

HIGH COURT OF PATNA

Bench: Justice P. B. Bajanthri and Justice Arun Kumar Jha

Date of Decision: 10-11-2023

Civil Writ Jurisdiction Case No.16899 of 2022

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1. BVG India Ltd a company incorporated under the Companies Act having its registered address at BVG House, Premier Plaza, Pune-Mumbai Road, Chinchwad Pune- 411019, Maharashtra through its Authorized Representative Raj Kumar Bhardwaj, Aged about 35 years (Male), S/o Indreshwar Jha, R/o NY/1 N Jagdish Bhawan, Kachi Talab, Gardanibagh, Phulwari, PS- Gardanibagh, District- Patna.
2. Sammaan Foundation, a non profit company registered under Companies act having its office at SBI Colony No. 2, House No 2/30, Jagdeo Path, Khajpura, Bailey Road, Patna-13 through its authorised representative Vivek Kumar Bhardwaj, Aged about 29Years, (Male), R/o Padmaytan, New Mahavir Colony, Hasanpura Road, Beur, Anisabad, PS- Beur, District Patna.
3. Consortium of BVG India Ltd. and Sammaan Foundation having office at SBI Colony No. 2, House No 2/30, Jagdeo Path, Khajpura, Bailey Road, Patna-13 through its authorised representative Vivek Kumar Bhardwaj, Aged about 29Years, (Male), R/o Padmaytan, New Mahavir Colony, Hasanpura Road, Beur, Anisabad, PS- Beur, District Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, Health Department, having its office at 1st Floor, Vikas Bhawan, Bailey Road, Patna -800015
2. The Executive Director, State Health Society, Bihar (SHSB), Government of Bihar Patna.
3. The Technical Committee, NIT Reference-1/SHSB/PPP (Ambulance)/20222023, State Health Society, Bihar (SHSB), Government of Bihar, Patna through its Chairperson and Members.
4. M/S Pashupatinath Distributors Private Limited having its registered address at F-2, Chandi Vyapar Bhawan 3rd Floor, Exhibition Road Patna, P.S.Gandhi Maidan- 800001, Bihar through its authorised representative.
5. M/s GUK Emergency Management and Research Institute, Having registered office at Paigah House, 156-159, Sardar Patel Road, Secunderabad, Telangana, through its Director.
6. Ziqitza Health Care Ltd., Sunshine Tower, 23rd Floor, Senapati Bapat Marg, Dadar (West), Mumbai, through its Director.

... .. Respondent/s

Civil Writ Jurisdiction Case No. 8553 of 2023

M/s Ziqitza Health Care Ltd. Having its registered office at 23rd Floor, Sunshine Tower, Senapati Bapat Marg, Dadar West, Mumbai - 400 013 through its authorized representative, Mr. Amit Kumar, Male, aged about

38 years, son of Shri Prameshwar Chandra Das, resident of 3, Anand Bazar, Danapur, District - 801503

... .. Petitioner/s

Versus

1. The State of Bihar Through the Additional Chief Secretary, Health Department, Bihar, Patna.
2. State Health Society, Bihar, Patna through its Executive Director
3. Executive Director, State Health Society, Bihar, Patna
4. M/s Pashupatinath Distributors Pvt Limited Having its registered office at F2, Chandi Vyapar Bhawan, 3rd Floor, Exhibition Road, P.S.-Gandhi Maidan, District - Patna, Pin Code - 800 001, through its Authorised Representative.

... .. Respondent/s

Legislation:

Section 2 (6), 2(40), 3(i) 129 of Companies Act, 2013

Article 14 of the Constitution of India

Subject: Challenging the disqualification of technical bid in a tender process and seeking fairness and transparency in State organizations' decision-making in contractual matters.

Headnotes:

Writ Petition – Technical Bid Disqualification – Challenging disqualification of technical bid and seeking fairness in the bid process – Petitioner's technical bid disqualified for not including 'Notes' in the Audited Balance Sheet – Fourth respondent's bid accepted despite non-fulfillment of eligibility criteria – Discretion of State organizations in contractual matters to satisfy reasonableness and fairness – Disqualification of petitioner's bid and acceptance of fourth respondent's bid set aside – Direction to Society to revisit and evaluate technical bids afresh, maintaining transparency and fairness. [Para 54-70]

State Organizations – Role and Responsibilities – Ensuring fairness, transparency, and compliance with constitutional principles in contractual matters – State organizations to act in public interest, avoiding arbitrariness and favoritism in tender processes – Upholding the principles of justice and equality enshrined in Article 14 of the Constitution in decision-making processes. [Para 67]

Judicial Review – Contractual Matters – Scope and limitations – Courts to intervene in cases of arbitrariness, irrationality, or procedural impropriety in State organizations' decisions – Emphasis on the decision-making process rather than the decision itself – Importance of judicial restraint, especially in technical and contractual issues requiring expertise. [Para 49, 57, 67]

Consortium Agreements – Impact on Bid Eligibility – Assessment of bidder's eligibility based on individual and consortium capacities – Discrepancies in the representation of consortium shares and profit

distribution affecting the credibility and eligibility of the bidder. [Para 58, 62-64]

Eligibility Criteria – Adherence in Tender Processes – Critical analysis of bidders' compliance with specified eligibility criteria – Rejection of bids for non-compliance with essential conditions – Evaluation of financial turnover and experience as per tender requirements – Importance of accurate and consistent financial statements and experience certificates. [Para 54-58, 62-64]

Interim Arrangements – Continuation Pending Re-Evaluation – Direction to maintain interim arrangements until the completion of re-evaluation of bids – Re-evaluation process to be completed within a specified timeframe, ensuring minimal disruption. [Para 68]

Decision – The petitions of BVG India Limited and others (CWJC No. 16899 of 2022) and M/s Ziqitza Health Care Ltd. (CWJC No. 8553 of 2023) were allowed in parts, setting aside the disqualification of BVG India Ltd. And the acceptance of the fourth respondent's bid. The interim arrangement ordered by the court to continue until the completion of the re-evaluation process. [Para 69-70]

Referred Cases:

- Poddar Steel Corporation vs Ganesh Engineering Works And Others [1991 (3) SCC 273]
- B.S.N. Joshi & Sons Ltd vs. Nair Coal Services Ltd. & Others [2006 11 SCC 548]
- Dutta Associates Pvt. Ltd vs. Indo Merchatiles Pvt. Ltd & Ors [1997 1 SCC 53]
- Reliance Energy Limited and Another vs. Maharashtra State Road Development Corp. Ltd. And Others [2007 8 SCC 1]
- National High Speed Rail Corp. Ltd. Vs. Montecarlo Ltd. And another [2022 6 SCC 401]
- New Horizons Ltd. And Others vs. Union of India and Others [1995 1 SCC 478]
- Silppi Constructions Contractors vs. Union of India and Another [2020 16 SCC 489]
- M/S N.G. Projects Limited vs. M/S Vinod Kumar Jain and Ors. [2022 6 SCC 127]
- Vidarbha Irrigation Development Corp. and Others vs. Anoj Kumar Agarwala and Others [2020 17 SCC 577]
- Municipal Corporation, Ujjain and Another vs. BVG India Limited and Others [2018 5 SCC 462]

Representing Advocates:

For Petitioner/s (BVG India Limited): Mr. S.D. Sanjay, Sr. Advocate assisted by Mr. Brisketu Sharan Pandey, Advocate; Mr. Nirbhay Prashant, Advocate; Mr. Vishal Kumar, Advocate; Mr. Rahul Kumar, Advocate; Mr. Lokesh Kumar, Advocate.

For Respondent No. 4: Mr. Jitendra Singh, Sr. Advocate assisted by Mr. Satyabir Bharti, Advocate; Mr. Abhishek Anand, Advocate; Ms. Kanupriya, Advocate; Ms. Sushmita Sharma, Advocate.

For Respondent Nos. 1, 2, and 3: Mr. Umesh Prasad Singh, Sr. Advocate assisted by Ms. Aditi Kumari, Advocate; Mr. K.K. Sinha, Advocate; Mr. Vaibhav Veer Shankar, Advocate.

For State: Mr. Ramadhar Singh, GP 25 assisted by Mr. Upendra Prasad Singh, AC to GP 25.

For Petitioner/s (CWJC No. 8553 of 2023 – M/s Ziqitza Health Care Ltd.): Mr. Abhinav Srivastava, Advocate.

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

CWJC No. 16899 of 2022

In the instant writ petition, petitioners have prayed for the following relief/reliefs:

“a. For quashing and setting aside the minutes of meeting of the Technical Committee (Respondent No. 3) dated 22.11.2022 (“impugned order”) issued on 28.11.2022 as contained in Annexure P/1, by which the Petitioners have been held to be disqualified in technical bid in the most arbitrary manner, contrary to principles of natural justice, illegally as well as having without jurisdiction.

b. For directing the State Health Society, Bihar (Respondent No. 2) to declare the petitioners as technically qualified and consequently open their financial bid in relation to the Notice Inviting Tender (NIT) bearing reference no. 01/SHSB/PPP(AMBULANCE)/2022-23.

c. For issuing appropriate orders restraining the respondent authorities from opening financial bid and handing over the work order (in relation to the tender in furtherance of Notice Inviting Tender (NIT) Reference no., 01/SHSB/PPP(Ambulance)/2022-23 to any of the bidders until the pendency of the present writ application.

d. For declaring that the action of the Respondent No. 3 is arbitrary, mala fide, malicious, colourable exercise of power, violating of principles of natural justice as well as without jurisdiction.

e. For directing the State Health Society, Bihar (Respondent No. 2) to declare the Respondent No. 4 as disqualified in the tender bearing reference no. 01/SHSB/PPP(AMBULANCE)/2022-23.

f. For further passing such an order or orders for which the petitioners are entitled under the law in the facts and circumstances of this case.

g. For directing the respondent authorities to cancel tender bearing E-Tender (NIT) Reference No.:01/SHSB/PPP/(Ambulance)/2022-23 (hereinafter referred as “NIT”) invited on 05.04.2022 as the confidential information and papers, both technical & financial, of the bidders so submitted by them with their respective tender documents was leaked in connivance with officials of the department during the pendency of the evaluation of the bid and all the confidential information of the bidders, except the Respondent No. 4, have been floating in the market from one hand to another hand and whereby the tender process has been compromised.

h. For directing the respondent authorities to disqualify the Respondent No. 5 & 6 in the tender bearing reference no. 01/SHSB/PPP(AMBULANCE)/2022-23 for submission of false information in Annexure – G relevance to the RFP clause 7 for fraudulent practices.

i. for quashing the Minutes of the meeting of Project Appraisal Committee (hereinafter referred as “PAC”) held on 23.01.2023 related to financial bid opening with reference to the NIT: 01/SHSB/PPP (Ambulance)/202223 wherein and where under M/s Pashupatinath Distributors Pvt. Ltd. (Respondent No. 4), the blue eye baby of the SHSB, has been declared L1 by lowering down the eligibility criteria earlier published in RFP.”

2. Petitioner No. 1 – BVG India Limited (hereinafter referred to as ‘BVG’) is a company incorporated under the Companies Act and has been providing facility management services to several public institutions and private organizations. It is also providing ambulance services in various States like State of Maharashtra, Telangana and Jammu and Kashmir. It claims that it has expertise in the aforementioned services.

3. Petitioner No. 2 – Sammaan Foundation works with marginalized section of the society in areas like healthcare, emergency services, community mobilization and participatory management. It is providing various kind of services through different projects in the States of Bihar, Jharkhand, Chattisgarh, Madhya Pradesh, Delhi and Rajasthan.

4. Petitioner No. 3 is the Consortium of the petitionerNos. 1 and 2. Petitioner No. 3 was formed to participate in the tender issued by the State Health Society, Bihar (hereinafter referred as 'Society') with reference to 1/SHSB/PPP(AMBULANCE)/2022-23 (hereinafter referred to as 'the tender') for selection of the agency for operationalization and management of fleet of ambulances and mortuary vans through Integrated Centralized Call Center in the State of Bihar under Public Private Partnership (hereinafter referred to as 'PPP'). These three petitioners are questioning the validity of the proceedings of meetings dated 22.11.2022 by which the technical disqualification of the petitioner No. 3 was notified in the website on 28.11.2022.

5. It is necessary to take note of the following dates and events:

S.No.	Dates	Events
1.	21.04.2017	In the year 2016, fourth respondent M/s Pashupatinath Distributors Private Limited had consortium with Sammaan Foundation, petitioner No. 2 vide agreement dated 05.08.2016 and they executed works from 2016 and it is for a period of five years.
2.	04.04.2022	Notice inviting tender reference No. 01/SHSB/PPP (Ambulance)/2022-2023 for operationalization and management of safety of ambulance and mortuary vans through Integrated Centralized Call Center in the State of Bihar under PPP for a period of five years from the date of agreement.
3.	08.04.2022	On four occasions Society proceeded to issue
	04.05.2022	corrigendum Nos. 1, 2, 3 and 4 while altering
	20.05.2022	certain timeline including certain specifications
	05.06.2022	have been altered.
4.	16.06.2022	Petitioners submitted online bid application and EMD was also paid along with requisite documents.
5.	29.06.2022	Petitioner - Sammaan Foundation sent an email relating to incorrect and patently false declaration of eligibility of 4 th respondent and it was marked to each of the five members of technical committee and others.
	30.06.2022	The aforementioned e-mail of Sammaan Foundation was communicated to fourth respondent by the Administrative Officer.
7.	15.07.2022	Society sought certain clarification from the Petitioners.

8. **19.07.2022** Sammaan Foundation made certain allegations against fourth respondent to the second respondent – Society.
9. **21.07.2022** The Society sought certain clarification on the observation arising out of scrutiny of the documents like turnover certificate seems to be from emergency medical services and not ambulance services.
10. **27.07.2022** Mukesh Kumar Roshan who is stated to be a member of the legislative assembly made certain correspondence while addressing to the Chief Secretary, Health Department and others. It is stated to have been forwarded to the Hon'ble Chief Minister and others.
11. **28.07.2022** Petitioner - Consortium filed their reply along with certain documents.
12. **17.08.2022** Petitioner No. 2 sent a reminder relating to consideration of allegations levelled on fourth respondent.
13. **31.08.2022** Second reminder was made to the Society about allegations against respondent No. 4 relating to non-fulfillment of certain criteria.
14. **14.11.2022** M/s Ziquitza Health Care Ltd. stated to have raised certain objections on the petitioners' eligibility. In this regard Society sought a clarification from the petitioner – Consortium.
15. **21.11.2022** Petitioner - Consortium filed their reply along with number of documents.
16. **09.11.2022/** Sammaan Foundation – petitioner No. 2 sought
22.11.2022 for action in the light of earlier representations while addressing to the Society respondent.
17. **22.11.2022** Technical Committee disqualified the petitioners in the technical bid.
18. **30.11.2022** Petitioners had submitted for reconsideration of their claim with reference to rejection of their technical bid.
19. **30.11.2022** Respondent – Society informed the Ziquitza Health Care Ltd, Mumbai – respondent No. 6, M/s GVK Emergency Management and Research Institute, Telangana and M/s Pashupatinath Distributors Private Limited, Patna – respondent No. 4.
20. **09.11.2022/** Sammaan Foundation – petitioner No. 2 sought
22.11.2022 for action in the light of earlier representations while addressing to the Society respondent.
21. **02.12.2022** EMRI (GREEN) Health Services submitted objection against fourth respondent to the extent that there is no compliance as per RFP Section – V, Clause 2.2 to the Society.
22. **23.01.2023** Respondent State Health Society, Bihar opened the financial bid.
23. **23.01.2023** Minutes of meeting of PAC was convened while declaring that respondent No. 4 as L1, respondent No. 6 as L2 and M/s. GVK Emergency Management and Research Institute, Telangana as L3.

Submission of the Petitioner – Consortium

6. Learned senior counsel for the petitioner submitted that rejection of technical bid is on the score that petitioner failed to comply eligibility criteria for bidders under Clause 2.2. It was pointed out that under Clause 2.2 eligibility criteria for bidders read with mandatory documents are that the bidders must have a cumulative minimum average annual turnover of INR 100 crores from ambulance services during the financial years FY 2018-19, FY 2019-20 and FY 2020-21. The lead partner in the Consortium must have minimum annual average turnover of INR 60 crores while other partner must have minimum annual average turnover of INR 25 crores from ambulance services during the mentioned financial years, however, the cumulative total minimum average annual turnover of Consortium members jointly must be INR 100 crores whereas mandatory documents are that Audited Balance Sheet, statement of profit and loss account (sole bidder or each partners in case of consortium) and Turnover Certificate issued by Chartered Accountant while furnishing membership etc.

7. The petitioner - Consortium technical bid was rejected and disqualified due to non submission of certain documents of the Audited Balance Sheet read with statement of profit and loss account in which notes have been referred, i.e., notes have not been made available along with balance sheet. It is submitted that reading of mandatory documents under Clause 2.2, it does not stipulate that respective bidders are required to furnish internal material information in respect of Audited Balance Sheet like notes. It is submitted that on other issues respondent - Society had sought certain clarification and it has been clarified like emergency medical services or ambulance services. Similarly, if the respondent - Society was of the view that notes of the Audited Balance Sheet was warranted, in that event they could have

sought clarification from the petitioner - Consortium. That apart there is no mandatory clause insofar as furnishing of certain materials like notes from the Audited Balance Sheet, therefore, rejection of bid or disqualifying the petitioner - Consortium in the technical bid stage is arbitrary and illegal. Moreover there are no such instructions to the bidders. On this ground, impugned action of the respondent – Society is liable to be set aside.

8. Learned senior counsel for the petitioners further submitted insofar as questioning the validity to declare fourth respondent's bid application responsive that it was not in order and consequently it being treated as L1 and therefore award of work to it was wrong and incorrect. On this issue he has contended that fourth respondent did not fulfill the eligibility criteria i.e., Clause 2.2 insofar as in not meeting the criteria of annual turnover of INR 100 crores for each of the year – FY 2018-19, FY 2019-20 and FY 2020-21.

9. It was further submitted that fourth respondent has not fulfilled yet another eligibility criteria i.e. Clause 2.3 read with Annexure - C to the tender - assignment of similar nature being successfully completed by it. It is submitted that the fourth respondent is lacking in experience in operations and management of at least 750 ambulances, i.e. Basic Life Support Ambulance (BLSA) and minimum 50 ambulances i.e. Advance Life Support Ambulance (ALSA) supported by Call Centre of at least 75 seats in the public and private sector during last three years i.e. FY 2018-19, FY 2019-20 and FY 2020-21. Even though minimum 50 ALS ambulances and 75 seats in public or private sector has been modified while issuing corrigendum to the extent that minimum 50 ALS ambulances has been redetermined as 40 and similarly 75 seats has been modified to 50 seats, fourth respondent does not fulfill any of the criteria. Having regard to the fact that on 21.04.2017, fourth respondent

was allotted work by the respondent - Society for a period of five years as on the last date of submission of bid application, he had not completed only 2 ½ years and not three years and so also minimum 40 ALS ambulances and 50 seats Call Centre for the respective period is not forthcoming, as is evident from Annexure - C to the tender form in which petitioners have given information only in respect of Serial No. 1 Column No. 3 relating to number of ambulances – ALSA and BLSA and date of commencement and it is still in vogue. On the other hand, fourth respondent was required to furnish information for the last three years namely FY 2018-19, FY 2019 –20, FY 2020-21 in the light of Clause 2.3 wherein it has stipulated that experience in operations and management should be for the last three years i.e. FY 2018-19, FY 2019–20 and FY 2020– 21. Thus, Society - respondent has favoured the fourth respondent in not examining eligibility criteria of the fourth respondent in the light of Clause 2.2 and 2.3 of the NIT read with documents produced on behalf of fourth respondent. The learned senior counsel for the petitioners further submitted that the e-mail dated 29.06.2022 sent by the petitioners to the members of the technical bid committee was leaked by the Administrative Officer of the Society to the respondent No. 4. This act was without any authority and was done to favour the respondent No. 4.

10. Learned counsel for the petitioners has relied on the following three decisions of the Apex Court:

(i) Poddar Steel Corporation vs Ganesh Engineering Works And Others reported in **1991 (3) SCC 273** (Paragraph Nos. 2, 6, 7) to support the contention that rejection of the petitioner’s technical bid is on non-existing ground, in other words, eligibility criteria under Clause 2.2, there is no specific instruction to the bidders to the extent that Audited Balance Sheet must contain notes of the balance sheet. In the absence

of specific instruction to the respective bidders to produce material information out of Audited Balance Sheet, petitioner/bidders are not expected to produce the same.

(ii) B.S.N. Joshi & Sons Ltd vs. Nair Coal Services Ltd. & Others reported in **2006 11 SCC 548**, Paragraph No. 66 (i) to (vii) and No. 69 reads as under:

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

- (i)* if there are essential conditions, the same must be adhered to;
- (ii)* if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii)* if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv)* the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v)* when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi)* the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- (vii)* where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions

which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction”

(iii) Dutta Associates Pvt. Ltd vs. Indo Merchatiles Pvt.Ltd

& Ors reported in **(1997) 1 SCC 53**, relevant Paragraph Nos. 4 to 8 reads as under:

“4. After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant's tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the “viability range” nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the “viability range” and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort. Secondly, we have not been able to understand the very concept of “viability range” though Shri Kapil Sibal, learned counsel for the appellant, and the learned counsel for the State of Assam tried to explain it to us. The learned counsel stated that because of the de-control of molasses, the price of rectified spirit fluctuates from time to time in the market and that, therefore, the viability range was determined keeping in view (1) distillery cost price; (2) export pass fees; (3) Central sales tax; (4) transportation charges; (5) transit wastage @ 1%; and (6) warehouse operational wastage @ 1 1/2% — vide the counter-affidavit filed by the Secretary to Excise Department, Government of Assam pursuant to this Court's orders. Shri Sibal further explained that because of the possibility of the fluctuation, the tender notice contains clause (16) which reserves to the Government the power to reduce or increase the contract rate depending upon the escalation or deceleration of the

market price in the exporting States. We are still not able to understand. Clause (16) deals with post-contract situation, i.e., the situation during the currency of the contract and not with a situation at the inception of the contract. The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs 11.14 per LPL or so, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range. Not only the rate obtaining during the period when the tenders were called was Rs 11.05 per LPL, the more significant feature is that during the period of about more than two years pending the writ petition and writ appeal, the appellant has been supplying rectified spirit @ Rs 9.20 per LPL. If it was not possible for anyone to supply rectified spirit at a rate lower than Rs 14.72 (the lower figure of the viability range), how could the appellant have been supplying the same at such a low rate as Rs 9.20 for such a long period. It may be relevant to note at this stage the circumstances in which the appellant volunteered to supply at the said rate. Indo Mercantiles, the respondent herein, filed the writ petition and asked for an interim order. The learned Single Judge directed (vide Order dated 2-6-1994) that while Dutta Associates (appellant herein) shall not be given the contract, he “shall be allowed to execute the contract at the lowest quoted rate which is stated to be Rs 9.20 by the writ petitioner. Respondent 3 (Dutta Associates) states that the lowest quoted rate is Rs 11.14. If the lowest quoted rate is Rs 9.20, it is that rate at which the contract shall be given to Respondent 3”. It is pursuant to the said order that the appellant-Dutta Associates has been supplying rectified spirit @ Rs 9.20 per LPL since June 1994 till October 1996. The said order did not compel the appellant (Respondent 3 in the writ petition) to supply at the rate of Rs 9.20p. If that rate was not feasible or economic, he could well have said, ‘sorry’. He did not say so but agreed to and has been supplying at that rate, till October 1996. It is equally significant to note that pursuant to the interim orders of this Court (which directed the Government to implement the orders of the Guwahati High Court with respect to interim arrangement) negotiations were held with both the appellant and the first respondent herein; both offered to supply at Rs 9.20p. The Commissioner, of course, chose the first respondent, Indo Merchantiles, over the appellant, for reason given by him in his order dated 14-10-1996. The rate, however, remains Rs 9.20p and the appellant's counsel has been making a grievance of the Commissioner not accepting the appellant's offer. All these facts make the so-called “viability range” and the very concept of “viability range” looks rather ridiculous — and we are not very far from the end of the three-year period for which the tenders were called for. Neither the interlocutory order of the learned Single Judge dated 2-6-1994 aforesaid nor does the order of the Commissioner dated 14-10-1996 passed pursuant to the interim orders of this Court provide for any fluctuation in the rate of supply depending upon the fluctuation in the market rate in the exporting States, as provided by clause (16) of the Tender Conditions, which too appears rather unusual. The order of the learned Single Judge aforesaid does not also say that the rate specified therein is tentative and that it shall be subject to revision at the final hearing of

the writ petition. As a matter of fact, no such revision was made either by the learned Single Judge or by the Division Bench. It is in these circumstances that, we said, we have not been able to understand or appreciate the concept of “viability range”, its necessity and/or its real purpose. Thirdly, the Division Bench states repeatedly in its judgment that having determined the “viability range”, the Government called upon only the appellant Dutta Associates (third respondent in the writ petition/writ appeal) to make a counter-offer to come within the “viability range” and that his revised offer at the higher limit of the “viability range” (Rs 15.71) was accepted. The Division Bench has stressed that no such opportunity to make a counter-offer was given to any other tenderer including the first respondent. As the Division Bench has rightly pointed out, this is equally a vitiating factor.

5. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (appellant herein) is unfair and opposed to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The Grounds 1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal.

6. Before parting with this matter, we must also say that we have not been able to appreciate a particular observation of the Division Bench. In para 12 of its judgment, it said: “In a matter like supply of spirit to warehouse, offer of low or high rate does not affect the government revenue. The more the profit earned by the supplier, the more sales tax can be levied by the Government.” We find it difficult to understand how the acceptance of a tender at a high rate does not affect the government revenue. Secondly, we find it yet more difficult to understand the observation that more profit the supplier earns, the more sales tax will the Government realise. Sales tax is not linked with profit. It is linked to the sale price and we see no logic in the Government paying higher rate at a substantive figure and realising sales tax at a smaller figure.

7. In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this Court in *Shiv Sagar Tiwari v. Union of India* [(1996) 6 SCC 558 and (1996) 6 SCC 599] (*In re, Capt. Satish Sharma and Sheila Kaul*).

8. We further direct that pending the finalisation of the contract pursuant to the tenders to be floated hereinafter pursuant to the directions made herein, the present temporary arrangement shall

continue. Though Shri Sibal has questioned the correctness of the Commissioner's orders dated 14-10-1996 awarding the contract for the interim period to Indo Merchantiles, we are not prepared to accept the criticism. In our opinion, the Commissioner has given valid reasons for preferring Indo Merchantiles over the appellant when both were prepared to supply at the same rate of Rs 9.20 per LPL. We further direct that fresh tenders should be floated within two months from today and the entire process finalised within four months from today.”

Submission of the respondent – Society 11.

Learned counsel for the respondent – Society, author of NIT raised a preliminary objection that the petitioners’ writ petition is not maintainable in view of defects in the affidavit to the extent that affidavit supporting writ petition does not reveal that it is on behalf of other petitioners. On this ground the present writ petition is liable to be dismissed. It is further submitted that agreement dated 15.06.2022, between petitioner Nos. 1 and 2 read with Clause 8 of the agreement, petitioners’ writ petition is not maintainable, since the agreement dated 15.06.2022 ceased with effect from 21.06.2022, the date on which petitioners’ bid was rejected.

12. It is further submitted that rejection of the petitioners’ bid at the technical bid stage is in order. The reasons for rejection of petitioners’ technical bid are that petitioners failed to furnish relevant materials which has been quoted in the balance sheet like notes. In this regard, he has cited Section 3 (i) read with Section 129 (1) and explanation of the Companies Act, 2013 requires that Column No. 2 note is essential. In not furnishing Column No. 2 - note of the Audited Balance Sheet on behalf of petitioners for the years FY 2018–19, FY 2019-20 and FY 2020– 21, the petitioners bid application is defective, in other words deficiency is in not furnishing complete records in the light of Clause 2.2, eligibility criteria for bidders read with mandatory requirements.

13. It has been further submitted that the petitioners have made certain allegations relating to leaking of information with reference

to e-mail sent by the petitioners to members of technical committee on 29.06.2022. Thereafter, the same was communicated to the fourth respondent through administrative officer on 30.06.2022. The aforementioned contention of the petitioners is incorrect to the extent that e-mail communication of the petitioners is not only addressed to the Five Members Committee and it was addressed to others also. That apart whatever objection filed by the petitioners was required to be ascertained from fourth respondent, therefore, fourth respondent has been informed about the alleged deficiencies in the fourth respondent's bid application. Further, it has been submitted that technical bid was opened on 21.06.2022 whereas e-mail of the petitioners is dated 29.06.2022 and further, it has been communicated to the fourth respondent by the administrative officer on 30.06.2022. Therefore, one cannot draw inference that confidential information have been leaked on behalf of the Society – respondent. It is also submitted that having regard to the list of documents 1 to 6 of respondent No. 4, it is clear that fourth respondent has complied the requisite eligibility criteria, the relevant extract of which reads as under:

“ELIGIBILITY CRITERIA

1. This invitation is open to all the organizations registered under Companies Act, 1956/2013 or Limited Liability Partnership Act 2008, or Societies Registration Act 1860, or Indian Trusts Act 1882, who fulfill the eligibility & qualification criteria specified hereunder. The bidder can be a sole bidder (i.e., Company/LLP/Society/Trust) or a group of legal entities (i.e., Company/LLP/Society/Trust) (maximum two) represented by a lead partner coming together as a consortium to implement the project. In case of consortium, all the partners should have experience of operating & managing the Ambulance Service.

2. The eligibility criteria and Supporting Documents to be submitted by the bidders are as follows:-

S.No.	Eligibility Criteria for Bidders	Mandatory Documents
2.1	<p>The Bidder (Sole Bidder or Consortium shall mean each of the partners including the lead partner) should be an established entity under Companies Act 1956/2013, or Limited Liability Partnership Act 2008, or Societies Registration Act 1860, or Indian Trusts Act 1882.</p>	<p>For Company/LLP - Copy of the certificate of incorporation issued by Registrar of Companies (RoC). For Society/Trust – Certificate issued under Societies Registration Act 1860/ Indian Trust Act 1882. In the case of consortium, apart from the above certificate to be provided by each of the partners, the consortium shall also submit: a) Board resolutions for individual partner(s) including lead partner in the consortium, as per format 'Annexure-E' b) Memorandum of Understanding (MoU) Consortium" in the format mentioned in</p>

		'Annexure-F'
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<p>2.2</p>	<p>The bidder (in case of sole bidder) must have minimum average annual turnover of INR 100 Crore from Ambulance Services during the financial years FY 2018-19, FY 2019-20 & FY 2020-21, as evidenced by the audited accounts of the bidder. i the bidder must have cumulative minimum average annual turnover of INR 100 Crore from Ambulance Services during the financial</p>	<p>Self-attested copies of the below documents for concerned financial years:</p> <ol style="list-style-type: none"> 1. Audited Balance sheet 2. Statement of Profit & loss account: if the bidder (sole bidder or each partners in case of consortium) is registered under Companies Act/LLP Act, or Income & expenditure account: if the bidder (sole bidder or each partners in case of consortium) is registered under Societies Registration Act, or Indian Trusts Act, or Section 8 under Companies Act. 3. Turnover certificate issued by Chartered Accountant (must be mentioned Membership No., UDIN No. & Date) certifying the turnover related
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	<p>years FY 2018-19, 2019-20 & FY 2020-21.</p> <p>However, the lead partner in the consortium must have minimum annual average turnover of INR 60 Crore, while other partner must have minimum annual average turnover of INR 25 Crore from Ambulance Services during the mentioned financial years.</p> <p>However, the cumulative total minimum average</p>	<p>to Ambulance Services of respective years for which the bidder (sole bidder or</p>
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	annual turnover of consortium members jointly must be Rs. 100 Crore.	
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		each partner in case of consortium) is submitting the turnover statement.
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<p>2.3</p>	<p>The bidder (in case of sole bidder) must have experience in Operations and Management of at least 750 Ambulances (BLS Ambulances and minimum 50 ALS Ambulances) supported by a Call Centre of at least 75 seats in Public or Private Sector during last 3 years i.e FY 2018-19, FY 2019-20 & FY 2020-21.</p> <p>In case of consortium, the lead partner in the consortium must have experience in Operations and Management of at least 450</p>	<p>Copy of 'Experience Certificate issued by Client/Employer' along with 'Work order or MoU or Contract' from the employers, to prove the experience.</p>
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	<p>Ambulances (BLS Ambulances and minimum 30 ALS Ambulances) supported by a Call Centre of at least 45 seats in Public or Private Sector during last 3 years i.e FY 2018-19, FY 2019-20 & FY 2020-21, while other partner must have experience in Operations and Management of at least 200 Ambulances (BLS Ambulances and minimum 15 ALS Ambulances) supported by a Call Centre of at least 25 seats in Public or Private Sector</p>	
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	<p>during last 3 years i.e FY 2018-19, FY 2019-20 & FY 2020-21. However, the consortium members jointly must have the experience in Operations and Management of at least 750 Ambulances (BLS Ambulances and minimum 50 ALS Ambulances) supported by a Call Centre of at least 75 seats in Public or Private Sector during last 3 years i.e FY 2018-19, FY 2019-20 & FY 2020-21.</p>	
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Annexure 'C'

ASSIGNMENT OF SIMILAR NATURE SUCCESSFULLY COMPLETED

(On Non – judicial stamp paper of Rs. 100/- duly attested by Notary Public/Executive Magistrate)

(to be submitted by the Sole bidder or Lead partners of the Consortium)

We <Mentioned the name of the organization>, registered as Company/ Limited Liability Partnership/Society/Trust, applying as a <Sole bidder/Lead Partner of the consortium>, having our registered office is at <Mention the address of the registered office> fulfilling the requisite experience of operating and managing ambulances during the FY 2018-

19, FY 2019-20 & FY 2020-21. The details of experiences are mentioned below.

S.No.	Description of Work/service Provided	Number of Ambulances	Date of Commencement
1.	ALSA: --- BLSA: ----		
2.	ALSA: --- BLSA: ----		
3.	ALSA: --- BLSA: ----		
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The relevant documents (as mentioned in the eligibility criteria) evidencing, the above said experience are submitted online. We further confirm that the submitting documents and the details provided in the certificate is true to best of my knowledge and we are aware that our Application for this project would be liable for rejection in case any material misrepresentation is made or discovered at any stage of the Bidding Process/ Selection process and legal action may be taken against us.

Dated this Day of.....2022

Name of the Bidder.....

Signature of the Authorized Person.....

Name of the Authorized Person.....

Designation of the Authorized Person.....”

Submission of the Fourth respondent

14. Mr. Jitendra Singh, learned Senior counsel for the fourth respondent submitted that rejection of petitioners’ bid is in order. He has relied on Section 2 (40) of the Companies Act which relates to Financial Statement, (v) any explanatory note annexed to, or forming party of, any document referred to in sub-clause (i) to sub clause (iv). Similarly, he

has relied on Sections 129 (3), 129 (7) Explanatory (notes), Section 134 (7) , Definition of Financial Statement, Board's Report read with Clauses 2, 3 and 6 of Schedule III Division I of the Companies Act, 2013 in support of his contention that if balance sheet has been asked to be submitted, it would necessarily include notes.

15. It is further submitted that petitioner's – BVG balance sheet for the period from 31.03.2021 – 31.03.2020, item Nos. 3 to 50 were not enclosed. To that effect there is defect. At this stage, he has pointed out contents of NIT like Section I – Notice Inviting Tender (NIT), Section II – Instructions to Bidders (ITB) – Section V – Eligibility Criteria. The petitioners fail to fulfill the Eligibility Criteria under Section V in not providing bidding information/contents of balance sheet, therefore, there is no infirmity insofar as rejection of the petitioners bid application is concerned. Petitioners' contention in the representation dated 30.11.2022 to the effect that sufficient space has not been provided is not the ground to contend that he need not make available the complete information under the heading of balance sheet. It is also submitted that certain allegations have been made on behalf of the petitioners to the extent that e-mail sent by the petitioner No. 2 to the Society has been leaked. The same is not tenable in view of the fact that e- mail has been marked (CC) to 19 others. It is also submitted that corrigendum has been issued to suit the fourth respondent's eligibility. The same is not tenable, since petitioners have not assailed the corrigendum issued from time to time like 08.04.2022, 04.05.2022, 20.05.2022 and 05.06.2022. Even allegation that pre-bidding was held on 18.04.2022 to favour the fourth respondent is incorrect in absence of any corroborative material information. Pre-bid meeting was held on 18.04.2022 in accordance with the relevant clauses, therefore, there is no infirmity and it is in terms of Clause 6 (6.1 and 6.2) of Section II.

16. It is further submitted that paragraph No. 34 of the Society's counter affidavit would answer to the effect that petitioner has not made out a case.

17. It is also submitted that minimum 100 crores turnover is required to be taken note of with reference to financial statement under Section 129 (3) read with Section 2 (6) of Companies Act, 2013 which includes "associate company". Fourth respondent had earlier gained experience and it would meet the requirement of 100 crores turnover.

18. Learned counsel for the fourth respondent relied on the following three decisions :

(i) **National High Speed Rail Corpn. Ltd. vs. Montecarlo Ltd. and another** reported in (2022) 6 SCC 401, Para 28.4, 28.5. He apprised that **Poddar's** case (cited supra) can be distinguished on the principle that party participated with full knowledge.

(ii) **New Horizons Ltd. and Others vs. Union of India and Others** reported in (1995) 1 SCC 478, Paragraph Nos. 11, 14, 22, 23, 24, 25 and 26.

(iii) **Silppi Constructions Contractors vs. Union of India and Another** reported in (2020) 16 SCC 489, Paragraph 20 and 21.

19. Section II of the NIT – Paragraph 10 relates to tender submission. He is relying on 10.2 and 10.3 which reads as under:

10. Tender Submission 10.2 Technical evaluation of the Bid will be done on the basis of technical qualification criteria and documents mentioned (TECHNICAL BID) in Mandatory Documents Link present in the

eProcurement Portal [https://](https://www.eproc.bihar.gov.in/BELTRON)

www.eproc.bihar.gov.in/BELTRON failing which the bid will not be considered for technical evaluation.

10.3 The technical evaluation shall be done only on the basis of documents/papers submitted by the bidder on e-Procurement Portal www.eproc.bihar.gov.in/BELTRON."

20. Learned counsel for the fourth respondent relied on agreement dated 05.08.2016 which is part and parcel of fourth respondent's affidavit. He further relied on counter affidavit of fourth respondent – Annexure R4/A. In copy of the joint venture agreement dated 05.08.2016, he relied on Clause 5 (A) (i to iv), (B) and Clause 6 – Consideration (6 a). These Clauses are to demonstrate that there was a joint bidding/consortium agreement among 4th respondent and petitioner M/s Sammaan Foundation.

21. Learned counsel for the fourth respondent has relied on Apex Court decision in the case of **M/S N.G. Projects Limited vs. M/S Vinod Kumar Jain and Ors.** reported in **(2022) 6 SCC 127, Paragraph Nos. 11, 13, 15, 17, 22 and 23** for stressing the fact that the Courts should be more reluctant in interfering with contractual matters involving public service.

22. Learned counsel for the sixth respondent – M/s Ziqitza Healthcare Limited (for short 'sixth respondent') submitted that it is L2. In the event writ petition is allowed against fourth respondent, in that case it being L2 should be entitled to have the benefit of subject matter of contract.

CWJC No. 8553 of 2023

23. In the instant petition, petitioner has prayed for the following relief/reliefs:

“(i) Issuance of a direction, order or writ in

the nature of certiorari quashing that part of the decision taken by the Project Appraisal Committee (PAC) of State Health Society, Bihar, Patna during its meeting held on 23/01/2023, by which respondent no. 4 has been declared to be L-1 bidder pursuant to the process of bidding carried out in furtherance of NIT bearing Reference No.

01/SHSB/PPP (AMBULANCE)/2022-23 published by the State Health Society, Bihar, Patna.

(ii) Issuance of Order or writ, including writ in that nature of certiorari quashing that party of the decision of the Technical Committee, constituted under State Health Society, Bihar, Patna taking during its meeting held on 22/11/2022, by which, it has been, inter alia, recommended to open the financial bid of respondent no. 4 while declaring it to be technically qualified notwithstanding the fact that in terms of the Notice Inviting Tender, in question respondent no. 4 was not event qualified to participate in the process of bidding pursuant to NIT bearing Reference No. 01/SHSB/PPP(AMBULANCE)/2022-23 published by the State Health Society, Bihar, Patna.

(iii) Issuance of a direction, order or writ, including writ in the nature of mandamus commanding the concerned respondent authorities to consider the present petitioner to be L1 bidder for the purposes of award of contract in its favour pursuant to the process of bidding conducted in furtherance of NIT bearing Reference No. 01/SHSB/PPP(AMBULANCE)/2022-23 published by the State Health Society, Bihar, Patna and accordingly, take necessary follow-up action in its favour in accordance with law.

(iv) Issuance of a declaration holding that respondent no. 4 was not eligible and qualified to be allowed to participate in the process of bidding pursuant to Notice Inviting Tender bearing Reference No. 01/SHSB/PPP(AMBULANCE)/2022-23 issued by the concerned authorities under the State Health Society, Bihar, Patna, in view of the fact that it did not fulfil the mandatory eligibility criteria and other requirements laid down in the said respect;

(v) Issuance of an ad interim direction upon the concerned respondent authorities to refrain from acting in furtherance of the decision taken by the Project Appraisal Committee (PAC) of State Health Society, Bihar, Patna during its meeting held on 23/01/2023 in so far as the same related to respondent no. 5 during the pendency of the present writ petition.

(vi) Any other relief that the petitioners may be found to be entitled to in the facts and circumstances of the present case.”

Submission of the Petitioner

24. The learned counsel for the petitioner submitted that the petitioner is one of the bidders and it has been declared as L2. It is submitted that fourth respondent who has been declared as L1 does not fulfill the eligibility criteria under Section (V) – RFP. He has pointed out Clause 2.3 in this regard. It is submitted that technical bid was evaluated on 22.11.2022. Petitioner's name appears at Serial No. 1 and number of qualified persons/firm are three in number.

25. The petitioner is stated to have filed representations/objections on 14.11.2022 and 07.12.2022 also insofar as ineligibility of respondent No. 4 as required under request for proposal Serial No. 2.3 under Section V of eligibility criteria read with corrigendum dated 18.04.2022. In this regard, he has pointed out that the certificate/affidavit is for the Consortium and it is not relating to respondent No. 4 only vide certificate dated 01.06.2022.

26. It is also submitted that in terms of Clause 2.2 of the NIT, one of the criteria is that 100 crores turnover should be by sole bidder for the years 2018-19, 2019-20 and 2020-21. Taking note of supplementary affidavit dated 11.10.2023, Note 15 read with the amount mentioned as on 31.03.2021, it is Rs. 32,71,91,698 and as on 31.03.2020, it is 23,02,47,915. It is further submitted that in the affidavit, it is materially evident that share of the respondent No. 4 is 60% and 40 % is that of Sammaan Foundation. However, in the affidavit dated 11.10.2023, from perusal of balance sheet (Note 22), it appears that the fourth respondent's share is 99 % as on 31.03.2021. This is also evident from counter affidavit filed on behalf of respondent No. 4 in CWJC No. 16899 of 2022.

Submission of Fourth respondent

27. Learned counsel for the fourth respondent while defending his selection and treating him as L1, submitted that the petitioner has presented this petition belatedly i.e. after six months of technical evaluation of bids and four months from the date of financial bid. In other words, he is not a vigilant litigant insofar as filing this petition.

28. Learned counsel for the fourth respondent further submitted that on Page 24 of the affidavit dated 11.10.2023, balance sheet has been placed on record and for the year 2021 it is mentioned 163 plus crores, for the year 2020 it is mentioned as 139 plus crores and for the year 2019 it is 121 plus crores. To this effect Chartered Accountant's certificate dated 01.06.2022 in support of aforementioned balance sheet read with the amount mentioned therein has been pointed out by the learned counsel for respondent No. 4. Therefore, the criteria of 100 crores is fulfilled by the fourth respondent insofar as entertaining its bid application and treating the same as L1.

29. It is further pointed out from the agreement dated 05.08.2016 to the extent that fourth respondent had invested 100 percent, therefore, whatever the agreement has been entered with the Sammaan Foundation and fourth respondent, it is only a service contract. There is no sharing of the profit in execution of earlier contract, hence, the petitioner's contention to the extent that fourth respondent investment is on percentage basis with the Sammaan Foundation is incorrect and contrary to material information.

30. In order to supplement agreement dated 05.08.2016, it has pointed out contents of further document dated 18.04.2017.

Petitioner's reply

31. In CWJC No. 16899 of 2022, petitioners' counsel submitted his reply on 4th respondent's counsel submission. It is submitted that

preliminary objection raised by the fourth respondent and Society that all the petitioners have not filed Vakalatnama, so there is a defect in the affidavit is not sustainable. On this issue, learned counsel for the petitioners submitted that there is no defect in the Vakalatnama and so also affidavit in support of the petition is in order. It is submitted that Consortium among the Petitioner and Sammaan Foundation is existing for all purposes and can question the validity of disqualification of petitioner/BVG.

32. It is further submitted that eligibility criteria of bidders under Clause 2.2 is required to be examined whether Audited Balance Sheet of the petitioner/BVG is in order or not? On this point, it is submitted that Section 129 read with Section 2 (40) of Companies Act, 2013 is in respect of Financial Statement and not audited balance sheet, therefore, contention of the fourth respondent that petitioner failed to furnish material information which are referred in the balance sheet is not required to be produced along with bid application other than balance sheet. Further, there are no specific instructions to the bidders that while furnishing audited balance sheet each of the bidders is required to furnish Notes mentioned in the audited balance sheet. In the absence of specific instruction to the bidders, the respondent Society cannot expect each of the bidders to produce material information of the audited balance sheet. On the other hand, what is required under Clause 2.2 is only audited balance sheet and not its internal material information. On this point, learned counsel for the petitioner/BVG relied on reported decision of the Apex Court in the case of **Reliance Energy Limited and Another vs. Maharashtra State Road Development Corp. Ltd. and Others** reported in **(2007) 8 SCC 1, Para Nos. 38 and 39.**

33. Learned counsel for the petitioner/BVG while replying to defects of the Society on leaking of e-mail submitted that administrative

officer of Society - respondent has no business to communicate e-mail sent by the petitioner. It is submitted that all the members of the Committee were communicated with the emails. Therefore, prima facie, there is leak of material information of the petitioner to the fourth respondent by the administrative officer of the Society - respondent which is unethical in the tender process.

34. It is submitted that annual turnover statement of fourth respondent for the year 2018-19 has been shown as 121.28 crores, for the year 2019 – 20 as 139.20 crores and for the year 2020-21 as 163.93 crores. Overall it is 424.41 crores vide statement dated 01.06.2022 whereas yet another document for the year 2017 – 18 it has been shown as 695.62 (in Lakhs – Rs.), for the year 2018 – 19 as 1952.70 (in Lakhs – Rs.), for the year 2019 – 20 as 2302.48 (in Lakhs – Rs.), this document is dated 19.03.2021. Therefore, fourth respondent has not approached the respondent - Society with clean hands. In other words, there are discrepancies in furnishing material information insofar as annual turnover statement of the fourth respondent.

35. It is further submitted that balance sheet of Respondent No. 4 for the period from the year 2018 – 19 as on 31.03.2019 stated to be consolidated balance sheet, the amount mentioned therein is 121,35,77,808 from the revenue. Rs. 9,85,20,000 (revenue from operation). The investment of fourth respondent of 100 % shown is incorrect in view of the documents like agreement dated 05.08.2016 where it has been shown as 92 % (forth respondent) and 8 % (Sammaan Foundation). Thereafter, it was amended on 18.04.2017 to the extent of 60 % and 40 % respectively. Paragraph 6 of the agreement is in respect of consideration (a) relates to 8 % to Sammaan Foundation.

36. It is further pointed out balance sheet as on 31.03.2020 – 31.03.2019 a sum of Rs. 1,39,20,36,533 and 1,21,35,77,808 have been

mentioned and further it is mentioned Rs. 10,37,48,000 and 9,85,20,000/- as revenue from ambulatory service whereas percentage has been shown as 99 %. Full turnover for the financial year 2018 – 19 has been shown as Rs. 1,40,60,97508/-

37. Balance sheet as on 31.03.2021 - 31.03.2020, it has been shown as Rs. 1,63,93,08,249 – 1,39,20,36,533/- and revenue from ambulatory service on comparison is Rs. 10,37,48,000 – 23,02,47,915/- and it is indicated that 99 % whereas for the year 2020 – 21 the amount shown is 1,65,58,66,918/-. The above figures make it crystal clear that fourth respondent has not approached Society - respondent insofar as bidding the subject matter of work with clean hands. In fact, Society - respondent should have rejected the fourth respondent's application at threshold due to discrepancies in mentioning the amount in balance sheet and other related papers.

38. Fourth respondent does not fulfill the Clause 2.3 relating to experience for the year 2018 – 19, 2019 – 20 and 2020 – 21. The certificate dated 28.05.2022 furnished by the fourth respondent is for the period with effect from 29.07.2017 to till date. It is pointed out that on 20.09.2018 criteria was modified to the extent of 44 ALSA taking note of financial year read with the experience, fourth respondent did not fulfill the experience criteria vide Clause 2.3.

39. Learned counsel for the petitioner submitted that fourth respondent who has been declared as L1 is incorrect, since he does not fulfill the requisite qualification/criteria laid down in Clause 2.2 and 2.3. It is pointed out from the supplementary affidavit filed on behalf of the Society.

40. It is submitted that fourth respondent was assigned identical contract to the extent that fourth respondent in his individual capacity is executing work. On the other hand, declaration on behalf of fourth

respondent in which it is stated that the fourth respondent was executing identical matter for the purpose of experience in the present matter is in its individual capacity and not as partnership or in consortium. On the other hand, it is submitted that Chartered Accountant's certificate dated 28.05.2022 issued in favour of fourth respondent speaks of consortium. Therefore, experience certificate is not tallying with what has been claimed by the fourth respondent.

41. It is further pointed out that GST, PAN, ESI and PF, it is of individual and whereas consortium material reveals different numbers.

42. Learned counsel for the petitioner of CWJC No. 8553 of 2023 in support of the contention that if L1 fails L2 like petitioner was to be awarded contract, on this point he is relying on Apex Court's decision in the case of **Vidarbha Irrigation Development Corp. and Others vs. Anoj Kumar Agarwala and Others** reported in **(2020) 17 SCC 577**, Paragraph Nos. 18, 19.

43. On the issue of experience certificate and defective experience certificate of fourth respondent, he relied on Apex Court's decision in the case of **Municipal Corporation, Ujjain and Another vs. BVG India Limited and Others** reported in **(2018) 5 SCC 462**, Paragraph Nos. 8, 21, 25 and 51.

Further submission of Fourth respondent 44.

Learned counsel for the fourth respondent submitted additional arguments in CWJC No. 16899 of 2022, it is submitted that it was claimed e-mail was forwarded only to technical members. Only five persons were authorized members whereas email has been sent by the petitioner to 13 members. Therefore, there is no question of leakage of e-mail addressed by the petitioner to contend that it has been sent to only technical members. In this regard, he has also pointed out Society

letter dated 16.11.2022 read with the fourth respondent's letter dated 08.11.2022 for clarifying the issue.

45. The learned counsel clarified about its joint ventures showing its share to be 60 % in the agreement dated 18.04.2017, and 40 % for Sammaan Foundation and agreement dated 05.08.2016 it was 8 %. In this backdrop, 99 % has been shown in the balance sheet. It is submitted that there is no profit sharing as between the fourth respondent and Sammaan Foundation. On the other hand, Sammaan Foundation has provided fourth respondent service for which certain percentage indicated in the agreements dated 05.08.2016 and 18.04.2017 has been provided. There is no sharing of profit with reference to earlier tender dated 18.06.2016.

46. Fourth respondent's counsel submitted that having regard to the documents of experience certificate dated 28.05.2022, read with work order dated 13.02.2017 pursuant to the earlier tender dated 18.06.2016 fourth respondent fulfills the criteria in Clause 2.3.

47. He has also countered the submission that petitioner has not raised year wise experience certificate. Learned counsel for the fourth respondent contended that citations quoted supra on behalf of the petitioner does not assist the case of the petitioner. He distinguished the citations in respect of **(2018) 5 SCC 462** while reading paragraph 51 to the extent that it was third party.

48. In support of fourth respondent's eligibility is concerned, he has quoted Apex Court decision in the case of **New Horizons Ltd. and Others vs. Union of India and Others** reported in **(1995) 1 SCC 478**, Paragraph Nos. 23 and 24 and **M/S N.G. Projects Limited vs. M/S Vinod Kumar Jain and Ors.** reported in **(2022) 6 SCC 127**, Paragraph Nos. 22 and 23 to the extent that past experience is required to be taken note of irrespective of individual or experience gained subsequently,

therefore, there is no infirmity on behalf of the Society in declaring the fourth respondent as L1 in the light of fulfilling the eligibility criteria under Clause 2.2 read with 2.3, therefore, the petitioner has not made out a case and petition is liable to be dismissed.

Analysis

49. Core issues involved in the present writ petition areas under:

(i) Whether petitioners' writ petition filed by the BVG Limited and two others is maintainable or not?

(ii) Whether petition filed by M/s Ziqitza Healthcare Limited is maintainable on the ground of delay or not?

(iii) Whether rejection of bid application of Petitioner – BVG India Limited and two others is in order or not?

(iv) Whether fourth respondent M/s Pashupatinath Distributors Private Limited, its bid application is in consonance with eligibility criteria under Clause 2.2 and Clause 2.3 of NIT or not?

(v) Whether M/s Ziqitza Health Care Limited –sixth respondent in BVG India limited petition and as a petitioner in CWJC No. 8553 of 2023 has made out a case that it is to be declared as L1 while holding M/s Pashupatinath Distributors Private Limited bid application is not in order and it should be disqualified for want of eligibility or not?

50. Fourth respondent – M/s Pashupatinath Distributor Private Limited and second respondent - Society has raised a preliminary objection insofar as entertaining BVG India Limited and others petition, it is contended that writ petition is not maintainable in view of defects in the affidavit to the extent that affidavit supporting writ petition does not reveal that it is on behalf of other petitioners. It is further submitted that agreement dated 15.06.2022 between petitioner Nos. 1 and 2 read with Clause 8 of the agreement, petitioner – BVG and others petition is not

maintainable since the agreement dated 15.06.2022 ceased to exist with effect from 21.06.2022, the date on which petitioners' bid was rejected.

51. It is also submitted that all the petitioners namely BVG India Limited, Sammaan Foundation and in the capacity of Consortium of BVG India Limited and Sammaan Foundation have not filed Vakalatnama. On this preliminary issue, learned counsel for the petitioners submitted that there is no defect in the Vakalatnama or affidavit supporting the petition. It is submitted that Consortium between petitioner – BVG Indian Limited and Sammaan Foundation is existing in the eye of law for the purpose of questioning the validity of disqualification of petitioner/BVG and others, reading of Consortium – agreement dated 15.06.2022 shows it is for the purpose of participating in the subject matter of bid process. Therefore, prima facie, petition of BVG India Limited and two others petitioners is maintainable. We find that there is no infirmity in the affidavit and so also Vakalatnama, therefore, the preliminary objection raised on behalf of second respondent - Society and fourth respondent - M/s Pashupatinath Distributors Private Limited stands rejected.

52. Both second respondent – Society and fourth respondent raised a preliminary issue in respect of maintainability of the writ petition filed by M/s Ziqitza Healthcare Limited. It is submitted that there is a delay of about four to six months insofar as filing the petition. Learned counsel for the petitioner M/s Ziqitza Healthcare Limited submitted that there is no delay as contended by the aforementioned counsel for Society and fourth respondent, since BVG India Limited and others petition was still pending consideration. In the event of BVG India Limited and others suffered an order, in that event, petitioner who is L2 is entitled to claim to the effect that its bid application is in order. On the other hand fourth respondent's bid application is not in order for want of eligibility criteria

under Clause 2.2 and Clause 2.3. We are satisfied with the contention on behalf of M/s Ziqitza to the effect that there is no delay in filing writ petition. Hence, preliminary objection raised on behalf of second respondent – Society and fourth respondent stands rejected.

53. Before advertng on the merits of the case, it is necessary to take note of principles laid down by the Apex Court in the case of **Silppi Constructions** cited supra, Paragraph 20 of reads as under:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

In the aforementioned case i.e. **Silppi Constructions**, Apex Court has held that scope of interference in the tender/contract matters, one of the principles is that Court has got no expertise to assess eligibility of bidder/s. In the present case, on the face of the record, read with criteria at Clause 2.2, it is evident that petitioners’ – BVG bid application was rejected contrary to the intention of the NIT in particularly enclosure of Audited Balance Sheet except that there are no instructions to the respective bidders in the NIT to produce internal material information of Audited Balance Sheet like ‘Notes’. Therefore, there is arbitrariness in the rejection of petitioners’ – BVG bid application. Similarly, fourth respondent – Pashupatinath Distributor Private Limited bid application was held to be in order is incorrect and it is not in consonance with clause/criteria at Clause 2.2 and Clause 2.3 of NIT. Fourth respondent –

Pashupatinath Distributor Private Limited is not fulfilling the turnover of INR 100 crore and experience qualification is also not fulfilled. These defects have been ignored by the second respondent – Society which proceeded to hold that fourth respondent is eligible in technical bid evaluation and financial bid, it's declaration as L1 and award of contract to the respondent No. 4. Thus, the decision of the second respondent – Society would fall under the arbitrariness. Therefore, we are not re-assessing eligibility of bidders. On the other hand, decision of the second respondent – Society to favour the fourth respondent – Pashupatinath Distributor Private Limited is evident in ignoring the criteria and eligibility mentioned in the NIT read with material information placed by the fourth respondent along with bid application.

54. Petitioner - BVG and two others bid application was rejected at technical evaluation stage on the score that petitioners' Audited Balance Sheet read with statement of profit and loss account failed to furnish internal material information of the balance sheet like Notes. It is submitted that Society – respondent had sought for certain clarification like emergency ambulance services and ambulance services etc. with the BVG India Limited and got clarification from the petitioners. At the same time they should have sought for clarification in respect of non-production of material information like Notes which is mentioned in the Audited Balance Sheet read with the statement of profit and loss account.

55. Further it is submitted that there are no instructions to respective bidders to furnish internal material information from the Audited Balance Sheet read with the statement of profit and loss account like Notes and its details (materials). Both second respondent – Society and fourth respondent vehemently contended that they are the mandatory requirements. They have pointed out certain provisions of the

Companies Act, 2013 including definitions. The provisions are Section 2 (6) of the Companies Act, 2013 (for short 'Act, 2013'), Section 2 (40) (v), Section 129 of the Act, 2013 read with Schedule III, 3 (i) (ii), Section 129 (7) Explanation (Notes). These are the provisions which have been cited on behalf of the learned counsel for the second respondent - Society and fourth respondent – M/s Pashupatinath Distributors Private Limited to contend that on these account petitioners – BVG India Limited and others technical evaluation has been disqualified and it is in order. It is to be noted that the aforementioned contentions of the respondent counsel is not tenable for the reasons that in the NIT, the official respondents have not prescribed with reference to Clause 2.3 and Audited Balance Sheet and statement of accounts are to be produced along with internal materials like Notes as contended by the respondents in the absence of any specific instructions to the bidders. The aforementioned contention of the respondents is incorrect. Infact, the petitioners' counsel in their reply, it is submitted that Section 2 (40) of Act, 2013 read with Section 129 of Act 2013 in respect of Financial Statement, there is difference between the Audited Balance Sheet and Financial Statement. Petitioners' counsel cited Apex Court decision in the case of **Reliance Energy Limited and another vs. Maharashtra State Road Development Corp. Ltd. and others** reported in **(2007) 8 SCC 1, paragraph Nos. 38 and 39** on the point of mala fide rejection. Petitioners' technical evaluation bid was rejected on the score that Notes have not been enclosed along with balance sheet. In view of these facts and circumstances, contentions of the respondents that it is a mandatory requirement to produce Notes along with Audited Balance Sheet is not tenable. Whatever instructions are assigned in the NIT, its various Clauses were required to be adhered by respective bidders. On the other hand, second respondent – Society rejected the petitioners – BVG bid application on technical evaluation to the extent in not producing Notes

of the Audited Balance Sheet read with the statement of profit and loss account. Therefore, respective bidders are not expected to produce internal material information with reference to Audited Balance Sheet unless specific instructions to the respective intended bidders. That apart, very object of production of Audited Balance Sheet read with the profit and loss account is to verify whether the respective bidders are fulfilling one of the criteria at Clause 2.2 of the NIT. In other words, annual turnover of INR 100 crore from ambulance services for the financial years 2018 – 19, 2019 – 20, 2020 – 21. In other words, Notes which is part and parcel of Audited Balance Sheet has no relevancy. Rejection of the petitioner – BVGs technical evaluation is arbitrary and illegal on this count.

56. Respective counsels cited the following decisions:

56.1 The petitioner – BVG India Limited and others

relied on:

(a) Poddar Steel Corporation Vs. Ganesh Engineering

Works and Others cited supra, paragraph Nos. 2, 6 and 7 reads as under:

“2. In response to a notice inviting tenders by the Diesel Locomotive Works, Indian Railways, in connection with disposal of one lot of Ferrous Scrap, a number of tenders were submitted by the appellant, respondent 1 and other intending purchasers. The tenders of respondent 1 and some other bidders were rejected as defective and the appellant's offer being the highest was accepted, and accordingly the appellant deposited a sum of about Rs 15 lakhs. Respondent 1 challenged the decision by a writ petition before the Allahabad High Court contending that there was no defect in its tender and that the tender of the appellant could not have been validly accepted as the necessary condition of payment of Rs 50,000 as earnest money with the tender had not been complied with. The application was resisted on the grounds (i) that respondent 1 having not deposited the earnest money at all was not entitled to a consideration of its tender and has no locus standi in the present matter; and (ii) that the appellant had substantially complied with the requirement by sending with its tender a banker's cheque marked and certified by the Union Bank of India as good for payment. The High Court accepted the appellant's first ground, holding that the tender of the respondent had been rightly rejected for failure to

deposit the earnest money, but allowed the writ petition on the finding that the appellant also did not satisfy condition 6 of the tender notice as the earnest money was offered by the banker's cheque of a bank other than the State Bank of India mentioned in the said clause. The High Court directed the authorities to consider the other valid tenders and further observed that should the other tenders be found to be unacceptable it would be open to the authorities to invite fresh tenders. The present appeal is directed against this judgment.

6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a 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 with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. 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. This aspect was examined by this Court in *C.J. Fernandez v. State of Karnataka* [(1990) 2 SCC 488] a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

7. The nature of payment by a certified cheque was considered by this Court in *Sita Ram Jhunjhunwala v. Bombay Bullion Association Ltd.* [(1965) 35 Comp Cas 526 : AIR 1965 SC 1628] Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (*vide Spargo case [Harmony and Montague Tin and Copper Mining Co., In re, (1873) 8 Ch A 407 : 28 LT 153]*) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A

to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards. This Court applied the observations to a transaction requiring payment by one to another. The High Court's decisions in B.D. Yadav case [AIR 1984 Bom 351] and T.V. Subhadra Amma case [AIR 1982 Ker 81 : 1981 Ker LT 444] are also illustrations where literal compliance of every term of the tender notice was not insisted upon.”

The aforementioned principles laid down by the Apex Court assist the contention of the petitioner.

(b) B.S.N. Joshi and Sons Ltd. case cited supra, paragraph Nos. 66 (i) to (vii), 69 reads as under:

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

“(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction”

The aforementioned decision has bearing on the petitioners’ contention.

(c) Dutta Associates Pvt. Ltd. case cited supra is not assisting the contention of the petitioners – BVG India Limited and others.

56.2 Respondent - Society cited the following decisions-

(a) State Bank of Travancore vs. Kingston ComputersIndia Private Limited reported in **(2011) 11 SCC 524**. This has no relevancy in support of the Society’s case.

(b) Cox And Kings India Limited vs. Indian RailwaysCatering and Tourism Corporation Limited and Another reported in **(2012) 7 SCC 587**. This case has no relevancy to the fact in issue in support of Society’s contention.

56.3 Fourth respondent has cited and relied upon the following decisions:

(a) National High Speed Rail Corp. Ltd. case cited supra, the aforementioned decision would not assist the fourth respondent having regard to the fact that fourth respondent does not fulfill the eligibility criteria under Clause 2.2 read with Clause 2.3 of the NIT.

(b) New Horizons Ltd. and Others case cited supra, this decision does not assist the fourth respondent's contention since on factual aspect fourth respondent is a sole bidder in the light of Clause 2.2, therefore, the aforementioned decision does not assist case of the fourth respondent.

(c) Silppi Constructions Contractors case cited supra.

(d) Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corp. Ltd. and Others reported in **(2007) 8 SCC 1**.

(e) N.G. Project Limited vs. Vinod Kumar Jain and others cited supra.

(f) Vidarbha Irrigation Development Corp. and Others vs. Anoj Kumar Agarwala and Others cited supra.

All these judgments do not assist the fourth respondent's contention in view of the fact that fourth respondent does not fulfill the eligibility criteria under Clause 2.2 read with Clause 2.3 of the NIT.

56.4 In CWJC No. 8553 of 2023, M/s Ziqitza Healthcare Limited, fourth respondent relied on the following decisions:

(a) Municipal Corporation, Ujjain and another vs. BVG India Limited and others cited supra. It supports the petitioner's contention in particularly paragraph Nos. 21 and 51, paragraph Nos. 21 and 51 read as under:

21. Likewise, in *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd.* [*B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548], this Court while summarising the scope of judicial review and the interference of superior courts in the matter of award of contracts, observed thus: (SCC pp. 57172, paras 65 & 66)

“65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

- (i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- (vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

51. It is necessary to note that in Annexure 1 to the NIT at Sl. No. 11, the bidder was required to set out details of any other company/firm involved as a consortium member to which Respondent 1 BVG India Ltd. replied in the negative, which means no other company/firm was involved as a consortium member with BVG India Limited in the process in question. In other words, BVG India Limited submitted the bid on its own unaccompanied by any of the consortium member. Despite the same, BVG India Limited (Respondent 1) furnished the experience certificate of BVG Kshitij Waste Management Services Pvt. Ltd. No information whatsoever was given of the relationship/linkage of BVG Kshitij and Respondent 1 BVG India Limited. Therefore, reliance placed by Respondent 1 on the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Ltd. would not come to the help of Respondent 1 to show its work experience. The Pimpri Chinchwad Municipal Corporation (PCMC) Certificate dated 24-10-2013 is in Marathi and the same discloses that the work order was issued on 2-3-2012. The PCMC Certificate thus neither shows three years' experience of BVG India Limited nor that BVG India Limited was carrying out garbage/waste collection of more than 300 MT per day. Since Respondent 1 has categorically mentioned in its bid under the

column “basic information about tenderer” that no other company (either joint venture or consortium) is involved with BVG India Ltd., Respondent 1 BVG India Limited could not have relied upon the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt. Ltd. Other certificates submitted by Respondent 1 also did not satisfy the eligibility requirement.

This decision supports the petitioner contention to the

extent fourth respondent does not fulfill the eligibility criteria.

(b) New Horizon Limited and another vs. Union of India and Others cited supra. This decision does not assist the petitioner’s contention.

(c) N.G. Projects Limited cited supra, paragraph No. 23 reads as under:

“**23.** In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

The factual aspects of the matter is distinguishable insofar as awarding damages in the present case, for the reasons that in the present case by virtue of interim order fourth respondent was permitted to execute the subject matter of tender work and it would be subject to outcome of the present petitions, therefore, the aforementioned decision does not assist the fourth respondent’s contention.

57. In view of the above analysis, petitioner – BVG India Limited and two others have made out a prima facie case that rejection

of their technical bid is contrary to factual aspects and contrary to Clause 2.2 of NIT. Clause 2.2 does not stipulate or instruct respective bidders to furnish internal material information from the Audited Balance Sheet read with the statement of profit and loss like Notes. Therefore, impugned decision in disqualifying the petitioner BVG India Limited and others stands set aside.

58. The petitioners – BVG India Limited and two others as well as M/s Ziqitza Healthcare have questioned the bid of the fourth respondent M/s Pashupatinath Distributors Private Limited after clearing fourth respondent's technical bid evaluation, financial bid, treating L1 and finally award of contract. It is submitted that fourth respondent does not fulfill the eligibility criteria under Clause 2.2 and 2.3 of NIT. The fourth respondent does not fulfill the criteria of annual turnover of INR 100 crores from ambulance services during the financial years 2018 – 19, 2019 – 20, 2020 – 21 as a sole bidder. It is submitted that three years in rendering ambulance services is also not fulfilled as on the last date of submission of bid application. There were shortage of few months insofar as three years required experience. It is also submitted that fourth respondent has misled the second respondent - Society while submitting bid application. There were discrepancies in mentioning turnover both in the balance sheet as well as chartered accountant's statement. It is also submitted that fourth respondent is sole bidder in the subject matter of tender whereas materials have been placed with reference to Consortium with Sammaan Foundation. It is also pointed out that fourth respondent had furnished that it was entitled to 100 % profit. On the other hand, agreement between the fourth respondent and Sammaan Foundation reveals that at one given point of time it was 92 % of the fourth respondent, 8 % of Sammaan Foundation. Thereafter, it was modified to 60 % and 40 % respectively. On the other hand, in the

balance sheet it has been shown as 99 %. Even the figures mentioned in the balance sheet are not tallying with figures mentioned therein. It is also submitted that fourth respondent had furnished GST, PAN, ESI, PF of individual as well as Consortium and material information show different numbers, therefore, fourth respondent has not filed bid application with correct factual material information. On the other hand, fourth respondent has not approached the second respondent Society with clean hands. It is also submitted that Society – Administrative Officer had leaked the certain information of e-mail of the petitioner BVG India Limited and two others in respect of certain defects alleged to have been committed by the fourth respondent. However, this issue is trivial in nature and it does not assist petitioner – BVG. Taking note of the above mentioned defects in the fourth respondent's bid application, at threshold, Society second respondent should have rejected its bid, however, Society being one of the State institution should have been fair in bid process without there being a violation of Article 14 and arbitrariness in the bid process. On these counts, the fourth respondent's technical bid evaluation and further proceedings of financial bid and declaring as L1 and further award of contract are liable to be set aside. Further, process of revisiting the remaining bid application are required to be examined from the stage of technical evaluation till award of contract.

59. Learned counsel for M/s Ziqitza Healthcare submitted that fourth respondent's eligibility has not been examined in the light of Clause 2.2 read with Clause 2.3 in respect of fulfilling Rs. 100 crores and furnishing false statement of experience gained in ambulance services. He has also reiterated the arguments advanced on behalf of the petitioner in the BVG India Limited. In addition to the aforementioned contention, he has pointed out specific false statement made on behalf of the fourth

respondent insofar as relying on GST, PAN, ESI and PF. In the light of these many defects in the bid application of the fourth respondent, second respondent – Society has favoured him. On these issues, fourth respondent's eligibility for technical bid evaluation, financial bid, declaring fourth respondent as L1 and further award of contract in its favour are farce and they are liable to be nullified.

60. Further, it is contended that petitioner M/s Ziqitzabeing declared as L2, petitioner is entitled to have the benefit of award of contract and while declaring petitioner as L1 in place of fourth respondent. Further, petitioner is entitled to award of contract. He has cited Apex Court decision in the case of **Vidarbha Irrigation Development Corp.** cited supra to the extent that if L1 fails, in that event L2 is entitled to award of contract.

61. On the issue of experience certificate, defective experience certificate of the fourth respondent, he relied on Apex Court decision in the case of **Municipal Corporation, Ujjain and Another vs. BVG India Limited and Others** cited supra would assist the petitioner M/s Ziqitz Healthcare.

62. Fourth respondent M/s Pashupatinath Distributor Limited countered the argument on behalf of the petitioner to the extent that how the experience is required to be counted. The contention of the fourth respondent is that overall period of three years experience is required to be taken into consideration. On the other hand, petitioner's contention is that each financial year is required to be taken into consideration. On this point, he relied on **(2018) 5 SCC 462**, paragraph 51.

63. The aforesaid contention of the fourth respondent is not appreciable for the reasons that the words existing in the relevant Clause is with reference to a particular years i.e. 2018 – 19, 2019 – 20 and 2020 – 21 and not over all period of three years. Further we have noticed that

fourth respondent experience is for a period with effect from 29.07.2017 to till date (till last date of submission of bid application). If these dates and events are taken into consideration, obviously fourth respondent does not fulfill the requisite experience for a particular year. Further, we have noticed that with effect from 20.09.2018, criteria was modified to the extent of 44 ALSA taking note of financial year read with the experience, vide Clause 2.3. On factual aspects itself, the fourth respondent has not fulfilled the criteria of experience for respective financial year, the cited decision i.e. **(2018) 5 SCC 462**, paragraph No. 51 does not assist the fourth respondent contention.

64. Fourth respondent's eligibility is concerned, learned counsel for the fourth respondent is relying on the Apex Court decisions in the case of **New Horizon Ltd. and others vs. Union of India and others** cited supra and **M/s N.G. Projects Limited vs. M/s Vinod Kumar Jain and Ors.** cited supra to the extent that past experience is required to be taken note of irrespective of individual or experience gained subsequently. Past experience is required to be taken note of with reference to Clause 2.2. It relates to the bidder (in case of sole bidder). Therefore, fourth respondent as a sole bidder does not fulfill the turnover INR 100 crore and so also experience. Further it is to be noted that as on the last date of submission of bid application, whatever experience gained by the respective bidders were to be taken into consideration, same could not be beyond the last date of submission of bid application for the purpose of gaining or considering the experience of a particular bidder. If the last date of submission of bid application is taken into consideration, the fourth respondent does not fulfill the experience criteria. Therefore, cited decisions namely **New Horizon Ltd and M/s N.G. Projects Limited** cited supra have no application or assisting the fourth respondent's eligibility criteria of experience as

contended by him. Therefore, the fourth respondent has not made out a case so as to affirm the decision of the second respondent – Society insofar as declaring that the fourth respondent to be qualified in the technical bid, financial bid, declaration of L1 and further award of work in his favour.

65. In the above analysis, petitioner BVG India Limited has made out a case to the extent that disqualifying or rejecting his bid application at technical stage vide order dated 22.11.2022 stands set aside.

66. Fourth respondent does not fulfill the eligibility criteria under Clause 2.2 and Clause 2.3. Therefore, its eligibility of technical bid, financial bid, declaring it as L1 and work order issued in its favour are set aside.

67. Second respondent is one of the State organization/institution and its action in a contractual matter, failed to satisfy the test of reasonableness then such an act or decision would be unconstitutional. On this issue, Apex Court in the case of **Reliance Energy Limited and another** cited supra, paragraph No. 39, held as under:

“39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads,

namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above “certainty” is an important aspect of the rule of law. In *Reliance Airport Developers [(2006) 10 SCC 1]* the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.”

Second respondent - Society in accepting tender of respondent No. 4 – Pashupatinath Distributors Private Limited has acted unfair and contrary to the norms which State institutions/organization should follow in such matters, namely, complying of Article 14 of the Constitution of India, transparency and fairness in the entire bid process. In other words, fairness in handling the contractual matters is in the public interest. Perusal of the records, it is evident that, there is no fairness on the part of the second respondent insofar as rejection of the petitioners – BVG bid application for want of internal materials of the Audited Balance Sheet like Notes. Similarly, while handling bid application of the fourth respondent – Pashupatinath Distributor Private Limited have failed to take note of eligibility of the fourth respondent insofar as Clause 2.2 read with Clause 2.3 of the NIT, which has been analyzed in earlier paragraph, therefore, the impugned action of the second respondent Society is unreasonable, arbitrary and in violation of Article 14 of the constitution of India.

68. Respondent No. 2 – Society is hereby directed to revisit from the stage of technical evaluation among the remaining bidders including petitioner – BVG India Limited and petitioner – Ziqitza and others, if any and proceed to evaluate technical bid afresh and thereafter undertake further proceedings. The above exercise shall be completed within a period of two months from the date of receipt of copy of this

order. Till then, the interim arrangement made by this Court shall continue.

69. Accordingly, writ petition of BVG India Limited and two others i.e. CWJC No. 16899 of 2022 is allowed.

70. CWJC No. 8553 of 2023 filed by M/s Ziqitza Health Care Ltd. is allowed in part to the extent reliefs sought against fourth respondent. Rest of the reliefs sought by the petitioner is not entitled in view of above analysis and directions.

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