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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
24.11.2021	07.12.2021

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THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.35845 OF 2019

AND

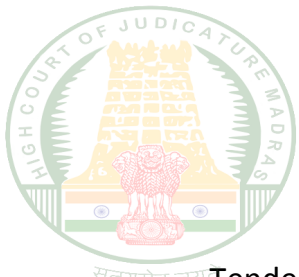
W.M.P. NO. 36748 OF 2019

M/s.Brandmidas Hospitality &
Aviation Services (P) Ltd., rep. By
its General Manager-Operations
Mr. S.N.Ashok
60/30, 2nd Floor, 28th Cross Street
Indira Nagar, Adyar, Chennai 600 020. .. Petitioner

- Vs -

1. Airports Authority of India
rep. By its Airport Director
Chennai Airport, Chennai 600 027.
2. M/s.Buddy Retail P Ltd.
Rep. By its Director
1402, Tower-15, Vipul Greens
Gurgaon, Haryana 122 002. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying
this Court to issue a writ of certiorarified mandamus calling for the records of the
1st respondent relating to the impugned order of rejection dated 10.12.2019 in



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Tender Ref. No.7/2019 (Bid ID No.2019_AAL_33091_1) issued by the 1st respondent herein and quash the same and consequently direct the 1st respondent to open the financial bid of the petitioner also to grant licence to the highest bidder to Build/Renovate, Operate and Maintain Smoking Lounge and Sales Kiosk at Chennai Airport or in the alternative to float a fresh e-tender to invite bids for grant of license.

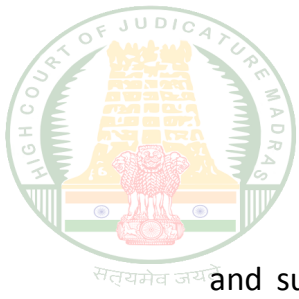
For Petitioner : Ms. R.Maheswari

For Respondent : Rev. Dr.Xavier Arulraj, SC, for
M/s.Arul Mary for R-1
No Appearance for R-2

ORDER

The petitioner, challenging the rejection of his bid in respect of the tender notification issued by the 1st respondent for the purpose of operation of a Smoking Lounge and Sales Kiosk at the Chennai Airport, has come forward with the present petition with an alternative plea for floating fresh e-tender.

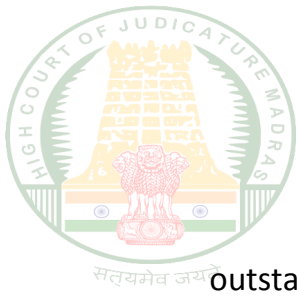
2. The facts in a nutshell is that the 1st respondent herein invited e-tenders for granting licence for operation of a build/renovate, Operate and Maintain Smoking Lounge and Sale Kiosk at Chennai Airport under two bid system, viz., Technical bid and Financial Bid and the petitioner participated in the said process



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and submitted the aforesaid two bids along with the requisite earnest money deposit within the time stipulated by the 1st respondent. It is the further case of the petitioner that the documents, that were called for, were duly uploaded by the petitioner on the e-portal, which includes 'No Due Certificate' with regard to the previous projects executed by the petitioner. Though the petitioner was following up with the 1st respondent on the position of the tender, however, to his utter shock and surprise, the technical bid of the petitioner was rejected by the 1st respondent, vide communication dated 10.12.19, on the premise that the petitioner has not provided the details of the contract at the various airports and that there were outstanding dues pertaining to Indore, Bhopal and Goa for the period upto June, 2019. Aggrieved over the said rejection order of the 1st respondent, which was communicated on 18.12.19, the present writ petition has been filed.

3. Learned counsel appearing for the petitioner submits that without giving an opportunity to submit their explanation for the observations recorded by the 1st respondent for rejecting the technical bid of the petitioner is clear violation of principles of natural justice. It is the further submission of the learned counsel for the petitioner that though the petitioner has cleared all the



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outstanding dues and submitted No Due Certificate in Form-I by uploading the documents, however, the petitioner not having commenced operations till September, 2019 in respect of Goa Airport, no due certificate as on 30.6.2019 has not been submitted, which fact has not been appreciated in proper perspective by the 1st respondent, but unilaterally rejected the technical bid of the petitioner, which is wholly unsustainable.

4. It is the further submission of the learned counsel for the petitioner the award of bid should be for the benefit of the exchequer, but curiously in the present case, the 1st respondent rejected the petitioner's bid, which is highest over and above the 2nd respondent, which clearly shows the favouritism and partiality being shown by the 1st respondent towards the 2nd respondent. The whole act of the 1st respondent is nothing but arbitrary and unreasonable and is violative of Article 14 of the Constitution.

5. It is the further submission of the learned counsel for the petitioner that the petitioner has been operating the Kiosk at Chennai Airport since 2015 and precluding the petitioner by rejecting his technical bid on frivolous grounds would cause great hardship and prejudice to the petitioner.



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6. It is the further submission of the learned counsel for the petitioner that the two bid system followed by the 1st respondent suffers from arbitrariness and unreasonableness and has caused financial loss to the exchequer as the higher bid of the petitioner has been rejected and this exercise of power by the 1st respondent is clearly mala fide and only to grant benefit on the 2nd respondent.

7. It is the further submission of the petitioner that the rejection of the technical bid of the petitioner leaves only the 2nd respondent in the fray, as only two bidders had bid for the contract and in the absence of appreciating the bid of the petitioner, the competition, which is the backbone of any tender process has been nullified and, therefore, the said process of a single bidder bidding in the financial bid is unsustainable in law. It is the further submission of the learned counsel for the petitioner that in the backdrop of the rejection of the technical bid of the petitioner, the proper course to have been adopted by the 1st respondent is calling for fresh bids and not sailing through with the single bid to the exclusion of the petitioner, which is nothing but an attempt on the part of the 1st respondent to confer the contract on the 2nd respondent without any competition.



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8. In the wake of violation of principles of natural justice and in the absence of any competition and non-application of mind on the part of the 1st respondent in appreciating the materials furnished by the petitioner in the technical bid, but rejecting the bid of the petitioner for frivolous reasons, it is prayed by the learned counsel to allow the present petition.

9. Per contra, learned senior counsel appearing for the 1st respondent submitted that the tender process is a two stage process comprising of technical bid and financial bid and unless the tenderer qualifies in the technical bid, the financial bid of the tenderer would not be considered. It is the submission of the learned senior counsel for the 1st respondent that the requisite information called for in the technical bid was not provided by the petitioner. Further, it is the submission of the learned senior counsel that the details furnished by the petitioner were incomplete and that no due certificate pertaining to certain airports, which were provided in the bid submitted by the petitioner and the statement in the affidavit were incorrect and, therefore, considering all the infirmities, the bid submitted by the petitioner was rejected.



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10. It is further submitted by the learned senior counsel for the 1st respondent that the Tender Opening Committee, on the opening of the bids on 23.10.19, found defaults on the side of the bidders and the bidders were requested to rectify the shortfall on 5.11.2019. Though the petitioner submitted some other documents on 9.11.2019, but they were mere repetitions of the earlier submissions and the mandatory declaration in the respective annexure and the due certificates from the other airports in which the petitioner was executing certain contracts were never submitted with the 1st respondent.

11. It is the further submission of the learned senior counsel that based on certain information provided in the bid, the 1st respondent co-ordinated with the other Regional Offices and other Airports and ascertained the outstanding due position insofar as the petitioner is concerned and even after reconciliation, the petitioner having not provided certain details in the tender, certain details could not be reconciled and the bid was in default in many aspects, including the filling up of the requisite mandatory clauses, which finally resulted in the rejection of the bid of the petitioner.

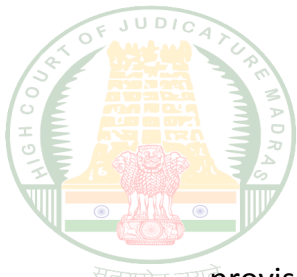


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12. It is the further submission of the learned senior counsel that the tender submission itself being through electronic mode, the details of the technical scrutiny was hosted in the portal and communicated to the bidders on 10.12.19 and the stand of the petitioner that communication was received only on 18.12.19 is wholly erroneous.

13. It is the further submission of the learned senior counsel for the 1st respondent that the stand of the petitioner that insofar as the operation of Goa Airport is concerned, the petitioner though commenced operation with effect from 20.8.2018, has misrepresented that operations have not been commenced by the petitioner.

14. It is the further submission of the learned senior counsel for the 1st respondent that the bid amount of the petitioner being higher than that of the successful bidder would be of no consequence as the 1st respondent was not even aware of the bid amount of the petitioner as the financial bid of the petitioner was not at all opened as the technical bid was rejected. It is the further submission of the learned senior counsel for the 1st respondent that the tender inviting authority is the best judge with regard to the interpretation of the



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provisions in the tender document and so long as the provisions have been uniformly followed, merely because a higher bid amount has been made by the petitioner would not entail the whole tender process unsustainable. Further, it is the submission of the learned senior counsel for the 1st respondent that so long as the tender process has been duly complied with, competition is immaterial and merely because there is no competition at the time of opening of financial bid, that would not in any way cast a doubt on the tender process.

15. In fine, it is the submission of the learned senior counsel for the 1st respondent that not only the non-submission of documents, but also the misrepresentation in the bid, towards which a declaration has been made by the petitioner, are grounds considered compositely while rejecting the technical bid of the petitioner and the petitioner has no vested right to demand calling for fresh e-tender for grant of licence. It is further submitted by the learned senior counsel for the 1st respondent that pending writ petition, no interim orders were granted and the successful bidder has accepted the tender and would be commencing operations and any direction by this Court at this distant point of time would cause not only great hardship to the 1st respondent but would greatly



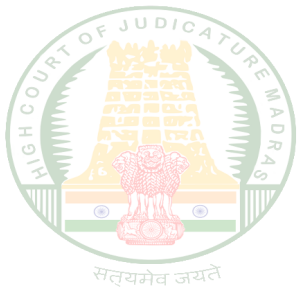
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prejudice the successful bidder and, therefore, prayer is made for dismissing the writ petition.

16. This Court gave its anxious consideration to the submissions advanced by the learned counsel on either side and perused the materials available on record.

17. The Hon'ble Supreme Court in ***Uflex Ltd. - Vs – Government of T.N. & Ors. (2021 SCC OnLine SC 738)*** has broadly visualised about the process of tender and the limitations in judicial review in the said process and the same is quoted hereunder by this Court before embarking upon analysing the merits and demerits of the contentions put forth by the parties :-

“The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even



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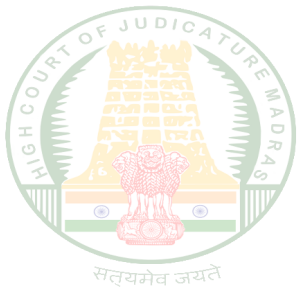
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participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

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

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted."

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One



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other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka as under:

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

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

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

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

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again,

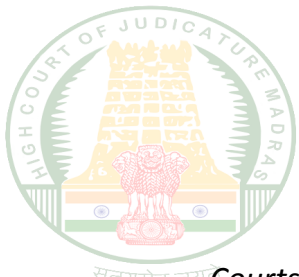


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interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

18. It is evident from the above view of the Hon'ble Supreme Court, that fairness in action by the State, non-arbitrariness in essence and substance is the heartbeat of fair play, which are the basic requirements of Article 14 and that judicial review should not be for whimsical or ulterior purpose so long as the State acts within the bounds of reasonableness. The Hon'ble Supreme Court had gone on to tabulate the various factors that govern the tender process and the yardstick that needs to be adopted and the leeway that needs to be given to the State in the discharge of its constitutional obligations by resorting to fair play and showing bona fide intent.

19. Further, as pointed out by the Hon'ble Supreme Court in ***Afcons Infrastructure Ltd. - Vs – Nagpur Metro Rail Corporation Ltd. (2016 (16) SCC 818)*** has expounded that *the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision.* The Hon'ble Supreme Court has further cautioned that *Constitutional*



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Courts are expected to exercise restraining in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. The Hon'ble Supreme Court has further emphasised that the author of the document is the best person to understand and appreciate its requirements.

20. Further, the Hon'ble Supreme Court in the case of **Tata Cellular – Vs – Union of India (1994 ((6) SCC 651)** has elucidated the following principles :-

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or



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quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

21. The decision of the House of Lords in ***Trollope & Colls Ltd. - Vs - North West Metropolitan Regional Hospital Board (1973 (1) WLR 601 (HL)***, which finds place in the decision of the Hon'ble Supreme Court in *Uflex case (supra)* has eruditely dealt with on the contract between the parties and for more clarity, the relevant portion is quoted hereunder :-

“...the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings : the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the

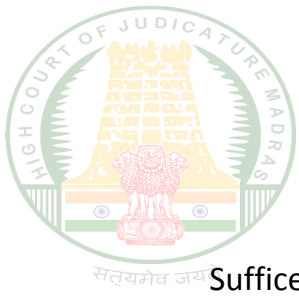


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court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.”

22. The Hon'ble Supreme Court, in ***Silppi Constructions Contractors – Vs – Union of India & Anr. (2020 (16) SCC 489)*** has succinctly pointed out that *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. 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 and the Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.*

23. A careful perusal of the ratio laid down on the question of appreciation and interference by the Courts in matters relating to contracts/tenders, it is clear that the Courts should be very much circumspect, while interfering in the tender process, as it is a qualitative analysis to be made by experts in the particular field.



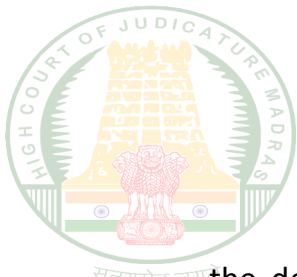
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Suffice for the Court to see that no unreasonableness, arbitrariness, bias or *mala fides* has crept in, in the tender process. The Hon'ble Supreme Court has also cautioned that the awarding of contracts by the Government and the Public Sector should not be made a cumbersome exercise in a long drawn out litigative battle.

24. In ***Poddar Steel Corporation – Vs – Ganesh Engg. Works (1991 (3) SCC 273)*** the Hon'ble Supreme Court has held that *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.*

25. From a conspicuous understanding of the ratio laid down in the law relating to contracts, as could be culled out from the above judgments, arbitrariness and unreasonableness should be the basis on which an administrative action can be interfered with in exercise of judicial review and not

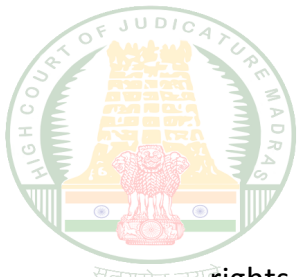


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the decision making process of the authority, so long as the decision making process is within the bounds of law.

26. In the case on hand, only two bidders participated in the bid by submitting technical as well as financial bids. Of the two bidders, the technical bids were opened initially leading to the rejection of the bid of the petitioner on account of the fact that the details which have been mandated to be provided have not been provided.

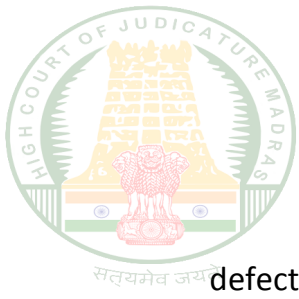
27. It is the stand of the petitioner that certain of the details, which have been mandated to be filed, have not been provided to the petitioner by the respective Airports, which come under the Airports Authority of India, viz., Indore, Bhopal and Goa relating to no due certificate for which the petitioner cannot be held liable for non-furnishing of the said particulars. It is the further submission of the learned counsel for the petitioner that it is within the domain of the 1st respondent that the details sought for are available. Such being the case, holding that the petitioner has not submitted the requisite no due certificates from Indore, Bhopal and Goa airports, when all the documents are very well available with the 1st respondent, is nothing but an act to curtail the



rights of the petitioner from participating in the bid for the benefit of the 2nd respondent.

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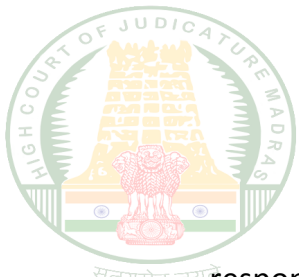
28. However, a perusal of the materials available on record, as pointed out by the learned senior counsel for the 1st respondent, reveals that certain particulars, which were mandated to be filled along with the tender form have not been filled by the petitioner. To put it precisely, no due certificates from Indore, Bhopal and Goa airports have not been filed by the petitioner, which are mandatory documents for scrutinizing the technical bid of the petitioner. Though the petitioner claims that the said information is within the knowledge of the 1st respondent, yet it is to be pointed out that it is the duty of the petitioner to fill up the tender form in full and relegating the 1st respondent to go through their materials to find about the status of the petitioner would not be in the interest of the 1st respondent. Further, it is the stand of the 1st respondent that the petitioner has not given any particulars for the 1st respondent even to cross verify the same with their counterparts at the other airports. It is the categorical stand of the 1st respondent that certain pages of the tender document is bereft of any particulars and inspite of the petitioner being provided with opportunity to rectify the defects, the petitioner has not taken any steps to rectify the said



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defects. It is further pointed out that atleast Annexure-G ought to have been filled up else relevant particulars are to have been filed. However, the petitioner, neither filled up the Annexure-G nor annexed any material in support of his stand. In such a backdrop, when it is the categorical stand of the 1st respondent that the petitioner has not provided the material particulars by either filling up the annexures or annexing relevant documents, to hold that the petitioner has not committed any error in submitting the requisite documents, would be nothing but stepping into the shoes of the tender evaluating authority by substituting the Court's view to that of the 1st respondent.

29. Further, it is to be pointed out that even it is the admitted case of the petitioner that it has not filed certain documents, but it is only contended that inspite of request made for providing the no due certificates, the respective airports, which come under the Airports Authority of India, have not provided them with the requisite certificate. However, it is to be pointed out that even if the said stand is to be accepted, it is the duty of the petitioner to provide all the relevant information sought for in the tender application. The said mandatory requirement having not been fulfilled, definitely, there the tender document is liable to be held to be deficient. Further, it is to be pointed out that the 1st



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respondent, on its own accord, had called for particulars from Bhopal and Goa Airports relating to the status of the dues of the petitioner and in turn had received information stating that the petitioner is due to the said airports, which is available in the typed set of documents filed by the 1st respondent.

30. As pointed out above, it has been reiterated by the Hon'ble Apex Court that the Courts, under the guise of judicial review should not conduct a roving expedition as to the matters connected with matter involving award of tender. The touchstone on which the tender awarding process should be looked at is only on the basis of arbitrariness and unreasonableness in the award of the tender. So long as arbitrariness and unreasonableness have not formed the basis of the tender scrutiny committee taking a decision, courts would not be justified in substituting its views to that of the tender inviting authority. If such a course is adopted, then all the process, where tender is called for and which does not fall in favour of one of the person, who had submitted its bid, would be prone to attack on one ground or the other and the necessity and reason for calling for tender would get defeated.



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31. It is to be pointed out that when certain documents are mandated as necessary documents, which should accompany the tender, non-furnishing of the said documents would definitely invalidate the tender. Though it is contended that the said documents are within the reach of the 1st respondent, however, it is to be pointed out that when there are deficiencies in the documents, which are attached with the tender, the tender evaluation committee was right in rejecting the bid submitted by the petitioner and the same cannot be interfered by assuming that the said deficiencies/mistakes or omissions are trivial in nature. As already pointed out above, by way of judicial review, the court shall not interfere with the orders of the administrative authorities by substituting its view and it is within the realm of the Tender Evaluation Committee.

32. Further, the other grounds raised by the petitioner relating to there being no competition once the petitioner is sent out of the bidding process and that accepting the financial bid has caused loss to the exchequer are not issues, which are to be considered by this Court under judicial review, as narrated above.

33. On a holistic consideration of the entire materials available on record, it is clear that the 1st respondent has considered the technical qualifications of



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the petitioner in line with the notice inviting tenders and also the materials placed before the Committee and for want of certain documents and due to non-filling of certain particulars in the tender application, has rightly rejected the technical bid of the petitioner. Further, this Court keeping in mind the scope of the Court in the matter of judicial review of contracts and taking into consideration the fact that there exists no arbitrariness or unreasonableness or mala fides in the award of contract to the 2nd respondent by the 1st respondent, this Court, sitting under Article 226 of the Constitution is not inclined to inject its view to that of the experts in the field as it is within the domain of the 1st respondent, and at the risk of repetition it is to be stated that the authority, which has floated the tender and has authored the tender documents is the best Judge as to how the documents have to be interpreted.

34. For the reasons aforesaid, this petition is devoid of merits and, accordingly, the same is dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

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**PRE-DELIVERY ORDER IN
W.P. NO.35845 OF 2019**

**Pronounced on
07.12.2021**