



GAHC010205722021

Page No.# 1/33



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6503/2021

ASIAN ENERGY SERVICES AND ANR.
(FORMERLY KNOWN AS ASIAN OILFIELD LIMITED) BEING A COMPANY
INCORPORATED UNDER THE RELEVANT PROVISIONS OF THE
COMPANIES ACT, 2013, HAVING ITS REGISTERED OFFICE AT 3B. 3RD
FLOOR, OMKAR E SQUARE CHUNABHATTI SIGNAL, EASTERN EXPRESS
HIGHWAY, SION EAST MUMBAI 400022

2: ASHUTOSH KUMAR
WORKING FOR GAIN AT ASIAN ENERGY SERVICES (FORMERLY KNOWN
AS ASIAN OILFIELD LIMITED) HAVING ITS REGISTERED OFFICE AT 3B.
3RD FLOOR
OMKAR E SQUARE CHUNABHATTI SIGNAL
EASTERN EXPRESS HIGHWAY
SION EAST MUMBAI 40002

VERSUS

OIL INDIA LTD. AND ANR.
A COMPANY REGISTERED UNDER THE RELEVANT PROVISIONS OF THE
COMPANIES ACT, 1956 HAVING ITS REGISTERED OFFICE AT PO
DULIAJAN, DIST DIBRUGARH, ASSAM 786602

2: MAHAABALA GEO PRIVATE LIMITED

BEING A COMPANY INCORPORATED UNDER THE RELEVANT
PROVISIONS OF THE COMPANIES ACT
2013
HAVING ITS REGISTERED OFFICE AT 1ST FLOOR
TRIBENI COMMERCIAL COMPLEX
ULUABRI
G.S ROAD
GUWAHATI 781007
ASSA



Advocate for the Petitioner : MR G KHANDELIA

Advocate for the Respondent : SC, OIL

Linked Case : WP(C)/6007/2021

ASIAN ENERGY SERVICES LTD. AND ANR.
(FORMERLY ASIAN OILFIELD LIMITED)
BEING A COMPANY INCORPORATED UNDER THE RELEVANT PROVISIONS
OF THE COMPANIES ACT
2013

HAVING ITS REGISTERED OFFICE AT 3B
3RD FLOOR
OMKAR E-SQUARE
CHUNABHATTI SIGNAL
EASTERN EXPRESS HIGHWAY
SION (EAST)
MUMBAI-400022

2: ASHUTOSH KUMAR
WORKING FOR GAIN AT ASIAN ENERGY SERVICES LIMITED (FORMERLY
ASIAN OILFIELD LIMITED)
HAVING ITS REGISTERED OFFICE AT 3B
3RD FLOOR
OMKAR E-SQUARE
CHUNABHATTI SIGNAL
EASTERN EXPRESS HIGHWAY
SION (EAST)
MUMBAI-400022
VERSUS

OIL INDIA LIMITED AND ANR.
A COMPANY REGISTERED UNDER THE RELEVANT PROVISIONS OF THE
COMPANIES ACT
1956
HAVING ITS REGISTERED OFFICE AT P.O.-DULIAJAN
DIST-DIBRUGARH
ASSAM-786602 AND ANOTHER OFFICE OF IN-CHARGE MATERIAL
MANAGEMENT
DHANSIRI BHAWAN
CINNAMARA
JORHAT-785704

2:M/S MAHAABALA GEO PVT. LTD.
HAVING ITS REGD. OFFICE AT 1ST FLOOR
TRIBENI'S COMMERCIAL COMPLEX
ULUBARI
G.S. ROAD



GUWAHATI
DIST.- KAMRUP (M)
ASSAM
PIN- 781007
REP. BY ITS DIRECTOR SRI UMANG BAJAJ.

Advocate for : MR G KHANDELIA
Advocate for : SC
O I L appearing for OIL INDIA LIMITED AND ANR.

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH
JUDGMENT AND ORDER(CAV)

Date : 09-02-2022

Heard Mr. U.K. Nair, the learned Senior Counsel assisted by Mr. B. Chatterjee, the counsel appearing on behalf of the petitioners. I have also heard Mr. S.N. Sarma, the learned Senior Counsel assisted by Mr. K. Kalita for Oil India Limited and Mr. K.N. Choudhury, the learned Senior Counsel assisted by Mr. D.J. Das, appearing on behalf of the respondent No. 2.

2. Both the writ petitions along with the Interlocutory Application registered as I.A. (C) No. 2190/2021 are taken up together for final disposal.

3. The brief facts of the instant case is that geologically the Kumchai structure which is a deep seated domal anticline trending NE-SW is located in the extreme eastern part of upper Assam Basin. Presence of commercial hydrocarbon was established in the said structure in the year 1987. Thereupon altogether 14 wells have been drilled so far in the said area and out of which two wells were drilled for Tipam Hydrocarbon prospects and the remaining 12 wells for Girujan and post Girujan prospects. Presently four wells are on production. In the year 2008, a volume of

around 80 sq. kms of 3D Seismic Data was acquired covering the present Kumchai structure. All the wells drilled in the said Kumchai structure are basically concentrated in the south western limb of the anticline and the entire north western limb remains unexplored for which large part of the Kumchai structure still remains to be delineated and developed. As of now 11 development/appraisal locations have been released recently with seismic reference based on Kumchai/Kherem 3D Seismic Survey. In view of the presence of substantial balance recoverable reserve and the necessity to recover the remaining hydrocarbon reserve from the lesser drained area and to augment the production and enhance recovery from the area for both oil and gas, Oil India Ltd. (for short OIL). proposed for acquisition of 96 sq. km. (source coverage area) of High Density (HD) 3D Seismic Data in Kumchai area falling in the State of Arunachal Pradesh by hiring the services of reputed and competent service provider having required infrastructure and relevant experience of carrying out seismic data acquisition in similar terrain/areas. The area of the seismic survey pertains to hilly/trust belt/logistically difficult areas/foreland part/close to river bed areas etc with moderate to high vegetations cover and inaccessibility. The service provider is also required to deploy sufficient technical resources, skilled manpower and adopt terrain specific shot hole drilling technology (100% mechanized shot hole drilling rigs) to meet the objective of the survey within stipulated timeline of six (6) operating months starting from November 2021 onwards. With that object in mind, Oil floated a tender bearing No. CDH 6944P22 for hiring of services for acquisition of high Density (HD) 3D Seismic Data of 96 sq. kms in Kumchai area Arunachal Pradesh on 10/5/2021 (published in E-portal tender process). It is also mentioned that technical requirement and significance of the time bound execution of planned high density 3D exploration campaign in Kumchai is very high in terms of denser sampling towards obtaining geologically conformable sub surface image to contribute for appraisal of the field.

4. As per the NIT the duration of the contract was for 6 months from the date of commencement of the operation. The bid was required to be submitted in two parts

i.e. technical bid and financial bid together on 24/6/2021. The financial bid would only be opened for those bidders who qualify in their technical bids. Although the tender documents stipulates various bid evaluation criterion, but as the instant petition relates to a dispute pertaining to the technical evaluation criteria, clause 3.1.2 the same is quoted herein below :-

“3.1.2 EXPERIENCE OF THE BIDDER

(a) The Bidder must be incorporated in India (A copy of Certificate of Incorporation issued by Registrar of Companies (ROC) should be submitted along with the technical bid) and must maintain more than 20% local content for the offered services. With regard to calculation submission of documents during & execution of contract, provision of Purchase Preference (Linked with Local Content) shall be applicable. If such local content is not maintained during execution of contract, OIL reserves the right to invoke the performances Securities submitted by the bidding and supporting companies.

(b) The bidder must meet the following experience criteria in the last seven years preceding the date of Original Bid Closing.

The Bidder must have successfully executed at least one or multiple contracts of onshore 3D Seismic Data Acquisition with minimum cumulative volume of 50 SQ KM (Square Kilo Meter) acquired with minimum 4000 active channels per shot using explosive as source in the last seven (7) years preceding the date of Original Bid Closing.

The Bidder must have "successfully executed at least one or multiple contracts of onshore 3D Seismic Data Acquisition of a minimum cumulative volume of 50 SQ KM (square Kil Meter) suing merchandised shot hole drilling rigs in the hilly mountainous areas in the last seven (7) years preceding the date of original Bid Closing. "

Notes: To this effect, as part of their Technical bid, the Bidder shall furnish statement as per Proforma-T, in a tabular form for the last seven (7) years preceding the Original Bid Closing date of the Tender. The Bidder must also submit the following documentary evidence: _

(i) Contract/Agreement copy along with satisfactory completion/performance report clearly mentioning Contract/Agreement No. and volume of job

completed Area/Terrain of Area of Operation and usage of Shot Hole Drilling methodology/Survey design adopted during execution to illustrate no. of live channels per shot.

OR

(ii) Contract/Agreement Copy clearly mentioning Area/Terrain of Area of Operation and usage of Shot Hole Drilling Methodology/Survey design adopted during execution to illustrate no. of live channels per shot along with proof of release of Performance Security after completion of the contract.

OR

(iii) Contract/Agreement Copy clearly mentioning Area/Terrain of Area of Operation and usage of Mechanical Shot Hole Drilling Rigs Survey design adopted during execution to illustrate no. of live channels per shot along with along with proof of settlement/release of final payment against the contract.

.

OR

(iv) Contract/Agreement Copy clearly mentioning Area/Terrain of Area of Operation and usage of Shot Hole Drilling Methodology/ Survey design adopted during execution to illustrate no. of live channels per shot along with any other documentary evidence that can substantiate the satisfactory execution of the contract as mentioned in the above clause.

Note : All the documents submitted towards compliance of BEC should be verified and certified by TPI as per Clause No. 4.8.

5. *Another clause relevant for the purpose of instant writ proceedings is clause 3.1.6 which is also quoted herein below :-*

“KEY PERSONNEL : The years for the minimum key personnel to be deployed per crew are specified in ANNEXURE –II. Bidder must submit the detailed bio data (as per PROFORMA –U) of key personnel which shall be proposed to be deployed in the field for execution of the contract, All the proposed personnel to be deployed shall be proficient in English. Bid shall be rejected if the key personnel offered do not meet the specified requirements.”

6. The petitioner pursuant to the said notice inviting tender sought for certain clarifications on 18/5/2021. Relevant for the purpose of this instant case is that the

petitioner requested Oil to accept the ongoing project 3D Seismic Data Acquisition experience also with minimum cumulative volume of 15 sq. Km. acquired with minimum 4000 active receiver channels per shot using explosive as source in the last seven (7) years preceding the date of original bid closing and also requested to modify clause 3.1.2 (b) by accepting the experience of the bidder who had successfully executed at least one or multiple contracts of onshore either 3D Seismic Data Acquisition of minimum cumulative volume of 50 sq. kms or 2D Seismic Data acquisition of a minimum cumulative data of 250/500 LKM using mechanized shot hole drilling rigs in the hilly/mountainous areas. This was responded to vide a communication dated 20/5/2021. Vide another communication dated 10th of June, 2021 the petitioners raised concerns upon the bid evaluation criteria in respect to the tender in question on the grounds that the technical qualification criteria has been drastically changed as compared to all other related tenders in the past; that there was no pre-bid meeting was conducted and there was no option of raising the queries for the tender in question. On the basis of the said communication, the petitioner requested OIL to take corrective actions in order to ensure competitive pricing to OIL due to increase number of bids, eliminate any unfair advantage to any bidder and to ensure that the foreign company does not benefit at the cost of reputed Indian companies.

7. OIL vide an email dated 14/6/2021 responded to the communication dated 10/6/2021 stating inter alia that the bid evaluation criteria has been put as the proposed High Density(HD) 3D Campaign in Kumchai is one of the first of its kind survey to be undertaken by OIL which will require involvement of significant source and receivers efforts (deployment of 8624 numbers of receivers per template) on the ground as per the survey design requirement technically finalized which commensurate with exploration requirement of the field and the objective of the campaign. It was also mentioned that the planned project though challenging would require the service provider to mobilize latest technical resources, competent

manpower and know-how of working in similar areas with projects involving similar source and receiver efforts to achieve the project objectives in addition to negotiating the logistics and environmental issues prevailing in the area. It was also mentioned that the qualification criteria of the instant NIT has been formulated to ascertain the participating bidders on field practical execution capability to carry out such jobs including but not limited to handling large numbers of receivers in active spread as well shot hole drilling which commensurate with source efforts stipulated in survey design for timely project completion in such challenging terrain and to ensure hiring of services from the competent service provided with know-how of actual on-field practical experience in similar terrain conditions to execute such important projects. It was also mentioned that the shot hole drilling efforts in 2D and 3D require completely different approach owing to basic architecture of modalities of operations in multiline source efforts of 3D campaign which is much more exhaustive in comparison with simple one line 2D operation and as such OIL has not kept the provisions to consider 2D experience as a qualification criterion for the proposed 3D campaign with involves such enormous source and receiver efforts. It was mentioned that previously in tenders where both 2D and 3D were part of the scope of the work, 3D experience with a certain conversion factor was considered for prequalification experience evaluation from the 2D work but not the reverse and in the instant case, the scope of the work is entirely for Acquisition of 3D High Density Seismic Data with such enormous source and receiver efforts. As regards the allegation in the communication dated 10/6/2021 relating to no pre-bid meeting was conducted and there was no option of raising the queries for the tender, the same was negated stating inter alia that as the petitioners had raised certain queries against the subject matter and the same was duly responded by OIL, the said allegation of there being no opportunity to seek techno commercial clarification is not accurate.

8. As admittedly the petitioner No. 1 did not fulfill the eligibility criteria, the petitioner collaborated with one Globe Ecologic Pvt. Ltd. and submitted a tender on

the virtual platform on 24/6/2021 along with another 4 bidders i.e. totaling to 5 bidders had participated in the said tender process.

9. The materials on record transpire that the petitioner had submitted only the single project experience of their technical collaborator M/S Globe Ecologic Pvt. Ltd. who executed the contract with Oil and Natural Gas Corporation Limited (for short ONGCL) through contract No. **JRT/MM/CONT/3D-DATA Acqn/29/16-17/16037/901-0026315** dated 8/2/2018 (for convenience herein after referred as the Contract dated 8/2/2018. Pursuant thereto after the technical bid was opened a committee comprising of the members from the Geophysics Department had carried out the technical scrutiny. During the technical scrutiny it was found that though the petitioner had submitted some documents in support of technical experience of its technical collaborator, however, the said document showed that as on March, 2020 to be the project completion schedule of the contract dated 8/2/2018 but the DPR stipulated that only cumulative coverage of 112.4032 sq. kms could be acquired out of the total scope of work of 200 sq.kms as mentioned in the contract document. As no completion certificate or any document stating post award revision of quantum in the original scope of work was provided from the ONGCL against that particular contract stating successful completion of the project/acquired volume as per actual so the reasons for this shortfall in the project completion (i.e. 112.4032 sq. kms as per DPR vis-a-vis 200 sq. kms as per the contract) could not be established, so OIL sought clarification from the petitioner vide email dated 22/7/2021 with a request to furnish either completion certificate or post award revision in the scope of the work document from the client i.e ONGCL against the particular contract to establish successful execution of the project in line with the basic evaluation criteria as per clause 3.1.2. (a) and (b). Further to that, query was also made as regards compliance to Clause 3.1.6.

10. The petitioner vide a letter dated 2/8/2021 stated that the documents submitted by the petitioners met the criterion mentioned in the NIT and satisfied the

tender requirements and no further documents were required. It was also mentioned that the contract was completed with coverage area 112.4032 sq. kms which met the minimum cumulative area of 50 sq. kms. As regards the contract with the ONGCL, it was stated that the contract was completed as the same was closed by the ONGCL on account of Force Maejure as per Clause 18.2 of the contract dated 8/2/2018 and the contract was completed/closed based on the volume of work achieved before start of force maejure. In support of the same the petitioner furnished 5 documents which were-- (i) contract termination notice from ONGCL on account of Force Maejure (suspension due to force Maejure exceeded 2 months); (ii) Page No. 17 of the contract dated 8/2/2018 referring to Clause 18.2 for termination on account of Force Maejure; (iii) Page No. 19 of the contract dated 8/2/2018 referring to Clause 23 for force Maejure iv) Letter from ONGCL for release of performance security with clearly mentioning "Contract Completed"(as reason for return) and v) GCC of contract dated 8/2/2018. It was also mentioned that in case OIL wishes they can approach DGM (MM)-A & AA Basin Jorhat ONGCL for confirmation. As regards the query pertaining to Clause No. 3.1.6 it was mentioned that in a case of award the "key personnel" shall be deployed by the technical collaborator M/S GEPL.

11. The Technical Scrutiny Committee thereupon on 5/8/2021 submitted the technical evaluation. The technical evaluation of M/S Devi Engineering & Construction Pvt. Ltd., M/S. TNG Exploration Pvt. Ltd. and M/S J.P. Singhal & Company were rejected on the grounds mentioned in the said Technical Committee Evaluation report. As regards the Respondent No.2, the technical bid was held to be acceptable. As regards the petitioner, the technical bid was held not to be acceptable on account of non-compliance of Clause 3.1.2 (a) & (b) as well as also in view of Clause 3.1.6. The relevant portion of the said report of the Technical Committee is quoted herein below :-

“Now since no completion certificate nor any document stating post award revision of quantum in original scope of work was provided

from client i.e. M/s ONGC against this particular contract stating successful completion of the project/acquired volume as per actual, so the reason for this shortfall in project quantum (Acquisition of 112.4032 Sq. Km. against total stipulated Scope of Work as 200 Sq.Km. as per contract) could

not be established by the technical scrutiny committee members.

Accordingly user department through Contract department sought clarifications from the bidder with a request to furnish either completion certificate or post award revision in Scope of Work document from client i.e. ONGC against this particular contract to establish successful execution of the project in line with the basis pre-requisite criteria as per aforesaid BEC Clause 3.1.2 a & b.

ii. As part of response to OIL's clarifications sought from bidder, instead of furnishing explicit document as sought by OIL they have submitted supplementary vintage document in the form of Contract Termination Notice issued from client i.e. PONGC on account of Force Majure in accordance with the contractual provisions vide para 18.0 and para 23.0 of General Contract Conditions (GCC) along with relevant pages of aforesaid contract citing above clauses. Moreover, they have reiterated their argument that proof of release of performance security after completion of contract as mentioned under clause no. 3.1.2 fulfills requirement per the tender and no other documents are required.

In fact, bidder M/s AFSL has submitted as part of Post Bid Query response (refer letter bearing ref. No. ASIAN BID.REF. NO: aes-oil-109-SIS –GEN-CNP-005-001 dated 02.08.2021 that in case Oil wishes they can approach ONGC Jorhat officer for confirmation.

In this regard the technical scrutiny committee is of the opinion that very essence of completion of contract as mentioned under Clause 3.1.2 Note ii corresponds to either exhaustion of quantum stipulated in original Scope of Work or short closure with approved post award amendment regarding revision of quantum with corresponding extension/reduction of schedules contract completion period as the case may be. View above the argument put forward by bidder that the particular contract terminated due to invocation of

Force Majure as in instant case to be considered as a candidate for evaluation against the BEC clause No. 3.1.2. Note (ii) in the pretext of completed contract is not acceptable. Further, the technical scrutiny committee feels that successful execution of job pertaining to Contract No. : JRT/MM/CONT/33D-DATAACQN/29/16-17/16037/9010

026315 dated 08.02.2019 executed by bidder's technical collaborator M/s Ecologistics Pvt. Ltd. can only be ascertained if OIL decides to undertake cross verification of actual facts from ONGC as deemed fit as per prevailing practices and policies for which bidder has also advocated in their response to clarifications sought by OIL dated 02.08.2021.

iii. Against BEC clause no. 3.1.6, from the submitted CVs as part of technical bid for proposed personnel against few of the key positions it could not be established that they are from the Bidder's Technical collaborator M/s Globe Ecologistics Pvt. Ltd. as per NIT requirement. Hence, OIL sought clarifications from the bidder to confirm categorically that key personnel whose CVs are provided along with the technical bid for the following key positions are from the Technical collaborator M/s s Globe Ecologistics Pvt. Ltd.

- a. Party Chief***
- b. QC Processing Geophysicist.***
- c. Seismologist***
- d. Observer***
- e. Sr. Surveyor***

In response bidder instead of responding to the specific query of OIL, opted to provide self-declaration stating "We confirm that in case of award the "Key Personnel" (positions as mentioned below) shall be deployed by the Technical Collaborator (M/s GEPL):

- a. Party Chief***
- b. QC Processing Geophysicist***
- c. Seismologist***
- d. Observer***

e. Sr. Surveyor”

The above is a conditional statement, hence the bidder's response is not acceptable against the BEC clause 3.1.6.

12. From a perusal of the above quoted portion of the technical evaluation report, it would be relevant that apart from the reasons assigned, the Technical Scrutiny Committee also observed that the successful execution of the contract dated 8/2/2018 executed by the petitioner's technical collaborator can only be ascertained, if OIL decides to undertake cross verification of actual facts from ONGCL as deemed fit as per the prevailing practice and policies for which the bidder had also advocated in their response to the clarification sought by OIL dated 2/8/2021.

13. In terms with the suggestion of the Technical Scrutiny Committee in its report dated 5/8/2021 as quoted herein above, OIL sought clarification from ONGCL vide the communication dated 12/8/2021. The queries so made in the said communication were—

(i) Whether the contract was successfully executed by the Contractor M/S Globe Ecologic Pvt. Ltd. ?

ii) The quantum of work successfully executed by the contractor?

14. To the said communication dated 12/8/2021 the Head, Geophysical Services ONGC, A&AA Basin, GPS, Jorhat replied by the E-mail dated 17/8/2021 as under :-

“1. The contractor could not successfully execute the said contract even after grant of multiple extensions (5 times with LD as applicable).

2. Although 11064 shots were taken (vs a nominal target of 22064) on a stand alone basis, however the successfully executed volume of work can not be readily quantified because the data coverage suffers from intermittent holes leading to loss of foldage and rendering the data of unamenable to seamless imaging.”

15. Further to that, OIL vide another email dated 14/9/2021 sought for further clarification from the ONGCL to take a decision on the acceptability of the offer. Vide

the said email dated 14/9/2021, OIL sought for the following clarifications :-

1. 0 Whether any change order was issued from your end with respect to the revised quantum of work ?
 2. 0 Have ONGC accepted the acquired data of 11064 shots(112.4032 Sq. km.) and released payment accordingly to the contractor ?
 3. 0 If not the entire 112.4032 Sq. kms. claimed to be acquired by M/S Globe Ecologistics, what quantum of acquired data was accepted by ONGC against the contract along with criteria of measurement ?
16. To the said email dated 14/9/2021 the Head Geophysical Services ONGC, A &AA Basin, Jorhat vide email dated 18/9/2021 replied as herein under :-
1. No post-- award change order was issued to the contractor for revision of the work volume.
 2. ONGCL made payment for the 11,064 shots, as per billing cycle but the 10% (of the invoice) withheld amount ; normally released on satisfactory coverage at the end of the project, was not released due to gaps left in the coverage.
 3. The volume reported in the DPR corresponds to 11,064 shot on a stand alone basis (against nominal 22,046 shots provided in the contract) for which payment was made by ONGC as per deductions mentioned above.
17. The said clarifications were then placed before the Technical Scrutiny Committee for further evaluation. The Technical Scrutiny Committee thereupon after taking into consideration the clarification, found that the Technical bid submitted by the petitioner, there was non-compliance with respect to BEC/Clause 3.1.2 (a) and 3.1.2 (b) and hence the bid was technically rejected. Accordingly, the Technical Scrutiny Committee vide an email dated 19/9/2021 submitted its final techno commercial evaluation before the contract department in respect to Tender No. CDH6944P22.
18. The petitioners claiming ignorance of the email dated 19/9/2021 invoked Section 8 of the Integrity Pact of E-Tender by lodging a complaint before the committee of IEM vide the letter dated 13/10/2021. In the said complaint, the

petitioners contended that they apprehended arbitrary disqualification and sought for certain directions from the said Committee. On the other hand, OIL claiming that the petitioners on coming to learn about the email dated 19/9/2021 about its technical disqualification had filed the complaint before the IEM vide letter dated 13/10/2021. OIL upon being forwarded the said complaint dated 13/10/2021 replied to the IEM vide a communication dated 19/10/2021. A similar communication was also sent to the petitioners on 19/10/2021 itself. At this stage, it may also be relevant herein to mention that in the communication issued to the petitioners dated 19/10/2021 OIL requested the petitioners to withdraw the representation against the tender to enable the respondent authorities to proceed further and it was also mentioned that the respondent authority would look forward to the petitioners' participation against the other future tender of OIL.

19. The record further reveals that on 29th of October, 2021 an email was sent by the General Manager, Contracts to the petitioner Company asking the petitioners to furnish their views to the communication dated 19/10/2021 issued by the OIL positively by 30/10/2021 with credible documentary evidence to substantiate the petitioners' claim. To the said communication one Ms. Nishita Chenoy issued an email on 30/10/2021 stating inter alia that the petitioners had already issued a reply on 22/10/2021 and the said reply was sent by email by one Mr. Gunjan Fernandes. To the said E-mail dated 30/10/2021, one Arup Jyoti Sarma, General Manager, Contracts acknowledged that as the email sent by Mr. Gunjan Fernandes was in his trash folder he had no knowledge of it.

20. In the meantime, as the tender process was urgently required to be completed as the working period was from the month of November to the month of April, a communication was issued by OIL to the IEM vide an email dated 27/10/2021 stating inter alia that it is essential to finalize the tender at the earliest and as such OIL is proceeding with the next course of action towards finalization of the tender. Pursuant thereto, OIL informed the registered bidders as per procedure, the date and time of

opening of the Price Bid and accordingly a system generated email dated 3/11/2021 was triggered automatically to the registered bidders. The price bid was opened on 3/11/2021 at 2.08 PM. After opening of the price bid, OIL at 2.22 PM of 3/11/2021 sent an email informing the IEM that since the bid submitted by the petitioners was concluded to be technically not acceptable for not complying with the BEC/BRC of the tender, OIL was proceeding with the finalization of the tender. Thereupon, the contract was awarded to the technically eligible bidder, i.e the Respondent No. 2 on 15/11/2021.

21. In the meantime, on 9/11/2021, the Writ Petition being W.P.(C) No. 6007/2021 was filed by the Petitioners. A perusal of the writ petition shows that the basic grievances of the petitioners was non-consideration of the Technical Bid of the petitioners which as per the Petitioners fulfilled the requisite criteria and formalities as per the Tender document. Allegations have been made in Paragraph 25 of the Writ Petition that OIL have intentionally disqualified the technical bid of the Petitioners and other bidders with the sole intention and purpose to favor the preferred bidder that too for astronomically higher financial bid. It was also alleged that when the complaint was pending before the IEM, the question of opening the bid on 3/11/2021 clearly shows the illegalities resorted by OIL. Another allegation as could be seen from the perusal of the Writ Petition was that vide the email dated 3/11/2021 at 1.19 PM, it was mentioned that the E-tender bearing No. CDH6944P22 has been amended and republished and a link was provided to check the amended folder and the Petitioner while checking the official portal of E-Tender and the Amendment could find that the alleged amendment was not uploaded. But in spite of that the Price Bid was opened on 3/11/2021 at 2 PM which as per the Petitioners prove the arbitrariness, high handedness and colourable exercise of power. It needs to be noted that the petitioners in Ground (ii) have stated that the Petitioners Price Bid was Rs.61, 90, 18, 748.80p including GST but the alleged preferred bidder's bid was astronomically high. Inter alia on the basis of said allegations, the Petitioners sought for declaration that

the opening of E-Tender on 3/11/2021 at 1.54 PM was bad; for a direction to OIL to withdraw/rescind/cancel/recall the opening/publishing and awarding the E-Tender; for a direction not to give effect or any further effect to the opening/publishing and awarding the E-Tender; for direction to consider the E-Tender quote of the Petitioners alongwith the technical and financial bid and republish the E-tender by giving a fair opportunity to all participating bidders in respect to the E-Tender; etc. But it needs to be taken into consideration that there was no specific relief sought for as regards rejection of the technical bid of the Petitioners. It is also relevant herein to mention that the technical collaborator of the Petitioner No. 1 whose qualification and supply of the personnel were made the basis of the technical bid in so far as Clause 3.1.2 (a) and (b) as well as 3.1.6 is not a petitioner before this Court.

22. The said Writ Petition i.e. W.P.(C) No. 6007/2021 was listed on 15/11/2021 for motion. At the request of the learned counsels for the parties, the matter was again directed to be listed on 17/11/2021 for motion. On 17/11/2021 the said writ petition was fixed on 18/11/2021 for passing necessary orders and this Court had on 18/11/2021 after taking into consideration that the contract was awarded to the Respondent No. 2, directed that till the returnable date, the OIL shall not proceed further with the impugned E-Tender IFB No. CDH6944P22.

23. The record further reveals that on the basis of an Interlocutory Application being I.A.(C) No. 2053/2021 filed by the Respondent No. 2 herein, this Court vide an order dated 6/12/2021 impleaded the Respondent No. 2. In the meantime, the Writ Petition (Civil) No. 6503/2021 was filed by the petitioners on 30/11/2021 and this Court vide order dated 8/12/2021 issued notice in W.P.(C) No. 6503/2021 and thereby tagging W.P.(C) No. 6503/2021 to W.P.(C) No. 6007/2021. The respondent No. 2 had also filed an application being registered as I.A. (Civil) No.2190/2021 seeking vacation of the order dated 18/11/2021 stating inter alia that the awarding of the contract to the Respondent No. 2 has been done by following the due process of law, and as such, the interim order dated 18/11/2021 ought to be vacated. Pursuant thereto

Pleadings have been exchanged as would be seen from the records.

24. In W.P.(C) No.6503/2021, what has been challenged in the Letter of Award dated 15/11/2021 issued in favour of the Respondent No. 2 on the edifice of the contentions made in W.P.(C) No. 6007/2021. On 20/1/2022, the Interlocutory Application being I.A. (C) No. 2190/2021 came up for consideration for vacation/modification/alteration of the order dated 18/11/2021 passed in W.P.(C) No. 6007/2021. As the adjudication on the said Interlocutory Application would lead to a decision on the merits and further taking into consideration that the contract in question is time sensitive the writ petitions were taken up for final disposal.

25. I have heard the learned counsel for the parties and have also perused the materials on record.

26. The question which arises before this Court is as to whether judicial review of the decision-making process in rejection of the Technical Bid of the Petitioners and in awarding of the contract to the Respondent No. 2 by the Respondent No. 1 is to be exercised and for that purpose the extent to which a Writ Court can interfere is required to be taken into consideration that too when the eligibility criteria is required to be scanned and perceived by the Court. As such it would be required to examine the scope of judicial review in respect to such matters more so when the parties before the Court have relied upon various judgment of the Supreme Court.

27. **In Tata Cellular Vs. Union of India** reported in **(1994) 6 SCC 651** certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the Court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joint as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be

tested by the application of the Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. In **Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517**, it was held that if the decision relating to the award of contract is bona fide and in public interest, Courts will not in exercise of the power of judicial review, interfere even if a procedural aberration or error in assessment or a prejudice to a tenderer is made out. In **Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.** reported in **(2016) 16 SCC 818** wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the document by the owner or employer unless malafide or perversity in understanding or appreciation is reflected, the Constitutional Court should not interfere was stated. It was also observed in the said case that it is possible that the owner or the employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Court but that by itself, is not the reason for interfering with the interpretation given.

28. A passage of the judgment of the Supreme Court in **Monte Carlo Limited Vs. N.T.P.C. Ltd.** reported in **(2016) 15 SCC 272** at paragraph 26 would further provide the insight to modern trend of judicial restraint which is quoted herein below :-

“26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner’s organization is taken. This ensures objectivity. Bidder’s expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not

comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. **But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."**

29. In **T.N. Generation and Distribution Corporation Ltd. Vs. CSEPDITrishe Consortium** reported in (2017) 4 SCC 318 the Supreme Court taking note of the complex fiscal evaluation and other aspects held at Paragraph 36 as herein under :

"36. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd."

30. Again in **Reliance Telecom Vs. Union of India** reported in (2017) 4SCC 269 the Supreme Court while taking note of contours of the power of judicial review had in Paragraph 58 & 59 observed as herein under :-

“58. We have already discussed that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. **The court cannot bet and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in NIA in exercise of the power of judicial review.** The contention is that the State cannot hoard the spectrum as per 2D case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in 2G case had been complied with and the auctions have been held thereafter from year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavor would be made to put it to auction when it becomes available in sufficient quantum. The Court cannot interfere with the tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a band and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command. In this regard, reference to the decision in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* would be apt. In the

said case, the Court referred to the authority in *Tata Cellular* and thereafter opined that ***though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favoritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. In the instant case, we are unable to perceive any arbitrariness or favoritism or exercise of power for any collateral purpose in NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service.***

59. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact.; It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision-making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable."

31. The learned counsel appearing on behalf of the OIL invited the attention of this Court to the judgment of the Supreme Court rendered in the case of *Afcons Infrastructure Ltd. (supra)* to buttress the contention that interference is permissible only if the decision making process is mala fide or is intended to favor someone. The learned Senior Counsel for OIL contended that the decision to award the contract to Respondent No.2 should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law would have reached. He also submitted that mere disagreement with the decision making process or the decision of the administrative authority is no reason for a Constitutional Court to interfere and the threshold of mala fides, intention to favor someone, arbitrariness, irrationality or

perversity must be met before the Constitutional Court interferes with the decision making process or decision. Paragraphs 11 to 15 of Afcon's Infrastructure Ltd. (supra), as per the said Senior Counsel would throw light in so far as the instant dispute in question and same are quoted herein below : -

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay it was held that the constitutional Courts are concerned with the decision-making process. Tata Cellular v. Union of India went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa as mentioned in Central Coalfields.

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision.

14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. In this context, the use of the word 'metro' in Clause 4.2 (a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having

authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

32. Another judgment which requires to be looked into is the judgment of the Supreme Court rendered in the case of **Central Coal Fields Vs. S.L.L.–SML (Joint Venture consortium)** reported in (2016) 8 SCC 622 wherein at paragraph 47 to 49 being relevant is quoted herein below :-

*"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. **As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.***

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

tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the Courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby re-write the arrangement, it could lead to all sorts of problems including the one that we are grappling with.....".

33. In a very recent judgment of the Supreme Court in the case of **M/S Agmatel India Pvt. Ltd. Vs. M/S Resoursys Telecom & Ors.** reported in **2022 SCC Online SC 113**, the Supreme Court while dealing with the question of the interpretation given by the tendering authority to the terms of the tender and the scope of judicial review in such matters observed at paragraph 39 as follows :

"39. The above-mentioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible ; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the Constitutional Court, that, by itself, would not be a reason for interfering with the interpretation given."

34. From the various judgments referred to herein above and the law laid down therein, it would reveal that ordinarily the soundness of a decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or is intended to favor someone or a decision that no responsible authority acting reasonably and in accordance with the relevant law could have reached. It can further be observed from a perusal of the said judgment of the Supreme Court that whether a term of a NIT is essential or not is a decision of an employer which should be respected and if the authority concerned deviates from it, the deviation should be made applicable to the bidders and potential bidders.

35. Further, the above referred judgments reveal that the authority that authors the tender document is the best person to understand and appreciate its requirements and thus, its interpretation should not be second guessed by a Court in judicial review proceedings. Such interpretation should be respected by the constitutional Courts unless the said understanding is so perverse or mala fide that no responsible authority can reasonably arrive at such conclusion.

36. The facts narrated herein above would show that the instant tender in question has been issued for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. Taking into consideration that the proposed High Density 3D campaign in Kumchai area would require involvement of competent service provider having required infrastructure and relevant experience of carrying out seismic data acquisition for which there needs to be deployment of sufficient technical resources, skilled man power and adopt terrain specific shot hole drilling technology to meet the objective of the survey within a time bound period of 6 months, such technical bids are scrutinized by the technical experts. The bidders expertise and the technical capabilities and the capacity have been assessed in the instant case by the technical experts. The instant tender stands on a different compartment and is not comparable to any scheme for allotment and this arena which this Court has referred to herein above requires technical expertise. The parameters applied are different. Its aim is to achieve high degree of precision and perfection in execution with adherence to the time schedule. Saying so, it does not mean that these tenders will escape scrutiny of judicial review. Exercise of the power of judicial review would be called for, if the approach is arbitrary or mala fide or the procedure adopted is meant to favor one. The decision making process as in the instant case of holding that the petitioner was not technically qualified and thereupon grant issuance of the Letter of Award (LOI) to the Respondent No. 2 should clearly show that the said maladies of arbitrariness, mala fide or bias are kept at bay. But when a decision is taken i.e. manifestly in consonance with the language of the tender

document or sub-serve the purpose for which the tender is floated, this Court under Article 226 of the Constitution should follow the principle of judicial restraint. As held in the case of Monte Carlo Ltd. (supra) technical evaluation or comparison by the Court would be impermissible, the principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skill and the owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

37. In the backdrop of the above let this Court take into consideration the decision making process by which the petitioners' bid has been held to be technically not acceptable. The above quoted provisions of Clause 3.1.2 (a) and (b) both uses the term that the bidder must have successfully executed at least one or multiple contracts of the volume, magnitude and technical parameters as stipulated therein.

38. Mr. U.K. Nair, the learned Senior Counsel appearing on behalf of the petitioners contends that a perusal of Clause 3.1.2 (a) and (b) has to be interpreted to mean that if a bidder has done a contract with minimum cumulative volume of 50 sq. kms acquired with minimum 4,000 active receiver channels per shot using explosives as the source in the last seven years preceding the date of the Original Bid Closing and have also completed a contract or multiple contracts of on-shore 3D Seismic Data Acquisition of a minimum cumulative volume of 50 sq kms using mechanized shot holes drilling rigs in hilly/mountainous areas in the last seven years preceding the date of the Original Bid Closing the bidder would be deemed to have successfully executed the same for the purpose of evaluation of the experience of the bidder in respect to the tender in question. The counsel for the petitioners submits that the Notes appended to Clause 3.1.2 (a) and (b) would further clearly go to show as to what the documents necessary to show the experience and amongst the various documents the documents mentioned in either of Sl. Nos. (i), (ii) (iii) or (iv) would prove the experience of the bidder. He submits that the petitioners' technical collaborator had

cumulative volume coverage of 112.4032 sq. kms, which was much more than the experience sought for in the bid document. He submitted that the petitioners have placed on record the document in terms with Clause (ii) which was the proof of release of Performance Security after completion of the contract of the petitioners' technical collaborator and the respondents could not have rejected the bid of the petitioners. In other words Mr. Nair submits that if a bidder in one or multiple contracts has the experience of the required parameter and in the instant case the Petitioners' technical collaborator had much more than the required parameter, it would be deemed that the contract has been successfully executed. He further submits that the said contract was not terminated on account of the fault of the petitioners' technical collaborator but was terminated on account of force Maejure Clause and as such the ONGCL while releasing the performance guarantee have also categorically stated that the Contract was Completed.

39. On the other hand, Mr. S.N. Sarma, the learned Senior Counsel appearing on behalf of OIL submitted that though Clause 3.1.2 (a) and (b) stipulates the experience on the basis of completion of certain parameters in one or multiple contracts but the said contract has to be successfully executed. He submits that when the employer/the owner have interpreted Clause 3.1.2 (a) and (b) to mean that the contracts wherein bidders had acquired the experience has to be successfully executed, this Court under Article 226 of the Constitution may not interfere with the said interpretation given by the employer. He submits that the emphasis on the contract to be successfully executed is very vital as it involves procurement of scientific data by using explosive at source and an inexperienced or an incompetent bidder if selected without looking into the question of successful execution of the earlier contract may not only result in financial loss to OIL but may result in loss to the natural resources which still remains unexplored in the Kumchai area. Under such circumstances, this Court ought not to interfere with the decision of the OIL to interpret the Clause 3.1.2 (a) and (b) wherein the interpretation so given is that the bidders should have successfully executed the

contract or contracts on the basis of which the bidders claim the experience. He further submits that the issue involved herein as to whether the decision making process to reject the tender of the petitioners' comes within the ambit of perversity, bias, unreasonableness and/or irrationality which in the facts of the case would clearly go to show that the OIL have arrived at the said decision to reject the technical bid of the petitioners after taking into account the various aspects of the matter. He further submits that a perusal of the communication dated 14/6/2021 which OIL sent to the Petitioners informing the technical scope of the work and the requirement; the clarification sought by the OIL from the Petitioners on 22/7/2021; the Technical Scrutiny Committee report dated 5/8/2021; the correspondence pursuant there to between the OIL and ONGCL on 12/8/2021 and 14/9/2021 and the reply by the ONGCL on 17-8-2021 and 18/9/2021 wherein the ONGCL in an unambiguous term stated that the petitioners' collaborator could not successfully execute the said contract and 10% (of the invoice) was withheld due to gap left in the coverage and on the basis thereof the Technical Evaluation Committee on 19/9/2021 had taken a decision that the petitioners' bid was not technically viable, cannot be said to be a decision taken which smacks off arbitrariness, irrationality, or unreasonableness or even perverse and as such no interference under Article 226 of the Constitution of India is called for.

40. Mr. K.N. Choudhury, the learned Senior Counsel appearing on behalf of the Respondent No. 2, while referring to the judgment of the Supreme Court in the case of Central Coal Fields(supra) and more particularly the paragraph 47, submits that a perusal of the materials on record and more particularly the evaluation done by the Technical Evaluation Committee on 5/8/2021 and the subsequent correspondence with the ONGCL wherein the ONGCL had categorically mentioned that the petitioners' collaborator did not successfully execute the contract, the respondent authorities were justified in rejecting the technical bid of the petitioners.

41. The question which arises before this Court is as to whether the bidder can be

held to have successfully executed the contract on acquiring the experience as stated in the said Clause or is it that the contract on the basis of which the bidder submits its experience has also to be successfully executed. The use of the words "successfully executed" in Clauses 3.1.2 (a) as well as Clauses 3.1.2 (b) cannot be ignored or treated as redundant or superfluous and which must given a meaning and the necessary significance. Noticeably it may be mentioned that the tendering authority has interpreted that the term "successfully executed" would mean that the contract on the basis of which experience has been shown has been successfully executed.

42. A reading of paragraph 14 & 15 of Afcon's Infrastructure Ltd.(supra), would show that words used in the tender documents cannot be ignored or treated as redundant or superfluous. Further, the owner or the employer of the project having authored the tender document is the best person to understand and appreciate its requirement and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. In the instant case, therefore the words "successfully executed" cannot be ignored or treated as redundant or superfluous.

43. Now in that backdrop can it be said that the interpretation so given by the OIL that the contract on the basis of which experience is being claimed has also to be successfully executed suffers from mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender document? In the opinion of this Court the contention made to the effect that having the experience of the technical requirement as stated in Clause 3.1.2 (a) and (b) would amount to successful execution of the contract may lead to a contrary result to what is sought to be achieved by the OIL and more so taking into consideration that the tender has been issued primarily for the purpose of getting data in respect to the presence of natural resources which is also time sensitive. The interpretation therefore, given by OIL that the contract on the basis of which the bidder claims technical experience, has

to be the successfully completed seems to be the correct interpretation taking into account the purpose for which the tender was issued. Even otherwise in view of the law laid down in Afcons Infrastructure Ltd. (supra), and Agmatel India (P) Ltd (supra), OIL being the tendering authority and the author of the tender documents its interpretation is to be taken to be the best person to understand and appreciate its requirements. The interpretation so given by OIL in the opinion of this Court as regards that the contract (s) upon which experience is claimed by the tenderer/bidder has/have to be successfully executed cannot be said to be vitiated by malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

44. It is also for that reason relevant at this stage to take note of the contract dated 8/2/2018 awarded to the technical collaborator of the petitioners. The said contract dated 8/2/2018 was for approximate quantum of 200 sq. kms within the time period of 9 months which included mobilization period of 90 days from the date of issue of the NOA and the rest 6 months will be for the experimental works; data acquisition and stand by period. Clause 3.4.1 relates to extension granted without liquidated damages in the eventualities as mentioned in the said clause while Clause 3.4.3 stipulates that extension can be granted with the applicable liquidated damages and penalties if the ONGCL permits. A perusal of the E-mail dated 17/8/2021 issued by ONGCL clearly goes to show that it was mentioned that the contractor i.e. the technical collaborator of the petitioner could not successfully execute the said contract even after grant of extension (5 times with LDs applicable). In the instant case there is a window within which the particular work is to be completed and delay in completion would have serious consequences as regards the exploration of the natural resources. In the said perspective the respondent authorities in insisting with the contract upon which the bidder claims the experience has to be "successfully executed" can neither be said to be perverse or mala fide in the understanding or appreciation or in the application with the terms of the tender document.

45. Further to that, it can also be seen that the Respondent authorities after taking note of that the contract on the basis of which the petitioner claims to be technically viable was for the cumulative quantum of 200 kms and the works executed was only in respect to 112.4032 sq. kms sought certain clarification from the petitioner. The petitioner while making clarification had also asked the OIL to make necessary confirmation from the ONGCL. The Technical Screening Committee in its report dated 5/8/2021 after taking into consideration the petitioners' bid observed that the petitioners' experience was not in terms with Clause 3.1.2(a) and (b) as the petitioners technical collaborator has not successfully executed the contract dated 8/2/2018 made an observation that OIL may further seek clarification from ONGCL. Thereupon on 12/8/2021 and 14/9/2021 OIL sought for clarification from the ONGCL and the competent authority of the ONGCL had given the clarification on 17/08/2021 and 18/9/2021 stating inter alia that the petitioners' technical collaborator had not successfully completed the contract and 10% (of the invoice) has been withheld due to gaps left in the coverage. It was also clarified that the said amount which is normally withheld is released on satisfactory coverage at the end of the project but the same was not released due to gaps left in the coverage. Thereupon on the basis of the said clarification, a decision was taken that the petitioners bid was technically not viable by the Technical Scrutiny Committee vide its email dated 19/9/2011 which subsequently resulted in granting the contract to the Respondent No. 2 who was the only eligible bidder. In the opinion of this Court, the exercise undertaken by OIL as stated hereinabove on the basis of which the petitioners' tender was held to be technically not acceptable and the subsequent award of the contract to the Respondent No. 2 cannot be said to be vitiated by arbitrariness, mala fide, perversity or to favor only the Respondent No, 2.

46. At this stage, it may also be taken note of that the petitioners have alleged arbitrariness, violation of public policy etc on the grounds of opening the Financial Bid during the pendency of the proceedings before IEM and also as regards the issuance

of the email dated 03/11/2021 at 1.19 PM informing the amendment to the Tender conditions. The proceedings pending before the IEM were in the capacity of advisory proceedings and the IEMs were expected to tender their advise on the complaints within 30 days. In the instant case, OIL awarded the contract on 15/11/2021 after more than one month from the date the complaint was lodged. Further vide emails dated 27/10/2021 and 3/11/2021 OIL duly informed IEM about the opening of the Price Bid and OIL has not received any advice from the IEM before or after the contract was awarded to the Respondent No. 2. The next allegation pertains to the email dated 3/11/2021 at 1.19 PM which relates to amendment of the Tender conditions and the same were not furnished. OIL in its affidavit had made it clear that the said email was system generated E mail which was triggered automatically as the Price Bid was to be opened, In view of the above, this Court is of the opinion that the said allegations do not merit the exercise of the power of judicial review.

47. Lastly a faint but a shrilling contention was made that the tender has been settled at an astronomically high rate which is almost 20 crores more than the petitioners and as such public interest demands interference. An unsuccessful bidder who failed in the technical bid, his quota for the financial bid has no relevance. OIL in the instant case is the best judge to decide and having decided the same to award the contract to the Respondent No. 2 at the price it has quoted, this Court cannot sit on appeal over the same. .

48. In view of the above, both the Writ Petitions are dismissed. Parties are left to bear their own costs. Interim order dated 18/11/2021 stands vacated.

JUDGE

Comparing Assistant