IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.
…

WRIT PETITION NO. 4876 OF 2021
WITH
WRIT PETITION NO. 129 OF 2022
WITH
WRIT PETITION NO. 5220 OF 2021

WRIT PETITION NO. 4876 OF 2021

Gayatri Mahila Bhachat Gat
Through its Secretary:
Smt.Vandana Rajendra Padole
having office at Jawla Shahapur
Tq.Chandur Bazar,Dist.Amravati. ..**Petitioner**

versus

1) State of Maharashtra
Through Secretary
School Education and Sports
Madam Cama Road,
Mantralaya, Mumbai -32.

2) Directorate of Primary Education
Maharashtra State
Through Director of Education (Primary)
Mid Day Meals Scheme
12 Pune Region Office
17, Babasaheb Amedkar Road, Pune-411 001.

3) Ganga Bakal Bansidhar
Amravati, A Partnership firm having
its office at Sakkarsath, Jawahar Gate
Amravati-444 601.

4) Khandelwal Industries
A Partnership firm having its office
at Shrikrushna Peth
Amravati Maharashtra-444 601.

5) Rajendra Trading Company
A Proprietorship : Pradeep Gajanan Chadawar
having office at 1st Floor
Above Buldana Urban Cooperative
Society 248/4-1-18
Sahakar Sanjeevani
VIP Road, Nanded -431 603.

6) National Cooperative Consumer Federation
of India, having its office at 65, 57 and 68
Shri Sitaram Mills compound
M.M. Joshi Marg, Mumbai 4000011.

7) Swastik Berojgar Noukari Seva
Sanstha Maryadit
Shop No. 24 ASMC Sankul,
Near Rajapeth Police Station,
Badnera Road, Amravati
Through its Secretary .. **Respondents**

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Mr. M.G. Bhangde, senior Advocate assisted by Mr. Shajal Sarda, Advocate for Petitioner
Mr S.P. Dharmadhikari, senior Advocate (special counsel) assisted by Ms. N.P. Mehta, Asst.Govt. Pleader for Respondent Nos. 1 and 2
Mr. Onkar Ghare, Advocate for Respondent No.3
Mr.Mr G.K.Mundhada, Advocate for Respondent No.4

Mr.D.V.Chauhan,Advocate with Mr C.J.Dhruv, Advocate for the RespondentNo.6
Mr. A.M. Sudame, Advocate for Respondent No.7

WRIT PETITION NO. 129 OF 2022

Gayatri Mahila Bhachat Gat
Through its Secretary
Smt. Vandana Rajendra Padole
having office at Jawla Shahapur
Tq.Chandur Bazar , Dist.Amravati. ..**Petitioner**

versus

1) State of Maharashtra
Through Secretary
School Education and Sports
Madam Kama road,
Mantralaya, Mumbai -32.

2) Directorate of Primary Education
Maharashtra State
Through Director of Education (Primary)
Mid Day Meals Scheme
12 Pune Regional Office 17,
Babasaheb Ambedkar Road, Pune -411 001.

3) Ashutosh Traders
Through its proprietor
Mr Rajesh Gokulchand Sharma
Aged 55 years occu: Business
Near Birla Bhavan,
New Radhakisan Plot, Akola 444 001.

4) NACOF India Limited
under the Aegis Ministry of Agriculture
Government of India,
Department of Agriculture and Cooperation,
New Delhi Branch Off. 28/201
Vishwa Darshan Nehru Nagar,
Kurla East Mumbai 440 024
Through its Chairman

5) The Maharashtra State Cooperative marketing
Fewderation Limited
Kanmoor House Narsi Natha Street
Masjid Bander, Mumbai 400 009
Through its Director

6) Vikas Mahila Audyogik Uptadak
Sahakari Sanstha Maryadit
Through its President
R/o 139, G-1 Ward No.24 C/o Copal
Khamdate, Indirabai Deshmukh Nagar
Khamgaon 444 303. .. **Respondents**

...

Mr. Firdos Mirza, Advocate for Petitioner
Mr S.P. Dharmadhikari, senior Advocate (special counsel) assisted by Ms. N.P. Mehta, Asst.Govt. Pleader for Respondent Nos. 1 and 2
Mr. A.A. Naik, Adv.with Mr H.S.Chitaley, Advocate for Respondent No.3
Mr. P.D. Ghare with Ms.Arti Singh Advocate for Respondent No.5
Mr. S.M.Vaishnav, Advocate for Respondent No.6

WRIT PETITION NO. 5220 OF 2021

Renuka Mata Mahila Bachat Gat
Through its President :
Sau. Urmila Manoj Pawar

Aged about 41 yars, having its registered
office at Post Vithalpur Gat No.71
Kannad Road, Kannad Aurangabad
Maharashtra 431103. ..**Petitioner**

versus

1. State of Maharashtra
Through Secretary
School Education and Sports
Madam Kama Road,
Mantralaya, Mumbai -32.

2) Directorate of Primary Education
Maharashtra State
Through Director of Education (Primary)
Mid Day Meals Scheme
12 Pune Regional Office 17,
Babasaheb Ambedkar Road, Pune -411 001.

3) Ashutosh Traders
Through its proprietor
Mr Rajesh Gokulchand Sharma
Aged 55 years occu: Business
Near Birla Bhavan,
New Radhakisan Plot, Akola 444 001.

4) Moreshwar Mahila Prathmik Grahak Sahakari
Sanstha :Through its President
Sau. Indubai Ghagwanrao Nagve
having its office at Post Rajur
Tahlsil Bhokardan Dist. Jalna.

5) Vikas Mahila Audyogik Uptapadak Sahakari
Sanstha Maryadit, Khamgaon :Through its
President : Smt.Durgadevi Omprakash Sharma
having its office at G-1 Infront of Maratha

Mangal Karyalaya
Indira Bai Deshmukh Nagar
Khamgaon Buldana
Maharashtra 444 303. .. **Respondents**

...

Mr. R.M.Bhangde, Advocate for Petitioner
Mr S.P. Dharmadhikari, senior Advocate (special counsel) assisted by
Ms. N.P. Mehta, Asst.Govt. Pleader for Respondent Nos. 1 and 2
Mr. A.A. Naik, Advocate for Respondent No.3
Mr.S.M.Vaishnav, Advocate for Respondent No.5

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CORAM: NITIN JAMDAR &
ANIL L.PANSARE,JJ.
DATE OF RESERVING: 01 APRIL 2022
DATE OF PRONOUNCEMENT: 4 MAY 2022

JUDGMENT: (PER ANIL L. PANSARE, J.)

Heard the learned Counsel for respective parties, at length.

2. **Rule**. Rule, made returnable forthwith. Heard finally with the consent of the parties.

3. The Respondent No.2 floated a tender for transportation of rice from Food Corporation of India godown and supply of foodgrains, such as, pulses, oil, spices and condiments to schools under Mid-Day Meal Scheme for Amravati, Akola and Buldana Districts. The Petitioner in Writ Petition No. 4876/2021 (hereinafter

referred to as "1st Petition") has challenged its exclusion from the tender process for Amravati District. The Petitioner in Writ Petition No. 129/2022 (hereinafter referred to as "2nd Petition") has challenged its exclusion from the tender process for Akola District and Petitioner in Writ Petition No.5220/2021 (hereinafter referred to as "3rd Petition") has challenged its exclusion from the tender process for Buldana District. The Petitioner in 1st and 2nd Petitions are the same *viz.* Gayatri Mahila Bachat Gat, Amravati, whereas the Petitioner in 3rd Petition is Renukamata Mahila Bachat Gat.

4. The Petitioners have submitted their bids for the respective tenders. The technical bids were opened on 30 September 2021. The technical bids were evaluated on two counts - the first being scrutiny of documents and the second being the test results of the foodgrains. All the Petitioners have been declared disqualified in scrutiny of documents vide decision dated 22/25 November 2021. The Petitioners are aggrieved by such disqualification and, therefore, challenged the same in the present Petitions. The Petitioners are seeking the order to quash and set aside the impugned decisions taken by Respondent No.2-Directorate of Primary Education, Maharashtra State. The Petitioners have further sought a declaration that they are technically qualified in the tender process and for directions to open their financial bid.

5. The common thread of arguments in the Petitions is that if the tender conditions could be relaxed for the Respondent-bidders (except the last Respondent), the benefit ought to have been extended to the Petitioners as well. Having not done so, the action of Respondent-employer is termed as arbitrary, unjust, unreasonable and violative of Article 14 of the Constitution of India.

6. In the 1st Petition, there were six bidders, viz. Petitioner and Respondent Nos. 3 to 7, in the 2nd Petition there were five bidders *viz.* Petitioner and Respondent Nos. 3 to 6, whereas in the 3rd Petition there were four bidders viz. Petitioner and Respondent Nos. 3 to 5. There is no dispute that technical bids of all the bidders were opened on or about 30 September 2021. The bids and other documents of the Petitioner and Respondents were visible to all the bidders on the website of the Respondent No.1. Since all the documents were visible to other bidders, every bidder could raise its objection to the qualification and satisfaction of the tender conditions by other bidders. The respective Petitioners have raised their objections in this regard with Respondent No.2.

7. According to Respondent Nos.1 and 2, the respective Petitioners suffered rejection of their bids principally for the reason that the bids were non-responsive inasmuch as the bids were incomplete. In the first two Petitions, some tender documents were

missing and in the 3rd Petition the tender documents were signed by an unauthorised person and that in all the petitions profile of the Petitioners were not uploaded. These Petitioners, therefore, were not entitled for any relaxation, even if it is presumed that relaxation was extended to the Respondent-bidders.

8. The Petitioners have admitted above lacunae but submit that the same occurred inadvertently and were rectified subsequently. The Petitioners in first two Petitions submit that they have addressed a communication dated 26 October 2021 i.e. prior to scrutiny of technical bid, submitting the entire tender document including the missing pages. The Petitioner in 3rd Petition has come up with a case that the shortcoming in its petition has been made good through the representation dated 6 December 2021. The question is whether it was permissible.

9. It will be appropriate to mention here that as per Clause 5.2 (a) (XIX) of the Tender conditions, a bidder is required to submit authorisation letter in the name of the authorised person on behalf of the bidder, to attend the meeting, to sign the bid document and for other ancillary purpose. The Petitioner in the 3rd Petition has submitted copy of the Resolution dated 15 July 2021 along with its bid authorising one Mahesh Sonwane. Thus, the bid documents were to be signed by the authorised person only i.e. Mahesh Sonwane. As

against, the bid documents were signed by Mrs. Urmila Pawar who admittedly was not an authorised person at the relevant time. The said authorisation has been obtained subsequently and submitted to Respondent-employer vide representation dated 6 December 2021.

10. Thus, all the Petitioners have admitted that there were defects in submitting their bids, but assert that such lapses were committed by other bidders too. Their case is that the Respondent No.2 chose to relax the condition in favour of Respondent bidders, but failed to do so in favour of the Petitioners. This act of Respondents, more particularly Respondent No.2 is said to be arbitrary, discriminatory and violative of Article 14 of the Constitution and done with *mala fide* intention.

11. Mr. M.G.Bhangde, learned senior Counsel for the Petitioners has referred to Clause 5.2 (a) (xxi) which provides that all the documents should be duly notarised and self-attested and that non self-attested and non-notarised documents will not be considered and will be liable for rejection of bid. According to him, the Respondent No.3, a successful bidder, in the 1st Petition has submitted its bid but none of the tender documents were duly notarised in terms of clause 5.2 (a) (xxi). Despite such non-compliance, the Respondent No.3 was not disqualified by the

Respondent No.2, rather the said tender condition was relaxed in favour of Respondent No.3.

12. So far as Respondent No.4 is concerned, apart from submission of non-notarised tender documents, the objection of the Petitioner is that the Partnership deed submitted by Respondent No.4 is dated 14 July 2015. However PAN Card submitted, refers to Partnership incorporated on 1 April 1990. The Respondent No.4 has issued a letter dated 22 November 2021 in favour of Respondent No.2 explaining therein the reasons for different dates in the partnership deed and PAN Card. The explanation would clarify that the partnership was entered into in the year 1990. There were subsequent changes in the partnership, the last of which is partnership deed dated 14 July 2015. The changes in composition of partnership and other related issues being a common phenomenon, it is usual practice to upload the latest partnership deed and accordingly the Respondent No.4 has uploaded the latest partnership deed having PAN Card details of 1990, the first date when partnership firm was created. Mr. M.G.Bhangde, learned senior Advocate for Petitioner would contend that the explanation was tendered on 22 November 2021 which is subsequent to the date of submission of bid and was not available with the Respondent No.2 at the time of opening of technical bid. Therefore, acceptance of PAN Card of the year 1990 for partnership deed of the year 2014 is a relaxation given to Respondent No.4.

13. In respect of Respondent No.5, the petitioner, apart from its objection that the tender documents submitted were not duly notarized, has lodged an objection that as per Clause 5 (1) (vi) the bidder should have adequate number of vehicles for transportation of rice and foodgrains to schools with FSSAI certificate but the Respondent No.5 did not submit the said certificate/license of the owner of the vehicle. The said condition has been relaxed by Respondent No.2 in favour of Respondent No.5.

14. In respect of Respondent No.6, the Petitioner's objection is that in terms of Clause 5.2 (a) (xiii) the bidder should have license /certificate under Food and Safety Standard Act, 2006 issued by the Department of Food & Drug Administration etc. However, the application for grant of license for Amravati District submitted by Respondent No.6 with the competent authority has been rejected. Further objection is that the Respondent No.6 has filed Udyog registration certificate, the type of registration is shown as micro enterprise, however, the annual turnover of Respondent No.6 is more than ₹ 1500 crores. The notification dated 1 June 2020 issued by the Government of India, Ministry of Micro, Small and Medium Enterprise would define a micro enterprise an entity whose turnover does not exceed Rs. 5 crores. Thus, on the face of the record, the Respondent No.6 was not a micro enterprise and the Udyog Registration certificate issued in its favour is void. It is further the

objection of the Petitioner that Respondent No.6 also has not complied with clause 5.2 (a) (xxi). However, the Respondent No.2 did not disqualify the Respondent No.6, but relaxed the aforesaid conditions in its favour.

15. It is thus argued by the Petitioners that the Respondent Nos. 1 and 2 have acted contrary to Article 14 of the Constitution, by relaxing the conditions in favour of some of the bidders like the Respondent Nos.3 to 6 in 1st Petition but refused to relax similar such conditions for the Petitioners.

16. So far as defects in the Petitioner's tender is concerned, the justification of the Petitioner is that it is an inadvertent mistake. According to the Petitioner, only three tender documents having Page Nos.7, 13 and 57 were missing. However, in reply, it has been pointed out that Petitioner failed to upload Pages 13, 21, 23, 29, 33, 35, 41, 49 and 57. These missing pages, according to Petitioner, would not render the Petitioner disqualified in the technical bid.

17. Mr. Bhangde, learned Senior Advocate submits that the missing pages refers to the tender conditions in respect of the proof of ability of the bidders, documents comprising bids, earnest money deposit, manner of submission of tender and its accompaniments, bid opening and evaluation, inspection of laboratory testing and bills

and payments, disputes, general obligations of the contractors etc. These missing pages which refers to formal clauses of the contract are covered in Page No.293 of the tender document. Page No. 293 provides for declaration by the contractor to have read the general conditions of contract enclosed with the tender and endorsing its agreement with those conditions. Having signed Page No.293, the requirement that bidder, like the Petitioner, has read all the general conditions of the contract which includes the conditions mentioned in the missing pages, and having agreed to these conditions, the essential condition of the contract has been complied. In other words, the Petitioner's case is that it has in substance, but not in the form complied with all the requisite stipulations, particularly when it is not the case of the Respondents that the Petitioner has not complied with one or other requirement prescribed in missing pages.

18. On the other ground of rejection of Petitioner's technical bid, i.e. profile having not been uploaded /submitted, Mr. Bhangde, Senior Advocate has drawn our attention to the profile submitted by Respondent Nos.3 and 4. It contains nothing but the name of the firm, name of the proprietor, address, phone No. PAN, GST Registration No. etc. Our attention then has been drawn to the reply filed by Respondent Nos. 1 and 2 seeking profile to understand the capability and work experience of the bidder and other such details. Mr. Bhangde, would argue that the profile as is submitted by Respondent Nos.3 and 4 discloses nothing either on the point of

experience or on the point of their ability to perform the contract. As against, the Petitioner has submitted its memorandum of association which is part of technical bid. The memorandum discloses the complete profile of the Petitioner which includes the aim and object, so also the capability of performing contract. However, the Respondent Nos.1 and 2 ignored to accept the said memorandum as profile of the Petitioners. Thus, it is argued that the action of Respondent Nos.1 and 2 in rejecting the technical bid of the Petitioner is arbitrary and discriminatory.

19. Mr. S.P. Dharmadhikari, learned Senior Advocate for Respondent Nos.1 and 2 has argued that the relaxation was not at all given to the Respondent-bidders. He has referred to clause 5.2 (a) (xx) which provides that all the tender documents including corrigendum must be signed by the authorised person. This condition, according to Mr. Dharmadhikari, has been satisfied by the Respondent-bidders inasmuch as there is no dispute that the authorised persons have signed the tender documents of Respondent-bidders. The tender document being document belonging to the Respondent Nos. 1 and 2, does not really require notarization on each page in terms of Clause 5.2(a) (xxi). What is required to be duly notarized is a document furnished or belonging to the respective bidders *viz.* the profile, the license and other related documents. In that sense, no relaxation was given to the Respondent bidders. Mr. Bhangde, however, would dispute such a proposition by

referring to Clause 5.2 (a) (xxi) which is subsequent to Clause 5.2(a) (xx) and which commences with the words "***all the above documents***....." This phrase, according to Mr.Bhangde, would mean and include documents referred to in Clause 5.2 (a) (xx) as well.

20. We need not delve upon the said controversy. Suffice it to say that law is well-settled, on the point of interpretation of terms of contract. The question as to whether the term of the contract is essential or not, is to be viewed from the perspective of both the employer and the bidder. However, the Apex Court in its recent decision in the case of *M/S N.G. Projects Limited Vs Vinod Kumar Jain and others,*[1] , has held that the said question is to be viewed from the perspective of the employer and by the employer. In that sense it is the prerogative of the employer to relax the conditions which, according to employer, are not essential or whose strict compliance, according to employer, is not essential. Further in the case of *Central Coalfields Ltd. Vs SLL-SML (Joint Venture Consortium)*[2], the Court held that the employer may even deviate from the NIT. Therefore, giving relaxation to Respondent-bidders would not by itself render the action of Respondent nos.1 and 2 arbitrary or unjust. The question that requires consideration is whether on the basis of such relaxation can the Petitioners claim relaxation in other conditions to rectify the defect which, according to Respondent Nos. 1 and 2, are

1 AIR 2022 SC 1531
2 (2016) 8 SCC 622

fundamental in nature. The answer certainly would be negative for the reasons to follow.

21. The question of comparing commercial bid arises between the bidders similarly circumstanced. It is well settled law that the bidders who meet the eligibility requirement are not equal to the bidders disqualified. Thus, the Petitioner will first have to show that their bids meet eligibility requirement, then only they can claim relaxation. However, the Petitioners herein are seeking relaxation to overcome the disqualification. The Petitioner in 1st two Petitions, admits that they failed to upload few pages of the tender documents. The Petitioner in 3rd Petition though uploaded the tender documents but the signatory to the documents was not an authorised person. Apart from above, all the petitioners failed to upload their profile. Thus, there is fundamental defect in the submission of the tender bid. To submit a bid with some pages of the tender missing or to submit the bid not signed by authorized person, cannot be said to be a valid bid. Thus the bid of the Petitioners did not meet the eligibility criteria.

22. The Petitioners further admit that they did not submit/upload the profile but have pointed fingers towards some of the Respondent-bidders contending that the profile submitted by them is not to the expectations spelt out by the Respondent Nos. 1

and 2 in their reply, which is narrated in the earlier paragraphs. The contentions of the Petitioners may be true, however, firstly the deficiency would not make the Petitioners technically qualified and secondly it would not render the Respondent-bidders technically disqualified. The requirement was to submit/upload the profile which admittedly has been submitted/uploaded by the Respondent-bidders. Whether it fulfilled expectations is to be decided by the Respondent nos.1 and 2. The fact remains that the Petitioners did not submit/upload profile and Respondent bidders did.

23. Thus, according to Respondent Nos. 1 and 2, some pages of the tender document were missing in respect of Petitioners in Petition Nos. 1 and 2. The Petitioner in 3rd Petition has submitted the tender which was not signed by authorised person. That apart, it was found that certain documents like profile etc. were absent. The State level Purchase Committee after analysis, found that the bids of the Petitioners and the last Respondent were not responsive. The bids of other Respondents were found responsive, but required certain clarification for example, the Partnership deed submitted by the Respondent No. 04 was dated 14 July 2015, as against its PAN Card was of the year 1990. The Respondent No. 04 explained the reasons through communication dated 22 November 2021, which appears to have satisfied Respondent nos.1 and 2. Such was not the case of the Petitioner.

When documents itself were missing, what clarification would Respondent No. 01 and 02 seek?

24. Mr. Dharmadhikari, learned senior Advocate for Respondent Nos. 1 and 2, in support of his contention that the bid submitted by the Petitioners was non responsive refers to clause 7.2 which deals with rejection of bids. According to said clause the bid is liable to be rejected if any page or part is missing. He has then referred to clause 6.6 which deals with format and signing of bids. Sub-clause (ii) thereof provides that the bidder is not allowed to alter, omit, delete, add, or change anything in bid document. Accordingly it is argued that the Petitioner's bid was liable to be rejected for submitting incomplete bid. Mr. Dharmadhakari has taken aid of the judgement in in the case of *Glodyne Technoserve Limited vs. State of Madhya Pradesh and Others* [3]. The appellant therein had a valid and active ISO certification which it did not submit along with the bid document. The certificate was sought to be submitted later on. The Court held that though the appellant had a valid certificate which was not submitted along with the bid document and which was sought to be submitted later on with certain explanation, whether such explanation was to be accepted or not lay with the discretionary power of the authority inviting bids and that the decision taken to reject the technical bid of the appellant therein cannot be said to be perverse or arbitrary.

[3] (2011) 5 SCC 103

25. As against, Shri Bhandge, learned senior Advocate by referring to sub-clause (i) and (ii) of clause 7.2 of the conditions of contract which deals with the rejection of bid, contends that under sub-clause (i) the bid is likely to be rejected, if it is found that bidder has not strictly followed the procedure laid down for submission of bid and the bidder has proposed a condition or additional conditions which are inconsistent with or contrary to the terms and conditions. Sub-clause (iii) provides that the bid is liable to be rejected if any page or part is missing. According to Mr Bhandge, senior Advocate the Respondent Nos. 1 and 2 have conveniently relaxed sub-clause (i) and (ii) of clause 7.2 against Respondent bidders, whereas rigidly applied sub-clause (iii) against the Petitioners.

26. We are not able to accede to the submissions made by Mr Bhangde. We do not find that any of the conditions provided in sub-clause (i), (ii) and (iii) of clause 7.2 have been relaxed. Sub-clause (i) provides for likelihood of rejection if bidder has not strictly followed the procedure. If one goes through the entire clause 7.2, it indicates complete absence of compliance like missing pages, not signing each page, not submitting sample of foodgrains, not submitting documents, absence of signature and seal under RPF, not uploading supporting documents etc. In addition, it provides for likelihood of rejection of bid if something that is not warranted has been proposed by the bidder *viz.* additional condition which is inconsistent with the

terms and condition, addition, correction or alteration made by the bidder without affixing signature etc. Thus, clause 7.2 refers to vital deviation from the tender conditions. 'Missing Pages' was one of such conditions. There is no dispute that some pages in the Petitioners' bid were missing. The Respondent Nos.1 and 2 rejected the technical bid. The judgment cited by Mr.Dharmadhikari would support Respondent Nos.1 and 2. There is no substance in the argument of the Petitioners.

27. Mr. Dharmadhikari, learned Senior Advocate, has then referred to sub-clause (i) and (iii) of Clause 6.6, which provides for format and signing of bids. Sub-clause (i) provides that all the pages of the bid document in original shall be signed by a person duly authorized to sign on behalf of the bidder. Sub-clause (iii) provides that each page of the tender along with corrigendum must be signed and submitted by bidder or authorised person. Both the conditions do not provide that these documents should be notarized. Thus, it is argued that absence of notarization of bid document by Respondent-bidders is not contrary to the tender conditions.

28. If clause 6.6 is read independently, the point urged by Mr Dharmadhikari appears to be in consonance with the said clause. However, Mr. Bhangde would contend that the aforesaid argument is without pleading and would rely upon the judgment in the case of

Bharat Singh and Others vs. State of Haryana and Others[4]. . The Supreme Court held that when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point must plead and prove such fact by evidence which must appear in the writ petition or the counter affidavit as the case may be. It is then held that if the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter affidavit, as the case may be, the Court will not entertain the point.

29. We have gone through the reply and found that though not in terms as expected by the Petitioners, there appears pleadings on this point in the reply filed by Respondent Nos. 1 and 2. They have stated that the objections received were scrutinised in the background of the tender conditions and that the Respondent Nos. 1 and 2 have found that the bidders had obtained signature of the authorised signatory on every page of the bid document and that such submission was found to be in compliance with the tender condition and that the documents were also found attested with the respective seal of the company/firm of the respective bidders. Thus, according to Respondent Nos. 1 and 2, the bids of Respondent-bidders were in compliance with the tender conditions and that tendering authority did not find the said bids to be non-responsive. The judgment cited by the Petitioners, therefore, will not be applicable, having found pleadings in the reply.

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[4] (1088) 4SCC 534

30. Mr.Dharmadhikari would then argue that the sub-clause (i) of Clause 6.6 would also answer the objection raised by the Petitioner in 1st Petition that the demand draft submitted by Respondent No.6 (successful bidder) was not notarized. The demand draft submitted being original does not require notarization in terms of said clause. Thus the Respondent nos.1 and 2 have their own justification for accepting bids of the bidders (except Respondent no.7) so also for rejecting Petitioners bid. The justification included relaxation in the tender conditions. We do not find that the said justification is sans support of law. The decision taken by the State level Purchase Committee and/or Respondent Nos.1 and 2 cannot be said to be arbitrary or unjust.

31. Another objection has been taken by the Petitioner in 1st Petition in respect of FSSAI license but for the first time through rejoinder. According to Petitioner, the Respondent No.6 did not possess license/certificate under the Act of 2006 for Amravati District for which it was awarded contract. Clause 5.2(a)(xiii) provides that bidder should have license /certificate under the Act of 2006. The corrigendum clearly states that the license of the District for which the bidder wish to submit bid will be accepted. As against, the learned senior Advocate for Respondent Nos.1 and 2 so also learned Advocate for Respondent No.6 would vehemently submit that the objection has been taken for the first time through rejoinder

and therefore cannot be entertained, as it would cause great prejudice to the Respondents.

32. There is substance in the point urged by the Respondents. The Petitioners have never raised this objection in past or even through the Petition. No reasons are given as to why the said objection was not raised earlier. It is well settled that in rejoinder the Petitioner has right to explain only the additional facts incorporated by the Respondents in their counter affidavit and that the Petitioner cannot be permitted to plead a new case/ grounds. In the present case, the Petitioners through rejoinder have raised new grounds.

33. The Petitioners, anticipating the above objection have then, continuing the focus on the same objection, referred to provisions of the Act of 2006 on this point. Mr. Bhangde, learned Senior Advocate has invited our attention to various provisions of the Act of 2006 to contend that the license is to be granted for the premises from where the bidder will be carrying on its business, *viz.* manufacturing, storage, selling or exhibition of the foodgrains. Mr. Bhangde would then refer to the license issued in the name of Respondent No.6. The address of authorized premises is shown to be of Greater Mumbai and not Amravati. Therefore, he contends that

the license is not in tune with the terms and conditions. The Respondent No.6 thus did not possess license to carry on any food business in Amravati District and, as such, the Respondent No.6 was clearly disqualified. He has further contended that there is nothing on record in the form of an affidavit of Respondent No.2 - Director that Central license, which Respondent No. 06 possesses, is a license of highest order and that it is valid license for the entire country. The Respondent No.1 & 2 have clarified through corrigendum that the bidders must possess license at the place where it intends to bid. Therefore, any relaxation in said condition would amount to malice in law. The Petitioners would then argue that where there is malice in law, the averments to that effect in the pleadings may not be required. Mr. Bhangde has placed reliance upon the judgement of the Apex Court, in the case of *Swarn Singh Chand vs. Punjab State Electricity Board and others*[5] to contend that when an order suffers from malice in law, neither any averment as such is required to be made nor strict proof thereof should be insisted upon. Such an order would be illegal and is wholly unsustainable. Another ruling relied upon by the Petitioner is, in the case of *Vidarbha Irrigation Development Corporation & others vs. Manojkumar Agrawal*[6]. The tender was for balance earthwork to be done in a canal. One of the conditions of the contract was that the bank guarantee shall be valid upto one month after the defect liability period which comes out to be 40 months. The bank

[5] (2009) 13 SCC 758
[6] (2020) 17 SCC 577

guarantee furnished by Respondent No.2 therein was for six months. The Respondent No.2 sought to make up this deficiency by adding a period of 34 months to the bank guarantee after opening of the tender. The Supreme Court, while referring to clarification in the pre-bid, held that the tendering authority ought not to have allowed relaxation in such condition. The next ruling is in the case of *BSN Joshi & Sons Ltd. vs. Nair Coal Services Ltd. And Others*[7]. The Hon'le Supreme Court while dealing with the principles applicable to award Government contracts/tenders held that the essential conditions of the contract must be adhered to and that power of relaxation should be exercised with fairness, reasonableness and in a bona fide manner.

34. Mr Bhangde, has then referred to the judgment of the Supreme Court, in the case of *G.J.Fernandez vs. State of Karnataka and others*[8]. The Court held that party issuing the tender has the right to punctiliously and rigidly enforce them and that any deviation should not result in arbitrariness or discrimination.

35. We are not able to accept the contentions of the Petitioners firstly, because the law as settled in the case of Central Coalfields (Supra) would permit the employer to deviate from the essential condition of the contract provided the deviation is uniformly applied

7 (2006) 11 SCC 548
8 (1990) 2 SCC 488

and is not arbitrary. Even the judgments relied upon by the Petitioners say so. Secondly, we have gone through the provisions of the Act of 2006 but are unable to find support in favour of the Petitioners. Section 31 of the Act of 2006 provides for licensing and registration of food business. Sub-Section (1) thereof provides that no person shall commence or carry on any food business except under a license. Sub-clause(3) provides for making an application for grant of license to the Designated officer, which is appointed for each District. Sub-clause (6) provides that a single license may be issued by the Designated officer for one or more articles of food and also for different establishments or premises in the same area. Sub-clause (7) provides that if the articles of food are manufactured, stored, sold or exhibited for sale at different premises is situated in more than one area, separate applications shall be made and separate license shall be issued in respect of such premises not falling within the same area. These provisions do not relate to the transportation of goods. None of the provisions mandates supply location to be place obtaining license unless the activity of manufacturing, storage, selling or exhibitions foodgrains is carried at such place. The contract doesn't envisage bidder to provide storage for the goods. Therefore the argument of the Petitioner that the provisions of the Act of 2006 provides for obtaining licence at the premises located at designated place is without any substance.

36. Reference has also been made to the Food Safety and Standards (Licensing & Registration of Food Businesses) Regulations, 2011. Regulation 1.2 provides for definitions. Sub-clause(1) provides that “Central Licensing Authority” means Designated officer; sub-clause(2) defines “District” to mean Revenue District; sub-clause(3) defines “Licensing Authority”, to mean the Designated officer appointed u/s 36(i) of the Act of 2006. Clause (6) provides “State Licencing Authority” to mean the Designated officer appointed u/s 36 (1) of the Act of 2006. Regulation 2.1 provides for registration and licensing of food business. Regulation 2.1.2 sub-clause (3) provides that license for commencing or carrying on food business which falls under Schedule I shall be granted by the Central Licensing Authority. Schedule 1 provides for list of food business falling under the purview of Central Licensing Authority. Clause (IX) thereof is in respect of food business operator operating in two or more States. Form B of Schedule 2 of the Regulations, relates to application for license under the Act of 2006. Clause (3) provides for address of premise for which license is being applied. Form “C” is a format of license. Clause (2) thereof provides for address for authorized premises. The premises referred to in these regulations, in our understanding, doesn’t indicate premises of supply location. The transporter will transport goods at various places in the Country as per demand. It is difficult to expect transporter to have license at the premises at each supply location, which belong to someone else.

37. There is no dispute that the license issued in favour of Respondent No.6 has been issued by the competent authority. The category of license is termed as central license. There is further no dispute that this license has been issued under the Act of 2006. The reference to various provisions made by Mr Bhangde would only show that whosoever intends to commence or carry on any food business is duty-bound to obtain license under the Act of 2006. The reference to premises in the Schedule or Form annexed to the Regulations appears to be for the purpose of the registered address of the person carrying on transportation business which is a different activity than manufacturing, storage, selling or exhibition of the foodgrains in premises. These activities would require the business entrepreneurs to obtain license at respective premises, but not the transporter. There is no dispute that Respondent No.6 possessed a valid FSSAI license. Whether it was a central license or state license, the requirement is to be tested by Respondent No.2 which found that the license issued in favour of Respondent No.6 was a valid license.

38. We may add here that the tender in question is for transportation of rice from FCI godowns and supply of foodgrains to schools under Mid-Day-Meal Scheme in Amravati District. The contract stipulates that bidders are expected to transport rice from FCI godowns to Schools and to the designated places and also to

procure and supply pulses, condiments, refined soyabean oil and spices in all Schools excluding schools under Central Kitchen, across Maharashtra. Thus, the main purpose of contract is to transport goods from FCI godowns to schools and the other designated places. According to Petitioner, FCI godowns are situated at Amravati and Nagpur and, therefore, the license showing premises at Amravati is mandatory. As against, the Respondent Nos. 1 and 2 contends that FCI godowns are situated all over Maharashtra. None of the parties have placed on record any cogent material in support of their contentions. Thus, what is left is that the bidders are expected to transport goods from one place to another. If that be so, we are unable to find merits in the contentions of the Petitioners that the premises referred to in the provision mentioned above or in the forms annexed with Schedule I of Act of 2006 would mean the premises where the goods are to be delivered.

39. Similarly, the objection of the Petitioner that the turnover of Respondent No.6 exceeds the required turnover of micro enterprise and therefore Udyog Registration Certificate issued in its favour is void will not have bearing on technical qualification of bidder. The reason being the Respondent No.6 has furnished a certificate. The petitioner did not raise any objection prior to the scrutiny of the documents. The objection has been raised for the first time through rejoinder. We have to also keep in mind that we are not considering this aspect in a proceedings arising under the Act of

2006 and are considering it in the context of subject matter of this petitions. In the tender matters writ court is not expected to hold an enquiry 'through a magnifying glass'.

40. Similar such objection has been raised by the Petitioner through rejoinder against Respondent No.5. The only difference is Respondent No.5 possesses State license. The discussion made in above paragraphs would cover this objection as well.

41. The Petitioner in 2nd petition has, apart from the grievance of notarization of documents, a grievance that the reasons for disqualification have not been communicated. Our attention has been drawn to clause 7.1(viii). It provides under the head, 'bid opening and evaluation' that the reasons for disqualification will be communicated to the bidder who is disqualified in technical bid. Mr. Mirza, learned counsel for the Petitioner, has referred to the decision of the Respondent No.2 declaring the Petitioner and two others as disqualified in technical bid. He contends that no reason has been provided. What is reflected in the decision is that the Petitioner and two bidders out of five have been declared disqualified in the scrutiny of documents though they were found qualified in testing samples through laboratory. Ultimately, they were declared disqualified in technical bid. Thus, except for the above, there is

absolutely no reason given by Respondent Nos.1 and 2 as to why the Petitioners have been declared disqualified in technical bid.

42. Mr.Mirza, learned Counsel for the Petitioner has referred to paragraph 2 of the reply filed by the Respondent Nos. 1 and 2. The Respondents have stated that the Petitioner suffered rejection of bid as being non-responsive because the bid was incomplete and entire tender documents were not uploaded. Further, the Shop Act license, profile, complete MSME certificate were also not part of the bid document. Mr.Mirza, would contend that these reasons have been disclosed for the first time through the reply. Thus, according to Petitioner, the Respondent No2 has failed to comply with the mandatory conditions of the contract. He has then referred to paragraph 7 of the reply wherein the Respondents have pleaded that the said clause does not provide that the reasons for disqualification will be communicated in writing. This plea, according to Mr.Mirza, is an afterthought.

43. As against, Mr. Dharmadhikari, learned senior Counsel has pointed out that the case of the Petitioners is that the reasons for disqualification were communicated orally and not in writing. In this context, it is the stand of Respondent Nos. 1 and 2 that the clause under question does not provide that reasons are to be communicated in writing. Mr. Dharmadhikari would then argue that

detailed reasons could be furnished later on and even in counter affidavit to a Petition. In support, he has relied upon the judgment in the case of *Shilpi Constructions Contractors vs. Union of India and another* [9]. One of the contentions that was dealt with by the Supreme Court was whether the learned single Judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. The Supreme Court held that the Court was dealing with purely administrative decision in the realm of contract and that while rejecting the tender, the person or the authority inviting tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution. The Court then held that such decisions are neither judicial nor quasi judicial and that if reasons are given at every stage then the commercial activities of the State would come to a grinding halt. The Court further held that the State must be given sufficient leeway in this regard and that the Respondents therein were entitled to give reasons in the counter to the writ petition. Mr Dharmadhikari has referred to *Afcon's judgment* (supra) to contend that interference by the superior court is permissible only if the decision making process is mala fide or is intended to favour someone and that the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached.

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[9] (2020) 16 SCC 489

44. On the point of Shop Act license, Mr Mirza, contends that Clause 5.2(a)(vii) provides for Shop Act/ Udyog Adhar. The Petitioner had annexed Udyog registration certificate. Thus, according to Petitioner, the rejection of their bid on this count is incorrect. Mr. Dharmadhikari would submit that the case of the Petitioner that it has submitted Udyog Adhar is incorrect and is an afterthought. The claim of the Petitioner that MSME registration certificate and Udyog registration certificate are one and the same is misleading. The tender document contemplates requirement of Udyog Adhar under clause 5 (2)(a) (viii) and MSME registration certificate under Clause 5(2)(a)(iv). These two certificates are distinct and, therefore, they are stipulated separately in the tender document. Further it is shown by the Respondents that the Udyog registration certificate of Petitioner is registered for manufacturing only; it does not include transportation. Secondly, only first page of the registration was annexed with the tender document though the certificate contains four pages. Thus, according to the Respondent Nos.1 and 2, the bid was incomplete and therefore non-responsive.

45. On the point of notarization, the Respondent Nos.1 and 2 have countered the objections on the similar lines as in case of 1st Petition. In addition, Mr Dharmadhikari, learned senior counsel would contend that as per clause 5.2(a)(ii) scanned copies of receipt, DD deposit for testing of sample is to be notarized and not the

original demand draft. The Respondent No.3 having submitted the original demand draft and the same having been encashed, the objection of Petitioner is redundant. On the point of discrepancy in the turnover in the certificate issued by the CA and the balance sheet, the Respondent No.3 in paragraph 18 has explained the discrepancy. According to Respondent No.3 the certificate of CA refers to turnover in respect of supply of foodgrains, pulses etc, whereas the balance sheet provides for the gross figure of turnover which includes turnover from the entire business of the firm, therefore, it is but natural that both the figures will not be the same.

46. Thus, on the point of giving reasons by the respondent employer, the law as spelt out in Shilpi Constructions Contractors (supra) will favour the respondent employer. Even otherwise, the case of the Petitioners is that they were informed of their disqualification orally and not in writing. According to Respondent Nos.1 and 2, clause 7.1 (VIII) does provide that reasons for disqualification will be communicated to the bidder who is disqualified in technical bid. Admittedly, the technical bid was opened on or about 30 September 2021 and the documents of each bidder were visible on the website of Respondent No.1. In that sense, the bidders ought to be aware of the deficiencies in their tender so also in the tenders of other bidders. The Petitioners have raised objections on the basis of above status. Therefore, the deficiency in submitting bids was visible to the bidders as well. According to

Petitioners, the Respondent No.s 1 and 2 have orally informed them of the reasons for disqualification. This could be said to be sufficient compliance of the condition of contract. The petitioners were disqualified in scrutiny of documents. Thus, they were aware of their disqualification for deficiency in uploading/submitting necessary documents. The detailed reasons may not have been communicated to the Petitioners at that time, but then such is not the requirement in the tender condition as well. The said act of the Respondent employer cannot be said to be unjust or arbitrary.

47. The Petitioners sought to rely upon the decision, in the case of *M/s Ajanta Industries vs. Central Board of Direct Taxes New Delhi and others*[10]. The Supreme Court, in view of the provisions of Income Tax Act 1961 held that Section 127(1) requires reasons to be recorded prior to passing of an order of transfer. The Supreme Court further held that the requirement of recording reasons u/s 127 (1) is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee. In our view, the law laid down by the Supreme Court is clearly distinguishable inasmuch as in the present case, the Petitioners have not even pleaded a case that there is statutory provision that would require Respondent Nos. 1 and 2 to communicate the reasons in writing to the bidder/s of their disqualification.

[10] (1976) 1 SCC 1001

48. The next judgment relied upon by the Petitioners, is in the case of *M/s Star Enterprises & others vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others*[11] The Supreme Court in context with rejection of bid of a bidder giving highest offer, held that when highest offers are rejected the reasons sufficient to indicate the stand of the appropriate authority should be made available and should be communicated to the concerned parties unless there be any specific justification not to do so. This judgement will not be of any help to the Petitioner as financial bid of the Petitioner were not even opened having been declared not qualified in technical bid.

49. Thus, Respondent employer has valid reasons to give relaxation in tender conditions to the eligible bidders. None of the relaxation in the condition could be said to be unjust or arbitrary merely because Petitioners alleges so. The relaxation as extended appears to us to be well-founded and supported by the judgements of the Apex Court.

50. To cut short the controversy, we may refer to the recent judgment of the Apex Court in the case of *M/s N.G. Projects Limited(supra)* which is also relied upon by the Respondents. The

[11] (1990) 3 SCC 280

matter before the Supreme Court pertained to notice inviting tenders for construction of road. The Court held by referring to various judgments that the position of law with regard to the interpretation of the terms of contract is that the question as to whether the term of contract is essential or not is to be viewed from the perspective of the employer and by the employer. The Court then proceeded to observe as under :

> *"23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly,*

by being deprived of the infrastructure for which the present-day Governments are expected to work.

> *26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone."*

...

51. Mr. Bhangde would submit that the above judgment did not notice the Judgement of the larger bench in the case of *Municipal Corporation, Ujjain Vs BVG India Limited and others,* (2018) 5 SCC 462. So also *Municipal Council, Neemuch Vs Mahadeo Real Estate and others*[12]. According to Mr. Bhangde, both these judgements are rendered by the larger bench of three Judges bench whereas the judgement relied upon by the Respondent Nos. 1 and 2 is of two Judges bench. Therefore, law laid down in above stated two Judges bench judgements will prevail which clearly lays down that if a decision is arbitrary, the same is liable to be struck down by a Writ Court. Mr. Bhangde would then submit that the said judgement has been rendered in context with construction of road which is a work related to the development of infrastructure. Mr. Bhangde, would

12 (2019) 10 SCC 738

further submit that each judgment is required to be considered in the light of the facts of that case. The difference of a single fact can make a world of difference.

52. True it is that the findings of the Hon'ble Supreme Court, in the case of *M/S N.G. Projects (Supra)* were in context with the work of development of infrastructure. However, one cannot ignore the underlying principles laid down by the Supreme Court in the matters related to tenders and contracts, that the Courts should be slow in interference in tender jurisdiction even if arbitrariness and/or *mala fide* is attributable to the tendering authority in granting tender. The court cannot be oblivious to the purpose of inviting tenders. The Respondent No.2 herein has floated a tender for transportation of rice from Food Corporation of India godowns to Schools at various places in Vidarbha under Mid-Day Meal scheme. Thus, the beneficiaries of the contract are children from marginal sections of society prosecuting their studies and as such, interference by the Court would definitely cause loss to the public interest inasmuch as large number of pupils of schools will be deprived of getting food – the most essential ingredient of human life. The timely fulfilment of the contract to ensure rendering essential services to the pupils is of utmost importance. In the circumstances, even if the Respondent Nos. 1 and 2 carries a blame of committing some irregularities in the tender process, the Petitioners will have to be relegated to seek

damages for the alleged wrongful exclusion. The law laid down in the case of N.G. Project (Supra) will have to be applied accordingly. Even in the judgements delivered by the larger Bench in the two cases cited by the Petitioners, the Apex Court held that if a decision is arbitrary, the same is liable to be struck down by a Writ Court. However the Petitioners failed to show that the decision taken by the Respondent Nos.1 and 2 was arbitrary.

53. In addition, what reveals from the arguments canvassed by Mr. Devendra Chauhan, Learned Advocate for Respondent No.6 in 1st Petition and Mr. Naik , Learned Advocate for Respondent No.3 in the 3rd Petition is advantageous to the Respondents. What follows from their submissions is as under :

54. In the 1st Petition ,there are no pleadings on *mala fides*. Four bidders were qualified. To whom favouritism is made is not clear. The Petitioner admits in Paragraph 7 that three pages were missing. There is no challenge to qualification of four Respondent bidders. It is not even the case of the Petitioner that Respondent No.6 fell short of bid pages. Clause 6.7 of the contract provides that the document should be uploaded online. There is no provision to submit offline documents and, therefore, the documents could not have been supplemented offline. The Petitioner has made such an attempt on 26 October 2021, when the technical bids were opened

on 30 September 2021. The objections were to be raised within 10 days, however most of the Objections were raised by the Petitioner after ten days and, therefore, the Respondent Nos. 1 and 2 were not under an obligation to decide the same, atleast at the instance of the Petitioners.

55. The Petitioner's case in the 3rd Petition is that the Petitioner has removed all the shortcomings by its representations dated 6 December 2021 and 8 December 2021 and despite this the Petitioner did not receive equal and fair treatment by Respondent Nos. 1 and 2. Thus, the Petitioner admits that there were shortcomings and these were attempted to be removed in December 2021 i.e. after its disqualification and not prior to technical evaluation of the bids.

56. Mr.Devendra Chauhan, learned Advocate has also relied upon few rulings. In the case of *Galaxy Transport Agencies vs. New J.K. Roadways.* [13] The judgment which is also referred by the Petitioners, the Court held in Paragraph 18 that it is well-settled that unless arbitrariness or *mala fide* on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation is not to be as guessed by Writ Court.

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[13] 2020 SC ONLINE SC 1035

57. In the case *Ratnagiri Gas & Power Pvt.Ltd. vs. RDS Projects Limited and Others*[14]:. The Court held that the law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inference deducible from the same. The Court further held that the person making such allegation should furnish particulars that would prove *mala fides* on the part of the decision maker. Mere assertion or bald statement is not sufficient. Thus, the mala fide should be obvious which the Petitioner failed to make out, as no particulars are furnished.

58. The case of *Reliance Infrastructure Ltd. vs. Maharashtra State Road Development Corporation Ltd.*[15], has been cited to counter the contentions of the Petitioner that had his bid been opened he would have been the lowest bidder. The Full Bench of Bombay High Court held that once the Petitioner's bid was found to be non-responsive, the plea that if the financial bid of the Petitioners therein were to be opened it might have been found to be more favourable, is unacceptable. It is then held that the bidder who does not meet the eligibility criteria cannot complain of the awarding of the contract on the ground that its financial bid offers better terms.

14 (2013) 1 SCC 524
15 (2011) (1) MH.L.J. 443

59. In the case of *Bharat Biotech International Ltd. vs. Directorate of Medical Eduction and Research and Others*[16]. In this case, the employer has accepted the non-responsive bid on the basis that the commercial bid quoted by the bidder was lowest. The coordinate Bench of this Court held that once the bid is disqualified, the bid in its entirety has to be kept aside and no part of that bid can be utilised for evaluating the merits of the other bids and that it was impossible to conceive how the contract could be awarded to such bidder, on the basis that his commercial bid was the lowest. The Court further held that the question of comparing commercial bids arises between bidders who meet the requirement of technical eligibility. Bidders who meet eligibility requirement are not equal to bidders who are disqualified and do not stand on the same basis as bidders who are eligible. To equate them is to treat unequals equally: something that is forbidden by Article 14 of the Constitution. Thus, the Petitioners herein could neither plead equality nor seek relief on the hypothetical ground that they would be lowest bidder if financial bid is opened.

60. The judgments relied upon by both the parties have been rendered in view of the facts before the Apex Court in each case and therefore the recent judgments which took into consideration the ratio of the previous landmark judgments in

16 2011(2) Mh.L.J. 524

tender matters, will hold the field. The consistent view is that the scope of judicial review of an administrative action is very limited. The interference by the High Court would be warranted only when the decision impugned is vitiated by an apparent error of law i.e. when the error is apparent on the face of the record and is self-evident. The test is not what the Court considers reasonable or unreasonable but the decision which the Court thinks that no reasonable person could have taken which has led to manifest injustice

61. If the case in hand is examined and if the challenge thrown by the Petitioners is tested in the backdrop of the above rulings cited by both the sides, then what transpires is that the Petitioners have participated in the tender process. Some pages of the tender documents submitted by the Petitioners in the first two petitions were missing whereas in the third petition the tender documents were not signed by the authorised person. In addition, the documents like profile etc. were not uploaded along with the tender bid. The Respondent Nos. 1 and 2, therefore, found that the bids of the Petitioners were non-responsive. Such decision cannot be said to be perverse or arbitrary. The decision has not let any benefit to the Respondent-bidders as it has not curtailed the competition amongst the other bidders. The attempt of the Petitioners to subsequently make good the bid by furnishing missing pages is/was not permissible. In any case, there was no

provision to submit documents offline, rather the mandate was to submit the tender online. The allegations of the Petitioners that the tender conditions were relaxed in favour of the Respondent bidders and that such relaxation amounts to malice in law is without any substance, in view of the law laid down by the Supreme Court that even an essential condition may be relaxed to all the qualifying bidders. There is no substance in the case of the Petitioners that no relaxation sought to have been extended to them. The relaxation in the conditions of the contract could only be extended to the responsive bids. The Respondent Nos. 1 and 2 have found that the bids of Respondent-bidders were substantially in compliance with the tender conditions and were thus eligible for extension of relaxation. The basic challenge of the Petitioners was that the Respondent-bidders have not notarized the tender documents and some other documents and that the profiles submitted by the Respondent- bidders were not to the expectation of the Respondent Nos.1 and 2. The said relaxation has been extended to all the bidders who were similarly placed. The Petitioners have made an attempt to improve and modify their cases through rejoinder by questioning the decision of the Respondent Nos.1 and 2 in accepting the bids of the Respondent bidders on the ground that the FSSAI license were not in tune with the tender conditions or corrigendum. The same has been justified by the Respondent Nos. 1 and 2. The Court cannot ignore the fact that ultimate beneficiaries of the contract are the school children and that their Mid day meal has been prolonged because of the litigation between the bidders. Moreover, the Petitioners are not left remediless, they are at liberty to challenge their alleged wrongful exclusion by seeking damages in the proceedings as permissible under the law, which if filed, will be decided on its own merit.

62. Put altogether, there is no merit in the case of the Petitioner. All the Petitions are liable to be dismissed and stand dismissed accordingly. Rule is discharged. No order as to costs.

[ANIL L. PANSARE,J.] [NITIN JAMDAR,J.]

63. After pronouncement of the judgment, Mr. R.M. Bhangde, learned Counsel for the Petitioner, made a request to continue the interim order granted earlier, for a period of two weeks to challenge the verdict before the Hon'ble Supreme Court.

64. We have already noted that the ultimate beneficiaries of the contract are school children and their Mid-Day Meal has been prolonged because of the litigation between the bidders. We do not intend to delay the benefits any further. Accordingly the request is rejected.

[ANIL L. PANSARE,J.] [NITIN JAMDAR,J.]