



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3391 OF 2023

Ghate and Kaware Associates,
a Partnership Firm duly registered under the Indian
Partnership Act having registered address
at Kothi Road, Near Rajendra High School,
Mahal, Nagpur-440 032 through its partners.

1. Shailendra Madhukarrao Ghate,
Aged about 51 years,
R/o. Kothi Road, Near Rajendra High School,
Mahal, Nagpur-440 032.
2. Shrikant Balchandra Kaware,
Aged about 55 years,
R/o. Plot No. 33 C, behind Tiger Saoji,
Dubey Layout, Nagpur-440 016.

..... **PETITIONERS**

...VERSUS...

1. Nagpur Municipal Corporation,
through its Municipal Commissioner,
Office at Civil Lines, Nagpur.
2. Technic Inc. through its Partner-
Ankush Vitthalrao Dahake,
Aged about 34 years,
R/o. Plot No. 25, Gokul Dahake Plot,
ITI Colony, Amravati Camp,
District Amravati-444 602.
3. Ankush Vitthalrao Dahake,
Aged about 34 years,
R/o. Plot No. 25, Gokul Dahake Plot,
ITI Colony, Amravati Camp,
District Amravati-444 602.

4. Nagpur Municipal Corporation,
through its Sports Officer (Department of Sports and
Education),
Office at Civil Lines, Nagpur.

...RESPONDENTS

Shri D. V. Chauhan, Advocate with Shri A.H.Daga, Advocate for petitioner.
Shri G.A.Kunte, Advocate for respondent nos. 1 and 4.
Shri S.W.Sambre, Advocate for respondent nos. 2 and 3.

CORAM :- A.S.CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

ARGUMENTS WERE HEARD ON : 11th OCTOBER, 2023

JUDGMENT IS PRONOUNCED ON : 30th NOVEMBER, 2023

JUDGMENT (Per A.S.CHANDURKAR, J.)

Rule. Rule made returnable forthwith and heard the learned
Counsel for the parties.

2. The petitioner, a partnership firm that is engaged in the business of operation and maintenance of sports complexes is aggrieved by the rejection of its technical bid that was offered by it in response to the tender notice dated 22.03.2022. The petitioner also challenges the work order dated 30.05.2023 issued to the second respondent.

3. The facts relevant for considering the challenge as raised is that on 08.06.2022, the first respondent-Nagpur Municipal Corporation through its Sports Officer was pleased to publish tender notice inviting bids for undertaking the work of maintenance and operation of Rashtrasant Tukdoji

Maharaj Krida Sankul. The work of maintenance and operation was to be undertaken for a period of three years and the estimated cost was indicated at Rs.22,17,600/-. The eligibility criteria was prescribed therein and one of the conditions stated was that the financial bid that was less than the estimated cost would be rejected. However the bids received were found to be non-responsive due to which various calls of the same tender notice were required to be made. Such calls were also made on 31.08.2022, 11.11.2022, 23.02.2023 and ultimately on 22.03.2023. The last call being the fifth call was responded by three bidders that included the petitioner-firm as well as the second respondent - Technic Inc. In the technical evaluation that was undertaken on 06.04.2023 the shortcomings in the technical bids were noted. Insofar as the petitioner is concerned, it was stated that it did not fulfill the eligibility criteria with regard to having trainers who were issued requisite certificate by the National Institute of Sports. It was also stated that the documents with regard to hosting tournament of the levels indicated in the tender notice were not attached. The shortcomings with regard to other bidders were also indicated therein and compliance was required to be made within a period of five days. On 10.04.2023 the petitioner issued a communication indicating its eligibility and also raising an objection to the eligibility of the second respondent to participate in the tender process. The Sports Officer of Nagpur Municipal Corporation referred all relevant documents including the technical aspects to its Chartered Accountant on

04.05.2023. Response to the aforesaid was received from the Chartered Accountant on 10.05.2023 expressing the opinion that the petitioner was not eligible to participate in the tender process and further that the second respondent satisfied the requisite criteria. On the basis of opinion expressed, the matter was considered and the bid of the second respondent came to be accepted. The work order in that regard came to be issued on 30.05.2023. It is in this backdrop that the petitioner has approached this Court under Article 226 of the Constitution of India raising the challenge referred to hereinabove.

4. Shri D. V. Chauhan, learned counsel for the petitioner submitted that the conduct of the tender process of the Nagpur Municipal Corporation had not been undertaken in a fair and transparent manner. The terms and conditions indicated in the tender notice had not been duly complied with and there were various shortcomings in the entire process. According to him, the bid submitted by the petitioner was not liable to be held technically non-responsive on the ground that the petitioner did meet the prescribed the eligibility criteria. Further it was submitted that that after grant of time of five days to the bidders to comply with the shortcomings indicated in the technical evaluation, there was no re-assessment undertaken by the Tendering Authority. Despite the fact that the petitioner had indicated the manner in which it was eligible by virtue of its communication dated

10.04.2023 coupled with the objections raised to the eligibility of the second respondent, the said aspects were not considered in the process of re-assessment. It was necessary for the Tendering Authority to have considered the matter in this regard. Further the Tendering Authority did not publish any corrigendum though reference to the same was made in the analysis undertaken by the Chartered Accountant. Since the corrigendum as stated had not been published nor had any due publicity been given, it was not permissible for the Tendering Authority to change the tender conditions. It was then submitted that the financial bid of the second respondent indicated an amount that was much less than the estimated cost. In the tender notice the estimated cost indicated was Rs. 22,17,600/- while the bid of the second respondent at Rs.12,25,224/- came to be accepted. In terms of the conditions of the tender notice, the financial bid of the second respondent ought to have been rejected. It was not permissible for the Tendering Authority to deviate from the terms and conditions indicated in the tender notice. It was thus clear that the entire tender process was flawed and in an arbitrary exercise of authority the Nagpur Municipal Corporation had issued the work order to the second respondent. To substantiate his contentions, the learned counsel for the petitioner placed reliance on the decision in *Anil Kumar Srivastava vs. State of U. P. and another [(2004) 8 SCC 671]* and submitted that the prayers made in the writ petition ought to be granted.

5. Shri G.A.Kunte, learned counsel for the Nagpur Municipal Corporation-Tendering Authority opposed the aforesaid submissions. He submitted that the entire tender process had been conducted in accordance with the terms and conditions indicated in the tender notice. After the technical evaluation of the bids received had been undertaken, each bidder had been issued an e-mail to comply with the shortcomings within a period of five days. Though the petitioner had responded to the e-mail it could not satisfy the Tendering Authority of its eligibility. After due consideration and assessment of the relevant material, the petitioner's technical bid came to be rejected on 16.05.2023. The petitioner could not demonstrate its eligibility since it did not fulfill the criteria prescribed with regard to hosting of the tournaments indicated therein. Further it was not able to indicate the availability of trainers with the requisite standard. Hence there was no fault with the rejection of the petitioner's technical bid. Insofar as the bid of the second respondent, it was submitted that on 16.06.2022 the corrigendum in question had been uploaded after publication of the tender notice on 22.03.2022. The said corrigendum was available on the concerned website. Since the petitioner failed to notice the same, it was urged by it that such corrigendum had never been published. As regards the acceptance of the bid of the second respondent below the estimated cost was concerned, reference was made to the Government Resolution dated 27.09.2018 and Clause 4.3 thereof. As per the said Clause, it was permissible for the Tendering

Authority to relax terms and conditions of the tender notice. This exercise of power was duly ratified and Resolution No.394A dated 30.05.2023 to that effect came to be passed. Since the entire tender process had been conducted in a fair and transparent manner there was no reason for the Court to interfere in the same. To substantiate his contention that there was a limited scope for interference in such matters, the learned counsel placed reliance on the decisions in *Tata Motors Limited vs. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and others* **[2023 Livelaw SC 467]**, *M/s. Om Gurusai Construction Company vs. M/s. V. N. Reddy and others* **[2023 Livelaw SC 694]**, *Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others vs. Director General of Civil Aviation and others* **[(2011) 5 SCC 435]**, *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another* **[(2016) 16 SCC 818]**, *JSW Infrastructure Limited and another vs. Kakinada Seaports Limited and others* **[(2017) 4 SCC 170]** and *Universal Cables Limited and another vs. State of Maharashtra, through its Principal Secretary, and others* **[(2023) 3 AIR Bom R 327]**. It was thus urged that there was no merit in the writ petition and it was liable to be dismissed.

Shri S. W. Sambre, learned counsel appearing for the second respondent adopted the contentions raised on behalf of the Nagpur Municipal Corporation. In addition, it was submitted that though the petitioner had been granted a similar work order by the Nagpur Municipal

Corporation on 04.03.2014, the said work had not been carried out satisfactorily by the petitioner. Since the petitioner was not able to indicate its eligibility, its technical bid was rightly rejected. The work order issued to the second respondent was in accordance with the terms and conditions of the tender notice.

6. Having heard the learned counsel for the parties and having perused the documents on record, we do not find that there is any case made out for this Court to interfere under Article 226 of the Constitution of India in the tender process conducted by the Nagpur Municipal Corporation. The facts on record indicate that though the tender notice was initially published on 08.06.2022, it did not get the requisite response resulting in various calls being required to be published. It was only in response to the fifth call dated 22.3.2023 that three bidders submitted their bids. During the course of technical evaluation, the shortcomings in the documents submitted by the bidders were indicated. Time of five days was given to remove the deficiencies indicated. Though the petitioner responded to the e-mail dated 06.04.2023 issued by the Tendering Authority and submitted its representation dated 10.04.2023, the analysis undertaken by the Chartered Accountant appointed by Nagpur Municipal Corporation indicated that it could not satisfy the eligibility criteria by submitting requisite documents. Perusal of the detailed analysis indicates that each objection raised by the

petitioner has been analyzed and thereafter opinion has been expressed by the Chartered Accountant. Similarly, the objection raised to the eligibility of the second respondent was also examined. Since an objective analysis of the documents submitted by the petitioner was undertaken so also the objection raised by it to the eligibility of the second respondent was also considered which analysis has been accepted by the Tendering Authority, we do not find that there is any reason for this Court to re-examine such analysis when the same is not shown to be arbitrary or irrational. The Tendering Authority being the best judge of its requirements it has to be granted some play in the joints while undertaking such assessment. The opinion expressed by the Chartered Accountant was duly considered by the Tendering Authority that is reflected in its note sheets. It is thus clear that in a transparent manner the representation made by the petitioner as well as the objection to the eligibility of the second respondent has been considered. This Court cannot substitute its opinion in place of that expressed by the Tendering Authority. We therefore do not find any reason to interfere in this aspect of the matter.

7. As regards the documents submitted by the second respondent, an objection was raised by the petitioner that the lifeguard certificate to be submitted alongwith the documents ought to be one issued by the Life Guard Authority of India. Since the certificate submitted by the second respondent was from the College of Physical Education, the same was not liable to be

accepted. While analyzing this objection, it has been noted that in view of the corrigendum issued, the said condition was amended and submission of a lifeguard certificate issued by any Life Saving Training Institute was sufficient. In this regard, it is the contention of the petitioner that such corrigendum was never issued and hence the second respondent was not eligible to participate in the tender process. It is seen that alongwith the additional affidavit filed on behalf of the Nagpur Municipal Corporation, it has been indicated that on 16.06.2022 such corrigendum has been duly published. It is to be noted that the tender notice was initially published on 08.06.2022 and the corrigendum was published thereafter. The publication of the corrigendum at the concerned website is sought to be substantiated by placing on record a downloaded document from the eProcurement System, Government of Maharashtra. Though it was urged by the learned counsel for the petitioner that the said corrigendum pertains to some other work, we do not find any basis whatsoever to accept the said contention. The work in question alongwith its tender value clearly indicate that the corrigendum was published with regard to the present tender notice that was initially published on 08.06.2022. It therefore cannot be said that the decision of the Tendering Authority to hold the second respondent eligible on the basis of documents submitted pursuant to corrigendum is either illegal or arbitrary. The material on record is sufficient to negative this contention of the petitioner.

8. As regards acceptance of the financial bid of the second respondent below the estimated cost is concerned, it has been urged on behalf of the Nagpur Municipal Corporation that in view of the fact that this was the fifth call pursuant to the tender notice, the Tendering Authority considered the said aspect of the matter and in the light of Clause 4.3 of the Government Resolution dated 27.09.2018 the offer made by the second respondent came to be accepted. Perusal of the said Government Resolution and Clause 4.3 thereof indicates that the Tendering Authority has been conferred with discretion in that regard keeping in mind the aspect of delay in carrying out the work and the time taken in the tendering process. While doing so, the concerned Authority is required to ensure that the quality of the work is not affected by relaxation of such terms and conditions. We find on a reading of the note sheet maintained by the Tending Authority that it was satisfied for the reasons stated therein that the bid of the second respondent could be accepted. In the light of the fact that the tender process had commenced on 08.06.2022 and was required to be continued for a period of more than one year since requisite offers were not received, the Tendering Authority has exercised its discretion and accepted the financial bid of the second respondent though it was below the estimated cost.

9. In *M/s. Om Gurusai Construction Company* (supra), the Hon'ble Supreme Court considered the question as to whether the tender conditions prescribed could be constructed as rigid and unalterable even if justice of the cause warranted otherwise. In the said case, it was found that there were no allegations of mala fides made and the interpretation adopted by the Tendering Authority could not be said to be perverse. On that touchstone it was held that the decision of the Tendering Authority was not liable to be interfered with. We find that in the facts of the present case, the ratio of the aforesaid decision can be made applicable. The Tendering Authority exercised its discretion of relaxing the tender conditions by relying upon the Government Resolution dated 27.09.2018. It has not been shown that only with a view to favour the second respondent, the same has been done. The Tendering Authority being the employer of the project is the best person to understand and appreciate its requirements. As held in *Afcons Infrastructure Limited* (supra) a mere disagreement with the decision-making process or the decision of the administrative authority would be no reason for a Constitutional Court to interfere. The threshold of mala fides, intention to favour someone, arbitrariness, irrationality or perversity must be met before the Constitutional Court interferes with the decision-making process or the decision itself. In the facts of the present case, we do not find that such threshold has been met. For this reason, the ratio of the decision in *Anil Kumar Srivastava* (supra) would not be attracted to the present facts.

We therefore do not find it necessary to interfere with the decision of the Tendering Authority in accepting the financial bid of the second respondent on the grounds urged by the petitioner.

10 In the light of the aforesaid discussion, there is no case made out to invoke jurisdiction under Article 226 of the Constitution of India. The challenge to the rejection of the petitioner's technical bid as well as to the issuance of work order dated 30.05.2023 to the second respondent fails. The writ petition stands dismissed. Rule stands discharged with no order as to costs.

(MRS. VRUSHALI V. JOSHI, J.)

(A.S.CHANDURKAR, J.)

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