

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

WRIT PETITION NO. 13453 OF 2023

Digvijay Enterprises
Through its Proprietor,
Sahebrao Damu Shewale,
Age 53 years, Occ. Business,
R/o. Plot No. A-18, Abhijit Park,
Kamatnagar, Kanatwade Nashik
Tq. & Dist. Nashik.

... **Petitioner**

VERSUS

- 1) The State of Maharashtra
Through its Secretary,
Urban Development,
Mantralaya Mumbai-32.
- 2) The Nagar Panchayat
Muktainagar, through its Chief
Officer, Tq. Muktainagar, Dist.
Jalgaon.

... **Respondents**

...

Advocate for the Petitioner : Mr. B.S. Deshmukh h/f Mr. Atul M. Pawar
A.G.P. for the Respondent No. 1 : Mr. S.B. Yawalkar
Advocate for Respondent No. 2 : Mr. M.M. Patil-Beedkar.

**CORAM : MANGESH S. PATIL &
NEERAJ P. DHOTE, JJ.**

DATE : 30.10.2023

JUDGMENT : (PER : MANGESH S. PATIL, J.)

Learned advocate for the respondent no. 2 tenders across the Bar an affidavit in reply, which is taken on record.

2. Rule. Rule is made returnable forthwith. Learned A.G.P. waives service for the respondent no. 1 and learned advocate Mr. Patil-Beedkar waives service for the respondent No. 2. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The petitioner having participated in the E-tender floated by the respondent no. 2 which is a Nagar Panchayat, for collection of solid waste inviting bids published on 16.10.2023 is seeking to recall the entire process.

4. The learned advocate for the petitioner submits that administration of respondent no. 2 is being looked after by a Chief Officer only as an incharge officer who holds the regular posting of the same post of Bodhwad Nagar Panchayat. He submits that in order to favour one of the bidders he has put tailor made conditions in the tender notice since the same entity is presently collecting solid waste at Bodhwad. He would advert out attention to few terms and conditions which according to him are not sustainable being illogical. He also objects to the right reserved by the respondent no. 2 to refuse the bids without assigning reasons, as an arbitrary condition. He would submit that even the stipulation that the bidder should currently have been undertaking similar work in atleast seven Nagar Panchayats or Nagar Parishads is also arbitrary and seeks to favour bidder Riddhi Ventures.

5. The learned advocate also points out that even pre-bid meeting has not been held and the technical bids are to be opened tomorrow. He points out that a representation was made to the respondent no. 2 on 09.10.2023 but has not been considered by him.

6. Per contra, the learned advocate for the respondent no. 2 by referring to the affidavit in reply submits that the petitioner's grievance is hypothetical and premature. The respondent no. 2 being an employer is entitled to articulate the terms and conditions to suit its needs. It should have full freedom to provide for the conditions as deemed suited to its requirements. Merely because the petitioner is not comfortable with certain terms and conditions that cannot be a ground to stall the tender process merely because the petitioner harbours some apprehension and even anticipates rejection of his bid. His grievance cannot be entertained in exercise of the tender jurisdiction by resorting to Article 226 of the

Constitution.

7. The learned advocate would also submit that by virtue of Government resolution dated 31.08.2023, no pre-bid meeting needs to be conducted if the cost of work is up to Rs. 1.5 Crore. The present work being less than that limit, the petitioner's grievance that no pre-bid meeting is conducted is not legally sustainable. It is a matter of public work. The petitioner who is a businessman cannot be allowed to create any obstacle.

8. At the outset one needs to reiterate the limitations on the powers of this Court under Article 226 of the Constitution in the tender matters. This Court cannot substitute the decision of the employer. Even the propriety of having certain stipulations would be a matter which would be within the exclusive domain of the employer. Suffice for the purpose to refer to the following observations of the Supreme Court in the matter of **N.G. Projects Limited Vs. Vinod Kumar Jain and others; (2022) 6 SCC 127** particularly in para No. 23 which are reproduced 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 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 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.”

and in the matter of **Jagdish Mandal Vs. State of Orissa and others; (2007)**

14 SCC 517, in para 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.”

Unless there is some element of arbitrariness or procedural impropriety, this Court would be loath in exercising the powers of judicial review by resorting to Article 226 of the Constitution.

9. Bearing in mind the limitations on the powers of this Court, if one examines the matter in hand, the petitioner's grievance seems to be in respect of certain conditions *inter alia* requiring the successful bidder who would be ultimately getting the contract of collection of solid waste to mandatorily initiate prosecution against violators of the plastic ban, reserving the right to undertake negotiations and to reject the bids without assigning any reason depriving the unsuccessful bidder of resorting to appropriate legal remedy, insistence of having minimum experience of seven Nagar Panchayats, undertaking same work and non holding of pre bid meeting. In our considered view these are all the matters which would fall within the domain of the employer and by no stretch of imagination can be said to be either arbitrary or wholly unsustainable. It cannot be said that it is a matter of gross impropriety or arbitrariness. It is settled position of law that settlement of terms and conditions of invitation to tender are within the ambit of tender making authority as is reiterated by apex court in **Airport Authority of India Vs. Centre for Aviation Policy, Safety and Research (CPSR)**; 2022 SCC OnLine SC 1334 except where those are arbitrary, discriminatory or *mala fide*. None of the terms in the tender in question, in our view suffers from these vices.

10. Though the petitioner claims that some of these conditions are tailor made to suit one of the bidders Riddhi Ventures, the allegations would be premature inasmuch as the technical bids and financial bids are still to be opened and that entity is still to be allotted the contract.

11. Besides, on our query the learned advocate for the respondent no. 2 informs that there are four bidders meaning thereby that except the petitioner the other

bidders have no grievance in respect of the terms and conditions regarding which he has the objections.

12. Under these circumstances, we find no arbitrariness or procedural impropriety in the process being undertaken by the respondent No. 2.

13. The Writ Petition is dismissed.

14. Rule is discharged.

(NEERAJ P. DHOTE, J.)

(MANGESH S. PATIL, J.)

mkd/-