

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.08.2021

% **Judgment delivered on: 27.09.2021**

+ **W.P.(C) 6676/ 2021 & CM APPLs. 21018/2021, 23797 - 798/2021**

RESOURSYS TELECOM AND ANR. Petitioners

Through: Mr. Dhananjai Jain, Mr. Bhoop Singh
and Mr. Omita Unnarkar, Adv.

versus

NAVODAYA VIDYALAYA SAMITI Respondent

Through: Mr. Bijender Singh, Adv. for Resp.
Mr. Krishnan Venugopal, Sr. Adv. with Mr. T.
Sundar Ramanathan, Mr. Ishaan Chakrabarti, Mr.
Shivendra Singh and Mr. Vivek Pandey, Adv. For
the Intervenor.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT OF THE COURT

1. The present writ petition has been filed to seek the quashing of invitation to tender dated 12.02.2021 bearing No. GEM/2021/b/1032762 issued by Respondent No.1 i.e. Navodaya Vidyalaya Samiti on the portal of Government E-Market Place (GEM), and in particular, letter dated 29.06.2021 issued to the Petitioner.

2. Briefly stated the facts as per petitioner giving rise to filing of the present writ petition are as under.

3. The Petitioner is a partnership firm dealing in trading and supplying of information and technological goods. Petitioner No.2 is one of the partners of Petitioner No.1.

4. The Respondent No.1 Navodaya Vidyalaya Samiti (NVS) is an autonomous organisation under the Ministry of Education/ Ministry of Human Resource Development, Department of School, Education and Literacy, Govt. of India. The Chairman of Respondent No.1 is the Minister of Education. The Respondent No.1 functions through the Executive Committee, under the Chairmanship of the Minister of Education and the Executive Head of the Administration is the Commissioner.

5. Respondent No.1 issued invitation to tender for supply of 68,940 tablets on the online trading portal of the Government of India, i.e. GEM2021/b/1032762. The essential Qualification Criteria with regard to past experience contained in the Notice Inviting Tender (NIT) – with which we are concerned, is that the bidder should have the stipulated past experience of dealing in “*same or similar category products*”. The bid document was subsequently revised, and there were certain corrigendum and amendments that were issued by Respondent No.1 from time to time, changing certain technical and general conditions of the tender. However, the same are not relevant for the purpose of adjudicating the present writ petition.

6. The Petitioner being desirous of participating in the tender process offered its product i.e. tablet, which is being manufactured by an Indian company, namely, M/s Lava International Ltd., on 27.04.2021. The Petitioner was duly authorised by the manufacturer to participate in the tender process.

7. One of the conditions for qualification in the tender, was of having supplied at least 60% of the required tendered quantity/ units in one financial year, in the preceding three years from the date of tender, to any Government or Public Sector Undertakings (PSUs) of “*same or similar category products*” as that of tablet. It was also required that 35 % of the tender quantity units must have been executed as a single order in one financial year. Since the Petitioner had supplied much more than the desired quantity under “*same or similar category product*” as that of a tablet, it submitted its bid. The petitioner claimed its past experience on the basis of the supplies made by it of mobile phones and laptops to various Governments and Public Sector Undertakings (PSU’s).

8. Respondent No.1 opened the technical bid on 08.05.2021 for evaluating the bids submitted by various bidders. On 25.06.2021, the Petitioner was informed that its bid had been rejected – the reason being ‘*technical specification mismatch*’. The communication simply stated that the bidder did not meet all the conditions of the tender. The ground for rejection cited by the Respondent No.1 did not specify any discernible reason for the rejection of the bid of the Petitioner, and was ambiguous. The Petitioner, aggrieved by the vague and unreasoned rejection, filed a detailed representation on 27.06.2021, seeking a clarification of the reason for rejection of its bid.

9. On 29.06.2021, the Respondent gave the reason that the petitioner does not qualify the past performance criteria, as the work orders for smart phones, laptops, aadhar kits, power banks, etc. are not considered as same or

similar category products of tablets. The exact extract of the communication of the respondent reads as follows:-

“

| <i>Bid Clause No</i> | <i>Content of Clause</i> | <i>Reason for Disqualification</i> |
|--|---|--|
| <i>Clause 4 (page 2) of Bid Document</i> | <i>Past performance: The bidder or its OEM themselves or through resellers should have supplied same or similar category products for 80% (changed to 60% vide corrigendum) of bid quantity in atleast one of the last three financial years before the bid opening date any central/state govt. Org/ PSU/ Public Lister company. Copies of relevant Contracts (providing supply of cumulative order quantity in any one financial year)</i> | <ol style="list-style-type: none"> 1. <i>Does not qualify pa</i> 2. 3. <i>St performance (Page 124) of tender document for any of the FY 2018-19, 2019-20, 2020-21.</i> 4. <i>Work Orders of Smart Phones, Laptops, Adhar Kits, Printers, Power-bank, etc are not considered as same or similar category products of tablets.</i> |

”

(emphasis supplied)

10. Respondent No.1 further, on 01.07.2021, clarified “*Technical Evaluation Committee has considered only tablets under similar category to*

ensure proven products". Aggrieved by the said action of Respondent No.1, the Petitioner filed the present writ petition seeking the following prayer :-

“a) Quash invitation to tender dated 12.2.2021 bearing no. GEM/2021/b/1 032762 issued by Navodaya Vidyalaya Samiti on the portal of Government E-Market Place (GEM) being vitiated due to arbitrary & whimsical process; and in particular letter dated 29.6.2021 issued to the petitioner”

11. The submission of learned counsel for the petitioner is that smart phones are goods which belong to the same or similar category, as “Tablets”. The act of Respondent No.1 in excluding smart phones from “*same or similar category of products*” is unreasonable, and against the principles of fair play and logic.

12. The Petitioner has placed reliance upon various tenders issued by: Meghalaya Information Technology Society (MITS); Kerala State Electronics Development Corporation Limited; HP State Electronics Development Corporation Ltd; Bihar Rural Development Society –working under the Government of Bihar; REC Power Distribution Company Limited, and; the Department of Education, Government of Bihar, to argue that various State Governments and PSUs had issued similar tenders, wherein past experience of supply of tablets and smart phones were treated alike. The relevant summary produced by the petitioner is reproduced under as :

*“i. Tender issued by Govt. of Bihar, Rural Development Department in which in SI. No. 10 under the category of experience and technical capacity it has been stated that **"if the bidder is supplier of the product then it should have at least 3 years' experience in trading similar products, i.e., products like tablets, smart phones with minimum Rs. 5 Crores and above 3 targets within last 3 years and at the same time***

respective manufacturer of the offered product must fulfil the requirement of Clause 2". (emphasis supplied)

*"ii. REC Power Distribution Co. Ltd. has also issued bids inviting tenders for 1,000 tablets wherein in pt. no. 2 to the clarification to the amendment it has been stated "bidder/OEM should have desired **experience in supply of tablets/smart phones** as main contractor during the last three financial years " (emphasis supplied)*

*"iii. That Department of Education, Govt. of Bihar has invited tablets for e-learning which are for similar requirement as in the present writ petition, wherein the past qualification in Clause 3. 7.3 the criteria is stated to be "**the bidder should be either original equipment manufacturer (OEM) or authorized supplier in India of mobiles/ tablets**". (emphasis supplied)*

*"iv. That the tender issued by Meghalaya Information Technology Society, Govt. of Meghalaya, inviting tenders for tablets in **clause 2.1.1(ii) has considered tablets/ smart/ phones/ laptops under same and similar category**" (emphasis supplied)*

*"v. H.P. State Electronic Development Corporation procuring smart phones in clause 3 of its tender documents at has also held **smart phones/ tablets and mobile devices under same and similar category as that of smart phones.**" (emphasis supplied)*

13. *Per contra* the learned counsel for the Respondent/ NVS argued that smart phones are a different category of product, from tablets and laptops. As per Respondent No.1, tablets, computers and smart phones are different goods as per their technical, commercial and trade related definitions, norms, and regulations prescribed by various authorities. The Respondent has highlighted the difference through various examples, which are the following:-

“(I) World Customs Organization (WCO) provides Nomenclature and Classification of Goods under the International Convention on the Harmonized Commodity Description and Coding System known as HS Code. WCO has put the “tablet computers” and “Smartphones” in different categories of goods. The same is evident from the fact that:

(a) the Tablet Computer’s classification code as to the constituent material is 8471.30 included in the Chapter 84 of Section XVI of the list titled as Nuclear Reactors, Boilers, Machinery and Mechanical Appliances; parts thereof.

(b) Smartphone’s (Mobile phone/ Cell phone) classification code is 8517.12 included in chapter 85 of Section XVI of the list titled as Electrical Machinery and Equipment and parts thereof; Sound Recorders and Reproducers, Television image and Sound Recorders and Reproducers, and parts and accessories of such article.

(II) Ministry of Electronics and Information Technology (MeitY), (IPHW Division), Govt. of India has also considered a tablet Computer and a smartphone as two different goods or commodities. The same is evident from the Office Memorandum No. W-43/4/2019- IPHW-MeitY, Govt. of India, Ministry of Electronics and Information Technology (IPHW Division) Electronics Niketan dated 16.09.2020 (read with gazette of India Notification F. No. W-43/4/2019-IPHW-MeitY, dated 07.09.2020.) regarding Public Procurement (Preference to Make in India) order 2017, wherein tablet computer is defined under clause 4.5 and smartphone is defined in Clause 4.13. The same are reproduced herein below:

“4.5 Tablet Personal Computers (PCs)

A. Definition: For the purpose of this Notification, a Tablet PC shall necessarily consist of an Integrated Motherboard with on board CPU/ Processor, Memory and

Power Module; Display Panel (Touch Panel + LCD/LED Module) and integrated battery and should be able to operate independently.”

“4.13 Cellular Mobile Phones

(A) Definition: For the purpose of this Notification, a Cellular Mobile Phone (Feature Phone or Smart phone) shall necessarily consist of a Main Printed Circuit Board (PCB), Battery Pack, Display Unit, Key Pad/ Touch Panel, Charger/ Adapter, Microphone & Receiver, Vibrator Motor/ Ringer and Mechanics.”

(III) Ministry of Electronics and Information Technology (MeitY) has launched two separate and distinct production incentive schemes namely, Production Incentive Scheme (PLI) for IT Hardware that includes “Tablet Computer” and Production Incentive Scheme (PLI) for Large Scale Electronics manufacturing for “Smartphone”. The relevant part of the Gazette of India notification is stated herein below:

(a) Tablet Computer: Gazette of India notification No. W-18/28/ 2020- IPHWMeitY dated 03.03.2021 has considered the aforesaid category under PLI for IT Hardware-

“4. Target Segment: The Target Segment under PLI shall include (i) Laptops (ii) Tablets (iii) All-in One PCs and (iv) Servers.”

(b) Smartphone: Gazette of India notification No. W-28/1/2019- IPHWMeitY dated 01.04.2020, PLI for Large Scale Electronics Manufacturing-

“4. Target Segments: The Scheme shall only be applicable for target segments namely mobile phones and specified electronic components (as detailed in Annexure B).”

(IV) GeM (e-marketing) Portal, Ministry of Commerce and Industry, Govt. of India provides an exhaustive Category Listing of all products sold on its platform. It is clearly evident from the GeM Portal, that both the goods namely, Tablet Computers and Smartphones are different and categorized as such. The details of the same are stated herein below:

(a) Tablets Computers fall within the category of “Computer Equipment and Accessories” with sub-heading being “Computers”.

(b) Smartphones fall within two categories:

(1) “Data Voice of Multimedia Network Equipment or Platforms and Accessories” with sub-heading “Digital Mobile Equipment and Components”.

(2) “Communications Devices and Accessories” with sub-heading “Personal Communication Devices”.

(V) Central Board of Excise & Customs, Department of Revenue, Ministry of Finance, Government of India vide Circular No. 20 / 2013- Customs F. No. 528/ 102/ 2011-STO (TU) dated 14.05.2013 specifically clarified that the tablet computers and smartphones are not similar goods and thus, they cannot be placed under the same or similar category.....”

(VI) Bureau of Indian Standard (BIS), Ministry of Consumer Affairs, Food & Public Distribution, Government of India provides a list of different goods or products for compulsory registration.....

Without prejudice, from the list, laptops or notebooks can be considered as similar products as tablet computers as all the three have been placed in one product category (Sl. No. 6) but mobile phones (smartphones) cannot be considered as same or similar in any manner whatsoever as it has been placed in another distinct category (Sl. No. 23) of the list.

The distinguishing effect between both the goods can further be evident from the fact that as per the BIS mandatory requirement, the manufactures have to apply for separate licenses-

- (i) one for manufacturing of “tablets/ notebook/ laptop”, and
- (ii) another for “smartphones”

“(VII)Commissionerate of Technical Education, Education Department, Gandhinagar, Gujarat had issued a tender on GeM Portal vide Bid No. GEM/ 2020/ B/ 887128 dated 24.11.2020 for procurement of 3 Lakhs Tablet Computers, wherein one of the conditions was:

“4. Past Performance: The Bidder or its OEM {themselves or through re-seller(s) should have supplied same or similar Category Products for 30% of bid quantity, 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.”

“It is pertinent to note that in the aforesaid bid, a clarification/ modification was sought by the bidders/ prospective sellers regarding past performance clause. And, in the clarification given by the authority, it was made clear at the GeM portal that the work orders of “Smartphones” shall not be considered under past performance clause”

Bid Number: GEM/ 2020/ B/ 887128 dated 24.11.2020 on GeM for 3 lacs Tablets

| # | Existing Clause in the RFP | Modification Requested | Final Clarification by GIL/ DTE |
|----|---|--|---------------------------------|
| 18 | Past Performance – 30% (Pt. no. 3, Pg. no. 2) | Please give relaxation 10% instead of 30% in past performance (1) Indian Market have higher Smart Phone requirement than Tablets so most of Indian | No change. As per Bid. |

| | | | |
|--|--|--|--|
| | | <p><i>Manufactures of Smart Phone and Tablets supplied Smartphone in large quantity compare to Tablets.</i></p> <p><i>(2) Many brands will be able to participate with relaxed past performance criteria in view to above mentioned points it is requested to give relaxation to 10% for past performance instead of 30%</i></p> | |
|--|--|--|--|

14. The Respondent No.1 has further stated that same or similar category of tablets would be “*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.*”

15. Learned counsel has relied upon various judgments to argue that it is the general or predominant user, which would determine the category in which the article will fall. They have further argued that identity of an article is associated with its primary function. The Respondent No.1 also showed various tenders to show that tablets and smart phones were under two different categories.

16. Lastly, the Respondent has argued that it is the Tender Floating Authority who is the best person to interpret the terms of the tender. The lawfulness of a decision of a Tender Floating Authority can only be looked into if it is arbitrary, irrational, unreasonable, mala fide or biased. In matters

of public interest, the Courts will not, in exercise of power under judicial review, interfere even if there is a procedural aberration or error in awarding the contract.

17. Reliance was placed on the Judgment of the Hon'ble Supreme Court in *Municipal Corporation, Ujjain and Ors v. BVG India Limited and Ors* (2018) 5 SCC 462 wherein it was observed:

“21. Thus, only when a decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, if it is bona fide and in public interest, the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the Court ordinarily should exercise judicial restraint. When a decision is taken by the concerned authority upon due consideration of the tender document submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.”

18. At this stage, we may take note of the manner in which the proceedings have taken place in this case. The writ petition – as originally filed by the petitioner, had only two respondents, namely, Navodaya Vidyalaya Samiti (NVS) and Union of India. On the day when the petition was preferred, the petitioner was not aware that the tender in question had been awarded by respondent No. 1 to any of the bidders. The writ petition came up for hearing before the Court, for the first time, on 19.07.2021. On

that day, Union of India was deleted as a party respondent. Learned counsel for the respondent/ NVS appeared on advance notice and informed the Court that the contract had been awarded to the successful bidder. However, the name of the successful bidder was not disclosed. We directed the respondent/ NVS to stay their hands in relation to performance of the contract, so awarded. The matter was adjourned to 26.07.2021 to enable the completion of pleadings.

19. On 26.07.2021, learned counsel put in appearance on behalf of the successful bidder, i.e. Agmatel India Private Limited (in short 'Agmatel') and informed the Court that an application for impleadment, and another application for interim relief – with compilation of documents, have been filed. The matter was adjourned to 03.08.2021.

20. On 02.08.2021, C.M. No. 23531/2021 preferred by Agmatel for impleadment was allowed, and we directed that Agmatel would be entitled to advance submissions on the date fixed. On 03.08.2021, the matter was further adjourned to 04.08.2021, when the arguments were heard and judgment reserved.

21. Thus, it would be seen that the successful bidder – Agmatel was impleaded as a party respondent only on 02.08.2021. Prior to that, the respondent/ NVS was contesting writ petition.

22. The Respondent No.2, namely, Agmatel, the successful bidder has also filed a detailed counter affidavit, and has sought to argue to following:

- i. Lack of jurisdiction- It was argued by Respondent No.2, that no cause of action arose in Delhi, as the tender was invited by Respondent No.1, whose office is located in Gautam Buddh Nagar, Uttar Pradesh. Thus the petitioner's bids were received; disqualified,

and; rejected in Uttar Pradesh, and as no material fact had taken place in the jurisdiction of Delhi, this court has no jurisdiction to entertain the present petition. They argued that simply because the petitioners have read the advertisement in Delhi, and made the representations to Respondent No.1 from Delhi, is not a material fact to form part of cause of action in Delhi. The failure of Respondent No.1 to challenge the jurisdiction, will not confer jurisdiction upon the Court.

ii. Courts should not interfere in the tender matters – Respondent No.2 further went on to argue that, it is a well settled position of law that courts should not interfere in the matters of tender, and the authors of the tender document best understand and appreciate its requirements. They submitted that the tendering authority themselves considered and identified “tablets” and “smartphones” under different product categories. Consequently, the Petitioners had been correctly disqualified by the Respondent No.1. They argued that it is the decision of the author of the Tender to treat Tablet Computer and Smartphones as different category products, based on their assessment, and the courts could not interfere in the same, unless there is malafide or perversity.

iii. That tablets and smartphones are inherently different products, and are used for different purposes. The primary use of a smartphone was as a communication device, whereas the primary use of a tablet was that as a computing device. Therefore ‘similar’ to tablets would be *‘laptops, desktops, notepad etc’*, and not smart phones.

iv. The intention of the tender floating authority was clear in the tender – It was contended that in order to place smartphones and

tablets in the same category, the petitioners wilfully replaced the term “*Tablet Computers*” used in the tender, with the term “*Mobile Tablets*”. It was their belief that the term “*Tablet Computers*” in the tender shows the intention of Respondent No.1 to separate mobile phones from tablets.

v. Classification by Different Authorities – the Respondent No.2 attached various definitions and classifications by International and National Authorities, showing that tablets and smartphones were defined as different devices.

23. We have heard learned counsels for the parties, and have considered their submissions and the documents placed on record.

24. The respondent No. 2/ Agmatel has claimed that this court lacks the territorial jurisdiction to entertain this Writ Petition, as the tender was issued by NVS from Gautam Budh Nagar, Uttar Pradesh, and no part of the cause of action arose within the jurisdiction of this Court. Even the respondent No. 1 is not having its office in Delhi.

25. However, this submission is meritless, as, firstly, the Respondent No.1 – Navodaya Vidyalaya Samiti, operates under the Department of School, Education & Literacy, Ministry of Human Resources Development, situated at New Delhi. Secondly, and even more importantly, this objection to territorial jurisdiction was open to Respondent No.1 to raise. However, it was not so raised by it when the writ petition was listed on 19.07.2021, and 26.07.2021. Respondent no.1, in fact, not only submitted to the jurisdiction of this Court, but also filed a detailed counter affidavit – without raising any such objection to the jurisdiction of this Court. Thus, respondent No.1 has

waived this objection and submitted to the jurisdiction of this Court. It is the acts/ omissions and conduct of respondent No. 1, which are under challenge in this petition. It is for respondent No.1 to primarily defend this petition. Respondent No. 2 has been subsequently added as a party, since the outcome of this petition may have a bearing on the rights claimed by Agmatel on the basis of its bid acceptance. Since respondent No. 1 has not raised any objection to the jurisdiction of this Court, and has waived it, in our view, respondent No. 2 has no locus to raise the said objection. In any event, it is well settled that lack of territorial jurisdiction – if not objected to at the appropriate stage, would not impinge on the jurisdiction of the Court to deal with the matter, if it has subject matter jurisdiction. This objection of respondent No. 2 is, therefore, rejected.

26. In relation to the contention of the Respondents that the tender floating authority is the best judge to determine the conditions of a tender, and that the courts should not interfere in tender matters, we may refer to ***Reliance Energy & Anr v. Maharashtra State Road Development Corporation Ltd & Ors*** 2007 (8) SCC 1 wherein the Supreme Court has held:

“24. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".”

27. At the outset, we may observe that it is nobody’s case that “smart mobile phones” are the “same” category products as “tablets”. The only

issue is, whether, under the terms of the NIT, “smart mobile phones” can be called “similar Category product”, as “tablets”.

28. Now coming to the meat of the matter, it will be relevant to reproduce the relevant terms and conditions of the e-tender, interpretation of which is in dispute:

*“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 Company 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, 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 I 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.”*

“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.” (emphasis supplied)

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.

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.

33. At this stage, we may also take note of the stand taken by the respondent NVS in their communication dated 01.07.2021, and their counter affidavit.

34. The communication of the respondent NVS dated 01.07.2021 reads as under:

“F.No. Acad-17014/3/2019-IT Date: 01/07/2021

To

*Manvendra Singh
M/s Lava International Ltd.*

*Sub:-Technical Disqualification of Bidder Resoursys Telecom
reg:*

*With reference your email dated 01.07.2021 regarding
GeM Bid No GEM/2021/B/1032762 dated 12-02-2021 the
following may be considered:-*

- a. *It is brought to your notice that the reason for disqualification is "not meeting the criterion for past performance" as per Clause 4 (Page 2) of Bid Document "Past Performance: The bidder or its OEM themselves or through resellers should have supplied same or similar category products for 80% (changed to 60% vide corrigendum) of bid quantity in atleast one of the last three financial years before the bid opening date to any central/state govt. Org/ PSU/Public Listed company. The Technical Bid evaluation committee has made its recommendations after thoroughly going through all the tender documents submitted by M/s Resoursys Telecom and M/s Ashoka Buidcon*
- b. *As NVS is procuring tablets for learning management, **the technical evaluation committee has considered only tablet under similar category to ensure proven products.***

This issues with the approval of the competent authority.

*Sd/-
(Rajesh Chelle)
Assistant Commissioner (IT)*

Copy through email to:

- 1. Chief Vigilance Officer, NVS*
- 2. P.A. to Commissioner NVS for information”*

(emphasis supplied)

35. In paragraph 10 of the counter affidavit filed on behalf of the respondent NVS, dated 24.07.2021, the respondent NVS, *inter alia*, states “.....that the Technical Evaluation Committee of the respondent had made the recommendation for considering only tablet under similar category after considering all the norms and guidelines in this regard and thus, decided not to consider work orders of smart phones, laptops, Aadhar Kits, Printers,

Power- Bank, etc. as same or similar category product of tablets under clause 4 (past-performance) of bid documents.” .

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.

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.*”

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.

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.

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.

41. The Supreme Court in *Nabha Power Ltd. v. Punjab SPCL* (2018) 11 SCC 508 has laid down the ‘*Penta test*’. The test of deemed interpretation has been taken from Penta test which reads as under:

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must

have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the *Officious Bystander Test*” [*Shirlaw v. Southern Foundries (1926) Ltd.* [*Shirlaw v. Southern Foundries (1926) Ltd.*, (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings* [*B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings*, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the *Officious Bystander Test*; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same pentaprinciples find reference also in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [*Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and *Attorney General of Belize v. Belize Telecom Ltd.* [*Attorney General of Belize v. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavor of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it

reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.” (emphasis supplied)

42. Similarly, the respondent NVS could not have either “implied” a term in the Tender or given a restrictive meaning to the, otherwise, clear language of the tender.

43. Even if we were to assume, for the sake of argument that there was lack of clarity in the tender conditions, the Doctrine of Contra Proferentem would work against the respondents in the present case. In *United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd* (2016) 3 SCC 49 , it was observed by the Hon’ble Supreme Court that:

“37. In Halsbury's Laws of England (5th Edn., Vol. 60, Para 105) principle of contra proferentem rule is stated thus:

“Contra proferentem rule. —Where there is ambiguity in the policy the court will apply the contra proferentem rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favorable to the insured. Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favorable to the insurers will prevail if the insured has created any ambiguity. This rule, however, only becomes operative where the words are truly ambiguous; it is a rule for resolving

ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application.”

39. It is a settled rule of interpretation that when the words of a statute are clear, plain or unambiguous i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. In other words, when a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. Equally well-settled rule of interpretation is that whenever the NOTE is appended to the main section, it is explanatory in nature to the main section and explains the true meaning of the main section and has to be read in the context of main section (See G.P. Singh, Principles of Statutory Interpretation, 13th Edn., pp. 50 and 172). This analogy, in our considered opinion, equally applies while interpreting the words used in any contract.” (emphasis supplied)

44. The above judgment, makes it explicit, that ambiguity cannot be read into a condition/clause when there exists none, to make the Doctrine of Contra Proferentem applicable. Further, even if such an ambiguity exists, then it should be construed against the drafter of the tender. In the absence of ambiguity, the plain and express meaning of the condition must be complied with.

45. Invitation and Evaluation of a Tender is an austere matter. The process of evaluation of Bids submitted in response to a Tender is a serious exercise, which the tender inviting authority/ TEC must undertake with all earnestness. Each and every word of a tender must be given a meaning, and the TEC cannot evolve its own criteria to evaluate the eligibility of the bidders, contrary to the terms and conditions of the tender.

46. We may also observe that the endeavour of Mr. Venugopal – who appears for Agmatel, was to refer to several documents, only to establish that “mobile smart phones” and “Tablets” are not the same products. As we have already observed, we accept the position that they are not the same product. However, they are products falling in similar categories of products. We, therefore, do not consider it necessary to either refer to, or deal with all the documents referred to and relied upon by Mr. Venugopal. Moreover, all the materials relied upon by Mr. Venugopal did not constitute the basis of the respondent NVS’s decision making process. For that reason as well, it is not material.

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”.

48. In view of the matter, we allow this petition and quash the Technical disqualification of the petitioner in respect of the tender in question. We hold that the rejection of the technical bid of the petitioner is unreasonable, and arbitrary. We hold that the respondent NVS cannot exclude from consideration, the past performance of the petitioner in respect of “*same or similar category Products*” as Tablets, and mobile smart phones fall in the

similar category products, of the category to which Tablets belong. Accordingly, we direct the respondent NVS to process the technical bid of the petitioner, and to proceed thereafter in accordance with law.

(VIPIN SANGHI, J)

(JASMEET SINGH, J)

SEPTEMBER 27, 2021/ 'ms'

