IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4775 OF 2020

Jalgaon Golden Transport Pvt. Ltd.,
Jalgaon, (a company registered under
the Companies Act, 1956)
Through its director,
Sachin Radheshyam Vyas, Age : 31,
Occu: Business, R/o: 41, Nutan Varsh
Colony, Mohadi Road, Dist: Jalgaon. …Petitioner

Versus

1 The Union of India,
Through its Secretary,
Ministry of Consumer Affairs,
Food and Public Distribution,
New Delhi.

2. The Food Corporation Of India,
(Through its General Manager),
Maharashtra Region, FCI
building, 5th and 6th Floor,
Rajendra Nagar, Datta Pada
Road, Borivali (East).

3. Technical Evaluation Committee,
(Through its Chairman and
Asstt. General Manager, FCI,
Maharashtra Regional Office, FCI
building, 5th and 6th Floor,
Rajendra Nagar, Datta Pada
Road, Borivali (East).

4. Maharashtra State
Warehousing Corporation,
Through its Managing Director, 583-B,
Market Yard, Gultekdi Pune – 37.

5. Asst. General Manager, (Cantt.)
Regional Office, FCI Maharashtra
Regional Office, FCI building,
5th and 6th Floor,
Rajendra Nagar, Datta Pada
Road, Borivali (East).

6. Sevakram S/o Parasaram
Jaisinghania, Age : Major,
Occu: Business, R/o : Station Road,
Dondaicha, Dist: Dhule.

7. Vishal s/o Mohan Navale,
Age : Major, Occ: Business
R/o: Kunal Concentration,
Opposite Society Petrol Pump,
Malegaon Rd, Dist: Dhule.

8. S.K. Translines Pvt. Ltd.
Through its proprietor
Mr.Hemant Kantilal Kothari,
Age: Major; Occ.: Business,
R/o: First floor, 17-19,
Suresh Dada Jain complex,
Ajanta Road, Dist.: Jalgaon. …Respondents

Ms Pradnya Talekar, Advocate for petitioner
Mr A.G. Talhar, Assistant Solicitor General for respondent No.1
Mr Milind Patil, Advocate for respondent Nos. 2, 3 and 5
Mr Avinash Irpatgire, Advocate for respondent No. 4
Mr Milind M. Joshi, Advocate for respondent No. 6
Respondent Nos. 7 and 8 absent

CORAM : S. V. GANGAPURWALA
AND
SHRIKANT D. KULKARNI, JJ.

DATE : 30th JULY, 2020

ORAL JUDGMENT: (PER SHRIKANT D. KULKARNI, J.)

1. Rule. Rule made returnable forthwith. The petition is taken

up for final disposal at admission stage with the consent of the parties.

2. The petitioner, who had participated in a tender process for appointment of Handling and Transport contractor at MSWC, Dondaicha (Wani and Rami Road) for a period of two years issued by the respondent No. 2, whereby his technical bid came to be rejected and same is challenged in the present petition by invoking Article 226 of the Constitution of India.

The factual matrix is as under :-

3. The tender notice was published on 07.05.2020 inviting online tenders from the tenderers for appointment of Handling and Transport contractor at MSWC, Dondaicha (Wani and Rami Road) for a period of two years issued by the Food Corporation of India/respondent No. 2. The last date for submission of tender was 30.05.2020 and tenders were to be opened on 01.06.2020. The estimated value of the contract was Rs. 10,00,00,000/-. The earnest money of Rs. 20,00,000/- and security deposit of Rs. 50,00,000/- was required to be deposited with further clause to furnish bank guarantee to the tune of Rs. 1,00,00,000/- .

4. The qualification conditions were mentioned in clause 03 of the tender document. The tender notice further stipulated certain

documents to be submitted by the bidders along with technical bid in respect of Employees Provident Fund returns. However, fresh tenderers were permitted to submit an undertaking that he is a fresh tenderer and EPF code is not applicable to him and he would obtain EPF code if tender is awarded to him and will not default in payment of EPF liabilities. Further clause 09 of the tender notice stipulates the prospective tenderers to submit proof of ESI code number for H & T contracts, whereas clause 10 of the tender notice required the contractors to give an undertaking agreeing to abide by section 11 of the Carriage by Road Act, 2007 and compensate the loss as per the provisions of the tender.

5. According to the petitioner, he had participated in the tender process. There were 11 bidders at the time of technical bid. The technical bids were opened on 01.06.2020. The petitioner raised an objection with regard to the eligibility of 5 bidders namely, A.K. Madan, P.C. Pirot, M/s Ravindra Narayan Chaudhari, S.P. Singhania and Mr Vishal Navale.

6. The technical bid of the petitioner came to be rejected on 10.06.2020 on the ground of insufficient experience. Whereas 5 bidders were approved at technical bid. On the very day, the petitioner has explained his experience as being more than what is required under tender conditions and requested to reconsider his

disqualification. On 12.06.2020, respondent No. 2 rejected the representation by stating that petitioner did not meet the eligibility criteria on the grounds other than experience as well. On 10.06.2020, respondent No. 2 opened the financial bids of the qualified tenderers and declared S.P. Singhania/respondent No. 6 as the lowest tenderer, who had quoted 36% more than the SOR, without considering request of the petitioner to reconsider his application, who had quoted 25 % above the SOR.

7. It is contended by the petitioner that rejection of his technical bid at the hands of respondent No. 2 is arbitrary, discriminatory, unjust and violative of Article 14 of the Constitution of India. The petitioner was satisfying all the eligibility conditions and criteria and he has quoted lowest rate, even then, he has been disqualified only to favour respondent No. 6 at the cost of the public interest. According to the petitioner, awarding tender to respondent No. 6, who had quoted 36 % more than SOR ,would cause loss of Rs. 70-75 lakhs to the public exchequer. Therefore, the petitioner has prayed to quash the impugned decision/order rejecting his technical bid coupled with the other prayers.

8. We have heard Ms Pradnya Talekar, Advocate for petitioner, Mr A.G. Talhar, Assistant Solicitor General for respondent No.1, Mr Milind Patil, Advocate for respondent Nos. 2, 3 and 5, Mr

Avinash Irpatgire, Advocate for respondent No. 4, and Mr Milind M. Joshi, Advocate for respondent No. 6.

9. We have perused notes of argument submitted by Ms Talekar, learned Counsel for the petitioner and studied the tender notice with its appendix.

10. Respondent Nos. 7 and 8, who were in the race at the time of financial bid, remained absent at the time of hearing of the petition, though both were duly served as per service affidavit produced by the petitioner. We have gone through the reply affidavit sworn on behalf of respondent No. 2 by the Asstt. General Manager, Food Corporation of India and rejoinder submitted by the petitioner.

11. Ms Talekar, learned advocate for the petitioner vehemently argued that the petitioner is eligible under all terms and conditions of the tender. She submitted that rejection of technical bid of the petitioner on the ground of insufficient experience is contrary to the record and documents submitted by the petitioner. As per the record and documents furnished by the petitioner, he had completed the work nearly Rs.2,70,00,000/- per single contract for respondent No. 4 – Corporation. The petitioner has more than enough experience in the subject field.

12. Ms Talekar, learned Counsel further argued that remaining three reasons for rejection of technical bid of the petitioner viz. Non-supply of EPF documentation, ESI Code and Registration under the Carriage by Road Act, 2007 are hyper technical and misconceived. Clause of furnishing EPF documentation does not apply to the petitioner since it is covered under exception clause 8 (c) of the tender and respondent No. 2 was aware about the same since the petitioner had submitted undertaking to that effect.

13. The clause for furnishing of ESI code even does not apply to the petitioner since the petitioner is registered with Mathadi and Unprotected Workers Board, Jalgaon under the Maharashtra Manual Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969, and is not required to individually generate ESI code or comply with its mandate, which is undertaken by the Board on its behalf. Even otherwise, the undertaking regarding compliance about the same in case found necessary is also submitted by the petitioner. According to Ms Talekar, the reason regarding non-submission of registration under the Carriage by Road Act, 2007 is concerned, the phrase used in clause 10 of the tender notice is “contractor” and not “bidder”, and therefore, the petitioner cannot be disqualified on this count. According to Ms Talekar, the disqualification of the petitioner appears to be premeditated and

only as a ploy, since all the undertakings showing the inapplicability of the reasons mentioned therein were fully known to respondent No. 2. It is contended by Ms Talekar that respondent No. 2 has wrongly approved bid of S.K. Translines/respondent No.8 despite being disqualified as per clause 4(3) of the tender notice. Ms Talekar, learned counsel submitted that the petitioner-company is one of the leading contractors of Handling, and Transport of food grains, chemicals and fertilizers, cement etc. in the State of Maharashtra and acquired good reputation.

14. She submitted that petitioner has quoted lowest rate of 25% above SOR being 11% lower than the presently declared bidder who quoted 36% above SOR. The decision to reject the technical bid of the petitioner would cause substantial loss to the public exchequer ranging from Rs. 70-80 lakhs.

15. Ms Talekar, learned counsel submitted that the petitioner had participated in the tender process initiated by Food Corporation of India in the year 2008. The petitioner was held eligible in technical scrutiny on the basis of same set of documents, which are produced in the present tender process. Mere repetition of a term in a small fond, would not make it either mandatory or directory. The petitioner had legitimate expectation from Food Corporation of India that it would not insist upon documents related to ESI, EPF and

Registration under Road by Carriage Act, 2007. Those documents are otherwise very simple to procure but due to COVID-19 pandemic, it was not possible for the petitioner to secure the same. Even otherwise, those documents cannot be termed as essential or mandatory as per the tender notice. According to Ms Talekar, by looking to the volume of contract, public interest shall not be sacrificed to favour respondent No. 6, who has been declared as successful bidder.

16. Ms Talekar, learned Counsel for the petitioner has placed reliance on following stock of citations in support of her argument :

(i) *BSN Joshi and Sons Ltd. v. Nair Coal Services Ltd. reported in (2006) 11 SCC 548.*

(ii) *Kanhaiya Lal Agarwal v. Union of India reported in (2002) 6 SCC 315.*

(iii) *G J Fernandez v. State of Karnataka reported in 1990 (2) SCC 488.*

(iv) *New Horizon Ltd. And Anr. v. Union of India reported in 1995 (1) SCC 478.*

(v) *Maa Binda Express Carrier and Anr. v. North East Frontier Railway and Ors. reported in 2014 (3) SCC 760.*

(vi) *Meerut Development authority v. Association of Management Studies and Anr. reported in 2009 (6) SCC 171.*

(vii) *Utpal Kumar Basu and Ors. v. Oil and Natural Gas Commission reported in (1994) 1 Cal LJ 448.*

(viii) *State of Uttar Pradesh and Anr. Vs. Santosh Kumar Mishra and Anr. (2010) 9 SCC 52.*

(ix) *Atlas Transport Company Vs. State of Maharashtra and Ors. 2004 (3) Mh.L.J. 809.*

17. By taking help of above said citations, Ms Talekar submitted that the tender process must be tested on the background of Article 14 of the Constitution of India. The bidder has an enforceable right to be treated equally in a tender process. The Government cannot act in a manner to benefit a private party at the cost of the State.

18. Ms Talekar submitted that respondent No. 2 has disqualified the petitioner at the time of technical bid on flimsy grounds. The petitioner is eligible contractor to participate in the tender process since he satisfied all the terms and conditions of the tender. It is a fit case to invoke Article 226 of the Constitution of India by way of judicial review.

<u>Submission of learned Counsel for respondent Nos. 2, 3 and 5.</u>

19. To combat the argument, Mr Milind Patil, learned Counsel for respondent Nos. 2, 3 and 5 submitted that the Food Corporation of India has appointed Technical Evaluation Committee to scrutinize the documents and papers of the bidders. On examining the documents and papers submitted by the petitioner, the Technical Evaluation Committee found that the petitioner-company did not satisfy the terms and conditions of a tender process. Mr Milind Patil,

learned Counsel invited our attention to the communication addressed to the petitioner dated 12.06.2020 and pointed out that the grievances made by the petitioner were considered by the Food Corporation of India. The Food Corporation of India, through its Asstt. General Manager (CONT.) for General Manager (Maha.) has given the detailed reasons on which the petitioner-company came to be disqualified. The petitioner-company did not satisfy certain clauses of the tender document. The technical evaluation process has been done strictly in accordance with the MTF terms and conditions.

20. Mr Milind Patil submitted that though the petitioner had participated in the tender process of 2018, and he was held eligible in that tender process, cannot give legal right to the petitioner to declare him eligible in this process. According to Mr Patil, the tender process of 2018 and tender process of 2020 are distinct and different. The terms and conditions for tender process of the year 2020 are different than the tender process of 2018. As such, no more weightage can be attributed to the argument advanced by the learned counsel for the petitioner in this regard.

21. According to Mr Patil, learned Counsel, the petitioner was disqualified on four grounds and not alone ground of insufficient experience. The documents which are required to be submitted as

per clause 3 of the tender, those are essential documents and petitioner ought to have produced those documents while participating in the tender process. Respondent No. 2 cannot be blamed for those lapses. Mr Patil submitted that award of contract is a commercial transaction and the scope for judicial review is very narrow. It is not a fit case to invoke writ jurisdiction. No *mala fides* are brought on record by the petitioner. No case of arbitrariness or abuse of power is made out. The tender cannot be awarded only because it is lowest in the competition. The ability and competency to complete the work also plays an important role, and therefore, plea raised by the petitioner that his tender was at lowest side needs to be accepted, which may save public exchequer money when he does not satisfy the mandatory requirement as per tender notice.

22. To support the argument, Mr Milind Patil, learned Counsel for respondent Nos. 2, 3 and 5 has relied upon following citations :

(i) *Glodyne Technoserve Ltd. Vs. State of M.P. and Ors. reported in 2011 DGLS (SC) 298.*

(ii) *Decision of this Court in writ petition No. 13244/2018 dated 20th December, 2018 (Aurangabad Bench).*

(iii) *Global Energy Ltd Vs. Adani Exports Limited reported in 2005 DGLS (SC) 421 SC.*

(iv) *Reliance infrastructure Ltd. and Ors. Vs. Maharashtra State Road Development Corporation Ltd. and Ors. reported in 2011 (3) Bom.C.R. 349 (Bombay High Court).*

Submission of learned Counsel for respondent No. 6

23. Mr Milind Joshi, learned Counsel for respondent No. 6 echoed the argument advanced by Mr Milind Patil, learned Counsel for respondent Nos. 2, 3 and 5.

24. We have considered the arguments advanced by learned Counsel for respective sides. We have also studied the citations of the Apex Court and this Court as well.

25. We have carefully gone through the tender notice issued by the Food Corporation of India inviting online tenders. The relevant portion is as under :-

> *Tenders are invited online under "TWO BID SYSTEM" at Central Public Procurement Portal (URL https://eprocure.gov.in/eprocure/app) as per conditions prescribed in the tender form for appointment of Handling & Transport Contractor at MSWC Dondaicha (Wani & Rami Road).*

26. Now, turning back to the controversial issue regarding rejection of technical bid of the petitioner, it can be gathered from the communication addressed to the petitioner dated 12.06.2020 vide Exhibit-B on what ground, technical bid of the petitioner came to be turned down. The petitioner/M/s. Jalgaon Golden Transport Pvt. Ltd.

has been disqualified at technical bid round on following grounds :-

1) Insufficient Experience as per the minimum criteria required under Point no. 3 of MTF terms and conditions.
2) EPF code and related documents not furnished.
3) Proof of ESI code not furnished.
4) RTO Registration w.r.t. Carriage by Road Act, 2007 not produced.

27. A tender notice may contain several terms and conditions, some of which are essential whereas others may be ancillary. A condition which is essential or a condition of eligibility cannot be waived and has to be complied with. But the same is not true about conditions or terms which are ancillary or subsidiary to the main object.

Legal position

28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision and not its soundness. Phrases differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional

separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

29. The position of law has been succinctly summed up in case of ***Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651,*** wherein it is held by the Hon'ble Supreme Court in para No. 77 which reads thus -

> *“77. ...Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :*
>
> *(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
> *(ii) Irrationality, namely, Wednesbury unreasonableness.*
> *(iii) Procedural impropriety.”*

30. In the case of ***Jagdish Mandal Vs. State of Orissa***

reported in (2007) 14 SCC 517, the Hon'ble Supreme Court has held in para 22 which reads thus :

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

31. In the case of ***Tejas Constructions & Infrastructure (P)***

Ltd. v. Municipal Council, Sendhwa reported in (2012) 6 SCC 464, *the Hon'ble Supreme Court has held in para 7 which reads thus :*

> *"7. ...The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. … Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it 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 intervene."*

32. Now, turning back to the grounds on which the petitioner has been disqualified at the round of technical bid are as under :

1) Insufficient Experience as per the minimum criteria required under Point no. 3 of MTF terms and conditions.
2) EPF code and related documents not furnished.
3) Proof of ESI code not furnished.
4) RTO Registration w.r.t. Carriage by Road Act, 2007 not produced.

33. If the above said grounds are considered in the background of terms and conditions of the tender notice, it would be very much clear that above said 4 conditions on which petitioner has been disqualified are essential and mandatory conditions to participate in the tender process. Experience is important in every tender to award the tender. It is evident from the reply-affidavit that respondent No. 2/Asstt. General Manager, Food Corporation of India has explained about the essential condition of experience in detail, how it is assessed and calculated. The petitioner was not having sufficient experience as per requirement of the tender notice, and as such, he was held to be ineligible on the ground of work experience. Experience letters which were submitted by the petitioner with his bid, were two different certificates issued by two different authorities. The individual experience certificate submitted with the different

documents by the petitioner were indicating that the experience under those two certificates i.e. Jalgaon H-14 and for Kirti Publisher Private Limited were under two different contracts whereas required experience under single contract to qualify. Accordingly, the experience at both said centers were considered as under different and separate work experience. The petitioner is now attempting to demonstrate that various experience certificates of both the works are in one contract. The certificates produced with the writ petition were not produced at the time technical bids were opened.

34. Now, coming to another ground for disqualification of the petitioner, which relates to EPF Code and ESI Code documents not furnished, and proof of ESI Code not furnished.

35. Ms Talekar, learned Counsel for the petitioner submitted that labourers for the subject work are to be engaged from Mathadi Board constituted under the Maharashtra Mathadi Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969, and the experience certificate is not granted to the contractors till the payment in full is made to the Mathadi Boards including EPF and ESI elements of payment. The Board is then responsible for making individual payments to the labourers. The petitioner is registered as an employer under the Jalgaon Mathadi Board, and therefore, undertaking was submitted by the petitioner in that regard to the

Food Corporation of India. She further submitted that clause No. 09 of the tender notice was not applicable to the bidders but only prospective tenderers requiring them to submit the ESI Code. The petitioner being a registered employer under the Mathadi and unprotected Labour Board, Jalgaon, the ESI Code is not required separately for the petitioner. She further submitted that said condition is a directory and not mandatory requirement since the insurance to be paid to the labourers is undertaken by the Mathadi Board engaged by the transport and handling contractors. On perusing the tender notice, clause Nos. 08 and 09, it nowhere provides about relaxation in case of registration of an employer/contractor with the Mathadi Board. The other tenderers have produced the EPF Code.

36. Now, coming to third ground of disqualification proof of ESI Code not furnished. In absence of any clear relaxation clause in the tender notice, it is difficult to accept the submissions of Ms Talekar, learned counsel for the petitioner.

37. Now, coming to last ground for disqualification, R.T.O. Registration with w.r.t. Carriage by Road Act, 2007, according to Ms Talekar, in pursuance of clause of tender notice, undertaking for compliance of section 11, the Carriage by Road Act, 2007 and liability to compensate has been given.

38. It is pointed out in the reply-affidavit that for a bidder expecting Rake Movement contract, registration under the Carriage By Road Act, 2007 is presumed requirement. The petitioner was not registered under Rule 5 of the said Act, and as such, he should not have participated in the bid. The plea of the petitioner that he is free to register under Carriage by Road Act, 2007 only after acceptance of his tender, is misconceived and illogical. It is evident that registration under the Carriage by Road Act, 2007 for Rake Movement contract is mandatory and contentions raised by the petitioner to that effect cannot be accepted.

39. As per the tender notice dated 07.05.2020, the petitioner was required to comply with above said four clauses in a strict sense. The petitioner is now seeking some relaxation in those clauses to satisfy those requirements, which cannot be taken into consideration. Giving relaxation to some of the terms and conditions of the tender notice would amount to rewriting and redefining the terms and conditions of the tender notice, which is not permissible under the Contract Act. This exercise of giving relaxation in respect of the above referred four clauses cannot be made. If this attempt is made, it may give rise to rewriting the terms and conditions of the tender notice and same is not permissible in the eyes of law. The Division Bench of this Court *(to which one of us Justice S.V.*

Gangapurwala was a party) in ***M/s Yogiraj Powertech Pvt. Ltd. Vs. State of Maharashtra and others reported in 2019 SCC Online Bom 5800*** held that essential conditions cannot be relaxed/deviated from rejection of bid for non-compliance with essential conditions held valid.

40. In case of ***Kanhaiya Lal Agrawal Vs. Union of India and others reported in (2002) 6 Supreme Court cases 315,*** it is held by Hon’ble Supreme Court as under :-

> *When an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term.*

41. In case of ***G.J. Fernandez Vs. State of Karnataka and others reported in (1990) 2 SCC 488,*** it is held by the Hon'ble Supreme Court as under :-

> *As per tender conditions, minimum qualifying requirements in intending tenderers and information and documents to be furnished by them prescribed by inviting tenders should be observed by the instrumentalities of the State equally in cases of all the intending tenderers. However, sufficiency of information/document supplied or effect delay in supply or non-supply thereof to be determined by the instrumentalities of the State. Any non-conformity with or relaxation in the prescribed standard allowed in case of any intending tenderers if not resulting in substantial*

prejudice or injustice to any of the parties or to public interest general, would not be bad.

42. In case of ***New Horizons Limited and Another Vs. Union of India and others reported in (1995) 1 SCC 478,*** it is held by the Hon'ble Supreme Court as under :-

> In the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection.

43. In case of ***Maa Binda Express Carrier and Another Vs. North-East Frontier Railway an others reported in (2014) 3 SCC 760,*** it is held by the Hon'ble Supreme Court as under :-

> *The power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for*

execution of works on behalf of the Government. All that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderers or class of tenderers.

44. In case of ***Meerut Development Authority Vs. Association of Management Studies and Another reported in (2009) 6 SCC 171,*** it is held by the Hon'ble Supreme Court as under :-

A tender is an offer. It is something which invites and is communicated to notify acceptance. It must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available I cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to *insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.*

It is so well settled in law and needs no restatement, that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.

45. In case of ***Utpal Kumar Basu & Anr. Vs. Oil & Natural Gas Commission & Ors. reported in 1993 SCC Online Cal 323,*** it is held by the Hon'ble Supreme Court as under :-

While interpreting terms of the contract if there is a manifest error of law apparent on the face of the order, the writ Court is entitled to interfere in exercise of his jurisdiction.

46. The judgment in case of ***State of Uttar Pradesh and Another Vs. Santosh Kumar Mishra and Another reported in (2010) 9 SCC 52,*** is on the point of service law and interpretation of service rules and as such, not any way helpful to the petitioner.

47. In case of ***Atlas Transport Company Vs. State of***

Maharashtra and Ors. reported in 2004 (3) Mh.L.J. 809, it is held by the Division Bench of this Court as under :-

> *The role model of governance requires that the action of an administrator should not only be fair, impartial, rational, reasonable and in the larger public interest, but also appear to be same so as to avoid arbitrariness.*
>
> *In the said decision, it is observed by the Division Bench of this Court that the decision of the Hon'ble Minister was based upon various extraneous and irrelevant considerations, and therefore, the Court was pleased to interfere in the tender process.*

48. It would be useful to refer the citation in case of ***BSN Joshi and Sons Ltd. v. Nair Coal Services Ltd. Reported in (2006) 11 SCC 548*** relied upon by Ms Talekar, learned counsel for the petitioner, wherein it is observed by the Hon'ble Supreme Court as under :-

> *"(i) if there are essential conditions, the same must be adhered to;*
>
> *(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;*
>
> *(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;*
>
> *(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation*

of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;...”

49. In case of ***K.K. Vidyut Vs. The Union of India reported in 2016 (6) ALLMR*** relied upon by Ms Talekar, learned counsel for the petitioner. It is held by the Hon’ble Supreme Court as under :-

14. The law with regard to interference by this Court in contractual matters is very well crystallized in the case of Tata Cellular v. Union of India, reported in MANU /SC/ 0002/ 1996 MANU/SC/0002/1996 : (1994) 6 SCC 651. Paragraph 77 of the said judgment reads thus,

"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?

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. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power

and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind 28, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

It could thus be seen that the scope of judicial interference in contractual matters is very limited. Unless the Court comes to a conclusion that the decision maker has not understood the law correctly that regulates his decision-making power it or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of 'Wednesbury Unreasonableness' or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for this Court to interfere in the decision-making process. It is also equally well settled that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision making process. In the present case, we find that the respondents had rightly taking into consideration, sub-clauses (c) and (e) of Clause 6 have found that the petitioner had failed to submit the necessary documents and, therefore, rightly rejected its technical bid. The decision of the respondents also cannot be said to be vitiated on the ground of mala fide action, inasmuch as even after rejection of the bid of the petitioner and one another bidder, there were six bidders in the fray.

50. In a recent decision of the Hon'ble Supreme Court in a case of ***The Bharat Cooking Coal Ltd. & Ors. Vs. AMR Dev Prabha & Ors. Civil Appeal No. 2197 of 2020 (Arising out of Special Leave Petition (C) No. 11915 of 2018)*** wherein, it is held as under :-

> *11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition.* ***If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction.*** *It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers. (emphasis supplied).*

51. Having regard to the study of various decisions of the Hon'ble Supreme Court and this Court (supra), it is clear that scope of judicial review is very much limited in matters relating to award of contracts by the State and its instrumentalities. Thus, from the judgments supra, it is clear that the scope of judicial review is very limited in matters relating to award of contracts by the State and its instrumentalities. Judicial review is not an appeal from the decision, the court cannot substitute its own decision and the court is hardly equipped to do so, it would not be desirable either. It is not the function of the Court to act as a super-board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the

administrator. Unless the court comes to a conclusion that the decision maker has not understood the law correctly that regulates his decision making power or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of 'Wednesbury Unreasonableness' or unless it is found that there has been a procedural impropriety in the decision making process, it would not be permissible for court to interfere in the decision making process.

52. It is also equally well settled law that it is permissible for the Court to examine only the correctness of the decision making process and not the validity of the decision. Even when some defect is found in the decision making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely for making out a legal point. The court should always keep the larger public interest in mind in order to decide whether intervention is called for or not. Only when its comes to a conclusion that overwhelming public interest requires interference, the court should intervene. When the Government or the authorities concerned, after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere. Ordinarily soundness of the decision ought not be questioned but the decision

making process certainly be subject to judicial review.

53. The award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. The party issuing the tender can fix the value and its own terms of invitation to tender and has the right to punctiliously and rigidly enforce the terms of the tender. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. The Court cannot make distinction between essential and non essential terms contrary to the intention of the tender issuing authority and thereby rewrite the arrangement. The terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers.

54. The authority, publishing the tender is bound to adhere to the essential terms, norms, standards and procedures laid down by it and cannot depart or deviate from the arbitrarily much less by giving relaxation. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some. The tender issuing authority could deviate from the terms and conditions of the tender if the changes affect all

intending applicants alike and were not objectionable and so long as the 'level playing field' is maintained and it does not result in any arbitrariness or discrimination. The authority is also free to grant any relaxation, for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

55. Submission of a tender in response to a notice is nothing more than that of making an offer. The State of its agencies are under no obligation to accept and the bidders participating in the tender process cannot insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon the contract. All that the participants bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Where selection or rejection is arbitrary, certainly the court would interfere.

56. In the present case, the petitioner had participated in the tender process by submitting tender. After the petitioner’s technical bid came to be rejected, it is now raising objection about certain clauses and stretching far to the extent of saying that those are just directory and not mandatory. It is not permissible. The petitioner cannot raise such grievances at a very late stage when he has been disqualified at technical bid round.

57. Having regard to the above reasons and discussion, we do not find any merit in the claim of the petitioner in absence of any material on record, to demonstrate that impugned decision is arbitrary or *mala fide* or irrational, we are of the candid view, not to interfere in the present matter.

58. It is needless to say that the petition is liable to be dismissed.

59. The writ petition stands dismissed.

60. Rule is discharged. No order as to costs.

[SHRIKANT D. KULKARNI, J.] **[S.V. GANGAPURWALA, J.]**

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