IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL APPELLATE

WRIT PETITION (L) NO. 23639 OF 2022

1. MEP Infrastructure Developers Ltd. A company incorporated under the Companies Act, 1956 having its office at 2102, Floor-21st, Plot No. 62, Kesar Equinox, Sir Bhalchandra Road, Hindu Colony, Dadar (East), Mumbai 400 014, through its authorised signatory Mr. Mandar Karandikar

2. Ozoneland Private Limited Through Mr. Manoj Upadhyay, authorized signatory, having office address at 4, Vaswani Mansion, 120 Churchgate, Mumbai 400 020

3. Mrs. Anuya J. Mhaiskar Director of MEP Infrastructure Developers Ltd., 2102, Floor-21st, Plot No. 62, Kesar Equinox, Sir Bhalchandra Road, Hindu Colony, Dadar (East), Mumbai 400 014

4. Mr. Manoj Upadhyay Having office address at 4, Vaswani Mansion, 120 Churchgate, Mumbai 400 020 } **Petitioners**

Versus

1. MSRDC Sea Link Ltd. }
A company incorporated }
under the Companies Act, }
2013 having its registered }
office Near Lilavati }
Hospital, Opp. Bandra }
Reclamation Bus Depot, }
K C Marg, Bandra (West) }
Mumbai 400 050 }
}
2. Maharashtra State }
Road Development }
Corporation Ltd. }
A company incorporated }
under the Companies Act, }
1956 having its registered }
office at MSRDC }
Limited, Opp. Bandra }
Reclamation Bus Depot, }
K C Marg, Bandra (West), }
Mumbai 400 051 }
}
3. State of Maharashtra }
Through the Government }
Pleader, High Court, Bombay } Respondents

Mr. Venkatesh Dhond, Senior Advocate a/w Mr. Ashish Kamat, Mr. Yashesh Kamdar, Mr. Deepak Deshmukh, Ms. Swati Singh and Mr. Rakesh Gupta i/by Naik Naik & Company for petitioners.

Dr. Milind Sathe, Senior Advocate a/w Mr. Prashant Chawan, Mr. Arun Siwach, Ms. Priyanka Mitra and Mr. Karan Gandhi i/by Cyril Amarchand Mangaldas for respondent nos.1 and 2.

Mr. Abhay Patki, Addl. Government Pleader a/w Mr. Hemant Haryan, AGP for respondent no.3/State.

CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

RESERVED ON: 17th AUGUST, 2022
PRONOUNCED ON: 20th AUGUST, 2022

JUDGMENT: [Per the Chief Justice**]**

1. After several abortive exercises initiated by it for selection and appointment of a toll collecting operator, Maharashtra State Road Development Corporation Sea Link Limited (hereafter "respondent no. 1", for brevity) floated tender notice dated 7th June 2022 for appointment of an operator for collection of toll at Rajiv Gandhi Sea Link (Bandra-Worli Sea Link) Toll Plaza (2nd call). Clause No. 2 laid down "eligibility and qualification criteria". Clauses 2.1 and 2.2.6 thereunder read as follows: -

> "2.1 Any bidder/its directors/its subsidiary/controlling interest including their Directors/JV partners/Partner in case of partnership firm, etc, who is minor or who has been adjudged insolvent or who has been convicted in a Court of Law for an offence under Indian Penal Code or offence involving moral turpitude or other criminal activities or detained under any preventive Law in force or who has been black listed by the Central/State Government or Semi Government organization or Corporation or MSRDC or its subsidiary, or who has defaulted in payment of outstanding dues or has breached terms and conditions resulting in termination of contract to MSRDC/MSLL/any of its subsidiary company/ies, such bidder/its subsidiary/JV Partner/partner in case of partnership firm etc. in respect of any other contract with MSRDC/MSLL/any of its subsidiary company/ies shall not be eligible to submit any offer/s. Offer/s if submitted by such bidder/ its subsidiary/JV Partner/partner in case of partnership firm, the same shall be treated as invalid.
>
> ******
>
> 2.2.6 Bidder/Offerer shall submit a no dues certificate issued by MSRDC's/MSLL's Accounts department in the Technical Envelop."

2. The petitioners 1 and 2 are companies which, as a consortium, submitted their bid in response to such tender

notice. Since clause 2.2.6 (supra) required submission of no-dues certificate issued by the Accounts Department of the respondent no. 1 as well as Maharashtra State Road Development Corporation Limited (hereafter "respondent no. 2", for brevity), the petitioner no. 1 had requested the respondent no. 2 vide letter dated 10th June 2022 to issue a no-dues certificate. In pursuance of such a request, a certificate dated 14th June 2022 was issued by the respondent no. 2 reading as follows: -

"**TO WHOMSOVER IT MAY CONCERN**

Sub: - Appointment of Contractor for collection of toll at Rajiv Gandhi Sea Link Toll Plaza

Ref: M/s. MEP Infrastructure Developers Ltd. vide request letter dtd. 10/06/2022

M/s. MEP Infrastructure Developers Ltd. does not have any outstanding dues as on 14th June, 2022.

However, the subsidiary companies of the Applicant have outstanding dues of Rs.408.83 Crore as on 14th June, 2022.

The details are as follows: -

Sr. No.	Company Name	Toll station Name	Particulars	Outstanding Amount (Rs)
1	MEP RGSL Toll Bridge Pvt. Ltd.	Rajiv Gandhi Sea Link	On Going Contract	69,49,39,626
		Rajiv Gandhi Sea Link	Revenue Sharing	71,11,25,786
		Rajiv Gandhi Sea Link	Anti-carbonation	16,30,52,186
		Rajiv Gandhi Sea Link	Negative variation	19,38,17,326
2	Raima Manpower & Consultancy Pvt. Ltd.	Kini & Tasawade Toll	Revenue Sharing	1,41,92,23,036
3	MEP Infrastructure Pvt. Ltd.	Mumbai Entry Points	Revenue Sharing (2015-20)	88,58,28,040
4	MEP Infrastructure Pvt. Ltd.	Mumbai Entry Points	Renewal of B.T. surface	2,03,21,836
			Total	**4,08,83,07,837**

In addition to above, subject to further that present we do not have any information on holding companies or its subsidiary companies, controlling interest or common management. Bidder has not submitted any such disclosure/details in the said request letter.

This certificate is issued as conditional certificate only to the extent of participation of tender invited by TAD."

3. In view of the outstanding dues owed by the subsidiary companies of the petitioner no. 1 to the extent of Rs. 408.83 crore as on 14th June 2022, the respondent no.1 on 6th July 2022 considered and held the bid of the petitioners 1 and 2 to be non-responsive and, accordingly, rejected such bid.

4. By instituting this writ petition, the petitioners have, *inter alia,* prayed for the following substantive relief: -

(a) this Hon'ble Court be pleased to Issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate orders or directions calling for the records for the papers and proceedings in respect of the impugned Tender process and the rejection of bid/technical disqualification of the Petitioner, and after perusing the legality and propriety of the same, be pleased to quash and set aside: -

(i) the impugned rejection dated 06 July 2022 inter alia rejecting the Petitioners bid; or

(ii) in the alternative to prayer clause (a)(i) above, the impugned Tender process.

(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, order or direction, directing Respondent No.1 to consider the Financial Proposal of the Petitioners along with and at par with all other qualified bidders by ignoring the qualifications and additional surplusage contained in the No Dues Certificate dated 14th June 2022;

(c) this Hon'ble Court be pleased to issue an appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the Respondents from taking any action pursuant to and/or in furtherance of the impugned rejection dated 6th July 2022;

(d) That only in the event of this Hon'ble Court coming to the conclusion that the No Dues Certificate dated 14th June 2022 can be looked at by Respondent No.2 in entirety (i.e., by giving regard to the surplusage therein) this Hon'ble Court be pleased to issue a Writ of mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction directing Respondent No.2 to forthwith issue a No Dues Certificate without any surplusage and then consider the same for the purposes of the Tender and until then keep further proceedings/ steps in the tender process (including issuing a Letter of Acceptance or Work Order or Contract and taking any steps/action pursuant thereto) in abeyance;

(e) That this Hon'ble Court be pleased to declare that, the disqualification contained in Clause 2.1 cannot attach to the Petitioner, inter alia because it is an admitted position that no contract between the Petitioner and/or its subsidiaries and Respondent Nos.1 and 2 and/or its subsidiaries has been terminated for the non-payment of the alleged amounts outstanding as reflected in the No Dues Certificate dated 14th June 2022 and/or there are admittedly no outstanding dues from Petitioner No.1."

5. The short question that we are called upon to decide is whether, by invoking clause 2.1, the technical bid of the petitioners could be rejected by the respondent no. 1.

6. As it appears from the pleaded case in the writ petition, the petitioners have read clause 2.1 to connote that mere

default in payment of outstanding dues would not amount to a disqualification; if only such default has resulted in termination of contract, such clause could be attracted.

7. On the other hand, it appears from the reply affidavit of the respondent no. 1, being the author of the tender, that it has urged us to uphold the impugned rejection of the technical bid of the petitioners 1 and 2 by reading clause 2.1 in the following manner: -

> "Clause 2.1
>
> **Any bidder/its directors/its subsidiary/ controlling interest including their Directors/JV partners/Partner in case of partnership firm, etc.,**
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> who is minor
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> or
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> who has been adjudged insolvent
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> or
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> who has been convicted in a Court of Law for an offence under Indian Penal Code or offence involving moral turpitude or other criminal activities
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> or
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> detained under any preventive law in force
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> or
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> who has been blacklisted by the Central/State Government or Semi Government organization or Corporation or MSRDC or its subsidiary,
>
> or
>
> **who has defaulted in payment of outstanding dues**
>
> or
>
> has breached terms and conditions resulting in termination of contract
>
> to MSRDC/MSLL/ any of its subsidiary company/ies,

such bidder/its subsidiary/JV Partner/partner in case of partnership firm etc., in respect of any other contract with MSRDC/MSLL/any of its subsidiary company/ies shall not be eligible to submit any offer/s. Offer/s if submitted by such bidder/its subsidiary/JV Partner/partner in case of partnership firm, the same shall be treated as invalid."

(emphasis supplied by the respondent no.1)

8. We record that at the outset, Dr. Sathe, learned senior counsel for the respondents 1 and 2 raised certain preliminary objections to the maintainability of the writ petition, namely, that the writ petition suffers from suppression of material facts, that the petitioner no. 2 cannot challenge the tender terms having participated in the tender unconditionally and that the question raised in the writ petition is academic in the context of dues/liability having been admitted by the petitioner no. 1.

9. We have not found the preliminary objections weighty enough for foreclosing a discussion on the merits of the rival claims. Suppression is alleged by Dr. Sathe by referring to a particular agreement dated 29th September 2017 titled "Contract Agreement" annexed to the reply affidavit of the respondents 1 and 2 (at page 288 of the paper book). The respondent no.2, the petitioner no.1 and MEP RGSL Toll Bridge Private Limited, which is alleged to be one of its subsidiaries and referred to as "Contractor" in the said agreement, are parties thereto. By such agreement, the petitioner no.1 bound itself to be jointly and severally liable with the subsidiary to the respondent no.2 under such agreement. According to Dr. Sathe, this agreement has not been annexed to the writ

petition and, thus, constitutes suppression of a material fact. However, we find this agreement to have been referred to in paragraph 8 of the writ petition and the petitioners also craved for leave to refer to and/or rely upon it as and when required. The point of suppression, in our opinion, is thus not well substantiated. The other two objections, in our further opinion, are also not in the nature of 'demurrer'. Such points touch upon the merits of the rival claims and, therefore, we intend to decide the fate of the petitioners based on our reading and understanding of what clause 2.1. is all about.

10. Appearing in support of the writ petition, Mr. Dhond, learned senior counsel contended that clause 2.1 could have been invoked by the respondents 1 and 2 and a disqualification would have been incurred by the petitioners 1 and 2 only if any contract owing to default in payment of outstanding dues were terminated by either of the first 2 (two) respondents. In other words, 'termination of contract' in clause 2.1 would apply to both, i.e., termination not only for breach of the terms and conditions but also for default in payment of outstanding dues.

11. Mr. Dhond further argued that default in payment of outstanding dues is not to be viewed as a 'standalone category' on the occurrence of which a bidder could be disallowed to cross the threshold. Disqualification of a bidder could be resorted to if there be a prior termination of a contract on the ground of either default or breach of the terms and conditions. Simplicitor default in payment of outstanding dues could not have given ground for disqualification.

12. Moving on to the next point, Mr. Dhond contended that the no dues certificate should have indicated whether the petitioner no.1 owes any outstanding dues to the respondents 1 and 2. The answer to the same correctly given in the negative left no further information to be provided. However, to the extent the certificate proceeds to say what the subsidiaries of the petitioner no.1 owe to the respondents 1 and 2 is surplusage. According to him, the certificate not only should not have contained information about the dues of the subsidiaries in view of clause 2.2.6, such information ought not to have been considered while rejecting the technical bid of the petitioners 1 and 2.

13. Next, Mr. Dhond urged that 'admitted liability' as referred to by Dr. Sathe in his preliminary objections is a 'non-issue'. In this regard, he contended that this was not the first time that the respondent no.1 floated a tender for appointment of an operator for collection of toll at the concerned site with similar terms and conditions; in fact, this tender was preceded by 7 (seven) earlier attempts made by the respondent no.1 to appoint such operator and majority of such tenders stood cancelled to fulfil the oblique motive of denying appointment as operator to the petitioner no.1 which had ultimately emerged as the L-1 bidder after crossing the various stages. No-dues certificate bearing similar contents, as extracted above, to the effect that the petitioner no.1 had no outstanding dues to the respondent no.2 but that the subsidiaries of the petitioner no.1 owed certain amounts to such respondent (which, of course, are vehemently disputed) had been submitted and were accepted by the respondent

no.1 without any reservation. Dues, if any, owed by the subsidiaries by itself did not constitute a ground for disqualification earlier and, therefore, the present rejection defies logic and reason.

14. Mr. Dhond further contended that one of the other two bidders had not even submitted the no dues certificate, yet, such bid was not rejected. This was deliberate, to ensure that the process does not fall through because of a single valid bid being received.

15. It was also submitted by Mr. Dhond that if the financial bid, as offered by the petitioners, were to be accepted by the respondent no. 1 and not the financial bid of one of the two qualified bidders, who bid lower than the other, and which the respondent no.1 is intending to accept and act upon, it would save the public exchequer of unnecessary drainage in excess of Rs. 20 crore per year. Since the respondents 1 and 2 are supposed to be the guardians of the finances of the "State", he sounded extremely critical of the impugned action of rejection of the technical bid of the petitioners 1 and 2.

16. Having regard to the aforesaid contentions, Mr. Dhond submitted that the petitioners are entitled to seek an order from this Court to set aside the impugned rejection of their financial bid with consequential order for awarding of the contract in their favour.

17. *Per contra*, Dr. Sathe contended that there has been no illegality in rejecting the technical bid of the petitioners 1 and 2. Clause 2.1, according to him, has been misread by the petitioners. The object and purpose of clause 2.1 read with clause 2.2.6 is clear and the substance thereof is to be seen.

The respondents 1 and 2 do not wish to enter into any relationship with a party which, in course of previous dealings, has not honoured its obligations under the relevant contracts. There are huge dues that the subsidiaries of the petitioner owe to the respondent no.2 and, therefore, if the respondents 1 and 2 wish not to enter into any relationship with a clear defaulter, illegality or arbitrariness cannot be raised as a valid plea to impugn such action. The petitioner no.1 cannot, in any event, escape liability by referring to absence of any outstanding dues on its part. Clause 2.1 in no uncertain terms bars participation by a bidder even if its subsidiary is in default. Every default in payment of outstanding dues may not result in termination but a single default could lead to disqualification. That is how the author of the tender wants the relevant clause to be read. After all, terms of a commercial document are under consideration and not terms of a statute. To buttress his argument that different considerations apply while interpreting a statute and a commercial document, reliance was placed on paragraph 43 of our decision dated 27th June 2022 in Writ Petition (L) No.14657 of 2022 (**Adani Ports and Special Economic Zone Limited vs. The Board of Trustees of Jawaharlal Nehru Port Authority & ors.**).

18. Referring to the "Contract Agreement" dated 29th September 2017, to which we have adverted above, Dr. Sathe contended that the respondent no.2 had selected the petitioner no.1 as the bidder for development, maintenance and operation of Worli-Bandra Sea Link (now known as Rajiv Gandhi Sea Link) and Letter of Acceptance (LoA) was issued

to such selected bidder on 28th June 2017 requiring *inter alia* execution of Contract Agreement with 45 (forty-five) days. Acting on the request of the petitioner no.1 and based on the representation of MEP RGSL Toll Bridge Private Limited (referred to therein as the "Contractor") that it was promoted by the petitioner no.1, the respondent no.2 entered into such agreement pursuant to the LoA. Inviting our attention to one of the clauses at the concluding part of such agreement, Dr. Sathe contended that the "Contractor" agreed and confirmed that "the Parties forming the SPV will be jointly and severally liable to MSRDC under this agreement" and "Parties" would obviously include the petitioner no.1. It has been pointed out from the no dues certificate dated 14th June 2022 that apart from other subsidiary companies of the petitioner no.1, MEP RGSL Toll Bridge Private Limited owes in excess of Rs. 19 crore to the respondent no.2. It has also been shown that there was a meeting dated 1st February 2021 to discuss the subject of "Operation and Maintenance of Rajiv Gandhi Sea Link and Toll Plaza and collection of toll on upfront basis" chaired by the Chief General Manager, TAD, of the respondent no.2. From the minutes of meeting, which forms part of the reply affidavit, it has been shown that the "CMD, M/s. RGSL Toll Bridge Pvt. Limited has agreed to deposit Rs.8,40,00,000/- on or before 3rd December 2021". Although post-dated cheques were issued by MEP RGSL Toll Bridge Private Limited, albeit 'under protest', most of such cheques have been dishonoured. Dr. Sathe vehemently contended that the petitioner no.1 cannot escape liability, having been instrumental in appointment of its subsidiary, MEP RGSL Toll

Bridge Private Limited, as a "Contractor" for development, maintenance and operation of Rajiv Gandhi Sea Link. He concluded his arguments on this point by contending that the petitioner no.1 has been operating for the last 13 (thirteen) years either through itself or through its subsidiary and dues are owed to the respondent no.2 in respect of the very same work for which the tender dated 7th June 2022 was floated.

19. Dr. Sathe also took serious exception to the petitioners' raising pleas in their rejoinder affidavit (which could have been raised but are untraceable in the writ petition) and thereby, building up a new case altogether. According to him, there is simply no justification for the petitioners to make allegations in the rejoinder affidavit without making them part of the writ petition and hence, contents of paragraphs 1 and 20 thereof do not merit any consideration.

20. Reacting to the allegation of Mr. Dhond that no dues certificate was not submitted by one of the bidders, Dr. Sathe contended that such a bidder had given a declaration that it had no subsisting contract with the respondent no.2. Such a declaration, upon inquiry, was found to be correct; hence, no dues certificate was not insisted upon. According to Dr. Sathe, this is one other unmeritorious plea that the petitioners have raised which deserves outright rejection.

21. Answering Mr. Dhond's contention that earlier no dues certificate containing similar contents was accepted by the respondents 1 and 2, Dr. Sathe vehemently urged that the petitioners have made incorrect statements in their rejoinder affidavit. The relevant file was placed before us for our perusal to demolish the contention of Mr. Dhond.

22. Resting on the aforesaid arguments, Dr. Sathe prayed that the writ petition be dismissed.

23. Having heard Mr. Dhond and Dr. Sathe at considerable length and upon consideration of the materials on record, we now proceed to answer the question noted at paragraph 5 (supra).

24. At the outset, we record our acceptance of the argument of Dr. Sathe that the petitioner no.1 cannot wriggle out of the terms of the "Contract Agreement" dated 29th September 2017. For any outstanding dues not cleared by MEP RGSL Toll Bridge Private Limited, the liability would stand foisted on the petitioner no.1 in view of the express and unambiguous contractual terms and the no dues certificate cannot be impeached on the ground that it contains surplusage.

25. We are also in agreement with Dr. Sathe that the pleas raised in the rejoinder affidavit by the petitioners do not deserve consideration in the absence of any valid reason for not pleading the same facts in the writ petition itself, yet, having regard to the arguments that have been addressed from the bar, we would not shy away from dealing with a few of them.

26. In **Adani Ports and Special Economic Zone Limited** (supra), we had considered a plethora of decisions of the Supreme Court. *Inter alia*, the decisions in **Michigan Rubber vs. State of Karnataka**, (2012) 8 SCC 216, **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd.**, (2016) 16 SCC 818, **Nabha Power Ltd. vs. Punjab State Power Corporation Ltd.**, (2018) 11 SCC 508, **Caretel**

Infotech Ltd. vs. Hindustan Petroleum Corporation Limited, (2019) 1 SCC 81, and **Silppi Constructions Contractors vs. Union of India**, (2020) 16 SCC 489, had provided guidance for us to hold that interpretation of a commercial contract stands on a footing distinct from interpreting statutes and the Courts ought to show deference to the interpretation of contractual terms placed by the tendering authority since the author of the tender is better placed to appreciate its requirements and interpret them.

27. Turning to clause 2.1, it admits of no doubt that it is not grammatically correct. That careless drafting without proper advertence results in proliferation of meritless litigation is a sad reality of present times and the case at hand is a typical example. The preposition 'to' has been erroneously placed before the words "MSRDC/MSLL/any of its subsidiary company/ies", with the sequitur that the sentence does not carry a specific meaning and opens up ambiguity. We are minded to observe that the present controversy could have been avoided if the intention of the respondents 1 and 2, as submitted before us, were expressed in clause 2.1, to the extent relevant, in terms as follows:

> "2.1 Any bidder/its directors/its subsidiary/controlling interest including their Directors/JV partners/Partner in case of partnership firm, etc,
>
> who has defaulted in payment of outstanding dues **to**
>
> or
>
> has breached terms and conditions resulting in termination of contract **with** (sic, instead of to)
>
> MSRDC/MSLL/any of its subsidiary company/ies,
>
> such bidder/its subsidiary/JV Partner/partner in case of partnership firm etc. in respect of any other contract

with MSRDC/MSLL/any of its subsidiary company/ies shall not be eligible to submit any offer/s.

Offer/s if submitted by such bidder/ its subsidiary/JV Partner/partner in case of partnership firm, the same shall be treated as invalid.

28. Although the Courts are not precluded from ironing out the creases, it would indeed be impermissible for us to alter the material of which clause 2.1 is woven by transplanting prepositions therein, as above. The simplest way of deciding the controversy open to us is, to follow the dicta of the Supreme Court in the aforesaid judicial authorities and to accept what Dr. Sathe has said about the intention of the respondents 1 and 2 that clause 2.1 has been inserted with the purpose that they do not wish to have any relationship with parties who have been defaulting in payment of the dues arising out of existing contracts by and between them.

29. It is axiomatic that while interpreting clauses of commercial contracts of the present nature, some leeway has to be provided to the tendering authority and that the Courts may not decide cases in a rigid spirit of legalism. While considerations which are relevant for interpreting statutes cannot be imported in understanding the scope and meaning of certain terms, as in clause 2.1, a common-sense approach should be taken when faced with grammatical errors in clauses of a notice inviting tender. Bearing this in mind, we may proceed a step further and examine whether clause 2.1., read in the context of the tender document, lends support to the point that Dr. Sathe argued, i.e., termination of contract governs only 'breach of terms and conditions' and not 'default in payment of outstanding dues'.

30. Law seems to be well settled that if a literal construction does not yield sense, it has to give way to a purposive approach. We need to understand the object or purpose of the clause and attempt to ascertain, based on the language or phraseology used, the interpretation that would be consonant with such object or purpose.

31. Clause 2.1 is no doubt a condition of eligibility. We once again agree with Dr. Sathe that the substance thereof has to be seen to determine the nature of requirement that the tendering authority had in mind. If indeed the words "resulting in termination of contract" are to be read twice, i.e., once after who "has defaulted in payment of outstanding dues" and again after who "has breached terms and conditions", it leads to an incongruity. Default in payment of outstanding dues could be an incident of breach of the terms and conditions of the contract. If default in payment of outstanding dues were not a standalone category attracting disqualification and governed by termination of contract, it would not have been required to be kept in clause 2.1. This, for the reason that the rest of the clause would have taken care of the condition of eligibility which the respondents 1 and 2 had in mind of not allowing a defaulter to bid. Harmonious reading of the terms of the tender notice, in the context of the factual setting that the tender is for the same work which, at the instance of the petitioner no.1, is presently being performed by MEP RGSL Toll Bridge Private Limited, and that there are outstanding dues not cleared by it despite issuing cheques, since dishonoured, the question that would obviously arise in the circumstances is, whether the

respondents 1 and 2 would have encouraged the petitioner no.1 to bid despite its omission/neglect/failure to have the outstanding dues cleared? If the answer is in the negative, and we do not have any reason to say why it should not be so, coupled with our observation at paragraph 24 (supra), the inevitable conclusion is that clause 2.1 requires a bidder not to have defaulted in payment of outstanding dues to the respondents 1 and 2 notwithstanding the fact that such default has not resulted in termination of the contract. We also do not see reason to hold that the tender terms and conditions could not have been so designed to keep defaulting parties out of the process. After all, the respondents 1 and 2 do have the freedom to contract and choose a party without blemishes for working out the contract. In a case of this nature, Article 14 of the Constitution also does not stand offended.

32. The arguments of Mr. Dhond, to the contrary, do not appeal to us to be sound and hence, stand rejected.

33. After considering a host of precedents including, *inter alia*, **Tata Cellular vs. Union of India**, AIR 1996 SC 11, the Supreme Court in **Jagdish Mandal vs. State of Orissa**, (2007) 14 SCC 517, observed as follows:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and

> natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (*i*) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> OR
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (*ii*) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226. ***

34. Applying the tests laid down, we have no hesitation in holding that this is not a case where the decision to reject the technical bid of the petitioners 1 and 2 is either *mala fide* or that the decision made is so arbitrary and irrational that an authority acting reasonably and in accordance with the relevant law could never have reached such decision or that the decision is against public interest.

35. We are, therefore, of the considered opinion that clause 2.1 was rightly invoked for disqualifying the petitioners 1 and 2 and that they are not entitled in law to claim consideration of their financial bid.

36. The contention that one of the bidders was declared eligible without it having produced the no dues certificate, in our opinion, is one advanced in desperation. It stands to reason that a case of outstanding dues might arise if there is a subsisting contract. If there is none, we fail to see why such bidder should be compelled to produce a no dues certificate. It is only the veracity of the declaration that has to be ascertained and we record our satisfaction, on perusal of the relevant file produced by Dr. Sathe that there has been due ascertainment that the respondent no.2 and the concerned bidder are not parties to a subsisting contract. The contention is meritless and, accordingly, fails.

37. Insofar as the contention of Mr. Dhond that on previous occasions similar no dues certificate was accepted by the respondents is concerned, the same is equally without merit. An administrative decision cannot be elevated to the level of precedents, as understood in the judicial world. Law is well settled that a previous illegal decision cannot be a ground for impugning a subsequent correct decision. Even otherwise, the incorrectness of Mr. Dhond's contention has been shown by Dr. Sathe from the relevant file. On a previous occasion too, the technical bid of the petitioner no.1 stood rejected on the ground of non-payment of outstanding dues by its subsidiaries. Hence, this contention too stands overruled.

38. Before parting, we wish to dwell upon the argument of Mr. Dhond that the financial bid of the petitioners 1 and 2, if accepted, would have resulted in the respondents 1 and 2 saving public money. No doubt, as Mr. Dhond submitted, the respondents 1 and 2 are duty bound to look for the best offer that would suit the interest of the "State" being the guardian of its finances. However, such a duty would arise when competing interests of equals are under consideration and not among unequals. In terms of the tender terms and conditions, the financial bids of only those bidders whose technical bids qualify and cross the threshold to enter the second round are required to be considered. So long they do not cross the threshold, no duty was cast on the respondents 1 and 2 to consider the financial bid of a bidder who is not technically qualified. The petitioners 1 and 2 being ineligible to bid in the first place, the question of crossing the threshold to have their financial bid considered does not and cannot arise. In such view of the matter, their financial bid could not have been considered to be a valid bid that would merit consideration.

39. That apart, drawing from our judicial experience, we may unhesitatingly refer to a common trend of ineligible bidders offering a lower/higher bid than the eligible bidders and then raising a plea of how the "State" would have benefited financially if its bid were accepted to arouse judicial conscience to prevent unnecessary drainage from the public exchequer. Unmeritorious pleas such as these ought not to detain us for a moment and deserve outright rejection, which we hereby do.

40. The writ petition is devoid of any merit and, accordingly, stands dismissed. Interim order, if any, stands vacated forthwith. Parties are, however, left to bear their own costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**

LATER:

1. Mr. Dhond seeks stay of operation of this order. The prayer is opposed by the learned advocate for respondents 1 and 2.

2. The prayer is considered and rejected.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**