



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 6277 OF 2024

Kanchan India Limited & Anr. } Petitioners

versus

Government of Maharashtra & Ors. } Respondents

WITH

WRIT PETITION (L) NO. 6698 OF 2024

Arvind Cotsyn India Limited } Petitioner

Versus

State of Maharashtra & Ors. } Respondents

Mr. Ashish Kamat, Senior Advocate with Mr. Mohit Khanna, Mr. Pranav Nair, Mr. Abhineet Sharma i/b. RHP Partners for the Petitioners in WPL/6277/2024.

Mr. Pranav Nair with Mr. Abhineet Sharma, Mr. Pratik Irpatgire for the Petitioner in WPL/6698/2024.

Dr. Birendra Saraf, Advocate General with Ms. P. H. Kantharia, Government Pleader, Mr. Vishal Thadani, Additional Government Pleader and Mr. Vikrant Parshurami, AGP for State in both the Petitions.

Ms. Anjali Helekar with Mr. Mahesh Shukla and Mr. Udaybhan Tiwari and Ms. Atithi Abhay for Respondent No. 3 (UoI) in WPL/6277/2024.

Mr. Deepak Shukla with Mr. Satsang Tailor for Respondent No. 3 (UoI) in WPL/6698/2024.

Mr. Janak Dwarkadas, Senior Advocate, with Ms. Rishika Harish, Mr. Vikram Trivedi, Mr. Sachin Chandrana, Mr. Aagam Mehta i/b.

Manilal Kher and Ambalal for Respondent No. 4 in WPL/6277/2024.

Mr. Ankit Lohiya with Ms. Pooja Batra, Mr. Vikram Trivedi, Mr. Sachin Chandrana, Mr. Aagam Mehta i/b. Manilal Kher and Ambalal for Respondent No. 4 in WPL/6698/2024.

CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. & ARIF S. DOCTOR, J.

DATE : MARCH 12, 2024

ORAL JUDGMENT: (PER : CHIEF JUSTICE)

1. Rule.

Rule is made returnable forthwith.

With the consent of the learned Counsel representing the parties, these two Writ Petitions where subject matter of challenge is the same, have been taken up and heard together for final adjudication.

(A) CHALLENGE:

2. These petitions take exception to the impugned action on the part of Respondent Nos.1 and 2 which according to the Petitioners has resulted in their illegal exclusion from participation in the tender process pursuant to the tender notice dated 25th January 2024 which was issued for procurement of

school uniform cloth material to be distributed amongst the students studying in the Government schools in the State of Maharashtra for the year 2024-2025. The primary submission made on behalf of the Petitioners is that as per the bid document, the time available for submission of bid was upto 4.00 pm. on 15th February 2024, however, the portal, where the participating bidders were supposed to submit their bids was closed at 3.00 pm. itself on the said date which resulted in exclusion of the Petitioners from participation in the bid thereby infringing their fundamental right enshrined under Article 19(1) (g) of the Constitution of India. Petitioners have also pleaded violation of the provisions contained in paragraph 4.4.3.1 of the Procurement Manual as embodied in the Government Resolution dated 1st December 2016.

(B) FACTS OF THE CASE AS PLEADED BY THE PETITIONERS:

3. The State of Maharashtra is implementing Free School Uniform Distribution Scheme and in that endeavor it is providing uniform to all students studying in class 1 to 8 in Government schools. For procuring the said uniform cloth, a tender notice

dated 25th January 2024 (hereinafter referred to as the **tender notice**) was published on the Government e-markets (Gem) portal according to which the estimated bid value of the tender was Rs.138.11 crores. The tender notice stipulated the "bid end date/time" as 15th February 2024 at 15.00.00. The said notice also stipulated the bid opening date/time as 15th February 2024 at 15.30.00 hrs.

4. As per the tender notice, the period within which the delivery of the item to be procured is to be made is 30 days. The tender notice was accompanied by e-tender document which contains detail procedure for inviting bids, the eligibility criteria, scope of work, schedule of e-tender process and other necessary details for bid opening and its evaluation etc. Clause 1(v) of the bid document clearly stipulated that the Maharashtra Prathamik Shikshan Parishad (hereinafter referred to as the **Parishad**) which had invited the bids shall not be responsible for delays in on-line submission of the bid for any reason. It also stipulated that the bidders were accordingly requested to upload the complete bid proposal well in advance so as to avoid issues like slow speed, choking of web site due to heavy load or any other

unforeseen problems. Clause 1(v) of the tender document is extracted hereinbelow:

1(v) Bidder (authorized signatory) shall submit their offer online in electronic formats for qualification, technical and financial proposal. However, Earnest Money Deposit (EMD) shall be paid as per the details provided in the E-Tender. MPSP shall not be responsible for delays in online submission by bidder due to any reason. For this, bidders are requested to upload the complete bid proposal well in advance so as to avoid issues like slow speed, chocking of web site due to heavy load or any other unforeseen problems.

5. Clause 1(vi) of the tender document also advised the bidders to refer help desk for any details about the Tendering process. The said advice was given by the tendering authority for the reason that the bidders were required to submit their offer online in electronic form. Clause 1(vi) is also extracted hereinbelow:

"1(vi) Bidders are also advised to refer help desk available at <https://gem.gov.in> for further details about the E-Tendering process."

6. As per the Schedule of e-tender process, the bid submission time was from 25th January 2024 at 11.00 a.m. upto 15th February 2024 at 4.00 p.m. by on-line only. The Schedule also provided that the technical bid shall be opened on 16th

February 2024 at 11.30 a.m. in the office of the Parishad. The tender document also provided that the material to be supplied as per the distribution chart provided by the Parishad should be completed within 60 days from the date of supply order. Thus, the time for bid submission as given in the Schedule of the tender document appears to be at variance with the 'bid end time' as given in the tender notice. As already observed above 'bid end date/time' as given in the tender notice was 15th February 2024 at 15.00.00 whereas the time for bid submission given in the tender document as per the Schedule was 15th February 2024 at 4.00 p.m. The bid opening time as given in the tender notice also appears to be at variance with the bid opening time given in the Schedule as contained in the tender document. The bid opening date/time as per the tender notice was 15th February 2024 at 15.30.00, whereas, as per the Schedule available in the tender document, the technical bid was to be opened on 16th February 2024 at 11.30 a.m. So far as the bid opening time is concerned, even if it was extended as per the Schedule of the tender process given in the tender document, over and above the bid opening date and time given in the e-tender notice, the Petitioners do not have any grievance; neither

they could have any grievance nor any prejudice was caused to any of the bidders. However, as regards the bid opening time, the Petitioners have raised their grievance stating that though the Schedule of bid opening time in the tender document prescribes that the bid submission can be made upto 15th February 2024 at 4.00 p.m. but the portal was closed at 15.00 hrs on 15th February 2024 which seriously prejudiced the Petitioners inasmuch as that the Petitioners were not able to submit their bids and accordingly such an action on the part of the tendering authority has resulted in denial of fundamental rights available to them in terms of Article 19(1)(9) of the Constitution of India.

7. Though the time limit for supply of material was also varied in the tender document and the successful tenderer was required to supply the material within 60 days, whereas, the tender notice provided that the supply shall be made within 30 days, however, the Petitioners or any one else cannot have any grievance in this regard for the reason that the time was extended for all, but the Petitioners have raised this issue as well to bring home the grounds challenging the manner in which the bids have been processed by submitting that such a variance

shows the arbitrariness on the part of the tendering authority.

8. In Writ Petition (L) No.6227 of 2024 it has been stated on behalf of the Petitioners that having duly obtained the bank guarantee on 15th February 2024 and other documents, the Petitioners were ready to upload the bid on the web portal and the Petitioners commenced its bid uploading process at 2.00 pm on 15th February 2024. However, while uploading the documents, suddenly at 3.00 p.m. the bid was closed. It is, thus, the contention of the Petitioners in the Writ Petition that the process of uploading the bid was started an hour before the official end time still the same was not submitted owing to sudden and arbitrary closing of the bid at a time which was against the time mentioned in the tender document.

9. Our attention has been drawn to a letter dated 15th February 2024 written by the Petitioners in Writ Petition (L) No.6227 of 2024 to the Project Director of Parishad wherein it was stated that the Petitioners had submitted all the required documents physically and were trying to submit the bid on-line on the GeM portal but due to technical issues the bid was not

submitted and time was over. The Petitioners, thus, prayed and requested to extend the due date by a minimum of 60-72 hours. The submission is that on account of sudden closure of the portal the Petitioners were deprived of their fundamental right of participation in the subject tender.

10. Learned Counsel representing the Petitioners have also stated that the impugned action in awarding the tender to Respondent No.4 is contrary to the provisions contained in the Procurement Manual issued by the Government of Maharashtra as embodied in the Government Resolution dated 1st December 2016. Our attention has been drawn to paragraph 4.4.3.1 which is extracted hereinbelow:

"A minimum three bidders are required to make the tender competitive. If less than three bidders takes part, the concerned officer should give an extension of one week at first. If it is found that less than three bidders have taken part even after such an extension, a further extension of one week should be given for the second time. No further extension should be given thereafter.

If following situation arises while implementing the tender process, the steps mentioned below should be taken:

a) If three or more tenders technically qualified, the purchase department can go ahead.

b) If two tenders become technically qualified, the actual purchase price and the estimated price decided earlier has a difference of (-) 20% to (+)10%, the purchasing department has liberty to accept the same. If such price do not come under the price band then there should be re-tender.

(c) If no tender is received or a single tender technically qualifies, then there should be retender.

For a tender value of below Rs.Ten (10) lakhs, only one time extension should be given.

If the importance has been given for the timely completion of the work then the purchase officer can decide to go ahead (after giving extension for 2 times" even if less than 3 tenders are received then, he will record appropriate reasons for that. In such a situation, the purchase committee would take extra care about the reasonableness of the price)."

11. According to the Petitioners, as per the afore-quoted paragraph 4.4.3.1 of the Procurement Manual, to make a tender competitive, three bidders are required and in case participation is by less than three bidders, an extension of one week is to be granted at first and further that if it is found that less than three bidders have participated then after such an extension, further extension of one week should be given for second time. The said paragraph also stipulates that no further extension should be given thereafter.

12. Paragraph 4.4.3.1 further provides that in case two tenders become technically qualified, the actual purchase price and estimated price has to be of (-) 20% to (+) 10%, which will be at the discretion of the purchase department to accept the same however, if such price does not come under this price-band, then there should be retender. The provision also states that if there is a requirement of timely completion of a particular work, then the purchase officer can decide to go-ahead after giving an extension for two time, even if less than three tenders are received. Such a course is permissible with a mandate to the purchase officer that he shall record appropriate reasons for that.

13. On behalf of the Petitioners, it has been argued that though the technical evaluation sheet in the instant case shows that out of six tenderers who participated in the process, two had technically qualified, however participation of other disqualified tenderers was a sham inasmuch as that these participants from the very beginning knew and understood that they were disqualified, however, they had participated in the bid process only to meet the requirement for participation of minimum three

bidders as per paragraph 4.4.3.1 of the Procurement Manual. It is, thus, the submission on behalf of the Petitioners that in such a situation, treating the four disqualified tenderers to be participants in the tender process was unlawful and in view of the judgment rendered by a Division Bench of this Court in the case of **Rosmerta Technologies Ltd. Vs. State of Maharashtra through Principal Secretary and Anr.**¹, the four disqualified tenderers ought to have been excluded as having participated in the tender and only two tenderers ought to have been treated to have participated in the process and thereafter the provision as contained in paragraph 4.4.3.1 of the Procurement Manual ought to have been complied with. It is thus accordingly argued that since there were only two participating tenderers, the time of tender ought to have been extended by one week at first and thereafter if the situation warranted, by another week. It has, therefore, been urged that the tendering authority having not adhered to paragraph 4.4.3.1 of the Procurement Manual, has acted unlawfully only to extend benefit to Respondent No.4.

¹**2022 SCC OnLine Bom 2738**

14. Lastly, learned counsel representing the Petitioners in Writ Petition (L) No.6277 of 20024 has argued that as per the evaluation of the final bid, Respondent No.4 has been found to be L-1 who had quoted the price of 127 crores, whereas the financial bid offered by the Petitioners was to the tune of Rs.105 crores. In this view, the submission is that by not resorting to the applicable tender process in terms of the provisions contained in the Procurement Manual, the tendering authority has caused loss to the State Exchequer to the tune of about Rs.21 Crores, which cannot be said to be in public interest.

15. On the aforesaid counts, it has vehemently been pleaded and argued by the learned Counsel for the Petitioners that the entire process adopted by the tendering authority in processing the subject tender is not in conformity with the Procurement Manual which has also resulted in exclusion of the Petitioners from participation in the bid process which clearly infringes the fundamental right of the Petitioners as enshrined in Article 19(1) (g) of the Constitution of India. It has, thus, been prayed by the Petitioners that the entire process of subject tender be quashed and in the alternative, it has also been prayed that the

Respondents be directed to allow the Petitioners to participate in the tender process.

(C) CASE AS PUT-FORTH ON BEHALF OF THE LEARNED ADVOCATE GENERAL REPRESENTING THE RESPONDENTS – STATE

16. Mr. Birendra Saraf, learned Advocate General has vehemently opposed the prayers made in the Writ Petitions and has submitted that from the documents on record of these Writ Petitions it is abundantly clear that the Petitioners are not in a capacity to supply the subject tender material and that the very conduct of the Petitioners explicitly reveals that the instant Writ Petitions have not been filed in *bona fide* manner; rather have been filed only with a view to stall the supply of the uniform clothing material and hence it would not be appropriate to grant the relief as prayed for in the Writ Petitions for the reason that the same will impact the supply of school uniforms to the children studying in Class-1 to Class-8 in the Government schools. In his submission, Mr. Saraf, learned Advocate General has, thus, argued that any relief claimed by the Petitioners is not in public interest.

17. On behalf of the Respondents - State, it has also been argued that from the very beginning, the Petitioners knew that the time for submission of bid was till 3.00 pm. on 15th February 2024 and that no such issue was raised by the Petitioners though they participated in the pre-bid meeting held on 8th February 2024.

18. To buttress the submission that the Petitioners were always in know of the fact that the time for submission of the bid was till 3.00 pm. on 15th February 2024, our attention has been drawn to the corrigendum issued by the tendering authority after pre-bid meeting. Mr. Saraf has taken us to the averments made by the Petitioners in paragraph 5.6 of the Writ Petition (L) No.6277 of 2024, wherein it has been stated that "Petitioner's representative along with the representatives of 7 other companies participated in the pre-bid session". Learned Advocate General has, thus, stated that it is not in dispute that the Petitioners had participated in the pre-bid meeting and if there was any doubt in the mind of the Petitioners as regards the last hours by which the bid was to be submitted on 15th February 2024, a clarification could have been sought in the said meeting.

Mr. Saraf has referred to query No.27 as per the corrigendum issued by the tendering authority on 8th February 2024, wherein it was clarified that the delivery period of the goods to be supplied under the said tender shall be 60 days. His submission is that there existed some discrepancy regarding delivery period and it was discussed in the pre-bid meeting and clarified. Mr. Saraf has stated that if the Petitioners were having any confusion as to the last hours by which the bid was to be submitted, such issue could have been discussed in the pre-bid meeting however, the silence of the Petitioners in this regard in the pre-bid meeting goes on to establish that the Petitioners always knew that the last hours by which the bid could be submitted was 3.00 p.m. on 15th February 2024. He has also drawn our attention to Point No.44 of the corrigendum dated 8th February 2024 issued by the tendering authority whereby it was clarified after the pre-bid meeting that the delivery period will be 60 days from the date work order is issued to the successful bidder. It has, thus, been stated that after the pre-bid meeting, as many as 50 clarifications about the existing discrepancies, were issued on the basis of discussion and deliberations with the intending participants. It is his submission that having not

raised the issue in the pre-bid meeting, all to be but inferred is that the Petitioners were in the know of the last hours by which the bid was to be submitted and hence by filing instant Writ Petitions, the Petitioners cannot be permitted to raise such issue.

19. He has also referred to the letter written by the Petitioners in Writ Petition (L) No.6277 of 2024 on 15th February 2024 once they did not / could not submit their bid and has pointed out that all what is written in the said letter is that "due to technical issues the bid was not submitted and time was over". According to the learned Advocate General, the expression of the phrase "time was over" itself shows that the Petitioners have always treated 3.00 hrs on 15th February 2024 as the last hours by which the bid could be uploaded. It is his submission that in the said letter dated 15th February 2024, it has nowhere been complained by the Petitioners that the portal was suddenly shut before the closing time for furnishing the bid in terms of the provisions contained in the tender document; rather the case set up in the said letter was that on account of the technical glitches, the Petitioners could not submit their tender and time was over.

20. Mr. Saraf submits that six tenderers had participated in the bid and technical bid was opened on 16th February 2024 wherein four tenderers were declared to be non-responsive in terms of the requirement of technical bid and thereafter the financial bid was opened on 20th February 2024 where Respondent No.4 was found to have quoted the lowest price and accordingly, the work order has been issued in its favour.

21. Our attention has been drawn to the letter dated 21st February 2024 written by the Petitioners of Writ Petition (L) No. 6277 of 2024 wherein, for the first time, the Petitioners have stated that as per the tender documents, the time given to submit the bid was till 4.00 pm on 15th February 2024 whereas, the bid was closed by the Department at 3.00 pm. It is, thus, submitted that the first response of the Petitioners after being unsuccessful in submitting their bid is reflected in the letter dated 15th February 2024, which specifically does not complain of the sudden closure of the portal at 3.00 p.m. instead of 4.00 p.m. It is, thus, the submission that the entire case set-up by the Petitioners by writing letter dated 21st February 2024 and filing these Writ Petitions is an after-thought attempt. On behalf

of the State - Respondents, it has also been submitted that the alleged violation of paragraph 4.4.3.1 of the Procurement Manual was mentioned by the Petitioners only after the financial bid was opened. For the first time, this issue was raised on 21st February 2024 by writing letter on the said date though the fact that six bidders had participated out of whom four bidders were declared to be technically disqualified was known to the Petitioners since 16th February 2024, when the technical bid was opened. Further submission is that the Petitioners did not raise any such objection after opening of the technical bid. The objection was raised only once the financial bid was opened on 20th February 2024. Such an attempt, according to the learned Advocate General, clearly amounts to challenge the tender process for *mala fide* reason and hence the challenge is not sustainable. It is also the case of the State - Respondents that so far as paragraph 4.4.3.1 is concerned, the requirement of three bidders for participation in a tender process and qualifying technically in such tender process are two different things. According to the learned Advocate General, in the instant case, six tenderers had participated thereby paragraph 4.4.3.1 so far as it requires extension of one week was not attracted. His further submission

is that since out of six participants only two were declared to be technically qualified, recourse was taken to paragraph (b) of paragraph 4.4.3.1 of the Procurement Manual and accordingly, the tender has been allotted to Respondent No.4.

(D) CASE SET-UP ON BEHALF OF RESPONDENT NO.4:

22. Mr. Janak Dwarkadas, learned Senior Advocate representing Respondent No.4, while adopting the submissions and arguments made by the learned Advocate General, has stated that the Petitioners were very clear from the beginning that the closure time for submission of bid was 3.00 pm. on 15th February 2024. He has drawn our attention to the averments made by the Petitioners in paragraph 5.13 to 5.15 of Writ Petition (L) No.6277 of 2024. In the said paragraphs, it has been stated by the Petitioners that necessary documents were collected between 8th February 2024 and 15th February 2024 and that on collecting the bank guarantee on 15th February 2024, the Petitioners were ready with all other documents and started uploading their bid at 2.00 p.m. on the said date but since the portal was closed at 3.00 p.m., the Petitioners could not submit their bid. Laying emphasize on what has been stated in

paragraph No.5.15 in Writ Petition, Mr. Janak Dwarkadas, learned Senior Advocate has stated that even in this paragraph, the Petitioners have stated that they started uploading their bid documents "an hour before the official ending time". Thus, the submission is that the Petitioners knew as to what was the official end time of submission of the bid. The submission further made on behalf of Respondent No.4 is that clause 1(v) and 1(vi) of the tender document clearly put a word of caution to the bidders; rather contains a request the bidders to upload and complete the bid process well in advance so as to avoid the issues like slow speed, choking of web site due to heavy load or any other unforeseen problems etc. It has also been submitted on behalf of the Respondents that in case there was any such confusion in the mind of the Petitioners, then they could have always taken help of the help desk as provided in clause 1(iv) of the e-tender document which clearly gives the address of the help desk. In sum and substance, Respondent No.4 has argued that since the Petitioners have been in the know of the exact last hours of submission of the bid from the very beginning, the issue now being raised in these Petitions cannot be entertained, especially keeping in view the well established limitations of this

Court while dealing with the tender matters as laid down by the Hon'ble Supreme Court and this Court in various pronouncements. The prayer, thus, is that the Writ Petitions be dismissed at its threshold.

(E) ISSUE WHICH FALLS FOR CONSIDERATION OF THE COURT:

23. On the basis of the pleadings available on record of these Writ Petitions and the submissions made by the learned Counsel representing the competing parties as also having regard to the law relating to scope of interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India in a tender matter and keeping in view the public interest element, the issue which can be culled out for our determination are; (a) as to whether the action complained against the tendering authority in the instant case amounted to exclusion of the Petitioners from participating in the subject tender process thereby infringing their fundamental right under Article 19(1)(g) of the Constitution of India?; (b) as to whether the impugned tender process adopted by the tendering authority can be said to be in contravention of paragraph 4.4.3.1 of the Procurement

Manual? and (c) as to whether these Petitions can be said to have been filed for *bona fide* reasons in the light of the fact as to whether or not the Petitioners, from the very beginning, have been in the know of last hours of submission of bid pursuant to the subject tender notice as 3.00 p.m. on 15th February 2024 ?

(F) DISCUSSION AND ANALYSIS:

24. For arriving at our conclusion, we propose to discuss issue (c) above, first. So far as closing hours for submission of bid is concerned, it is not in dispute; rather it is apparent that closing hours mentioned in the tender notice is at variance with that mentioned in the tender document. Tender notice mentions the 'bid end time/date' as 15th February 2024 at 15.00 hrs. whereas the Schedule of tender process in the tender document mentions the bid submission time upto 4.00 p.m. on 15th February 2024. Having observed this, it is to be noticed that admittedly in the pre-bid meeting held on 8th February 2024, the Petitioners had participated. On the basis of discussions and deliberations which took place on 8th February 2024 in the pre-bid meeting, a corrigendum was issued by the tendering authority spelling out clarification in respect of as many as 50 queries. We are of the

opinion that in case there was any confusion in the mind of the Petitioners as regards the closing hour for the submission of bid, such an issue could have been raised by the Petitioners in the pre-bid meeting which they clearly did not and hence this one reason which impels us to give a finding that the Petitioners had all along treated 3.00 pm. of 15th February 2024 as the closing hours for submission of the bid.

25. We may also notice that the first reaction of the Petitioners after they were unsuccessful in submission of the bid is reflected in letter dated 15th February 2024 written to the tendering authority wherein no complaint was made that the portal was shut before the time prescribed for submission of the bids. What all the letter dated 15th February 2024 mentions is that on account of certain technical issues, the Petitioners could not submit their bid and time was over. Once the Petitioners themselves use the expression "time was over", we unhesitatingly conclude that it is 3.00 p.m. on 15th February 2024, which was always treated by the Petitioners to be closing time for submission of the bid. We also notice that for the first time, the complaint that the portal was closed at 3.00 p.m.

instead of 4.00 p.m. on 15th February 2024 was raised by the Petitioners only on 21st February 2024. The date of opening of the technical bid and the financial bid and the date when such an objection was raised in this regard are essential to be noticed to evaluate the conduct of the Petitioners. The technical bid was opened on 16th February 2024, whereas, the financial bid was opened on 20th February 2024. The issue that the time prescribed for submission of bid was 4.00 p.m. on 15th February 2024 was never raised by the Petitioners before 21st February 2024. It was raised only after the financial bid of the two technically qualified bidders was opened. The issue thus, was neither raised by the Petitioners in the pre-bid meeting nor in the first letter / representation made after the Petitioners did not / could not submit their bid on 15th February 2024. The conspectus of these facts and attending circumstances lead us to indefeasibly conclude that it has all along been known to the Petitioners that the closing hours of submission of the bid was 3.00 p.m. on 15th February 2024 and it is this closing hour which the Petitioners always kept in their mind. In these circumstances, in our opinion, the Petitioners do not gain any ground by raising such contentions at this stage. The grounds

raised are an after thought attempt by the Petitioners, hence it cannot be said that the Petitions have been filed for *bona fide* reasons.

26. The contentions made by the learned Counsel for the Petitioners based on the provisions contained in paragraph 4.4.3.1 in the Procurement Manual are also not tenable. A perusal of the said paragraph, which has been reproduced hereinabove, clearly shows that the same mandates participation of minimum three bidders. However, before the bid is technically evaluated, to presume that the tendering authority would know that out of the participating tenderers some were not qualified, is highly misplaced. As to whether participating tenders were technically qualified or not could be known to the tendering authority only after the bids are technically evaluated. The requirement of paragraph 4.4.3.1 is participation by minimum three bidders and not participation by three technically qualified bidders. If we read paragraph 4.4.3.1 to mean that it requires participation by minimum of three technically qualified bidders, such an interpretation will make the provision non-workable. The reason is very clear. No tendering authority can be said to be in

know of the fact forehand as to whether the participating tenderer is technically qualified or not. Thus, the submission that some of the tenderers who were technically disqualified in the technical bid had participated in the tender process only to make the number of participants minimum of three and this fact was known to the tendering authority, is absolutely untenable in absence of any substantiated pleading of *mala fide*.

27. As far as the judgment relied upon by the learned Counsel for the Petitioners in the case of **Rosmerta Technologies Ltd. (supra)**, we may state that the said judgment is distinguishable on facts. It was a case, where one of the bidders was incorporated at a time period that would not have made the bidder to possess the requisite experience and the other bidder was not even incorporated. It is in such fact situation that the Division Bench in the case of **Rosmerta Technologies Ltd. (supra)** has held that there were only two bidders and accordingly, it was observed that the relevant department of the Government of Maharashtra must give extension of one week. Accordingly, the judgment in the case of **Rosmerta Technologies Ltd. (supra)** being clearly distinguishable on

facts, does not come to the rescue of the Petitioners.

28. Reliance has also been placed by the learned Counsel representing the Petitioners on a judgment of a coordinate Bench of this Court in the case of ***NDC Diagnostic Centre Pvt. Ltd. Vs. Navi Mumbai Municipal Corporation & Anr.***². In this regard, we may only observe that it was a case where in the facts and circumstances, cancellation of the tender process and decision to issue fresh tender by the tendering authority was held to be valid and lawful as the same was found to be in consonance with the provisions contained in the Procurement Manual embodied in the Government Resolution dated 1st December 2016. Thus, if on facts, some tender process is found to be in contravention of the Government Resolution dated 1st December 2016, such tender process may not be held to be lawful, however, in this case, we do not find that paragraph 4.4.3.1 of the Procurement Manual, as argued on behalf of the Petitioners, was in any manner contravened. Accordingly, the judgment in the case of ***NDC Diagnostic Centre Pvt. Ltd. (supra)*** is also of no avail to the Petitioners.

² decided on 03.07.2018 in WP No.4900 of 2018

29. Learned Counsel for the Petitioners also placed reliance on yet another division bench judgment of this Court in the case of ***Infrastructure Leasing & Financial Services Ltd. Mumbai and Anr. Vs. State of Maharashtra & Anr.***³ So far as the principle of law laid down in this case that the State and its instrumentalities are required to design their activities to ensure fair competition and non discrimination is concerned, there cannot be any quarrel on the said proposition of law, however, in the facts of the instant case, we do not find any discrepancy or irregularity or illegality in the manner in which the subject tender has been processed. Accordingly, we have no hesitation to hold that the ground of challenge raised in these Writ Petitions, based on the alleged violation and contravention of the provisions contained in paragraph 4.4.3.1 of Procurement Manual as embodied in Government Resolution dated 1st December 2016 is bereft of any weight which merits rejection and is hereby rejected.

30. Having discussed as above, we may also notice the legal principles governing scope of interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of

³ **2009 SCC OnLine Bom 2510**

India in the matters relating to award of contract. In ***Jagdish Mandal Vs. State of Orissa and Ors.***⁴, the Hon'ble Supreme Court has discussed the scope of judicial review of administrative action in a matter which related to tender/award of contracts. The Hon'ble Supreme Court has clearly laid down that the judicial review in such matters is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Further observation made in the ***Jagdish Mandal (supra)*** is that by exercising the powers of judicial review, the Courts are not supposed to check whether the decision made is sound. The Hon'ble Supreme Court has also observed that when jurisdiction of the Court is invoked under Article 226 of the Constitution of India in matters relating to tenders or award of contracts, the fact that the contract is a commercial transaction and hence evaluating the tenders and awarding contracts are also essentially commercial functions, should not be lost sight of. The Court has further observed that in these matters, principle of equity and natural justice are to stay at bay and that if the decision relating to award of contract is *bona fide* and is in public interest, the Court will not interfere, even if there is some

⁴ (2007) 14 SCC 517

procedural aberration or error in assessment or prejudice to a tenderer is made out. Paragraph 22 of the **Jagdish Mandal** (*supra*) is extracted hereinbelow:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

31. Affirming the view taken in the case of ***Jagdish Mandal (supra)***, the Hon'ble Supreme Court in yet another case of ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. New J. K. Roadways, Fleet Owners and Transport Contractors and Ors.***⁵, has observed that if the answers to the question posed in paragraph 22 of the ***Jagdish Mandal (supra)*** are in negative, there should not be any interference under Article 226 of the Constitution of India.

32. In ***N.J. Projects Ltd. Vs. Vinod Kumar Jain & Ors.***⁶, the Hon'ble Supreme Court has expressed a word of caution that in

⁵ (2021) 16 SCC 808

⁶ (2022) 6 SCC 127

tender matters, the Court should refrain itself from imposing its decision over the decision of the tendering authority on the issue as to whether or not to accept the bid of a tenderer for the reason that the Courts do not have any expertise to examine the terms and conditions of the present day economic activities of the State and that this limitation should be kept in view. The Hon'ble Supreme Court goes on to observe further that approach of the Court should be not to find fault with magnifying glass; rather the Court should examine as to whether the decision making process complies with the procedure contemplated by the tender conditions. Paragraph 23 of the judgment in the case of ***N.J. Projects Ltd. (supra)*** is apposite to be referred to which runs as under:

"23. *In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that*

the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work."

33. The observations made by the Hon'ble Supreme Court in a latest pronouncement in the case of ***Tata Motors Ltd. Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors.***⁷ is also relevant to be noticed. The Hon'ble Supreme Court, while recognizing that the constitutional Courts being guardian of fundamental rights, are duty bound to interfere when there is arbitrariness, irrationality, *mala fides* or bias. However, in the same breath it has also been held that the Court must realize its limitations and the havoc which needless interference in commercial matters can cause. Paragraph 48 of the judgment in the case of ***Tata Motors Ltd. (supra)*** runs as under:

"48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot

⁷ 2023 SCC OnLine SC 671

*of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See : *Silppi Constructions Contractors v. Union of India*, (2020) 16 SCC 489)*

34. When we, thus, analyze the facts and circumstances of the instant case, as discussed in the preceding paragraphs of this judgment, in the light of the legal principles as quoted above relating to scope of interference in matters of tenders and award of contracts, under Article 226 of the Constitution of India, what we find is that the Petitioners have completely failed to establish any infringement or contravention of any of the provisions

including those contained in paragraph 4.4.3.1 of the Procurement Manual as embodied in Government Resolution dated 1st December 2016. We have also discussed and held above that the Petitioners were even always in the know of the fact that the closing hours for submission of the bid was 3.00 p.m. on 15th February 2024 and hence any grievance in this regard at this juncture in our opinion is not entertainable. The manner in which the Petitioners have conducted themselves in this matter, as already noticed above, goes on to show that the alleged exclusion of the Petitioners from participation in the subject tender process had occurred on account of their negligence and hence such an exclusion cannot be said to be at the instance of the State authorities. As a matter of fact, the grounds raised in these Writ Petitions are after-thought and have been raised only once the financial bid was opened and accordingly, we will not be erring in holding that the Petitions have not been filed with bona fide intention.

35. There is yet another reason of our refusal to entertain these Writ Petitions and the reason is that the tender was floated for procuring school uniform to be supplied by the Government

to the students studying in class 1 to class 8 in the entire State of Maharashtra in Government schools. The end user of these school uniforms are the school children studying in Government schools, who for various disadvantages, may not be in a position to afford the school uniform and hence any interference by us in this matter leading to stalling such process cannot be said to be in public interest.

(G) CONCLUSION:

36. For the discussions made and the reasons given above, we conclude that the instant Writ Petitions are devoid of any merit, as we do not find any infringement of Article 19(1)(g) of the Constitution of India or any other law.

37. Resultantly, the Writ Petitions fail which are hereby dismissed. However, there will be no order as to costs.

38. Rule is discharged.

39. Interim Applications, if any, stand disposed of.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)