Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO.1037 OF 2017 & 179 OF 2018

WRIT PETITION NO.1037 OF 2017

Mahalsa Services,
a Proprietary concern of
Shri Pradeep P. Shet, Delta City Plaza
Antique Mardol Building,
Near IBPC Petrol Pump,
Verna Electronic City, Highway
Verna-Goa. ….. Petitioner.

Versus

1. State of Goa, through its
Chief Secretary, having Office at
Secretariat, Porvorim, Bardez, Goa.

2. The Director of Health Services,
Government of Goa, having Office at
Directorate of Health Services,
Campal, Panaji, Goa 403 002. ….. Respondents.

Mr. D.J. Pangam, with Mr. Parikshit Sawant, Advocate for the Petitioner.

Mr. Dattaprasad Lawande, Advocate General with Mr. P. Dangui, Government Advocate for Respondents No.1 and 2.

WRIT PETITION NO.179 OF 2018

Cam Industrial Services,
A registered Partnership Firm,
having office address at Office No.10,
Hotel Ashok Plaza, Unit Z Square

Business Centre, 18th June Road
Panaji, Goa represent through its
Managing Partner Mr. Caitano Jose
Fernandes having office at address
at Office No.10,
Hotel Ashok Plaza, Unit Z Square
Business Centre, 18th June Road
Panaji, Goa ..... Petitioner.

Versus

1. State of Goa, through its
Chief Secretary, having Office at
Secretariat, Porvorim, Bardez, Goa.

2. The Director of Health Services,
Government of Goa, having Office at
Directorate of Health Services,
Campal, Panaji, Goa 403 002. ..... Respondents.

Mr. S.G. Dessai, Senior Advocate with Mr. Vivek Agnelo Rodrigues, Advocate for the Petitioner.

Mr. Dattaprasad Lawande, Advocate General with Mr. P. Dangui, Government Advocate for Respondents No.1 and 2.

Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.

Date : 29 June 2018.

ORAL JUDGMENT : (Per N.M. Jamdar, J.)

Rule. Rule made returnable forthwith. The respondents waive service. Taken up for final disposal.

2. Both these Petitions arise on account of issuance of tenders by the State of Goa for the work of housekeeping and other activities in various hospitals in the State of Goa.

3. The Director of Health Services, Goa decided to invite bids from service providers for maintenance of the various hospitals, health centres, offices of health institutions, including Goa Medical College, Goa Dental College & Hospital, IPHB, and Food & Drugs Administration, situated in the State of Goa. On 24 November 2016, a tender was issued by the Respondent-State for up-keeping at various hospitals, health centres, and offices of health institutions in the State of Goa. The scope of the work was housekeeping, sweeping and swabbing, environmental support services etc. The last date of submission of online technical bid was 16 December 2016, and the last date of opening the technical bid was 20 December 2016. The date of opening financial bid was 2 January 2017. This was a part of larger work, which contained five modules. Module-I was Directorate of Health Services and its peripheral units in North Goa, Module-II was Directorate of Health Services and its peripheral units in South Goa, Module-III was Goa Medical College and Hospital, Bambolim, Module-IV was Goa Dental College and Hospital, Bambolim, and Module-V was Directorate of Foods and Drugs,

Bambolim. Earnest Money Deposits for each of these modules were different.

4. The Module-I, with which these Petitions are concerned, specified 27 institution. Those were New District Hospital, Mapusa, Sub-District Hospital, Ponda, CHC Valpoi, CHC Pernem, PHC Cansarvarnem, PHC Candolim, PHC Siolim, PHC Aldona, PHC Bicholim, PHC Sanquelim, PHC Betki, PHC Madkai, PHC Shiroda, PHC Dharbandora, PHC Colvale, PHC Corlim, RMD Keri, Sattari, RMD Guleli Sattari, RMD Thane (Sattari), UHC Panaji, UHC Mapusa, PHC Porvorim, PHC Mayem, RMD Piedade Diwar, Institute of Nursing Education, Bambolim, Hostel of INE, Bambolim, Directorate of Health Services, Office Building, Campal Panaji.

5. The documents annexed to the tenders specified the conditions therein. The condition regarding qualification criteria was specified. The amount of turnover or the amount of work earlier carried out was specified. The bidder was required to possess certain certificates and licences required in law. General conditions of contracts and special conditions of contracts accompanied the tender document. Clause 2 of the tender document provided that the Respondent-State reserved right to accept or reject the whole or

any part of the tender and the contractor/bidder shall be bound to perform the work at his quoted rates. At the time of submitting tenders, the tenderers bound themselves to the conditions of the tender.

6. After issuance of the first tender, four major hospitals were separated as, according to the State, a decision was taken to include them in a comprehensive tender as Facility Management Service and award it to a single contractor. This according to the State was done on pilot basis and if the experiment was successful, it could be implemented elsewhere. The work in the first tender in respect of 27 hospital, minus the four separated, that is 23 hospitals, was given to Mahalsa Services. Accordingly, a tender for four hospitals was published on 24 October 2017. The tender of 24 November 2016 was in respect of housekeeping, sweeping, swabbing, and environmental support services. The subsequent tender for the four hospitals not only included the housekeeping, but other aspects such as maintenance of toilets, engineering, water management, plumbing services, electrical services, pest control services, and all maintenance work. The comprehensive work was termed as 'Facility Management Service'. The last date for submitting online bid for the new tender was 23 November 2017. Date of opening the technical bids was 27 November 2017. According to the

State, technical bids were opened on 27 November 2017. There were five bidders and only one bidder i.e. M/s. Ecoclean Systems was found to be meeting all the technical specifications. A decision was taken by the Committee, which was constituted on 28 November 2017, to go for tendering again. The tender was accordingly notified on 15 January 2018. It is informed that pursuant to the said tender notice dated 15 January 2018, three tenderers had applied, out of which two tenderers have been found to be technically qualified.

7. Writ Petition No.1037 of 2017 is filed by Mahalsa Services challenging the issuance of tenders in respect of Module-I, dated 24 November 2016 and 24 October 2017. Writ Petition No.179/2018 is filed by Cam Industrial Services, challenging the decision to cancel the tender dated 24 October 2017 and inviting a new tender on 15 January 2018 i.e. the third tender. Since both these Petitions involve same tenders and identical questions of law, they have been argued heard and disposed of by this common judgment.

8. We have heard Mr. D. Pangam, learned Counsel for the Petitioner in Writ Petition No.1037/2017 filed by Mahalsa Services, Mr. S.G. Dessai, learned Senior Advocate for the Petitioner in Writ Petition No.179/2018 filed by Cam Industrial Services and Mr. D. Lawande, learned Advocate General for the Respondents in both the

Petitions.

9. Writ Petition No.1037/2017 is filed by Mahalsa Services, a proprietary concern. Mahalsa Services is engaged in the business of housekeeping, garden maintenance, labour contractor, security loading-unloading. According to the Mahalsa Services, it was eligible for the said work and filed the tender along with all relevant documents, including the EMD, certificates, acceptance letters, etc. Respondent No.2 opened the technical and financial bids. Financial bid of the Mahalsa Services was found to be lowest in respect of Module-I. The Mahalsa Services was given a work order on 10 October 2017 in respect of the work of an amount of ₹75906000/-. The work order stated that it was in respect of small public health centres. According to Mahalsa Services, major hospitals in North Goa, such as North Goa District Hospital, Mapusa, Sub-District Hospital, Ponda, Sub-District Hospital, Valpoi and Sub-District Hospital, Sanquelim, Goa were excluded from the scope of the work.

10 It is an admitted position that the bid of Mahalsa Services was the lowest for the first tender. Mahalsa Services was given work order on 10 October 2017. The work order was in respect of 23 units. Four hospitals i.e. New North Goa District Hospital, Mapusa, Sub-District Hospital, Ponda, CHC Valpoi and

PHC Angelique were not included in the work order. Mahalsa Services, accordingly, addressed a communication on 23 October 2017 and was informed by letter dated 31 October 2017 that this modification has been carried out pursuant to the power vested in the State to accept or reject the whole or any part of the tender. Mahalsa Services has accepted said 23 works and at present carrying them on. Mahalsa Services made a representation to Respondent No.2 on 23 October 2017 in respect of allotting only a part of the work. On 30 October 2017, Respondent No.2 informed Mahalsa Services that in view of clause 2 of the tender document, which gave right to the Respondent-State to accept or reject any part of the tender, the representation of Mahalsa Services could not be accepted. As stated earlier, thereafter, another tender was issued on 24 October 2017 in respect of four hospitals, which were excluded from the purview of the earlier tender. This tender included not only the housekeeping, but also maintenance of toilets, engineering, water management and plumbing services, electrical services, pest control services, and all maintenance works. Mahalsa Services, out of 27 works that were under Module-I initially advertised, was granted work for 23 hospitals.

11. Being aggrieved by the action of the Respondents in issuing the fresh tender on 24 October 2017 and excluding the four

hospitals from the scope of the work from the earlier tender, Mahalsa Services has filed the present Petition with the prayers that entire work in respect of Module I as advertised in the tender dated 24 November 2016 be given to it and Notice dated 24 October 2017 inviting fresh tenders, be quashed and set aside.

12. Mahalsa Services has thus raised a challenge in respect of the tender dated 24 November 2016, along with the notice dated 24 October 2017. So also the notice of the third tender dated 15 January 2018. The main challenge of the Mahalsa Services is based on the position that it was the lowest tenderer and was found to be qualified and the work for which the tender was issued, was in respect of 27 hospitals, and without giving any reasons whatsoever four hospitals were excluded from the tender. Mr. Pangam contended that even after Mahalsa Services sought for reasons for exclusion, all that was informed to it was that there is a power in the State to partly grant the work and this exercise of power, according to Mahalsa Services, is entirely an arbitrary exercise on the part of the State and there is no such policy of any pilot project, nor there exists any valid reasons for segregation of the four hospitals and assuming that such power exists, it is not being uniformly applied. It was further contended that the entire exercise of excluding the four hospitals, floating a tender for a work in which the Petitioner cannot

compete, is only to see that the Petitioner is removed from the competition and the tailor-made criteria are created to suit the persons which have been predetermined.

13. Writ Petition No.179/2018 filed by Cam Industrial Services arises from the factual situation which starts from the tender dated 24 October 2017. Cam Industrial Services filed its bid pursuant to the tender dated 24 October 2017. According to Cam Industrial Services, nothing was heard from the Respondents-Authorities in respect of its bid and on 15 January 2018, they noticed a fresh tender being issued for the same work. On 16 January 2018, Cam Industrial Services ought information from the Respondents-Authorities. Cam Industrial Services was informed by a communication dated 23 January 2018 that the earlier tender has been withdrawn. Can Industrial Services thereafter filed this Petition challenging the decision of the State Government to cancel the earlier tender dated 24 October 2017 and the notice inviting tender dated 15 January 2018. The challenge raised by Cam Industrial Services broadly is that the technical bids were never opened on the assigned date and the Cam Industrial Services was never informed about the date on which the technical bids were subsequently opened. According to Cam Industrial Services, the theory of the Respondents that only one person qualified is not borne out by any record.

Therefore, while dealing with the Cam Industrial Services, the State has acted unfairly and in an arbitrary manner. It was contended that after the decision was taken to re-tender for the purpose of attracting wider competitiveness, restrictive criteria were included in the subsequent tender, which only shows that the object was to favour same party and to remove the Cam Industrial Services from the competition.

14. Both, Mahalsa Services and Cam Industrial Services, have invoked writ jurisdiction of this Court. In the context of jurisdiction of the Court, a brief review of the law regarding interference of the Constitutional Courts in the commercial matters more particularly, in respect of the tenders called for public works, is necessary.

15. Firstly what is to be noticed is the subject matter for which the tenders were called for. The work is primarily of maintenance of various health institutions in the State, ranging from housekeeping services, civil works, engineering, etc. It is necessary that the premises where the health care is provided are maintained well so as to increase the quality of health-care by improving the hygiene and avoiding infections. Such work otherwise could have been carried out by the State, but under the policy of the State, is

being entrusted to private parties as the State was of the opinion that it would be an efficient method of achieving the goal of health care. It is for this work, the Petitioners have submitted their bids offering to carry out the work. The extent of judicial review would differ in the cases where the State is calling for bids to auction the State largeness such as allotment of lands, flat, shops, etc. In such circumstances, entitlement of persons who apply for such resources, would be treated differently as held in the case of *Jagdish Mandal vs. State of Orissa & Ors.*[1]. However, where tenders are called for providing public services, such as health, road, power, etc., what will predominantly weigh with the Court is the public interest, as the quality and timeliness of the work affect the general public at large. The Apex Court in various decisions has underlined the need to keep in mind the larger public interest in such matters and not to treat such challenges brought in writ jurisdiction as a matter between the tenderer and the State alone.

16. The basic premise is that in the contractual matters of inviting tenders, there is no obligation on the part of the person issuing the tender notice to accept any of the tenders, even the lowest tender. After the tender is called, it may be decided not to enter into the contract, cancel the tender, or a part of the contract could be

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1 (2007) 14 SCC 517

granted, particularly so if the tenderer accepts such terms. That a tenderer has no vested right has been clarified in the case of *State of Jharkhand and ors. vs. CWE-SOMA Consortium* [2].

17. It cannot be disputed that a judicial review of a State action even in commercial matters while issuing the tenders, is available. Also it cannot be disputed that the High Court, in a given case, has power to set aside a tender. But the parameters of such interference are not as wide as that would be available in the cases where substantive rights of the citizens are involved. In the case of *Sterling Computers Ltd. vs. M & N Publications Ltd.* [3] the Apex Court held that while exercising the power of judicial review, the Court is concerned primarily with the decision making process. In the matters concerning fiscal policies and financial implications, the State has wide choice.

18. A review of the entire legal position concerning tenders for public work was taken by the Apex Court in the recent decision in the case of *Municipal Corporation, Ujjain & anr. vs. BVG India Limited and ors.,* [4]. After considering the entire case law on the subject, the learned Judges have held that the power of judicial review will not be permitted to be invoked to protect private interest

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[2] (2016) 14 SCC 172
[3] (1993) 1 SCC 445
[4] (2018) 5 SCC 462

by ignoring public interest. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. The Apex Court observed that if the process adopted or decision made by the Authority is not *mala fide* and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226. The Apex Court further observed that is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision. Apex Court observed that even when some defect is found in the decision-making process in respect of such tenders, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere. The Apex Court held that ultimately, the public interest must be safeguarded. The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously and effectively. The public would also be interested in the quality of work undertaken. Poor quality of work or goods can lead to public hardship and substantial financial outlay. The Apex Court reiterated, that unless the Court concludes that the decision making process or the decision taken by the authority bristles with *mala fides*, arbitrariness, or perversity, or that the authority has intended to favour someone, the Constitutional Court will not interfere with the decision-making process or the decision.

19. Keeping in mind this position of law, what we have to essentially see is whether the action of the State is in public interest or otherwise. This Writ Petition cannot be converted into a civil law remedy purely to adjudicate the private grievances of the tenderers. In such matters, the Court will not interfere unless demonstrated that there is arbitrariness of the degree indicated above on the part of the State, resulting into directly affecting the public interest.

20. As regards the challenge in Writ Petition No.1037/2017

filed by Mahalsa Services is concerned, the foundation is that the Mahalsa Services has some right vested in it being the lowest tender. This is erroneous in view of the clear dicta of the Apex Court in *CWE-SOMA Consortium.* It is then contended on behalf of Mahalsa Services that the State action is arbitrary. Firstly, when Mahalsa Services submitted its bid and signed tender documents, it did contain a clause that the State reserves the right to grant whole or any part of the work out of 27 works that has been granted. Mahalsa Services was granted work for 23 hospitals, which it has accepted and the work is going on. When Mahalsa Services sought to know why twenty three hospitals were given to it and not twenty seven, its attention was drawn to a clause in the contract which Mahalsa Services had signed. When Mahalsa Services has challenged this action by way of this Petition, the State has filed an affidavit and has given reasons as to why this power under clause was exercised. Therefore, the question that arises is whether the reasons which have been given can be considered as entirely arbitrary.

21. An affidavit-in-reply has been filed by the Director of Health Services as regards segregation of four hospitals. It is stated in reply thus :

> *"With reference to paragraph 6 of the Petition the contents of the same are denied to the extent the same are contrary to whatever has been stated herein. I state*

that pursuant to the Tender dated 24/11/2016 the Respondent opened the Technical Bid on 20/12/2016 and Financial bid was opened on 02.01.2017. I state that the Respondents were in the process of finalisation of Work Order. I state that prior to the finalisation of the Work Order it was observed and also suggestions were received from the administration of the Hospitals that the major Hospitals are facing problems as regards to maintenance facilities like Electrical/Plumbing/minor civil and carpentry repairs within the Hospitals. I state that therefore it was suggested that if all these works can be combined and can be given to single Contractor who will take responsibility of all these works and cater to the needs of the Hospitals, I state that considering the problems faced by the Hospitals and Respondent took a policy decision to include all these works in a comprehensive Tender as "Facility Management Services" and awarded it to a single contractor. I state that out of the 27 hospitals from Module-I only 4 major hospitals were removed to implement the Pilot project of "Facility Management Services" in four major Hospitals within the State. I state that decision of the Respondent was only with respect to 4 major Hospitals and have not altered any changes in other Hospitals. I state that the Respondent in the interest of the Hospitals have taken a policy decision to issue a composite tender and that is the reasons why on account of difficulty faced by the State Government decided to go for Composite Tender. I state that the said decision is neither arbitrary, unfair and same is taken in the best interest of the Hospital and their maintenance."

The Director of Health Services had himself initiated the tender process. The statement is made on oath by the Director of Health Services that this is an experiment that the State proposes to do. We have not been shown any reason as to why we should not accept the statement made on oath by the Director. Merely because the supporting documents that will reflect the policy is not placed before us, cannot lead to a conclusion that it does not exist. If we accept the statement made on oath on behalf of the State by a responsible officer, further existence of the document in respect of which statement is made, is not necessary. We are sure that the Director knows the gravity of making statements on oath. We have also to keep in mind the nature of right of the Petitioner and the consequent scope of judicial review.

22. Having accepted this statement made by the Director of Health Services, it will have to be seen whether such a stand was wholly arbitrary, against public interest and no responsible Authority would conceive of such a state of affairs. It is stated by the Director that suggestions were received from the Administration and it was found that even for minor works, tendering process has to be initiated through PWD, which affected the health services and the methodology was time consuming. The State accordingly took a decision to delete four major hospitals and give a comprehensive contract of Facility Management Services on an experimental basis to

one entity. The decision taken by the State as to call for tenders to outsource the work of health services and fixing the eligibility criteria for the same, are the matters in the realm of policy. It is entirely for the State to carry out such experiment if it finds that better health services can be rendered. That there could be other possible ways for achieving the same result, cannot be a sole ground to interfere with a policy decision. The argument of Mr. Pangam that the same experiment should have been carried out in other modules, is only to state that either the decision should be taken in entirety or not at all. It is within the realm of policy making as to which module to choose and which hospital to be chosen as a pilot project. The Court not being expert either in the field of medical sciences or in the hospital administration cannot substitute its views on the policy making on such technical matters, unless the decision is *ex facie* absurd. It is not possible for us to sit in appeal over such decision to hold that the four hospitals should not be separated and a comprehensive contract on experimental basis should not be given. This decision taken is neither abhorrent, nor can be stated to be against the public interest. Further the arrangements are not made in public interest, but a purely private interest by a bidder in pursuance of a pure private demand that entire work should have been given to it.

23. As far as the contention of Mahalsa Services that the entire exercise was tailor-made to suit a party already chosen, nothing is placed before us to substantiate this contention. Because the State chose to separate the four hospitals and include them in the Facility Management Services, the eligibility criteria had to change, as the work was wider in scope. That in this eligibility criteria Mahalsa Services did not fall, is a consequence of the decision and it cannot be termed as a motive. It is too far-fetched to contend that the four hospitals were taken on experimental basis for the Facility Management Services programme, with the sole purpose of defeating the right of Mahalsa Services. Mahalsa Services has accepted and continued with the remaining work. Even the contention that the criteria is tailor-made made to suit one party, is baseless. After the tender process had gone through and only one tenderer was found technically qualified, that tender was cancelled and further a fresh tender was floated. If the tender was tailor-made to suit one party, the State would not have cancelled that tender.

24. Mr. Pangam relied upon a decision of the Division Bench of this Court in its own case in Writ Petition No.728 of 2013 dated 13 August 2014. The Division Bench, by relying upon the law laid down in the case of *Ramana Dayaram Shetty vs. International*

Airport Authority of India & ors.[5] and *Star Enterprises and ors. vs City and Industrial Development Corporation of Maharashtra Ltd. and ors.*[6] , came to the conclusion that a scrutiny of tender conditions and eligibility criteria was permissible and accordingly concluded that the eligibility criteria was in such a manner to exclude the Mahalsa Services and accordingly set aside the tender process to initiate the process. We, however, note that in the said decision, the entire line of the subsequent decisions of the Apex Court in the last two decades, has not been referred to. The Apex Court in various subsequent decisions has substantially defined the parameters of judicial review in tender matters. A comprehensive review is taken in the decision of *Municipal Corporation, Ujjain* that, we are bound to follow.

25. Mr. Pangam then relied upon the decision of the Apex Court in the case of *Meerut Development Authority vs. Association of Management Studies and anr.*[7] to emphasize upon the rights of the tenderer and scope of judicial review in the matters of tender process. In the case of *Meerut Development Authority,* the respondent therein had applied for grant of a plot pursuant to bids notified by the Authority. The action of the Authority in the process

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[5] (1979) 3 SCC 489,
[6] (1990) 3 SCC 280

[7] (2009) 6 SCC 171

of grant of plot, was found to be arbitrary. This factual matrix is different. As held by the Apex Court in *Jagdish Mandal* the allotment of land, plots or shops on licence basis stands on a different footing, as they require higher degree of fairness and action. Consequently, there is absolutely no merit in the challenge of Mahalsa Services.

26. Turning to the challenge raised in Writ Petition No.179/2018 filed by Cam Industrial Service, this Petitioner challenges the action of the State in calling for fresh tender and cancelling the earlier tender. Mr. Dessai, learned Senior Advocate contended that the bid which was submitted by Cam Industrial Services was never opened on the stipulated date, but subsequently when the Cam Industrial Services was not aware of the same. It was urged that the date of opening online technical bid was 27 November 2017, however, on that date, it was not opened. The clause "*Evaluation of Tender*" shows that the bid shall be opened in presence of the representatives on mentioned date and time at Directorate of Health Services, Campal. It was urged that this position that on the date stipulated the bids were not opened, but they were opened on 18 December 2017, has been accepted by the State in their affidavit.

27. The assertions of Cam Industrial Services were

countered by the learned Advocate General contending that there is no averment in the Petition that on the date i.e. 27 November 2017 the Cam Industrial Services remained present, however, the bids were not opened. He submitted that there is a mistake in para 10 of the reply filed by the State that the bid was opened on 18 December 2017. We have to see the record and the surrounding circumstances to ascertain whether this stand is correct. A sur-rejoinder has been filed by the Director wherein it is specifically stated that the bid was opened on 27 November 2017 and the Petitioner was not present when the bid was opened. The learned Advocate General has also placed before us Minutes of the Meeting held on 18 December 2017, so also the original Tender Register, P & D Section, DHS, Vol.II. The Minutes of the Meeting have been signed by five committee members. It refers to the fact of technical bids being opened on 27 November 2017 in the cabin of Joint Director of Accounts, Directorate of Health Services. It also states that only one representative of M/s. Sumeet Facilities Pvt. Ltd., Pune being present. The same position is borne out by the Tender Register, original of which, was shown to us. Therefore, only on the basis of a statement, which clearly appears to be a mistake, it is not possible for us to draw a conclusion that technical bids were never opened on the date stipulated.

28. In the additional affidavit filed on behalf of the State by the Director, the reasons why the Cam Industrial Services was not found to be qualified have been given. The lacunae that have been pointed out in the bid of Cam Industrial Services are, (1) Balance Sheet FY 2014-2015, not submitted, (2) Balance Sheet FY 2015-2016, not submitted, (3) Balance Sheet FY 2016-2017 not submitted, (4) Proof of sole proprietor/partnership firm or a company having existence for minimum five years, not submitted. (5) the bidder should have average annual turn over of ₹1500-00 lakhs in last three years i.e. 2014-2015, 2015-2016, 2016-2017 audited balance sheet along with certificate from Chartered Accountancy clearly showing the turnover, not submitted, (6) The bidder should submit a copy of Labour Licence for 100 staff one single licence (copy of relevant certificate is to be attached, is not submitted (7) proof of incorporation of the company viz. of MOA and AOA (in case of Pvt. Ltd. Company) Partnership Deed (in case of partnership firm), or Registration Deed (in case of sole proprietorships) (copy to be attached), not submitted, and (8) the bidder should have minimum two years experience (at least 3 locations) of providing similar services in facility management and mechanized housekeeping services, experience certificates to be enclosed. Facility management is as defined in Price Schedule, not submitted. It is also argued on behalf of the State that after it has been brought to the notice of Cam

Industrial Services that its bid has been found to be not qualified, no efforts had been made to challenge the said decision. The Cam Industrial Services, therefore, is proceeding on the basis that it is a bidder who is disqualified in the technical scrutiny.

29. It was also urged on behalf of the State that Cam Industrial Services had bid in its individual capacity, but the documents attached to the bid showed that Cam Industrial Services tried to take assistance of second agency, styled it as a joint venture, to fall within the criteria of the total turnover. It was pointed out that the total turnover of the Cam Industrial Services for the financial year 2016-17 was only ₹18738,614/-, but it had shown a turnover of M/s. B2B Labyrinth Solutions Private Limited of ₹ 246524219/- to demonstrate that it fulfills the criteria of ₹ 15.00 crores. It was pointed out to us that a Joint Venture Agreement, which is neither registered nor notarized, was executed one day before the filing of the technical bid. It is also pointed out from these documents that the joint venture placed the entire responsibility on Cam Industrial Services to carry out the work. A grievance was made by the learned Advocate General that Cam Industrial Services has misrepresented the facts to the Authority and has not been candid in approaching this Court. This grievance cannot be said to be unjustified.

30. Cam Industrial Services, thus, was not qualified, and the challenge raised in this Petition filed by Cam Industrial Services will have to be considered in that context. Cam Industrial Services has sought to set aside the decision to cancel the earlier tender and issue a fresh tender. Even if the earlier tender is cancelled, there is no relief that can be granted to it. It is not explained as to how the outcome will benefit Cam Industrial Services, since it was not qualified. We have further examined the matter in public interest and looked into the record to see whether the action of the State could be considered as against the public interest within the parameters laid down by the Apex Court in the case of *Municipal Corporation, Ujjain.*

31. Firstly, to consider the legality and justification for cancelling the tender, the decision taken in the meeting dated 18 December 2017 the State on 18 November 2017 had constituted a Committee comprising of five members, which included Additional Secretary (Health), Under Secretary to Minister (Health), Director of Health Services, Deputy Director (Public Health), Under Secretary (Health II), Joint Director of Accounts, Director of Health Services, and Under Secretary (Health-I). All the Committee Members are from the field of health services. It is this Committee that evaluated

the bids submitted pursuant to the tender dated 24 October 2017. The Committee having been confronted with the position of only one tenderer being qualified out of five, decided to go for re-tendering. There is absolutely no arbitrariness in taking such a step. The Committee decided that retendering needs to be resorted to, where more qualified bidders could apply so that the State will have better choice from the successful bidder and not faced with *fait accompli* of choosing one tenderer for default of others. In the case of *CWE-SOMA Consortium* the Apex Court, while dealing with a factual situation, where only one tenderer was qualified and the Tender Committee had decided to cancel the tenders and invite fresh tenders, held that it was entirely permissible for the Authorities to do so, and unless there were *mala fides,* unreasonableness or arbitrariness, such decision could not have been interfered with. As noted earlier, after fresh tender was called, the number of bidders have gone up to two, clearly an indication that the decision is in public interest and with the purpose of getting a better choice.

32. It was then contended that if the reason for re-tendering was to seek wider competitiveness, while issuing the subsequent tender notice dated 15 January 2018, criteria have been imposed which in fact curtails the competitiveness. It was contended that by restricting registrations to the State of in Goa, the field of choice is

substantially narrowed. We have considered this submission. The notice inviting tender dated 15 January 2018 lays down the eligibility criteria as under :

> *The following documents duly attested shall have to be submitted failing which the tender will be rejected.*
> *1. The bidder can be sole proprietor, partnership firm or a Company and the bidder should be registered with EPF Office & ESIC Office and should have been registered under Goa Shops and Establishments Rules, 1975 for minimum five years. Proof of Certificate to be notarized and furnished.*
> *2. A copy of ISO 9001:2008 certificate valid as on the date of submission of Bid is preferable.*
> *3. A copy of PAN No. Service Tax Registration to be furnished.*
> *4. Earnest Money Deposit of Rs.1,00,000/- by electronic mode only.*
> *5. The bidder should have average Annual turnover of Rs.1000.00 lakhs in last three years i.e. 2014-15, 2015-16 & 2016-17. Audited Balance Sheet along with Certificate from Chartered Accountant clearly showing the turnover, would be attached as per the attached format.*
> *6. the bidder should submit a copy of labour Licence of 100 employees single Certificate.*
> *7. Proof of incorporation of the company, viz. of MOA and AOA (in case of Pvt. Ltd. Company) Partnership Deed (in case of partner-ship firm), or Registration Deed (in case of sole proprietorship)-(copy to be attached).*
> *8. The bidder should have minimum two years experience of providing similar services in facility management of three organizations out of which at least*

two organizations must be in Goa, which covers similar size of an area in sq. metres per day (single order). No joint ventures permitted unless in existence and registered for two years. Experience certificate of such employers/clients to be attached giving details of the nature of the various jobs executed/currently being executed. Facility management means jobs as mentioned in this tender document. Non fulfillment of the above criteria will disqualify the bidder.

9. All the technical bid documents are required to be scan and uploaded to e-tender website.

33. The first criterion in the notice is about the status of the bidder, its registration under Goa Shops and Establishments Rules, and the proof of certificate. If the challenge to this condition is to be considered without reference to any other intent, it cannot be said that the condition of registration is wholly unnecessary or irrelevant. Registration under this Act would mean that there is a Registering Authority, through which the State can exercise control. The second criterion of ISO Certificate is also an usual criterion, so also the condition regarding PAN No., EMD, and Annual Turnover of ₹1000 lakhs for last three years. The requirement to submit labour licence of 100 employees is commensurate with the work for which the tender is called. The condition that the bidder should have minimum two years experience in providing similar services in facility management of three organizations, out of which at least two

organizations must be in Goa, which covers similar size of an area in square metres per day and no joint ventures permitted unless in existence and registered for two years, also cannot be considered as *ex facie* arbitrary.

34. Merely because there could be a different criterion more suitable to the Petitioners, does not mean that the criteria specified are arbitrary. Ultimately, it is for the State to specify the criterias. It is for the State to decide what kind of experience it needs before entrusting any public work to a private body. That a different criterion could have achieved the purpose in more efficient manner, is also not a ground to interfere with the criteria laid down. If the State, in its wisdom, as a matter of economic policy, has decided that these criteria will enable it to call for applications from suitable agencies, it is for the State to decide so. Therefore, the notice inviting tender of 15 January 2018 cannot be said to have laid down the criteria that will defeat the purpose.

35. Turning now to the second challenge of the Petitioner that since re-tendering was sought for a particular objective, the fresh tender does not achieve the same and, therefore, the action is entirely arbitrary and against public interest. As far as the condition of registration under the Goa Shops and Establishment Rules is

concerned, it has been pointed out to us that in the earlier condition it was necessary that the entity shall be in existence for minimum five years for commercial entity requirement to carry the work specified in the tender was to exist. It could be presumed to have necessary registration under the local laws and, therefore, registration under the Goa Shops and Establishment Rules cannot be considered as a wholly alien concept. The turnover in fact has been brought down to Rs.1000 lakhs. The earlier notice did not mention anything about a joint venture. The new notice specifically stated that joint venture is permitted and put condition that it must be in existence and registered for two years. This, according to the State, is in fact a wider choice.

36. On behalf of both the Petitioners, various alternate positions were argued, which according to them, would have been better. There is a limit to which we can entertain such a debate. The power under Article 226 is to be exercised in such matters in larger public interest and not for the sake of intricate legal points advanced solely to benefit the tenderers. We cannot exercise an appellate jurisdiction over the decision making. Even, *prima facie*, it appears that one of the main conditions of turnover has been relaxed. Re-tendering had to be resorted to because of the default of the four tenderers and the State was reduced to only one successful tenderer

with hardly any choice and it is in this context retendering was resorted to.

37. Challenge of Cam Industrial Services on the ground of *mala fide* is entirely meritless. We have gone through the Petition filed by Cam Industrial Services to find out whether *mala fides* have been pleaded anywhere. In paragraph 15 of the Petition it is pleaded that the tender has been designed only to benefit Respondent No.3. The same averments appear in ground 19(h). The allegation so utterly casual that there is no Respondent No.3 in the Petition. There are only two respondents and those are the State Authorities. This is apart from the position that the Petitioner has not disclosed about the manner in which the joint venture was constituted. By presenting the Petition in this fashion at the last minute of the tender process, this Petitioner has delayed the commencement of the work. Mahalsa Services, though has not asked for a separate interim order, has taken advantage of the interim order in the case of Cam Industrial Services, because it covered its case as well.

38. To conclude, we do not find any merit in the challenge raised by both the Petitioners.

39. If there is gross arbitrariness in the State action in the tender matters and the public interest is being jettisoned, the Court

may strike down the State action, however, even if such challenges are found to be meritless and purely in private cause, it is not enough to simply dismiss the petition, but also to impose costs as it is the general public who remains a victim having faced delays in the public service. As observed by the Apex Court in *Municipal Corporation, Ujjain* attempts by unsuccessful bidders with an artificial grievance and to get the public purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. Therefore, it will be in the interest of justice that deterrent costs are imposed.

40. Both the Petitions are dismissed. Rule discharged. The Petitioners shall pay costs of ₹ 50000/- in each Petition, within six weeks from today, failing which the State will take steps to recover the same as arrears of land revenue. The learned Advocate General states that the costs be paid to the Goa State Legal Services Authority. The Petitioners shall do so.

Prithviraj K. Chavan, J. ***N.M. Jamdar, J.***