**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 786 OF 2022**
**(ARISING OUT OF SLP(C) No. 16671 OF 2021)**

**M/s AGMATEL INDIA PVT. LTD. ……APPELLANT(S)**

**VERSUS**

**M/s RESOURSYS TELECOM & ORS. ……RESPONDENT(S)**

**WITH**

**C.A. NO. 787 OF 2022**
**(ARISING OUT OF SLP(C) No. 16672 of 2021)**

**JUDGMENT**

**Dinesh Maheshwari, J.**

**Contents**



## Preliminary

Leave granted.

2. These two appeals against the same judgment and order dated 27.09.2021, as passed by the High Court of Delhi at New Delhi in Writ Petition (C) No. 6676 of 2021, have been considered together and are taken up for disposal by this common judgment.

2.1. By the impugned judgment and order dated 27.09.2021, the High Court has accepted the writ petition filed by the respondent No. 1 of these appeals (M/s. Resoursys Telecom- hereinafter referred to as 'the writ petitioner') and has disapproved the technical disqualification and consequential rejection of the technical bid of writ petitioner in respect of a tender floated by the appellant of the appeal arising out of SLP(C) No. 16672 of 2021 (Navodaya Vidyalaya Samiti – hereinafter referred to as 'NVS'). The appellant of the other appeal arising out of SLP(C) No. 16671 of 2021 (Agmatel India Pvt. Ltd. – hereinafter referred to as 'Agmatel') is said to be the bidder whose offer was accepted by NVS after technically disqualifying the writ petitioner.

3. The crux of the matter involved in these two appeals is as to whether the High Court has been justified in interfering with the view taken by the tender inviting authority, i.e., NVS, in rejection of the technical bid of writ petitioner for want of fulfilment of 'Past Performance' criterion about supply of 'same or similar Category Products' of 60% of bid quantity in at least one of the last three financial years?

3.1. It may be observed at the outset that a contention had also been urged, particularly on behalf of Agmatel, that the High Court of Delhi had no jurisdiction to entertain the subject writ petition when all the material events took place in the State of Uttar Pradesh and when the tender inviting authority was also in the State of Uttar Pradesh. The High Court has rejected this objection with reference to the fact that such an

objection was not taken by the tender inviting authority-NVS, who was even otherwise operating under the Department of School Education and Literacy, Ministry of Human Resources Development, New Delhi. This aspect has not been given much emphasis before us and we would also leave it at that only, while dealing with the matter on its merit.

4. It may also be observed that while considering these appeals initially on 29.10.2021, we had considered it appropriate to take up the matters for final hearing at the admission stage itself, particularly looking to the object of the tender process in question, for that being related with education of the children. However, in the circumstances of the case, we had stayed the operation of the impugned order of the High Court while providing that status quo in relation to the tender process in question shall be maintained by all the concerned. After completion of pleadings, we have heard learned counsel for the parties finally at the admission stage.

5. After the foregoing preliminary comments, we may take note of the factual aspects in brief, and insofar as relevant for the issues at hand.

**Relevant Factual Matrix and Background**

6. The dispute in the present appeals has its genesis in a Notice Inviting Tenders ('NIT') bearing No. GEM/2021/b/1032762, as issued by the appellant-NVS on 12.02.2021 on the Government online portal i.e., Government e-market Place ('GeM') for supply of 68,940 Tablets for school children. The NIT carried with it several of the terms and

conditions but, we are concerned in the present appeals with the terms and conditions pertaining to 'Experience' and 'Past Performance' of the bidders. The relevant terms and conditions may be extracted as under: -

> "1. Experience Criteria: In respect of the filter applied for experience criteria, the Bidder or its OEM {themselves or through reseller(s)} should have regularly, manufactured and supplied **same or similar Category Products to any Central / State Govt Organization / PSU / Public Listed Compan**y for number of Financial years as indicated above in the bid document before the bid opening date. Copies of relevant contracts to be submitted along with bid in support of having supplied some quantity during each of the Financial year. In case of bunch bids, the category of primary product having highest value should meet this criterion.
> ****** ***** ******
> 4. Past Performance: The Bidder or its OEM {themselves or through re-seller(s)} **should have supplied same or similar Category Products for 80% of bid quantity[1], in at least one of the last three Financial years before the bid opening date to any Central/State Govt Organization / PSU / Public Listed Company.** Copies of relevant contracts (proving supply of cumulative order quantity in anyone financial year) to be submitted along with bid in support of quantity supplied in the relevant Financial year. In case of bunch bids, the category related to primary product having highest bid value should meet this criterion."
>
> **Bid Specific Additional Terms and Conditions**
>
> "****** ***** ******
> 3. The Bidder / OEM {themselves or through reseller(s)}, should have executed project for supply and installation/ commissioning of **same or similar Category Products** during preceding 3 financial years (i.e. current year and three previous financial years) as on opening of bid, as per following criteria:
> (i) Single order of at least 35% of estimated bid value; or
> (ii) Two orders of at least 20% each of estimated bid value; or
> (iii) Three orders of at least 15% each of estimated bid value.
> ****** ***** ******

1 This quantity requirement of 80% was admittedly reduced to 60% by way of a corrigendum issued by the tender inviting authority.

> 14. Experience Criteria: The Bidder or its OEM {themselves or through reseller(s)} should have regularly, manufactured and supplied **same or similar Category Products** to any Central/ State Govt Organization / PSU / Public Listed Company for 3 years before the bid opening date. Copies of relevant contracts to be submitted along with bid in support of having supplied some quantity during each of the year. In case of bunch bids, the primary product having highest value should meet this criterion."
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> (emphasis in bold supplied)

6.1. It is the requirement concerning “same or similar Category Products” in the aforesaid conditions which forms the bone of contention in these appeals.

7. The writ petitioner M/s. Resoursys Telecom responded to the said NIT and offered its bid for the product i.e., “Tablet” which is being manufactured by an Indian company namely, Lava International Limited, after having necessary approvals from the manufacturer (OEM). After opening the technical bids on 08.05.2021, the appellant-NVS rejected the bid of the writ petitioner on 25.06.2021, while stating the reason of rejection as ‘technical specification mismatch’. The writ petitioner felt that the grounds for rejection were not discernible and the rejection was vague and ambiguous; and, therefore, made a representation dated 27.06.2021 seeking clarification of the reason for rejection. The appellant-NVS, in its reply dated 29.06.2021, *inter alia*, stated as under: -

> “1. Does not qualify past Performance (Page 124) of tender document for any of the FY 2018-19, 2019-20, 2020-21. Work Orders of Smart Phones, Laptops, Aadhar Kits, Printers, Power-bank, etc are not considered as same or similar category products of tablets.”

7.1. The writ petitioner M/s. Resoursys Telecom, as also the said OEM Lava International Limited submitted further representations while maintaining that they were duly complying with the Past Performance clause of the tender document. The appellant-NVS stated in its response dated 01.07.2021 that they were procuring "Tablets" for learning management and the Technical Evaluation Committee ('TEC') has considered only "Tablets" under similar category 'to ensure proven products'.

8. At this juncture, we may take note of the facts emerging on record that the writ petitioner, in order to assert its fulfilment of the above referred Past Performance criterion, has relied upon the statements made by its OEM in the letter dated 16.04.2021, wherein the supplies made in the financial year 2019-2020 to Punjab Infotech, Directorate of Welfare of Scheduled Castes-Assam, Directorate of Welfare of Plain Tribes & Backward Classes–Assam, and Directorate of Women and Child Development Kerala were referred and it was also stated that they had received the biggest purchase order of 1,75,443 units of "Smart Phones" from Punjab Infotech and supplied the device successfully. We shall be adverting to the relevant details of the said letter dated 16.04.2021 hereafter later, in the segment of discussion.

8.1. It has been the case of the appellants that in the aforesaid supplies, only smart phones were supplied to Punjab Infotech and to the Directorate of Women and Child Development, Kerala; and the product

"Smart Phone" does not fall within the description of "same or similar Category Product" vis-à-vis the product required under the NIT in question, i.e., "Tablet".

9. Being aggrieved by the decision taken by the tender inviting authority, the writ petitioner M/s. Resoursys Telecom preferred the writ petition leading to these appeals with the submissions, *inter alia,* that the process in question was vitiated due to an arbitrary and whimsical decision taken by the tender inviting authority. During the pendency of writ petition, it was informed by the tender inviting authority that the contract in question had been awarded to the other bidder who was found qualified and successful; and the application for impleadment made by the said successful bidder-Agmatel was allowed by the High Court.

**High Court disapproves the decision of tender inviting authority**

10. In essence, the submission of the writ petitioner before the High Court was that a "Tablet" was an electronic product belonging to the "same or similar category" as a "Smart Phone"; and that the decision of the NVS, excluding "Smart Phones" from "same or similar Category Products" was unreasonable and against the principles of fair play and logic. On behalf of the writ petitioner, strong reliance was placed on various tender notices issued by other departments and institutions, including the Electronic and Information Technology Departments of the States of Kerala, Himachal Pradesh, Bihar and Meghalaya; and it was

submitted that in all such tender notices, the past experience of supply of tablets and smart phones had been treated alike. On the other hand, it was submitted on behalf of the tender inviting authority-NVS that the products like tablets, computers and smart phones were electronic goods, distinguishable on the basis of their technical, commercial and trade-related definitions, norms, and regulations provided by the authorities concerned. It was also argued that the tender inviting authority was the best person to interpret the terms of tender, and its decision could only be examined in case of it being arbitrary, biased or mala fide; and no such case being alleged, no interference was called for. The same contentions were urged on behalf of the impleaded party-Agmatel, while also raising the objection of jurisdiction.

11. While dealing with the rival contentions, the High Court of Delhi, after rejecting the contention on jurisdiction, formed the view that the product “Smart Phone” was definitely a similar category product as “Tablet”; and the tender inviting authority as also its TEC had been unjustified in giving a restrictive meaning to the terms of NIT; and if at all there was any ambiguity, the tender inviting authority cannot be left to the option of interpreting the terms contrary to their plain meaning. The High Court, therefore, proceeded to allow the writ petition and disapproved the rejection of technical bid of the writ petitioner. It shall be appropriate to summarise the relevant aspects of the reasons that prevailed with the High Court in allowing the writ petition.

11.1. The High Court took note of the contentions that the tender floating authority was the best judge to determine the conditions of a tender but, in that regard, referred to a passage from the decision of this Court in the case of ***Reliance Energy & Anr. v. Maharasthra State Road Development Corporation Ltd & Ors.*: (2007) 8 SCC 1** to the effect that in invitation to tenders, the terms and conditions must indicate the norms and benchmarks with legal certainty; and if there be any vagueness and subjectivity in the said norms, it may result in unequal and discriminatory treatment and violate the doctrine of "level playing field". The High Court, thereafter, observed that it was nobody's case that "Smart Mobile Phones" were the "same" category products as "Tablets"; and that the issue was as to whether under the terms of NIT, "Smart Mobile Phones" could be called "similar Category Products" as "Tablets".

11.2. Thereafter, the High Court referred to the aforementioned terms and conditions of NIT and opined that when the expression used had been "category" before the word "product" and with the qualifying expression "similar", the intendment was not to exclude such products which were of "similar category"; and the intention had not been to insist only for "same" category products. Having thus minutely analysed the expressions "same", "similar" and "category" as also the related semantics, the High Court proceeded to indicate the perceived similarities of the two products, i.e., "Smart Phones" and "Tablets" including that both were electronic products; were used for audio-visual

reception/transmission of data; were having facilities of running programmes and applications; were sold and traded through the same channels and were likely to be found in the same shop; and were being sold by the large manufacturers and producers under the same brand. The High Court, thus, concluded that even if the said two products were not the "same", it would not mean that they do not belong to "similar Category of Products". The High Court further said that the interpretation prevalent in the market, where these products were treated as falling in "similar" category, was demonstrated by the writ petitioner with reference to five tenders floated by different Governments/PSUs in different parts of the country. Applying such test, the High Court concluded that NVS could not have excluded the product "Smart Mobile Phones" from the "similar" category vis-a-vis the product "Tablets". According to the High Court, the clause in question had been so worded as to provide maximum competition. These observations and findings of the High Court, forming the core of its decision, could be usefully reproduced as under: -

> "29. From the above, it would be seen that the author of the tender in question has consciously and repeatedly used the expression "Category" before the word "Product". Thus, the use of the expression "Category" is not inadvertent, or unintentional. Secondly, the author has also repeatedly used the words "same or similar" in relation to – not the product in question, but in relation to the category of products to which "Tablet" belongs. The use of the plural i.e. "Products", and not "Product" also shows that the author was conscious that within the same or similar category of products, there would be products other than "Tablets". Pertinently, the expression used is not "same products", or even "same Category Products". It is "same or *similar Category* Products". Firstly, the use of the word "Category" shows that not just

the same product, but all products which fall in the same category which are covered. Thus, if the expression used would have been "same Category Products", other products which fall in the same category – as a Tablet, would be covered. The respondents have themselves enlisted other products which fall in the same category of products, as Tablets. They are "*Slate tablets, Convertible Tablets, Hybrid Tablets, Phablets, Rugged tablets, Tough Tablets, Booklet, Microsoft Surface, Amazon Kindle Fire, Surface Pro Tablet PC, iPad, iPad Air, iPad Pro, iPad Mini, Samsung Galaxy Tab, and ThinkPad.*" However, the respondent NVS has further enlarged the scope, by using the expression "similar Category Products". By using this expression, all products which fall in similar categories – to the category in which Tablets fall, are also covered. The expression "similar" does not mean "same". Therefore, a thing which is "similar" to another, would not be the same as that other. In the present context, the word "similar Category" has to be understood in relation to the nature and usage of the categories of products being compared. According to the Cambridge Dictionary, the word "*same*" means "*exactly like another or each other*", whereas the word "*similar*" means *"looking or being almost, but not exactly, the same*". Thus, if it was indeed the intent of the Respondent to exclude similar category products, from the category of products in which "Tablet" falls, they need not have used the words "*same or similar category products*". They would have simply said "same products", or "same category products"

30. Both smart mobile phones, and Tablets, are electronic products. Both are used for audio-visual reception/ transmission of data. Both have facility of running programmes and applications to perform varied tasks, such as, receiving and sending messages/ e-mails, surfing internet, downloading content from the internet, viewing audio-visual content, transmitting audio-visual and the like. Both also have the facility to make audio calls through data networks – though, mobile phones use the mobile call network for regular calls. Both these products are sold and traded through the same channels. In the same shop, which sells smart mobile phones, one is likely to find Tablets, and vice versa. In fact, the larger manufacturers and producers of electronic goods produce and sell both – smart mobile phones, and tablets under the same brand. There are bound to be differences, since these two products are not "same". They may not even belong to the "same category" of products. However, merely because they are not "same",

> it does not mean that they do not belong to "*similar category of products*".
>
> 31. The terms of tender must receive the natural and commonly understood interpretation, which has been prevalent in the trade. What is prevalent in the trade has been demonstrated by the petitioner – by reference to the 5 tenders floated by different Government/ PSUs in different parts of the country for same/ similar products.
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> 32. Applying the said test, can it be said that the respondent NVS could exclude smart mobile phones from the similar category of products, as Tablets? The answer is an emphatic "No". The Clause, intentionally, has been worded loosely in order to have maximum competition amongst bidders."

11.3. Thereafter, the High Court took note of the stand taken by NVS in its reply dated 01.07.2021 and that taken in the counter affidavit filed before the Court and observed that the TEC of NVS, on its own, had decided to curtail the competition by narrowing the scope of the eligibility criteria by taking only tablets as falling under "similar" category and not considering the past supplies of other products like smart mobile phones, laptops etc. The High Court, however, observed that exclusion of the products like Aadhaar kits, printers, power-banks etc. was not being considered and the TEC might have been justified in not considering them as falling under "similar" category products but, the TEC could not have gone outside the scope of tender. The Court further observed that in the counter affidavit, the averment had been to the effect that the "Tablets" and "Smart Mobile Phones" were not of "same" product or "similar" product but the criterion had been of "similar Category of

Products" and these words were not of surplusage. The High Court disapproved the stance of NVS, as being not in conformity with open competition and found it unacceptable in public interest. The High Court observed and held thus: -

> "36. Thus, it is evident to us that the Technical Evaluation Committee (TEC) of the respondent NVS, on its own decided to curtail the competition by narrowing the scope of the eligibility criteria, by consideration of only Tablets as falling under similar category, and not to consider past supplies for other products like smart phones, laptops, etc, which are covered under "*same or similar category products*", as tablets. We are not concerned with the exclusion of products like Aadhar kits, printers, power bank, etc. in the facts and circumstances of the present case. The TEC of the respondent NVS may have been justified in not considering past experience/ turnover of supply of products like aadhar kits, printers, power banks, etc., as falling under similar category products, as that of the tablets. However, the TEC of the respondent NVS could not have gone outside the scope of the tender to lay down its own criteria to determine the eligibility of the bidders. They were bound to adhere to, and strictly comply with the terms and conditions stipulated in the tender floated by NVS. The decision taken by the TEC to exclude from consideration all other similar category products – for the purpose of evaluating past performance of the bidders, was wholly incompetent and beyond the authority of the TEC.
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> 37. From the counter affidavit, we also find that at various places, the respondent has averred that Tablets and smart mobile phones are not the same product, or similar product. It appears to us that the respondent has forgotten the eligibility criteria set out in the NIT, which is, "*same or similar category products*", and not "*same product*" or even "*similar products*."
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> 38. If that interpretation as given by the respondent NVS were to be accepted, the word "similar category of products" becomes a surplusage, which cannot be the intention attributed to the tender framing authority.
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> 39. To arbitrarily and whimsically change the goalpost, and determine what can, and cannot, be considered a "similar product", at the time of evaluation of bids,

> disrupts the level playing field for bidders and extinguishes healthy competition. The respondents have argued that smartphones and tablets are separate products, and there can be no doubt about it. This is a no brainer. However, they don't say that these two products are not even falling under two different similar categories of products.
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> 40. The restrictive interpretation given by the respondent NVS to the aforesaid tender conditions – not borne out from the tender terms and conditions, which would curb competition, does not find favour with the Court, in Public Interest. The whole purpose of issuing a tender is to invite maximum bids from bidders meeting the technical qualification so that the employer/ tender floating authority gets the most favourable product/services, at the most competitive price."

11.4. The High Court, thereafter, referred to a decision of this Court in ***Nabha Power Ltd. v. Punjab SPCL*: (2018) 11 SCC 508** for application of the "five condition test" for an implied condition to be read into the contract, including the "business efficacy test" and highlighted the principles laid down by this Court that "implied term" was a concept necessitated when the referred five conditions were satisfied and there was a strict necessity for it. On that basis, the High Court observed that NVS could have neither implied any term in the tender nor given restrictive meaning to the clear language of the tender. The High Court, thereafter, referred to the doctrine of '*Contra proferentem'*, as referred to in the case of ***United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.*: (2016) 3 SCC 49**, whereby, any ambiguity in an insurance policy would be resolved by a construction favourable to the insured. The High Court observed and held that if at all there was an ambiguity, it would be construed against the drafter of the tender; and in the absence of

ambiguity, the plain meaning of the condition must be complied with. Having said so, the High Court observed that each and every word of a tender must be given a meaning, for it being a serious exercise; and TEC cannot evolve its own criteria to evaluate the eligibility of bidders, contrary to the terms and conditions of the tender.

11.5. Before concluding on the matter, the High Court observed, with reference to the decision of this Court in ***Tata Cellular v. Union of India*****: (1994) 6 SCC 651**, that the tender floating authority was the best person to interpret the terms of the tender but the said authority cannot act arbitrarily, whimsically or contrary to the terms and conditions of the tender. The High Court reiterated that in the first place, the terms and conditions were clear and if at all they were ambiguous, it could not be left to the option of tender floating authority to interpret it in a manner which is contrary to their plain meaning. The High Court said thus: -

> "47. We are conscious of the scope of judicial scrutiny in tender matters. We are also conscious that the tender floating authority is best person to interpret the terms of the tender, as they know what best is the requirement and how to achieve the same. (see ***Tata Cellular v. UOI*** (1994) 6SCC 651) However, the authorities cannot act arbitrarily, whimsically and contrary to the terms and conditions of the tender. As noticed hereinabove, the terms and conditions of the tender are clear. However, even if the terms of the tender are unclear and ambiguous, can it be left to the option of the tender floating authority to interpret it in a manner which is contrary to their plain meaning? The answer is "No"."

11.6. With the aforementioned reasons, findings and observations, the High Court proceeded to allow the writ petition and held the rejection of the technical bid of the writ petitioner as unreasonable and arbitrary, while

holding that “Smart Mobile Phones” fall in “similar Category Products’. Accordingly, the High Court directed the appellant-NVS to process the technical bid of the writ petitioner and thereafter proceed in accordance with law.

11.7. Feeling aggrieved by the aforesaid judgment and order dated 27.09.2021, the tender inviting authority-NVS as also the bidder who is declared successful-Agmatel have preferred these appeals.

**Rival Submissions**

12. Assailing the judgment and order so passed by the High Court, learned Solicitor General of India appearing for the appellant-NVS has referred to the facts that the tender notice in question was issued for supply of Tablets for the students of Class XI and XII, with specific past performance criterion that the bidder or its OEM, themselves or through resellers, ought to have supplied same or similar category products to the extent of 80% of bid quantity (which was changed to 60% by corrigendum) in at least one of the last three financial years before bid opening date to any Central/State Government Organisation/PSU/Public Listed Company; and when the technical bids were opened, the writ petitioner was declared disqualified for having fallen short in past performance criterion by 10.20%. In this regard, the learned Solicitor General has particularly referred to the details stated in the additional affidavit filed on behalf of the appellant-NVS. We shall refer to the relevant part of these details too, in the segment of discussion.

12.1. The learned Solicitor General would argue that the writ petitioner had erroneously added its past supplies towards “Smart Phones/Mobile Handsets” and “Power Banks” so as to fulfil the past performance criterion required for awarding the tender for “Tablets” and hence, such supplies were not counted towards the requisite 60% of the bid quantity.

12.2. The learned Solicitor General has contended that “Smart Phones” and “Tablets” are two different products and belong to different categories and in this regard, has particularly referred to GeM portal of the Ministry of Commerce and Industry, Government of India. It has been submitted that on the said portal, “Smart Phones” and “Tablets” have been placed in totally different categories inasmuch as “Tablets” fall under the category “Computer Equipment and Accessories” within sub-category “Computers” whereas “Smart Phones” fall under the category “Communication Devices and Accessories” within sub-category “Personal Communication Devices”. The “Smart Phones” also fall under the category “Data Voice or Multimedia Network Equipment or Platforms and Accessories” within sub-category “Digital Mobile Equipment and Components”. With such categorisation, the learned Solicitor General would argue, the stand of the appellant-NVS is fortified that “Smart Phones” do not fall under same or similar category products as “Tablets”. It has further been argued that the terms were clear and none of the participating bidder found any ambiguity therein and hence, provided the requisite details of the supplies pertaining to “Tablets” only, except the writ petitioner. There was neither any

ambiguity nor anyone asked for any clarification including the writ petitioner and only request was for reducing the past performance quantity from 80% to 40% whereupon, the quantity was reduced by corrigendum to 60%. The contention, thus, has been that everyone including the writ petitioner well understood the requirement in the past performance criterion as being that of supply of “Tablet” computers only.

12.3. It has further been submitted that the expressions “same” or “similar” category products in the tender condition were obviously in reference to different varieties and types of “Tablets”, like Slate Tablets, Convertible Tablets, Hybrid Tablets, Phablets, Rugged Tablets, Tough Tablets, Booklet, Microsoft Surface, Amazon Kindle Fire, Surface Pro Tablet PC, iPad, iPad Air, iPad Pro, iPad Mini, Samsung Galaxy Tab, ThinkPad etc.

12.4. With reference to the decision of this Court in ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.*: (2016) 16 SCC 818**, the learned Solicitor General has argued that author of the tender document is the best person to understand and appreciate its requirements; and that the Courts must defer to such understanding and appreciation of tender documents by the tender inviting authority, unless there be any allegation of mala fide or perversity. The learned Solicitor General has particularly referred to the enunciation by this Court that even if an interpretation to the tender document by the

author of the tender is not acceptable to the Constitutional Court, that, by itself, would not be a reason for interfering with the interpretation given.

12.5. It has further been contended that the threshold of mala fide intention to favour someone or arbitrariness or irrationality or perversity must be met before the Court would interfere with the decision-making process or the decision itself. Even in the case of ambiguity or doubt, the Court would be refraining from giving its own interpretation unless the interpretation given by the administrative authority is shown to be perverse or mala fide or intended to favour someone. The learned Solicitor General has contended that there being no finding about any mala fide or perversity or bias, the High Court has erred in interfering in the present tender process. It has been argued that even if the interpretation of tender document by the appellant was not found acceptable by the High Court, that, by itself, was not a sufficient reason for interference. It has also been submitted that the interpretation of the appellant-NVS is based on the pre-dominant purpose of the goods sought to be procured and no arbitrariness or irrationality could be imputed therein.

12.6. In its written submissions, the appellant-NVS has also adverted to the other purchases/tenders referred by the writ petitioner in a tabular form; and has pointed out the distinguishing features. We shall refer to the relevant contents of this table too hereafter later.

13. More or less similar submissions have been made by the learned senior counsel appearing on behalf of the appellant-Agmatel (successful bidder) while supplementing that the High Court has erred in going into the technical evaluation of two products and their similarity; and this remains an impermissible area for judicial review, as held by this Court in the case of ***Galaxy Transport Agencies v. New J K Roadways*: 2020 SCC OnLine SC 1035**. The learned senior counsel has further argued that the view taken by the tender inviting authority and its evaluation committee remains a reasonable view that "Smart Phones" are not similar to "Tablets". In this regard, the learned senior counsel has, apart from reiterating the categories specified on the online portal GeM, has also referred to the classification of "Tablet" computers by the Central Board of Excise and Customs under Section 151A of the Customs Act, 1950 while specifically noting that a "Tablet" computer is different from a "Smart Phone", as it is an automatic data processing machine classifiable under the heading 847130 and not 8517. Learned senior counsel has further referred to the fact that various other authorities have considered "Tablet" computers as computing devices similar to Laptops, PCs etc., while taking "Mobile Phones" under a different category. Thus, according to the learned senior counsel, there being a reasonable view taken by NVS and there being no mala fide or bias, there was no case for interference by the High Court.

14. While countering the submissions so made on behalf of the appellants, the learned counsel for the contesting respondent-writ petitioner, has in the first place, submitted that its bid was rejected on rather specious grounds inasmuch as even the reasons for rejection had not been consistent, as noticeable from different stands taken in the initial rejection dated 25.06.2021, in the clarification dated 29.06.2021, in the other response dated 01.07.2021 and in the submissions made before the High Court and this Court.

14.1. The main plank of the submissions of the learned counsel for the writ petitioner has been that various similarly placed PSUs and Government Agencies, in various tender documents, have used the terms “Tablets” and “Smart Phones” rather interchangeably. In this regard, the learned counsel has referred to the prescriptions in tender documents by Meghalaya Information Technology Society, REC Power Distribution Co. Ltd., Department of Education, Government of Bihar, and the Himachal Pradesh State Electronics Development Corporation Ltd. The learned counsel has further submitted that, wherever the tender inviting authority wanted to restrict the past performance only to “Tablets”, the same was stated in unambiguous terms and has referred to the tender documents issued by Keltron and the Government of Maharashtra. The learned counsel has further submitted that not only tender issuing authorities have interchangeably used the products “Tablets” and “Smart Phones” but, even the utility based application issued by various Governments do not

make any distinction between “Tablets” and “Smart Phones”; and has referred to the Government portal e-pathshala which provides for e-pub, an android based application, which is required for tablets and smart phones alike whereas for laptops and desktops, it provides for flip-book, which is a Windows based programme. It has also been pointed out that MSME, Kolkata has issued common training programme for repair and working of smart phones and tablets.

14.2. With the aforesaid details and comparisons, it has been contended on behalf of the writ petitioner that the interpretation sought to be suggested by the tender inviting authority in the present case is entirely unreasonable and has rightly been interfered with by the High Court. It has also been submitted that in the present case, the tender inviting authority has attempted to exercise its discretion to suit a particular bidder and to curb the competition on rather inconsistent grounds by attempting to distinguish between otherwise identical products. It is contended that when the tender inviting authority was conscious of the terms stated in a particular manner, it cannot be permitted to change such terms by way of interpretation to suit a particular bidder or by taking away the level playing field. The submission has been that “Smart Phones” and “Tablets” are rather synonymous terms and the stand of the appellants deserves to be disapproved.

14.3. It has also been submitted on behalf of the writ petitioner that in fact, it has been awarded another contract for supply of 3,00,000 tablets

and it had been regularly supplying various electronic products, including tablets.

14.4. Yet further, it has been submitted that a caution was sounded by the Central Vigilance Commission ('CVC') to the effect that the terms of tender must be clear and ascertainable with specificity; and *post facto* interpretations must be avoided to bring in transparency in tendering matters. Thus, the learned counsel has supported the order impugned and submitted that the appeals deserve to be dismissed.

15. We have given thoughtful consideration to the rival submissions and have examined the record with reference to the law applicable.

**Interpretation of Tender Document: Relevant Principles**

16. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the 3-Judge Bench decision of this Court in ***Galaxy Transport Agency*** (supra) wherein, among others, the said decision in ***Afcons Infrastructure Limited*** (supra) has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and

equipment. This Court referred to various decisions on the subject and stated the legal principles as follows: -

> **"14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings.** In *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, this Court held:
>
> > "**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**."
>
> (page 825)
> (emphasis supplied)
>
> **15.** In the judgment in *Bharat Coking Coal Ltd.* v. *AMR Dev Prabha* 2020 SCC OnLine SC 335, under the heading "*Deference to authority's interpretation*", this Court stated:
>
> > "**51.** Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.
> >
> > 52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (*Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818)

> 53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality."
>
> (emphasis supplied)

**16.** Further, in the recent judgment in *Silppi Constructions Contractors* v. *Union of India*, 2019 SCC OnLine SC 1133, this Court held as follows:

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

**17.** In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "*both*" appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

**18.** Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. **Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or *mala fide* on the part of the tendering**

**authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court**. Thus, in *Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517, this Court noted:

> "**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. 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. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(pages 531-532)
(emphasis supplied)

**19.** Similarly, in *Montecarlo Ltd.* v. *NTPC Ltd.*, (2016) 15 SCC 272, this Court stated as follows:

"**26.** We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. **But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible.** The principle that is applied to scan

> and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."
>
> (page 288)
>
> **20.** This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own."
>
> (Underlining emphasis in the original; emphasis in bold supplied)

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

**Application of relevant principles to the case at hand**

18. Applying the aforesaid principles to the case at hand, we are clearly of the view that the impugned order cannot be sustained.

19. In relation to the contention that the tender inviting authority was the best judge to interpret the conditions of tender and the Court should

not interfere, the High Court referred to an observation by this Court in the case of ***Reliance Energy Ltd.*** (supra) that when tenders are invited, terms and conditions must indicate norms and benchmarks with legal certainty. In that case, the said observations came in the backdrop of the facts that in the eligibility conditions of the tender before the Court, one of the criteria had been of the consortium net cash profit of Rs. 200 crores but, the State had not specified the accounting norms with clarity for calculation of net cash profit; and one of the two acceptable methods of calculation of net cash profit was not taken into account without any reason. In the given facts, the decision of the authority concerned was found to be arbitrary, whimsical and unreasonable. The said decision in ***Reliance Energy Ltd.*** (supra) has no direct application to the facts of the present case and even otherwise, it has not been the finding of the High Court that the term stated by the tender inviting authority-NVS was lacking in certainty. However, beyond this, as to which particular product was to be treated as similar category product, could not have been a matter of interpretative exercise by the Court, particularly when the view taken by the tender inviting authority and its evaluation committee has not been shown to be absurd or irrational or suffering from mala fide.

20. It has also rightly been pointed out by the appellants, with reference to the decision in ***Afcons Infrastructure Limited*** (as extracted in the quotation hereinabove), that an interpretation by owner or employer of a project to the tender document may not be acceptable to the

Constitutional Courts but that, by itself, would not be a reason for interfering with the interpretation given. In the aforesaid view of matter, the long-drawn exercise by the High Court on the dictionary meaning of the words and on semantics, in our view, had been entirely unnecessary.

21. The High Court has even proceeded to find the elements of similarity between "Smart Phones" and "Tablets" (*vide* paragraph 30 of the impugned order). The writ petitioner has also made elaborate submissions to suggest that "Smart Phones" and "Tablets" are of similar category. The respondents, *per contra*, have also made detailed submissions that these two products are neither the same nor of similar category. In our view, an elaborate and in-depth analysis of the features and categorisation of these two products is not called for but, for the reason that the High Court has adopted such a course, a few comments on this aspect would also be apposite.

21.1. Even if some organisations/institutions, with reference to their requirements or other relevant factors, had assumed these two products, i.e., "Tablets" and "Smart Phones" akin to each other, the facts do remain that these very products have been placed under different categories on the online portal GeM and have also been taken as classifiable differently by the customs authority. In the given set of facts and classifications, the decision, as taken by NVS and its TEC, cannot be said to be suffering from irrationality, absurdity or mala fide. In our view, the analysis of the writ Court needs to stop at that. Beyond this point, the writ Court would

not be substituting its preferred interpretation of the tender condition with the one adopted by the author of the tender document and the person procuring the product, who has to be regarded as the best person to understand its requirements.

21.2. Putting it differently, neither the excessive analysis, as entered into by the High Court, was required in this case nor we would be evaluating all the specifications of these two products, namely, “Smart Phones” and “Tablets”. Suffice it to notice for the present purpose that even if both are electronic devices and even if several of their utility features are the same or similar, their categorisation under different headings is also a fact not unknown to the parties, as would appear from the categorisation on the Government online portal itself. Beyond this aspect, in our view, no adjudicatory process is called for and the interpretation as put by the tender inviting authority-NVS does not deserve interference. Similarly, if in some of the notice inviting tenders, both smart phones and tablets were stated, or in some of the tenders, specific product tablet alone was stated, that would also not be decisive because that would, obviously, depend on the purpose for which the procurement was being made; and the procuring party, i.e., the tender inviting authority, ought to be extended the latitude to decide on its requirements.

22. In the same context, we may also deal with another feature of this case related with the supplies made by the writ petitioner to different organisations pursuant to different tender notices.

22.1. As noticed, the writ petitioner, in order to assert its fulfilment of the above referred Past Performance criterion, has relied upon the statements made by its OEM in the letter dated 16.04.2021. That reads as under: -

**"PO details in FY 2019-20 (Single Year): Past Performance Clause**

| **Sr.No.** | **Organisation Name** | **PO & Completion Certificate** | **Quantity (Units)** |
|---|---|---|---|
| 1 | Punjab Infotech | PICTC/ITeG/2019/2872 dated 25.11.2019 | 1,75,443 |
| 2 | Directorate of Welfare of Scheduled Castes-Assam | DSC./Spl.Grant/TB/539/2019/45 dated 06-02-2020 | 3809 |
| 3 | Directorate of Welfare of Plain Tribes & Backward Classes–Assam | DW/OTG./OBC/2019-20/755/Pt-IX/16 dated 13-01-2020 | 19047 |
| 4 | Directorate of Welfare of Plain Tribes & Backward Classes–Assam | DW/OTG./ST/2019-20/754/Pt-VI/13 dated 13-01-2020 | 14285 |
| 5 | Directorate of Women and Child Development Kerala | Contract No. GEMC-511687738091493; Date:13-Aug-2019 | 27550 |

| | | | |
|---|---|---|---|
| 6 | Directorate of Women and Child Development Kerala | Contract No. GEMC-511687712946705; Date: 23-Apr-2019 | 8885 |
| **Total Quantity** | | | **249019** |

> We have even received the Biggest Purchase order of round 175443 Units of Smart phones by Punjab Infotech for Education Purpose and supplied the device successfully. PO and Completion Certificate is enclosed."

22.2. In regard to the supplies shown by the writ petitioner, details have been stated by the appellant-NVS in the additional affidavit in the following terms: -

> "3…..Quantity supplied by Ms. Lava International Ltd. (OEM of respondent no. 1) during last 3 financial years before the bid opening date are as under:

| Sl. No. | Financial Year | Device Type | Quantity Supplied | Page Nos. |
|---|---|---|---|---|
| 1 | 2020-21 | Tablets | - | - |
| | | Smartphones | - | - |
| | | Power banks | - | - |
| 2 | 2019-20 | Tablets | 3809 | 131 |
| | | | 19047 | 132 |
| | | | 14285 | 133 |
| | | **Total** | **37141** | |
| | | Smartphones | 175443 | 127 |
| | | | 27550 | 136 |
| | | | 8885 | 143 |
| | | **Total** | **211878** | |
| | | Power banks | 27550 | 136 |
| | | | 8885 | 143 |
| | | **Total** | **36435** | |
| 3 | 2018-19 | Tablets | 3809 | 135 |
| | | | 3809 | 135 |
| | | **Total** | **7618** | |
| | | Smartphones | 1598 | 120 |
| | | | 4418 | 121 |
| | | **Total** | **6016** | |
| | | Power banks | **-** | - |

> 4. I submit that the Committee for Technical Evaluation had opened the bids on 12.05.2021 and, after scrutinizing the documents submitted by Respondent No. 1 with regard to past performance mentioned at clause 4 of bid document found that Power banks and Smart Phones could not be considered as "same or similar category products" and, only work orders for Tablets could be considered as per the clause 4 of the bid document. Further it was found that the data and documents provided by the Respondent No. 1 for the three Financial Years viz., FY 2018-19, 2019-20 and 2020-21, maximum quantities of Tablets supplied by the Respondent No. 1 were in the FY 2019-20 i.e. 37141 nos. which was short by 10.20% of the 60% criterion [60% of 68490 = 41364] for satisfying the past performance clause 4 of the bid document.
>
> 5. I submit that due to shortfall of 10.2% of the required quantity of same or similar category products as per past performance clause, the Respondent No. 1 was declared disqualified in technical bid."

22.3. The writ petitioner has also referred to the several such contracts where both the products, tablets and smart phones, have been procured simultaneously while suggesting that these terms have even been used interchangeably. On the other hand, the appellant-NVS has stated in detail that the supplies of Tablets by the writ petitioner fell short by 10.20% to 60% criterion and the writ petitioner was, in fact, largely supplying smart phones and not tablets. As regards the organisations and their tender processes referred by the writ petitioner, various comments have been offered by the appellant-NVS in a tabular form; the relevant parts thereof read as under: -

> **"Purchases/ Tenders referred by Resoursys Telecom through its WP no. 6676/2021 and additional affidavit filed therein**

| **Purchaser** | **Purpose & Objectives** | **Claim through the WP** | **Reply of NVS** |
|---|---|---|---|
| HP State Electronics Development Corporation Ltd. (for | Rate Contract for procurement of android based | HP State Electronics Development Corp had placed | **Since, the referred tender was itself for smartphones, hence no |

| | | | |
|---|---|---|---|
| Himachal Pradesh Govt.) | smartphones | smartphones & Tablets at par in the e-tender documents | compatibility and relevance with the subject matter which is the bid process of Tablet Computers. |
| Guwahati High Court at Guwahati | Bid was invited for supply & maintenance of 395 numbers of smartphones for Bailiff/ Process servers in various court complexes of Assam. | Not mentioned in the Writ as well as additional affidavit. However, documents were attached with the WP. | ** Since, the referred tender was itself for smartphones, hence no compatibility and relevance with the subject matter which is the bid process of Tablet Computers. |
| High Court of Himachal Pradesh, Shimla | To supply and install approx. 455 number of smartphones to the process servers and bailiffs in the subordinate courts. | Smart phones & Tablets are considered at par for the purpose of meeting the eligibility criteria.<br><br>Smart Phones are interchangeable.<br><br>Both have same specifications. | **Bid was cancelled. |
| Meghalaya Information Technology Society (MITY) | Tender for procurement of Tablet PCs | Meghalaya Information Technology Society invited a tender for Tablets wherein Tablets/ Smart/ Phones/ Laptops are considered under same and similar category. | ** Tender clause for eligibility criteria is totally distinct from the NVS bid.<br><br>**In the eligibility conditions, bidder has specifically mentioned that they will consider Tablet PC or Smart |

| | | | |
|---|---|---|---|
| | | | Phones or Laptops or IT products. |
| Kerala State Electronics Development Corporation Ltd. | Rate Contract for Tablet PC's for e-health | Not mentioned in the Writ as well as additional affidavit. However, documents were attached with the WP. | In the bid document of KELTRON, it is specifically mentioned that Tablet, PCs, Laptop, Net books, Desktops will be accepted. Nowhere Kerala State Electronics Development Corporation Ltd. accepted the smartphones in the similar category of ICT(Tablet, PC Laptop, Netbook and Desktop).<br><br>**Tender clause is different however smartphones is not considered. |
| REC Power Distribution Co. Ltd. | Rate contract for supply of 1000 number of Tablet. | Bidder should have desire experience of supplying Tablet/ Smart phones. | **In the bid document, past performance criteria is totally distinct from the NVS bid document. Tender clause is different.<br><br>**The bid process floated by RECPDCL was not floated through the GeM Portal, hence, the RECPDCL and NVS are not on similar footing.<br><br>**The matter of |

| | | | |
|---|---|---|---|
| | | | NVS is distinct as no query was raised by the anyone of prospective bidders regarding inclusion of smart phones in past experience.<br><br>**The bid process was floated 6 years back. |
| Department of Education, Govt. of Bihar | Expression of interest (EOI) for selection of agencies for supply and service of E-learning tablets. | In the tender documents under clause 3.7.3, the criteria is mentioned that the bidder should be either OEM or authorized supplier of Mobiles/ Tablets. | **It is Expression of Interest not a Tender.<br><br>**Referred bidder has prepared the documents of bid as per their need, expertise and familiarity. However, NVS has floated the bid of procuring Tablet on GeM portal, Govt of India adhering to the all norms & provisions of bidding process.<br><br>**Pre-qualification criteria are distinct from the NVS criterias.<br><br>**Past performance criteria mentioned in clause 4 by NVS and criteria referred by the bidder under clause |

| | | | |
|---|---|---|---|
| | | | 3.7.3 are distinct. |
| Govt. of Bihar, Rural Development Department | Tender for procurement of Tablet and related accessories for BRDS under BIPS project | Rural Development Department, Govt. of Bihar considered experience of products like tablet and smartphones under similar products. | **The matter of NVS is distinct as no query was raised by the anyone of prospective bidders regarding inclusion of smart phones in past experience.<br><br>**In the bid document (Addendum-II), experience [clause 3(b)] is distinct to the NVS past experience clause 4. In the referred bid document tenderer (buyer/author of the tender) has specifically shown the intends to consider the IT product like Tablet and Smartphones whereas NVS has nowhere mentioned. |

**In all aforesaid purchases referred by the respondents Resoursys Telecom, incomplete documents are attached with the Writ and additional affidavit.
**NVS in its bid documents specifically mentioned that Tender is floated for Tablet Computers only.
**NVS has floated the bid through the GeM portal.
**No prospective bidders raised any query regarding inclusion of smartphones under similar category. Only OEM of the R-1 i.e. Ms. Lava OEM has requested to reduce the past performance from 80% to 40% and technical committee has considered the request of the Ms. Lava positively and reduced the requirement of past performance from 80% to 60%.
**There is not a single case where bid condition is same and smartphones added in the similar category products.

> **Referred purchases consists different clause and purposes, hence, the same are not squarly covered in the instant case i.e. tender floated by the NVS for Tablet Computer only wherein specifically mentioned under clause 4 of past performance that the experience under same or similar category will be considered.
> **In the aforesaid purchase referred by the respondent, no matter on GeM wherein smartphones is considered under same or similar category of Tablet Computer unless specifically and unequivocally mentioned to this effect. It axiomatically demonstrates that the Smartphones are not comes under the purview of same or similar category of Tablet Computers."

22.4. The aforesaid submissions on facts make this much clear that the decision, as taken by the appellant-NVS and its TEC, cannot be said to be totally baseless or absurd or irrational or illogical. It gets perforce reiterated that even if some of the organisations, in relation to their requirements, procured tablets and smart phones both under the same tender process or even used these expressions "interchangeably" or "interconnected", that by itself cannot lead to a definite conclusion by the Court that "Smart Phones" and "Tablets" are to be taken as similar category products for the tender process in question.

23. Viewed from any angle, interference by the High Court in this matter does not appear justified, particularly when no case of mala fide or bias is alleged. Every decision of the administrative authority which may not appear plausible to the Court cannot, for that reason alone, be called arbitrary or whimsical. The High Court, in the present matter has obviously proceeded with an assumption that the view as being taken by it, in acceptance of the case of the writ petitioner, was required to be substituted in place of the views of the tender inviting authority. That has been an error of law and cannot sustain itself in view of the consistent

binding decisions of this Court, including the 3-Judge Bench decision in ***Galaxy Transport*** (supra).

24. The High Court, while supporting its process of reasoning, has referred to such principles which, with respect, we find entirely inapposite and beyond the periphery of the question involved in the present case. As noticed, in such matter of contracts, the process of interpretation of terms and conditions is essentially left to the author of the tender document and the occasion for interference by the Court would arise only if the questioned decision fails on the salutary tests laid down and settled by this Court in consistent decisions, namely, irrationality or unreasonableness or bias or procedural impropriety.

24.1. In the case of ***Nabha Power Limited*** (supra), as referred by the High Court, this Court, while referring to the concept of 'Penta test' for 'business efficacy', made it clear that such a test and thereby reading an "implied term", would come in play only when the five conditions are satisfied. Even in that case, the Court, while dealing with the question of reimbursement of cost incurred by the successful bidder/power supplier towards washing of coal in a power procurement project, analysed as to what charges would be payable by interpretation of all the terms of the contract and held the appellant entitled to certain charges as the formula for energy charges was clear. In the present case too, neither the High Court was reading any "implied term" in the past performance criterion nor NVS had done so. It is difficult to find any correlation of the decision

in ***Nabha Power Limited*** (supra) to the case at hand or even to the analysis by the High Court.

24.2. The same aspects apply to the observations regarding '*contra proferentem rule'* as referred by the High Court with reference to the case of ***United India Insurance Company Limited*** (supra). The said rule was referred by this Court while not accepting the argument made on behalf of the insured and while observing that the said rule had no application, when the language of the relevant clauses was plain, clear and unambiguous. We may, however, observe that even from the extracted part of the principles related with the '*contra proferentem rule'*, as reproduced by this Court from the Halsbury's Laws of England, it is clear that the said rule was applied in the case of ambiguity in the insurance policy because the policies are made by the insurer and its ambiguity cannot be allowed to operate against the insured. This rule, in our view, cannot be applied to lay down that in case of any ambiguity in a tender document, it has to be construed in favour of a particular person who projects a particular view point. The obvious inapplicability of this doctrine to the eligibility conditions in a notice inviting tender could be visualised from a simple fact that in case of ambiguity, if two different tenderers suggest two different interpretations, the question would always remain as to which of the two interpretation is to be accepted? Obviously, to avoid such unworkable scenarios, the principle is that the author of the tender document is the best person to interpret its documents and

requirements. The only requirement of law, for such process of decision-making by the tender inviting authority, is that it should not be suffering from illegality, irrationality, mala fide, perversity, or procedural impropriety. No such case being made out, the decision of the tender inviting authority (NVS) in the present case was not required to be interfered with on the reasoning that according to the writ Court, the product “Smart Phone” ought to be taken as being of similar category as the product “Tablet”.

25. It has also been argued on behalf of the writ petitioner that the reasons for rejection by NVS have not been consistent. We are unable to find any inconsistency in the reasons assigned by the appellant-NVS in rejection of the bid of the writ petitioner. In the initial information, only this much was stated that there was a mismatch of technical specification but, when required further by the writ petitioner, the appellant-NVS elaborated, in its reply dated 29.06.2021, on the fact that the work orders concerning smart phones, laptops, Aadhaar kits, printers, power-banks were not considered to be as same or similar category products to that of tablets. Yet further, the representations made by the writ petitioner and its OEM were responded with the assertion that the TEC had considered only “Tablets” under similar category to ensure proven products. Same has been the stand of NVS before the High Court and before us. Mere elaboration by the tender inviting authority as regards its reasons and basis of the decision cannot be said to be that of any inconsistency.

26. We may also observe that the other submission made on behalf of the writ petitioner about the caution sounded by CVC that the terms of tender must be clear and *post facto* interpretations must be avoided to bring in transparency in the tendering matters, carry no implication in the facts of the present case. The terms of tender in the present case had been clear, and they were ascertainable with specificity available on the very portal on which NIT was issued. It had not been a case of *post facto* interpretations by the tender inviting authority-NVS. Certain suggestions made on behalf of the writ petitioner about the tender inviting authority changing the terms to suit a particular bidder remain baseless. No such case of mala fide has been made out; rather, as pointed out on behalf of the appellant, all the other tenderers clearly understood the meaning and requirement of the past performance criterion and stated the particulars of tablets supplied by them in the past. Such contentions of the writ petitioner have only been noted to be rejected.

27. Similarly, the submission made on behalf of the writ petitioner, that it had been awarded another contract for supply of 3,00,000 tablets, carries no meaning at all. Such a supply contract had not been a matter of evaluation in the tender process in question, where the quantity in the last three financial years before the bid opening date was to be considered. Any subsequent event could neither invest the writ petitioner with any right in the present matter nor the impugned order could be sustained on that basis.

**Conclusion**

28. For what has discussed hereinabove, we are clearly of the view that the petition filed by the writ petitioner was required to be dismissed. The High Court having allowed the writ petition on rather irrelevant considerations, the impugned order is required to be set aside

29. Consequently, these appeals succeed and are allowed; the impugned judgment and order dated 27.09.2021 is set aside; Writ Petition (C) No. 6676 of 2021, as filed by the writ petitioner, is dismissed with no order as to costs.

**…….. J.**
**(DINESH MAHESHWARI)**

**……..J.**
**(VIKRAM NATH)**

**New Delhi;**
**Dated: January 31, 2022**