

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

WRIT PETITION NO.2682 OF 2023

1. Shri Sai Sports and Fitness,
through its proprietor,
Syed Mushtaq Ali Syed Qamar Ali,
age 31 years, occ. Business,
R/o Kadrabad Plot, Parbhani,
Dist. Parbhani.
2. M/s. Engineering Body Master Pvt
Ltd., Through its proprietor,
Sanjay Maruti Sawant,
age 58 years, Occ. Business,
R/o. Plot No.37, Block Bhosari,
MIDC, Pune, Dist. Pune.
3. Unix Sports
through its Proprietor,
Abdul Nadeem Malik,
age 32 yrs, Occ. Business,
R/o Plot No.28, Nasheman Coop. Society,
Zingabai Takli, Nagpur,
Dist. Nagpur. Petitioners.

Versus

1. The State of Maharashtra,
through its Secretary,
Department of School Education and
Sports, Mantralaya, Mumbai – 32.
2. The Commissioner,
Directorate of Sports and Youth Services (MAH),
Shivchatrapati Kridapeeth Sports Complex,
Balewadi, Mahalunge, Pune – 411 045. Respondents

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Mr. Sachin S. Deshmukh, advocate for petitioners.
Mr. V.D. Hon Sr. Counsel i/b Mr. D R Kale Government
Pleader a/w Mr. M T Joshi Advocate
for respondent nos.1 and 2.

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**CORAM : NITIN W. SAMBRE &
S. G. CHAPALGAONKAR, JJ.**

Dated : April 10, 2023
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ORDER :- (Per S.G.Chapalgaonkar, J.)

1. The petitioners have approached this Court under Article 226 of the Constitution of India, thereby raising challenge to the corrigendum dated 29.12.2022, Government Resolution dated 14.2.2023 and tender notices dated 10.2.2023 and 14.2.2023 issued by respondent no.2 / The Commissioner, Directorate of Sports and Youth services (MAH), which according to the petitioners is an act defying the mandate of larger participation of small and medium enterprises in Government contracts and also an attempt to monopolize the procurement from the big players.

2. The contention of the petitioners is that, they are the registered with Ministry of Micro, Small and Medium Enterprises and equipped with 'Udyam' Registration Certificate. According to the petitioners, they are entitled to enjoy the promotional benefits under Micro, Small and Medium Enterprises Development Act, 2006. The State of Maharashtra ensured participation and promotion of Micro, Small and Medium Enterprises (hereinafter referred to as

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'MSMEs') from all the corners of the State under comprehensive policy promulgated under Government Resolution dated 1.12.2016, however, by issuing the impugned corrigendum dated 29.12.2022 everything is brought within the sweep of rate contract under garb of the purchases on sweep succession. Further, the Government Resolution dated 14.2.2023 provides for procuring sports, gymnasium equipment and outdoor gym from panel suppliers through centralized mode by appointing the Commissioner Pune as a designated authority,

3. It is further contention of the petitioners that, the impugned tender notices dated 10.2.2023 and 14.2.2023 have been issued by the Government of Maharashtra, through department of School Education and Sports, inviting 'Request For Offer' from original manufacturers / authorized distributor / authorized supplier on one year rate contract supply of sports equipment and installation of Gymnasium equipment and outdoor Gymnasium in the Maharashtra State. The tender notices stipulate eligibility criteria under clause no.3. The technical and financial eligibility prescribed under clause 3(B) and 3(C) puts condition that bidder must have completed work of supply and installation worth Rs.10 crores in one financial year during last three years. Similarly, he must have achieved
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turnover of minimum 25 crores in any one of last three years. According to petitioners such condition, practically close down the entry for MSMEs/Startups. According to the petitioners, said conditions are arbitrary and violates constitutional mandate under Article 14 as well as the statutory scheme under MSMEs Development Act. The petitioners further contend that the Corrigendum dated 29.12.2022 would frustrate the policy of the state promulgated under Government Resolution dated 1.12.2016.

4. The respondent no.2 filed affidavit-in-reply in response to the notice issued by this Court. It states that the impugned decisions sub serves interest of public exchequer and run in deference to the Government Policy promulgated under Government Resolution dated 1.12.2016. The Corrigendum dated 29.12.2022 prescribes to have “procurement from empanelled / rate contract supplier” to meet requirement of repeated purchase of particular goods with definite standard. That brings fast and simple alternative to the lengthy procurement process of tender. The impugned tender notices call upon request for proposal (RFP) on one year rate contract basis from manufacturer/distributor/supplier for supply and installation of indoor and outdoor gym equipment in the State of Maharashtra. The objective behind RFP is to prepare the

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pool of Original Equipment Manufacturers / Authorized Distributors for supply, installation of Gymnasium or Outdoor Gym Equipment at different locations across the state with assured free of cost maintenance for 3 years. It also includes one-year defect liability period and two years guarantee for supply of all consumable and replaceable spare parts.

5. It is further stated that considering the tender value, the condition of experience of supply and installation of gymnasium equipment of aggregate minimum value of not less than 10 crores has been incorporated. Similarly, other eligibility conditions are incorporated considering the peculiar needs under RFP.

6. It is further contended that, in case of MSMEs /startup firms registered under Government of Maharashtra, condition of prior experience and financial eligibility is relaxed by 50% subject to meeting quality and technical specification under clause 3. In that view of the matter, prayer is made to dismiss the petition.

7. Mr. Sachin Deshmukh, learned advocate appearing for the petitioners would submit that the petitioners are Micro, Small and Medium Enterprises having Udyam registration in

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pursuance to the Act of 2006. The Central Government aimed to ensure facilitating promoting and development of MSMEs under Act of 2006. He invited attention of this Court to the classification of micro, small and medium Enterprises appearing in Section 7 of the Act. He would urge that the eligibility conditions prescribed under RFP dated 10.2.2023 and 14.2.2023 forbids the participation of MSMEs in the tender process, which is contrary to the object of the legislation. He would submit that under the Government Resolution dated 1.12.2016 the procurement policy of the State Government has been promulgated which takes care of prompting MSME's/startups. However, by introducing the Corrigendum dated 29.12.2022 procurement has been introduced from empanelled / rate contract supplier for one year through centralized process. As such, the startups like the petitioners would lose business. He would further urge that the procurement from empanelled / rate contract supply can be adopted where there is repeated purchase of particular goods, however, the purchase of Gymnasium equipment is one-time exercise for every ten years that cannot be relegated to empaneled / rate contract supplier instead procurement through tender process.

8. Mr. Deshmukh, learned advocate appearing for the petitioners would further urge that, the eligibility criteria prescribed under the tender notices / request for proposal provides for technical eligibility for the bidder having the technical experience in last three financial years with supply and installation of the equipment of aggregate minimum amount of 10 crores in any one financial year during last three years. The financial eligibility requiring annual turnover of minimum 25 crores in any one year in the last three financial years. This clause clearly forbids MSMEs / startups (as defined / classified under section 7 of Act of 2006) from participating in the tender process.

9. Mr. Deshmukh, learned advocate appearing for the petitioners would place his reliance on following judgments :-

- 1. *Tata Cellular Vs. Union of India reported in (1994) 6 Supreme Court Cases 651.***
- 2. *Michigan Rubber (India) Limited Vs. State of Karnataka and others reported in (2012) 8 Supreme Court Cases 216.***
- 3. *M/s. N.G. Projects Ltd., Vs. M/s Vinod Kumar Jain and others reported in 2022 Livelaw (SC) 302.***
- 4. *Jai Bholenath Construction Vs. The Chief Executive Officer, Zilla Parishad, Nanded and ors. reported in 2022 Livelaw (SC) 542.***

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5. *Ram and Shyam Company Vs. State of Haryana and others reported in (1985) 3 Supreme Court Cases 267.*

10. Mr. V.D. Hon, learned Senior counsel i/b Mr. D.R.Kale, the learned in charge Government Pleader with Mr. M.T. Joshi, appearing for respondent nos.1 and 2 would submit that huge budgetary allocation is made by the State Government with intention to provide facilities of sports and Gymnasium to the youngsters through the Department of sports. The Government Departments are under obligation to utilize public funds to fulfill specific purposes. The Government Resolution dated 1.12.2016 prescribes for the method of procuring the requisite material. However, the Government of Maharashtra issued Corrigendum dated 29.12.2022 thereby prescribing procurement through empaneled / rate contract supplier to meet repeated purchase of the particular goods of assured quality and rate. By introducing this procedure, the fast and simple alternative to existing lengthy procurement process by open tender has been achieved. It is further contention of the respondents that the objective behind RFP is to prepare a pool of original equipment manufacturer/authorized distributor, who would provide the equipment, with three years free maintenance, along with two years defect liability period for all

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types of consumable and replaceable spare parts of supplied equipment.

11. Mr. V.D. Hon, learned Senior counsel would submit that the eligibility criteria provided under clause 3(B) ensures participation of experienced bidders. The eligibility criteria in clause 3(C) ensures participation of reputed agency having sufficient turnover to meet procurement demand of 36 Districts. It is further contended that the Corrigendum dated 29.12.2022 does not limit right of District Level Purchase Committee. On other hand, it guarantees uniformity in the products to be supplied throughout the State and also curbs the supply of substandard goods.

12. It is further contention of the respondents that under the Government Resolution dated 1.12.2016 the list of the items to be procured from MSMEs has been prescribed. The sports or Gymnasium items does not find place in the said list. It is further pointed out that the 50% concession as regards to eligibility criteria regarding turnover as well as the prior experience has been provided for MSMEs / startups registered in State of Maharashtra. As such, interest of the MSMEs / startups has been taken care in the tender process.

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13. Mr. Hon, the learned Senior Counsel would submit that, it is well settled legal position that the tendering authority must be given discretion in fixing terms of the contract, particularly, in the interest of public exchequer. Merely because some parties would loose out, terms of the contract cannot be subjected to judicial review. In support of his contentions, he relies upon the following judgments of the Supreme Court of India :-

1. ***Uflex Limited Vs. Government of Tamil Nadu and others reported in (2022) 1 SCC 165.***
2. ***Airport Authority of India Vs. Centre for Aviation Policy, Safety and Research (CAPSR) and others reported in 2022 SCC online 1334.***
3. ***Association of Registration Plates Vs. Union of India and others reported in (2005) 1 SCC 679.***

14. We have heard the arguments advanced by the learned advocates appearing for contesting parties. We have perused the record. The gist of the contentions of the petitioners is that they are startups having registration under the MSMEs Development Act, 2006. However, the impugned tender notices, Government resolution and Corrigendum creates obstacle in their way to participate in tender process. The basic object of promoting startup under the Act of 2006 as well

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as the policy of the State Government under the Government Resolution dated 1.12.2016 has been frustrated. According to the petitioners, the tender conditions are arbitrary and aimed to patronize big player and boost the **capitalism**. At this stage, reference to classification of Micro, Small and Medium Enterprises introduced vide notification dated 1.6.2020 issued under MSMEs Act of 2006 needs to be referred. The clause nos.1,2, and 3 reads thus :-

- i. a micro enterprise, where the investment in plant and Machinery of Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees ;
- ii. a small enterprise, where the investment in Plant and Machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees.
- iii. a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

15. The enterprises having turnover up to 250 crores are brought within preview of MSMEs. Considering this classification, introduced under the aforesaid notification, the contention of the petitioners that the MSMEs / Startups does not fit in the eligibility criteria prescribed in the impugned tender notice cannot be accepted. Apparently, petitioners are relying on classification that existed prior to issuance of Notification dated 1.6.2020 under MSMEs Act of 2006 to

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contend that none of MSMEs would be eligible to meet condition of minimum turnover of 25 crores under impugned Tender Notice. The impugned tender notice prescribe for requirement of turnover up to Rs.10 crores or 25 crores, respectively in manufacture of gymnasium and sports equipment, therefore Small and Medium MSMEs are eligible to participate in tender process.

16. Second contention of the petitioners that, MSMEs or startups are not provided with the concessions is also fallacious. The tender notices provide for 50% rebate in eligibility criteria prescribed under clause 3 (B) (C) regarding experience & turnover to MSMEs registered in Maharashtra. It appears that, the petitioners have registered themselves as 'Udyam' with the Ministry of Micro, Small and Medium Enterprises but do not have registration in the State of Maharashtra. It appears, they have apprehension in the mind that they would not be entitled for concession for want of registration with the State of Maharashtra. On our specific query in this regard, the learned advocate appearing for the petitioners fairly concedes that there is no distinction under the tender notice or otherwise that would dis-entitle them to avail concession as MSMEs.

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17. The next contention of the petitioners is that, under the impugned Corrigendum dated 29.12.2022, the policy has been adopted for procurement through empaneled rate contract supplier and such policy is defying the MSMEs/startups. According to the petitioners, there is no reason to adopt such procurement, particularly, in relation to installation of indoor and outdoor gym equipment having life span up to 10 years. It can be procured through Tender process without adopting rate contract suitable for frequent purchases. However, respondents are justifying the policy of empaneled or rate contract procurement so as to bring uniformity in the rate and quality of the product with three years maintenance throughout the State of Maharashtra. Further, procurement of all sports and gym Equipment is a continuous activity depending upon need of particular District and provisions of the budget.

18. We find it difficult to accede to contentions of petitioners. The tendering authority has right to adopt policy and frame suitable conditions in the interest of public exchequer. We do not find that policy has been adopted with motive to obliterate MSMEs Or with object to create monopoly. Even under government policy promulgated vide GR dated 1.12.2016 mode of procurement based on rate contract is provisioned. If

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by past experiences, state considers particular procurement method suitable to bring uniform / standardized quality of equipment, they must be given leverage to adopt such method.

19. The issue regarding judicial review in the matter of the Government contract is no more res-integra. The Supreme Court of India in the matter of **Michigan Rubber (India) Ltd., Vs. The State of Karnataka reported in (2012) 8 SCC 216** observed that if the State acts within the boundaries of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. Ultimate test is whether on touch stone of reasonableness policy decision comes out unscathed. Referring to the judgment in the case of **Raunaq International Ltd., Vs. I.V.R. Construction Ltd and others reported in (1999) 1 SCC 492**, It is observed that the writ court would not be justified in interfering with commercial transactions in which State is one of the parties where there is substantial public interest involved. In a case of **Tata Cellular Vs Union of India (UOI) reported (1999) 6 SCC 651** it is observed that the courts do not have expertise to correct administrative decision. If a review of administrative decision is permitted, it will be

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substituting its own decision without necessary expertise/itself may be fallible.

20. Recently, the Supreme Court of India in the matter of **N.G.Projects Limited Vs. Vinod Kumar Jain and others in Civil appeal No.1846 of 2022** arising out of SLP (Civil) 2103 of 2022 observed in paragraph no.23 thus :-

“23. 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 a 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 malafide 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.

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21. In **Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and another reported in (2016) (16) SCC 818** the Hon'ble Supreme Court observed as under :-

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

22. Considering the legal position flowing from the aforesaid judgments, it is evident that this court will exercise restraints in interfering the administrative decisions of the administrative authorities unless such decision is shown to be arbitrary or tainted with malafide. In the present case, no material is brought before us to show that the decision is tainted with malafide. Even no grounds are made out to term the State policy of procurement from empaneled / rate contract supplier as arbitrary or detrimental to the interests MSMEs. Pertinently, sports Or Gymnasium equipment are not enlisted in priority list for procurement from MSMEs. The decision under Corrigendum dated 29.12.2022 for procurement from empaneled / rate contract supplier for one year through

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centralized process is in tune with object of providing quality material with uniform rates throughout the state. The prevailing policy of individual purchases at District level had inherent defects. No mechanism to bring uniformity in quality and rates of procured product was available in old method of procurement at individual district level through tenders. The impugned decisions remedied the issue. Therefore, we are not able to subscribe with the contention of the petitioners.

23. For aforesaid reasons, we do not find merit in the petition. Writ Petition stands dismissed.

(S. G. CHAPALGAONKAR)
JUDGE

(NITIN W. SAMBRE)
JUDGE

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