

# National High Speed Rail Corporation ... vs Montecarlo Limited on 31 January, 2022

**Author: M.R. Shah**

**Bench: A.S. Bopanna, M.R. Shah**

REPORTABLE

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6466 OF 2021

National High Speed Rail Corporation Limited

...Appellant(s)

Versus

Montecarlo Limited & Anr.

...Respondent(s)

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 23.08.2021 passed by the High Court of Delhi in Writ Petition (C) No. 5127 of 2021 by which the High Court has allowed the said writ petition preferred by the respondent herein – original writ petitioner (hereinafter referred to as the “original writ petitioner”) and has quashed the communications dated 27.04.2021 and 28.04.2021 and the notification dated 28.04.2021 by which the original writ petitioner was informed that its technical Bid has been rejected on the ground that the same is non-responsive and consequently has directed the appellant herein to proceed in accordance with law qua the tender process by further examining the Bid of the original writ petitioner, the original respondent – National High Speed Rail Corporation Limited (hereinafter referred to as “NHSRCL”) has preferred the present appeal.

2. That the appellant herein – NHSRCL is a Government Company incorporated under the Companies Act, 2013 with equity participation of the Government of India, Government of Gujarat and Government of Maharashtra, incorporated with the object to finance, construct, maintain and manage the upcoming High Speed Rail Corridor in India. 2.1 That the NHSRCL issued a tender notice on 22.10.2020 calling for bids in relation “to the Bid Package No. MAHSR-8 for the -- Design and Construction of Civil and Building Works for the Depot on Design Build Lump Sum Price Basis

for Double Line High Speed Railway involving works for Site Formation, Abutment, Retaining Walls, Roadbed for track, Box Culvert, Roads, Cable Duct, Foundations of OHE Masts, Piping, Drainage, Water Supply, Water Harvesting, Fire Fighting, Land-scraping, Boundary Wall, General Inspection Train Shed, Maintenance Depot and other Associated Works at Sabarmati between MAHSR Km. 507.599 and MAHSR Km. 509.726 in the State of Gujarat for the Project of Construction of Mumbai-Ahmedabad High Speed Rail, (hereinafter referred to as “the Project”).

2.2 That the Technical Bids submitted by various bidders including the original writ petitioner, were opened by the NHSRCL on 19.02.2021. The original writ petitioner alongwith four other bidders were declared unsuccessful. The NHSRCL informed the original writ petitioner through uploading of Technical Proposal Evaluation Summary on 27.04.2021 on CPPP that the Bid of the original writ petitioner alongwith four other bidders have been rejected at Technical Stage. The original writ petitioner sought the reasons for rejection of its Bid. In response, NHSRCL vide its communication dated 28.04.2021 addressed to original writ petitioner informed that its Bid was not substantially responsive. A reference was made to Clauses ITB 28.1 and 42.5. Under clause 28.1 “information relating to the evaluation of the Bids and recommendation of the Contract award shall not be disclosed to bidders or any other persons, not officially concerned, with such process until information on Contract award is communicated to all bidders in accordance with ITB

42.” As per clause 42.5, “only after notification of award, unsuccessful Bidders may request, in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected and the Employer shall promptly respond, in writing, to any unsuccessful Bidders who, after the notification of the award in accordance with ITB 42.1, request a debriefing.” It appears that NHSRCL acted as per the aforesaid two clauses.

2.3 Aggrieved by the aforesaid communication/notification dated 27.04.2021 and 28.04.2021 respectively and aggrieved by the disqualification of its Bid, the original writ petitioner approached the High Court by way of writ petition being Writ Petition (C) No. 5127 of 2021 and by the impugned judgment and order, the High Court has allowed the said writ petition and has quashed and set aside the communications dated 27.04.2021 and 28.04.2021 and the notification dated 28.04.2021 rejecting the Bid of original writ petitioner at Technical Stage. 2.4 While allowing the writ petition, the High Court has commented upon Clauses 28.1 and 42.5 of ITB and has observed that not to give reasons at that stage would tantamount to depriving the bidders to approach the Court and know the reasons for rejection of their Bid. That thereafter the High Court has considered the reasons for which the Bid submitted by the original writ petitioner was found to be technically non- responsive and has overruled the objections while treating the Bid as technically non-responsive and has observed and held that the Bid submitted by the original writ petitioner was substantially responsive and that there was a substantial compliance of the terms and conditions of the Bid document. Consequently, the High Court has quashed and set aside the aforesaid communications rejecting the original writ petitioner’s Bid at Technical Stage as a technically non-responsive and has directed the NHSRCL to consider and evaluate the Bid submitted by the original writ petitioner alongwith the Bids submitted by four other bidders. 2.5 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the NHSRCL has preferred the present appeal.

3. Shri Tushar Mehta, learned Solicitor General appearing on behalf of the appellant – NHSRCL has submitted that the present matter pertains to the tender floated for works in Package C8, which is a part of various other packages being finalized for the implementation of Mumbai-Ahmedabad High Speed Rail popularly known as Bullet Train Project. It is submitted that the Mumbai-Ahmedabad Project is a fully foreign funded project, which was envisaged when the Japanese and the Indian Governments entered into a Memorandum of Understanding, pursuant to which it was agreed that the said project would be fully funded by the Concessional Official Development Assistance Loan of over Rs.80,000/- crores by the Japan International Cooperation Agency (JICA). It is submitted that thus, the Bullet Train Project is a Foreign Sovereign Funded Contract distinct from Contracts Funded from Consolidated Fund of India. It is submitted that as per the Memorandum of Corporation, and when the said project is fully funded by JICA for an amount of Rs.1 lakh crore with a very negligible rate of interest and by providing repayment in installments of 27 years and above, as per the Memorandum of Corporation, the process of bidding and the subsequent decisions are to be vetted by JICA. It is submitted that the content of the bidding documents was based on JICA's Standard Bidding Documents (SBD) as well as JICA's procurement guidelines and the same form an integral part of the loan agreement. It is submitted that in the present case, JICA appointed JICC as consultant.

3.1 It is further submitted by Shri Mehta, learned Solicitor General that in the present case when the original writ petitioner submitted its Bid / Technical Bid and when the same was evaluated at the Technical Evaluation Stage, the Technical Bid submitted by the original writ petitioner was found to be non-responsive on the ground of (i) Non- Signing of Form CON: 2.0 Pending Litigation and (ii) Non-Signing of 3.0 Litigation History in the physically submitted Bid by the authorised representative of the original writ petitioner. It is submitted that as such the Bid document was prepared by JICC and approved by JICA. It is submitted that in the present case when the Bids submitted by the respective bidder was evaluated by JICC as per the JICA'S International Guidelines, the same was approved by the Tender Committee of the appellant, which was finally concurred and approved by JICA. It is submitted that the decision to hold that the Bid was non-responsive was of JICC, which has been approved by the JICA. It is submitted that appellant under the contractual mechanism cannot in its discretion deviate from the evaluation done by JICC and any deviation unilaterally made by the Appellant/Government of India may not be acceptable/concurred by JICA. It is submitted that the same shall also be violative of "privilege participation principle" as implementing the High Court's order will enable the other bidders whose Bids have been rejected by the appellant on the same ground to participate in the tender. It is submitted that the High Court's evaluation of the other bidders will also render their bids responsive and therefore any such action will render the entire bidding un-competitive and shall have cascading effect on the other Packages.

3.2 Shri Mehta, learned Solicitor General has taken us to the relevant clauses of the Memorandum of Corporation or Understanding as entered between JICA and the President of India; JICA's Standard Bidding Guidelines and the Guidelines for procurement under Japanese ODA Loans. He has also taken us to the various clauses of the Bid documents and to satisfy the Court's conscience that the appellant acted just in accordance with the Memorandum of Understanding, Loan Agreement entered between JICA and Government of India and as per the relevant terms and

conditions of the Bid document. 3.3 It is submitted that in the present case, Technical Bid Evaluation was done by JICC (consultant appointed by JICA). It is submitted that there was a detailed deliberation / discussion by the Technical Consultant (TC) on Technical Bid evaluation. It is submitted that Stage 1 was Evaluation of Administrative Requirements and Stage 3 was Evaluation of Compliance with Technical Requirements. It is submitted that the JICC recommended that the Bids of the five bidders had material non-conformities and were not in compliance with the technical requirements of the Bidding Documents and so they were disqualified. It is submitted that the Bid submitted by the original writ petitioner was also found to be non-responsive/found to be had material non-conformities. It is submitted that by letter dated 10.04.2021, the appellant – NHSRCL sought the concurrence of JICA to Technical Bid Evaluation Report. It is submitted that vide communication dated 23.04.2021, JICA confirmed the Technical Bid Evaluation Report.

3.4 It is submitted that when JICA, JICC and the Technical Evaluation Committee took a conscious decision that the Bid submitted by the original writ petitioner was non-responsive and was not in conformity with the relevant clauses of the Bidding Document, and therefore, when the appellant acted upon the said recommendation/Technical Bid Evaluation Report and rejected the Bid submitted by original writ petitioner at Technical Stage, the High Court has materially erred in interfering with such a fair and conscious decision in exercise of powers under Article 226 of the Constitution of India.

3.5 Shri Tushar Mehta, learned Solicitor General appearing on behalf of the appellant has vehemently submitted that in the present case and with greatest respect, the High Court has not at all considered the distinction between Foreign Sovereign Funded Contracts and the contracts funded from the Consolidated Fund of India. 3.6 It is submitted that Foreign Sovereign Funded Contracts, like the present one, are sui generis specie of contracts and are completely different and distinct from Government Contracts/ Public Works Department Contracts / Public Private Partnership Contracts, which are either wholly or partially funded from public money, i.e., Consolidated Fund of India or of the State and implemented by a statutory/local authority of the State. It is submitted that in such foreign funded contracts, it is the investor, which normally is the friendly sovereign country (a developed nation, like in the present case Japan) which takes a decision to invest in a friendly State (a developing nation, like in the present case India) and finances and implements projects meant for development of the recipient developing nation. 3.7 It is submitted that these investments from developed nations are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what would be the conditions of the investments and on what terms the contractors would be chosen to implement the project, vests with the investor foreign developed nation. Thus, all crucial aspects of decision making and the terms and conditions on which such investment has to be made and how the contractors have to be chosen to implement the said project remains with the instrumentality/agency of the sovereign which has proposed to make investments in developing nation. It is submitted that so far as role of Indian authorities / local authorities is concerned, they theoretically act as an intermediary and are technically only given the role of performing 'first level scrutiny' that the investment made would be expended/contractors would be chosen as per the terms and conditions proposed by the investor State. It is submitted that in such a case, the local authority/instrumentality of the State acts as a facilitator and for all purposes the final decision-making authority regarding selection of the

contractors etc. remains with the entity of the foreign State through whom the investments are made. It is submitted that in the present case, the scrutiny of the Bids was not done by the NHSRCL. It was done by JICC which is an independent body authorised by JICA to evaluate the bids as per its terms and conditions and thereafter on the basis of recommendations given by JICC, the final decision to select a contractor is of JICA. It is, therefore, submitted that the discretion with the Indian authority - appellant - NHSRCL to vary any term is not at all permissible and even advisable.

3.8 It is submitted that the Hon'ble Gujarat High Court in its judgment and order in the case of CRRC Corporation Ltd. Vs. Metro-Link Express for Gandhinagar and Ahmedabad (MEGA) Company Ltd. in Special Civil Application No.12833 of 2017 has dealt with and considered in detail role of JICA and role of the implementing agency of the project in India and the scope of the judicial review of the Indian Courts while exercising the power under Article 226 of the Constitution of India. It is submitted that the decision of the Gujarat High Court in the case of CRRC Corporation Ltd. Vs. Metro-Link Express for Gandhinagar and Ahmedabad (MEGA) Company Ltd. (supra) has been confirmed by this Court. Heavy reliance is placed upon the decision of this Court in the case of M/s CRRC Corporation Ltd. Vs. Metro Link Express for Gandhinagar and Ahmedabad (MEGA) Company Ltd. passed in Special Leave Petition (Civil) Diary No.35385 of 2017.

3.9 Shri Mehta, learned Solicitor General has further vehemently submitted that in the facts and circumstances of the case, the High Court has materially erred in interfering with the tender process in exercise of powers under Article 226 of the Constitution of India. It is submitted that in the present case the High Court has exceeded in its jurisdiction in exercise of powers under Article 226 of the Constitution of India and has deviated the scope of judicial review in contractual matters. It is submitted that the High Court while exercising the powers under Article 226 of the Constitution of India and interfering with the administrative process with respect to the Foreign Sovereign Funded Contract/Project has not at all appreciated and/or considered the difference between the foreign funded contracts and the ordinary Public Works contracts funded from Public Exchequer.

3.10 It is submitted that considering the special peculiarity of such Foreign Sovereign Funded Development Contracts, which can be envisaged and exist only due to the availability of the investment and willingness of the foreign sovereign country to finance such infrastructural project, the said contract assumes the characteristics, which are more of private in nature rather than being a full-fledged Public Works Contracts/Government Contracts where the Government of India is the sole authority of funding and implementing the project and in which the element of public law and judicial review parameters are applicable in its full vigour. It is submitted that being in the nature of an investment by a friendly sovereign country on concession, the decision remains with the investor as to through whom the said investments are transformed into public infrastructural projects and as to on what terms and conditions the contractors are to be chosen who would transform their project into public infrastructural projects.

3.11 It is submitted that the terms of NIT proposed by the investor assumes a sacrosanct effect as any deviation from the same can perpetrate a detrimental effect on the funding of the infrastructural project. Such Contracts have ramification which are international in nature, far beyond the decision-making power of the local Government situated in India and therefore, the decision

making with regard to such contract is dependent upon larger consideration of international fiscal policy where a developed country decides to finance an infrastructural project for a developing country. It is submitted that considering the aforesaid factors, the scope of judicial review in these foreign funded contracts is far much less than the ordinary Government Funded Contracts, i.e., funded from the Consolidated Fund of India, whose scope of judicial review is otherwise held to be restricted and limited by this Court. Reliance is placed upon the decision of this Court in the case of Siemens Public Communication Networks Private Limited and Anr. Vs. Union of India and Ors., (2008) 16 SCC 215 @ paras 20-24. 3.12 It is further submitted that in such foreign funded contracts, there is no room of any deviation from essential conditions of tender proposed by the investor. Signing of the forms to the Bid in indelible ink, thus, formed an essential condition of the NIT. It is submitted that deviation from the essential conditions of NIT is not at all permissible in the contract of present nature and the doctrine of substantial compliance, which may be applicable in the case of domestic tender matters shall not be applicable at all with respect to the contract of present nature having international ramification and foreign funding. Reliance is placed upon the decision of this Court in the case of Poddar Steel Corporation Vs. Ganesh Engineering Works and Others, (1991) 3 SCC 273. It is submitted that when the final decision-making authority is under the jurisdictional control of a governmental body in India, the State may adopt a position wherein it allows tender participant to participate in case there is substantial compliance. However, the same may not be a position with contracts issued for implementing foreign funded infrastructural projects as the same would amount to changing the terms on which the investment is agreed to be made. It is submitted that in the present case as such, the appellant has complied with and/or followed the conditions as envisaged by the foreign funding party and there cannot be any deviation from the terms and conditions of the NIT by the appellant; as such which can be said to be a facilitating party and/or implementing agency only. It is submitted that in the present case, as one of the essential conditions of signing the forms in indelible ink has not been complied with, therefore, a conscious decision was taken by the investor – JICA and the consultant – JICC, which has been applied by the appellant.

3.13 It is submitted that in the impugned judgment and order the High Court has applied the doctrine of substantial compliance, equity and fair play. It is submitted that however the doctrine of substantial compliance shall not be applicable in commercial contracts. It is submitted that it would tantamount to violation of the essential conditions of the contract. It is submitted that when a condition which is specifically imposed by a foreign funding party for an infrastructural project, such condition being non-negotiable in nature and forms an integral part to the contract, the adherence of such condition has to be in totality as it is not permissible either for the executing authority in India to approve a Bid document despite there being a clear breach of a condition imposed by the foreign funding party. It is submitted that doctrine of substantial compliance, thus, cannot be negotiated with the foreign funding party; though in public works which are funded from Consolidated Fund of India/public money the same may be possible and/or may be permissible. It is submitted that the High Court has not properly appreciated the facts while allowing the doctrine of substantial compliance to creep in such foreign funded international projects which would result in seriously jeopardizing the willingness of the foreign State to finance an infrastructure project of this magnitude. It is submitted that as such the scope of judicial review on the parameters laid down for judicial review of contractual matters and projects funded solely from the Consolidated Fund of India where the decision-making authority is solely an Indian Governmental authority will not be

applicable in such cases. It is submitted that in cases like the present one, the terms offered by the foreign sovereign, on the basis of which it proceeds to finance an infrastructural project, becomes sacrosanct and cannot be deviated from and in such cases, the compliance has to be strict and not substantial. It is submitted that any insistence on substantial compliance may affect the willingness of the foreign sovereign to finance such a project and to share technical know-how regarding the same.

3.14 It is further submitted by Shri Mehta, learned Solicitor General that as per the settled preposition of law laid down by this Court, the scope of judicial review in contractual matters is extremely limited. It is submitted that only in a case where the process adopted or decision made by the authority is mala fide or intended to favour someone; or where the process adopted or decision made is arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law would have reached"; and in cases where the public interest is affected, the Courts will be justified in interfering such decision in exercise of powers under Article 226 of the Constitution of India. Reliance is placed upon the following decisions:-

Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited, AIR 2016 SC 4305; B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Ors., (2006) 11 SCC 548; Michigan Rubber (India) Limited Vs. State of Karnataka, (2012) 8 SCC 216; Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517; Tejas Constructions and Infrastructure (P) Ltd.

Vs. Municipal Council, Sendhwa, (2012) 6 SCC 464; Central Coalfields Limited & Anr. Vs. SLL-SML [A Joint Venture Consortium], (2016) 8 SCC 622; and Maa Binda Express Carrier & Anr. Vs. North Eastern Frontier Railway & Ors., (2014) 3 SCC 760.

3.15 It is further submitted that with the aforesaid limited scope of judicial interference/intervention in exercise of the powers under Article 226 of the Constitution of India, the decision taken in the present case to reject the Bid of original writ petitioner at Technical Stage on the ground that the same is non-responsive is to be considered. It is submitted that considering the relevant clauses of the ITB/Bid document, it is ultimately for the investor and/or the appropriate authority to consider whether the Bid complies with the terms and conditions of the Bid document and/or whether there is a substantial compliance and/or whether there is any material deviation or not. Once there is an application of mind on the aforesaid aspects and the appropriate authority/investor comes to the conclusion that there is a material deviation in the Bid submitted by the bidder, unless there are allegations of mala fide and the same are established and proved, the interference of the Court in exercise of powers under Article 226 of the Constitution of India with respect to such a conscious decision is not warranted. It is submitted that it is ultimately for the Employer to have a conscious call or decision whether the Bid is technically responsive or there is a material deviation or not. 3.16 It is further submitted by Shri Mehta, learned Solicitor General that observations made by the High Court that applying Clauses ITB 28.1 and 42.5 it affects the fairness in the tender process and it affects the rights of the bidders to challenge the decision rejecting their bids, the High Court has not at all appreciated and/or considered the object and purpose of the said clauses. It is submitted that

the object and purpose of the said clauses cannot be said to be taking away the rights of the bidders to challenge the decision rejecting its bids. It is submitted that it only differs the challenge. It is submitted that the main object and purpose of the aforesaid clauses is that there is no interference at the stage where the tender process is going on. It is submitted that if at every stage the bidder approaches the Court and/or makes grievance, it may further delay the completion of the tender process and which may ultimately result in delay in execution of the Mega project / public project. It is submitted that after the entire tender process is completed and the work order is issued, on the request made, the reasons for rejecting the Bid can be supplied and thereafter it will be open for the bidder to take recourse to law at that stage and even after the contract is awarded; the bidder is not rendered remediless. It is, therefore, submitted that the observations made by the High Court with respect to the aforesaid two clauses are absolutely unwarranted and beyond the scope of judicial review in exercise of powers under Article 226 of the Constitution of India.

3.17 It is submitted that the findings recorded by the High Court in the impugned judgment and order that ITB Clauses 28.1 and 42.5 are patently illegal may lead to altering the tender conditions as these are as per JICA SBD and can be altered only with JICA's concurrence. It is submitted that seeking alterations in JICA ITB will tantamount to re- negotiations between the tendering authorities and JICA. This will not only delay the BID-Package No.C8 but also the other 17 Bid Packages which are yet to be awarded for this project, valued at approximately Rs.50,000 crores.

3.18 It is submitted that the confidentiality clauses are a part of JICA guidelines and the appellant as well as the participating bidders are bound by the same. It is submitted that as a consequence of the findings of the High Court, the confidentiality clauses will have to be removed from all the on-going and future tenders. JICA being an international funding agency may or may not agree to altering of the tendering rules and this may take substantial period of time for negotiations, which eventually may lead to a deadlock in all the JICA funded projects. It is submitted that JICA SBD shall apply to all JICA funded projects in India and, therefore, this change will have to be implemented across all the projects including but not limited to the Bullet Train Project. It is submitted that between 2016-2021, JICA has approved 49 loan agreements amounting to JPY 1975 Billion (INR 132,300 crores) for different projects in India. It is submitted that therefore the impugned judgment and order passed by the High Court would have a far-reaching cascading effect, which has not been considered by the High Court at all.

3.19 It is submitted that the Bullet Train Project is a highly prestigious project and it is imperative and in the interest of public welfare that the contract ought to be concluded at the earliest. It is, therefore, submitted that if every unsuccessful bidder is granted liberty to approach a court of law as per their whims and fancies seeking remedy against its individual grievances, the whole intent and approach behind the project will get throttled. It is submitted that bearing in mind that, clause Nos.28.1 and 42.5 are enacted which are as per JICA ITB.

3.20 It is further submitted that in the present case as such the terms of the tender has been applied uniformly to all the bidders and there is no discrimination at all. It is submitted that the entire tender process has been conducted absolutely in fair and transparent manner. It is submitted that as such there are no specific allegations of either mala fides or favouritism and, therefore, the tender



process is not vitiated. 3.21 It is submitted that ITB 29.1 in order to enable examination, evaluation and comparison of the Bids, permits the Appellant to ask any Bidder for a clarification of its Bid, provided the same does not result in a change in the substance of the Bid. It is submitted that the submission on behalf of the original writ petitioner that the discretion of seeking clarifications from other Bidders except the original writ petitioner is discriminatory and arbitrary is wrong and misplaced. It is submitted that the appellant has treated all the Bidders at equal footing. It is submitted that the High Court has wrongly observed and held that the clarification sought by the appellant only from other bidders is discriminatory. It is submitted that procedure followed by the appellant in disqualifying the bidder and nature of clarifications sought from other bidders were strictly as per the protocols laid down by JICA. It is submitted that evaluation of the bids is done in various stages. In the present case, the original writ petitioner was disqualified at stage 1 and only the bidders who pass Stage 1 were to proceed to next stage and given their disqualification at Stage 1, no clarifications were sought from original writ petitioner. 3.22 It is submitted that on the issue of clarifications, the High Court has wrongly concluded that seeking clarifications from other bidders was discriminatory. It is submitted that other bidders from whom clarifications were sought had cleared stage 1 and pursuant to that the clarifications were sought from them. It is submitted that the submission on behalf of the respondent - original writ petitioner that the appellant would have granted the liberty to cure the defect cannot be sustained. It is submitted that at Stage 1.1 (b) (iii) read with Clause A.4 (b), the appellant was not obliged to provide opportunity to Montecarlo-original writ petitioner for curing the defects of non-signing of the forms and JICA was justified in holding the said omission as material and holding the Bid as non-compliant/non-responsive. It is submitted that as per clause A.4

(b), all the forms must be reviewed exactly as submitted and errors or omissions may count against the bidder.

3.23 It is submitted that the High Court has failed to appreciate that the Technical Bids of four bidders – Bidder Nos. 1, 3, 7 and 9 were “Substantially Responsive” as they adhered to the requirements laid down in Stage 1 evaluation. It is submitted that therefore an opportunity was accorded to them for clarification. It is submitted that clarifications to re-confirm compliance to the Bidding Documents were sought by the appellant on the recommendations of JICC in terms of ITB clause 29.1 for rectification of the non-conformities. The said decision was affirmed by the Tender Committee of the appellant in its meeting dated 09.04.2021. Therefore, clarifications were sought only from those bidders whose bids were found to be ‘Substantially Responsive’ and were in conformity with the evaluation process laid down in Stages 1 &

2. It is submitted that the High Court has erred in concluding that such opportunity was discriminatory.

3.24 It is further submitted by learned Solicitor General that if the impugned judgment and order passed by the High Court in these circumstances is interfered by this Court, the same would have a cascading effect. It will not only affect the fundings to the National projects by the foreign country/foreign agency, it would further delay the MEGA project like Bullet Train Project. It is submitted that pursuant to the impugned judgment and order, the Package C8 has been delayed

which has a cascading effect on implementation of other packages and thus eventually delaying the entire project. It is submitted that halting of work of C8 Package which concerns the construction of depot at Sabarmati will have a cascading effect on another linked package, package D2 which pertains to the design, construction, installation, testing and commissioning of Sabarmati Depot consisting of workshop, inspection shed, maintenance facilities and associated works. It is submitted that the Bullet Train Project is of national importance and the appellant/Government /Union Government's ultimate object is catering to aspirations of the people of India. It is submitted that the total cost of the Bullet Train Project is Rs.1,08,000 crores and the substantial amount with the concessional rate of interest is to be funded by JICA and, therefore, the project is a foreign funded project due to the relations between the developed country and developing country. It is submitted that therefore any delay in such a project due to frivolous litigation and baseless challenges to the tendering clauses may render the project commercially and transactionally unviable as it may affect the willingness of the investor/financing State to go ahead with the project.

3.25 Making above submissions and relying upon above decisions, it is prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the High Court.

4. Present appeal is vehemently opposed by Shri Anshin H. Desai, learned Senior Advocate appearing on behalf of the respondent. It is vehemently submitted by Shri Desai, learned Senior Advocate appearing on behalf of the respondent/original writ petitioner that in the facts and circumstances of the case, the High Court has not committed any error in allowing the writ petition directing the appellant herein to proceed in accordance with law qua the tender process examining the Bid of the original writ petitioner.

4.1 It is submitted by Shri Desai, learned Senior Advocate appearing on behalf of the respondent that the main contention on behalf of the appellant is that the project being funded by JICA and the same being a foreign funded project, the decisions taken in this regard must not be a subject matter of judicial review. So far as the said submission is concerned, it is submitted that though the project is funded by JICA and the evaluation assistance is rendered by JICC, which upon being approved by Ministry of Railways is subject to review of JICA, still the project involves outlay of a substantial amount of the public exchequer of this country. It is submitted that 81% of the total project cost is funded by JICA loan, which needs to be repaid from the public exchequer – capital along with interest. It is submitted that the amount paid by JICA for the project in question is not an aid but it is a loan. It is submitted that even the balance 19% of the total project cost needs to be arranged for by the Ministry of Railways upfront from the public exchequer. It is submitted that therefore the decision with respect to the tender process is always a subject matter of judicial review.

4.2 It is further submitted on behalf of the respondent that in the case of CRRC Corporation Limited Vs. Metro Link Express for Gandhinagar and Ahmedabad (MEGA) Company Limited, (2017) 8 SCC 282, in relation to a JICA funded project, while reversing the decision of the Hon'ble Gujarat High Court, which rejected the petition, has held the evaluation done therein as erroneous and has directed the concerned authority to proceed with the further evaluation of the Bid, despite existence of Clause 42.5. It is submitted that in the aforesaid case, the facts and circumstances were similar to that in the present case.

4.3 It is further submitted that even if the sole contention of the appellant is accepted the same cannot in any manner be deemed to be providing the appellant with a free hand to act in an arbitrary and discriminatory manner. It is further submitted by Shri Desai, learned Senior Advocate appearing on behalf of the respondent that in the present case the respondent is not asking for the tender to be awarded to it, the only prayer is that its Bid, which is wrongly rejected at Stage I (Evaluation of Administrative Requirements) by adopting a discriminatory approach must be evaluated further. It is submitted that as such the respondent's Bid is almost Rs.32 crores lesser than that of L1. It is further submitted on behalf of the respondent that the terms of the tender must be applied uniformly to all Bidders and there can be no discrimination even in a JICA funded/loaned project. Shri Desai, learned Senior Advocate appearing on behalf of the respondent has taken us to the ITB Clauses 1.1, 22.1, 22.2, 29.1, 33.2, 34 and 1.3, the relevant clauses of the tender. It is submitted that the evaluation sequence comprises of five stages of evaluation as under:-

i. Stage 1 – Evaluation of Administrative Requirements ii. Stage 2 – Evaluation of Compliance and Responsiveness iii. Stage 3 – Evaluation of Compliance with Qualification Requirements iv. Stage 4 – Technical Evaluation v. Stage 5 – Evaluation of Price Bid 4.4 It is submitted that in the present case, the respondent submitted Form CON 2.0 with the requisite details filled in. It is submitted that the Form was duly stamped, however, inadvertently, the same was not signed. It is submitted that the respondent also submitted Form CON 3.0 with the requisite details filled in. The said form was also duly stamped, however, inadvertently, the same was also not signed. 4.5 It is submitted that the respondent Bidder had also filed Form ACK with specific declaration that all information provided in the Bid by the respondent is true, correct and accurate as per Para A(i). It is submitted that the said Form is also duly signed and stamped. It is submitted that as rightly observed by the High Court, the evaluation process and holding the respondent non-compliance at Stage 1 is discriminatory. 4.6 It is submitted that JICC Evaluation Report, which was confirmed by the Ministry of Railways and acted upon, in Para 2.1.1, there is a specific observation pursuant to a Preliminary Examination that there are no material non-conformities as regards the respondent (5/9) and others, except 2 Bidders. It is submitted that in Para 2.1.3, it is specifically observed that there were a number of non-conformities in the Bids submitted by Bidders 1/9, 3/9, 7/9 and 9/9 creating inconsistencies with the stated position in their Letter of Technical Bid which is an essential document as per ITB 31.2(a).

4.7 It is submitted that clarifications were sought from the above Bidders and they were given opportunity to rectify the non-conformities in accordance with ITB 29.1 so as to re-confirm compliance to the Bidding Document. However, so far as the respondent is concerned, no such opportunity and/or clarification has been sought for contrary to ITB 33.2 which defines Material Deviation and arbitrarily, the respondent's non-conformity has been held to be as material non-conformities. It is submitted therefore that the action of the appellant is rightly held to be discriminatory.

4.8 It is submitted by Shri Desai, learned Senior Advocate appearing on behalf of the respondent that in the present case, the sole reason provided for rejection is that “without signature, it is unknown whether it has been submitted with the Bidder’s knowledge and approval”. No other reason has been ascribed for the rejection. It is submitted that even the said reasoning is provided to the respondent after the respondent approached the Hon’ble High Court. It is submitted that all the appellant had to do was to call upon the respondent to provide a signed copy, or to seek a clarification that the respondent confirms the Form CON 2.0 and CON 3.0. It is submitted that the respondent is not resiling from the declaration made in the said Forms and stands by it even today and the stage to evaluate whether the declaration made by the respondent is correct or not has not come and still the Bid is rejected on the sole ground that it is not signed. It is further submitted that surprisingly, in relation to ‘Material Deviations’ and non-conformities of far more serious nature, the appellant has permitted select Bidders to rectify and/or clarify.

4.9 It is submitted that so far as the Bidder No.9/9 (L2) is concerned, he had made an identical error whereby the said Bidder failed to put its signature and stamp on the Site Organization Chart in accordance with ITB 22.2. In the case of the said Bidder, the appellant exercised discretion and called upon the said Bidder to rectify the same.

4.10 It is submitted that even with respect to Bidder No.7/9 (L1), though it failed to provide details qua the Site Organization Chart, Method Statement qua Earthwork and other details, the appellant exercised discretion in terms of ITB 29.1 and permitted the Bidder to rectify all defects. It is submitted that the said Bidder also did not submit Bid Security Form in accordance with ITB 12.1. It is submitted that despite noting that the submission was in contravention of ITB 12.1, which does not permit alteration to the Bidding Form, the defect was waived as being non-material.

4.11 It is submitted that so far as Bidder 3/9 is concerned, though it failed to submit details of Key Personnel and also failed to give an undertaking as required in Form ACK, the appellant has given the opportunity to rectify the defects. It is submitted that the aforesaid errors/non-conformities are far more serious than the inadvertent error of the respondent. It is submitted that though the aforesaid Bidders were given the opportunity to rectify the defects, no such opportunity was given to the respondent.

4.12 It is submitted that so far as the respondent is concerned, not signing of Forms CON 2.0 and Con 3.0 is an inadvertent error, which can be said to be a non-material, non-conform in terms of ITB 33.2 read with ITB 34, which ought to have been waived as has been done in the case of other Bidders with more serious non-conformities.

4.13 It is further submitted that even otherwise as held by this Court in the case of Poddar Steel Corporation Vs. Ganesh Engineering Works and Others (supra) and B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Ors., (2006) 11 SCC 548, non-material non-

conformity can be waived even if there is no clause permitting such waiver. It is submitted that even if ITB 28.1 and ITB 42.5 provide for no reasons to be given, the respondent where it perceives foul play in the tendering process, can always approach the Court. It is submitted that in the present case, the High Court having examined the facts and the record, has categorically observed that the appellant has indulged in 'changing the goal posts' and 'giving a long rope to the other Bidders', while adopting 'an allergic attitude towards the respondent'. It is submitted that before the High Court, the respondent also specifically alleged 'mala fide' on the part of the appellant.

4.14 Now, so far as the submission on behalf of the appellant that there would be a cascading effect of the impugned order is concerned, it is submitted that the aforesaid is not sustainable, in view of the fact that after the impugned order, till date the appellant has awarded or is in the process of awarding contracts for other Packages cumulating to about Rs. 5,000 crores already.

4.15 Now so far as the documents produced by the appellant before this Court by way of I.A. No.128406 of 2021 and I.A. No.132078 of 2021 are concerned, it is submitted that as they do not form part of the record before the High Court and therefore, the same may not be considered by this Hon'ble Court. It is submitted that nothing has been stated why the same could not be placed before the Hon'ble High Court. 4.16 Making above submissions, it is prayed to dismiss the present appeal and direct the appellant to proceed and further evaluate the Bid submitted by the respondent in accordance with the terms of the Bid Document.

5. Heard learned counsel for the respective parties at length.

6. By the impugned judgment and order, the High Court has allowed the writ petition preferred by the respondent herein – original writ petitioner and has quashed the communications dated 27.04.2021 and 28.04.2021 and the notification dated 28.04.2021 by which the technical Bid submitted by the respondents – original writ petitioners was rejected on the ground that the same is non-responsive and consequently the High Court has directed to proceed in accordance with law qua the tender process by further examining the Bid of the respondent herein – original writ petitioner.

6.1 Therefore, the short question which is posed for the consideration of this Court is whether in the facts and circumstances of the case and with respect to such a foreign funded project, the High Court is justified in interfering with the tender process in absence of any specific allegations of mala fides and/or favouritism?

6.2 While considering the aforesaid issue, the nature of the project and few relevant chronological dates and events are required to be noted, referred to and considered.

6.3 The present matter pertains to the tender floated for works in Package C8, which is a part of various other Packages being finalized for the implementation of the Mumbai-Ahmedabad High Speed Rail popularly known as Bullet Train Project. It cannot be disputed that the Bullet Train Project is very important and National project. The Bullet Train Project is a fully foreign funded project, which was envisaged when the Japanese and Indian Governments entered into a

Memorandum of Understanding, pursuant to which it was agreed that the said project would be fully funded by a Concessional Official Development Assistance (ODA) loan of Rs.1 lakh crores by the Japan International Cooperation Agency. It appears that before the loan agreement was entered into, a Memorandum of Understanding / Agreement was entered into between the two Prime Ministers - Japan and the India, which provided how the project would be financed and operated. From the Memorandum of Understanding, it appears that the loan was on diplomatic consideration and was based on Republic of India's position in commodity of nations due to which a huge loan was granted to India with provisions of:- (i) technology transfer (which is unavailable in India);

(ii) Indian Human resource training/development by Japan International Cooperation Agency and its consultant for operation of the said projects; and (iii) provision to 'Make in India' the bullet train which would be operating under the said project. That thereafter a discussion was held between the JICA and the Ministry of Railways, Government of India on 26.09.2016 and the discussion was recorded on various aspects including the project objectives, selection of the consultant(s), implementation schedule, Products (Draft and final documents for adoption by the Ministry of Railways), which included:- (1) Technical specifications and standards, as required for the project (excluding those prepared under the Follow-up Study); (2) Basic Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project; (3) Standard Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project; (4) Detailed Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project; (5) Bidding Documents, including Prequalification Documents (hereinafter referred to as "Bidding Documents"); (6) General Arrangements Drawings (hereinafter referred to as "GAD"); (7) Cost Estimate of the Project; (8) Construction Standards; and (9) Updated Resettlement Action Pion, Environment Impact Assessment and Environmental Management Plan which were prepared under the Joint F/S. 6.4 A detailed discussion took place with respect to the role of JICA, Consultant (JICC) and the Ministry of Railways. The relevant clauses of the record of discussion for General Consultancy (excluding supervision) of the Bullet Train Project between JICA and Ministry of Railways are as under:-

"1. Project Objectives With the Final Alignment Design (FAD) being prepared as part of the Follow-up Study, the objectives of the General Consultancy (hereinafter referred to as "the Study") are to prepare technical specification and standards (excluding those prepared under the Follow-up study), Basic Design Documents, Standard Design Documents, Detailed Design Documents (along with Design Basis Reports (set of conditions and requirements taken into account in designing) necessary for bidding or implementation of the Project, Bidding Documents, Engineering Cost Estimation and Construction Standard for the Project which are to be adopted by the Ministry of Railways (hereinafter referred to as "the MOR"), to prepare General Arrangement Drawings (hereinafter referred to as "GAD"), Environment and Social Impact Assessment and to support the MOR for procurement of contractors. It is confirmed by the MOR that the drawings and documents to be formulated by the Study will be utilized for procurement of the Project, only after they are adopted and endorsed by the MOR.

3. Selection of the Consultant(s) A Japanese consultant firm(s) will be selected and engaged by JICA for the implementation of the Study (hereinafter referred to as “the JICA Consultant (s)”) 6.2 Products (Draft and final documents for adoption by the MoR) (1) Technical specifications and standards, as required for the project (excluding those prepared under the Follow-up Study);

(2) Basic Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(3) Standard Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(4) Detailed Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(5) Bidding Documents, including Prequalification Documents (hereinafter referred to as “Bidding Documents”);

(6) General Arrangements Drawings (hereinafter referred to as “GAD”);

(7) Cost Estimate of the Project;

(8) Construction Standards; and (9) Updated Resettlement Action Plan, Environment Impact Assessment and Environmental Management Plan which were prepared under the Joint F/S.

7. Implementing Arrangements 7.1 Precondition for the Commencement of the Study The MOR will complete the items described in Annex 2 at its own cost and expense, and submit them to JICA, in a satisfactory manner, prior to the commencement of the Study, Neither JICA nor JICA Consultant(s) will have any obligation to commence the Study unless such preconditions are satisfied.

7.3 Implementation Arrangement The MOR and the JICA Consultant(s) will be responsible in the following manner for completing the Study in order to ensure a smooth procurement procedure of the Project.

(1) The JICA Consultant(s) will prepare the Draft Design Documents and technical specification and standards as required under this study and submit them to the MOR.

(2) The MOR will review the Draft Design Documents as well as technical specification and standards. It will give comments, if any, within 15 days of submission of the Draft Design Documents by the JICA Consultant(s). The JICA Consultant(s) will consider these comments and incorporate them appropriately, wherever the JICA Consultant(s) consider it necessary. If no comments are submitted by the MOR by the said deadline, it will be deemed that the MOR has no comments to offer.

(3) The JICA Consultant(s) will then forward these documents and technical specification and standards along with the comments from the MOR to the committee for their review, as mentioned in paragraph 8.2.

(4) The MOR will adopt the outcomes of the study based on the recommendations of the committee within 15 days of receiving the final documents duly recommended. If the intimation for adoption by the MOR is not issued by the said deadline, the documents/outcomes will be deemed to be adopted by the MOR. JICA will notify the MOR in a written form after such deemed adoption.

7.4 The JICA Consultant(s) The JICA Consultant(s) will work on the comments and requests of the MOR with all due technical diligence to the extent of the TOR stipulated in this Record of Discussion between the MOR and JICA.

7.5 Consultation JICA, the JICA Consultant(s) and the MOR will consult each other in good faith in respect of any matter that may arise from or in connection with the Study, including any disputes among from this document. When a dispute that cannot be solved through an amicable consultation among the three parties arises, both sides will consult their relevant government authorities to solve such dispute.

8. Products of the Study 8.1 Services of the JICA Consultant(s) The JICA Consultant(s) will provide the following services:-

(1) Customize and provide all technical specifications and standards required for design and operation of High Speed Rail systems, along with their technical commentary (excluding those prepared under Follow- up study) (2) Preparation of Basic Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(3) Preparation of Standard Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(4) Preparation of Detailed Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;

(5) Preparation of Bidding Documents;

(6) Preparation of Engineering Cost Estimation; (7) Preparation of Construction Standard;

(8) Support to the MOR for procurement of contractors;

(9) preparation of GAD; and

(10) Review and update of the Resettlement Action Plan, Environment Impact Assessment and Environmental management Plan, which were prepared under the Joint F/S. It is the MOR's responsibility to provide necessary, accurate and appropriate data/information to JICA and the JICA Consultant(s), so as to finalize the documents listed at (2) to (4), (hereinafter collectively



referred to as "the Draft Design Documents") and (1), (5) to (7) and (9) to (10) so that they can be utilized only for the procurement (bidding) process and construction work of the Project.

8.2 Adoption by the MOR Upon request from the relevant government authorities of Japan, JICA will set up a committee composed of experts of Japanese high speed railway (hereinafter referred to as "the Committee") to review the organization structure, the process and the GC's work for the Draft Design Documents, technical specification and standards which are developed through the Fellow-up Study and the Study. The Committee offer its review may require the JICA Consultant(s) to revise the documents. The JICA Consultant(s) will revise the documents as advised by the committee and resubmit them for the Committee's review. The Committee, when satisfied, will issue a letter to the MOR recommending the Draft Design Documents for adoption by the MOR.

The MOR will conduct technical inspection to review the technical aspects of the Final Design Documents and Construction Standard and adopt the Final Design Documents. the Bidding Documents, the Engineering Cost Estimation, and the Construction Standard in a written form, as the executing agency of the Project, for use of these documents on the Project, at its own expense.

The MOR acknowledges and confirms that the JICA and the Committee, or the Committee members will not bear any liability and responsibility in connection with their review of the Draft Design Documents and technical specification and standards. The MOR will indemnify and hold harmless JICA, the Committee and the Committee members against any claim from any third parties that may arise from or in connection with such review.” 6.5 As per Annexure I to the said Record of Discussion, the JICA consultant was to prepare GAD on all aspects mentioned in Clause 2, which included preparation of Bidding Documents. Clause 2.8 and Clause 3, which are relevant for our purpose are as under:-

“2.8 Preparation of Bidding Documents The JICA Consultant(s) will prepare the Draft Bidding Documents for each contract package in accordance with the latest version of Standard Bidding Documents under Japanese ODA Loans together with all relevant specifications, drawings and other documents, which are consisting of the following documents:-

- a. Instruction to Bidders;
- b. Bid Form;
- c. General Conditions of Contract;
- d. Particular Conditions of Contract;
- e. General Specifications;
- f. Technical Specifications;

g. Bill of Quantities based on the design drawings for detailed design packages and price schedule for design and built packages;

h. Design Drawing;

i. Contract Form;

j. Bid Security Form;

k. Performance Security Form: and I. Employer's Requirement.

### 3) Tender Assistance

3)-1 Assistance in Pre-Qualification (P/Q) The JICA Consultant(s) will:

a. define technical and financial requirements, capacity and/or experience for P/Q criteria taking into consideration technical features of the Project and the capabilities of industry in both countries; b. prepare draft P/Q documents in accordance with the latest version of Standard Prequalification Documents under Japanese ODA Loans, c. assist the MOR in P/Q announcement, addendum/corrigendum, and clarifications to the applicants' queries, d. assist the MOR in evaluating P/Q applicants in accordance with the criteria set forth in PQ documents; and e. prepare a draft P/Q evaluation report for approval by the P/Q evaluation committee of the MOR.

3)-2 Assistance in the Bidding Procedure The JICA Consultant(s) will:-

a. assist the MOR in issuing bid invitation, conducting pre-

bid meetings, issuing addendum/corrigendum, and clarifications to bidders' queries;

b. assist the MOR in evaluating bids in accordance with the criteria set forth in the bidding documents;

c. prepare a draft bid evaluation report for approval by the bid evaluation committee of the MOR;

d. assist the MOR in contract negotiation by preparing agenda and facilitating negotiations. including preparation of minutes of negotiation meetings; and e. prepare a draft contract agreement.” 6.6 That the Japan International Consultants Consortium (JICC) was appointed by JICA. That thereafter a loan agreement No.ID-P277 came to be entered into between JICA and the President of India dated 28.09.2018 under which the JICA agreed to lend the Republic of India approximately Rs.1 Lakh Crores on the terms and conditions mentioned in the loan agreement. Article 1 provided for loan amount; Article II provided for repayment, interest and

Front-End Fee; Article III provided for Particular Covenants, which included, Section 1 – General Terms and Conditions, Section 2 – Procurement Procedure and Section 3 – Disbursement Procedure. Thereafter the Bidding Documents were prepared based on JICA's Standard Bidding Documents as well as JICA's procurement guidelines, which was an integral part of the loan agreement. The Bidding Documents were prepared by the JICC – consultant approved/weighed by the JICA. From the aforesaid, it appears that the entire tender process was to be carried out by the Consultant – JICC, approved by JICA and the Ministry of Railways can be said to be only an implementing agency.

6.7 That thereafter the tenders came to be invited taking into consideration the Record of Discussion for General Consultancy of the Project and Loan Agreement and JICA's Standard Bidding Guidelines and Guidelines for procurement under the Japanese ODA Loans. The Bidding Documents were prepared by the JICC (consultant) and approved by JICA. That evaluation of the Technical Bids was carried out by JICC (consultant), which was appointed by JICA. At this stage, it is required to be noted that the JICC was appointed in terms of the specific understanding between the Borrower (Republic of India) and JICA with the specific mandate to support the Ministry of Railways for preparation of Bidding Documents including Prequalification Documents and procurement of contractors for the construction of the Project. It is required to be noted that the Bidding Documents were prepared as per JICA's International Guidelines and as per the terms and conditions of the Loan Agreement as observed hereinabove.

6.8 That Nine Bidders including the respondent herein – original writ petitioner submitted their Bids. That Technical Bid of Nine Bidders was evaluated by JICC as per JICA's International Guidelines. The evaluation of the Technical Bids was carried out as per Evaluation and Qualification Criteria in four stages namely, (i) - Stage 1 – Evaluation of Administrative Requirements; (ii) Stage 2 – Evaluation of Compliance and Responsiveness; (iii) Stage 3 – Evaluation of Compliance with Qualification Requirements; and (iv) Stage 4 – Technical Evaluation.

6.9 It appears that during the course of technical evaluation, clarification was sought from four Bidders (other than the respondent herein - original writ petitioner, who was Bidder No.5/9). It was found that respondent herein – original writ petitioner had material deviation in its Bid and therefore it was disqualified at Stage 1. The Bid submitted by other Bidders, i.e., 2/9, 4/9, 6/9 and 8/9, which also had material deviation, their respective Bids were not further evaluated. A conscious decision was taken by the consultant – JICC holding that the Bid submitted by the original writ petitioner was non-responsive and was suffering from material deviation. By communication dated 23.03.2021, accepting the report, which was prepared as per the Evaluation and Qualification Criteria, a conscious decision was taken by the JICC (Consultant) that five Bidders namely Bidder Nos. 2/9, 4/9, 5/9, 6/9 and 8/9 be disqualified. Thereafter, the JICC took a conscious decision accepting the Draft Final

Technical Bid Evaluation Report and it was observed that JICC has determined that the Technical Bids of Bidder Nos. 1/9, 3/9, 7/9 and 9/9 are substantially responsive. That thereafter JICA concurred with the decision of the JICC holding that the Technical Bids of the above four Bidders are substantially responsive and compliant to the Technical Requirements of the Bidding Documents.

That thereafter the JICC recommended the NHSRCL, the opening of the Price Bid of the aforesaid four Bidders after JICA's concurrence of the Final Technical Bid Evaluation Report, which as observed hereinabove, the JICA concurred.

6.10 From the aforesaid, it appears that a conscious decision has been taken by the JICC (consultant) approved/concurred by the JICA on the Bid submitted by the original writ petitioner as non-responsive and non-compliant to the technical requirements of the Bidding Documents. The decision of the JICC and JICA has been followed by the appellant herein – Corporation, which otherwise, they were bound to as per the terms and conditions of the loan agreement as well as the general terms and conditions referred to hereinabove.

6.11 From the aforesaid, it can be seen that the decision to hold that the Bid was not responsive was of JICC. Under the contractual mechanism, the appellant had no authority to deviate from the evaluation done by JICC. Any deviation by the appellant or Government of India may not be acceptable by JICA, who has agreed to fund a huge sum of approximately Rs. 1 lakh crores for the Bullet Train Project, which was funded on the terms and conditions agreed between the JICA and the Republic of India / Hon'ble the President of India. It is ultimately for the JICC/JICA to take a decision whether the Bid submitted by a particular Bidder is responsive or not and/or compliant or not to the technical requirements of the Bidding Documents. From the impugned judgment and order passed by the High Court, it appears that what is weighed by the High Court is that some of the Bidders were called for negotiation and the original writ petitioner was not called for the negotiation and therefore the High Court has held that the action of the appellant is discriminatory and violative of Article 14 of the Constitution of India. However, the High Court has not appreciated that it was the decision of the JICC concurred by the JICA that the Bid submitted by the original writ petitioner was non-responsive and non-compliant to the technical requirements of the Bidding Documents. It appears that the JICC thought it fit to call clarification from some of the Bidders at the initial stage, however, it was found that the Bid submitted by the respondent – original writ petitioner was suffering from material deviation, the JICC thought it fit not to call for any explanation and/or clarification from the original writ petitioner and the Bid submitted by the respondent – original writ petitioner was rejected at the first stage itself, i.e., at the stage of Technical Evaluation.

6.12 At the cost of repetition, it is observed that the appellant herein acted as per the decision of the JICC concurred by JICA. As per the contractual obligation and the terms and conditions of the loan agreement as well as the Guidelines for procurement under the Japanese ODA loans and the Memorandum of Understanding and the terms and conditions on which the JICA agreed to fund a huge sum of approximately Rs.1 lakh crores, the JICC and JICA can be said to be the final authority and no contrary decision to the decision of the JICC/JICA could have been taken by the appellant,

more particularly, with respect to the Bidding Process etc. It cannot be disputed that being the funding agency, who has agreed to fund such a huge amount, role of the JICA is very important and the JICA would always have an upper hand and the say in the entire Project. From the material on record, we are satisfied that the Bidding Procedure adopted is transparent, fair and does not suffer from any arbitrariness. It is required to be noted that as such there are no allegations of mala fides and/or favouritism either against the appellant or against JICC and/or JICA.

7. In light of the above, it is required to be considered whether in the facts and circumstances of the case, the High Court is justified in setting aside the decision of the appellant / JICC / JICA in rejecting the Bid submitted by the respondent – original writ petitioner on the ground that it is non-responsive / non-compliant to the technical requirements of the Bidding Documents.

7.1 While considering the aforesaid issue, few decisions of this Court are required to be referred to and considered coupled with the fact that Bullet Train Project is a high cost and MEGA Government Project and is funded by a foreign country and which is one of the biggest National Project. It is to be noted that foreign sovereign funded contracts, like the present one, are completely different and distinct from the Government Contracts/ Public Works Department Contracts / Public Private Partnership Contracts, which are either wholly or partially funded from public money, i.e., Consolidated Fund of India or of the State and implemented by a statutory/local authority of the State. It cannot be disputed that in the present case, Japan being friendly sovereign country – a developed nation has agreed to fund a huge amount for a National Project in favour of another friendly State – developing nation – in the present case, the Republic of India. Such a huge sum/amount is funded by the developed nation to implement the Project meant for development of the developing nation – the Republic of India. The contracts are entered into and the huge sum is funded on the basis of non-negotiated terms and conditions and therefore, the foreign developed nation, who has agreed to invest/fund such a huge amount is always justified in insisting for their own terms and conditions on which such a huge amount is funded.

7.2 At this stage, a decision of the Gujarat High Court, which has been confirmed by this Court in the case of CRRC Corporation Ltd. Vs. Metro-Link Express for Gandhinagar and Ahmedabad (MEGA) Company Ltd. in Special Civil Application No.12833 of 2017 is required to be referred to. In that case the Metro Rail Project was financed by the JICA. One GEC was appointed as consultant. Bid submitted by one of the Bidders was rejected on the ground that the same was non-responsive. The decision was taken by the Metro Rail Corporation after consulting JICA. Rejection of the Bid at Technical Stage was the subject matter of writ petition before the High Court. One of the submissions made on behalf of the Bidder was that the JICA ought not to have been consulted and that decision could not have been taken on the basis of the opinion of the JICA. While rejecting the submission on behalf of the original writ petitioner that JICA ought not to have been consulted, it was observed that when the entire project is being financed by the JICA, and when JICA is going to fund the entire project, the cost of which is Rs. 10,773 Crores, it is expected of the JICA that the whole process of awarding tender has to be done and is being done, after obtaining JICA's concurrence at all stages. It was held that there is nothing wrong in involving JICA at every stage of tender process and in obtaining JICA's concurrence on it. In the present case also, no wrong has been committed by the appellant corporation in accepting and/or taking decision to reject the

original writ petitioner's Bid at Technical Stage on the basis of the decision of the JICC approved/concurred by JICA.

7.3 It is required to be noted that as per the tender documents, all the Bidders were required to adhere to the requirements as per the terms and conditions mentioned in the tender document. There cannot be any deviation by any Bidder. The terms and conditions of the tender documents were settled by the JICA as per JICA's International Guidelines, which are required to be followed by all Bidders including the original writ petitioner. Therefore, when the terms and conditions of the tender document were settled by the JICA, it is ultimately for the JICC/JICA to take a decision whether a Bid submitted by a particular Bidder is non-responsive and/or non-compliant to the technical requirements of the Bidding Documents. Therefore, when a conscious decision has been taken by the JICC/JICA on the Bid submitted by the original writ petitioner being non-responsive/non-compliant to the technical requirements of the Bidding Documents, unless there are specific allegations of mala fides and/or favouritism, the same could not have been the subject matter of scrutiny by the High Court in exercise of the powers under Article 226 of the Constitution of India. 7.4 At this stage, the decision of this Court in the case of Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Ors., (1997) 1 SCC 738 is required to be referred to. In that case, before this Court, the offer made by the Bidder, who was found to be L1 was not accepted after consulting the international financial institutions such as Asian Development Bank/World Bank, approving the same, this Court observed that it is difficult for a country to go ahead with such a high-cost projects unless the financial institutions the Asian Development Bank and/or the World Bank grant loan/subsidy. It is further observed that when such financial institutions grant such huge loan, they always insist that for any project for which loan has been sanctioned must be carried out in accordance with the specifications and within the scheduled time and the procedure for granting the award must be duly adhered to. In the case before this Court, there was some dispute between the Bank on the one hand and the consultant, who was called upon to evaluate bids on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court after construing certain clauses of the bid documents came to the conclusion that such a correction was permissible, and therefore, the Bank could not have insisted upon granting the contract in favour of the appellant therein. This Court did not accept the view taken by the High Court by observing that it was not within the permissible limits of interference for a court of law, particularly when the Court has not found any mala fides / favouritism in the grant of contract. 7.5 From the impugned judgment and order passed by the High Court and as observed hereinabove, the High Court has set aside the decision of the appellant to reject the Bid submitted by the original writ petitioner as non-responsive and suffering from material deviation on the ground of violation of Article 14 of the Constitution of India by observing that other Bidders were called for clarification but the original writ petitioner was not called. However, as observed hereinabove, the appellant had taken a decision as per the decision taken by the JICC/JICA. JICC/JICA took a conscious decision to reject the Bid of the original writ petitioner as non-responsive/non-complaint and the same was found to be material deviation.

7.6 At this stage, it is to be noted that what can be said to be substantially responsive Technical Bid has been defined under Article 33.2. The High Court in the impugned order has observed and held

that the Bid submitted by the original writ petitioner can be said to be substantially responsive Technical Bid. However, it is required to be noted that when the author of the tender document, in the present case, JICC/JICA, had taken a conscious decision that the Bid submitted by the respondent – original writ petitioner can be said to be non-responsive and suffering from material deviation, it was not for the High Court to consider/opine whether the Bid submitted by the original writ petitioner is substantially responsive Technical Bid or not unless the decision is found to be perverse and/or suffered from mala fides and/or favoritism. 7.7 At the cost of repetition, it is to be noted that under the contractual obligation, it was not open for the appellant – corporation and/or even the Republic of India to deviate from any of the terms and conditions of the loan agreement and/or the decision of JICC/JICA. Therefore, in absence of any allegation of mala fides/arbitrariness and/or favouritism, we are of the opinion that the High Court has committed a grave error in interfering with a conscious decision taken by the JICC/JICA, which has been followed by the appellant.

7.8 At this stage, few decisions of this Court on the interference by the Courts in the tender matters are required to be referred to:-

7.8.1 In the case of Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited, AIR 2016 SC 4305, this Court in paras 11 to 13 and 15 has observed and held as under :-

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, 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. Port of Bombay, (1989) 3 SCC 293, it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 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, (2007) 14 SCC 517, as mentioned in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622.

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.

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.” 7.8.2 In the case of B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. and Ors., (2006) 11 SCC 548, after considering the various decisions of this Court on the point enumerated in para 66, this Court has observed and held as under:

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

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

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

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

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

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

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



tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.” 7.8.3 In the case of *Michigan Rubber (India) Limited Vs. State of Karnataka*, (2012) 8 SCC 216, after considering various other decisions of this Court on the point, more particularly, after considering the decisions in the case of *Jagdish Mandal (supra)* and *Tejas Constructions and Infrastructure (P) Ltd. (supra)*, in paras 23 and 24, this Court has observed and held as under:

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

(a) The basic requirement of Article 14 is fairness in action by the State, and 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 the 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 the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

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

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

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

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no

responsible authority acting reasonably and in accordance with relevant law could have reached”? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article

226.” 7.8.4 In the case of the Central Coalfields Limited & Anr. Vs. SLL- SML [A Joint Venture Consortium] and Ors., (2016) 8 SCC 622, it is specifically observed and held by this Court that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. It is further observed that whether a term of NIT is essential or not is a decision taken by the employer, which should be respected and soundness of that decision cannot be questioned by Court. In the case before this Court, the bid was rejected for non furnishing of bank guarantee in prescribed format. While submitting EMD by furnishing bank guarantee in format prescribed by GTC of another tender and the bidder took the plea that bank guarantee format of present tender was ambiguous. Rejecting the claim of the bidder and upholding the decision of the employer of rejection of bid for non-compliance of submitting the bank guarantee in prescribed format, this Court in paras 31 to 38, 42 to 44, 47 to 49, 52, 55 and 56 has observed and held as under:

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

32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

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

500, para 7) “7. ... It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document “and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use”.

To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable.”

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

35. It was further held that if others (such as the appellant in Ramana Dayaram Shetty case) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 — treatment that was constitutionally impermissible. Expounding on this, it was held: (SCC p. 504, para 10) “10. ... It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.” (emphasis supplied)

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

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

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

42. Unfortunately, this Court in *Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273 did not at all advert to the privilege-of-participation principle laid down in *Ramana Dayaram Shetty* and accepted in *G.J. Fernandez*. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in *Poddar Steel*.

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of- participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular*) in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22) “22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.” This Court then laid down the questions that ought to be asked in such a situation. It was said: (*Jagdish Mandal* case, SCC p.

531, para 22) “22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

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

(ii) Whether public interest is affected.

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

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

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of 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 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 rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that “Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive”. Surely, CCL

ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2), namely:

“... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.” There is no valid reason to give up this salutary principle or not to apply it *mutatis mutandis* to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad* that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

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

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever.” 7.8.5 In the case of *Maa Binda Express Carrier & Anr. Vs. North Eastern Frontier Railway & Ors.*, (2014) 3 SCC 760, this Court had an occasion to consider the scope of judicial review in the matters relating to award of contracts by the State and its instrumentalities. In paras 8 to 10 this Court has observed and held as under:

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are

under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn. of Management Studies* [(2009) 6 SCC 171] and *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617].

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India*, *Raunaq International Ltd. case* [*Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492] and in *Jagdish Mandal v. State of Orissa* besides several other decisions to which we need not refer.”

7.9 Thus, from the aforesaid decisions, it can be seen that a Court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:-

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

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

(ii) Whether the public interest is affected? If the answers to the above questions are in negative, then there should be no interference under Article 226."

7.10 Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when a conscious decision was taken by the JICC/JICA holding the Bid submitted by the original writ petitioner as non-responsive/non-compliant to the technical requirements of the Bidding Documents and suffering from material deviation, we are of the opinion that the High Court

has erred in interfering with the tender process and interfering with the decision of the JICC/JICA rejecting the Bid submitted by the original writ petitioner at technical stage.

8. At the outset, it is to be noted that the Bid submitted by the original writ petitioner was rejected at the first stage on the ground of material deviation/non-responsive and having found that the tender submitted by the original writ petitioner was not found to be as per the terms and conditions of the tender document. However, the High Court by the impugned judgment and order has set aside the conscious decision taken by the JICA, JICC and the appellant by observing that the Bid submitted by the original writ petitioner can be said to be in substantial compliance and on the ground that though the other Bidders were given opportunity to correct their errors/defects, however, the original writ petitioner was not afforded the same opportunity and therefore the decision not to give opportunity to correct the defects/errors can be said to be discriminatory and violative of Article 14 of the Constitution of India.

However, it is required to be noted that a conscious decision was taken by JICC/JICA holding that the Bid submitted by the original writ petitioner suffers from material deviation and the same cannot be said to be a substantially responsive Technical Bid. The decision was taken by the employer – JICC/JICA and followed by the appellant considering the relevant clauses of the ITB, more particularly, ITB Clause 33.2, which defines a substantially responsive Technical Bid. The High Court ought to have appreciated that other Bidders, who were granted opportunity to cure the defects had cleared the first stage and they were granted opportunity to cure the defects as per ITB Clause 34. As per the JICC and JICA, with respect to those Bidders, who were given an opportunity to cure the defects after they cleared Stage I, their defects were found to be substantially responsive and, therefore, in exercise of the powers under Clause 34, the opportunity was given to them to cure the defects, which as such was found to be substantially responsive and non-material compliance. The High Court ought to have appreciated that so far as the original writ petitioner is concerned, its Bid was rejected at the first stage itself having specifically found that the same constitute a material deviation/non-conformity. Therefore, all the other Bidders who were granted the opportunity to cure the defects were different than that of the original writ petitioner and, therefore, the High Court has erred in holding that not granting the opportunity to the original writ petitioner to cure the defect is discriminatory.

9. Even otherwise it is required to be noted that once a conscious decision was taken by the JICC and JICA, who can be said to be the author of the terms and conditions of the tender document, taking a view and stand that the Bid submitted by the original writ petitioner suffers from material deviation and the said decision was taken after considering the relevant clauses of the ITB, thereafter it was not open for the High Court to interfere with such a conscious decision in exercise of powers under Article 226 of the Constitution of India and take a view that the Bid submitted by the original writ petitioner was in substantial compliance.

10. As observed hereinabove, there are as such no allegations of mala fides and/or favouritism at all. Therefore, the High Court has erred in holding that the Bid submitted by the original writ petitioner was in substantial compliance. Whether the Bid submitted by a Bidder suffers from any material deviation and/or any substantial deviation should be left to the author of the Bid document and



normally, the High Courts, in exercise of the powers under Article 226 of the Constitution of India, should not interfere with the same unless such a decision is found to be mala fide and/or there are allegations of favouritism and/or such a decision is arbitrary.

11. In the present case, as observed hereinabove, the decision to reject the Bid of the original writ petitioner at the first stage on the ground that the Bid submitted by the original writ petitioner suffers from material deviation and the same cannot be said to be in substantial compliance has been taken by the tender committee in concurrence with JICC and JICA. The role of the JICA has been extensively dealt with by the Gujarat High Court in the decision referred to hereinabove. Therefore, when the JICA has agreed to fund such a huge amount and the terms and conditions of the tender document are finalized by the JICC/JICA, and, therefore, when conscious decision has been taken by the JICC/JICA, the same was not required to be interfered with by the High Court lightly and when such a decision of the High Court would have a cascading effect on such a foreign funded Mega project. The scope of judicial review in such foreign funded contract should be far much less than the ordinary Government funded contracts funded from Consolidated Fund of India. The scope of judicial review in such foreign funded contracts/projects would be restricted and minimal. In such foreign funded contracts, the only ground for judicial review ought to be on a limited aspect, i.e., the action of the executing authority does not suffer from favouritism or nepotism and based on the grounds which have been concealed from the foreign financing authority, if disclosed, would have persuaded the financing authority to cancel the contract.

12. The High Court ought to have appreciated that the Bullet Train Project is a result of long-drawn deliberations between the Government of India on the one hand and the Government of Japan on the other. That thereafter a loan agreement came to be executed between the Japan International Cooperation Agency (JICA) and Hon'ble the President of India and the JICA agreed to fund approximately Rs.1 lakh crores for the project on the terms and conditions mentioned in the loan agreement and the other agreed terms including the terms and conditions of the Bid document shall be finalized by the JICA/JICC. The Bidding Documents are based on JICA's Standard Bidding Documents as well as based on JICA's procurement guidelines, which form an integral part of the loan agreement. Therefore, any decision contrary to the terms and conditions of the Bidding Document would be altering the terms and conditions of the loan agreement, which would not be permissible. JICA has a vital role to play in such contracts. It is to be noted that the foreign funded investment such as the present investment in the form of concessional Official Development Assistance (ODA) loan by the JICA are made on the basis of non-negotiated terms and conditions where the sole discretion as to what will be the conditions of investment and on what terms the contractors would be chosen to implement the project vests with the investor – foreign developed nation. The ultimate decision vests on the concerned parties, who financed/invested in the project, i.e., in the present case JICA. Therefore, the High Court has erred in interfering with the conscious decision taken by the JICA and the JICC, which has been acted upon by the tender committee.

13. Under the circumstances, the High Court has erred in interfering with the conscious decision of the JICC / JICA / appellant / tender committee to reject the Bid submitted by the original writ petitioner at Stage I on the ground that the Bid submitted by the original writ petitioner was suffering from material deviation.

14. Now so far as the view taken by the High Court in the impugned judgment and order that Clause 28 under Clause (e) of Option A Section 1 and Clause 42.5 of ITB are patently illegal, inasmuch as they seek to curtail the right of the bidders to challenge the rejection of their bid in a multi-stage bidding process at the earliest, and before the award of the contract is concerned, at the outset, it is required to be noted that as such the aforesaid clauses of the ITB were not under challenge before the High Court. Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 of ITB were well within the knowledge of the original writ petitioner at the time of participating in the tender process. The aforesaid clauses of the ITB were put to the knowledge of all the participants/bidders and the same applied to all. Despite the above clauses in the ITB, original writ petitioner participated in the tender process. Therefore, once having accepted the terms and conditions of the tender process with the full knowledge of Clauses 28.1 and 42.5, and participated with full knowledge, thereafter, it was not open for the original writ petitioner to make a grievance with respect to such clauses. 14.1 Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 are part of the instructions to the Bidders (ITB) and, therefore, part of the Bidding Document. At this stage, it is required to be noted that loan agreement was materialized after a detailed Memorandum of Understanding and the loan agreement between the two Prime Ministers and how the project would be financed and operated. That thereafter followed by general consultancy of the project discussion, it was culminated into a loan agreement with the specific condition that the terms of the contract and the Bid document shall be finalised and prepared by JICC and approved by JICA. It appears that the contents of the Bidding Document are based on JICA' Standard Bidding Documents as well as JICA's procurement guidelines and form an integral part of the loan agreement. It is to be noted that such foreign funded investments in the form of concessional Official Development Assistance (ODA) loan by JICA are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what will be the terms and conditions of the tender and on what terms and conditions the project would be financed, vests with the investor foreign developed nation. Therefore, the impugned judgment and order passed by the High Court on Clauses 28.1 and 42.5 would be altering the terms and conditions of the Bid Document / ITB, which as such were finalized and approved by the JICC/JICA and which were provided as per the JICA's international guidelines and which as such were to be complied with by all the bidders/participants.

14.2 Even otherwise, the High Court has not at all appreciated the purpose of the aforesaid clauses. The aforesaid clauses stated that information relating to the evaluation of the Bids and recommendation of the Contract award, shall not be disclosed to Bidders or any other person, until information on Contract award is communicated to all the Bidders in accordance with ITB 42 and as per Clause 42.5 "After notification of award, unsuccessful Bidders may request, in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected". It further provides that "the Employer shall promptly respond, in writing, to any unsuccessful Bidders who, after the notification of the award in accordance with ITB 42.1, request a debriefing". Thus, Clauses 28.1 and 42.5 read as under:-

"Option A – Section I. Instructions to Bidders Clause E. Evaluation and Comparison of Bids

28. Confidentiality “28.1 Information relating to the evaluation of Bids and recommendation of Contract award, shall not be disclosed to Bidders or any other persons not officially concerned with such process until information on Contract award is communicated to all Bidders in accordance with ITB 42.

#### Clause F. Award of Contract

42. Notification of Award 42.5 After notification of award, unsuccessful Bidders may request, in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected. The Employer shall promptly respond, in writing, to any unsuccessful Bidders who, after the notification of award in accordance with ITB 42.1, request a debriefing.” (emphasis supplied) 14.3 The purpose of the aforesaid clauses appears to be to prevent a possible challenge to the multiple stage tender process midway. The High Court has construed that the said clauses would restrict the right of the bidders to seek judicial scrutiny of the tender process. However, the High Court does not seem to be wholly true. The High Court ought to have appreciated that first of all Clause 28 is a confidentiality clause. On general reading of the aforesaid two clauses, it can be said that it does not take away the right of the Bidders to seek judicial scrutiny at all. Only the stage and time to know the reasons and thereafter if the unsuccessful Bidder is aggrieved can seek the remedy, which is deferred till the final decision on award of contract is taken and communicated. As observed hereinabove, the object and purpose would be no interference in the tender process in between till the final decision to award the contract is taken. By no stretch of imagination, it can be said that it takes away the right of the unsuccessful bidder to seek the judicial scrutiny of the tender process. After the final decision is taken to award the contract and the contract is awarded, thereafter it will always be open for the unsuccessful bidders to ask for the reasons to which the employer is required to furnish promptly and thereafter the unsuccessful bidder may avail the legal remedy, which may be available to it, may be claiming the damages. The High Court ought to have appreciated that it is always advisable that in such a foreign funded Mega project, delay may have a cascading effect and many a times have a financial burden due to delay in projects and therefore, there shall be minimal interference and/or no interference till the entire tender process or till the award of contract is completed. The foreign funded agency therefore is justified in providing such clauses to prevent challenge to the tender process midway. A foreign funded agency, who invests/funds such a huge amount for such a Mega project on bilateral talks between two countries is justified in insisting such clauses and to insist that the information relating to the evaluation of the Bids and recommendation of contract award shall not be disclosed to Bidders or any other person until information on contract award is communicated to all the Bidders and the grounds on which the unsuccessful Bidders’ Bids are not selected shall be provided thereafter.

14.4 The object and purpose of providing aforesaid clauses is very clear namely no interference with respect to the tender process midway and till the final decision on awarding the contract is taken. Even, we are also of the opinion that in a Mega project, which is funded by a foreign country, there shall not be any interference with the tender process midway till the final decision is taken to award the contract. The reason behind this is that any delay in such a project may increase the ultimate project cost and it may affect the future investment by the foreign country, which would never be in the larger nation’s interest. 14.5 Under the circumstances, the High Court has committed a grave

error in holding that Clauses 28.1 and 42.5 are patently illegal, more particularly, in absence of any challenge to the same and also on the ground that once the original writ petitioner participated having knowledge of the aforesaid clauses in the ITB, thereafter it was not open for the original writ petitioner to challenge the same. The original writ petitioner was knowing right from the very beginning with respect to the confidentiality clause contained in Clause 28 and that grounds on which the Bids of unsuccessful Bidders are not selected shall be communicated only after a final decision to award the contract is communicated under Clause 42. If the original writ petitioner was aggrieved either it would not have participated and/or ought to have challenged such clauses before participating in the tender process. Under the circumstances, the impugned judgment and order passed by the High Court holding Clauses 28.1 and 42.5 as patently illegal cannot sustain and the same also deserves to be quashed and set aside.

15. Before we part, we deem it proper to express few words of caution to the High Courts while entertaining the writ petitions challenging the tender process midway and/or while interfering with the tender process in the contracts, more particularly, with respect to the contracts/projects funded by the foreign countries and with respect to the Mega project like the present one. Before entertaining the writ petition with respect to such Mega projects funded by the foreign countries, one has to appreciate that funds of such Mega projects by the foreign country is followed by a detailed discussion between the Prime Ministers of both the countries and to strengthen bilateral cooperation in the rail sector. The foreign country is ready to invest/fund such a huge amount on non- negotiated terms and the Bid Documents are prepared by the foreign financial agency/country in accordance with the latest version of the Standard Bidding Documents. These investments from developed nations are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what would be the conditions of the investments and on what terms the contractors would be chosen to implement the project, vests with the investor foreign developed nation. Considering the special peculiarities of such foreign sovereign funded development contracts, which can be envisaged and exist only due to the availability of the investment and willingness of the foreign sovereign country to finance such infrastructure project, the said contracts assume the different characteristics. Therefore, there shall be different considerations so far as the judicial interference is concerned between the foreign funded contracts and the ordinary public works contracts funded from public exchequer. It is always to be borne in mind and as observed by this Court in the case of Asia Foundation and Construction Ltd. (*supra*), it is difficult for a developing country to go ahead with such a high cost project unless the developed country grant loan/subsidy and/or ready to fund such high cost projects, which are very important projects for developing country, more particularly, when the developed country is ready to fund a huge amount at a minimal concessional rate of interest and on suitable terms and conditions of repayment. It is also to be noted that any delay in execution of such a Mega project, which is very important project for the developing country like India may not be in the larger public interest and in the nation's interest. Such an interference by the Courts midway and delay in the projects like these which is funded by the foreign countries on bilateral mutual understanding/agreement by the developed country to a developing country may affect the future investments/funding. Many a times, such a delay in the execution of the project due to the intervention by the Courts may have cascading effect on the project cost and ultimately may increase the project cost and may impose heavy financial burden and lead to increased and unbudgeted expenditure. Therefore, while exercising the writ jurisdiction

challenging the tender process midway and/or while entertaining the writ petition challenging the award of contract with respect to such Mega projects, more particularly, when such Mega projects are funded by the foreign countries, the Courts have to bear in mind the following principles laid down by this Court in the case of Tata Cellular Vs. Union of India, 1994 6 SCC 651 in paragraph 94 as under:

“94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such

projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved.

16. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court is clearly unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. Present appeal is allowed accordingly. The original writ petition before the High Court filed by the original writ petitioner – respondent herein stands dismissed. No costs.

Pending application(s), if any, also stand disposed of.

..... J .  
[M.R. SHAH]

NEW DELHI;  
JANUARY 31, 2022 .

..... J .  
[A.S. BOPANNA]