IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Subrata Talukdar

and

The Hon'ble Justice Saugata Bhattacharyya

MAT 279 of 2021

With

IA No. CAN 1 of 2021

Bingas Electrical Electronics & Solar System

-Vs.-

Aroni Tubes Private Limited & Ors.

With

COT 16 of 2021

Aroni Tubes Pvt. Ltd. & Ors.

-Vs.-

Bingas Electrical Electronics & Solar System & Ors.

With

COT 20 of 2021

West Bengal Agro Industries Corporation Ltd. & Ors.

-Vs.-

Bingas Electrical Electronics & Solar System & Ors.

For the Appellant and for The Respondent in COT 16 Of 2021& COT 20 of 2021	: Mr. Debdeep Sinha Mr. Bhaskar Dwivedi
For the Respondent/Writ Petitioner	: Mr. Ayan Banerjee

Ms. Debasree Dhamali

For the Respondent Nos. 2, 3 & 4 in MAT 279 of 2021 and for the Appellant in COT 20 of 2021	: Mr. Jaydip Kar Ms. Sarmila Das
Last Heard on	: 16.12.2022
Judgment on	: 15.03.2023

<u>Subrata Talukdar, J.:</u>- In this appeal, being MAT 279 of 2021 (for short, the said appeal), the Judgement and Order dated 23rd of February, 2021 passed by the Hon'ble Single Bench in the Writ Petition, being WPA 2504 of 2021 with CAN 1 of 2021, is under challenge. In the Writ Petition a Notice Inviting e-Tender (for short *NIT*) dated 9th of January, 2021 floated by the West Bengal Agro Industries Corporation Ltd. (for short, the Corporation) was challenged by an allegedly disqualified bidder. The *NIT* was floated for installation of 50 numbers of Solar Submersible Pumps in Jhargram District.

Along with this appeal, the Corporation has filed a Cross-Objection, being COT 20 of 2021 and the Writ Petitioner has also filed a Cross-Objection, being COT 16 of 2021.

The Hon'ble Single Bench, *inter alia*, noted that in terms of Clause 22.0 of the NIT no price preference or other concessions were allowed for the tender in question. Taking notice of the Notification dated 19th November, 2004 issued by the Finance Department, Government of West Bengal, the Hon'ble Single Bench found that Rule 47A as introduced by the said

Notification covers all purchases and execution of works by the State Government and Government entities such as the Corporation.

The Hon'ble Single Bench interpreted Rule 47A (*supra*) as follows:-

> *"21. Sub-rule (1) of Rule 47A specifically provides that all registered "SSI Units of the State" are to be given 15 per cent price preference vis-àvis large and small scale Industrial Units and SSI Units located outside the State.*
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> *22. The said sub-rule also provides that registered "SSI Units of the State" shall be exempted from payment of earnest money for tenders.*
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> *23. However, in contradistinction with Sub-rule (1), the expression used in Sub-Rule (2)(b) is "State-based medium and large scale units", which will also be given 10 per cent price preference over large and medium units and SSI Units of other States.*
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> *24. The explanation to Rule 47A defines the term "State-based Unit", which are restricted to manufacturing units.*
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> *25. The argument of the respondents, that the units covered by Rule 47A have to be manufacturing units, is belied by the language used in the said Rule itself. The distinction between the expressions "SSI Units of the State" and "State-based Unit" makes it amply clear that two different categories of units are envisaged in the rule. The expression "State-based unit" has only been used in Sub-rule (2)(b) of Rule 47A, which relates to medium and large scale units, whereas the SSI Units of the nature of the writ petitioner, being "units of the State" have been provided for in Sub-rule (1) of Rule 47A.*
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> *26. Such distinction also becomes clear from the use of the term "major" used to qualify the manufacturing units which are covered by the expression "State-based Units".*

> *Hence, the explanation, by its language makes it abundantly clear that the State-based medium and large scale units covered by Rule 47A (2)(b) have to be manufacturing units situated within the State. The expression "major" preceding the term "manufacturing unit" in the explanation is a further indicator in that regard and shows that the expression pertains to medium or large scale units and not small scale industrial (SSI) units.*
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> *27. The language used in Rule 47A(1), however, relates to registered SSI Units of the State, which are to be given 15 per cent price preference. Since the definition of "State-based Units" does not cover the price preference given to SSI "Units of the State" as envisaged in Sub-rule (1) of Rule 47A, such units cannot be confined to manufacturing units. Thus, the defence of the respondents on that score is invalid. Hence, Clause 22.0 of the NIT was clearly in contravention of the Finance Department Notification dated November 19, 2004. The exemption of earnest money, also contemplated in the said Notification, was violated as well by making it a mandatory prerequisite to deposit earnest money for participating in the online bidding process. The NIT is also de hors the Notification on such score."*

The next limb of the findings arrived at by the Hon'ble Single Bench pertained to the allegation of cartelisation levelled by the writ petitioner, Ms. Aroni Tubes Pvt. Ltd. (for short Ms. Aroni). The Hon'ble Single Bench, although holding that cartelisation has not been proved beyond reasonable doubt, sufficient presumption has been raised in such regard by the synchronicity of bids between a majority of the bidders.

On the second aspect pertaining to the allegation of cartelisation, the Hon'ble Single Bench held as follows:-

> *"28. However, the petitioner's objection as regards Clause 2.12, preventing Joint Ventures and consortia from participating in the tender, cannot be labelled as illegal, since the Government Order dated December 18, 2020 makes it optional ("if required") to include Joint Ventures in respect of a tender process. It falls within the discretion of the Tendering Authority as to what type of participants it wants to execute the work contemplated in the tender. A classification between the Joint Ventures/consortia and other juristic entities cannot be said to be so unreasonable as to violate Article 14 of the Constitution of India. As held by the Supreme Court in Meerut Development Authority (supra), a tender process is not open to judicial scrutiny unless it is established to be so tailor-made as to suit the convenience of any particular person.*
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> *29. In such context, the allegation of cartelization levelled by the petitioner assumes importance. The petitioner has sought to make out a case that the NIT was tailor-made to suit the purpose of a particular cartel/ cartels. For such proposition, the petitioner relies on the matching bids of at least two of the participants and the plan behind synchronization of the price quoted by five out of the eight bidders, which ensured that each of the said five bidders would be awarded two work contracts. A careful perusal of the materials produced by the petitioner vindicates such stand. Not only were some of the bids exactly identical, the synchronicity between the bids of five tenderers, being*

the B.K. Enterprise, Equipments & Spare Agency, Bingas Electrical Electronics, S.N. Polymer Pvt. Ltd. and Z Star Commotrade, is clearly reflected in the Financial Bid Chart of the tenders opened on February 6, 2021.

30. Although such cartelization has not been proved beyond reasonable doubt, sufficient presumption is raised in that regard by the synchronicity between a majority of the bidders."

Concluding its findings, the Hon'ble Single Bench ultimately held as follows:-

"31. Such attempt at catering to the participation of only some of the bidders, in conjunction with gross violation of the Finance Department Notification dated November 19, 2004, by precluding price preference and concession in Clause 22.0 of the NIT and making it compulsory to deposit earnest money prior to online uploading of the bids, vitiates the impugned tender process.

32. The respondents could not provide sufficient justification for such patent contravention of the Notification dated November 19, 2004, which binds respondent no.1, the Tendering Authority, which is a Government of West Bengal Undertaking. As such, the impugned tender was de hors the Government Notification and contravened principles of natural justice. Hence, the impugned tender has to be set aside.

33. Accordingly, WPA No.2504 of 2021 is allowed, thereby setting aside the Notice Inviting e-Tender (NIT) dated January 9, 2021 (Annexure P-3 at page 23 of the writ petition), impugned in the present writ petition. Any action and/or work order taken/issued pursuant to such NIT are

> *also hereby set aside and quashed. All connected pending applications are disposed of accordingly."*

The appellant, Ms. Bingas Electrical Electronics & Solar System (for short, Ms. Bingas), in MAT 279 of 2021 was a successful bidder. The application filed by the appellant for intervening in the writ petition was not allowed by the Hon'ble Single Bench. The appellant has argued in the appeal that the Hon'ble Single Bench failed to appreciate the fact that the Writ Petitioner, being an outsider who did not participate in the *NIT* having failed to meet the eligibility criteria, did not have the *locus standi* to file the writ petition. Since, the Writ Petitioner, Ms. Aroni, could not be a person aggrieved by the *NIT* and the writ petition not being in the nature of a Public Interest Litigation, the Hon'ble Single Bench erred in admitting the writ petition and more so, in allowing the same.

The appellant/Ms. Bingas also submits that Rule 47A of the said Notification has no manner of application to a Works Contract as floated by the *NIT*. Rule 47A only applies to purchases of products from manufacturers which are SSI Units.

Relying on several judicial authorities reported in *2009) 6 SCC 171, 2018) 5 SCC 462, 2020) 16 SCC 489* and *2022) 6 SCC 127*, the appellant/ Ms. Bingas takes the position that it is therefore the sole prerogative of the tendering authority to decide on the scope of application of Rule 47A. The Writ Court could not sit in appeal over such decision. Since the NIT pertained to only a Works Contracts, the Hon'ble Single Bench could not have interpreted Rule 47A in a manner so as to substitute its view in place of the decision taken by the tendering authority.

On the second aspect pertaining to a presumption of cartelisation as held by the Hon'ble Single Bench, the appellant submits that such presumption is purely academic based on the writ petitioner' insinuations being a wounded business rival. It is submitted that in terms of *Clause 5.0 (c)* of the *NIT,* the tender price quoted is firm, final and irrevocable. The appellant has invested heavily for executing the tender works and thereby stands to be irretrievably prejudiced if the Judgement and Order impugned is not set aside.

The position taken by the appellant/Ms. Bingas in MAT 279 of 2021 (*supra*) is adopted by the Corporation in its Cross-Objection being COT 20 of 2021. The Corporation takes the position that the writ petition was allowed without allowing the Corporation, being a material respondent, an opportunity to file its affidavit-in-opposition.

The Corporation reiterates the argument that Courts have no jurisdiction to alter the terms of a tender. Additionally, the writ petitioner could not show any legal injury suffered by it as a participating tenderer. Furthermore, since the *NIT* pertains to a Works Contract, the application of Rule 47A (*supra*) does not arise.

The Corporation therefore submits that the Hon'ble Single Bench embarked on a purely academic exercise *apropos* to its discussion on tender costs, exemption of earnest money deposit and price preference. It is pointed out that in the event the Hon'ble Single Bench had allowed the Corporation to file an affidavit, the true nature and scope of Rule 47A (*supra*) could have been explained.

The Writ Petitioner, Ms. Aroni, who is also the Cross Objector in COT 16 of 2021, has argued as follows.

It is submitted that suspicious circumstances have been generated *qua* the *NIT* particularly with regard to the rates floated by the tendering authority which were higher than the Government schedule of rates. Since the Corporation had thereafter revised the rates of the *NIT* to make such rates compatible with the Government schedule of rates, the entire tendering process stood vitiated.

It is particularly pointed out by the writ petitioner/Ms. Aroni that in view of the serious financial irregularities discovered, the Corporation had previously cancelled nine similar tenders, although the Hon'ble Single Bench had decided against the Corporation in respect of a single tender.

It is submitted that a sister concern of the writ petitioner/Ms. Aroni had communicated to the tendering authority on the 23rd of November, 2020 with regard to the alleged illegal clauses in respect of tenders which were floated previous to the present *NIT*. Pursuant to the said communication dated 23rd November, 2020, the earlier tenders were withdrawn by the tendering authority. However, the *NIT* in issue in the present appeal was floated on the 9th of January, 2021, again incorporating the illegal clauses.

The writ petitioner therefore filed a representation on the 11th of January, 2021 pointing out to the alleged illegal clauses and praying for withdrawal of the tender. However, without considering such representation in the pre-bid meeting, the technical bid of the *NIT* was opened on the 1st of February, 2021 and uploaded on the 4th of February, 2021. The financial bid was opened on the 6th of February, 2021 when the instant writ petition was pending before the Hon'ble Single Bench having been filed on the 22nd of January, 2021. It is submitted that the Work Order was issue on the 8th of February, 2021, on which date the writ petition was appearing as a fixed matter before the Hon'ble Single Bench.

Reiterating its arguments that the *NIT* contravened the said Notification dated 19th of November, 2004, the writ petitioner points out that the rates of the *NIT* were found to be higher than the prescribed official tender rates circulated by the Chief Engineer, Water Resource Investigation Department, Government of West Bengal, being the controlling authority of the Corporation. The writ petitioner has also relied on a Comparative Compilation disclosing the difference between the Government Schedule of Rates and the rates floated by the *NIT*.

Relying on authorities reported in *1995) 1 SCC 478 and 2011) 12 SCC 499*, the writ petitioner takes the position that the refusal on the part of the Corporation not to waive the earnest money and not to allow Joint Ventures (for short *JVs*) the right of participation in the *NIT*, the entire tendering process and particularly Clause 22 thereof stands vitiated being in conflict with the West Bengal Financial Rules.

With reference to the arguments on alleged cartelisation, the writ petitioner has relied on the price bids submitted by the participating tenderers. It is pleaded that *all the tenderers have varied their rates for the* *same item (50 submersible pumps) in respect of different tenders in such a synchronized manner that each participant has been awarded two work orders.* Relying on *2017) 8 SCC 47*, the writ petitioner points out *that it is extremely improbable that for the same item, the five participants have all quoted different rates in respect of the eight tenders.* It clearly shows the understanding between the tenderers and formation of a cartel which has been viewed with displeasure by the Hon'ble Apex Court in *2017) 8 SCC 47 (supra).*

It is submitted that the financial bid was opened on 6th of February, 2021, which was a holiday. The participants quoted the same rates, which is an impossibility unless the bidding is done in consultation with each other.

Having heard the parties and considering the materials placed, this Court must notice that the Corporation is admittedly a body which is expected to be guided by its parent Department namely, the Department of Water Resources Investigation and Development, Government of West Bengal. Equally therefore, the Corporation cannot institute a tender process such as the present *NIT* in violation of a Notification issued by the Finance Department, Audit Branch, Government of West Bengal as in this case, being the Notification dated 19th of November, 2004, incorporating Rule 47A as inserted by the West Bengal Financial Rules, Volume 1.

This Court finds sufficient force in the cognizance taken by the Hon'ble Single Bench of the fact that instead of engaging in a discussion in the pre-bid meeting on the points raised by the writ petitioner, the Corporation proceeded with the present NIT which repeated the illegalities committed in the earlier tenders which were withdrawn by the Corporation. The haste on the part of the Corporation became aggravated when the Work Order was issued in favour of the appellant/Ms. Bingas on the morning of 8th February, 2021, on which date the writ petition was to be taken up for hearing. Besides, although the matter was enlisted before the Hon'ble Single Bench on the 5th of February, 2021, the Financial Bid was opened on 6th of February, 2021, being a holiday, in order to frustrate the instant writ petition.

This Court also finds sufficient force in the reasoning of the Hon'ble Single Bench, having regard to the identical bids/synchronicity of bids submitted by a majority of bidders, that the Hon'ble Single Bench had reason to draw sufficient presumption against the *bona fides* of the tendering process. The details of the bids disclosed by way of a Chart by the writ petitioner showing their synchronicity could not be controverted either by appellant/Ms. Bingas or the Corporation at the hearing. The only argument advanced by the present appellant/Ms. Bingas as well as the Corporation on the charge of synchronicity of bids is that the writ petitioner had no *locus standi* to maintain the writ petition, being not a person directly aggrieved by the *NIT*.

In the facts of the present case it is noticed that the Writ Petitioner had pointed out to the defects in the *NIT* by way of a representation filed before the Tendering Authority. The said representation raised issues which were also raised before the Tendering Authority by a sister concern of the Writ Petitioner. On the basis of the issues raised by the sister concern of the

Writ Petitioner, similar tenders earlier issued by the Tendering Authority were cancelled.

However, without examining the representation of the Writ Petitioner at the pre-bid meeting, the Technical Bid was hastily opened and uploaded. The Financial Bid was also hastily opened and the Work Order allotted even as the Hon'ble Single Bench was in *seisin* of the matter.

The Hon'ble Apex Court *In Re: Noble Resources Ltd. vs. State of Orissa and Another, 2006) 10 SCC 236, at Paragraphs 26, 27, 28, 29, 30 and 31* has held as follows:-

> *"26. In ABL International Ltd. (supra), this Court opined that on a given set of facts, if a State acts in an arbitrary manner even in a matter of contract, a writ petition would be maintainable. It was opined :*
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> *"23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent"*
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> *27. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited.*

28. Although terms of the invitation to tender may not be open to judicial scruting, but the courts can scrutinize the award of contract by the Government or its agencies in exercise of their power of judicial review to prevent arbitrariness or favouritism. [See Directorate of Education and Others v. Educomp Datamatics Ltd.] However, the court may refuse to exercise its jurisdiction, if it does not involve any public interest.

29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. (supra), each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible. [See Binny Ltd. and Another v. V. Sadasivan and G.B. Mahajan and Others v. Jalgaon Municipal Council.

30. In State of U.P and Another. v. Johri Mal, it was held :
"30. It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision- maker's

opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision- making process, it is always open to the court to review the evaluation of facts by the decision-maker."

31. Another field where judicial review is permissible would be when mala fide or ulterior motives is attributed. In Asia Foundation and Construction Ltd. v. Trafalgar House Construction India Ltd. and Others, this Court held :

"We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant"

It was further held :

> *"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant".*

It is clear from the legal position stated above that the Hon'ble Single Bench found the issues raised by the Writ Petitioner to be of a nature which entitled the Writ Court to scrutinise the decision-making process even to the limited extent to ***review the evaluation of facts by the decision-maker*** (emphasis supplied).

Additionally, the synchronicity in the rates quoted by the bidders in a public tender has resulted in vitiating the tender process. The Writ Court had to take judicial notice of the fact that on the basis of similar illegalities pointed out in respect of earlier tenders, the said earlier tenders were withdrawn, however followed by the impugned *NIT* incorporating similar illegal terms.

This Court finds no infirmity in the reasoning of the Hon'ble Single Bench identifying the factual and legal deficiencies in the impugned *NIT*. Since the decision making process was found to be riddled with manifest illegalities, the Judgement and Order impugned quashing the *NIT* deserves no interference.

MAT No. 279 of 2021 and **COT 20 of 2021** stand accordingly **dismissed**.

COT 16 of 2021 stands thus **disposed of**.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Saugata Bhattacharyya, J.) **(Subrata Talukdar, J.)**