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MONTECARLO LTD.

v.

NTPC LTD.

(Civil Appeal No. 10143 of 2016)

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OCTOBER 18, 2016

**[DIPAK MISRA AND UDAY UMESH LALIT, JJ.]**

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*Tenders – Judicial review – Invitation for bids for development and operation of coal mines – Respondent-NTPC found the bid by appellant technically non-responsive as appellant did not have necessary experience of drilling for blasting purposes – Appellant invoked jurisdiction of High Court challenging the determination made by respondent – Plea of appellant that the tender documents required experience of a bidder only in drilling, not drilling for blasting purposes – High Court held that the assessment of the respondent-NTPC was correct as it did not affect public interest but subserved the public purpose – On appeal, held: 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 – Constitutional Courts must defer to this understanding and appreciation of tender documents unless there is malafide or perversity in understanding – Technical evaluation or comparison by the court thus is impermissible – Principle to understand ordinary instrument relatable to contract has to be treated differently than tender documents relating to technical works and projects – In the instant case, tenders and offers are invited for highly technical subjects – It is to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic – It requires technical expertise – Therefore, respondent should be allowed to carry out technical evaluation freely – No infirmity in the judgment and order passed by the High Court.*

**Dismissing the appeal, the Court**

**HELD: 1. The Respondent-NTPC invited bids for development and operation of coal mines and had issued “Instructions to Bidders” (ITB) which contained clauses as to**

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how the proposal shall be conducted. Clauses of Mine operations are technical but they are fundamental to understand the Qualifying Requirements (QR). They clearly demonstrate that drilling is imperative. High Court has considered the documents filed by appellant and opined that the documents filed in support of the QR are substantially inadequate. Adverting to the facet of drilling, the writ court has opined that there is specific use of the words “drilling for the purposes of blasting”. [Para 17][243-D-F]

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

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A 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. There is no infirmity in the judgment and order passed by the High Court. [Paras 24, 25][245-H; 246-A-F]

B *Tata Cellular v. Union of India* (1994) 6 SCC 651: 1994 (2) Suppl. SCR 122; *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.* (2012) 8 SCC 216: 2012 (8) SCR 128; *Sterling Computers Limited v. M/s M & N Publications Limited & Ors.* (1993) 1 SCC 445: 1993 (1) SCR 81; *Jagdish Mandal v. State of Orissa and Ors* (2007) 14 SCC 517: 2006 (10) Suppl. SCR 606; *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr.* (2005) 6 SCC 138: 2005 (3) SCR 666; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.* (2006) 11 SCC 548: 2006 (8) Suppl. SCR 11; *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* 2016 (8) SCALE 765 – relied on.

#### Case Law Reference

E	1994 (2) Suppl. SCR 122	relied on	Para 12
	2012 (8) SCR 128	relied on	Para 12
	1993 (1) SCR 81	relied on	Para 17
	2006 (10) Suppl. SCR 606	relied on	Para 19
F	2005 (3) SCR 666	relied on	Para 20
	2006 (8) Suppl. SCR 11	relied on	Para 21
	2016 (8) SCALE 765	relied on	Para 22

G CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10143 of 2016.

From the Judgment and Order dated 30.09.2016 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 7726 of 2016.

H P. Chidambaram, Harish P. Raval, Vikas Singh, Sr. Adv., Sandeep Singh, Mahesh Agarwal, Shamik Bhat, Shashank Manish, E. C. Agrawala,

Ankit Jain, Ms. Iti Agarwal, Ravi Prakash, Chandra Prakash, Advs. for appearing parties. A

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. The respondent, NTPC Limited, had issued separate invitation for bids for development and operation of three coal mines, viz., Dulanga Coal Block, Chatti Bariatu and Talaipalli in the State of Odisha. Online bids were invited on Single Stage Two Envelope Bidding basis (Envelope-I: Techno-Commercial Bid and Envelope-II: Price Bid). There was stipulation for Reverse Auction from the eligible bidders. It was also stated in the Invitation For Bids (IFB) issued on 22.01.2016 that the bids shall be received on 17.03.2016 and Envelope-I, that is, Techno-Commercial Bid will be opened on 17.03.2016. The date of opening of Envelope-II, that is, Price Proposal shall be intimated separately. Clause 5 of the IFB stipulated Qualifying Requirements (QR). Clauses 5.1 and 5.1.2 dealt with technical criteria. B C

2. The respondent had also issued “Instructions To Bidders” (ITB) which contain clauses as to how the proposal shall be conducted. Clause 6.3.1 of ITB deals with Preliminary Examination of Techno-Commercial Proposals. We think it appropriate to reproduce the same:- D

“6.3.1 Preliminary Examination of Techno-Commercial Proposals: E

(a) OWNER will examine the Project Proposals to determine whether they are complete, whether required securities have been furnished, whether the documents have been properly signed and whether the bids are generally in order. F

(b) Prior to the detailed evaluation, OWNER will initially determine whether each Techno Commercial Proposal is of acceptable quality, is generally complete and is substantially responsive to the bidding documents. For purposes of this determination, a substantially responsive Proposal is one that conforms to all the terms, conditions and specifications of the bidding documents without material deviations, objections, conditionalities or reservations. A material deviation, objection, conditionality or reservation is one (i) that affects in any substantial way the scope, quality G

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A or performance of the contract; (ii) that limits in any substantial way, inconsistent with the bidding documents, the Owner's rights or the successful Bidder's obligations under the contract; or (iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive Proposals.

B (c) OWNER's determination of a Techno Commercial Proposal's responsiveness is to be based on the contents of the Techno Commercial Proposal itself without recourse to extrinsic evidence. If a Techno Commercial Proposal is not substantially responsive, it will be rejected by OWNER, and may not subsequently be made responsive by the Bidder by correction of the nonconformity."

C 3. Clauses 6.3.2 6.3.2.1, 6.3.2.2 and 6.3.4 provide for Evaluation of Responsive Techno-Commercial Proposal, Evaluation of Qualification Proposals, Evaluation of Technical Proposals and Clarification Meeting.

D Clause 6.3.5 deals with the steps where the responsive Techno-Commercial Proposal which meets the QR specified in Chapter 7 and Technical Requirements specified in Chapter 8 of REF Documents and stipulates that they shall be considered for Price Proposal Phase of the Bidding Process. It has also been provided therein that the bidders who meet QR specified in Chapter 7 and Technical Requirements specified in Chapter 8 of REP documents shall be terms as "shortlisted bidders". Chapter 7 of ITB deals with technical criteria. Clauses 7.1.1 and 7.1.2, being significant, are extracted below:-

E "7.1.1 The Bidder should have, in the preceding 7 (seven) years reckoned from the date of opening of the Techno-commercial Bids developed & operated single coal/lignite mine having coal/lignite reserves of at least 150 million tonnes & annual capacity of at least 6 MTPA and produced at least 2 million tonnes of coal/lignite from such mine.

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G 7.1.2 The Bidder should have, in the preceding 7 (seven) years reckoned from the date of opening of the Techno-commercial Bids, operated and produced:

H a) At least 23 Million SCM of aggregated volume of

overburden and/or coal/lignite from a maximum of seven open cast mines of Coal/Lignite, in any year.

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b) At least 11.5 Million SCM of composite volume of overburden and coal/lignite from single open cast mine in any year, out of which at least 3 million tonnes shall be coal/lignite.

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The qualifying works at clause 7.1.2(a) can be from same mine or different mines including the mine considered to meet qualifying requirement at clause 7.1.2(b).”

4. At this stage, it is necessary to refer to Notes appended to Clause 7.3.3 that deals with route-3. Notes are as under:-

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“i. The word “operated” means that the Bidder should have performed the necessary activities of drilling, excavation, hauling etc. on its own or through sub-contracting.

ii. The word “developed” means that the Bidder should have performed the necessary activities of Land Acquisition/assisted in Land Acquisition, Statutory clearances/assisted in Statutory clearances and carried out ‘Infrastructure development’ on its own or through sub-contracting.”

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5. Chapter 9 of the ITB deals with Evaluation Methodology for Techno- Commercial Proposal (Qualification Proposal and Technical Proposal). Clause 9.1 deals with Evaluation of Qualification Proposal and Clause 9.2 deals with Evaluation of Technical Proposal. They read as under:-

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“9. Evaluation Methodology for Techno Commercial Proposal (Qualification Proposal and Technical Proposal)

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9.1 Evaluation of Qualification Proposal:

The Techno-Commercial Proposal shall be scrutinized to establish “responsiveness” as per Clause 6.3.1.

The Responsive Techno-Commercial Proposal shall be evaluated in detail to determine their fulfillment of Qualifying requirements specified in Chapter 7 of this RFP document.

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During the bid evaluation, NTPC may, at its discretion, ask the Bidder for a clarification of its Qualification Proposal

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A including documentary evidence pertaining to only the  
reference mines declared in the Qualification Proposal for  
the purpose of meeting Qualifying Requirement specified  
in Chapter 7 of this RFP document. The request for  
clarification and the response shall be in writing and no  
change in the substance of the TECHNO-COMMERCIAL  
B Proposal including substitution of reference mines in the  
Qualification Proposal by new/additional mines for  
conforming to Qualifying Requirement shall be sought,  
offered or permitted.

C The Qualification Proposals which meets the qualification  
criteria shall be considered for Technical Proposal  
Evaluation Phase of the Bidding Process. The Bidders who  
meet the qualification criteria shall be termed as Qualified  
Bidders.

D 9.2 Evaluation of Technical Proposal:

The Technical Proposals shall be evaluated to determine  
their compliance with the Technical Proposal Requirements.  
For this purpose, NTPC shall use the supporting documents  
and/or information available with or obtained by NTPC.

E 9.2.1 During evaluation NTPC may seek clarification from  
the Bidders, may conduct discussions with the Bidders, and  
may ask the bidder to make Technical presentation.

Technical proposal shall include details as has been sought  
vide Chapter 8.

F 9.2.2 The Technical Proposals without sufficient information  
as per the terms of Chapter 8 of this document shall be  
deemed “Non Responsive Technical Proposal”.

G 9.2.3 The Responsive Technical Proposals meeting the  
requirements to the satisfaction of Owner shall be  
considered for further detailed Technical Evaluation.”

[emphasis added]

H 6. Clause 9.3 provides how detailed evaluation of technical  
proposals submitted by the bidder shall take place. Clauses 9.3.1 and  
9.3.2 which are relevant for the present purpose are reproduced below:-

“9.3.1 The purpose of technical evaluation is to check responsive and assess the compliance with the requirements of NTPC.

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9.3.2 To ensure effective evaluation of Technical Proposals the Bidders shall provide the necessary details as specified in Clause 8.4. The Technical evaluation will be for evaluating whether the Technical Proposal of the Bidder meets the following criteria.

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(a) Time Schedule to Achieve First Year Coal Production Target – NTPC shall evaluate the PERT chart submitted by the Bidder, to determine its completeness; reasonableness; and achievability.

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(b) Adequacy of the Equipment Plan – The Bidder shall submit an equipment plan giving details of the equipment that shall be used by the Mine Operator to provide Mining Services which shall be not less than the Minimum Equipment to be deployed as specified by NTPC at Schedule 6 of Project Agreement. NTPC shall evaluate the adequacy of equipment to meet the criteria imposed by NTPC in terms of quantity of production, quality of coal produced etc.”

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[emphasis supplied]

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7. The controversy in the instant case basically pertains to whether the appellant meets the qualification criteria as provided under the heading Technical Criteria that occurs in Clauses 7.1 and 7.2 of QR. To appreciate the same, it is essential to have a look at the bid submitted by the appellant. The appellant had uploaded the proposal on 26.4.2016 by referring to three mines in support of its stand to meet the QR. The three mines that have been referred to in the proposal are (i) Mata No Madh, Lignite Mine, Kutch, GMDC (Mine 1); (ii) June Kundada OCP of Western Coalfield Limited (Mine 2) and (iii) Khadia OCP, Northern Coalfield Limited (Mine 3). As regards the Mine No. 1, the appellant declaring the scope of work in the aforesaid Mine had furnished the following details:-

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Sl. No.	Particulars	Mine 1 (Lignite Project, Mata No Madh, Kutch)
10.	Brief description of scope of work	Turnkey mining Contract involving overburden/inter burden removal, excavation and/or loading of lignite from mines face and ancillary activities
11.	<b>Drilling</b>	<b>Yes/No</b>
	Carried out Drilling on our own or through subcontracting	Our own/subcontracting
	<b>Excavation</b>	<b>Yes/No</b>
	Carried out Excavation on our own or through subcontracting	Our own/subcontracting
	<b>Hauling</b>	<b>Yes/No.</b>
	Carried out Excavation on our own or through subcontracting	Our own/subcontracting"

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8. As the proposal would reflect, the appellant had not provided the information that it had carried out the drilling in the aforesaid Mine, namely, Mata No Madh. The respondent-owner sent a communication on 17.5.2016 seeking certain clarification pertaining to the QR and other aspects. The High Court has referred to the said communication and we think it necessary to reproduce the same:-

“Ref:01/CS-7014-602(R1)-9-PAA Dated: 17.05.2016

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To,  
M/s. Montecarlo Limited,  
706, Ship Building, Near Municipal Market,  
C.G. Road, Navrangpura, Ahmedabad-380 009,  
Gujarat, India

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Kind Attn. Sh. Shekhar Shanna, Sr. General Manager

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Sub: Development and Operation of Dulanga Coal Block  
as per IFB No. 40051319; Bid Doc. No.CS-7014-802(R1)-  
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Dear Sir,

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1.0 This has reference to your Project Proposal (Techno-  
Commercial Bid) against IFB No.40051319 for the subject  
package. You are requested to furnish the following  
information with respect to the details/documents furnished  
in the bid for qualification requirement data:

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**(i) Against QR requirement of Clause 7.1.2 of ITB:** It  
is observed in the Contract Agreement dtd. 11.02.2014  
submitted by the bidder in support of meeting qualifying  
requirement for Lignite project Mata No Madh, Kutch,  
Gujrat that the necessary activity of drilling as per stipulations  
of QR (sr.no. i of Notes) is not mentioned. The same may  
please be clarified with supporting documents.

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**(ii) Against QR requirement of Clause 7.2 of ITB:**  
Details of Other non cash expenses in Million for calculating  
Annual Cash Accrual for three year viz. 2013-14, 2014-15  
& 2015-16

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2.0 It is requested that the requisite information along with  
necessary documents be furnished to us at the earliest,  
preferably by 24.05.2016.

3.0 It may please be noted that seeking the above  
clarifications should not be construed that the bid submitted  
by you is considered techno commercially responsive and/  
or meeting the Qualification requirements (QR).”

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9. The response that was given by the appellant on 21.5.2016 is to  
the following effect:-

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“A) Para 1.0 (i) of your above letter against QR of Clause  
7.1.2 of ITB: We are attaching the followings:

a) A certificate from GMDC (client of our Lignite Project  
at Mata No Math) Vide No.GMDC/MMLG/298/2016-17

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A dated 18.05.2016 mentioning our scope on this Turnkey Project which includes activities of Mine Planning, Quality Control, Drilling, Ripping, Dust suppression, Nala Diversion, preparation of Garland drain, dewatering of Monsoon and seepage water, preparation and monitoring of haul road for better hauling as required to complete the mining process.

B b) Certificates from Northern Coalfields Ltd. (NCL) and Western Coalfields Ltd. (WCL) are also attached herewith mentioning drilling as part of the Mining Process of these projects as ready reference:

C i) NCL Certificate No.GM/KSL/2016/460 dated 31.03.2016

ii) NCL Certificate No.GM/KSL/25 dated 24.04.2016

iii) NCL Certificate No.GM/KHD/OS/2016/43 dated 23.04.2015

D iv) WCL Certificate No. WCL/MA/MGR/JKOC/2015/400 dated 04.12.2015

v) WCL Certificate No. WCL/MA/MGR/JKOC/2015/27 dated 14.04.2016

E Further, as you are kindly aware that Indian Lignite deposits occur in the Tertiary sediments in southern and western parts of peninsular shield particularly in Tamilnadu, Rajasthan and Gujarat. The Overburden and interburden comprises of Clay, Claystone, mudstone and as well as lignite [Geologically younger sediments (Formations) then occurrences of Coal] which can be excavated by hydraulic Shovel dumper combination. As such, in lignite deposits of Tamilnadu, Gujarat and Rajasthan, Blast hole drilling is normally not required.

F **B) Para 1.0 (ii) of your above letter against QR of Clause 7.2 of ITB:**

G We are attaching the following:

a) Financial certificate of last 3 years

We hope that the above submission clarifies your points on QR requirement;

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If you require further clarification/information in this regard, kindly inform us. We shall be pleased to provide the same at your convenience.”

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10. To the said letter, a document issued by the Gujarat Mineral Development Corporation Ltd (GMDC) dated 18.5.2016 was enclosed. The said certificate reads as follows:-

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“GMDC/MMLG/298/2016-17 Dated:18.05.2016

To Whom It May Concern

This is to certify that the Turnkey Mining Contract involving Overburden/Inter burden removal, Excavation and/or Loading of Lignite from mining face and ancillary activities at Lignite project, Mata No Madh Vide Tender Notice No. (R1)/LP/01/13-14 dated 30.08.2013, has been awarded to M/s. Montecarlo Limited, having registered office at 7<sup>th</sup> Floor, Shilp Building, Nr. Municipal Market, C.G. Road, Navrangpura, Ahmedabad – 380009, Gujarat, India.

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Name of Work: Turnkey Mining Contract involving Overburden/Inter burden removal, Excavation and/or loading of Lignite from mines face and ancillary activities at Lignite project, Mata No Madh.

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Name of Contractor : M/s. Montecarlo Limited  
LOI No. : GMDC/LP/13306/13-14  
Dated: 15/01/2014

Estimated Cost/

Contract Value : 663.04 Cr.  
Awarded Quantity : Over Burden (1109.00)  
Lac CUM  
Lignite (148.00) Lac MT  
Contract Period : 28.01.2014 to 27.01.2019

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The scope of Project is to carry out mining operation on Turnkey basis comprising of removal of over burden, inter burden and lignite and/or loading from mines faces using hydraulic shovel and dumper combination and other activities like Mine Planning, Quality control, Drilling,

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- A Ripping, Dust suppression, Nala Diversion, preparation of Garland drain, dewatering of Monsoon and seepage water, preparation and monitoring of haul road for better hauling etc. as required to complete the mining process.

Quantities Executed (year-wise) by M/s. Montecarlo Limited are shown below:

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Sr. No	Period	Over Burden Removal (cum)	Lignite Dispatched (MT)	Total Work Done Amount (Rs.)
C 1	28.01.2014 To 31.03.2014	18,24,674.03	7,64,791.18	33,59,23,240.00
2	01.04.2014 To 31.03.2015	1,37,54,520.76	32,10,961.46	135,57,06,364.00
D 3	01.04.2015 To 31.03.2016	1,45,66,445.22	13,68,861.67	55,38,02,253.00

- E M/s. Montecarlo Limited successfully carried out Dewatering of Mine. Yearwise details are shown for dewatering by deploying high capacities of Diesel and Electrical operated pump:

Sr. No.	Period	Dewatering in Lac m <sup>3</sup>
F 1.	01.04.2015 To 31.03.2016	65.0

- G This certificate is issued as per their request vide letter no. ML(P)/mn/4190/clt/2016-17/020 date: 18.05.16 for applying tender.”

11. On the basis of the said communications, the respondent formed an opinion that the bid of the appellant was technically non-responsive. The reason for arriving at the said conclusion by the respondent was

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that the appellant did not have necessary experience of drilling for blasting purposes. As the appellant was regarded as technically non-responsive, it invoked the jurisdiction of the High Court challenging the said determination made by the respondent. It was contended before the High Court that the tender documents that contained QR was of the experience of a bidder in only drilling, excavation and hauling, etc. and not blasting or drilling for blasting purposes. It was further urged that the scope of work for Dulanga Mines projects which was taken into consideration by the respondent in evaluating the technical proposal of the petitioner as being non-responsive had been wrongly understood. The stand of NTPC before the High Court was that the assessment by the Technical Committee was absolutely justified and the writ petitioner therein did not meet the QR and, therefore, was treated as non-responsive.

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12. The High Court referred to how tender documents that reflected the nature of mine operations, how blasting is an inherent part and drilling is differently understood in the sense that the appellant had understood. Thereafter, placing reliance on *Tata Cellular v. Union of India*<sup>1</sup> and *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.*<sup>2</sup>, it came to hold that the decision taken by the owner was correct and did not adversely affect public interest but subserved the public purpose. Being of this view, the High Court dismissed the writ petition. Hence, the present appeal by special leave.

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13. We have heard Mr. P. Chidambaram and Mr. Harin P. Raval, learned senior counsel with Mr. Sandeep Singh, learned counsel for the appellant and Mr. Vikas Singh, learned senior counsel with Mr. Ankit Jain, learned counsel for the respondent.

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14. The dispute and the dissention between the parties rest on how the Chapter 7 (QR) of ITB that contains Clause 7.2 that deals with technical criteria is to be understood. We are not really concerned with Clause 7.1. The centrality of controversy hinges on the interpretation to be placed on Clause 7.1.2. It is submitted by Mr. Chidambaram, learned senior counsel appearing for the appellant that the appellant satisfied the condition as postulated in the QR under Clause 7.1.2 (a) and Clause 7.1.2 (a) stipulates that 23 Million BCM of aggregated volume of overburden and/or coal/lignite from a maximum of seven open cast mines

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<sup>1</sup> (1994) 6 SCC 651

<sup>2</sup> (2012) 8 SCC 216

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- A of coal/Lignite, in any year and clause 7.1.2. (b) lays down that at least 11.5 Million BCM of composite volume of overburden and coal/lignite from single open cast mine in any year, out of which at least 3 million tones shall be coal/lignite. Learned senior counsel would lay emphasis on the documents which the appellant had filed to show that it had operated and produced from single mine 11.5 Million BCM of composite
- B volume of overburden and coal/lignite from single open cast mine in a year. Mr. Singh, learned senior counsel resisting the said stance would urge that the appellant does not satisfy the condition of drilling as is required under the QR regard being had to the nature of work. In this context, we may usefully take note of the definition of “operated”. The
- C said term, as defined, means activities of drilling and excavation. The documents produced by the appellant indicate the scope of work including activities of operation of coal/lignite mine. It reads as follows:-

D	“10.	The scope of work includes the following activities of operation of the Coal Lignite Mine		
	Drilling	Yes/No	Yes/No	Yes/No
E	Carried out Drilling on our own or through sub contracting	Our own/sub contracting	Our own/ sub contracting	Our own/sub contracting
	Excavation	Yes/No	Yes/No	Yes/No
F	Carried out Excavation on our own or through sub contracting	Our own/ sub contracting	Our own/sub contracting	Our own/ sub contracting
	Hauling	Yes/No	Yes/No	Yes/No
G	Carried out Hauling on our own or through sub contracting	Our own/sub contracting	Our own/ sub contracting	Our own/ sub contracting

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S.No.	Particulars	Mine 1		Mine 2		Mine 3	
		Coal/ Lignite (in MT)	Overburden (in Million BCM)	Coal/ Lignite (in MT)	Overburden (in Million BCM)	Coal/Lignite (in MT)	Overburden (in Million BCM)
11	Annual Production in Million Bank Cubic Meters. <i>Bidder to refer Note (vii) of the Qualifying Requirements of Chapter 7</i>	Year (From 01.04.2014 to 31.03.2015)		Year (From 01.04.2014 to 31.03.2015)		Year (From 01.04.2014 to 31.03.2015)	
		3.210 Million Tonne	13.754	1.221 Million Tonne	3.386	-	12.707"

15. We have already analysed what is covered by the word "operated" as per ITB. In this regard, the High Court has referred to Schedule II that deals with description of mining services. Clause 5 deals with the Mine Operations. We think it appropriate to reproduce Clauses 5.1, 5.9 and 5.10 of the same:-

"5.1. The Mine Operator shall construct and operate the Site in accordance with the following scope:

- (a) Plan the mine (Site), its development and construction
- (b) Strip OB and store such OB on dumps
- (c) Mine and extract coal in accordance with the requirements of Owner
- (d) Make provisions for HEMM, other mining machinery and its effective maintenance
- (e) Implement, and comply with EMP and environmental clearances;
- (f) Construction, maintenance and operation of mine



- A dewatering plant, sump, and garland drains with de-silting provisions
- (g) Construct and maintain all access ways and haul roads
- (h) Arrangement and use of explosives, as per Indian Explosives Act
- B (i) Drilling and blasting
- (j) Construction and maintenance of workshops, stores etc as per the requirement.
- (k) Construction, Operation and maintenance of complete power supply system.
- C (l) Mine illumination as per prevalent laws
- (m) Arrangement of petrol/diesel, oil and lubricants.
- (n) (if applicable) control any spontaneous combustion on Site
- D (o) Conduct advance infill drilling.
- (p) OB dump management including rehandling of internal dump as per Environmental Clearance.
- E (q) Progressive mine closure with effective land reclamation plan in accordance with approved mine closure plan. The Mine Operator shall submit to the Owner the annual financial statement of cost incurred towards progressive mine closure activities duly certified by National Environmental Engineering Research Institute (NEERI) or Central Mine Planning & Design Institute Limited (CMPDIL) or any other institute as may be notified by the Government for these purpose to an acceptable level by the Coal Controller.
- F (r) POL Store shed
- G (s) Development of Power Supply Distribution System beyond 33KV switchgear breaker terminals of Darlipalli STPP for various equipments/facilities included in Mine Operator's scope.

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5.9 Blasting:

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Blasting shall be required for coal and selectively for overburden with the objective of achieving good fragmentation so that the excavators can operate at high levels of efficiency.

5.10 Overburden and Interburden Removal:

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The terms overburden and interburden are each included in the term overburden below unless noted otherwise. The Mine Operator shall ensure the following in respect of Overburden removal:

(a) The Mine Operator shall assess the admissibility of accommodation of OB volume in the external dump/in-pit-dump and accordingly if warranted, notify or seek necessary clearances/ approvals from appropriate authority, keeping in view the stipulation of MoEF, contained in Forest Clearance Stage – 1, dated 10.01.2014.

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(b) The Mine Operator's daily and weekly scheduling shall be consistent with the AAPP. All levels, benches, haul roads, and highwalls shall be consistent with the Monthly Production Plans and the statutory requirements.

(c) Weekly digging plans shall contain recommended methods for excavation and removal of overburden including blasting plans if needed.

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(d) The Owner shall not be responsible for any costs associated with the Mine Operator inefficiently scheduling daily and weekly activities.

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(e) The Mine Operator considers itself fully aware of conditions of the Overburden in the mining area. No claim for lack of knowledge of the site conditions shall be allowed.

(f) Reasonable efforts shall be made to keep coal clean and free from soil, overburden, rock, clay, parting bands, steel, stones, timber, rags, equipment parts or any other deleterious material.

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(g) The Mine Operator shall ensure the quality of the coal

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- A is not affected by its mining methods which cause coal ash to rise above the target levels presented in AAPP.
- (h) Water in the pit shall be kept to a minimum.
- (i) Fires or hot spots in the coal shall be handled expeditiously and not transported to the crusher. The Owner shall be notified of any significant occurrence. Oxidized coal shall be treated as Overburden for compensation purposes.
- B (j) Any equipment repairs on the coal bench shall be cleaned after use to prevent contamination.
- (k) All equipment shall undergo pre shift inspections including loose bucket teeth or other parts.
- C (l) The Mine Operator shall be responsible to provide equipment to suit the varying thickness of the seams and partings which must be mined.
- D (m) The Owner may instruct the Mine Operator to maintain an overburden or interburden cover over in-pit coal inventory prior to mining.
- (n) If, during the excavation or overburden, any coal is found, the Mine Operator shall inform the Owner and seek instructions before proceeding. Overburden shall be hauled and placed in areas as shown in the Mining Plan.
- E (o) Reject coal placed in overburden or interburden dumps shall be buried in 5 meter lifts and compacted to ensure no ingress of air which could cause spontaneous combustion.
- F The Mine Operator shall be required, at its own expense, to dig out, compact and replace any smouldering dump area.
- (p) Placement of overburden shall be carried out with due regard to water run off, final topography, and long term ground stabilization.
- G (q) Any erosion or land slip in areas of placed materials shall be rectified by the Mine Operator at its own expense.”

16. Clause 5.7.2. deals with drilling and blasting. It is as follows:-

“5.7.2. Drilling & Blasting

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Crawler-mounted pneumatically operated down the hold drilling rigs are capable to meet the future requirement of 8 m/hr will be deployed for OB. R.B.H. drills will be used for drilling about 160 mm dia. holes in coal.

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After shot holes are drilled into the horizontal bench cut by the shovel, the faces are blasted using explosives and detonators. Coal is also extracted after blasting off the coal faces.

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Drilling & Blasting would be required both in OB and Coal, benches, before excavation by shovel. Except for coal benched which will be mined by CSMs Heavy ANFO type/ Slurry Emulsion is proposed to be used based on the daily requirement. However, flexibility may have to be provided for usage of suitable alternative/available explosives as per the requirement.”

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17. We have referred to these clauses which are technical but hey are fundamental to understand the QR. They clearly demonstrate that drilling is imperative. Mr. Chidambaram, learned senior counsel for the appelland would argue with all the conviction at his command that the appelland is engaged in drilling in Lignite and the tender requirement was coal/lignite. According to the learned senior counsel, drilling in lignite would meet the requirement but the owner has travelled beyond the postulates of the QR to insist on drilling for the purpose of blasting. We have already referred to the certificate issued by GMDC in favour of the appelland and the documents filed by the appelland. The High Court has considered the documents and opined that the documents filed in support of the QR are substantially inadequate. Adverting to the facet of drilling, the writ court has opined that there is specific use of the words ‘drilling for the purposes of blasting’. It is urged by Mr. Chidambaram and Mr. Raval, learned senior counsel that in the absence of a definitive prescription, the court cannot add an attribute or quality component to the qualifying clause. In this regard, we may usefully refer to certain authorities. In *Sterling Computers Limited v. M/s M & N Publications Limited & Ors*<sup>3</sup>, the Court has held that under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be

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<sup>3</sup> (1993) 1 SCC 445

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A awarded and at what terms. It has also been observed that by way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.

B 18. In *Tata Cellular* (supra) a three-Judge Bench after referring to earlier decisions culled out certain principles, namely, (a) the modern trend points to judicial restraint in administrative action, (b) the court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (c) 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, and (d) the Government must have freedom of contract and that permits a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Hence, the Court has laid down that 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.

E 19. In *Jagdish Mandal v. State of Orissa and Ors*<sup>4</sup> the Court has held that 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.

F 20. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr*<sup>5</sup>, it has been ruled that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

<sup>4</sup> (2007) 14 SCC 517

H <sup>5</sup> (2005) 6 SCC 138

21. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.*<sup>6</sup> a two-Judge Bench, after referring to series of judgments has culled out certain principles which include the one that where a decision has been taken purely on public interest, the court ordinarily should apply judicial restraint. A

22. In *Michigan Rubber (India) Ltd.* (supra) the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question 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 judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest. B C

23. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*<sup>7</sup> a two-Judge Bench eloquently expounded the test which is to the following effect:- D

“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.” E F

24. 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 G

<sup>6</sup> (2006) 11 SCC 548

<sup>7</sup> 2016 (8) SCALE 765

- A scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or *malafide* or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.
- F 25. In view of the aforesaid analysis, we do not perceive any infirmity in the judgment and order passed by the High Court and, accordingly, the appeal stands dismissed. In the facts and circumstances of the case, there shall be no order as to costs.