

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

Writ Petition No. 6944 / 2023

Waterfront Constructions Private
Limited, A Company registered under the
Companies Act, 1956
having its registered office at
Office No.3 & 4, 3rd floor,
Rajyog Creation Apartment, Anand Park,
Aund, Pune — 411 007
Through Its Authorised Person,
Bhushan s/o Rajendra Patni
Age 33 years, Occu. Business.

...Petitioner

Versus

1. The State of Maharashtra,
Through its Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai.
2. The Commissioner,
Municipal Administration,
Navi Mumbai.
3. The Divisional Commissioner,
Aurangabad, Tq. & Dist. Aurangabad.
4. The Collector, Osmanabad,
Tq. & Dist. Osmanabad.

5. The Chief Engineer,
Public Works Division, Aurangabad.
 6. The Executive Engineer,
Construction Division, Aurangabad,
Tq. & Dist. Aurangabad.
 7. The Sub-Divisional Officer,
Public Works Sub-Division,
Paranda, Tq. Paranda, Dist. Osmanabad.
 8. The Chief Officer,
Municipal Council, Paranda,
Tq. Paranda, Dist. Osmanabad.
- ...Respondents**

WITH
Civil Application No. 8616 / 2023
In
Writ Petition No. 6944 / 2023

M/s Prashant S. Paikekar –
A registered Partnership firm
Navi Chate Galli,
Near Murlidhar Mandir,
Barshi, Dist. Solapur
Through its Partner
Pratik Prashant Paikekar
Age 64 Years, Occ.: Business,
R/o Navi Chate Galli, Barshi,
Dist. Solapur.

...Applicant

Versus

1. Waterfront Constructions Private

Limited, A Company registered under the Companies Act, 1956
having its registered office at
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Construction Division, Aurangabad,
Tq. & Dist. Aurangabad.

8. The Sub-Divisional Officer,
Public Works Sub-Division,
Paranda, Tq. Paranda, Dist. Osmanabad.

9. The Chief Officer,
Municipal Council, Bhoom,
Tq. Paranda, Dist. Osmanabad.

...Respondents

WITH

Civil Application No. 8617 / 2023

In

Writ Petition No. 6944 / 2023

M/S D.C. Ajmera
Through its Partner
Saurabh Deepak Ajmera
Age 39 Years, Occ.: Business,
R/o Marwadigalli Osmanabad,
Dist. Osmanabad.

...Applicant

Versus

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Limited, A Company registered under the
Companies Act, 1956
having its registered office at
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Through Its Authorised Person,
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Age 33 years, Occu. Business.

2. The State of Maharashtra,
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Urban Development Department,
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 8. The Sub-Divisional Officer,
Public Works Sub-Division,
Paranda, Tq. Paranda, Dist. Osmanabad.
 9. The Chief Officer,
Municipal Council, Paranda,
Tq. Paranda, Dist. Osmanabad.
- ...Respondents**

(Non-Applicant No.1 is Original Petitioner and
Non-Applicant Nos. 2 to 9 are Respondents.)

AND

Writ Petition No. 6949 / 2023

Waterfront Constructions Private
Limited, A Company registered under the
Companies Act, 1956

having its registered office at
Office No.3 & 4, 3rd floor,
Rajyog Creation Apartment, Anand Park,
Aund, Pune — 411 007

Through Its Authorised Person,
Bhushan s/o Rajendra Patni
Age 33 years, Occu. Business.

...Petitioner

Versus

1. The State of Maharashtra,
Through its Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai.
2. The Commissioner,
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3. The Divisional Commissioner,
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Public Works Division, Aurangabad.

6. The Executive Engineer,
Construction Division, Aurangabad,
Tq. & Dist. Aurangabad.
7. The Sub-Divisional Officer,
Public Works Sub-Division,
Bhoom, Tq. Bhoom, Dist. Osmanabad.
8. The Chief Officer,
Municipal Council, Bhoom,
Tq. Bhoom, Dist. Osmanabad.

...Respondents

WITH

Civil Application No. 8604 / 2023

In

Writ Petition No. 6949 / 2023

M/s Prashant S. Paikekar –
A registered Partnership firm
Navi Chate Galli,
Near Murlidhar Mandir,
Barshi, Dist. Solapur
Through its Partner
Pratik Prashant Paikekar
Age 64 Years, Occ.: Business,
R/o Navi Chate Galli, Barshi,
Dist. Solapur.

...Applicant

Versus

1. Waterfront Constructions Private
Limited, A Company registered under the
Companies Act, 1956

having its registered office at
Office No.3 & 4, 3rd floor,
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Public Works Sub-Division,
Paranda, Tq. Paranda, Dist. Osmanabad.

9. The Chief Officer,
Municipal Council, Bhoom,
Tq. Paranda, Dist. Osmanabad.

...Respondents

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Senior Advocate Mr. R.N. Dhorde a/w Mr. P.S. Dighe i/by
Mr. V.R. Dhorde, Advocate for the petitioner in both petitions.

Senior Advocate Mr. R.S. Deshmukh i/by Mr. V.S. Undre,
Advocate for Respondent No.8 in both petitions.

Ms. P.S. Talekar i/by Talekar & Associates, Advocate for the
Applicant in C.A. No.8616/2023 & C.A. No.8604/2023

Mr. S.S. Thombre, Advocate for the Applicant in
C.A. No.8617/2023.

Mr. D.R. Kale, G.P. for Respondent/State

— — —

**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

RESERVED ON : 5 SEPTEMBER, 2023.

PRONOUNCED ON : 20 SEPTEMBER, 2023.

JUDGMENT [Shailesh P. Brahme, J.] :

. Rule. Rule is made returnable forthwith. With the consent
of the learned Counsels for the respective parties, both the
petitions are heard for final disposal.

2. Writ Petition No.6949/2023 pertains to tender process
undertaken by the respondent no.8/Municipal Council, Bhoom,

whereas in Writ Petition No.6944/2023, the tender process is undertaken by the respondent no.8/ Municipal Council, Paranda. For the sake of convenience, we are referring to the papers of Writ Petition No.6949/2023. Facts in issue in both the petitions are identical in material particulars. In both the petitions, affidavits-in-reply are filed by the respondent no.8/Municipal Council contesting the claim of the petitioner.

3. The petitioner is challenging the terms/conditions of tender documents and is seeking the writ of prohibition to restrain the Municipal Council from proceeding with the tender process and mandamus for undertaking fresh tender process by deleting the terms/conditions which are under challenge. Following are the terms and the conditions under challenge.

(A) “Eligibility Criteria :

5. Contractor shall have his own RMC plant within 40 km actual work place. The contractor shall submit documentary evidence of Plant for guaranteed supply for the said work.”

(B) Bid Capacity :

Contractor shall have financial capacity to qualify for bid capacity of equal to or more than the total value of works for which he has offered his bid. Contractor who

meets the minimum qualification criteria will be qualified only if their available bid capacity is equal to or more than the total value of works for which he has offered his bid. The available bid capacity will be calculated as below :

$$\text{Assessed Available bid capacity} = (A \times N \times 2.0 \div B)$$

A = Maximum value of civil engineering works executed in any one year during the last three years i.e. from April, 2020 to March, 2023 (updated to 2020-2023 level by factor of Price Escalation of 10% per year) taking into account the works completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bids are invited.

B = Value, at current years price level, of existing commitments and on-going works to be completed during the N years.

a) The tender submitted by the Tenderer shall be strictly as per NIT (Notice inviting tenders) and Common set of deviation issued by the Chief Officer, The tender offer shall be unconditional. Conditional tenders/offers will be summarily rejected.

b) All tenderers are cautioned that the tender containing any deviations from the contractual terms and conditions, specifications, or other requirements will be rejected as non-responsive.

(C) MANNER OF SUBMISSION OF TENDER AND ITS ACCOMPANIMENTS

The TECHNICAL DOCUMENT shall consist of the following documents :

(XIX). *Scan copy of Distance Certificate given by the Municipal Engineer/ Chief Officer that the works site within 40 Km from the RMC Plant.*

(XXVIII) *List of Machinery should be Available with Contractor.*

- 1. RMC PLANT (Own) - 1 No.*
- 2. Transit Mixer (Own) - 10 No.*
- 3. Needle Vibrator (Own) - 5 No.*

4. *Water Tanker (Own) - 5 No.*

5. *Shuttering & Centering Material Plates (Iron Plates) etc. - 10000 cum*

6. *Tipper (Own) - 20 No.*

7. *Steel Cutter (Own) - 5 No.*

8. *Excavator (Own) - 10 No.*

9. *Vibrator Roller signal Drum/Dabble Drum (Own) - 10 No.*

10. *Motor Grader (Own) - 3 No.*

common set of deviations or any corrigendum/ addendum/ amendment issued by Chief Officer signed by Contractor.

4. Both the parties are *ad-idem* on following relevant facts.

(i) Under Maharashtra Suvarnajayanti Nagar Utthan Maha-Abhiyan Scheme, the work of construction of cement concrete roads and drains is proposed for the Municipal Council, Bhoom and Paranda. The technical sanction followed by administration sanction was given for the work. The construction work is to be completed within eighteen months.

(ii) The respective Municipal Councils are the implementing agencies. The Municipal Council, Bhoom issued tender notice dated 09.06.2023 and the estimated cost was Rs. 95,62,23,250/-, whereas the Municipal Council, Paranda issued notice on 12.06.2023 for cost of Rs.76,72,05,356/-.

(iii) The petitioner participated in the tender process floated by Municipal Council, Bhoom. For Municipal Council, Paranda, it did not participate.

(iv) Tender documents are circulated by respective Municipal Council containing terms and conditions of eligibility, bid capacity, essential conditions, documents to be submitted for technical bid, modality to be followed for opening tenders etc.

(v) Petitioner is relying upon the following Governments Resolutions :

- a) G.R. dated 27.09.2018 issued by Public Works Department (PWD) stipulating guidelines for e-tender process.
- b) G.R. dated 12.03.2017 and 11.05.2022 pertain to the revised instructions issued by the same department.

(vi) Respondents rely on following policies :

- a) G.R. dated 21.08.2014 is for implementation of Maharashtra Suvarnajayanti Nagar Utthan Maha-Abhiyan Scheme issued by the Urban Development Department.
- b) G.R. dated 17.11.2017 is issued by Urban Development Department.

(vii) There was pre-bid meeting.

(viii) the opening of the technical bid and further process is stayed by the interim orders passed in the matters.

5. The petitioner has challenged the tender conditions/terms and the tender process on the following grounds :

- (i) The impugned tender conditions are designed to exclude

the petitioner and to favour the intervenors. They are arbitrary, irrational and against the policies and the guidelines issued by the PWD. They are formulated with malafides of reducing competition and to have monopoly.

(ii) The impugned conditions pertaining to the ownership of the machinery and the plant are arbitrary, extraneous and designed to eliminate the petitioner.

(iii) The condition pertaining to the bid capacity is contrary to Government Resolution issued by the PWD.

(iv) The conditions are discriminatory as compared to the conditions stipulated in the tender process floated by other Municipal Councils like Gangakhed, Nanded and Hingoli.

(v) The tender process is vitiated because it is not in Engineering Procurement and Construction (EPC) format.

(vi) The requirement of the documents to be filed for the technical bid are leading to hardship, impossibility and corruption.

(vii) The impugned terms/conditions are violative of Articles 14 and 19(1)(g) of the Constitution of India.

6. The respondent no.8/Municipal Council in both matters resisted the claim as follows :

(i) The petitioner has no locus-standi in Writ Petition No.6944/2023 as it did not participate in the tender process.

(ii) The impugned tender condition no.5 is included to have fair and more competition.

(iii) The petitioner has a plant within 25 Kms. and therefore he is opposing the stipulation of 40 Kms. to avoid the competition.

(iv) The work is to be completed within eighteen months and 31 items of the work are consolidated. To ensure the completion of the work with time and without any impediment, conditions regarding owning particular machinery, plant, vehicles are incorporated.

(v) It is not mandatory to follow the identical terms and conditions of tender process undertaken by other Municipal Councils.

(vi) Some conditions are modified, like bid capacity vide common set of deviation.

(vii) The tender processes in question are regulated by the instructions and the guidelines issued by the Urban

Development Department. The policies or the guidelines issued by the PWD are not mandatory, but directory.

(viii) The petitioner is misinterpreting G.R. dated 27.09.2018 for claiming relaxation of ownership of hot mix plant.

(ix) The relaxation laid down by the Clause No.53 of standing instructions dated 29.12.2005 gives limited discretion to the local body to complete the project without any delay and to avoid the inconvenience to the residence.

(x) The petitioner did not raise objection during pre-bid meeting. Now it is estopped from challenging the conditions or the tender process.

(xi) The impugned conditions and over all tender process are reasonable, transparent and providing fair competition and equal opportunity to the eligible participants.

7. The civil applications are filed by the intervenors to oppose the petitions. According to them, the petitioner is ineligible having objectionable track record in the matters of Government contract. With mala-fide intention the petitions are filed to avoid the competition. The petitions are against public

interest. The impugned terms and conditions are incorporated to complete the work within stipulated period. The funds are to be utilized within short period. The interim stay granted by this Court is causing prejudice to the stake holders and to the ex-chequer. The applicants have prayed for dismissal of the writ petitions.

8. Mr. Dhorde, learned Senior Counsel for the petitioner relied upon two judgments :

(i) R.B. Contractors, Yavatmal Vs. State of Maharashtra and Others, reported in 2006(6) Mh.L.J.

(ii) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, reported in AIR 1979 SC 1628.

9. The respondents and intervenors relied on following judgments.

(i) Afcons Infrastructure Ltd vs Nagpur Metro Rail Corporation Ltd. and Ors. Reported in AIR 2016 (SC) 4305.

(ii) Silppi Constructions Contractors Vs. Union of India and Ors. Reported in 2019 SCC OnLine SC 1133.

- (iii) M/S Galaxy Transport Agencies Vs. M/S New J.K. Roadways, Reported in 2020 SCC OnLine SC 1035.
- (iv) M/S N.G. Projects Limited Vs. M/S. Vinod Kumar Jain & Ors., Reported in 2022 LiveLaw (SC) 302.
- (v) Tata Motors Limited Vs. The Brihan Mumbai Electric Supply and Transport Undertaking (BEST) and Others, Appeal arising out of SLP (C) No.11933/2022.
- (vi) Airport Authority of India Vs. Centre for Aviation Policy, Safety & Research (CAPSR) & Others, reported in 2022 SCC OnLine SC 1334.
- (vii) Michigan Rubber (India) Limited Vs. The State of Karnataka and Others, reported in (2012) 8 SCC 216.
- (viii) TATA Cellular Vs. Union of India, reported in (1994) 6 SCC 651.
- (ix) High-G Transmissions Pvt. Ltd. Vs. The Maharashtra State Board Road Development Corporation Ltd., reported in 2016 SCC OnLine Bom 9423
- (x) National High Speed Rail Corporation Ltd. Vs. Montecarlo Ltd. and Anr., reported in (2002) 6 SCC 401.

10. The respondent no.8 and the intervenors have raised preliminary objection to locus-standi of the petitioner to file Writ Petition No.6944/2023 as it has not participated in the

tender process. To overcome the objection, learned Senior Counsel Mr. Dhorde has placed reliance upon the judgment in the matter of Ramana Dayaram Shetty (supra). The paragraph no.9 and 11 of the judgment are pressed into service to buttress the submission that the privilege of participation is at stake and without participating in the tender process, the terms can be challenged. We find that there is substance in the submissions of the learned Senior Counsel. We are considering another petition on merits. Therefore, we propose to consider both the petitions on merits.

11. We feel it expedient to remind ourselves of the restrictions for exercising writ jurisdiction under Article 226 of the Constitution of India in the matters of tender process and its terms and conditions. We are not exercising appellate jurisdiction. We seek to rely upon the following judgments of the Supreme Court :

(A). Michigan Rubber (India) Limited Vs. The State of Karnataka and Others, reported in (2012) 8 SCC 216.

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of [Article 14](#) is fairness in action by the State, and

non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

(B). Afcons Infrastructure Ltd vs Nagpur Metro Rail Corporation Ltd. and Ors. Reported in AIR 2016 (SC) 4305.

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts

but that by itself is not a reason for interfering with the interpretation given.”

(C). Silppi Constructions Contractors Vs. Union of India and Ors. Reported in 2019 SCC OnLine SC 1133.

“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges’ robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court

does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

(D). M/S Galaxy Transport Agencies Vs. M/S New J.K. Roadways, Reported in 2020 SCC OnLine SC 1035.

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in

exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under [Article 226](#). Cases involving blacklisting or imposition of penal consequences on a tenderer /contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

(E). M/S N.G. Projects Limited Vs. M/S. Vinod Kumar Jain & Ors., Reported in 2022 LiveLaw (SC) 302.

“21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while exercising its jurisdiction under Article 226 of the Constitution of India.

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 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.”

(F). Tata Motors Limited Vs. The Brihan Mumbai Electric Supply and Transport Undertaking (BEST) and Others, Appeal arising out of SLP (C) No.11933/2022.

“48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector

undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.”

(G). Airport Authority of India Vs. Centre for Aviation Policy, Safety & Research (CAPSR) & Others, reported in 2022 SCC OnLine SC 1334.

“27. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.”

12. The above guidelines with equal force are applicable while considering the validity of particular term/condition of the tender process. It is not that the above referred principles would apply only if the grievance is made for illegal exclusion from the tender process and illegal selection of bidder. In the present matter, the interpretation of alleged tender condition is implicit. The employer is the best person to appreciate its requirement and to interpret its documents. Repeatedly it is

observed that normally this Court is loathe to interfere in contractual matters unless a clear-cut case of arbitrariness, mala fides or irrationality is made out.

13. There is no dispute that near about 31 items of the work of construction of cement concrete roads and drains within city of Bhoom and Paranda are consolidated under the scheme. The work is to be completed within a period of eighteen months. Any delay in the work is likely to cause inconvenience and hardship to the residence of the cities. The funds allocated for the project are also likely to lapse if not utilized within stipulated period. In view of such peculiar background, the impugned terms and conditions are incorporated in the tendered documents. We do not find any arbitrariness or mala fides to have the terms and conditions in contract to facilitate the speedy completion of the work.

14. It is obvious for the respondent no.8/Municipal Council to see that the successful tenderer should own and possess hot mix plant, sufficient number of vehicles, adequate machinery

and the required bid-capacity to complete the work within time. The impugned terms and conditions are designed to seek these objects. The suitability of any term/condition to aspirant contractor or inconvenience caused, is inconsequential.

15. The grievance of the petitioner for having plant within radius of 40 Kms. from the work site is superfluous. The condition of the distance is incorporated to extend opportunity to participate to more bidders. The claim of the petitioner in this regard is against principles of privilege of participation.

16. The respondents are the employers. Considering the nature of the work, magnitude and time line, they have discretion to incorporate suitable conditions. We cannot at the instance of petitioner adjudge any condition as inconvenient or stringent or hyper technical. We are not experts. The Court can not dictate any term or condition. We have limited role in examining the validity of the terms and conditions under challenge.

17. The learned Senior Counsel for the petitioner have not demonstrated that there is violation of statutory provision of law, blatant violation of principles of equality or gross arbitrariness.

18. The tender processes in question are guided by the instructions and the norms laid down by the Urban Development Department. The learned Senior Counsel Mr. Deshmukh for respondent no.8 is justified in submitting that Clause No.53 cannot be invoked to relax the vital mandatory conditions. It is an enabling provision to be invoked to avoid inconvenience and hardship to the stake holders.

19. We are not impressed by the submission that the guidelines and the instructions issued by the PWD vide G.R. dated 02.03.2017 and 27.09.2018 are mandatory. Those are directory. We are not convinced by the submission of the learned Senior Counsel for the petitioner that the Municipal Council of Hingoli, Gangakhed, Nanded have incorporated certain conditions in their tender process and that would bind

the tender process in the present matter. Every local body is an implementing agency and has a discretion to stipulate the terms and conditions. Only rider which can be culled out from various judgments cited above is that there has to be transparency, fair play and reasonableness in the tender process. We find all these elements present in the tender process undertaken by the respondent no.8. The impugned tender conditions and tender process cannot be faulted.

20. For the reasons stated above, we hold that no case is made out by the petitioner to exercise writ jurisdiction under Article 226 of the Constitution of India. We, therefore, dismiss both the petitions. Rule is discharged. Accordingly, civil applications are disposed of.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]

21. At this stage, the learned Advocate for the petitioners submits that interim relief has been in operation till date and

the petitioners be granted some breathing time to approach the Supreme Court by extending the interim relief.

22. The learned Advocates for the respondents strongly oppose the request saying that it is a matter of public project.

23. In view of the nature of the dispute coupled with the fact that the interim relief has been in operation till date, the interim relief to continue for a period of two weeks.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]