IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13128 OF 2022

1] M/s. Shobha Constructions
Through Proprietor
Sonali Sandeeprao Udgirkar,
Age : 44 years, Occu. : Business,
Through G.P.A. Holder,
Sandeeprao Sudhakarrao Udgirkar,
Age : 49 years, Occu. : Business,
R/o. Padmaja Hills, Malegaon Road,
Pasadgaon, Nanded

2] M/s Pratibha Construction,
Through its Partner,
Md. Sajid Mohiyoddin Kazi,
Age : 55 years, Occu. : Business,
Shop No. 3, GTB Market, Hingoli Get Road,
Behind Khurana Travels, Nanded,
District – Nanded

3] M/s Sahayog Construction,
Through its Partner,
Dharojirao Marotrao Hamberde,
Age : 55 years, Occu. : Business,
Plot No. 8, Indira Niwas, Vishnupuri, Nanded,
Dist. Nanded

4] Sudhir Narayanrao Jadhav,
Age : 35 years, Occu. : Business,
Proprietor,
M/s Sanjivani Constructions,
Plot No.3, Tirumala Park, Mama Chouk,
New Kautha, Tal. and Dist. Nanded

5] Salim Nabi Shaikh,
Proprietor,
M/s Saim Constructions,
House No. 1-23-26/1A, Tahura Colony,
Sangi (BK), Nanded

6] Ramesh Madhavrao Patil
Age : 58 years, Occu. : Business,
Proprietor,
M/s Kunal Constructions,
17, Ashok Nagar, Nanded,
Tal. and Dist. Nanded .. PETITIONERS

VERSUS

1] State of Maharashtra
Through its Secretary,
Rural Water Supply and Sanitation Department,
Mantralaya, Mumbai

2] Maharashtra Jeevan Pradhikaran,
Through its Member Secretary,
4th Floor, Express Tower,
Nariman Point, Mumbai-21.

3] Chief Engineer,
Maharashtra Jeevan Pradhikaran,
Aurangabad Region,
Jal Bhawan, Administrative Building,
Vedant Nagar, Near Devgiri College,
Aurangabad

4] Executive Engineer,
Maharashtra Jeevan Pradhikaran,
Nanded Division, 2nd Floor,
Jal Bhawan, Tushar Colony, Near Work Shop,
Nanded, Tal. and Dist. Nanded .. RESPONDENTS

...
Advocate for petitioner : Mr. Anil M. Gaikwad
AGP for the respondent no. 1 – State : Mr. P.K. Lakhotiya
Advocate for the respondents nos. 2 to 4 : Mr. A.G. Vasmatkar
...

CORAM : MANGESH S. PATIL &
Y. G. KHOBRAGADE, JJ.

DATE : 22 DECEMBER 2022

ORDER (MANGESH S. PATIL, J.) :

Heard.

2. Rule. Rule is made returnable forthwith. Learned AGP waives service for respondent no.1 and Mr. Amol G. Vasmatkar waives

service for respondents nos. 2 to 4. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The petitioners are the civil contractors registered with various public departments including the respondent no. 2. The mission for providing drinking water to each house, for the projects costing more than Rs. 5 Crores, the respondent no. 2 is the implementing authority. It had published a tender for 15 different villages. The petitioners responded by placing bids, however, cancelling that tender process the respondent no. 2 has clubbed all the 15 works and has floated a single tender treating it as one work at an estimated cost of Rs.1,61,69,94,398/-. As a result, only A category contractors now would be eligible to fill the tender depriving the petitioners and every such other small entities an opportunity to undertake the work. They therefore pray to quash and set aside the tender floated by the respondents on 28-11-2022 and seek direction to proceed with the first tender.

4. Learned advocate for the petitioners would submit that there is no sufficient and cogent reason to cancel the first tender which was separate for each of the 15 villages. There is no reason why those were sought to be clubbed. It would now enable only the A category contractors to submit the bids to the exclusion of the other contractors including the petitioners. The action is arbitrary and capricious and

would deprive the petitioners of right to participate. Mr. Gaikwad relies upon the decision of the Supreme Court in the matter of ***Meerut Development Authority Vs. Association of Management Studies and Another*** with connected matters***; 2009 AIR SCW 4623***.

5. Mr. Gaikwad would further submit that no explanation was disclosed while issuing the impugned communication cancelling the tender process and it was vaguely mentioned that it was being cancelled for technical reasons. Even in the affidavit in reply, no reason can be discerned touching the aspect. The only reason quoted in the affidavit in reply of the respondents nos. 2 to 4 is that they intended to curtail the time for completion of the project. This ground is factually not tenable since the time for completion of the project as indicated in the first tender and the new tender is the same.

6. Learned advocate Vasmatkar for the respondents nos. 2 to 4 would submit that there was no arbitrariness in cancelling the earlier tender process and floating the new tender by clubbing the works. The decision has not been prompted by any *mala fides*. Even if it is based on any unsustainable ground, it would not be justiciable. The scope for undertaking a judicial review in tender matters is very limited. It is only if it can be demonstrated that the decision has been taken mala fide or to favour someone or is arbitrary and irrational or is affecting public interest, then alone the Courts should intervene else it would only be

restricted to the scrutiny as to the decision making process. He relies upon the decision in the matter of ***Jagdish Mandal Vs. State of Orissa and others; (2007) 14 SCC 517***.

7. We have considered the rival submissions and the papers.

8. To begin with, one must bear in mind the scope for judicial review in tender matters. There are umpteen number of cases touching different aspects of the matter. The decisions in the case of ***Tata Cellular Vs. Union of India; 1994 (6) SCC 651, Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and another; (2016) 16 SCC 818, N.G. Projects Limited Vs. M/s. Vinod Kumar Jain and others (Civil Appeal No. 1846 of 2022); (2022) 6 SCC 127, Air India Ltd. Vs. Cochin International Airport Ltd.; (2000) 2 SCC 617*** and even the afore-mentioned two decisions elaborately lay down the guidelines. In the matter of ***Tata Cellular*** (supra), the guidelines have been culled down in paragraph no. 94 thereof, as under:-

> "**94.** The principles deducible from the above are:
>
> (1) The modern trend points to judicial restraint in administrative action.
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> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative

> decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
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> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
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> Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

9. Bearing in mind the afore-mentioned principles, it is imperative to ascertain if the decision to cancel the separate tenders and clubbing them and to float a new tender is prompted by some ulterior reasons either to secure benefit for some person or to deprive it to someone.

10. It should be borne in mind that the decision making process only has to be considered and not the reasons for the

decisions. This is the distinction laid down in the matter of *Jagdish Mandal* (supra) in paragraph no. 19, which reads thus:-

> "**19.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are 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 :
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> 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."

11. Similarly, the following observations in the matter of *Meerut Development Authority* (supra) are also important.

"**17.** A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the biding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

12. There is absolutely dearth of material to indicate that the decision in question was prompted by some mala fides albeit the petitioners being small time contractors, may have lost an opportunity to undertake the work.

13. In view of fresh tender, the estimated cost would eliminate the small contractors from group 'B' and even the contractors like petitioners who are waiting for their empanelment. It is only the group A category of contractors who would now be eligible to participate.

14. The learned advocate Mr. Gaikwad submits that there are as many as 19 contractors from category A whereas Mr. Vasmatkar tenders across the bar a list of such A category contractors which are 39 in number. If this be so, individual interest of the contractors like petitioners apart, it cannot be said that the decision to cancel the earlier separate tenders, clubbing them and issuing a fresh tender by consolidating the same is taken to secure some advantage to an individual, entity or person. Any of these 39 A category bidders can apply and succeed in getting the contract. It cannot be pre-judged and there is no material to demonstrate that care is being taken to exclude the persons and secure the allotment of contract to some specific entity which is the parameter to be borne in mind in view of the observations in the matter of *Meerut Development Authority* (supra).

15. Absence of any sound reason for cancellation is obviously not justiciable, as has been indicated in the matter of *Jagdish Mandal* (supra). There is nothing to demonstrate that these is some oblique interest.

16. There is no merit in the petition. It is dismissed.

17. Rule is discharged.

[Y. G. KHOBRAGADE]
JUDGE

[MANGESH S. PATIL]
JUDGE

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