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

WRIT PETITION NO. 5260/2021

Balaji Ventures Pvt. Ltd., A company duly incorporated under the Indian Companies Act, 1956, having its registered office at 71/A, Krishna House, ST Bus Stand Road, Ganeshpeth, Nagpur 440018. Through its authorised signatory Kishor Himmatlal Agrawal. **PETITIONER**

.....VERSUS.....

1. Maharashtra State Power Generation Company Ltd. A Government corporation incorporated under the Indian Companies Act, 1956, having its registered office at Prakashgad, Plot No.G-9, 3rd floor, Bandra (East) Mumbai-400 051, Through its Chief Engineer.

2. Vimala Infrastructure (India) Pvt. Ltd. 1st Floor, Mohsin Market Gurunanak Chowk, M.G. Road, Raipur CT 492001 IN. **RESPONDENTS**

Shri D.V. Chauhan, counsel for the petitioner.
Shri M.P. Khajanchi, counsel for the respondent no.1.
Shri S.P. Dharmadhikari, Senior Advocate with Ms Payal Bawankule, counsel for the respondent no.2.

CORAM : A. S. CHANDURKAR AND SMT. M.S. JAWALKAR, JJ.

DATE : 24TH JANUARY, 2022.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. On 02.12.2021, the Maharashtra State Power Generation Company Limited-Principal floated a tender inviting bids for transportation of raw coal against Road-cum-Rail allocation from various mines of Western Coalfields Limited to the Thermal Power Station of the Principal. Clause 1.12(V) which is the contentious clause that has given rise to this writ petition reads as under:

"***1.12(V)*** ***Railway Siding***:-

Bidder should have permission / consent of private siding owner to operate the Vimla siding for dispatch of coal to TPS of Mahagenco.

Permission / consent of Vimla private siding owner to operate the siding should be submitted along with the bid, failure which the bid will not be considered. The siding should be available for the entire period of the contract."

This clause has been challenged as being arbitrary, capricious and violative of Articles 14 and 19(1)(g) of the Constitution of India.

3. Shri D.V. Chauhan, learned counsel for the petitioner-Bidder submits that by introducing a private party in the matter of transportation of raw coal there is uncertainty in the manner in which the prospective bidders would be required to submit their bids, especially the financial aspect thereof. Considering the nature of the work under the tender which pertained to transportation of raw coal, given the fact that there were various private siding entities available for unloading and transportation of the coal there was no reason to restrict such operation to be undertaken only through the respondent no.2 – a Private Siding Agent. It was submitted that despite being eligible for participation in the tender process, introduction of a private entity in the work of transportation resulted in such private party playing a crucial role as

regards the financial rates to be quoted by the bidders. The tender document did not indicate the manner in which the Private Siding Agent would provide its services and therefore a bidder even if technically qualified would be prejudiced while submitting the financial bid. The learned counsel invited attention to various clauses of the tender document to urge that prospective bidders could not be directed or compelled to have the transportation work completed with the aid of such Private Siding Agent. It was emphasized that the petitioner was not challenging the basic qualification criteria that was prescribed by the Principal in the tender notice but the involvement of a private party in the transportation process resulted in uncertainty in the nature of the price to be offered by the bidders. The fate of a bidder was dependent on the terms offered by the Private Siding Agent. It was likely that in absence of any uniformity in the rates that were to be charged by the Private Siding Agent, the rates charged by it could differ from bidder to bidder. Thus despite a bidder being competent and technically qualified for succeeding in the tender process it was likely that for the rates to be paid by the bidder to the Private Siding Agent the financial bid to be submitted would not be competitive.

During pendency of the writ petition, the petitioner filed C.A.W. No.167 of 2022 seeking to raise additional grounds of challenge and also striking down of revised tender Clause 1.12(V) through

Corrigendum II dated 20.12.2021. In effect the entire tender process initiated by the Principal was sought to be challenged as being arbitrary. It was thus submitted that since the bids were to be submitted by today and the price bids were to be opened on 25.01.2022 appropriate reliefs as prayed for in the writ petition be granted to the petitioner. In support of aforesaid submissions, the learned counsel for the petitioner placed reliance on the decisions in *Ramana Dayaram Shetty Versus International Airport Authority of India & Others* [**(1979) 3 SCC 489**], *Electrical Contractors Association of Maharashtra Versus City and Industrial Development Corporation of Maharashtra* [**2019 (6) Mh.L.J. 130**] and *Shagun Mahila Audyogik Sahakari Sanstha Maryadit Versus State of Maharashtra & Others* [**2022(1) Mh.L.J. 363**].

4. Shri M.P. Khajanchi, learned counsel for the respondent no.1-Principal at the outset submitted that in view of the ad-interim order passed by this Court on 14.12.2021 a Corrigendum came to be issued on 20.12.2021 as a result of which Clause 1.12(V) of the tender conditions came to be modified and the necessary permission/consent/no objection certificate that was required at the time of submission of the bid was now required to be submitted before opening of the price bid. He further submitted that the due date for submission of bids was extended till today by having the requisite notice published on the website. This was in

accordance with Clause 1.10 of the tender notice. The learned counsel then submitted that the petitioner having participated in the tender floated by the Principal pursuant to the Corrigendum as issued, it was now estopped from challenging that condition. Such participation without reserving the rights sought to be agitated in the present proceedings precluded the petitioner from raising a challenge to Clause 1.12(V). It was then submitted that considering the nature of work offered under the tender notice and as the Principal was interested in uninterrupted transportation of coal, a convenient Private Siding Agent in the form of the respondent no.2 was identified. The said agent was to provide a dedicated siding for the Principal and this was found to be logistically feasible. Considering the scope of the work as per Clause 2.1 of the tender document, the Principal was justified in utilizing the private siding provided by the respondent no.2. The same had a nexus with the work to be done under the tender notice. Since said condition was part of the tender notice and the petitioner having participated thereafter, it was not permissible for the petitioner to challenge the same. Attention was invited to such similar clause in the tender documents floated by other power companies.

On the prayer for amendment in the writ petition, it was submitted that the amendment sought was belated as the Corrigendum was issued on 20.12.2021 and the amendment was sought after almost a month on 18.01.2022. The grounds proposed to be raised had no merit and it was denied that the Private Siding Agent had been given a free hand by the Principal. In support of his submissions the learned counsel placed reliance on the decisions in *Michigan Rubber (India) Limited Versus State of Karnataka & Others* [**(2012) 8 SCC 216**] and *Uflex Limited Versus Government of Tamil Nadu & Others* [**(2022) 1 SCC 165**]. It was thus submitted that there was no case made out to interfere in writ jurisdiction.

5. Shri S.P. Dharmadhikari, learned Senior Advocate for the respondent no.2-Private Siding Agent submitted that the grounds raised by the petitioner so as to challenge Clause 1.12(V) of the tender document were without any merit for the reason that the involvement of the Private Siding Agent at the instance of the Principal was for ensuring uninterrupted transportation of coal. Considering the service charges of the Private Siding Agent and its location, the siding was found suitable by the Principal for its needs. Attention was invited to Clause 1.47 of the tender document which permitted change/addition of railway siding to the contractor during the tenure of the contract provided there was no extra financial implication on the Principal. This clause indicated that a chosen Private Siding Agent could be replaced at any point of time by the contractor. There was no monopoly in that regard. It was then submitted

that under the tender a successful bidder was only to act as an arm of the Principal in transportation of the coal. The contractor had to liaison with all concerned agencies to ensure efficient and uninterrupted supply of coal. On instructions it was submitted that the service charges as charged by the Private Siding Agent were identical *qua* each bidder. There were various heads under which the Private Siding Agent was required to provide service. However if a contractor undertook to carry out a particular work itself the same would result in reduction of the total service charges of the Private Siding Agent. It was thus submitted that by no stretch of imagination could it be said that the role of the Private Siding Agent or the rates cited by it could be considered as a guiding/ governing factor in submitting the financial bid.

It was then submitted that despite the Private Siding Agent informing the petitioner that it was willing to issue the requisite no objection certificate subject to fulfillment of general terms and conditions for rake handling as applicable for all siding users, there was no further response from the petitioner. The petitioner could have got necessary clarification from the Private Siding Agent if it so desired. In absence of any allegation of *mala fide*s or arbitrariness there was no ground made out to interfere with the tender document, the scope for interference being limited. The learned Senior Advocate placed reliance on the decisions in *Tata Cellular Versus Union of India* [**(1994) 6 SCC 651**] and

Uflex Limited (supra) and submitted that the writ petition was liable to be rejected.

6. In reply, it was submitted by the learned counsel for the petitioner that the submission that similar rates would be applied by the Private Siding Agent was being made for the first time before the Court and this was not indicated in the tender document. Infact, the Private Siding Agent ought to have indicated the rates which it was to charge for various services in the tender notice itself. In absence of any transparency therein said aspect did not deserve consideration. On the aspect of acquiescence on account of submission of its bid it was submitted that if Clause 1.12(V) was found to be arbitrary such submission of bid by the petitioner would not preclude it from challenging the same. Mere fact that some other power companies had introduced a similar clause cannot justify the inclusion of such clause in the tender document. It was submitted that in a challenge raised to a similar clause before the Madhya Pradesh High Court, the tender notice was itself cancelled by the Principal therein and this substantiated the challenge raised by the petitioner. It was thus submitted that the reliefs prayed for by the petitioner ought to be granted.

7. We have heard the learned counsel for the parties at length and with their assistance we have perused the various documents placed

on record. The scope for interference in a challenge raised to the tender process and especially the terms of invitation to tender are quite limited as held in *Meerut Development Authority Versus Association of Management Studies & Another* [**(2009) 6 SCC 171**]. This is for the reason that an invitation to tender is in the realm of contract and limited judicial review would be available in cases where it is established that the terms of invitation to tender are so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. In *Michigan Rubber (India) Limited* (supra), it was observed that it would not be permissible for the Courts to interfere with the terms of the tender merely because the Court feels that some other terms in the tender document would have been fair, wiser or logical. The Principal inviting tender must have a free hand in stating the terms of the tender and it is only if any term is found to be arbitrary, discriminatory, *mala fide* or actuated by bias that the Court would interfere. The proposition that the Court does not make a contract for the parties and the Court would not improve the contract which the parties have made for themselves however desirable improvements might be, has been reiterated in *Uflex Limited* (supra). Keeping the aforesaid position in mind, when the challenge to Clause 1.12(V) of the tender document is concerned, we do not find the said Clause to be so arbitrary or irrational warranting interference under Article 226 of the Constitution of India.

8. The tender in question is for transportation of raw coal from the mines owned by the Western Coalfields Limited to railway sidings and then loading the same in the railway wagons for onward transportation through end to end road and rail mode to Khaperkheda Thermal Power Station. The uninterrupted supply of coal to the power plant is undisputedly the priority of the Principal. It is with that object in mind that the Principal has sought to justify its selection of a Private Siding Agent for assistance in the dispatch of coal to the Thermal Power Station. The Private Siding Agent is stated to have a dedicated siding for the Principal and the said private siding operated by the respondent no.2 is stated to be nearest to the railway station and is the only one available in Wani area. Since the Principal has found the railway siding operated by the respondent no.2 to be logistically feasible there can hardly be any scope to have a doubt in that regard. The same infact indicates the nexus behind having a Private Siding Agent for transportation of the coal.

The grievance of the petitioner is that the involvement of a private party in the form of the Private Siding Agent in the tender process has resulted in the tender no more being a public tender. It is apprehended that the rates for rendering services by a Private Siding Agent could differ from bidder to bidder thus making it unfeasible for a bidder to competitively submit its financial bid. The rates to be quoted by the petitioner would be governed by the service charges to be levied by the respondent no.2 over which the Principal had no control. This resulted in absence of a level playing field for the bidders. Since such involvement resulted in introducing arbitrariness, Clause 1.12(V) ought to be struck down. This apprehension expressed by the petitioner is found to be unjustified and not supported by any material whatsoever. We have noted the statement made on behalf of the Private Siding Agent by its learned Senior Advocate that uniform rates would be quoted to each bidder depending on the nature of services availed. This statement takes care of the apprehension expressed by the petitioner that the rates to be quoted by it in the financial bid would depend on the rates charged by the Private Siding Agent. It was clarified that if contractor undertakes to carry out some services on its own, charges in that regard would naturally be reduced. Once the aspect of charging of uniform rates is taken into account, there is hardly any scope left for the petitioner to raise a further grievance. We find substance in the contention of the Private Siding Agent that despite its communication dated 14.12.2021 in response to the petitioner's communication dated 11.12.2021 that the respondent no.2 was willing to issue required no objection certificate for the tender document subject to fulfillment of its general terms and conditions that were applicable to all siding users, no further response has been shown to have been made by the petitioner in that regard. A prudent bidder would have definitely enquired about such general terms and conditions that were applicable so as to take further steps but the same has not been done by the petitioner herein. It would have been a different matter had the petitioner come up with instances of different rates being applied by the Private Siding Agent to different bidders. That is not the case on record. The statement that such similar rates ought to have been indicated by the Principal in the tender notice cannot take the case of the petitioner any further. The fact remains that the Private Siding Agent has clearly stated that similar rates have been applied for its services to all bidders.

9. We have also considered the grounds of challenge as proposed by the petitioner in the amendment application. We are however not persuaded to accept the challenge as raised to Clause 1.12(V) by the petitioner. Presence of such clause does not render the tender document to be either arbitrary, unreasonable or resulting in violating the provisions of Articles 14 and 19(1)(g) of the Constitution of India. The Private Siding Agent having stated that all bidders would be treated equally while quoting the rates for the services to be rendered, we do not find any case whatsoever made out to interfere under Article 226 of the Constitution of India. Consequently, the challenge as raised fails. The writ petition is dismissed. Rule stands discharged leaving the parties to bear their own costs.

10. At this stage, the learned counsel for the petitioner prays that for a period of two weeks from today the Principal be restrained from awarding the work order to the successful bidder. This request is opposed by the learned counsel for the respondent no.1.

For the view that we have taken, we do not find any reason to accept the request made by the learned counsel for the petitioner. Such request is refused.

(**SMT. M.S. JAWALKAR, J.**) (**A.S. CHANDURKAR, J.**)

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