

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 8545-8546 of 2010
(Arising out of S.L.P. (C) Nos. 14538-14539 of 2010)

M/s. Indian Railway Catering & Tourism
Corporation Limited & Anr. Appellants

Versus

M/s. Doshion Veolia Water Solutions (P)
Limited & Ors. Respondents

WITH

CIVIL APPEAL NOs.8547-8548 of 2010
(Arising out of S.L.P. (C) Nos. 14996-14997 of 2010)

M/s. Ion Exchange India Limited Appellant

Versus

M/s. Doshion Veolia Water Solutions (P)
Limited & Ors. Respondents

AND

CIVIL APPEAL NO. 8549 of 2010
(Arising out of S.L.P. (C) No. 17471 of 2010)

M/s. Doshion Veolia Water Solutions (P)
Limited Appellant

Versus

M/s. Indian Railway Catering & Tourism
Corporation Limited & Ors. Respondents

J U D G M E N T**A. K. PATNAIK, J.**

Leave granted.

2. These Appeals are against the judgment and order dated 29.04.2010 passed by the Division Bench of the Madras High Court in Writ Appeal Nos. 726 and 727 of 2010.

3. The relevant facts very briefly are that M/s Indian Railway Catering and Tourism Corporation Limited (for short 'IRCTC') planned to set up a packaged drinking water bottling plant at Palure, near Chennai, to produce drinking water under the brand name "Rail Neer" for railway passengers. In November 2008, the civil work for construction of the plant building was started. In February 2009, IRCTC published a tender notice for turnkey project for design, engineering, supply, installation, commissioning, operation and maintenance of the packaged drinking water bottling plant. Pursuant to the tender notice, three tenderers, namely, M/s Thermax, M/s Ion Exchange (I) Ltd. and M/s. Doshion Veolia Water Solutions (P) Limited submitted their offers, but as the

offers were conditional, it was not possible to evaluate them and to decide the inter-se position of the three tenderers in an objective manner and therefore the Tender Committee of the IRCTC recommended for discharge of the tender and to invite fresh tenders after incorporating all the relevant revisions in the tender document to avoid anomalies. On 04.08.2009, a fresh tender notice was advertised by IRCTC and in response to this fresh tender notice M/s Ion Exchange (I) Limited (for short 'Ion Exchange') and M/s. Doshion Veolia Water Solutions (P) Limited (for short 'Doshion') submitted their technical and financial bids in separate sealed covers. The technical bids were opened on 24.08.2009 and both Ion Exchange and Doshion were informed on 26.08.2009 that their financial bids would be opened on 27.08.2009. When on 27.08.2009 the financial bids of Ion Exchange and Doshion were opened, it was found that Doshion had quoted a total price of Rs. 18.65 Crores, whereas Ion Exchange had quoted a total price of Rs. 18.66 Crores and had also quoted a discount of 1% on the quoted price. The result was that the net price quoted by Ion Exchange after deducting the discount of 1%

worked out to Rs.18,47,34,000/- as against the price of Rs.18,66,00,000/- quoted by Doshion.

4. On 28.08.2009, Doshion submitted a letter to IRCTC saying that the offer of discount on the quoted price made by Ion Exchange was in violation of Clause 1.10 of the Instructions to Bidders. Again on 03.09.2009, Doshion submitted a letter reiterating its objection to the offer of discount made by Ion Exchange and also saying that the excise duty amount had not been indicated in rupees by Ion Exchange in its financial bid contrary to the terms and conditions of the tender. On 18.10.2009, the Tender Committee of IRCTC met and made its first recommendation to the Accepting Authority of IRCTC. In the recommendation, the two members of the Tender Committee gave their opinion that the discount of 1% offered by Ion Exchange was not valid and that the non-mentioning of the excise duty amount in Rupees by Ion Exchange was a major deviation. The third member gave his dissent in the recommendation saying that the excise duty could be easily ascertainable by applying the normal methodology of calculation and so calculated the

excise duty amount in the bid of Doshion was Rs.69,26,080/- and that of Ion Exchange was Rs.55,12,050/-. The third member also gave his opinion that the bid amount of Ion Exchange was Rs.17 Lacs lesser and if the set off received in service tax for operation and maintenance part of the contract is taken into account, then the additional benefit of MODVAT would get neutralized and therefore even if excise duty amount was not quoted by Ion Exchange in its financial bid, this was not a material deviation. On 13.10.2009, the Accepting Authority of IRCTC directed the Tender Committee to look into the financial implications of excise duty on plant and equipment/ MODVAT credit. Regarding the discount of 1%, the Accepting Authority directed the Tender Committee to look into the prevalent practice being followed by Government Departments and Public Sector Undertakings regarding discount and thereafter make their recommendations. On 02.11.2009, the Tender Committee made its second recommendation. In this recommendation, all the three members of the Tender Committee were of the unanimous view that excise duty should not be taken into account for

tender evaluation because if the offer of Ion Exchange in totality was considered, there was no adverse financial implication to IRCTC. Regarding discount, the Tender Committee could not find any instruction relating to the prevalent practice followed by Government Departments and Public Sector Undertakings. On 13.11.2009, the Accepting Authority considered the second recommendation of the Tender Committee and asked the Tender Committee for further clarification on excise duty and to make a review of the cases of Central Vigilance Commission, Chief Technical Examiner's Organization and Stores Directorate Compendium, Railway Board on the discount aspect. On 20.11.2009, the Tender Committee made its third recommendation. In the third recommendation, the members of the Tender Committee were of the unanimous view that taxes and duties (excise duty in particular) had no adverse financial implication to IRCTC. Two of the three members of the Tender Committee after taking into consideration the guidelines/observations in the Railway Stores Directorate Compendium, Central Vigilance Commission, Chief Technical Examiner's Organization, the bid

documents of other Public Sector Undertakings in respect of discounts and after verification from Railways and Railway Public Sector Undertakings, took the view that unconditional discount available alongwith the offer should be considered. The third member of the Tender Committee, however, did not agree with this view and maintained his earlier view that unconditional discount offers should not be considered when price bid does not speak of discount as part of the bid conditions. The Accepting Authority of the IRCTC accepted the unanimous recommendation of the Tender Committee that taxes and duties (including the excise duty) had no financial implication on IRCTC. The Accepting Authority also accepted the majority recommendation of the Tender Committee that the 1% discount offered in the bid of Ion Exchange can be considered. Accordingly, the Accepting Authority decided to accept the offer of Ion Exchange and on 17.12.2009 letter of acceptance was issued to Ion Exchange.

5. On 21.12.2009, Doshion filed Writ Petition No. 27074 of 2009 in the Madras High Court praying for a writ of mandamus restraining IRCTC from taking any step in

furtherance of the tender. On 23.12.2009, learned Single Judge of the Madras High Court issued an interim injunction till 15.01.2010 and posted the matter for 05.01.2010. On 05.01.2010, IRCTC filed its detailed counter affidavit in reply to the writ petition. On 17.01.2010, Doshion filed Writ Petition No. 1059 of 2010 praying for quashing the letter of acceptance dated 17.12.2009 issued in favour of Ion Exchange. IRCTC and Ion Exchange filed their respective counter affidavits in reply to the Writ Petition and Doshion also filed its rejoinder affidavit. After hearing, the learned Single Judge of the Madras High Court dismissed the two Writ Petitions on 16.02.2010. On 08.04.2010, Doshion filed Writ Appeal Nos. 726-727 of 2010 before the Division Bench of the Madras High Court and on 12.04.2010 the Division Bench passed the order of status quo while admitting the appeals. After hearing the appeals, the Division Bench passed the impugned judgment and order dated 29.04.2010 setting aside the order dated 16.02.2010 of the learned Single Judge in Writ Petition Nos. 27074 of 2009 and 1059 of 2010 and allowed the Writ Petitions of the appellant and quashed the acceptance of

the offer of Ion Exchange. The Division Bench, however, refused to grant the prayer in the Writ Petition to award the contract to Doshion and instead observed in the impugned judgment and order that it is for IRCTC to take a decision in the light of the findings in the impugned judgment. Aggrieved, the IRCTC and Ion Exchange have filed appeals against quashing of acceptance of the offer of Ion Exchange by the Division Bench of the High Court and Doshion has filed the appeal against the refusal of the Division Bench of the High Court to grant the prayer in the writ petition to award the contract to Doshion.

6. Mr. Goolam E. Vahanvati, learned Attorney General for India appearing for IRCTC, submitted that the Division Bench of the High Court quashed the acceptance of the offer of Ion Exchange by IRCTC on the ground that the offer of discount of 1% over the quoted price and the non-mentioning of excise duty amount in rupees in the offer of Ion Exchange were contrary to the provisions of the tender notification and the tender format and, therefore, the acceptance of the offer of Ion

Exchange was unfair and arbitrary and violative of Article 14 of the Constitution.

7. He argued that the terms and conditions of the tender documents did not contain any express provision prohibiting a tenderer from quoting a discount on the price offered by him and in the absence of an express provision in this regard, an implied provision cannot be read into the terms and conditions of the tender documents prohibiting a tenderer from quoting a discount on the quoted price. He urged that in the facts of the present case, the majority of the members of the Tender Committee, after taking into consideration the guidelines/ observations in the Railway Stores Directorate Compendium, Central Vigilance Commission, Chief Technical Examiner's Organization and the bid documents of other Public Sector Undertakings in respect of discounts and after verification from Railways and Railway Public Sector Undertakings, had given the opinion in their third recommendation on 20.11.2009 that unconditional discount along with the offer should be considered and the Accepting Authority had accordingly considered the 1% discount offered on the quoted

price of Ion Exchange and accepted the offer of Ion Exchange. He cited the decision of this Court in Kanhaiya Lal Agrawal v. Union of India and Others [(2002) 6 SCC 315] in which rebates offered by a tenderer as an additional inducement to accept his offer was not treated as breach of the terms and conditions of the invitation to tender.

8. Regarding the non-mentioning of excise duty in rupees in the offer of Ion Exchange, Mr. Vahanvati contended that the members of the Tender Committee in their third recommendation made on 20.11.2009 were unanimous in their view that taxes and duties including excise duty had no adverse financial implication on IRCTC and this recommendation of the Tender Committee was accepted by the Accepting Authority. He submitted that the Division Bench of the High Court has acted as an appellate court over the Tender Committee and the Accepting Authority by holding that the non-mentioning of excise duty in rupees in the offer of Ion Exchange amounted to breach of the essential terms and conditions of the tender notification and tender format and has exceeded the power of judicial review in matters relating to

tenders and award of contracts. He cited the decision of this Court in *Tata Cellular v. Union of India* [(1994) 6 SCC 651] in which it has been held that it is not the function of the Judge to act as Super Board over the decisions of the administrator in matters relating to tenders.

9. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for Ion Exchange, submitted that in the impugned judgment and order, the Division Bench of the High Court has referred to Clause 1.10 of the Instructions to Bidders which provides that rates are to be quoted in the prescribed price schedule format only and has also referred to Clause 1.12 of the Instructions to Bidders which states that failure to comply with either of the conditions will render the tender void. He submitted that the Division Bench of the High Court appears to have taken the view that Clause 1.12 is attracted in case of failure of the tenderer to comply with Clause 1.10, but a careful reading of Clause 1.12 would show that it will apply when the tenderer fails to comply with either of the two conditions in Clause 1.11 of the Instructions to Bidders and will not apply when the tenderer does not comply with Clause

1.10 of the Instructions to Bidders. He contended that excise duty rate is 8.24% on the value of the plants and equipments and therefore the excise duty amount in rupees can always be calculated by IRCTC and it made no difference whether the excise duty was quoted in rate or in rupees. He submitted that for these reasons, mentioning of excise duty in rupees for the plants and equipments cannot constitute an essential term of the tender notification or tender format as held by the Division Bench of the High Court.

10. Dr. Singhvi argued that the fact remains that the price offered by Ion Exchange with 1% discount is less than that of Doshion and for this reason was accepted by IRCTC and hence the Division Bench of the High Court should not have quashed the acceptance of the offer of Ion Exchange. He cited Jagdish Mandal v. State of Orissa and Others [(2007) 14 SCC 517] in which this Court has held that so long as a decision relating to award of contract is bona fide and is in the public interest, courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

11. Mr. Jaideep Gupta, learned senior counsel appearing for Doshion, on the other hand, supported the impugned judgment and order of the Division Bench of the High Court quashing the acceptance of offer of Ion Exchange by IRCTC. He submitted that when IRCTC published the first notice inviting tenders in February, 2009, the bid of Doshion was the lowest and yet IRCTC cancelled the tender process on the ground that the offer made by the three tenderers were conditional and it was not possible to evaluate them. He submitted that when the fresh tender notice was advertised on 04.08.2009 for the very same work, IRCTC revised the tender conditions and the tender format and in Clause 1.10 of the Instructions to Bidders clearly stipulated that rates are to be quoted in the Prescribed Price Schedule only. He submitted that the IRCTC further stipulated in Clause 1.12 of the Instructions to Bidders that failure to comply with either of the conditions in Clauses 1.10 or 1.11 of the Instructions to Bidders will render the tender void. He contended that on a reading of these two tender conditions, it will be clear that rates were to be quoted in the Prescribed Price Schedule only

and no tenderer could quote any discount on the quoted price, and further any offer of discount on the quoted price would be in breach of Clause 1.10 of the Instructions to Bidders and the tender would be rendered void under Clause 1.12 of the Instructions to Bidders. He submitted that it would be also clear from Clause 2.1 of the Special Terms and Conditions of the tender documents that the vendor was required to quote a lump sum price along with detailed break-up as per price schedule enclosed with the bid documents and Clause 9.0 of the Special Terms and Conditions stated that the vendor should clearly spell out in his offer his acceptance of the Special Terms and Conditions and in case of deviation, his offer may be rejected. He also referred to the Prescribed Price Schedule to show that there was no scope for a bidder to quote any discount. Mr. Gupta next submitted that Note (ii) at the bottom of the price schedule provides that the vendor should indicate total excise duty amount included in the price for plants and equipments, and yet Ion Exchange did not mention the total excise duty amount in its offer. He argued that since Ion Exchange quoted a discount on the price and did not

indicate the excise duty amount in its offer, the Division Bench of the High Court rightly held that the offer of Ion Exchange did not comply with the essential terms and conditions of the tender notification and tender format and was ought to have been rejected by IRCTC.

12. Mr. Gupta relied upon the observations of this Court in W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others [(2001) 2 SCC 451] that the very purpose of issuing Rules/Instructions to bidders is to ensure their enforcement lest the rule of law should be a casualty and relaxation or waiver of a rule or condition, unless provided in the Instructions to Bidders, by the State or its agencies in favour of one bidder would create justifiable doubts in the minds of the other bidders and would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts. He also relied upon Kanhaiya Lal Agrawal v. Union of India and Others (supra) for the proposition that if the consequence of non-compliance of a condition in the notice inviting tenders is rejection of the

tender, then the condition is an essential condition of the invitation to tender. Mr. Gupta submitted that the Division Bench of the High Court therefore was right in quashing the offer of Ion Exchange on the ground that it was in breach of the essential terms and conditions of the tender notification and the tender format. He submitted that as the tender of Doshion was the only other valid tender, the High Court should have directed IRCTC to award the contract to Doshion. He urged that we should allow the appeal of Doshion on this point and direct IRCTC to award the contract to Doshion.

13. The first question that we have to decide in this case is whether the offer of 1% discount on the quoted price made by Ion Exchange was in breach of any essential term of the tender notification or the tender format as held by the High Court. Mr. Gupta, learned counsel for Doshion, has relied upon Clauses 1.10, 1.11 and 1.12 of the Instructions to Bidders and Clauses 2.1 and 9.0 of the Special Terms and Conditions of the tender documents to support this finding of the High Court, which are quoted hereinbelow:

“Instructions to Bidders:

- 1.10 Rates are to be quoted in the prescribed price schedule format only and it shall be inclusive of all taxes, levies and duties.
- 1.11 Every page of the tender document shall be signed on the left hand side bottom corner and stamped properly by the authorized person or persons submitting the tender in token of his/their having acquainted himself/themselves with the general conditions of contract, technical specifications etc. as laid down. Any tender is liable to be treated as defective and is liable to be rejected if any of the documents is not signed. The initials of the tenderer must attest all erasures and alterations made while filling the tender. Over-writing of figures is not permitted.
- 1.12 Failure to comply with either of these conditions will render the tender void. No advice of any change in rate after opening of the tender will be entertained.

Special Terms & Conditions:

- 2.1 Vendor shall quote for lump sum price along with detailed break-up as per price schedule enclosed with this bid document. The cost of plants and equipments as quoted in the price schedule will constitute contract price/contract value.

9.0 Deviation to Terms and Conditions:

The vendor should clearly spell out in his offer his acceptance of the terms &

conditions indicated above. In case of deviation, his offer may be rejected.

Deviations proposed, if any, should be raised in pre-bid meeting and decision taken there and conveyed to all parties will be final and binding.”

14. Clause 1.10 of the Instructions to Bidders quoted above states that rates are to be quoted in the Prescribed Price Schedule format only and it shall be inclusive of all taxes, levies and duties. This clause does not say that the tenderer will not quote any discount on the price. Clause 1.11 of the Instructions to Bidders states that every page of the tender document shall be signed and properly stamped by the authorized person or persons submitting the tender and no over-writing will be permitted. Clause 1.12 of the Instructions to Bidders states that failure to comply with either of these conditions will render the tender void. Since there is no condition either in Clause 1.10 or Clause 1.11 that the tenderer will not quote discount on the price, in case a tenderer offers a discount on his quoted price his tender will not be rendered void under Clause 1.12 of the Instructions to

Bidders. Clause 2.1 of the Special Terms and Conditions quoted above states that the vendor shall quote for lump sum price along with detailed break-up as per price schedule enclosed with the bid document and the cost of plants and equipments as quoted in the price schedule will constitute contract price/contract value. This clause also does not say that the vendor will not quote a discount on the lump sum price. Clause 9.0 of the Special Terms and Conditions states that the vendor should clearly spell out in his offer his acceptance of the terms and conditions as indicated in the Special Terms and Conditions and in case of deviation, his offer may be rejected. There is nothing in this clause also to show that the vendor cannot quote a discount on the price. In the Prescribed Price Schedule also there is no mention anywhere that the tenderer will not offer any discount on his quoted price. In the absence of any express stipulation in the Instructions to Bidders or the Special Terms and Conditions or in the Prescribed Price Schedule prohibiting the tenderer from quoting a discount on the price offered by him, the High Court could not have come to the conclusion that by offering a

discount of 1% on the quoted price Ion Exchange has committed a breach of the essential terms of the tender notification or the tender format.

15. For this conclusion, we are supported by a direct authority of this Court in Kanhaiya Lal Agrawal v. Union of India and Others (supra) cited by Mr. Vahanvati. In this case, the conditions in the tender notice required that the rates at which the supply was to be made had to be stated in words as well as in figures against each item of work as per Schedule attached thereto and that the tenders submitted with any omissions or alteration of the tender document were liable to be rejected, but permissible corrections could be attached with due signature of the tenderers. Kanhaiya Lal Agrawal submitted along with his tender a covering letter that if his offer was accepted within the stipulated time the following rebates would be offered by him:

- (a) 5% reduction in rates if the contract is given to him within 45 days,
- (b) 3% reduction in rates if the contract is given within 60 days, and

- (c) 2% reduction in rates if the contract is given within 75 days.”

The Union of India accepted the tender offered by Kanhaiya Lal Agrawal on the rates subject to the rebate. Another tenderer, whose rates would have been the lowest if the rebates offered by Kanhaiya Lal Agrawal would not have been considered, filed a writ petition in the Madhya Pradesh High Court contending that the offer of Kanhaiya Lal Agrawal was conditional and not valid and succeeded both before the learned Single Judge and before the Division Bench of the High Court. Kanhaiya Lal Agrawal carried an appeal to this Court and this Court held that the offer of rebates made by Kanhaiya Lal Agrawal “did not militate against the terms and conditions of inviting tender”. From the decision of this Court in Kanhaiya Lal Agrawal v. Union of India (supra), therefore, it is clear that unless the offer of rebate or discount is in breach of the clear stipulations in the notice inviting tenders it cannot be held that such offer is in breach of the essential terms and conditions of the notice inviting tenders.

16. The observations of this Court in W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others (supra), on which Mr. Gupta relied upon, is of no assistance to Doshion. In that case the West Bengal State Electricity Board invited bids for the Purulia Pumped Storage Project and the bids, which were submitted, were opened on 08.09.1999 and while the details of the bids were under scrutiny, respondents 1 to 4 in the appeal before this Court informed the State Electricity Board that there was a repetitive systematic computer typographical transmission failure on account of which there were errors in their bid and requested that the errors be corrected. On 17.12.1999, they sent another letter stating that they had reason to believe that the State Electricity Board was evaluating their price bid by an incorrect application of the Instructions to Bidders and that their bid was the lowest. The State Electricity Board evaluated their bid and on 18.12.1999 sent a letter to them saying that during checking of their bid documents a good number of arithmetical errors were discovered. Respondents 1 to 4 challenged the validity of the letter dated 18.12.1999 of the State Electricity Board in a

writ petition filed in the High Court at Calcutta. Learned Single Judge of the High Court directed the State Electricity Board to consider the representation of Respondents 1 to 4 and to communicate a reasoned order to them. Against the order of the learned Single Judge, the State Electricity Board filed appeals. Cross-objections were also filed by Respondents 1 to 4. The Division Bench of the High Court dismissed the appeals and the cross-objections upholding the order of the learned Single Judge and directed the State Electricity Board to permit Respondents 1 to 4 to correct the errors in the bid documents and then consider their bid along with the other bids and take a decision objectively and rationally. On these facts, this Court held that Respondents 1 to 4 in that appeal were bound by the Instructions to Bidders which should be complied with scrupulously and adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. This Court further observed that the very purpose of issuing

rules/instructions is to ensure their enforcement lest the rule of law should be a casualty and relaxation or waiver of a rule or condition, unless so provided under the Instructions to Bidders, by the State or its agencies in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts.

17. These observations made by this Court in W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others (supra) rather come to the aid of Ion Exchange in this case. Since IRCTC did not clearly stipulate in the Instructions to Bidders or in the Special Terms and Conditions or in the Prescribed Price Schedule or in any other part of the tender documents that a tenderer will not offer any discount on the prices quoted by him and if any such discount is offered the tender will be rejected, the offer of discount on the price made by Ion Exchange cannot be treated to be in breach of the essential term or condition of the tender documents. To hold

that the State or its agencies can reject a tender for breach of a term or condition in the tender document, which is not explicit in the tender documents, is to give room to the State or its agencies to arbitrarily reject tenders even where the clear terms or conditions of the tender documents are complied with. In Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. [(1997) 1 SCC 53], this Court found that the offer of the lowest tenderer for wholesale supply of rectified spirit (Grade 1) to the Excise Department of the Government of Assam was not accepted on the ground that the price offered did not come within the “viability range” and this Court held that the tender process was vitiated for the reason that the tender notice did not specify the “viability range” nor did it say that only the tenders coming within the “viability range” will be considered. The Court further observed that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice and the consideration of tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

18. The next question, which falls for consideration in this case, is whether the High Court was right in coming to the conclusion that by not indicating the excise duty amount in rupees in its offer, Ion Exchange committed breach of an essential term or condition of the tender notification or the tender format. Clauses (i) and (ii) of the Note appended to the Prescribed Price Schedule, which relate to duties and taxes, are quoted hereinbelow:

“Note:

- (i) The prices quoted are lump sum inclusive of all duties and taxes etc.
- (ii) Vendor should indicate total Excise Duty amount included in above prices (for Plants & Equipments)”

The language of Clauses (i) and (ii) of the Note quoted above is clear that the prices quoted are to be lump sum inclusive of all duties and taxes etc. and the vendor should indicate total excise duty amount included in the prices for plants and equipments. The Note does not indicate the consequences that will follow if the vendor does not indicate the total excise

duty amount included in the prices for plants and equipments. The Note does not say that if the vendor does not indicate the total excise duty amount included in the prices for plants and equipments, the offer of the vendor “shall” be rejected. In the absence of any mention of the consequence of rejection of the offer for not indicating the total excise duty amount in rupees included in the price of plants and equipments in the tender documents, the High Court could not have held that Ion Exchange had committed breach of an essential term or condition of the tender notification or the tender format. For this conclusion, we are again supported by the decision in Kanhaiya Lal Agrawal v. Union of India and Others (supra) in which this Court relying on G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] held:

“Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term.”

Hence, if on the recommendation of the Tender Committee, the Accepting Authority did not find the deviation from Clause (ii)

of the Note by Ion Exchange very material and has accepted the offer of Ion Exchange, the Division Bench of the High Court could not have held that Ion Exchange committed a breach of an essential term by not mentioning the excise duty amount in rupees in its offer.

19. As the offer of 1% discount on the quoted price and the non-mentioning of excise duty amount in rupees in the bid of Ion Exchange were not in breach of the essential terms of the tender documents, it was for IRCTC to evaluate the valid offers of Ion Exchange and Doshion on the merits of the two offers. We find that on the basis of recommendations of the Tender Committee, the Accepting Authority of IRCTC found the offer of Ion Exchange at a net price of Rs.18,47,34,000/- to be better than the offer of Doshion at the price of Rs.18,66,00,000/- and that tax and duties including excise duty had no adverse financial implications to IRCTC and accordingly accepted the offer of Ion Exchange. By reversing this decision of the Accepting Authority of the IRCTC, the Division Bench of the High Court, in our considered opinion, acted as an Appellate Court and exceeded its power of judicial

review in a matter relating to award of contract contrary to the law laid down by this Court in the leading case of *Tata Cellular* (supra).

20. In the result, we set aside the impugned judgment and order of the Division Bench of the High Court and allow the appeals of IRCTC and Ion Exchange and dismiss the appeal of Doshion. There shall be no order as to costs.

.....J.
(Altamas Kabir)

.....J.
(A. K. Patnaik)

New Delhi,
October 04, 2010.