IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

WRIT PETITION NO. 9363 OF 2022

1. Amjad s/o Mastan Pathan,
Aged 46 years, Occu. : Contractorship &
Proprietor of Ajinkyatara Construction
Ltd. R/o Khori Galli, Latur,
Tq. and Dist. Latur.

2. Dhanraj s/o Ganpat Kale,
Age 45 years, Occu. : Contractorship &
Proprietor of Bhoomi Constructions,
Latur, Tq. and Dist. Latur,
R/o Anand Nagar, Latur,
Tq. and Dist. Latur. .. Petitioners

Versus

1. The State of Maharashtra,
Through its Secretary,
in the Department of Urban
Development Mantralaya,
Mumbai – 32.

2. The Latur City Municipal Corporation,
Latur, Tq. and Dist. Latur.
Through its Commissioner/Administrator,

3. The City Engineer,
The Latur City Municipal Corporation,
Latur, Tq. and Dist. Latur.

4. Girjai Infrastructure,
Sharda Bhavan, Rajeev Gandhi
Chowk, Ausa Road, Latur,
Tq. and Dist. Latur,
Through its Director,
Akash S/o Shankar Morge.

5. Annappa s/o Maharudrappa Guddodagi,
Aged : 46 years, Occu. : Business,
R/o Sharda Bhavan, Rajeev Gandhi
Chowk, Ausa Road, Latur,
Tq. and Dist. Latur. .. Respondents

Shri A. N. Irpatgire, Advocate for the Petitioners.
Shri S. G. Sangale, A.G.P. for the Respondent No. 1.
Shri A. V. Hon, Advocate for the Respondent No. 2.
Shri H. V. Patil, Advocate for the Respondent No. 3.
Shri P. P. More, Advocate for the Respondent Nos. 4 and 5.

WITH
WRIT PETITION NO. 12798 OF 2022

1. National Traders
Through its Proprietor,
Gafur S/o Isaksab Shaikh,
Aged : 43 years, Occu. : Business,
R/o Opp. S. T. Workshop,
Ambajogai Road, Latur.

2. Rashed S/o Sartaj Sayyed,
Age : 27 years, Occu. : Contractor
R/o Shop No. 3, Near Patel Medical,
Khaja Nagar, Osmanabad,
Tq. & Dist. Osmanabad. .. Petitioners

Versus

1. The State of Maharashtra,
Through the Secretary,
Urban Development Department,
Mantralaya, Mumbai – 32.

2. The Commissioner,
Municipal Corporation, Latur,
Tq. and Dist. Latur.
3. Shri Navnath Kendre,
The City Engineer,
Municipal Corporation, Latur,
Tq. and Dist. Latur. .. Respondents

Shri V. C. Valse, Advocate h/f Shri T. M. Venjane, Advocate for the Petitioners.
Shri S. G. Sangale, A.G.P. for the Respondent No. 1.
Shri H. V. Patil, Advocate for the Respondent Nos. 2 and 3.

CORAM : MANGESH S. PATIL AND SHAILESH P. BRAHME, JJ.

CLOSED FOR JUDGMENT ON : 07.09.2023
JUDGMENT PRONOUNCED ON : 26.09.2023

JUDGMENT (*Per Shailesh P. Brahme, J.*) :-

. Rule. Rule is made returnable forthwith. Heard learned counsel for the respective sides for final disposal at the admission stage.

2. The petitioners claim to be successful bidders in the tender process. They have filed present petitions initially for direction to issue work order being successful bidders and for quashment of the tender notice dated 26.08.2022. Due to the subsequent developments, additional reliefs challenging the work order dated 22.09.2022 issued in favour of the respondent No. 5 direction to initiate disciplinary action against the respondent Nos. 2 and 3 and to recover amount paid by the respondent Nos. 4 and 5 in pursuance of work order dated 22.09.2022 are sought.

3. The respondent No. 2 has been governed and looked after by the administrator as the term of elected body has expired. To carry out various developmental works in Latur city resolution was passed and the administrative sanction was secured. On 20.07.2022 E-tender notice was issued by the respondent No. 2 for

forty developmental works. The petitioners and others submitted their bids.

4. The petitioners qualified technical and financial bid. By letter dated 05.08.2022 they were called upon by the respondent No. 3 to deposit security amount. The same was complied with. They were waiting for issuance of the work order. They were shocked to know that the respondent No. 2 issued a fresh tender notice on 26.08.2022 for the same works without informing them and instead of completing the earlier tender process. This was the cause for the petitioners to approach this Court.

5. Writ Petition No. 9363 of 2022 was filed on 12.09.2022. Writ Petition No. 12798 of 2022 was filed on 12.12.2022. As per the contentions of the petitioners, when first writ petition was pending and awaiting the admission hearing few developments took place with jet-speed. The subsequent tender process commenced on 26.08.2022 and was concluded on 22.09.2022 by opening the bids, accepting the bids and issuing the work orders. The petitioners were not issued the relevant documents. According to them the tender process was wound up to frustrate the claim of the petitioners in clandestine manner.

6. In the wake of above subsequent developments, petitioners were given liberty to amend the petition by order dated 26.09.2022. Additional pleadings were incorporated with prayers challenging the work order dated 22.09.2022 issued to the respondent Nos. 4 and 5 and direction to conduct disciplinary

action.

7. The respondent No. 2/Municipal Corporation has filed affidavit in reply in both the matters. It is the case of the corporation that initially process was by invitation of quotations. Last date for acceptance of the quotations was 27.07.2022. It is stated to have received various complaints pointing out irregularities. The corporation was required to cancel the tender process with a decision to initiate fresh tender process as per condition No. 7. There was no vested right in the petitioners.

8. It is averred that the fresh tender notice was floated by amalgamating the work under three schemes. A E-tender notice was issued on 26.08.2022. The last date for submission of tender was 19.09.2022. Online tenders were received, evaluated and work orders were issued on 22.09.2022. The successful bidders are stated to have almost completed the work. The petitioners did not participate in the subsequent E-tender process. The petitioners have no vested right and the petitions are prayed to be dismissed.

9. The respondent No. 3 would support the respondent No. 2. The respondent Nos. 4 and 5 have filed affidavit in reply stating that they were selected after following due procedure of law. They were eligible. The substantial work has been completed as there was no impediment or prohibitory orders from the Court. It is stated that no case is made out to point out any lacuna in the tender process. The constrains on the judicial review have been

pressed into service. There has been satisfactory execution of the work by them. They also pray to dismiss the petitions.

10. The learned counsel for the petitioners Mr. A. N. Irpatgire would submit that the petitioners were the lowest successful bidders in the earlier tender process which was aborted in a clandestine manner. They are entitled to receive the work orders. However, without any intimation the respondent Nos. 2 and 3 acted in collusion with other contesting respondents and deprived them. The impugned action is arbitrary and non transparent.

11. He would submit that the subsequent tender process initiated by tender notice dated 26.08.2022 is against the Government Resolutions dated 25.10.2019 and 27.09.2018. The respondent Nos. 4 and 5 are not eligible. They quoted more rates than the petitioners and are still selected and allotted the work. This has caused loss to the public exchequer also. It is submitted that there was a concluded contract with the petitioners and adverting to the subsequent tender process was impermissible.

12. The learned counsel would submit that before completing the requisite period of 85 days, fresh tender process was adverted to, which is patent illegality. This has been done with *mala fide* intention by the respondent Nos. 2 and 3 to favour unsuccessful bidders. It is submitted that the respondent Nos. 2 and 3 are liable for disciplinary action. The petitioners have assailed the manner in which the process is conducted with astonishing speed reflecting total high handedness. It is prayed that indulgence

under Article 226 of the Constitution of India is necessary.

13. To repel the above submissions, the learned counsel for the respondents states that the compelling circumstances to abandon earlier process of tender was because it was in the form of inviting quotations. The corporation stated to have invoked its power under Clause 8 of the tender condition stated in the tender notice dated 20.08.2022 at Exhibit – C. Due to the complaints and the irregularities the earlier process was required to be abandoned. The learned counsel would submit that the petitioners failed to participate in the subsequent tender process though they were aware of it. It is pointed out that the Writ Petition No. 12798 of 2022 was filed after conclusion of subsequent tender process.

14. It is submitted that substantial work has been completed. The duration for completion of the work was three months. Both the petitions have become infructuous. There was no concluded contract with the petitioner. Hence it is submitted that no case is made out to warrant interference.

15. The learned counsel for the respondents would submit that the petitioners have failed to prove *mala fides*, arbitrariness or unreasonableness.

16. The respondent No. 3 has placed reliance on the following judgments of the Supreme Court and this Court.

A. N. G. Projects Limited Vs. Vinod Kumar Jain and others reported in (2022) 6 SCC 127.

B. Jagdish Mandal Vs. State of Orissa and others reported in (2007) 14 SCC 517.

C. M/s Aditya Enterprises Vs. City Industrial and Development Corporation of Maharashtra Ltd. Writ Petition No. 15601 of 2022 dated 20.04.2023.

17. We have considered the rival submissions canvassed by the parties. The petitioners are invoking the tender jurisdiction of the High Court under Article 226 of the Constitution of India. There are inherent restrictions while exercising jurisdiction and especially directing to substitute the decision taken by the employer. We need to appreciate the facts and the submissions of the parties keeping in mind the guidelines issued by the Supreme Court from time to time. We propose to deal with those principles a little later.

18. It reveals from the papers that earlier tender process was in the form of invitation of quotations. The period of the work was of three months excluding the rainy days. The tender notice which is produced at Annexure – C indicates terms and conditions of project No. 43. A condition No. 8 provides for discretion to the Corporation for continuing with the tender process. It is the case of the respondent No. 2/Corporation that after inviting quotations, complaints were received pointing out irregularities. A decision was required to be taken to abort the process and to advert to fresh E-tender process. This defence of the corporation has not been controverted by the petitioners. There is nothing on record to

disbelieve the stand taken by the corporation for aborting the process.

19. The respondent No. 2/Corporation has invoked its power under condition No. 8 of the tender notice. To have transparency and for avoiding the difficulties if the new process was initiated then there is nothing illegal or arbitrary in it. It is not that the Corporation is not empowered to give up earlier process. We find that nothing substantial had progressed in earlier process and without causing any hardship or prejudice either to the petitioners or the stake holders, the respondent/Corporation adverted to fresh process. We do not find any illegality or *mala fides* in the said decision of the corporation.

20. The learned counsel for the petitioners was insisting for issuance of a work order for them being lowest bidders. We find that no agreement was ever executed by the Corporation in favour of the petitioners or any successful bidder. There is no concluded contract between the petitioners and the corporation. No right has been created in favour of the petitioners. The payment of security deposit does not invest any contractual right in petitioners. Therefore, the submission of the learned counsel for the petitioners is devoid of any substance.

21. It is next submitted by the learned counsel for the petitioners that they were lowest bidders. It is settled legal position that an employer is not obliged to accept the tender and award the work to the contractor just because it/they are

lowest/highest bidders. No right can be said to have been created in favour of the petitioners. Normally also, the employer has discretion not to go for lowest/highest bidder and for the reasons or special circumstances there is choice to deviate. We are not prepared to accept the contention that the respondent Nos. 4 and 5 have quoted more rates than the petitioners and, therefore, petitioners be given an opportunity which would save public money. The petitioners did not participate in the subsequent tender process and have no right to replace the respondent Nos. 4 and 5.

22. It is a matter of record that the duration of the work is of three months excluding the rainy days. The respondent Nos. 4 and 5 were issued with work orders on 22.09.2022. Though the period stipulated has been expired, the execution of work is in progress. It is stated to have been on the verge of completion. The respondent Nos. 4 and 5 have sought reliance upon the compliance certificate produced on record. The petitioners have not participated in the subsequent tender process and they are challenging the same.

23. Considering time gone and the subsequent developments, we do not deem it appropriate to grant indulgence and to divest the work from the respondent Nos.4 and 5. It appears that substantial amount has been spent. It is too late in the day to quash the subsequent tender process considering the nature of work. We cannot be oblivious of the fact that it is a developmental work of amalgamated schemes. The work has

been carried out in the city of Latur. The convenience of the residents and their hardship will have to be considered before passing any drastic order. We are of the view that the infrstructural work cannot be halted at any rate. We are not inclined to grant any relief to the petitioners.

24. The judgments cited by the learned counsel for the respondent No. 3 are worth relying. We find that paragraph No. 22 of the judgment in the matter of **M/s Aditya Enterprises Vs. City Industrial and Development Corporation** (cited supra) refers to the law laid down by the Supreme Court in the matter of **Haryana Urban Development Authority (HUDA) and others Vs. Orchid Infrastructure Developers Pvt. Ltd.** ***(2017) 4 SCC 243***. We have already held that there is no concluded contract as well as there can be no vested right in the petitioners being lowest bidders. We are fortified in our view for refusing any relief to the petitioners in the matter in hand.

25. The guidelines issued by the Supreme Court in the matter of **N. G. Projects Limited Vs. Vinod Kumar Jain and others** cited supra in para No. 23 are reproduced as below.

> "**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 com- plying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a *mala fide* manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."

26. We are reluctant to interfere considering the economic activity of the respondent Nos. 1 to 3. As per guidelines laid down by the Supreme Court, we are refraining ourselves from substituting the decision of the corporation. We have already held that any indulgence by us would lead to additional cost and would be against the public interest.

27. The principles laid down by the Supreme Court in the matter of **Jagdish Mandal Vs. State of Orissa and others** (cited supra) in respect of judicial review are well established. We refer to paragraph No. 22, which reads as under.

> "**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 black-listing 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."

28. As laid down by the Supreme Court in the matter of **Jagdish Mandal Vs. State of Orissa and others** (cited supra), the petitioners are at liberty to approach appropriate forum claiming

damages. For the reasons stated above, we do not find any arbitrariness or procedural impropriety in the process undertaken by respondent Nos. 2 and 3.

29. Before parting with the judgment, we have noticed startling features of the subsequent process in question. The petitioners have participated in the earlier tender process. They were called upon to pay the security deposit. They were identified being successful bidders. Under these circumstances, when the respondent/corporation decided to abandon the earlier tender process, it was under obligation to intimate the petitioners regarding the decision. The petitioners should not have been kept waiting for the work orders. We disapprove incalcitrant attitude of the respondent No. 2.

30. In subsequent tender process, the tenders were to be submitted lastly by 19.09.2022. They were opened and evaluated on 22.09.2022. Some resolution was passed on the same day. The work orders were issued on the self same date. This unusual method adopted by the respondent No. 2 reflects highhandedness and grave irregularity. It is informed that the administrator was looking after the tender process on behalf of the corporation. A high rank public officer is not expected to adopt the procedure in selecting bidders involving high stakes. This unnecessary haste creates doubt. There is no explanation for the supersonic speed shown by the administrator.

31. For the reasons stated above and in view of the law laid

down by the Supreme Court, we find that the petitioners have failed to make out any case to cause our indulgence while exercising writ jurisdiction. The writ petitions are devoid of merits. Same are dismissed. Rule is discharged. There shall be no order as to costs.

[SHAILESH P. BRAHME, J.] **[MANGESH S. PATIL, J.]**

bsb/Sept. 23