforesaid decisions of the Hon'ble Supreme Court and when the Corporation applied such condition to all the bidders and as such other bidders also complied with the same, thereafter it will not be open for the petitioners and that too after participating in the tender process that such a condition cannot be said to be essential condition. Similarly, submission on

behalf of the petitioners that such a condition is not backed by law and therefore, such a condition could not have been provided is concerned, once having participated in the tender process thereafter and having found ineligible on the ground of non

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compliance of essential condition of non deposit of entire bid tender document fee and consequently not getting the entry at the initial stage itself, thereafter, it would not be open for the petitioners to challenge the condition and / to contend that such a condition was not warranted.

12.1. Now, so far as submission on behalf of the petitioner that once the petitioners downloaded the entire tender documents and submitted its bid, the bid submitted by the petitioner is required to be considered at technical stage and price bid stage is concerned, it is required to be noted that entire tender process was through E Tender process and downloading of tender document was free. Unless and until all the terms and conditions of the tender document, more particularly, "nProcure" and the essential conditions are complied with the petitioners / bidders would not get right automatically to consider him eligible. Downloading of tender document is different thing then thereafter getting the entry after complying with the terms and conditions of the tender document "nProcure" requirement. Therefore, merely because the petitioner and others were permitted to download the tender document free of cost, unless and until all the terms and conditions are satisfied, it does not get any right to consider its bid. Mere downloading of tender document cannot be said to be entry at the initial stage to consider such person who has downloaded as bidder / tenderer.

12.2. Now, so far as the submission on behalf of the petitioners that earlier the tender process was canceled as only one

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bidder was there and therefore, it was the case of single bid and in the present case also two bidders other than petitioners submitted their bids one bidder was found to be ineligible and therefore, only respondent no.2 would be there and it would again be a case of single tender and therefore, again entire tender process is required to be canceled is concerned, the aforesaid has no substance. At the outset, it is required to be noted that as such no such case has been pleaded. However, in the affidavit in reply, it is specifically

submitted on behalf of the respondent Corporation that aforesaid shall not be applicable in case of second time tender process.

13.0. Now, so far as reliance placed upon the decisions of the G.J.Fernandez (supra), Poddar Steel Corporation (supra), Rashmi Metaliks Limited and Another (supra), Om Prakash Sharma (supra), Jal Mahal Resorts Private Limited (supra), Baksh Security And Personnel Services Private Limited (supra), MHS Infra Tech Pvt Ltd (supra), PES Installations Pvt. Ltd and Anr (supra) and R.G. Holding Pvt Ltd (supra) by the learned counsel for the petitioners are concerned, in the facts and circumstances of the case, the said decisions shall not be applicable to the facts of the case on hand. At this stage, it is required to be noted that in the case of Central Coalfields Limited and Another (supra) and Afcons Infrastructure Limited (supra), the Hon'ble Supreme Court did consider the aforesaid decisions and has distinguished the same on facts. Therefore, considering the decision of the Hon'ble Supreme Court in the case of Central Coalfields Limited and Another (supra) and Afcons Infrastructure Limited (supra), we are of the opinion that impugned decision cannot be said to be either

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perverse and / or arbitrary and / or mala fide and therefore, the same does not require any interference of this Court in exercise of under Article 226 of the Constitution of India.

14. In view of the above and for the reasons stated above, present petition fails and same deserves to be dismissed and is accordingly dismissed. Rule is discharged.

**(M.R. SHAH, J.)**

**(B.N. KARIA, J.)**

Kaushik

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