

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1612 OF 2019

Asha Under Water Services Pvt. Ltd.

Office at B-12, Aquarina,
Casuarina-Aquarina CHS Ltd.,
Godrej Hill Complex, Kalyan (W),
Dist-Thane-421 301

...Petitioner

V/s.

- 1. The State of Maharashtra**
Through The Principal Secretary
Forest and Revenue Dept
Mantralaya, Mumbai.
- 2. The Principal Secretary,**
Water Resources Department
Mantralaya, Mumbai.
- 3. The Executive Director,**
Water Resources Department,
Sinchan Bhavan, Pune.
- 4. Maharashtra Krishna Khore Vikas**
Mahamandal, Pune
Through its Executive Engineer,
Ujani Dam Management Department
Bhima Nagar, Taluka-Madha,
District-Solapur.
- 5. Tapi Patbandhare Vikas Mahamandal**
Jalgon, Through its Executive Engineer,
Girna Patbandhare Vibhag, Jalgaon.

6. **Godavari Marathwada Patbandhare,**
Vikas Mahamandal, Aurangabad
Through its Executive Engineer,
Jaikwadi Patbandhare Vibhag
Nath Nagar, Paithan,
Taluka-Paithan, Dist-Aurangabad.
7. **Vidarbh Patbandhare Vikas**
Mahamandal, Nagpur
Through its Executive Engineer,
Goshikhurd Dam Department,
Wahi (Pavani), Distict Bhandara **...Respondents**

WITH
WRIT PETITION NO.1466 OF 2019

Dharti Dredging and Infrastructure Ltd.
(formerly known as Dharti Dredging &
Construction Ltd)
R/at 6-3-1113/2, DDIL Bhavan,
B.S. Maktha, Begumpet,
Hyderabad-500 016, Telangana **...Petitioner**

V/s.

1. **The State of Maharashtra**
Through The Principal Secretary
Forest and Revenue Department
Mantralaya, Mumbai.
2. **The Principal Secretary,**
Water Resources Department
Mantralaya, Mumbai.
3. **The Executive Director,**
Water Resources Department,
Sinchan Bhavan, Pune.

4. **Maharashtra Krishna Khore Vikas**
Mahamandal, Pune
Through its Executive Engineer,
Ujani Dam Management Department
Bhima Nagar, Taluka-Madha,
District-Solapur.
5. **Tapi Patbandhare Vikas Mahamandal**
Jalgon, Through its Executive Engineer,
Girna Patbandhare Vibhag, Jalgaon
6. **Godavari Marathwada Patbandhare,**
Vikas Mahamandal, Aurangabad
Through its Executive Engineer,
Jaikwadi Patbandhare Vibhag
Nath Nagar, Paithan,
Taluka-Paithan, Dist-Aurangabad
7. **Vidarbha Patbandhare Vikas**
Mahamandal, Nagpur
Through its Executive Engineer,
Goshikhurd Dam Department,
Wahi (Pavani), District Bhandara ...Respondents

WITH
WRIT PETITION NO.1453 OF 2019

M/s.Pratik Enterprises
Through Prop. Nagesh Laxman
Thakmoge O/at C-7,
Vishwakaran Park, Jule Solapur,
Solapur-413 006 ...Petitioner

V/s.

1. **The State of Maharashtra**
Through The Principal Secretary
Revenue and Forest Department,
Mantralaya, Mumbai.

2. **The State of Maharashtra,**
Through its Principal Secretary,
Water Resources Department
Mantralaya, Mumbai.
 3. **The Executive Director,**
Water Resources Department,
Sinchan Bhavan, Pune.
 4. **Maharashtra Krishna Khore Vikas
Mahamandal, Pune** through
its Executive Engineer, Ujani Dam
Management Department Bhima
Nagar, Tal-Madha, Dist-Solapur.
 5. **The Chief Engineer (S.P.)**
Water Resources Department,
Having Officer at Pune-11
 6. **Superintendent Engineer &
Administrator, Command Area,
Development Authority, Solapur.**
 7. **M/s.Mahalaxmi Industrial
Manufacturing Cooperative Soc. Ltd.,**
O/at Shop No.4, Darya Sarang
Shopping Centre, 1st Floor,
Mahim Road, Palghar,
District-Palghar,
Through Director Shri.Sandeep
Sanjay Deshpande
- ...Respondents**

WITH
WRIT PETITION NO.1455 OF 2019

Shri.Raghunath Anand Nagane
R/at Hivargaon, Post: Dongargaon,
Taluka : Mangalwedha
Dist: Solapur

...Petitioner

V/s.

- 1. The State of Maharashtra**
Through The Principal Secretary
Revenue and Forest Department,
Mantralaya, Mumbai.
- 2. The State of Maharashtra,**
Through its Principal Secretary,
Water Resources Department
Mantralaya, Mumbai.
- 3. The Executive Engineer,**
Water Resources Department,
Sinchan Bhavan, Pune.
- 4. Maharashtra Krushna Khore Vikas
Mahamandal, Pune**
Through its Executive Engineer,
Ujani Dam Management Department
Bhima Nagar, Taluka-Madha,
District-Solapur.
- 5. The Chief Engineer (S.P.)**
Water Resources Department,
Having Officer at Pune-11
- 6. Superintendent Engineer &
Administrator, Command Area,
Development Authority, Solapur.**
- 7. M/s.Mahalaxmi Industrial
Manufacturing Cooperative Soc. Ltd.,**
O/at Shop No.4, Darya Sarang
Shopping Centre, 1st Floor,
Mahim Road, Palghar, District-Palghar,
Through Director Shri.Sandeep
Sanjay Deshpande

...Respondents

Mr.Vineet Naik, Sr.Adv. a/w.Mr.Subhash Jadhav, Rupesh Gite, Ms.Sanaya Kapadia i/by. M/s.Parinam Law Associates for the Petitioner in W.P.No.1612/2019.

Mr.S.S.Shah, Mr.Subhash Jadhav, Rupesh Geete, Ms.Sanaya Kapadia i/by. M/s.Parinam Law Associates for the Petitioner in W.P.No.1466/2019.

Mr.Y.S.Jahagirdar,Sr.Adv. i/by. S.S.Kanetkar for the Petitioner in W.P.No.1453/2019.

Mr.P.S.Dani, Sr.Advocate with Milind Prabhune i/b S.S. Aradhaye for the Petitioner in W.P.No.1455/2019.

Mrs. M. P. Thakur, AGP for the Respondent-State.

Mr. A. V. Anturkar, Senior Advocate with Mr. D.B. Dhaire, Yatin Malvankar, Kalyani Tulankar, Ajinkya Udane for R.No.4.

**CORAM : RANJIT MORE &
SMT.BHARATI H. DANGRE, JJ.**

RESERVED ON : 06th MARCH 2019

PRONOUNCED ON : 18th MARCH 2019

JUDGMENT : (Per Smt.Bharati H. Dangre,J)

1 Heard. Rule. Rule is made returnable forthwith.

2 The four Writ Petitions listed before us seek a similar relief of quashing and setting aside the conditions stipulated in the Government Resolution dated 03.08.2018

issued by the Water Resources Department of the Government of Maharashtra and the said conditions have been assailed on the ground that they are illegal, arbitrary and violative of Article 14, 19(1)(g) of the Constitution of India. Further all the aforesaid Writ Petitions pose a challenge to certain conditions of the tender floated by the respondent No.4-Corporation, also on the ground that they violate the fundamental rights of the petitioners guaranteed under Article 14 and 19(1)(g) of the Constitution of India. It is also a common ground in all the Writ Petitions that the e-tender process initiated by the State is in utter violation of the directives issued by this Hon'ble Court in PIL No.143 of 2012.

Since all the Writ Petitions revolve around a similar cause of action, with the consent of parties we have heard the Writ Petitions together and they are disposed off by this common judgment.

3 The State of Maharashtra formulated a policy for extracting silt with alleviated sand from the major dam/projects and the policy envisaged "Restoration of storage

capacity of the dams by removing silt and silt mixed sand by means of mechanical operations”. The policy under challenge is evolved after undergoing several phases and being subjected to judicial scrutiny at times and is contained in the Government Resolution impugned before us. The petitions seek relief against the Departments of State of Maharashtra and also the Maharashtra Krishna Khore Vikas Mahamandal, Pune i.e. respondent no.4 who has floated the tender for the work in question. Before embarking upon the issue involved, it would be necessary to make a brief reference to the chronology of events leading to the formulation of the said policy.

4 The chronology of facts set out in the petition, divulge that in or about the year 2012, the State Government through Collector, Pune, without undertaking any tender process directly issued work of excavation of sand and silt from the Ujani dam constructed on Bhima River, in favour of one M/s.Mahalaxmi Audyogik Sahakari Sanstha Limited, Palghar. This act of the State Government lead to filing of a

Public Interest Litigation at the Principal Seat of this Court, where the allotment of work to the said Society was challenged.

The said Public Interest Litigation was numbered as PIL No.143 of 2012. This Court took a serious note of the aforesaid act which was alleged to be arbitrary since work was allotted without following the tender process and the allotment in favour of the society came to be stayed. When the petition was listed before the Court, the learned Advocate General on behalf of the State of Maharashtra made a statement to the effect that Government has already taken a policy decision to resort to e-tender process in respect of any work to be allotted in excess of Rs.10 lakhs. He therefore, prayed for deferring of the hearing of the petition awaiting the implementation of the new decision. In the mean time, the Hon'ble Minister of Revenue set aside the order awarding the contract to M/s.Mahalaxmi Audyogik Sahakari Sanstha Limited and the grievance made against the said contractor did not survive.

It is pertinent to note that at the relevant time, it was the Revenue and Forest Department of the State of

Maharashtra which was empowered to formulate the policy of desilting. It issued a resolution on 9.9.2014 and framed a policy for desilting of reservoirs. By the said policy, the period of contract was fixed as one year and the Government Resolution contemplated a 'No Objection Certificate' of the concerned department before auction and it also contemplated an environmental clearance. The said resolution also prescribed for fixing of the offset price before issuance of the tender. In view of this policy being formulated, the PIL came to be disposed of with an observation that since the fresh policy was framed for desilting of reservoir, the contract would be awarded in accordance with the said policy as may be revised from time to time.

5 The State of Maharashtra at the end of 2015 had within its jurisdiction 3452 irrigation projects and it was a common experience that in the monsoon, on account of the flood in the river and rivulets, streams, lakes, the water gets accumulated in the dam and along with it also gushes in, clay stones, sand, silt, etc and its constant accumulation results in

sedimentation which causes reduction in the storage capacity of these dams. The reduction in the storage capacity of the dam adversely affect the irrigation project as it is the most common pollutant and it also causes environmental damage. It degrades the quality of water for drinking. It also affects the safety of dams and reduces energy production, storage, discharge capacity and flood attenuation capabilities. It increases loads on the dam and gates, damages mechanical equipments. It was also noted that the production of electricity in the State has assumed great importance and the reduction in the storage capacity was affecting the electricity production which was the need of the day. The water in the dam is also used for drinking, agriculture and industrial purposes and the demand for the water is on the rise contemplating its scarcity in the future. The State, therefore, evolved a mechanism for increasing the storage capacity of the small, medium and major dams by strengthening its water retention capacity by removing the sand mixed silt.

In order to ascertain the silt estimation, the Central Water Commission carried out its survey of sedimentation and

30 reservoirs in the State were assessed by using the remote sensing techniques. In the mean time, the irrigation projects came to be transferred to the Water Resources Department from the Revenue Department since the major dams and command areas fall within the jurisdiction of the said Department. A Government Resolution came to be issued by the Water Resources Department on 4.5.2017 framing a policy for desilting of clay/sand from the dam. The said policy enumerated guidelines for extracting the silt with alleviated sand from the major site projects in the State of Maharashtra. The said Resolution implemented the policy in form of a pilot project and contemplated its implementation through the Irrigation Development Corporation. The Revenue accruing on account of the implementation of the project was resolved to be utilized for the purposes of strengthening of the said irrigation projects in the State. After experimenting in the five major projects, the State was at liberty to implement the policy in respect of other dams/reservoirs. The policy also provided that the silt to be excavated would be distributed free of costs to the farmers since it had the potential to enhance the fertility

of the agricultural land. The period of contract was stipulated to be 15 years and after desilting, the contractor was permitted to sell the sand in the open market after depositing the royalty as per the prevailing rate.

6 In furtherance of the said Government Resolution, the tender process was initiated and this was a subject matter of PIL No.78 of 2017 instituted at Aurangabad Bench. The challenge to the tender conditions was posed on three counts namely,

- (i) *The offset prize was not fixed while issuing the tender.*
- (ii) *The tender is allotted for the long duration of 15 years.*
- (iii) *The marking system contemplated, while scrutinizing the tender is predominantly to favour one party and the said system contemplated in the government resolution was challenged as arbitrary and irrational.*

The said Public Interest Litigation was extensively heard by the Division Bench at Aurangabad and came to be disposed off by a detailed judgment delivered on 4th May 2018. The said judgment by and large upheld the policy of the State Government but it directed the State Government to reconsider

the duration of contract as proposed in clause 3 of the Government Resolution dated 4th May 2017 and the decision was left to the wisdom of the executive to determine the period of the contract. The marking system contemplated in clause 6A of the Government Resolution was set aside and the respondent State was permitted to evolve better marking system or methodology to avoid discrimination between parties. The judgment delivered in the said Public Interest Litigation noted that the project of desiltation is undertaken by the government on experimental basis and is a Public Utility project since the sedimentation causes reduction in the storage capacity of the reservoir/dam and desilting process restores the water storage capacity. The Bench also highlighted the multifarious advantages of the said policy i.e. (i) restoration of storage capacity of reservoir/dam (ii) providing free mud/soil to the agriculturist to be used as fertilizer for their fields and (iii) Revenue to the Government in form of royalty. It was also observed that this would not incur any financial burden on the State. The Public Interest Litigations and the Writ Petitions came to be disposed of on 4th May 2018.

7 As a follow-up of the policy decision taken by the State Government, the Water Resources Department undertook a detailed survey and it was noted that all the irrigation projects in the State of Maharashtra are under the control of the irrigation development corporation and there are five major corporations under which the projects are executed region wise. The tender work of Ujani dam falls within the purview of Maharashtra Krishna Development Corporation established under Act No.15 of 1996. The irrigation corporations are established to take appropriate steps for planning construction and management of the irrigation projects falling within its jurisdiction. Resultantly, a decision was taken to implement the project of excavation of silt from five major dams in each Region, namely, Ujani dam, Girna dam, Goshikhurd dam, Jaykwadi dam and Mula dam and depending on its results the project should be implemented in the remaining irrigation projects in the State. The Government Resolution was therefore issued by the Water Resources Department on 04.05.2017 which prescribes a policy of desilting the mud and mud mixed sand from the 5 major

projects. It was resolved that the implementation of the said project should be carried out in the State through the respective Irrigation Development Corporations.

8 Pursuant to this development, a fresh Government Resolution was issued on 03.08.2018 by the Water Resources Department of the State of Maharashtra and the writ petitions before us assail various clauses of the said Government Resolution. Apart from challenge to the policy decision, the common thread of contention in all the writ petitions is that the tender conditions to implement the pilot project are tailor-made so as to favour co-operative society like M/s.Mahalaxmi Audyogik Sahakari Sanstha Limited and it is also alleged that it is the only society which has the experience and financial capacity and technical know how contemplated by the stipulations in the tender that is floated by the Executive Engineer, Ujani Dam Division on 10.01.2019. All the Writ Petitions seek a relief of quashing and setting aside of the said Government Resolution and the conditions of the tender floated in furtherance of the policy of the State Government on

the ground that it is arbitrary, illegal and tailor-made and it violates the fundamental rights of the petitioners guaranteed under Articles 14, 19(1)(g) of the Constitution. That is how the challenge is placed before us.

9 In Petition No.1612 of 2019, the petitioner is a Company registered under the Companies Act, 1956 having its registered office in Kalyan (West), District-Thane and it is claimed by the petitioner that it is one of the most proficient, nationwide Diving Contractor for on-shore and offshore Diving and related services and possessing the latest equipments backed by specialized and talented team of professionals. It is also claimed by the petitioner that it is one of the few EPC infrastructure companies in India having capability to execute offshore pipelines which includes underwater construction related activity i.e. Laying HDPE Pipe, Cable or detection and repair of under water problem area in Dams and Atomic Stations. It is the claim of the petitioner that it is engaged in the business of dredging and excavation including sediment removal using “sewer ball” pigging, directional jetting and

suction, and pressure pump backwater/reverse nozzle flushing techniques.

The petitioner in Writ Petition No.1466 of 2019, is also a company, known as Dharti Dredging and Infrastructure Limited having its registered office at Hyderabad, Telangana. The petitioner claims to be engaged in the business of Dredging and involved in a number of marine projects in India, Indonesia, Myanmar and Middle east regions. The petitioner claims that for last three decades, it has an experience of dredging and maintaining the vital assets like Seaports, Inland Waterways, Canals, Lakes, Estuaries and possess the associated infrastructure and experience of excavating silt, minerals such as sand.

10 The two petitioners in Writ Petition Nos.1453 of 2019 and 1455 of 2019 are the authorized contractors engaged in the business of excavation of sand for more than a decade. The claim of both the petitioners is that they have participated in the auction of various sand ghats and they possess the experience of excavation of sand from river/river bed.

11 The E-tender notice no.03 for 2018-2019 was published by the Maharashtra Krishna Valley Development Corporation i.e. respondent no.3 on 10.1.2019. The name of the work is “restoration of storage capacity of Ujani Dam Reservoir by removing silt and silt mixed sand by means of mechanical operations”. The time limit for completion of the said work was prescribed as 120 months. The mechanism to be adopted is two envelope system and the bidder was directed to upload technical bid (envelope no.1) along with qualification information, prescribed forms and other documents. The financial bid was to be filled online with offer of the bidder. The tender condition prescribed that for the financial bid, the bidder should quote his offer on brass basis (1 brass = 2.83 cubic meter) considering the quantum of sand that will be available after desilting of reservoir. The bidder rate was to exclude prevailing royalty charges of sand and applicable taxes payable to the Government. The last date of bid submission was set out in the Notice as 5.2.2019 and the date of opening of the bid was slated to be 6.2.2019 at 1.30 p.m.

Section V of the Tender Notice prescribe the eligibility criteria for qualification which reads thus :

“5. ELIGIBILITY CRITERIA FOR QUALIFICATION :

1. ONLY those applicants meeting the following minimum eligibility criteria will be eligible for the evaluation of the bids and the bids not fulfilling these conditions will not be considered and opened for Technical as well Financial Evaluation.

2. The Bidder shall be Single Entity only (JOINT VENTURE is not allowed)

3. Bidders shall have the Registered Office in the State of Maharashtra Only.

4. Bidders shall be making entity with no adverse remark, CDR or classified as NPA.

5. Bidders shall not be black listed by any Agency or Organization belonging to any State or Central Government.”

*(6) **Bidders shall have:***

1) (I) SPECIALIZED experience of De-silting of Dams/Reservoirs in State of Maharashtra only (Experience in Marine Dredging shall not be considered)

or

*(ii) **SAND PROCESSING/ MANUFACTURING OF ENGINEERED SAND/ EXTRACTION AND SEPARATION OF RIVER SAND** by Hydrocyclone method (out put capacity 150TPH) with residual Water Treatment Plant for Sludge Management (THICKNER CAPACITY 600 cu.mtr/hr.)*

** Minimum Quantity more than 25000 brass in a single year in last 7 years ending on March, 2018 in State of Maharashtra ONLY.*

* *For (I) Proof of quantity of Royalty on minor minerals likes Sand/Earth/Rock etc., with Works Orders/ Permission issued by Competent Authority. Royalty paid by bidder should only from the desilting work and not from sand dredging and supported by proof in form of challans OR Royalty Receipts.*

* *For (ii)-The Royalty paid on Rock or Boulder which is used as raw material in manufacture of engineering or processed or Crush Sand, should only be used for the same and supported by the proof in form of Challan or Royalty Receipt.*

* *The bidder shall have 5 years experience in such similar work.*

2. *Bidders shall have minimum 2 years of sound technical experience I separation of sand and silt / earth / organic waste using HYDRO CYCLONE METHOD.*

3. *Bidders shall have minimum 2 years of experience of treatment of residual water after hydro cyclone process.*

4) *Bidders shall have minimum Rs.5 Crores. Annual Turnover.*

5) *Bidders shall have minimum 5 Nos of Dredgers.*

6) *Bidders shall have minimum 7 years of experience in Salvage Technology.*

7) *Bidders shall have the Barge Building capacity with it's own Shipyard Facility and must have credentials demonstrating to carryout Barge building or Repairing in last 7 years with MPCB permissions and CRZ clearance.*

The details of parameters of technical evaluation under Clause 9.2 of the tender notice was bifurcated under three Heads i.e. Financial capacity, experience and machinery and technical capabilities. The tender notice prescribe the following conditions.

9.1 Financial Capacity

The bidder shall have minimum Rs. 5 Crores annual turnover.

9.2 EXPERIENCE

*9.2.1(I) Experience of De-silting of Dams / Weirs / Reservoirs
Or*

*(II) SAND PROCESSING/MANUFACTURING OF
ENGINEERED SAND/EXTRACTION AND
SEPARATION OF RIVER SAND by Hydro-
cyclone method*

*9.2.2 Bidders shall have Sound Technical experience in
separation of sand and silt/Earth/Organic waste using
HYDEROCYCLONE METHOD (MAX MARKS (5))*

**9.2.3 Bidders shall have experience of treatment of
Residual Water after Hydro cyclone Process.
(For Sludge Management)**

**9.3 MACHINDERY AND TECHNICAL
CAPABILITIES**

MAX MARKS (35)

9.3.1 Availability of Dredgers: MAX MARKS (5)

*The Bidders/Bidder shall have either cutter
suction /grab dredger mounted on pontoons or modular
pontoons having capacity of 250 to 300 Cubic Meter per*

hour and Cutter suction having minimum discharge distance capacity 750 to 1000 Meter.

The bidder shall have minimum 5 Nos. of dredgers.

9.3.2 Salvaging Technology: MAXMARKS (10)

The company must be registered with Register of companies in Maharashtra under salvaging category with requisite experience of 7 years supported by experience certificate from client.

The bidder shall have minimum 7 years of such experience.

12 The common grounds which could be culled out from all the petitions pose a challenge to the policy of the Government and the tender notice can be summarized briefly as under :-

(1) The foremost challenge is that the tender is in respect of the pilot project and in the resolution issued on 03.08.2018 the State Government has contemplated the contract to be for a period of 10 years with a permissible extension of further period of five years. The challenge to the said stipulation is to the effect that the Division Bench of this Court in the Public Interest Litigation had frowned upon the pilot project being implemented for a long duration of 15 years and has expressed its opinion on the disadvantage of implementing the project for such a longer period of time.

(2) *The tender condition 5(2) that the bidder should be a single entity is challenged*

(3) *Clause no.5(3) mandating that the bidder shall have registered office in State of Maharashtra is challenged.*

(4) *Clause No.6 making it imperative for the bidder to possess the experience of desilting only in State of Maharashtra to the exclusion of marine dredging is also challenged. Further, the inclusion of several technologies stipulated from paragraph nos.9.3.2 to 9.3.6 are also challenged.*

(5) *The condition 9.3.1 of allotment of one mark if the Dredger is owned by the bidder on ownership basis and allotment of ½ mark if the Dredger is on lease basis is also challenged. The challenge is also posed to the condition imposed in the tender for obtaining the environmental clearance by the bidder and it is alleged that said condition is contrary to the decision of the Hon'ble Apex Court in the judgment in case of **Deepak Kumar Vs. State of Haryana, (2012) 4 SCC 629.***

13 In support of the petitions, we have heard the respective learned senior counsels – Shri.Vineet Naik (WP 1612/2019) Shri.Y.S. Jahagirdar (Writ Petition No.1453/2019), Mr.Dani, (Writ Petition No.1455/2019) and Mr.Shah (Writ Petition No.1466/2019). The respective learned senior counsels for the petitioners have adopted the same line of argument and in unison they would submit before us that the policy decision of the State Government as contained in the impugned Government Resolution and which is subsequently implemented by issuance of the Tender Notice smacks of favoritism and arbitrariness. It is attempted to be canvassed by the learned counsel Shri.Naik that the tender has been floated as pilot project and if it is so, then it is impermissible to allot the contract for duration of 10 years with a stipulation of continuation for another five years if the work of contractor is found to be satisfactory. Shri.Naik would submit that decision of the Division Bench of this Court that expressed that contract of 15 years would be too long a duration and if the Government comes out with better solution or policy, it will

not be in a position to implement it if it is for 15 years and it would have been better for the Government to have proposed a lesser period, say, five or seven years. He would submit that in the backdrop of the observations of the Division Bench, the present tender which intends to fix the contract period for 10 years with a further extension of five years is nothing but a novice way to get away from the observations of this Court.

As far as marking system is concerned, Shri.Naik would submit that the Division Bench has also dealt with clause 6A of the earlier policy of the State Government where a Co-operative Society was granted a relaxation to secure 70 marks out of the 100 whereas other bidders were required to secure 85 marks. The justification offered by the State Government to give additional weightage of 15 marks to the Co-operative Society in view of Article 43(b) inserted by the Constitution 97 Amendment Act, according to Shri.Naik did not find favour with the Division Bench of this Court and resultantly the said clause contained in the resolution has been quashed and set aside and the Division Bench expected the State to evolve a better marking system. His submission is that

the State Government again introduced a policy with the similar clause which was depreciated by the Division Bench while disposing of the PIL. He would also place reliance on the judgment of the Hon'ble Apex Court in case of **Deepak Kumar V/s. State of Haryana** (supra) and submit that the Division Bench had categorically held that the task of dredging and desilting of dam/reservoir for the purposes of their maintenance and upkeep contemplates an environmental clearance from the Competent Authority for it may recommend preventive measures to be taken and it was an observation of the Division Bench that the environmental clearance if obtained as a pre-condition, it can receive recommendation from the competent authority as to the depth upto which the sand, mud and clay can be excavated for desilting purpose and in tune with the Apex Court Judgment it was held that the obtaining the environmental clearance it would be appropriate. Shri.Naik would submit that the attempt of the respondent is to give a complete go by to the said judgment and needs to be considered seriously. He has also invited our attention to other clauses in the tender and specifically the clause contemplating

an experience of dredging only in the State of Maharashtra and to the exclusion of experience in marine dredging. He submits that the experience of five years as contemplated by the tender condition is a restrictive condition and if the State Government itself is projecting that it is a pilot project and respondent for the first time are carrying out such type of work, it is impossible for any bidder who have similar experience in State of Maharashtra. He is also highly critical about exclusion of the experience in marine dredging which according to him is similar to the work which is contemplated under the tender notice and therefore he clamps the said condition as unreasonable and arbitrary and he cast a serious allegation that the tender process aims at keeping the bidders like the petitioners out of fray. Shri.Naik also assiduously asserted that the involvement of the technology like the hydro-cyclone method, Salvage Technology, hydrographer services as contemplated in Clause 6(ii), 6.6 and 9.3.4 has no co-relation or nexus with the nature and scope of work involved in the impugned resolution or the tender work. With a great responsibility he advance a submission that the impugned

condition incorporated by the respondent in tender is only with a view to favour certain class of bidders. In his argument he is supported by the learned senior counsel Shri.Jahagirdar who submit that no doubt it is well understood principle that while government takes a decision it need to be allowed more play in the joints that do not mean that the State Authorities who are distributing the State largesse can act arbitrarily and rather he goes a step ahead and makes a submission that the State was expected to be more cautious if it was to implement a pilot project and rather the State ought to have encouraged more competition so that it would have yielded better results. The learned senior counsel Shri.Dani makes a categorical submission that the petitioners who are engaged in the activity of sand processing/manufacturing of engineered sand/ extraction and separation of river sand need not be the one who have undertaken this activity only in State of Maharashtra. He puts a question as to why the experience in conduct of similar activity outside the State of Maharashtra is excluded from Clause No. 6 of Section_V of the tender notice. He also submits that the stipulation “the bidder shall have 5

years experience in such similar work” is a vague term and he is also in agreement with the co-counsel arguing for the petitioners and submit that the conditions stipulated in Clause Nos.6(3)(4)(5)(6) and (7) which are inserted for first time without they being on part of the policy decision of the State Government as contained in the Government Resolution dated 03.08.2017. Shri.Shah appearing for the petitioners also advanced his argument more or less on the similar line of the learned respective senior counsel.

14 The learned senior counsel Shri Anturkar, appearing on behalf of the respondent-authorities, after taking us through the policy of the State Government submit that the project of desilting of the dams in the State is of grave importance so as to increase their efficiency. He would submit that the State Government has altered its policy in terms of the directions issued by this Hon'ble Court and it has come up with an open policy of inviting tenders for carrying out the desiltation process. According to him, the said process would involve highly sophisticated machinery and use of modern

technology as it is not only restricted to excavation of the silt from the bottom of the dam but also involves segregation of the sand from the silt and thereafter the silt which is mixed with clay is available for distribution free of cost to the farmer since it has the potential to make the land fertile. As far as sand is concerned which is to be obtained after application of Hydro-cyclonic process, the contractor after paying royalty is at liberty to sell the same in open market. Shri.Anturkar would further submit that the purified water which is the out product of this process is then decanted into the dam and it can be used for several purposes like drinking, agriculture etc. Shri.Anturkar would submit that wisdom or soundness of the policy cannot be the subject matter of judicial review and the manner in which the policy of desilting is being implemented by the State Government would not be easily interfered with unless it is patently arbitrary or illegal. The Court at the most contest the legality of the policy but not the wisdom or the soundness of the decision makers. He also makes a categorical submission that the project is being implemented as a pilot project and as and when the outputs are received, the

Government has left the option open to modulate its policy accordingly. According to him the silt excavated would consist of sand and mud which is required to be segregated. This would involve the sophisticated machinery like the dredgers, and it would also involve salvaging technology, hydrography services plus the possession of existence of barge building capacity with its own shipyard facility and availability of weed harvesting machinery, slurry pump etc. He submits that all the said requirements fall in line if the nature and scope of work tender would be looked at.

Shri. Anturkar placed heavy reliance on the affidavit filed by the Superintendent Engineer and Administrator, Command Area Development Authority, Solapur, Water Resources Department of Government of Maharashtra dated 16.02.2019.

The affidavit highlights the chronology of event that led to the issuance of the Government Resolution which is impugned in the present Writ Petition. The affidavit proceeds to state that in pursuance of the said Government Resolution, the tender process was initiated and it was published on

10.01.2019. The affidavit boldly proceed to state that without participating in the pre-bid meeting, the petitions have been filed and whole object of the petitioner is to stall the entire process. The affidavit then states that the order passed by the Division Bench in the PIL No.78 of 2017 was abided by and there is no deviation from the said decision of this Court. The challenges are then met out point by point and it is then stated that it is the discretion of the State Government to choose the person with whom it may deal with and the said discretion is also available in case of Commercial transactions with the only embargo of complying with the mandate of Article 14 which necessarily implies fairness in action and that such a decision is arrived at by following a proper decision making process. It is stated in the affidavit that pursuant to the Government Resolution issued on 03.08.2018, the State issued another Resolution on 06.08.2018 for determining the terms and conditions of the tender and the Committee was constituted under the Chairmanship of Shri.A.V. Surve, Executive Director of Vidharbha Irrigation Development Corporation. The Committee also comprised of the experts of various irrigation

projects and the Chief Engineer (Mechanical) of Water Resources Department of Government of Maharashtra and the terms and conditions stipulated in the tender are enumerated by the said Committee. The decision to exclude Joint Venture from the said tender is sought to be justified and the Reliance placed by the petitioners on the judgment of *New Horizons Limited V/s. Union of India*¹ is referred to as misconceived.

15 It is clarified that the Joint Venture is not allowed only for financial and actual work experience. It is further stated that the dam in which the project is to be implemented cater to the need of water not only to the agriculturalist but in respect of the large population which is inhabited in the urban, semi-urban and rural areas. Any contamination caused due to accident or spillage of oil would be disastrous and if the experts to control the same is immediately and instantly not available, it would pose a threat to life, therefore, experience in salvaging is contemplated as an essential condition of tender.

¹ (1995-1-SCC-478)

The affidavit also proceeds to state that the Committee of experts was constituted by Government of Maharashtra and it had recommended the mechanism and quantum of assessment of silt, excavate and the sand separated and this was taken into consideration while formulating the policy. As far as period of 10 years is concerned along with provisions of extension for another 5 years it is sought to be explained by stating that the work contemplated under the contract would require substantial investment in terms of machinery, man power, resources etc., and the quantum of work to be carried out as the process itself the perennial and therefore a longer period of contract was provided for and in any case it is stated that the period of 5 years extension was subject to fulfillment of terms and conditions by the contractor and it is not a mandate. The challenge to the marking system/ methodology/qualification category is sought to be justified and it is stated that the criteria which was prescribed in Government Resolution dated 04.05.2017 was completely distinct and after the decision of this Court that has been done away with and a Co-operative Society, which under the earlier

Government Resolution was entitled for weightage of 50 marks, has been excluded and the Government has acted in terms of the mandate issued by this Court.

It is also attempted to the canvass that the excavation of the silt is comparable to mining and therefore the type of machinery used for excavation, the environmental impact and the ancillary things would have to be borne in mind. The affidavit further states that the petitioners are trying to mislead this Court by making a comparison that the sand auction which stand on the different footing and the present project is a contract of a specialized work and not merely a regular sand mining.

16 Shri.Anturkar, has placed reliance on the judgment of the Hon'ble Apex Court in case of *Municipal Corporation Ujjan and Another V/s. BVG India Limited and Ors*² to effectively canvass his submission that the public interest is to be reckoned as a guiding factor in determining the action of the State Government. He would submit that the Hon'ble Apex

2 (2018)-5-SCC-462

Court in the said judgment has reiterated its earlier view that the State, its instrumentalities, Corporation and agencies have a public duty to be fair to all concern and even if some defect is found in the decision making process, the Court must exercise its jurisdictional power under Article 226 of the Constitution of India with great caution and only in furtherance of the larger interest. He would also rely on the judgment of the Hon'ble Apex Court in case of *Reliance Energy Ltd & Another V/s. Maharashtra State Road Development Corporation Ltd. And Others*³ (2007)-8-SCC-1. He also relies on the latest judgment of the Hon'ble Apex Court in case of *Swapnil Tripathi V/s. Supreme Court of India* where the Hon'ble Apex Court has dealt with a request for live streaming of Court proceedings easily for public viewing and he submits that such pilot projects for use of technology have been looked at pro-actively by the judiciary and directions have been issued to accept the said request by amending the Supreme Court Rules 2013 and directions have been issued to frame regulatory measures as may be found necessary for legalistic live streaming without

3 (2007)-8-SCC-1

impinging the cause of administration of justice in any manner. On the issue of pilot project being implemented, he has placed reliance on the judgment in case of *Ravi Development V/s. Shree Krishna Prathisthan and Others*⁴ where the Hon'ble Apex Court has set aside the judgment of the High Court and deserved that the High Court was not justified in striking out swiss challenge method without allowing State Government to exercise its executive discretion on the pilot basis, when it was not found to be arbitrary or unreasonable.

17 With the assistance of the learned counsel for the parties, we have carefully perused the copy of the Writ Petitions, the affidavit-in-reply and considered the submissions advanced by the learned counsel for the parties.

18 The petition raises a challenge to the Government Resolution dated 03.08.2018. The collective argument advanced for assailing the said policy is that the said policy formulated clearly deviates from the directives contained in

4 (2009)-7-SCC-462

judgment delivered by this Hon'ble Court on 04.05.2018. The deviation is pointed out on two counts, namely, that the earlier policy contemplated a period of 15 years for the contract and the Court did not find sufficient justification for such a long duration of a contract specifically in a pilot project and it was left to the wisdom of the executive to determine the period of contract. It is then canvassed that the Government Resolution dated 03.08.2018 maintain same duration, the only difference being it gives a break up of 10 years plus renewal of five years. Another clause which is severely criticized Clause No.6 of the earlier Government Resolution relating to the marking system of the tender and it is urged that the said criteria was set aside by this Court and the Government was directed to evolve better marking system or methodology in order to contract so as to discrimination between the parties. The allegation about the said policy framed by the State Government is that the entire policy is framed in favour of M/s.Mahalaxmi Audyogik Sahakari Sanstha Limited, and none of the bidder would qualify as per the marking system.

We have taken note of the policy decision taken by

the State Government and it is trite position of law that of executive order termed as policy decision may not be completely outside the preview of judicial review and though the Courts may not interfere with the mitty gritties of the policy or substitute one by other but it is also not correct to assume that the Court will not interfere with it at all. The parameters broadly provide interference in the policy matter in exercise of power of judicial review if the policy decision is found to be unconstitutional, or if it contravene the provisions of any Act and the Regulations or if the executive policy is contrary to the larger policy. In ***Transportation and Dock Workers and Others V/s. Mumbai Port Trust and Another***⁵

the Hon'ble Apex Court has observed thus :-

34. Excessive interference by the judiciary in the functions of the executive is not proper. In several decisions, we have held that there must be judicial restraint in such matters, vide [Divisional Manager, Aravali Golf Club vs. Chander Hass](#) (2008) 1 SCC 683. [In Government of Andhra Pradesh vs. P. Laxmi Devi](#) (2008) 4 SCC 720 the doctrine of judicial review of statutes has been discussed in great detail, and it has been observed that the judiciary must show great restraint in this connection.

40. As Lord Denning observed :

⁵ (2011)2 SSC 575,

"This power to overturn executive decision must be exercised very carefully, because you have got to remember that the executive and the local authorities have their very own responsibilities and they have the right to make decisions. The Courts should be very wary about interfering and only interfere in extreme cases, that is, cases where the Court is sure they have gone wrong in law or they have been utterly unreasonable. Otherwise you would get a conflict between the courts and the government and the authorities, which would be most undesirable. The courts must act very warily in this matter." (See Judging the World' by Garry Sturges Philip Chubb).

41. In our opinion Judges must maintain judicial self restraint while exercising the powers of judicial review of administrative or legislative decisions. "In view of the complexities of modern society", wrote Justice Frankfurter, while Professor of Law at Harvard University, "and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language : It is misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."

42. In writing a biographical essay on the celebrated Justice Holmes of the U.S. Supreme Court in the dictionary of American Biography, Justice Frankfurter wrote :

"It was not for him (Holmes) to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of skepticism-by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest." (see 'Essays on Legal History in Honour of Felix Frankfurter' edited by Morris D. Forkosh.)

19 The Constitutional Court would thus not meddle with the policy decision unless and until the decision is arbitrary perverse or unconstitutional. A procedure evolved for prescribing a criteria for selecting the contract to implement the pilot project in State of Maharashtra can be interfered only if it is found to be arbitrary, discriminatory or wholly unfair. We find none of the criteria being satisfied by the petitioners so as to convince us that the policy decision of the State Government needs to be strucked down being arbitrary or unreasonable. We also did not agree with the submissions of the learned counsel for the petitioner that it is in utter

derogation of the directions issued by this Court as this Court being conscious of its own limitation had left it open to the wisdom of the executive to determine the period of contract and as far as marking system is concerned had left it to the executive to evolve better marking system or methodology in awarding contract.

Perusal of the Government policy as contained in the resolution dated 03.08.2018 clearly stipulates the scope of work contemplated by the State Government and it permits and e-tender process to be carried for selection of the contract for desilting of 5 major dams namely Ujani dam, Girna dam, Goshikhurd dam, Jaykwadi dam and Mula dam. The terms and conditions of the tender, the procedure to be followed was left to the discretion of the Irrigation Development Corporation and the policy broadly highlighted the marking criteria and it also stipulated that the bid which would offer the maximum brass would be accepted. It also stipulate that in light of any Court orders/directions refusal to grant environmental clearance any natural calamities or for any other similar reasons if the contract was required to stayed or rejected, the

contractor would not be entitled for any compensation. The detailed mechanism about storage of the silt and sand was also directed to be formulated by the Water Resources Department separately. The policy also provided for the action to be taken against the contractor in case of violation of the stipulations and conditions contained in the Government Resolution. There is no challenge to the said policy on any other point other than the two points which we have mentioned above. In light of the settled legal position we are not satisfied or convinced that the said policy is arbitrary or discriminatory or it is in violation of any statute or regulations.

20 Before averting to the facts, we would reflect position of law as regards the scope of judicial review in examining the terms and conditions incorporated in a tender. By now it is settled principle of law that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favoritism. The inherent limitation in exercise of that power of judicial review was highlighted by the Hon'ble

Apex Court in case of *Tata Cellular V/s. Union of India*⁶. We would rely on the observations by their Lordships in the said judgment which read thus :

70. *It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in [Article 14](#) of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of [Article 14](#) if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.*

74. *Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.*

77. *The duty of the court is to confine itself to the question of legality. Its concern should be :*

1. *Whether a decision-making authority exceeded its powers?*

6 (1994-6-SCC-651)

2. *Committed an error of law,*
3. *committed a breach of the rules of natural justice,*
4. *reached a decision which no reasonable tribunal would have reached or,*
5. *abused its powers.*

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case.

94 *The principles deducible from the above are :*

- (1) *The modern trend points to judicial restraint in administrative action.*
- (2) *The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- (3) *The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
- (4) *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.*

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

- (5) *The Government must have freedom of contract. In other words, a fair play in the joints is a*

necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

21 The above observations of the Hon'ble Apex Court continues to determine the ambit of power of judicial review exercised by this Court under Article 226 of the Constitution of India. In a catena of judgments, the Hon'ble Apex Court as well as this Court have conclusively held that the exercise of power of judicial review would be called for if the approach of the authority is arbitrary or *mala fide* or the procedure adopted is meant to favour one. The scope of the exercise of the power is thus to be understood by extending its ambit to prevent arbitrariness and favoritism and its exercise in the larger public interest. The constitutional Courts would always strike at an action when it is brought to the notice of the Court that in the matter of award of contract, the power has been exercised for any collateral purpose.

22 In the case of *Michigan Rubber (India) Ltd Vs. State of Karnataka*⁷ the Apex Court once again re-iterated the said principle in the following words:

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.

7 (2012) 8 SCC 216

23 In latest judgment in case of ***Afcons Infrastructure Ltd V/s. Nagpur Metro Rail Corporation Limited and Another***⁸, the Hon'ble Apex Court while scrutinizing the tender conditions/ criteria/ norms request for proposal (RFP)/ Notice inviting Tender (NIT) had an opportunity to re-examine the scope of judicial review in the backdrop of the eligibility criteria prescribed for bidders.

Their lordships reiterated the principle that the decision making process in accepting or rejecting bid should not be lightly interfered with. The decision making process which is *mala fide* or intended to favour someone, then the interference is permissible. It is also permissible if the decision is arbitrary or irrational or say that no responsible authority acting reasonably and in accordance with law could have reached such a decision. It also held that the perversity of decision-making process or of the decision would permit interference but not a mere faulty or incorrect decision. It would be appropriate to reproduce the observations of their lordships in paragraph No.11, 12, 14 and 15:-

8 (2016)-16 SCC-818

“11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*[2] it was held by this Court, relying on a host of decisions that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. [In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay](#)[3] it was held that the constitutional Courts are concerned with the decision making process. [Tata Cellular v. Union of India](#)[4] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in [Jagdish Mandal v. State of Orissa](#)[5] as mentioned in *Central Coalfields*.

14. We must reiterate the words of caution that this Court has stated right from the time when [Ramana Dayaram Shetty v. International Airport Authority of India](#)[6] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as

redundant or superfluous – they must be given meaning and their necessary significance. In this context, the use of the word ‘metro’ in Clause 4.2 (a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

With the aforesaid observation, the decision of the Bombay High Court hold in a company of China and M/s.Tata Project Limited (TPL) as a joint venture to be eligible bid for a tender invited by the Nagpur Metro Rail Corporation Limited and Another was set aside. It was also observed in the aforesaid judgment there is also any ambiguity or doubt about the interpretation given by the NMRCL to the tender conditions and even if there was such an ambiguity or doubt,

the High Court ought to have refrained from giving its own interpretation unless it had arrived at a clear conclusion that the interpretation given by NMRCL was perverse or *mala fide* or intended to in favour one of the bidders.

24 Shri.Anturkar has rightly placed reliance on the judgment of the Apex Court in case of ***Municipal Corporation Ujan and Another (Supra)*** where it has been held that High Court cannot ordinarily interfered with judgment on expert consultation on issue of technical qualification of the bidder when the consultation takes into consideration various factor including basis of non performance of the bidder.

In paragraph No.64 the questions raised in the Appeal were answered as follows :-

“64.1 Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2 A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any third party for its qualification.

64.3 It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of malafides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint.”

25 With the aforesaid legal scenario holding the field, an argument which is canvassed before us needs to be tested and it is to be examined whether we can independently evaluate the terms and conditions of the tender document which have been prescribed by an expert committee though it is attempted to canvass before us that we should exercise the power of judicial review in the backdrop of the allegations of favoritism or arbitrariness that has been brought to our notice. We have noticed the evolution of the Government policy which is contained in the Government Resolution dated 03.08.2018. Apart from assailing the terms and conditions of the said Government Resolution, a challenge is also posed to tender notice published by the respondent inviting bids for “Restoration of storage capacity of Ujani dam reservoirs by silt

and silt mixed sand by means of mechanical operations”. The e-tender notice No.3 for 2018-2019 is issued by the Maharashtra Krishna Valley Development Corporation, Pune. It is to be noted that after issuance of a Government Resolution by the Water Resources Department on 3rd August 2018, another resolution came to be issued for the purposes of determination of the terms and conditions of the contract to be awarded for desilting of the silt and silt mixed sand and the power to determine the terms and conditions were conferred on the Irrigation Development Corporation. The said Government Resolution issued on 6th August 2018, constituted a Committee for the aforesaid purpose under the Chairmanship of the Executive Director of Vidharbha Irrigation Development Corporation, Nagpur. It also comprised of the Executive Directors of the other development corporations i.e. Krishna Khore, Godavari Marathwada, Tapi, etc. It is to be noted that the Irrigation Corporations are established under the statutory enactment and are entrusted with the work of investigation, planning, designing of projects, maintenance, construction of irrigation projects and management of major, medium and

minor projects. With this expertise being available from the said Corporations, the State Government left the work of formulating the terms and conditions of the tender of desilting to it. The terms and conditions and the criteria for evaluation was enumerated by this expert committee, keeping in mind the object to be achieved i.e. desilting of the dams. It is not the case of the petitioners that the Committee was not properly constituted or that it did not possess the expertise. No allegations of malafides are levelled against the member of the Committee. The Committee comprise of experts in the field of Water Resources and they have determined the terms and conditions of the tender.

26 In the present petition, we are mainly concerned with the eligibility criteria for qualification prescribed in Section-V of the tender notice. We have already reproduced the said terms and conditions. Perusal of Chapter V of the tender notice disclose that the eligibility criteria for qualification has been prescribed in Clause No.5 and 6. Clause No.9.0 prescribes the parameters of technical evaluation and

weightage of marks under this category is segregated in three categories – financial capacity – experience – machinery and technical capability.

As far as financial capacity is concerned Clause 9.1 prescribed maximum 30 marks and sets out the bidder shall have minimum 5 crores annual turn over. As far as experience is concerned 35 marks are allotted under this criteria and the experience contemplated is of desilting of dams/weirs/reservoirs or sand processing/manufacturing of engineered sand/extraction and separation of river sand by hydro cyclone method for residual water treatment plant for sludge management.

27 We have perused the aforesaid tender conditions which are alleged to be arbitrary and discriminatory. The tender conditions will have to be read in the backdrop of the scope of work covered by the said tender. The tender is for restoration of capacity of dam by removing the silt and sand mixed silt by means of mechanical operations. The project of

desilting is taken by the Government on experimental basis on the five major dams in the State of Maharashtra. The work is aimed at removing the material in form of sand, soil, clay which is brought in the dam along with flowing water and which settles down at the bottom of the dam and results into sedimentation. This is responsible for reduction in the storage capacity of the reservoir/dam and the scope of work of the tender floated by respondent intends to restore its capacity by removing the silt in a mechanized and systematic activity. As per the study conducted by Marine Engineering Research Institute (MERI), Nashik in respect of Ujani Dam of Solapur District in Maharashtra, the total silt + silt with sand is approximated at 238.096 MQM. It is approximated that there is an incremental rise in silt at the rate of 8.81 MQM per year. In the year 2017, the report of MERI estimated the total silt content to be 326.2 MQM (11.52 crore) brass. The report of 2013 of the same institution record that the sand content is 21.30 % in the silt and the silt mixed sand. The scope of the work, therefore, involves dredging. Dredging is an operation of removing the material including mud from the bottom of a

river, canal by using a special machine and relocating it to another place. It involves excavation undertaken by a specialist floating plant known as 'dredger'. Dredging is carried out in many different locations and many different purposes but the main objective is to recover material that has some value or use or to create greater depth of water. It is carried out under water or partially under water and at times, it is carried out in shallow waters or ocean waters. The requirement as per clause 6 of tender document is that the bidder must have experience of desilting of dams/reservoirs in the State of Maharashtra. Objection is raised to the exclusion clause about the experience garnered in marine dredging. Marine dredging no doubt involves removal of sediments and debris from the bottom of the sea and it is a routine necessitated in water vests around the world because sedimentation gradually fills the channels and harbors. By way of dredging, the habitat is restored and it also ensures that there is no shoreline erosion. Further, it also results in removal of sediments which contain pollutants, may be from industrial run off and which affects the water quality. Marine

dredging is the process of removing silt from the floor of any ocean body silt in order to make water easily accessible for ships and other types of vessels. This is mostly focused on maintaining or increasing the depth of navigation channels anchorages or berthing areas to ensure the safe passage of boats and ships. In this type of dredging, there is no focus on disposal of the dredged material and this is why the present work of dredging is distinct. The scope of work in the present tender not only involves removal of the material but it also involves a process of segregating the silt and sand/earth/organic waste by use of Hydro-cyclone method. A hydro-cyclone method is a device to classify, separate or sort particles in liquid separation based on the ratio of their centripetal force to fluid resistance. It is a mechanical device designed to reduce or increase the concentration of dispersed phase, solid, liquid or brass of different density by means of centrifugal forces. The said method ensures complete segregation of the particles of sand and silt. The condition in the tender stipulates that the bidder should have sound technical experience in separation of sand and silt/earth by using hydro-

cyclone method and mandates the bidder to have minimum two years of experience. Maximum weightage of 5 marks is given for fulfilling the said stipulation. The experience of marine dredging is distinct where the said mechanism is not involved. The present project also involves the treatment of residual waters after carrying out the hydro-cyclone process (sludge management) and there is weightage of five marks for the said work. The sand which is a minor mineral obtained after segregating it from silt by the hydro-cyclone method is in its pure form which can be sold by the bidder in the market after paying the royalty. We also do not find substance in the argument advanced by the learned counsel for the petitioner to the effect that since it is a pilot project, there are no bidders in the State of Maharashtra who have the experience of desilting of dams. Perusal of the tender condition no.6 disclose that the bidders can compete if he has experience of desilting not only of dams but of reservoirs in the State of Maharashtra. The doubt raised about the experience of five years in similar works as contained in clause 6 and the allegation that it is vague, in our opinion, is also not correct. Clause no.6 requires an

experience of desilting of dams/reservoirs in State of Maharashtra or an experience of sand processing, manufacturing of engineer sand/extraction and separation of river sand by hydro-cyclone method with the residual water treatment plant for sludge treatment and the bidder, according to the tender condition, should possess five years experience in such type of work.

The terms and conditions of the bid documents are, therefore, plain and clear and do not create any confusion. The words used in the tender documents cannot be ignored or treated as redundant and they must be accorded their meaning and necessary significance. The tender inviting authority is the best person to understand and appreciate its requirement. We do not think that we possess a technical expertise to understand and appreciate the requirements of this authority. When the scope of work evolved by the tender do not restrict itself only to dredging but it also extends to separation of the sand from the silt by applying hydro-cyclone method with residual water treatment plant for sludge management and the tender document mandates the bidder to comply with the said

requirements, we do not think it is possible for us to interpret the terms to extend any relaxation of these conditions.

28 If we understand the scope of the work, then the subsequent requirement of the salvaging technology also finds its proper place in the tender document. The salvaging technology is a mechanism to manage to rescue something something from being lost or being damaged, especially from a ship that is sunk or being damaged. When the dredger and the machinery is going to be used under water, the knowledge of salvaging technology is a must and the respondents have categorically stated in the affidavit that the Company must have salvaging experience of 7 years. The tender condition also requires a bidder to have the barge building capacity with its own ship-yard facility with the necessary permission and work force in the State of Maharashtra. This stipulation is necessitated on account of the fact that the ship-yard facility will ensure the repairing and maintenance of the equipments to be deployed for carrying out the tender work. Another stipulation in the tender involves the services of a

Hydrographer. Hydrography is the branch of applied science which deals with the surveying and charting bodies of water with its measurement and description of physical features of oceans, sea, lakes, rivers etc. It is helpful for predicting the change of the course of these water bodies overtime, for the primary purpose of safety of navigation. The stipulation in the tender notice that the company must have Hydrographer services of an Ex-Navy personnel possessing the necessary qualification in Hydrography, therefore, cannot be said to be out of place in the whole scheme of the scope of work. The stipulation of slurry pump with the prescribed output capacity at par with cutter section dredgers to ensure the pumping of the liquid containing solid particles and by which sludge is thrown out. It is pertinent to note that it is permissible for the bidder to ensure the compliance either in-house or at the most, with two technical partners having registered office in Maharashtra State with MOU and even the MOU for technical partners before submission of bid is permissible. These terms and conditions of the tender ensure the end result which is sought to be achieved by the State Government and if the focal

point is enhancing the capacity and potential of the dams, what are the stipulations by which this can be ensured has been determined by an expert body. The right to specify these stipulations and conditions by the expert agencies cannot be said to be arbitrary and this Court cannot arrogate the power of the executive. The focus of the State Government in implementing the pilot project is to ensure maximum utilization of the five major dams in the State and it also involves an overwhelming public interest since the water from these dams is a need of the future. The eligibility criteria for qualification cannot be said to demonstrate a pick and choose policy as it is made applicable to every bidder who intends to enter into a contractual relationship with the State Government with the avowed purpose of restoration of the capacity of the dam. The condition of exclusion of joint venture and not permitting such joint venture in assessing a financial capacity of a bidder is also sought to be explained by the respondents to the effect that the bidder is expected to have minimum of five crores annual turnover and it is expected that the huge project which is being undertaken by

the bidder ensures a minimum annual turnover of five crores but it is clarified in clause 9.3.6 that for compliances of the technical capacities, partnership is allowed. We do not find any stipulations in the said tender to be tailor-made as is sought to be canvassed by the learned counsel for the petitioners.

29 All the writ petitions point a finger towards Mahalaxmi Enterprises but the petitions lack in specific pleadings to demonstrate that it is only Mahalaxmi Enterprises which would be held eligible. Shri Anturkar has placed on record before us a chart showing the bids received for restoration of storage capacity of Ujani Dam. The petitioner in Writ Petition No.1466 of 2019 had submitted a bid for the Ujani Dam work whereas the petitioner in Writ Petition No.1612 of 2019 has submitted a bid for Jaikwadi Mula and Girnar Dam. The noting in the said bid sheet discloses that this petitioner has submitted the off-line bid in terms of Court direction but has not submitted the financial cover in terms of the tender condition in two projects viz. Jayakawadi & Mula.

There is no bid for Ujani Dam which itself would disqualify the bidder. As far as the other two petitioners are concerned, M/s.Pratik Enterprises, petitioner in Writ Petition No.1453/19 and Shri Ragunath Anand Nagane in WP 1455 of 2019 have not submitted their bids. We have noted that none of the petitioners have been ousted on the ground that it do not have a desired experience in the State of Maharashtra. Dharti Dredging and Infrastructure Limited, petitioner in (WP No.1466 of 2019) is having its registered office in State of Maharashtra but according to the petition, the experience of the petitioner is limited to Marine projects. The petitioner Asha Under-Water Services Pvt.Ltd is having its registered office in the State of Maharashtra and it is engaged in the business of Dredging and excavation including sediment removal but do not possess the experience of desilting of dams/reservoirs or the experience of sand processing/manufacturing of engineered sand by hydro-cyclone method. Since none of the petitioners are affected by the condition of joint venture, we are not inclined to deal with the said issue for academic purpose. As per the chart produced by Shri

Anturkar, the petitioners in two Writ Petitions have not submitted the financial bid and the other two petitioners, except Dharti Dredging have not even submitted their bid nor did they participate in the pre-bid meeting. In such circumstances, the challenge to the various tender conditions only on an apprehension that the condition would hit them and elude them from participating in the tender process cannot be a ground for our interference in the conditions of tender. Once we have concluded that the experience of marine dredging is distinct from the present scope of work, we are not inclined to interfere in the tender conditions at the instance of the present petitioners.

30 We have noted that the State Government is implementing this project as a pilot project and this is necessarily on an experimental basis. When it is experimenting, in our opinion, it should be given more latitude and let the State learn by its own experience before implementing the said project in respect of the other dams/reservoirs within its jurisdiction. Though we are not

satisfied with the explanation offered by the learned senior counsel Shri Anturkar, in insisting on the experience of dredging/desilting only in the State of Maharashtra, we do not feel that any of the petitioners possess the desired experience outside the State of Maharashtra and they have been deprived. The State of Maharashtra has devised the terms and conditions of the tender by taking into consideration the work which it contemplated and therefore, it prescribed the necessary machinery and the capability criteria for the participant to comply with. The scope for our interference in the terms and conditions which involve a technical eye is limited. The terms and conditions of the tender are not open to judicial scrutiny unless and until they are arbitrary or discriminatory. The State, in our opinion, should be given the liberty to decide what it expects to do and it is not the case of the petitioner before us that the terms are selectively applied. The bidders expertise and technical capabilities must be best left to be assessed by the experts. The Government must have freedom for stipulating the terms corresponding to the nature of work in relation to which it intends to enter into a contract and in

the words of the Hon'ble Apex Court in case of ***Tata Cellular*** (supra) “a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or *actuated by mala fides*”.

31 In such circumstances, when the petitioners are not able to establish that the decision of the authority is malafide, we are not inclined to interfere and even if there is some defect in the decision making process, we leave it to the discretion of the respondent authorities to determine as to what technical capability it contemplates and our intervention, is clearly unwarranted. The necessary sequitur is that the challenge in all the writ petitions to the policy and the Tender Notice must fail as we are not inclined to entertain the writ petitions for the reasons recorded above and accordingly, dismiss the same. No order as to costs.

(SMT.BHARATI H. DANGRE, J.)

(RANJIT MORE, J.)

At this stage, Mr. Shah, learned counsel for the petitioner pray for the continuation of the order dated 6th February 2019. Since we have given detailed reasons for dismissal of the Writ Petitions and the work under the impugned tender will have to be commenced well in advance, before the monsoon, we are not inclined to continue the ad-interim relief. Request for continuation of the same is therefore, rejected.

(SMT.BHARATI H. DANGRE, J.)

(RANJIT MORE, J.)