

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5085 OF 2021

V. S. Sales Corporation
through its Proprietor
Pritesh Balkishan Totla .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Sanjeev B. Deshpande, Advocate for the Petitioner.
Shri P. K. Lakhotiya, A.G.P. for the Respondent No. 1.
Shri A. M. Gaikwad, Advocate for the Respondent No. 2.
Shri P. D. Bachate, Advocate for the Respondent No. 3.

AND

WRIT PETITION NO. 5144 OF 2021

V. S. Sales Corporation
through its Proprietor
Pritesh Balkishan Totla .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Sanjeev B. Deshpande, Advocate for the Petitioner.
Shri P. K. Lakhotiya, A.G.P. for the Respondent No. 1.
Shri A. M. Gaikwad, Advocate for the Respondent No. 2.
Shri P. D. Bachate, Advocate for the Respondent No. 3.

**CORAM : S. V. GANGAPURWALA AND
R. N. LADDHA, JJ.**

DATE : 02ND AUGUST, 2021.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

. Both these writ petitions are based on similar set of facts

and involve same issue. To avoid rigmarole, both these writ petitions are decided by common this judgment.

2. The facts are taken from Writ Petition No. 5144 of 2021.

3. The petitioner assails the rejection of his technical bid in the tender process and allotment of tender to the respondent No. 3.

4. Mr. Deshpande, the learned advocate for the petitioner contends that, the technical bid of the petitioner is rejected on frivolous grounds. The same is rejected on the ground that the petitioner has not submitted the work completion certificate. The condition was that during the last five years bidder should have executed at-least single order equal to 25% of value of the tendered item. The channel partner of the petitioner had completed the work. The petitioner had placed on record the minutes of meeting between the channel partner of the petitioner M/s Reva Industries Ltd. and M/s B.H.E.L. There was no reason to discard said document. No particular form was required to be submitted. The rejection of the technical bid of the petitioner is erroneous.

5. The learned advocate further submits that, every attempt has been made to favour present respondent No. 3 by the respondent No. 2. The respondent No. 3 was blacklisted as on the last date of submission of the bid. The blacklisting was lifted only from 31.01.2001. The last date for submission of the bid

was 18.11.2020. On the said date the respondent No. 3 was already blacklisted. In spite of the fact that, the respondent No. 3 was blacklisted as on the last date of submission of the bid, the respondent No. 2 accepted the tender of the respondent No. 3. The respondent No. 2, in fact, ought to have disqualified the respondent No. 3 from the tender process. The respondent No. 2 has taken a very novel plea that, other department of the respondent No. 2 had blacklisted the respondent No. 3 and not the department issuing the tender. Such an argument is fallacious and does not stand to reason.

6. Mr. Deshpande, the learned advocate further submits that, assuming that the technical bid of the petitioner was rejected by the respondent No. 2, still the petitioner can agitate as against the acceptance of the bid of a blacklisted bidder, as the same would be against the public interest. The Court is required to scrutinize the allegations made by the petitioner. The lamentable state of affair having brought to the notice of this Court. This Court would consider the said aspect. The learned counsel relies on the judgment of the Apex Court in a case of Shivajirao Nilangekar Patil Vs. Mahesh Gosavi and others reported in AIR 1997 SC 294.

7. The learned counsel further submits that, the judicial review of administrative action is permissible to prevent arbitrariness, malafides, bias and unreasonableness. The learned counsel relies on the judgment of the Apex Court in a case of Jagdish Mandal Vs. State of Orissa and others reported in

(2007) 14 SCC 517. This Court would consider whether process adopted or decision made by the authority is malafide and/or intended to favour some one. The learned advocate relying upon the judgment of the Apex Court in a case of Michigan Rubber (India) Ltd. Vs. The State of Karnataka and others reported in *AIR 2012 SC 2915* submits that, if the Court finds that the action of the authority is malafide and with an ulterior purpose, this Court would invoke its writ jurisdiction.

8. Mr. Deshpande, the learned advocate further submits that, the respondent No. 2 exhibited blatant favouritism for the respondent No. 3. The action of the respondent No. 2 is malafide, arbitrary and against the public interest. The respondent No. 2 has not acted with fairness. This Court would certainly invoke its power under Article 226 of the Constitution of India and set aside work order issued in favour of the respondent No. 3.

9. Mr. Gaikwad, the learned advocate for the respondent No. 2 submits that, the petitioner was ineligible and its technical bid is rightly rejected. The petitioner and its channel partner could not produce work completion certificate of a single order equal to 25% of value of the tendered item. The same was a mandatory condition. The petitioner also failed to submit solvency certificate of the 100% cost of the tender work of Nationalized/Scheduled Bank. The Committee of the respondent No. 2 has given deviations from time to time upto 30/12/2020 permitting the bidders to cure the deficiencies pointed out by the scrutiny committee. The petitioner, still did not submit the work

completion certificate as per the tender document. On 25.01.2021, the tender committee has verified the documents submitted by the tenderers. The petitioner's technical bid was not in compliance with the qualifying requirement. After due scrutiny, the committee has found five qualified bidders. The price bids were opened on 04.02.2021, in which the bid of the respondent No. 3 was found to be lowest.

10. Mr. Gaikwad, the learned counsel further submits that, the respondent No. 3 was blacklisted by the operation and maintenance department of the respondent No. 2. The respondent No. 3 was blacklisted in respect of operation and maintenance. The said department is distinct department of the company. The respondent No. 2 company has four distinct departments. The present tender is floated by the project wing dealing with the work of erection of the generation unit and other subsidiary units. The work assigned to various wings is distinct from each other. The blacklisting of contractor by one department is not applicable to other distinct department. The learned counsel refers to the guidelines issued by the State Government and more particularly Clause 5.2-A. The learned counsel submits that, the blacklisting can be restricted to one department and if one department has blacklisted the contractor, he cannot be restricted from participating in tender process of any other department. No illegality has been committed by the respondent No. 2. The learned advocate relies upon the judgment of the Division Bench of this Court in a case of Sterlite Technological Limited Aurangabad Vs. Aurangabad Industrial Township

Limited Andheri (East) and others reported in *2017 (5) ABR 581* and submits that, the decision of the evaluation committee has to be honoured. The learned counsel also relies on the **judgment dated 30.07.2020** of the Division Bench of this Court in a case of **Jalgaon Golden Transport Pvt. Ltd. Jalgaon Vs. Union of India** in **Writ Petition No. 4775 of 2020** to submit that in absence of the relevant documents, the evaluation committee is competent to reject the technical bid. The learned counsel also relies on the judgment of the Apex Court in a case of Jagdish Mandal Vs. State of Orissa and others (supra) and submits that, in matters of tender, the Court would be slow to exercise its power under Article 226 of the Constitution of India. The power of judicial review may not be invoked on behalf of unsuccessful tenderer with imaginary grievances.

11. Mr. Bachate, the learned advocate for the respondent No. 3 adopts the argument of Mr. Gaikwad, the learned counsel for the respondent No. 2 and further submits that, the operation and maintenance department had without notice to the respondent No. 3 and without hearing the respondent No. 3 had blacklisted the respondent No. 3. The respondent No. 3 had challenged the said blacklisting before this Court by filing writ petition. After the writ petition was filed, the department agreed to give hearing to the respondent No. 3, as such, the writ petition was withdrawn and after finding that the blacklisting was erroneous, the department on its own revoked the order of blacklisting. Third party played a mischief and in the name of the respondent No. 3 had filed false documents claiming to have been filed by the

respondent No. 3. This was brought to the notice of the department. The department was convinced that the foul play is at the behest of the third party and the respondent No. 3 is not at fault. The respondent No. 3 had never submitted any false document. The respondent No. 2 revoked the order of blacklisting. The learned counsel relying on the judgment of the Apex Court in a case of Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and others reported in *(2000) 5 SCC 287* submits that, the terms and conditions of the tender are required to be complied with.

12. We have considered the submissions canvassed by the learned counsel for the respective parties.

13. The respondent No. 2 had floated the tender for the work of comprehensive contract for supply, installation, testing and commissioning of miscellaneous crans and hoist at Unit VIII Parli Vajinath on 17.10.2020. The tenderers were required to submit the technical bid, commercial, price bid on or before 06.11.2020. The last date of submission of bid was extended twice and lastly it was extended upto 18.11.2020. The tenderers were permitted to cure the deficiencies upto 30th December, 2020.

14. In all eleven tenders were received. Upon evaluation of the technical bid by the Expert Committee of the respondent No. 2, only five bidders were qualified and the financial bids of the five bidders were opened. The respondent No. 3's bid was the lowest. The petitioner was disqualified. The reason communicated to the

petitioner for disqualification is that, the petitioner could not demonstrate of having executed at least single order during the last five years equal to 25% value of tendered items. The petitioner admittedly has not executed a single order equal to 25% value of the tendered items during the last five years. The petitioner is relying on the work undertaken by the channel partner of the petitioner namely M/s Reva Industries to substantiate the contention that the channel partner of the petitioner has executed the work as per requirement. The petitioner relied upon the minutes of meeting of the channel partner M/s Reva Industries and M/s. B.H.E.L.. Some of the relevant points of the minutes of meeting are as under.

1. Punch points status is attached in Annexure – 1.
2. BHEL informed that, since civil works in STG unloading bay and its entry is progressing, it will not be possible to shift load (plates) to the location. Load testing of EOT crane can only be done after completion of civil work.
3. BHEL informed that Load testing shall be done by 31.10.18 (Tentatively). Exact date will be informed shortly.
4. M/s REVA requested BHEL to release pending E&C amount which was withheld due to punch points. M/s BHEL informed that proportionate amount will be released on account of punch points completion.

15. It would appear from the aforementioned minutes of meeting that, civil work in STG unloading and its entry is progressing, that would show that the work was not completed. The condition of executing at least a single order equal to 25% value of tendered item during the last five years by the bidder is

an essential covenant in the tender document. Non compliance of the same would result in rejection of the technical bid. The Expert Committee of the respondent No. 2 did not commit any error in rejecting the technical bid of the petitioner.

16. This takes us to the second contention of the petitioner that, the respondent No. 3 was disqualified having been blacklisted as on the last date of submission of the bid.

17. The documents placed on record demonstrate that, the respondent No. 3 was blacklisted on or about 04.09.2020. The relevant para of the order blacklisting the respondent No. 3 reads thus :

“Hence, your firm M/s Shriram Enterprises, who is solely responsible for submission of forged documents in above referred tenders published by T.P.S. Parvli-V, is blacklisted from participating in Open Tender/Multiple Enquiry/Limited tender/OEM/Confirmatory for the period of one year i. e. (2020-2021) for TPS Parli-V.”

18. The order of blacklisting the respondent No. 3 is specific viz, the respondent No. 3 is blacklisted from participating in open tender/Multiple enquires/Limited tender/ OEM/ Confirmatory for the period of one year i. e. 2020-2021 for T.P.S. Parvli-V. The order of blacklisting does not appear to be blanket for all the tenders. But for T.P.S. Parli-V. The respondent No. 3 had assailed the said blacklisting by filing writ petition bearing Writ Petition No. 6607 of 2020 before this Court. Notice was issued by this Court in the writ petition. On or about 23rd

November, 2020, the writ petition was withdrawn by the respondent No. 3 and on 01.01.2021 order is passed by the respondent No. 2 that order of blacklisting the respondent No. 3 is revoked with effect from 31.01.2021.

19. The contention of the respondent No. 3 that he was blacklisted without opportunity to him is not disputed by the respondent No. 2.

20. We cannot comprehend the arguments of the learned counsel for respondent Nos. 2 and 3 that department blacklisting the respondent No. 3 was distinct than the department that had issued the instant tender. The respondent No. 3 was blacklisted by the respondent No. 2, may be in the tender process issued by one of the department of the respondent No. 2. However, it is the respondent No. 2 who would issues the work order and the tender notices. Eventually liability would be of the respondent No. 2. The respondent No. 2 is a registered company under the Companies Act and it cannot suggest that the operation and maintenance department had blacklisted the respondent No. 3, so would not be binding on another department of the respondent No. 2 and that would be binding only on the operation and maintenance department of the respondent No. 2. Eventually, it is the respondent No. 2 as a company and a legal entity who would issue the work order. The guidelines relied by the petitioner and more particularly clause 5.2 suggesting that, if the order of blacklisting is by one department and order is not that it should extend to all the departments, then order of blacklisting

will be applicable only to the tender of the department that has blacklisted the contractor may not be of any avail to the respondent Nos. 2 and 3, in as much as the respondent No. 2 is a company registered under the Companies Act and various departments are carved out and segregated by the respondent No. 2 for the effective working of the respondent No. 2. Eventually, it is the respondent No. 2 who would be making the payment pursuant to the tender. The tender also would be in the name of the respondent No. 2 and not in the name of the department. The notice inviting tender is by the respondent No. 2 as a company limited. It is no gain saying that, as the respondent No. 3 was disqualified in the tender process of another department, as such he would not be considered as blacklisted for the department issuing the present tender. Such an argument is fallacious and does not stand to reason.

21. This would take us to further issue as to how far this Court would interfere in the tender process at this stage. Taking stock of the judgments of the Apex Court and as relied by the learned advocate for parties, it is manifest that, the jurisdiction of this Court under Article 226 of the Constitution would be invoked to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The Apex Court in a case of **Jagdish Mandal Vs. State of Orissa and others** (supra) has observed as under :

“When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are

essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

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

OR

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

ii) Whether public interest is affected.

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

22. It would appear that, eleven bidders had filled in the tender. After evaluation of the technical bid, five bidders were found to be qualified. The financial bids of the five bidders were opened. The respondent No. 3 was found to be lowest and the work order is issued to the lowest tenderer. The respondent No. 2 it appears under misconception had accepted the bid of the respondent No. 3 on the ground that the respondent No. 3 was blacklisted by another department.

23. As observed above, under order dated 01.01.2021, the order of blacklisting the respondent No. 3 was revoked. On 25.01.2021, the Expert Committee of the respondent No. 2 evaluated and verified the documents submitted by the tenderers. On 25.01.2021, the respondent No. 2 had already revoked the order of blacklisting. The price bids were opened on 04th February, 2021. The respondent No. 3 was found to be lowest and on 07th April, 2021 the work order is issued to the respondent No. 3. As on the date the bids were opened and work order was issued, the order of blacklisting the respondent No. 3 was already revoked. It is stated that, 25% work of the tender is already completed. The petitioner is disqualified. The petitioner is technically not qualified. The petitioner cannot get the tender. It would not be in public interest, at this stage to interfere in the matter. Interference at this stage would hamper the work and it would be loss to the public exchequer. The work in progress is of supply, installation, testing and commissioning of miscellaneous crains and hoist at Unit VIII Parli Vaijnath. It would be in

nobody's interest to stall the work already undertaken and 25% completed. The petitioner is not eligible to get the tender. As on the date the technical bids are evaluated, the order of blacklisting the respondent No. 3 was already revoked. The price bid of the tenderers were opened and the work order was issued to the lowest bidder. As the order of blacklisting is revoked by the authority on its own, it would appear that the order of blacklisting was improper.

24. In the light of the aforesaid facts taken cumulatively, we are not inclined to exercise our jurisdiction under Article 226 of the Constitution and entertain the writ petitions. The writ petition as such are disposed of. No costs.

[R. N. LADDHA, J.]

[S. V. GANGAPURWALA, J.]