IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.04.2021
DELIVERED ON : 29.04.2021

CORAM :
THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.Nos.848 and 854 of 2021

M/s.Kumbhat Holographics
Kumbhat Complex
No.29, Rattan Bazaar
Chennai 600 003
rep. by its Partner, Sanjay Kumbhat.

.. Appellant in W.A.No.848/2021/Petitioner

M/s.Alpha Lasertek India LLP
rep. by its Authorised Signatory
Mr.P.Jegadeesan
Flat No.609, Building No.89
Hemkunt Chamber, Nehru Place
New Delhi - 110 019.

.. Appellant in W.A.No.854/2021/Petitioner

Vs

1. The Government of Tamil Nadu
rep. by its Secretary
Prohibition and Excise Department
Secretariat, Fort. St. George
Chennai - 600 009.

2. The Commissioner of Prohibition and Excise
Government of Tamil Nadu
Ezhilagam, Chepauk
Chennai - 600 005.

3. The Tender Scrutiny Committee
C/o. The Commissioner of Prohibition and Excise
Ezhilagam, Chepauk
Chennai - 600 005.

4. Uflex Limited
No.305, 3rd Floor, Bhanot Corner
Pamposh Enclave, Greater Kailash - I
New Delhi - 110 048.

5. Montage Enterprises Pvt. Ltd.
C-53, Shashi Garden
Mayur Vihar Phase - I
New Pocket - VI
New Delhi - 110 091. .. Respondents in both appeals

Prayer: W.A.No.848 of 2021 filed under Clause 15 of the Letters Patent against the order made in W.P.No.15156 of 2020 dated 10.02.2021.

W.P.No.15156/2020:

Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender for Production and Supply of polyester Based Hologram Excise Labels on Turnkey Basis bearing Tender No. 1/2020 issued on 01.10.2020 by the 1st and 2nd respondent and quash the same.

W.A.No.854 of 2021 filed under Clause 15 of the Letters Patent against the order made in W.P.No.15632 of 2020 dated 10.02.2021.

W.P.No.15632/2020:

Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender No.01/ 2020 dated 01.10.2020 for production and supply of Polyester based Hologram Excise Labels on Turnkey issued by the 1st and 2nd respondents and quash the same.

For Appellant in W.A.No.848/2021 : Mr.R.Sandeep Bagmar

For Appellant in W.A.No.854/2021 : Mr.P.S.Raman Senior Counsel for Mr.Dwarakesh Prabhakaran

For Respondents in both appeals : Mr.P.H.Arvind Pandian Additional Advocate-General assisted by Mr.V.Jayaprakash Narayanan State Government Pleader for respondents 1 to 3

: Mr.P.Wilson Senior Counsel for M/s.M.Vasanthakumar for 4th respondent

: Mr.V.Prakash
Senior Counsel
for M/s.Abitha Banu
for 5th respondent

COMMON JUDGMENT

SENTHILKUMAR RAMAMOORTHY, J

Two of the six writ petitioners, who had approached this Court under Article 226 of the Constitution to complain of the unfair tender terms presented by the State, assail the common order dated February 10, 2021 dismissing the writ petitions.

2. At the outset, it must be observed that matters of the present kind must be treated with great circumspection, since the real fight is between the private parties to obtain a lucrative contract and the status of the employer is used as an excuse to approach the extraordinary jurisdiction under Article 226 of the Constitution. Further, the Court may not have the expertise to go into complex matters such as technical specifications. Equally, notwithstanding the employer being a State or other authority answering to the description under Article 12 of the Constitution, there is an element of latitude which has to be allowed for an employer to choose the product that would be best suited to it. The benefit of the doubt has always to be given to the employer in most cases and there is a presumption that the process adopted is fair and reasonable. However, such presumption is rebuttable.

3. It needs also to be acknowledged that, more often than not, the commercial entities approaching the Court seek to write down the very rules of the game that they aspire to participate in. But what is of paramount importance is the nature of the work that is required to be undertaken by the employer and how the employer may be best served. All the dramatis personae herein are armed with authoritative judicial pronouncements on the principles that they perceive are applicable, quite often endeavouring to twist a principle out of context and make it fit a situation not suited to it. Concepts that would apply to contracts and dicta that would hold good for tender matters are sought to be used interchangeably in a free-for-all where only the ends justify the means.

4. The challenge in the writ petitions was to certain terms contained in the tender documents for production and supply of polyester based hologram excise labels on turnkey basis. The appellant in W.A.No.848 of 2021 is a partnership firm which claims to have been in business from the year 2000. The appellant in W.A.No.854 of 2021 is a limited liability partnership registered under the Limited Liability Partnership

Act, 2008. This appellant carried on business as a company between 1991 and 2018 and the company was converted into a limited liability partnership in August, 2018. The appellant in the second of the appeals is also registered under the Micro, Small and Medium Enterprises Development Act, 2006 (the MSMED Act) in the State of Uttar Pradesh.

5. The substance of the challenge in the writ petitions was to the tender terms announced by the State for stickers to be pasted across the caps of the bottles of liquor sold by the State Government through one of its instrumentalities, the Tamil Nadu State Marketing Corporation Ltd, popularly known as Tasmac. According to these appellants, the technical specifications and tender conditions were such that they were tailor-made to the patented technology, of which the fourth respondent and fifth respondents are licensees, and the tender process was a mere charade for a single vendor contract to be awarded to the fourth respondent. It is also the common case of the appellants that respondents 4 and 5, the only two bidders who qualified on all counts as per the tender specifications and conditions, are related parties, in the sense that there is substantial connection between the two entities for their source of the technology to be used for the purpose of the production and supply covered by the tender notice to be regarded as the same.

6. The appellants question the rationale for the State to require only companies to participate in the tender process and exclude other business entities. The appellants maintain that there is no nexus with the object of the tender to limit the bidders to only registered companies. The more robust challenge is on the ground that the technical specifications and conditions laid down in the initial tender terms left no manner of doubt that it was the fourth respondent's patented technology that was being sought.

7. The other grounds urged before the Writ Court and in course of the present appeals pertained to the conditions that a bidder ought to have undertaken such supply to excise departments of other States during any one of the preceding three financial years and that the eligible bidder must have had a specified turnover in such business in the last three financial years. In addition, the appellants assert that the spirit of the Tamil Nadu Transparency in Tenders Act, 1998 (the Tenders Act) and the Tamil Nadu Transparency in Tenders Rules, 2000 (the Tenders Rules) has been breached, if not the letter of the law violated. The appellants contend that the essential condition set by the government notification, which set the process in motion, was that more than three bidders ought to participate in the process upon meeting all the eligibility criteria, but, in the impugned tender process, only the fourth

respondent and its associate, the fifth respondent, were the last bidders standing upon all others being eliminated on the lopsided and the biased eligibility criteria set by the State.

8. There is also an insinuation that there was an element of deceit and impropriety involved in obtaining the order by misleading the Writ Court with a unilateral representation that is apparently contrary to the records. The appellants also refer to the perceived surreptitious manner in which the State has gone about awarding the contract to the fourth respondent and procuring supplies even before the matter had been disposed of by the Writ Court.

9. Tender No.1/2020 was published on October 1, 2020. However, the process commenced several months earlier with G.O.Ms.No.23 dated August 24, 2020 being issued by the State to float the tender for supply of polyester based hologram excise labels to be used across the caps of all bottles of liquor sold through Tasmac. The relevant government notification referred to Rule 24 of the Tenders Rules and provided for a Technical Specification Committee to be set up. The scope of work of the Technical Specification Committee, as specified in the said notification of August 24, 2020, required the preparation of "technical specifications which are generic in nature and ensure wider participation by incorporating those features that are available with more than three bidders." A Tender Scrutiny and Finalization Committee was also set up by the same notification to, inter alia, ensure that "the technical specifications for the hologram ... to be finalized by the technical committee must be generic and there must be multiple vendors in the market who are capable of supplying the same."

10. The Technical Specification Committee met on September 9, 2020 to deliberate on the specifications. The Committee resolved that technical specifications would be prepared "which are generic in nature and ensure wider participation by incorporating those features that are available with at least not less than three bidders." The committee included academicians from the Indian Institute of Technology, Madras and from Anna University specialising in the field of holograph or printing technology. In course of the deliberations of the Technical Specification Committee, the minutes ascribe the idea pertaining to hidden test on colour change background capable of being read by a hand-held device to the two experts from Indian Institute of Technology and Anna University. Such experts suggested that these were the most secure features available and small-time manufacturers and duplicators would find it difficult to mimic such security design.

11. The tender terms came to be finalised thereafter and pre-bid meetings were held with prospective bidders to clear the air and to address various issues raised in respect of the possible terms of the tender as indicated beforehand. One of the grievances raised at such pre-bid meeting was that the specifications covered the patented technology of the fourth respondent and other bidders would not be able to match the same.

12. Upon the essential tender conditions, particularly the essential eligibility criteria, being retained in the tender conditions published on October 1, 2020, the writ petitions came to be filed on the broad grounds indicated above. It appears that on the oral submission on behalf of the State that no immediate steps would be taken to complete the process of selection, no interim order was passed on the writ petitions. However, notices were issued continually extending the life-time of the tender till, in December 2020, it was conducive, after the relaxation of the lockdown in the wake of the pandemic, for the matter to be finally heard. The hearing was concluded on December 17, 2020. Paragraph 15 of the impugned judgment and order of February 10, 2021 records that "with the consent of the learned counsel for the petitioners, this Court permitted the respondents to accept the bids from the prospective bidders, process the same and to submit a report on the details of the bidders who qualify the technical specifications of the tender." The judgment proceeds to record that bids were accepted till the afternoon of December 24, 2020 and "there were only three bidders ... and the technical specifications and the product specifications of the sample of each of the bidders was evaluated ..." A passage from paragraph 16 of the judgment is of relevance in the context, since it appears that what weighed with the Writ Court was that three bidders had qualified for their commercial bids to be assessed and, as such, the other grounds asserted by the writ petitioners were not required to be gone into:

> "16 ... the Committee had concluded that the three bidders participated in the tender satisfies all the technical and product specifications mentioned in part 3 of the tender document. The learned Additional Advocate General submitted a report of the second respondent dated 24.12.2020 in Lr No.P&E 10(3)/3088/2020 in this regard."

13. It is the common refrain of the appellants that the report could not have been unilaterally furnished to the Court without reference to the appellants at a time when the hearing had been concluded. The appellants suggest that the more appropriate course of action would have been to furnish copies of such report to the writ petitioners before submitting the same to Court at a disclosed time so that the writ petitioners

could have attempted to obtain an opportunity to make their submission qua the report.

14. Submissions were made on behalf of each appellant to substantiate the contentions that were outlined above. The appellant in W.A.No.854 of 2021, M/s. Alpha Lasertek India LLP (Alpha), was represented through Mr.P.S.Raman, learned Senior Advocate, assisted by Mr.Dwarakesh Prabhakaran, learned Advocate, and raised the following contentions. The first contention was that the tender specifications are based on a patented technology or process and that only the fourth and fifth respondents are licensed to use such technology. Part 3 of the tender document was referred to in this connection and the focal point of challenge was the following specification:

> "Hidden text on colour change background - a stripe of design transferred (but not laminated) on the top of the hologram with visual holo graphic designs on top layer and hidden texts /images encrypted on second layer on different colour background. The hidden colour should change at every 45 degree angle. This hidden text "Tamil Nadu Excise" shall be visible only through a special Polaroid identifier. The texts will be decided by the department from time to time. The size of the feature should be at least six mm x 15 mm. This feature should be incorporated in the hologram through the transfer process and not laminated. Identifiers to be part of supply and numbers will be decided by the department. This feature should come off with the top layer of the hologram when tampered."

In addition, the following specifications from Clause 4.6 of Part 4 of the tender document were referred to:

> "(b) the bidder should have supplied at least 20 crores full polyester-based security hologram labels to any State Excise Department during any one of the last three financial years (2017-18, 2018-19 and 2019-20). The bidder must have direct agreement with the department or must have received direct purchase order from the department. The bidder should also submit satisfactory performance certificate from the competent authority or end user.
>
> (c) the tenderer must have experience in manufacturing and supplying polyester-based Excise Holograms with each and every Holographic and Non-Holographic features as detailed in Part

3, page number 16 to 21 of this tender document to State Excise Departments in India for fixation on liquor bottles. Relevant documentary proof and an affidavit confirming the above should be enclosed with the bid."

15. According to Alpha, other than the fourth and fifth respondents herein, no other bidder would satisfy the aforesaid requirements cumulatively. By drawing reference to similar specifications in the tenders floated by other States, it was contended that whenever specifications substantially similar to those indicated above were included in the tender documents, the successful bidder was always either Alpha or Montage Enterprises Pvt. Ltd.(Montage). By contrast, when the technical specification was couched in generic terms, a different bidder, Prizm Holography and Security Films (P) Limited, succeeded.

16. Alpha says that the Government of Tamil Nadu issued G.O. (Ms.)No.23 dated August 24, 2020 of the Home, Prohibition and Excise (VII) Department (the Government Order) in relation to the finalization of the tender for procurement of polyesterised hologram excise labels. The Government Order sets out the proposal of the Commissioner of Prohibition and Excise with regard to the composition of the technical specification committee and, significantly, the scope of such committee is, inter alia, as under:

> "c. To prepare technical specifications which are generic in nature and ensure wider participation by incorporating those features that are available with more than three bidders."

The Government Order records the decision of the Government after examining the proposal of the Commissioner. With regard to the scope of the Technical Specification Committee and the nature of technical specifications, it was ordered as under:

> "(a) the technical specifications for the hologram which is to be finalised by the technical committee must be generic and there must be multiple vendors in the market who are capable of supplying the same."

Alpha says that the Technical Specification Committee understood the Government's decision as implying that the technical specifications should be generic in nature so as to ensure wider participation by incorporating features that are available with more than 3 bidders. In such regard, reference was made to the minutes of the first meeting of the Technical Specification Committee, which was held on September 9, 2020. However, Alpha contends that the Technical Specification Committee deviated from the mandate of framing generic specifications at the second meeting. At the said meeting, additional features were suggested which includes the hidden text on colour change background feature. Indeed, Alpha says that at the third meeting, it was decided as under:

> "5. In order to ensure the quality and security of the hologram excise label, the committee has consciously decided to include a clause "that the bidder should possess experience in each and every holographic and non-holographic feature which are to be part of technical specification and product specification".

Once these features were introduced in the technical specifications, Alpha says it became an ostensible two horse race between Uflex and Montage. Alpha also says that it approached the learned single bench of this Court at the earliest and requested that the tender process should not be permitted to be completed on these terms.

17. The contention that Alpha does not possess manufacturing capacity is rebutted by contending that the truncated income and expenditure statement of Alpha during the transitional period that followed shortly after its conversion from a limited company to a limited liability partnership does not capture the manufacturing turnover of Alpha, whereas it was captured in the financial statement for the full years that preceded and succeeded it.

18. Although it was ostensibly a two horse race, Alpha says that the only eligible bidders are closely connected. By turning to the annual report of Uflex for the financial year 2019 - 2020, Alpha points out that Uflex has invested a sum of about Rs.152 crore in the preference share capital of Montage. Alpha says that Montage has a total paid-up share capital of a little over Rs.6 crore and, especially when viewed in context, Uflex would obviously have considerable influence in the affairs of Montage. In order to further substantiate this contention, an order of the Delhi High Court in a case filed by the Principal Commissioner of Income Tax against Montage is referred to. In particular, reference is made to the fact that Flex industries Ltd (the previous name of Uflex) was referred to in the said order as a sister company of Montage. Thus, according to Alpha, it eventually became, in effect, a single bidder scenario.

19. As regards the third bidder, Hololive Corporation Industries (Hololive), Alpha says that the third bidder was not eligible on multiple parameters. The GST registration of

Hololive was referred to so as to contend that it is a partnership firm which was registered on July 1, 2017. According to Alpha, if this bid had been disregarded, there would only have been two eligible bidders. Alpha contends that a misrepresentation was made to the learned single bench of this Court that there were three eligible bidders and the learned single bench, consequently, recorded the erroneous observation that "admittedly, there are three bidders qualified in the technical bids."

20. Kumbhat Holographics (Kumbhat) was represented by Mr.Sandeep Bagmar, learned Advocate. Kumbhat reiterated that the technical specifications were tailored such that only Uflex and Montage would qualify. As soon as the tender specifications were finalised, Kumbhat says that by communication of October 7, 2020, it pointed out to the State that the technical feature of hidden text on colour change background "can only be provided wholly and solely by one hologram manufacturer which is U-Flex Ltd, Noida in the entire country and this is also being used by their associate company Montage Enterprises Pvt. Ltd." In such context, by relying upon paragraph 24 of Michigan Rubber (India) Ltd v. State of Karnataka, (2012) 8 SCC 216, it was contended that interference with a tender is justified if "the process adopted or decision made by the authority is mala fide or intended to favour someone..." and if "the decision is such that no reasonable authority acting reasonably and in accordance with relevant law could have reached" such decision. Moreover, Kumbhat says that it is completely arbitrary to exclude partnership firms. Indeed, Kumbhat claims that it is a registered small industry in terms of the classification under the MSMED Act. As a consequence, it qualifies as a domestic enterprise as defined in the Tenders Act. As a domestic enterprise, Kumbhat is entitled, as per the proviso to sub-section (2) of Section 10 of the Tenders Act, to supply a maximum of 25% of the total procurement if it is willing to match the price quoted by the lowest bidder. On this issue, Rule 30-A of the Tenders Rules is also relied upon to contend that purchase preference is required to be extended to domestic enterprises.

21. By referring to Rule 15 of the Transparency in Tenders (Public-Private Partnership Procurement) Rules 2012 (the PPP Tenders Rules), it was contended that there is conflict of interest as between Uflex and Montage and that although the PPP Tenders Rules do not per se apply, the conflict of interest provisions contained therein are applicable in principle.

22. In response and to the contrary, the first contention on behalf of Uflex, which was represented by Mr.Wilson, learned Senior Advocate, assisted by Mr.M.Vasanthakumar, learned

Advocate, was that neither Alpha nor Kumbhat participated in the tender and, therefore, do not have the locus standi to challenge the tender. Uflex relied upon the income and expenditure statement of Alpha for the financial year ended on March 31, 2020 and pointed out that Alpha had not manufactured and sold any goods during the relevant financial year, as evidenced by the fact that the income and expenditure statement shows a zero turnover from the sale of manufactured goods. The fact that no expenditure was incurred towards procurement of raw material was also cited to substantiate the contention that the income of Alpha was largely from trading. Uflex emphasised that the tender conditions mandate that "the tenderer must have experience in manufacturing and supplying polyester-based excise holograms with each and every holographic and non-holographic features as detailed in Part 3". A bidder which did not undertake any manufacturing activity during one of the relevant financial years would certainly not satisfy the above requirement.

23. As a matter of fact, it was pointed out that the original condition that only corporate entities could participate in the tender was relaxed and limited liability partnerships were permitted to participate so as to enable persons such as Alpha to participate but Alpha did not participate because it did not fulfil other mandatory criteria such as the manufacturing capability requirement.

24. As regards Kumbhat, it was contended that a partnership firm is evidently prohibited from participating in the tender. Such conditions were previously upheld on the basis that it is justifiable for a government entity to procure goods from only corporate entities so as to be assured of the stability and continued existence of such entities.

25. With regard to the tender conditions that were the focal point of challenge, Uflex submitted that, originally, the tender conditions mandated that the "hidden text with colour change background" should be visible through a Polaroid identifier. However, other prospective bidders objected on the ground that only Uflex and Montage possessed such patented technology. Consequently, a corrigendum was issued whereby film could be used for identification of the hidden text in addition to a Polaroid identifier. Thus, all legitimate grievances of prospective bidders were addressed but the appellants herein seek to frustrate a legitimate tender process because they were ineligible to participate in such tender.

26. The next contention on behalf of Uflex was that the technology of producing latent images, which are invisible to the naked eye and can be viewed only through a polariser, is available with other entities, and is not a monopoly of Uflex

and Montage. The product specifications of an Israeli company called Latent Imaging Technology (LIT) was referred to in this connection. Likewise, the product specifications of an entity called H.W.Sands Corp and that of Ophthentic Corporation were also referred to in support of this contention.

27. Uflex also says that the technology is sufficiently generic as evidenced by the fact that an entity called Prizm Holography and Security Films (P) Ltd. succeeded in the tender floated by the excise department of Chhattisgarh.

28. With regard to the allegation that Uflex and Montage are connected entities, it was submitted that Uflex invested in redeemable, non-voting, non-participating preference shares of Montage. Such investment is permissible under applicable law. As a consequence thereof, Uflex is neither a holding nor an associate company of Montage. A judgment of a Division Bench of the Madhya Pradesh High Court was cited to rely on the conclusion therein that Uflex and Montage are not related entities. The relevant definitions of a subsidiary company and an associate company under the Companies Act 2013 were adverted to in this regard. The complete lack of influence of a preference shareholder, in contrast to an equity shareholder, was also emphasised.

29. Several judgments were cited in support of the contention that the tender process is not liable to be interfered with. These judgments are referred to below along with the applicable principle of law:

(i) Central Coalfield Limited v. SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622, wherein, at paragraph 48, it was held that the court should not examine the soundness of the decision to prescribe a condition in the tender documents and that the scope of scrutiny should be confined to the lawfulness thereof.

(ii) Tata Cellular v. Union of India (1994) 6 SCC 651, wherein the principles relating to interference with a tender process were set out at paragraph 111.

(iii) Master Marine Services Pvt. Ltd v. Metcalfe and Hodgkinson Pvt. Ltd (2005) 6 SCC 138, wherein, at paragraph 12, it was held that the discretionary power under Article 226 should be exercised in matters relating to tenders only in furtherance of public interest and not merely because a legal point was made.

(iv) Directorate of Education v. Educomp Datamatics Ltd (2004) 4 SCC 19, wherein, at paragraphs 11 and 12, it was held that the tender inviting authority and not the court is the best judge as regards prescription of tender conditions, and that court interference is limited to cases where the decision is arbitrary, discriminatory, mala fide or biased.

(v) Holoflex Ltd v. State of MP MANU/MP/0484/2016, wherein a Division Bench of the Madhya Pradesh High Court framed the question whether Uflex and Montage were related entities and answered it in the negative.

(vi) Jagdish Mandal v. State of Orissa (2007) 14 SCC 517, wherein after citing Raunaq International Ltd. v. I.V.R.Construction Ltd AIR 1999 SC 393, the Supreme Court set out the elements of public interest in such matters and concluded that the court should not interfere unless there is a substantial amount of public interest.

(vii) Kumbhat Holographics v. State of Tamil Nadu 2017 (1) CTC 83, where the Division Bench of this Court rejected the challenge to the 2015 tender of the State by upholding the requirement that only a corporate entity may participate in such tender.

30. Montage was represented through Mr.V.Prakash, learned Senior Advocate, assisted by Ms.Abitha Banu, learned Advocate. The first contention on behalf of Montage was that the technology deployed by Montage is based on a process and not a product patent. By referring extensively to the specifications and the claim made by the patent holder, ATB Latent Export Import Limited, it was pointed out that the patent consists of a process of producing polymer layers with a latent image which is visible only through a polariser. Significantly, it was pointed out that the production of multiple polymer layers with a latent image was not novel even at the time when the patent holder obtained the patent. The inventive step revolved around creating a latent image which did not leave a contour or trace when viewed with the naked eye. By comparing and contrasting the specifications and claim of the patent holder with the technical specifications in the present tender, it was contended that the patented process and technology has clearly not been incorporated in the relevant technical specifications. In specific, the patented process does not refer to colour change at a 45° angle or to the Polaroid identifier. On this basis,

Montage contended that the technical specification can be satisfied by deploying technology that does not infringe the patent.

31. The next contention was that Uflex made an investment in Montage in course of business. Such investment was in non-voting, redeemable preference shares, and such investment clearly does not provide control or even influence to Uflex in the affairs of Montage. With regard to the equity share capital investment by Montage in Uflex, the contention was that such investment is insignificant and certainly does not give Montage control or even influence over the assets and affairs of Uflex.

32. The State was represented by Mr.Arvindh Pandian, learned Additional Advocate-General, assisted by Mr. Jayaprakash Narayanan, learned State Government Pleader, who submitted that the Government did not adopt the recommendation of the Commissioner of Prohibition and Excise to prescribe generic technical specifications that can be fulfilled by more than three bidders; instead, it was ordered that the tender specifications should be framed in such manner that multiple vendors would have the capacity to satisfy the tender specifications, and that this requirement would be satisfied if more than one vendor possesses the necessary technical pre-requisites.

33. As regards the participation by the third bidder, it was submitted that the technical bid is evaluated in two stages. At the first stage, only the sample provided by the relevant bidder is examined to assess whether such sample meets all the technical specifications. In the case at hand, the sample provided by Hololive satisfied the technical specifications. The bid of Hololive was rejected only at the second stage of the technical bid evaluation when the bid was tested against the requirements of Part 4 of the tender.

34. By drawing reference to the tender floated in 2015, it was contended that the scope of the tender specification committee was identical in as much as such committee was required to frame the tender specifications generically so as to enable multiple vendors to participate. The evaluation process was also identical and involved two stages at the technical bid stage. By referring to the minutes of proceedings relating to the 2015 tender, the tendering authority demonstrated that the testing of samples provided by bidders was undertaken at the first stage just as in the 2020 tender. Thus, a consistent process was followed both in the 2015 and 2020 tender and such process is certainly not vitiated by mala fide considerations or arbitrariness.

35. Even at the pre-bid stage, whenever legitimate grievances were canvassed by prospective bidders, such grievances were redressed by issuing corrigenda. For instance, limited liability partnerships were permitted to participate although the original tender specifications permitted only corporate entities. Likewise, the specifications were modified so as to enable a film to be used for identification of the latent image instead of restricting it to a Polaroid identifier.

36. In the light of the rival contentions, the first issue to be examined pertains to the technical specifications. Several questions arise with regard thereto: whether they were tailored to suit Uflex and Montage; irrespective of whether they were tailored to suit Uflex and Montage, whether any other bidder could have satisfied such specifications; and whether the Technical Specification Committee deviated from and, indeed, violated the mandate to prescribe generic technical specifications so that multiple vendors satisfy the pre-requisites. Both Alpha and Kumbhat focussed on the fact that either Uflex or Montage succeeded in every State excise tender containing substantially similar technical specifications as that of the tender in question. They also pointed out that the requirement in clause 4.6 (c), which mandates that the bidder should satisfy each and every holographic and non-holographic feature as specified in Part 3 of the tender resulted in the disqualification of all other interested bidders. From the Government Order of August 24, 2020, it is evident that the Commissioner of Prohibition and Excise recommended that the Technical Specification Committee should prescribe technical specifications which are generic and would enable more than three bidders to qualify. While this recommendation was not adopted verbatim, the Government directed that the technical specifications should be generic so as to enable multiple vendors to be in a position to satisfy such technical specifications. When viewed in isolation, the expression "multiple vendors" could mean any number greater than one but, when viewed in context, it cannot be understood as carrying such meaning. If the intention of the Government were to reject the recommendation of the Commissioner of Prohibition and Excise in this regard, the Government would have used language to expressly indicate such rejection. Therefore, it appears that the Government accepted the recommendation and merely used the expression "multiple vendors" as a rough equivalent of the expression "more than 3 bidders". The minutes of the first meeting of the Technical Specification Committee reflect that said Committee understood the decision of the Government as mandating the prescription of generic technical specifications, which could be fulfilled by more than 3 bidders.

37. This leads to the question whether the Technical Specification Committee deviated from and violated the aforesaid mandate of framing the technical specifications generically. For such purpose, the minutes of meetings of the Technical Specification Committee should be examined closely. As stated above, the first meeting of the Committee reiterated that the technical specifications should be such that there are more than 3 bidders. In the second meeting, it appears that the expert members of the Committee suggested that enhanced security features should be introduced in the form of a hidden text with a colour change background. In the third meeting, it appears that the requirement that each bidder should fulfil each and every holographic and non-holographic feature in Part 3 of the tender was agreed to. The minutes of the second and third meetings do not contain any discussion as to whether the proposed changes would make the technical specifications non-generic. Wittingly or otherwise, it thus appears that the Technical Specification Committee deviated from the mandate of prescribing generic technical specifications.

38. Both Uflex and Montage contended that the technical specification does not incorporate a patented technology. Indeed, it was submitted on behalf of Montage that the specifications and claim of the patent holder reveal that the patented process is a method of creating multiple polymer layers, including a latent image, which would not be visible to the naked eye, and does not leave contours or traces that are visible to the naked eye. When the said specifications and claim of the patent holder are compared and contrasted with the impugned tender specification, it is evident that the impugned tender specification prescribes a hidden text with a colour change background; that the colour change would occur at 45° angle; and that such hidden text would be visible either through a Polaroid identifier or a film. However, such features are not noticeable from the specifications and claim of the patented process. Thus, Alpha and Kumbhat have failed to establish that the impugned specification incorporates a patented process.

39. Nonetheless, there is another aspect that warrants attention: is there any other potential bidder capable of fulfilling the impugned technical specification? The details of successful bidders at tenders floated by other State excise departments clearly indicate, albeit anecdotally, that whenever the technical specification is substantially, if not wholly, similar to that of the impugned specification, the successful bidder is either Uflex or Montage. Even the State was unable to point out any other bidder that succeeded in such situation.

40. This aspect assumes greater salience when viewed against the backdrop of at least potential bidder, Kumbhat,

communicating in no uncertain terms to the State on October 7, 2020 that only Uflex and Montage would satisfy this technical specification. Kumbhat stated, in relevant part, as follows:

> " The technical requirement as mentioned in the tender dt. 1st October 2020 specifying the requirement of the hologram to have Hidden Text on Colour Change Background. It is pertinent to state here that the said feature can only be provided wholly and solely by one hologram manufacturer which is U-Flex Ltd, Noida in the entire country and this is also is being used by their associate company Montage Enterprises Pvt. Ltd.... We would like to highlight that where the said feature of Hidden text with color change background (Unigram) has been asked by the state excise department, the said tender has been awarded either to U-Flex Limited or to Montage Enterprises Pvt Ltd"

41. As regards the soundness of the technical specification, as contended by Uflex and Montage on the basis of judgments of the Supreme Court, there is little doubt that the court should not sit in judgment over the soundness of the technical specification. Both common sense and estabished legal principles instruct that such aspects should be left to the judgment of the procuring entity. The impact of such technical specification from the perspective of eliminating reasonable competition in the bidding process is, however, a matter that falls within the domain of judicial review. In the case at hand, an additional factor is the mandate of the Government to prescribe technical specifications that are generic with a view to ensure reasonable participation in the tendering process. Based on the aforesaid discussion, the material on record supports an inference that the technical specification of hidden text with colour change background at a 45° angle, when coupled with the requirement of having made such supplies of a specified minimum value to a State excise department in any one of the preceding three years, had the effect of eliminating all bidders other than Uflex and Montage.

42. Whether such technical specifications were framed so as to eliminate other bidders is a distinct matter. In order to draw such conclusion, there should be positive evidence of a mala fide intention on the part of the State. The evidence on record and, in particular, Kumbhat's communication of October 7, 2020, indicates that the State was informed of the effect that such technical specification would have. However, in the absence of compelling evidence of malice, we are not inclined to draw such inference.

43. The other aspect to be examined is whether the third bidder, Hololive, can be said to have fulfilled the technical specifications. The main contention of the State, in

this regard, was that the technical bid evaluation consisted of two phases: the first being the examination of the sample provided by the bidder concerned; and the second being whether the bidder concerned fulfilled all the requirements of Parts 3 and 4 of the tender document. The process followed in the 2015 tender was adverted to so as to emphasise that the same process was followed in the present tender too. Upon examining the minutes of the meetings of the Tender Scrutiny Committee held on December 24,2020, it is evident that the sample evaluation as well as the evaluation of fulfillment of the requirements of Parts 3 and 4 of the tender document were undertaken on December 24, 2020. Strangely, in spite of carrying out both stages of the technical bid evaluation on the same date, in the report submitted by the Technical Scrutiny and Finalization Committee to its legal counsel on December 26, 2020, it was not pointed out that the third bidder did not fulfill the requirements of Parts 3 and 4 of the tender document. Consequently, in turn, the State's legal counsel did not inform the Court that Hololive did not fulfill all the technical specifications. Indeed, there is little doubt that the Court would not have recorded that there were three eligible bidders if the Court were aware that Hololive's bid was rejected on the same date. Instead, the result of the bid evaluation would have vindicated the stand of Alpha and Kumbhat that there cannot be more than two eligible bidders, i.e. Uflex and Montage. On this issue, the State, undoubtedly, made selective disclosures, and successfully facilitated the recording of erroneous conclusions by the Court on a vital aspect of the tendering process.

44. In the changed context of only two eligible bidders having participated in the tender, the contention that the two eligible bidders are related entities assumes significance. While the contention of both Uflex and Montage that the two entities do not share a holding-subsidiary company relationship and that the two companies cannot be construed as associate companies is unimpeachable in a formal and technical sense, the material consideration is not whether they are in the kind of relationship referred to above; instead, it is whether there is a nexus between these two entities and whether such nexus impairs the integrity of the tendering process.

45. The documents on record conclusively disclose that Uflex invested about Rs.152 crore in the preference share capital of Montage. Indeed, neither Uflex nor Montage deny this fact. While it was contended that the investment in preference share capital does not give the investor control or significant influence over the investee, the scale of investment - especially when viewed in the context of the total equity share capital of Montage being in the region of Rs. 6 crore - cannot be disregarded and it can scarcely be inferred that Uflex would

not wield influence over Montage. An additional factor that could contribute to the inference of a nexus between the two entities is the equity share capital investment of Montage in Uflex. Although Uflex is a listed public company, Montage is one of the top non-promoter shareholders with a holding in excess of 4%.

46. One more significant aspect should be thrown into the mix: the undisputed position is that both Uflex and Montage derive their right to the technology for producing the latent image from a common source, i.e. the patented technology of ATB Latent Export Import Limited. When viewed cumulatively, the three elements discussed above: the cross holdings and investments coupled with the reference to the two companies concerned as sister companies in orders of court ; the sourcing of technology from a common source; and the fact that the one or the other was the successful bidder whenever substantially similar technical specifications were prescribed by other S tate excise departments, leads to the conclusion that there is a nexus between the two entities. Such nexus may not be significant or determinative in a multi-bidder scenario but in this factual context can scarcely be disregarded.

47. As stated above, the evidence on record is insufficient to draw the definitive conclusion that the tender conditions were tailored to suit only the two eligible bidders, although there is sufficient basis for justifiable doubts on that count. Be that as it may, the evidence is sufficient to conclude that the tender specifications were not generic and had not been prepared in accordance with the mandate of the Tender Specification Committee, which was to prepare specifications in such manner that there would be more than or at least three bidders. Consequently, there were only two eligible bidders and there is sufficient evidence that such bidders have a strong nexus. In our view, when viewed in context, the nexus between the only two eligible bidders, undoubtedly, undermines the tendering process. Indeed, keeping in mind the fact that the price bid was restricted to the two eligible bidders, it raises questions as to the integrity and reliability of the price bid. When the State is the procuring entity, such questions assume considerable significance and cannot be disregarded in judicial review.

48. The learned single bench did not deal with the principal contentions; instead, reliance was placed on a report from the State, which was not shared with the other parties, in order to draw the erroneous conclusion on such basis that "admittedly there are three bidders qualified in the technical bids". For these and others reasons set out above, the order impugned in these appeals calls for interference.

49. Although the scope of judicial review in matters relating to tenders is limited and both judicial restraint and fair play in the joints are instructed in judgments that were cited at the bar, such judgments also endorse interference where there is arbitrariness, where the evidence is indicative of favouritism, and, above all, where public interest demands interference. In our view, the facts and circumstances of the present case, when viewed holistically, warrant interference with the tendering process in public interest. The technical specifications were not framed in conformity with the Government's mandate and eventually this resulted in the participation of only two eligible bidders, whose nexus cannot be disregarded. This undermined and, indeed, vitiated the tendering process.

50. At the same time, we are mindful of the fact that the contract was awarded to Uflex pursuant to the tendering process and the work is ongoing. The nature of the contract is such that both considerable revenue and even public health could be at stake. Therefore, it is critical to ensure that the least disruption is occasioned by the cancellation of the impugned tender. To that end, Uflex shall continue to perform its obligations for a further period of four months from date on the same terms and conditions. During such period, the State shall either float a fresh tender with technical specifications that are generic so as to ensure that there is wider participation or, if the State is of the view that these technical specifications are at the heart of the tender, opt for a single source procurement, albeit by adhering strictly to the requirements of the Tenders Act in such regard. Whichever option is exercised, the process should be completed within the four month period mentioned above.

51. In sum, the order impugned of the Writ Court dated February 10, 2021 is set aside and W.A.Nos.848 and 854 of 2020 are allowed without any order as to costs. As a corollary, W.P. Nos.15156 of 2020 and 15632 of 2020, which were filed by the two appellants herein, are allowed and Tender No.1/2020 is quashed albeit subject to the terms set out above. Consequently, C.M.P.Nos.4880, 4881, 4936 and 4939 of 2021 are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sasi/kal

To:

1. The Secretary
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   Chennai - 600 009

2. The Commissioner of Prohibition and Excise
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3. The Tender Scrutiny Committee
   C/o. The Commissioner of Prohibition and Excise
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+1 CC to The Government Pleader sr 26385
+1 CC to M/s. Dwarakesh Prabhakaran, Advocate sr 26453.
+1 CC to Mr. Sandeep Bagmar, Advocate sr 26454
+3 Ccs to Mr.M. Vasantha Kumar, Advocate sr 26459

W.A.Nos.848 and 854 of 2021

PPA(CO)
SP(02/06/2021)