

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

WRIT PETITION NO. 9620 OF 2022

Yash Construction Company
A partnership firm "Padmini
Niwas", H.No.9/529, Opp. Municipal
Council, Prashant Nagar, Ambajogai,
Tq. Ambajogai, Dist. Beed – 413 512
through its partner

Pradeep s/o Madhukarrao Thombre
Age : 42 years, Occ : Business,
R/o : "Padmini Niwas", H.No.9/529,
Opp. Municipal Council, Prashant
Nagar, Ambajogai, Tq. Ambajogai,
Dist. Beed – 413 512

... **PETITIONER**

VERSUS

1. The Secretary
Ministry of Road Transport and
Highways (MoRT & H), Room
No.509, Ministry of Road Transport
and Highways Transport Bhavan, 1,
Parliament Street, New Delhi – 110 001.
2. The Chief Engineer and Regional
Office, (Maharashtra and Goa) Room
No.508 & 509, Konkan Bhavan, 5th
Floor, Sector-6, C.B.D., Belapur,
Navi Mumbai – 400 614.
3. The Chief Engineer,
Public Works Department,
National Highways, Government
of Maharashtra Room No.526,
5th Floor, Kokan Bhavan, Sector-10,
CBD, Belapur, Navi Mumbai – 400 614
4. The Superintendent Engineer,
National Highway (PW.) Circle,
"Bandhakam Bhawan, Sneh Nagar,
Adalat Road, Aurangabad – 431 005.

5. The Executive Engineer,
National Highways Division,
Barure Complex, Opp. S.T. Workshop,
Ambajogai Road, Latur – 413 512.

... RESPONDENTS

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Mr. R.N. Dhorde, Senior advocate i/b.
Mr. V.R. Dhorde, advocate for petitioner
Mr. A.G. Talhar, DSGI for respondents No.1
Mr. D.R. Kale – Government Pleader for the respondent Nos. 2 to 5

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WRIT PETITION NO.11026 OF 2022

1. M/s. Saket – RPS JV
A joint venture between one Saket
Infraprojects Private Limited and RPS
Infraprojects Private Limited having its
office at L-3, 308, the Summit Business
Bay, near Service Road, Off Western Express
Highway, Vile Parle (E), Mumbai – 400 057
2. Saket Infraprojects Private Limited
[CIN: U45201MH2006PTC163441]
A private limited company, governed
by the provisions of the Companies Act, 2013
having its registered address at L-3, 308,
the Summit Business Bay, near Service Road,
Off Western Express Highway, Vile Parle (E),
Mumbai – 400 057.
3. RPS Infra Project Private Limited
[CIN: U45201MH2006PTC163522]
A private limited company, governed
by the provisions of the Companies Act, 2013
having its registered address at C-113, 1st Floor,
Shyam Kamal, Agarwal Market, Vile Parle (E),
Mumbai – 400 057.
4. Vishal Wadhawan
Age : 42 years, adult, Indian Inhabitant,
Director and Shareholder/Member of
the petitioner No.2 Company, having his office
address at L-3, 308, the Summit Business Bay,
near Service Road, Off Western Express Highway,
Vile Parle (E), Mumbai – 400 057.

... PETITIONERS

VERSUS

1. Union of India,
through the Ministry of Road
Transport and Highways Transport
Bhawan, 1, Parliament Street,
New Delhi – 110001.
also at : Regional Office, Maharashtra
and Goa, Room No.508 and 509, Konkan
Bhavan, 5th Floor, Sector-6, C.B.D., Belapur,
Navi Mumbai – 400 614.
2. State of Maharashtra
through the Chief Engineer (NH),
Public Works Department, Room No.526,
5th Floor, Konkan Bhavan, Sector-10,
CBD Belapur, Navi Mumbai – 400 614.
3. The Superintending Engineer,
National Highway (P.W.) Circle,
“Bandhakam Bhawan, Sneh Nagar,
Adalat Road, Aurangabad – 431005.
4. The Executive Engineer,
National Highways Division,
Latur Barure Complex, Opp.
S.T. Workshop, Ambajogai Road,
Latur, Maharashtra – 413512.

... RESPONDENTS

...

Mr. R.N. Dhorde, Senior advocate i/b.
Mr. V.R. Dhorde, advocate for petitioner
Mr. A.G. Talhar, DSGI for respondents No.1
Mr. D.R. Kale – Government Pleader for the respondent Nos. 2 to 4

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**CORAM : MANGESH S. PATIL &
Y.G. KHOBRADE, JJ.**

Reserved on : 07.12.2022

Pronounced on : 16.12.2022

JUDGMENT (MANGESH S. PATIL, J.) :

In these two separate writ petitions, the respective petitioners are challenging the action of the respondents impliedly not accepting their respective bids for rehabilitation and upgradation of two different stretches

of the same NH361F by deciding to and going ahead with the fresh tender processes. Though the petitioners are different the respondents are the same, the facts also being exactly the same and even the learned advocates representing the parties being same we are disposing of these two writ petitions by this common judgment in order to avoid rigmarole.

2. Heard. Rule in both the writ petitions. Rule is made returnable forthwith. The learned DSGI waives service for respondent No.1 in both the writ petitions and the learned Government Pleader waives service for respondents Nos.2 to 5 in writ petition No.9620/2022 and for respondents Nos.2 to 4 in writ petition No.11026/2022. At the request of the parties the matters are being disposed of finally at the stage of admission.

3. The sum and substance of the relevant facts leading to the filing of these writ petitions can be summarized as under :-

- a) Rehabilitation and upgradation of NH361F, a project of the Ministry of Road, Transport and Highways of the Central Government (R1) and (R2), is being executed by the Public Works Department of the State headed by the Chief Engineer (R3), Superintendent Engineer (R4) and Executive Engineer (R5). The Chief Engineer (R3) published the tenders on the instructions of respondent Nos.1 and 2 for two stretches of widening and upgradation of 16.2 and 18.5 Kms into two lanes with paved shoulder carriageway and also 5.5. Kms and 6 Kms stretches of four lane carriageway.

- b) The work was to be completed within 24 months. Pre-bid meetings were held on 14.01.2022. Apart from the petitioners several entities submitted their bids. The estimated cost of the stretch of road for which the petitioner in Writ Petition No.9620/2022 had applied was 229 crores whereas in the other matter it was 212.7 crores. The respective petitioners' bids were 29.99% and 24.83% less than the estimated cost. After financial bids, technical bids were opened the petitioners were declared as L1. They furnished requisite bank guarantees. The respondent Nos.3 and 4 recommended the petitioners' offers to the respondent Nos.1 and 2 in August 2022.
- c) The respondent No.5 in Writ Petition No.9620/2022 called upon the petitioners therein to furnish justification for completing the work at less than 29.99% of the estimated cost. The petitioner furnished the details of his ability to perform the work at that cost. The explanation was accepted, the report was submitted to the Superintendent Engineer (R4) who also accorded approval and it was forwarded to the Chief Engineer (R3) who also approved it and submitted it to the respondent No.2.
- d) By two separate communications dated 29.08.2022 in Writ Petition No.9620/2022 and dated 30.08.2022 in Writ Petition No.11026/2022 respondent No.2 informed the respondent No.3 that the stipulation in the tender advertisement regarding

completion of work in 24 months was incorrect and it ought to have been 18 months and directed to invite fresh bids for the same works.

- e) Both the petitioners conveyed their readiness and willingness to complete the work even within 18 months with the same cost. However, in September 2022 the process was cancelled and fresh tender notices were published on 07.09.2022 for the same work.

4. The learned senior advocate Mr. Dhorde for the petitioners at the outset submitted that in spite of the petitioners having found to be the lowest bidders, the respondents have aborted the process for an unsustainable reason. In fact no specific order was communicated to the petitioners quoting the reasons for cancellation. The respondents being public authorities it was imperative for them to have communicated the precise reason for not going ahead with the process to conclude the contracts. He would refer to the decisions in the following matters :

- i. **Poddar Steel Corporation Vs. Ganesh Engineering Works and Ors.; (1991) 3 SCC 273**
- ii. **Jailaxmi Constructions Vs. State of Maharashtra; 2012 SCC OnLine Bom 1127**
- iii. **Rashmi Metaliks Limited Vs. Kolkata Metropolitan Development Authority and Ors.; (2013) 10 SCC 95**
- iv. **Royal Power Turnkey Implements Pvt. Ltd. Vs. Maharashtra Industrial Development Corporation; 2014 SCC OnLine Bom 2884**
- v. **Pankaj Kesara Vs. Andaman and Nicobar Administration ; 2014 SCC OnLine Cal 22708**

- vi. **Shree Ganesh Construction Vs. State of Orissa;**
2016 SCC OnLine Ori 288
- vii. **Gangadhar Jena Vs. State of Odisha;**
2017 SCC OnLine Ori 611
- viii. **United Contractors Association Vs. State of Orissa ;**
2018 SCC OnLine Ori 44
- ix. **Maharashtra Chess Association Vs. Union of India and Ors.;**
(2020) 13 SCC 285
- x. **Insituform Pipeline Rehabilitation Private Limited V/s New Delhi**
Municipal Council ; 2021 SCC OnLine Del 3210
- xi. **BOC India Limited and Ors. Vs. Kolkata Metropolitan Development**
Authority and Ors.; (WP No.5292/2010 dated 07.05.2010 Calcutta
High Court)

5. Mr. Dhorde would submit that contrary to the well settled principles laid down in the matter of **Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner New Delhi and Ors.;** (1978) 1 SCC 405 the reasons are now being quoted by the respondents in their affidavit-in-reply which is impermissible. He would then submit that even according to the guidelines applicable to the Central P.W.D. projects and the general terms of bidding, there is no precise clarity as to the period of completion of the work particularly when the projects involve rehabilitation and upgradation of mixed stretch of roads where some portion is two lane road where the work is to be completed within 18 months and a four lane road for which the period is 24 months. Admittedly, in both the matters, the projects involved mixed work (16.2 Kms of two lane + 5.5 Kms of four lane in Writ Petition No.9620/2022 and 18.5 Kms of two lane and 6 Kms of four lane in Writ Petition No.11026/2022). Mr. Dhorde would, therefore submit that in view

of such peculiar state of facts, the ground being furnished for cancelling the tender process on this sole count is too technical.

6. Mr. Dhorde would submit that even both the petitioners even before cancellation, had communicated their readiness to complete the project even within 18 months without any escalation in the cost. He would submit that though it is trite that no post bid negotiations are permissible, since these are the projects for constructions of roads and when petitioners are admittedly the lowest bidders, that analogy would not be applicable, even if they have after initial offer expressed their willingness to complete the project within 18 months. In the peculiar facts and circumstances when the work was a mixed work where admittedly a portion of the work even according to the respondents could be completed within 24 months, this difference of interpretation would make the condition not a material condition or essential terms. In support of his submission he would refer to the judgment in the matter of **Rashmi Metaliks Ltd.**(supra). Mr. Dhorde would also refer to the CVC circular which enables negotiations in exceptional circumstances with L1 lowest tenderer in the work/supply orders where the Government has to make the payment. He would also emphasize on the fact that the bid capacity of the petitioners to complete the work even within 18 months is much more.

7. As an appendage to these submissions Mr. Dhorde would also emphasize the fact that when the petitioners bids would cut even the estimated cost by around 25% to 30%, it would be in the public interest

inasmuch as the Government would spend much less than the estimated cost. As against this, he would submit, when this process had begun almost 10 to 11 months back, any fresh invitation to offer in all probability would escalate the cost of construction, increasing the burden on the public exchequer. Besides the petitioners would lose edge inasmuch as the process has been aborted at the fag end making everybody aware about their offer to complete the projects at such a lesser cost which would cause a serious prejudice to the petitioners. He would, therefore, submit that the respondents have not acted in fair manner and have decided to go ahead with the fresh tender process undermining the public interest that too on an untenable ground.

8. Learned DSGI Mr. Talhar would at the outset begun with the argument that there is no concluded contract. It was merely an invitation to offer and it would be the prerogative of the respondents to accept or refuse the offer. The petitioners would have a right only in the case there was a concluded contract. That being not the state of affairs. The respondents are not under any contractual obligation. Mr. Talhar would then raise the issue regarding clause 6.1 of the tender document restricting the jurisdiction to decide any dispute to the Delhi High Court. He would submit that the petitions in this Court are not maintainable in view of such a stipulation. He would submit that it is the prerogative of the respondents expressly stipulated in clause 2.16.1 to annul the bidding process. He would further submit that contrary to the guidelines issued by the Ministry the period for

construction of the project was stipulated as 24 months instead of 18 months. Realizing the mistake a fresh tender has been floated. A change post negotiation altering the condition to complete the project would constitute a material alteration. There is no discrimination. It was always open for the petitioners to participate even in the fresh tender process. No *mala fides* have been attributed. The decision is based on technical reasons. The stipulation as to the period is strictly based on the technical note of the Ministry and this Court cannot embark upon and decide the correctness or reasonableness of the stipulation. Since it is a matter touching completion of a public work involving some special knowledge, this Court cannot sit in appeal to scrutinize the decision of the technical expert committee. He would rely upon the following decisions to buttress his arguments :

- i. **Rajasthan Co-Operative Dairy Federation Vs. Maha Laxmi Mingrate Marketing Service Private Limited ; 1966 DGLS (SC) 1429**
- ii. **Laxmikant and Ors. Vs. Satyawan and Ors.; (1996) 4 SCC 208**
- iii. **South Delhi Municipal Corporation Vs. Ravinder Kumar and Anr.; 2015 DGLS (SC) 961**
- iv. **State of Jharkhand and Ors. Vs. CWE Soma Consortium ; 2016 DGLS (SC) 706**
- v. **Bharat Coking Coal Limited and Ors. Vs. AMR Dev Prabha and Ors.; 2020 DGLS (SC) 318**
- vi. **Agmatel India Private Limited Vs. Resoursys Telecom and Ors.; (2022) 5 Supreme 362**
- vii. **N.G. Projects Limited Vs. Vinod Kumar Jain and Ors.; 2022 DGLS (SC) 324.**
- viii. **Omassery Labour Contract Co-operative Society Omassery P.O. Vs. Mukkam Municipality Mukkam ; (WP (C) No.3228/2022)**

9. The learned Government Pleader would submit that the respondents Nos.3 to 5 are merely implementing the project of the respondents Nos.1 and 2. The ultimate decision to accept the offers or to go for a fresh tender fully rests with them. The scope for judicial review in such matter is very limited. The circumstances do not warrant any interference in the on going process.

10. The rival submissions now fall for our consideration.

11. At the cost of repetition we begin with the observation that so far as the facts are concerned there is not much of a dispute. In the invitation to offer the period for completion of work was stipulated as 24 months pursuant to which the offers were received. The petitioners were the lowest bidders and had quoted almost 30% and 25% less than the estimated cost, respectively. No dispute has been raised either in their capacity to complete the work at this less cost and the sole reason being relied upon by the respondents for going for a fresh tender is the stipulation as to the period of completion of work. For that matter even there is no dispute that the respondents are implementing a project where as per the technical note of the Ministry dated 05.03.2019 there is stipulation as to the period for completion of work for construction of highways depending upon the width and the length of the road. Admittedly, it was a project of the Central P.W.D. and the work was to be completed in accordance with the permission granted by the respondent No.2 with the approval of the competent authority. The State PWD was supposed to implement the project

strictly in accordance with the communication vide letter No.1275 dated 31.01.2022 and the bids were supposed to be invited based on standard RFP and EPC documents of the Ministry dated 05.03.2019.

12. Normally this Court cannot interfere with the view taken by the tender inviting authority or indulge in the process of interpretation of the terms which essentially has to be left for the author of the tender document as has been laid down in the matter of **Agmatel India Pvt. Ltd.** (supra) wherein with respect the principles have been succinctly laid down while considering the scope of judicial review in tender matters.

13. This Court has its inherent limitations in going into the technical aspect and it would not be proper to scientifically scrutinize justification for the period for implementation of the work, whether it should be 18 months or 24 months. However, going by the guidelines, for a road up to the length of 50 Kms stretch for laying two lanes with paved shoulder carriageway the period stipulated for completion of work is 18 months whereas for the roads comprising of four lanes the period is 24 months. However in the peculiar matters in hand, admittedly, each work comprises of two different stretches a part of the portion may be major of around 60% to 65% is a two lane road and the rest is a four lane road. It is perhaps because of this peculiar state of affairs, even there seems to be a difference of opinion in the respondent Nos.1 and 2 on the one hand and the respondent Nos.3 to 5 on the other.

14. It can be seen from the papers that the respondent Nos.1 to 3

had scrutinized the aspect and even attempted to justify their interpretation and the stand of stipulating 24 months in the bid document as the period for completion of work. For that matter, irrespective of the stand being taken in the affidavits-in-reply filed on behalf of respondents, even during pendency of the petitions Mr. Dhorde tendered across the bar a communication *inter se* between the respondents demonstrating that even now some of the respondents are of the view that the projects can be completed within 24 months even by following the guidelines of the Ministry. It is not that such an attempt has been made belatedly. Even before filing of the petitions there has been a communication *inter se* between the respondents, wherein, some of them tried to justify the period for completion of project as 24 months. It is in view of such a peculiar state of affairs, we have been called upon to consider the petitions questioning the decision of the respondents to go for a fresh tender.

15. As has been observed earlier we have inherent limitations in entering into this debate. The fact remains that as per the guidelines of the Ministry there is a stipulation as to the period of completion of work but conspicuously, we are concerned that the guidelines do not contemplate a situation where it is a mixed work, where a portion of the road is to be constructed within 24 months whereas the remainder of it is expected to be completed in 18 months. Be that as it may, there is every room to believe that it is a subjective satisfaction of the authorities to go ahead and decide the issue more so involving construction of a public project and it can be

said that the reason for abortion of the project is too technical for this Court to step in and scrutinize the action of the respondents.

16. Admittedly, the petitioners were never expressly communicated with the reasons cancelling the tender process. It appears that they only learnt about the aforementioned being the ground for the respondents to go for a fresh bidding process. However, irrespective of this aspect, admittedly, both the petitioners had expressly stated and informed the respondents their willingness to go ahead and complete the project as per their interpretation within 18 months without escalation of the cost. This certainly cannot be said to be a post tender negotiation inasmuch as, the government was to spend for the project and was not to earn something. The petitioners are the lowest bidders who though had initially offered to complete the work within the period of 24 months stipulated in the tender document but in view of the supervening events have expressed their willingness to complete the same work within 18 months, and more importantly the respondents have not formed any opinion by resorting to any inquiry regarding petitioners inability to complete the work within 18 months. The decision of the respondents to refuse to concede to the petitioners' fresh offer to complete the work even in 18 months is clearly an arbitrary decision which potentially would have the tendency to burden the public exchequer. Already 8 to 10 months have lapsed. Factoring the inflation, in all probability, going for a fresh tender merely because of this technical defect which can be easily cured by accepting the petitioners' fresh offer to

complete the project even in 18 months at the same cost offered by them is nothing but an arbitrary and capricious decision and would lead to a loss to the public exchequer. Besides, as mentioned herein above, as it is the offer of the petitioners is less than the estimated costs by 30% to 25% which would save another 70 to 80 crores for each project.

17. The submission of the learned DSGI and the decision cited by him regarding the rule being to desist from any post-bid negotiation would not come into play when the Government is to pay the money for the work to be performed when the negotiation is with the lowest bidder. Such negotiations are not justifiable when the Government is to receive the money. It is in this sense that the decisions quoted herein above by the learned DSGI will have to be appreciated. The negotiation in the facts and circumstances is only for performing the work in a lesser period and not for increasing the period of performance which would have been impermissible.

18. In the peculiar facts and circumstances of the matters in hand we are merely pointing out that even the respondents *inter se* have a different opinion as to what should have been the period for completion of the work. We have pointed out that the guidelines do not take into consideration a peculiar circumstance where a part of the project is to be completed in 18 months and the remainder to be completed in 24 months. The situation is certainly susceptible to a difference of opinion amongst the authorities themselves. Since it is a matter of rehabilitation and improvement of roads, when the petitioners have also now expressed their

willingness even before filing of the petitions to complete the work within 18 months, in our considered view we are not embarking into any decision touching the technical aspect. So the fetters on the powers of this Court in view of catena of judgments in the matter of **Tata Cellular Vs. Union of India**; (1994) 6 SCC 651, **Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.**; (2016) 16 SCC 818 and **M/s. N.G. Projects Limited Vs M/s. Vinod Kumar Jain & Ors.**; (Civil Appeal No.1846 of 2022 arising out of SLP (c) No.2103/2022 dated 21.03.2022) would not be applicable to the peculiar facts and circumstances of the matters in hand.

19. True it is that the petitioners have not been able to expressly attribute any *mala fides* for the respondents in aborting the process. However, in our considered view the facts and circumstances discussed herein above are peculiar enough and we have demonstrated that the petitioners being ready to complete the work even in 18 months, avoiding a possible loss to the public exchequer could be the decisive circumstances even in the absence of any specific allegations regarding *mala fides* of the respondents.

20. It is not a matter of any deviation from the explicit terms of the invitation to offer to work within period of 18 months as against 24 months. The decision in the matter of **Bharat Coking Coal Limited** (supra) a minor deviation from explicit terms of the notice inviting tender was held to be not sufficient in itself in the absence of *mala fides* to set aside the tender at the behest of unsuccessful bidders. We do not intend to and are not sitting in

appeal to judge the propriety of the decision of the respondents to go for a fresh bid but at the same time we cannot turn a blind eye when the facts and circumstances discussed herein above are so peculiar and the decision of the respondents has the potential of burdening the public exchequer.

21. The submission of the learned DSGI that there is no concluded contract and the petitioners' offer having not been accepted there being no privity of contract is a submission too naive to accept. When these are the matters involving public authorities, any decision of theirs can be examined to ascertain if the decision being taken is arbitrary or otherwise more so when it has the tendency of burdening the public exchequer. We therefore discard the submission of Mr. Talhar that in the absence of any concluded contract the petitioners cannot be heard.

22. As far as the submission of Mr. Talhar regarding stipulation in the notice inviting tender and the other annexures restricting the jurisdiction to the Delhi High Court is equally untenable in law. This being a High Court exercising powers under Article 226 of the Constitution of India, the parties could not have by agreement excluded its jurisdiction and power as has been laid down in the matter of **Maharashtra Chess Association** (supra).

23. To sum up, the decision of the respondents to abort the process of tender wherein the petitioners were the successful L1 bidders on the sole ground that the notice inviting tender stipulated 24 months as the period for completion of the work instead of 18 months and even when the petitioners expressed their readiness and willingness to complete the work at the same

cost offered by them which does not suffer from the sin of post tender negotiations, the decision of the respondents is clearly arbitrary and would lead to a loss of public money. The cases are fit to be interfered with.

24. Both the petitions are allowed. The fresh tenders issued by the respondents are quashed and set aside. The respondents are directed to resume and complete the tender process wherein the petitioners are participating but with a rider that the petitioners shall be bound to complete the works within 18 months irrespective of the stipulation in the notice inviting the offers.

25. Rule is made absolute in both the petitions in above terms.

(Y.G. KHOBRADE, J.)

(MANGESH S. PATIL, J.)