IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

CIVIL WRIT PETITION NO.4042 OF 2023

Vijay Construction,	]
Through it's Partner – Mr. Hardik Patel	]
Aged about 36 years, Occ.: Business,	]
"Jay Khodiyar", 26 New Sneha Nagar,	]
Wardha Road, Nagpur – 440015.	] … Petitioner

Versus

1. **State of Maharashtra,**	]
Through the Collector,	]
Civil Lines, Nagpur.	]
2. **Nagpur Metropolitan Region Department Authority**	]
Through Metropolitan Commissioner,	]
NMRDA, Nagpur.	]
3. **Superintending Engineer,**	]
Metropolitan Region Development Authority,	]
Nagpur.	]
4. **The Executive Engineer (Technical Section),**	]
Metropolitan Region Development Authority,	]
Nagpur.	]

5. **D.V. Patel and Company,**]
Through it's Partner – Mr. Bhavesh D. Patel,]
Aged about ___ years, Occ.: Business,]
Office address at : 2nd Floor, 65A, Flat No.5,]
Mahalaxmi Apartment, WHC Road,]
Shankar Nagar, Nagpur]

6. **Indu Constructions,**]
Through it's Proprietor – Mr. Nitin N. Gabhane]
Aged about ___ years, Occ.: Business]
Office address at Opposite Telephone Office,]
Camp, Amravati – 444602.]

7. **Shubham EPC Pvt. Ltd.,**]
Amit Crystal, 401/402, Above Bank of Baroda,]
Opposite to Chatushringi Temple,]
Senapati Bapat Road, Pune – 411016.] **... Respondents**

Mr. Hrishikesh S. Chitaley for the Petitioner.
Mr. H.D. Marathe, AGP for Respondent No.1.
Mr. Girish Kunte for Respondent Nos.2 to 4.
Mr. N.C. Phadnis for Respondent No.5.

CORAM : A.S. CHANDURKAR & ABHAY J. MANTRI, JJ.

Date on which arguments were heard : 8th November, 2023

Date on which judgment is pronounced : 22nd December, 2023

[PRONOUNCEMENT THROUGH VIDEO CONFERENCE]

JUDGMENT : { Per A.S. Chandurkar, J. }

1. RULE. Rule made returnable forthwith and heard, by consent, learned counsel for the parties.

2. The challenge raised in this Writ Petition is to the Technical Summary Report dated 30th May 2023, as a result of which Technical Bids of the 5th and 6th respondents have been held to be qualified, enabling them to participate in the Financial Bids. By amending Writ Petition, the challenge is also raised to the Work Order dated 14th August 2023 issued by the 2nd respondent in favour of the 5th respondent.

3. The Nagpur Metropolitan Region Development Authority – NMRDA, the 2nd respondent, issued a Tender Notice for the construction and upgradation of the Radiotherapy Department of the Government Medical College and Hospital, Nagpur. In response to the said Tender Notice, five bids were received by the Tendering Authority. As per the Tender Summary Report, the Technical Bids were updated on 30th May 2023 at 02:43 pm. The Technical Bid of one bidder came to be rejected while the Technical Bids of the petitioner along with the 5th to 7th respondents came to be admitted so as to enable them to participate in the Financial Bids. The Financial Bids were opened at 02:45 pm on 30th May 2023 itself. On the same day, the petitioner made a complaint to the Metropolitan Commissioner – NMRDA, stating therein that in accordance

with Clause 23.9 of the Tender Notice, it was necessary to grant time of two working days after the result of the Technical Bids was made public to enable the bidders to submit a complaint, if warranted. According to the petitioner, Clause 23.9 was not complied with and the Financial Bids were opened on the same day. NMRDA thereafter, on due evaluation of the Financial Bids, proceeded to accept the Financial Bid of the 5th respondent and on 14th August 2023, a Work Order was issued to it. Being aggrieved by the aforesaid, this Writ Petition has been filed.

4. Mr. Hrishikesh S. Chitaley, learned counsel for the petitioner submitted that the manner in which the Work Order was issued to the 5th respondent was not in accordance with the terms mentioned in the Tender Notice. Referring to Clause 23.9 of the Tender Notice, it was submitted that the result of evaluation of the Technical Bids was required to be made public on the eProcurement system, after which a period of two working days was available for a bidder to submit a complaint for resolution before opening of the Financial Bids. As per the Tender Evaluation Report, the Technical Bids and the Financial Bids were opened on the same day within a span of few hours. Period of two working days was not made available for raising objection to the eligibility of other bidders. The petitioner desired to raise an objection to the technical eligibility of the 5th and 6th respondents but was precluded from doing so. It was the specific case of the petitioner that as the said respondents were not technically qualified, they were not eligible to participate in the

subsequent bidding process. It was further submitted that from the documents on record, it was clear that the said bidders were not technically qualified. The requisite documents that were required to be submitted were not available with them. In the absence of such required documents, relaxation was granted to the said bidders and they were held eligible for further participation. In the Tender Notice, there was no reference made to Government Resolution dated 27th September 2018 and that it would be relied upon while considering the bids. Without giving any indication in that regard, the 2nd respondent sought to rely upon the aforesaid Government Resolution for holding the 5th and 6th respondents eligible for participation. This would indicate that the tender process, as a whole, was conducted in an arbitrary manner. On the financial rates quoted by the 5th respondent, it was submitted that given an opportunity, the petitioner would have matched the rates quoted by the said respondent. There was no opportunity granted in that regard. It was submitted that even today, the petitioner is willing to match the bid of the 5th respondent. All this would indicate that the petitioner was singled out with a view to deprive him of the grant of the Work Order. It was thus submitted that a case was made out for this Court to interfere in the conduct of the tender process and the issuance of Work Order to the 5th respondent.

5. Mr. Girish Kunte, learned counsel for respondent nos.2 to 4 opposed the aforesaid submissions. According to him, the entire tender process had been conducted in a fair manner by granting full opportunity to all bidders to

participate therein. He denied that the tender process was conducted in a manner so as to deprive the petitioner from participating in the same. The Technical Bid of the petitioner was held to be qualified, after which his Financial Bids were opened. Since the rates quoted by the 5th respondent were more competitive than the rates quoted by the petitioner, the Work Order was issued to the 5th respondent. On the applicability of Clause 23.9 of the Tender Notice, it was submitted that a similar clause of this nature was also a part of the earlier tender process, in which the petitioner had participated and had been successful in getting the Work Order. In e-Tender Notice No.25/2018-19 (NMRDA) as well as e-Tender Notice No.7/2021-22, though such a clause was present, the Financial Bids had been opened immediately after the technical evaluation. In the previous Tender Notice, the petitioner was successful and was thus aware of this practice of the 2nd respondent. Moreover, the opportunity to make a complaint was to be exercised by a disqualified bidder and not by a bidder whose Technical Bid was accepted. Since the petitioner's bid had been held to be technically eligible, no grievance in that regard could be raised by the petitioner. As regards the shortfall of documents and absence of a provision for relaxation, it was submitted that the Tendering Authority relied upon the provisions of Government Resolution dated 27th September 2018, as revised on 17th September 2019. There was no arbitrariness in this regard. All documents available were considered along with the earlier work experience of the said bidders. Reference in this regard was made to the letters dated 12th May 2023 issued by the 5th and 6th respondents, requesting for consideration of their work experience. In accordance with Clause 4.5.2 of the Government Resolution dated 27th September 2018, the eligibility and suitability of each bidder was considered and the Work Order was issued by accepting the most competitive rates that had been quoted by the 5th respondent. There was no arbitrariness whatsoever and considering the nature of the work proposed, which was in larger public interest, there was no reason to interfere in exercise of writ jurisdiction. In support of these contentions, the learned counsel for respondent nos.2 to 4 has relied upon the decision of this Court in *Universal Cables Ltd. and Anr. Vs. State of Maharashtra, Through it's Principal Secretary, Ministry of Power and Energy and Ors., 2023 SCC OnLine Bom 588* and decisions of the Hon'ble Supreme Court in ***(i)*** *Om Gurusai Construction Company Vs. V.N. Reddy and Ors., 2023 Live Law (SC) 694;* ***(ii)*** *Agmatel India Pvt. Ltd. Vs. Resoursys Telecom and Ors., 2022 Live Law (SC) 105;* ***(iii)*** *Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd. and Anr., 2022 Live Law (SC) 295;* ***(iv)*** *N.G. Projects Ltd. Vs. Vinod Kumar Jain and Ors., Civil Appeal No.1846 of 2022, decided on 21st March 2022;* ***(v)*** *Airport Authority of India Vs. Centre for Aviation Policy, Safety & Research (CAPSR) and Ors., Civil Appeal Nos.6615-6616 of 2022, decided on 30th September 2022 and;* ***(vi)*** *Tata Motors Ltd. Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors., 2023 Live Law (SC) 467.* It was prayed that no interference was called for in the writ petition.

6. Mr. N.C. Phadnis, learned counsel for the 5th respondent, who had been issued the Work Order, also opposed the Writ Petition. According to him, after being found technically qualified, the bids of all successful bidders, who were technically qualified were evaluated. Since the offer given by the 5th respondent was most competitive, it was awarded the Work Order. According to the learned counsel, it was not open for the petitioner to make a grievance with regard to Clause 23.9 of the Tender Notice for the reason that the petitioner's Technical Bid had been accepted and the provision for making a grievance under the said clause was with a bidder whose Technical Bid was not accepted. It was urged that though the Technical Bids had been updated on 24th April 2023, the petitioner sought to raise an objection only on 30th May 2023. Despite the fact that about 36 days were available, the petitioner failed to raise any objection. It was denied that there was any shortfall of documents at the instance of the 5th respondent. The said respondent had given a detailed clarification and had submitted all requisite documents, that was clear from the communication dated 12th May 2023. There was no relaxation of any nature granted in favour of the 5th respondent. It's bid was accepted in accordance with the requisite tender conditions. The learned counsel also sought to place reliance on the decision in *Universal Cables Limited and Anr. (Supra)*. It was thus submitted that there was no case made out to interfere in writ jurisdiction.

7. We have heard the learned counsel for the parties at length and with their assistance, we have perused the documents on record. We have thereafter given due consideration to their respective submissions. Before considering the same, it would be necessary to bear in mind the law laid down by the Hon'ble Supreme Court in some of its decisions.

8. In *Air India Ltd. Vs. Cochin International Airport Ltd. and Ors., along with connected matter, (2000) 2 SCC 617*, it has been observed, in paragraph 7, as under :-

> "7. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review,

the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

9. In *Jagdish Mandal Vs. State of Orissa and Ors., along with connected matter, (2007) 14 SCC 517*, it has been held, in paragraph 22, 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 seeks 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."

10. Recently, in *Tata Motors Ltd. Vs. Brihan Mumbai Electric Supply and Transport Undertaking (BEST), AIR 2023 SC 2717*, the Hon'ble Supreme Court, in paragraph 48, has observed as under :-

"48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, malafides 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."

11. Keeping in mind the aforesaid law, the rival contentions now fall for consideration. According to the learned counsel for the petitioner, under Clause 23.9(i) of the Tender Notice, the result of evaluation of Part-I of the Bid was required to be made public on the eProcurement system and period of two working days was to be given, during which any bidder could submit his complaint, which was to be considered before opening of Part-II of the Bid. At the outset, it may be stated that a plain reading of this clause does not give it a restrictive meaning that it is only such bidder whose Technical Bid has been held to be disqualified can submit a complaint against the same. The said clause permits "any" bidder to submit a complaint during the period of two working days after results of the evaluation of the Technical Bids is made public. It is thus clear that it was permissible for any bidder, including the one whose Technical Bid had been held qualified, to submit a complaint for

consideration as regards acceptance of any other bid. The stand taken otherwise by the Tendering Authority as well as the 5th respondent cannot be accepted.

12. Having found so, we do not find that in the facts of the present case, absence of an opportunity to the petitioner to raise a complaint against the decision of the Tendering Authority of holding the bids of the 5th to 7th respondents successful has resulted in any serious prejudice that would vitiate the entire tender process. For considering this aspect, if the objection sought to be raised by the petitioner is considered, it is seen that the 5th and 6th respondents are stated to have failed to produce any document with regard to ownership of machinery required for the tender work. On this aspect, it has been stated by the 2nd respondent in its affidavit-in-reply that the requirement specified in the tender document was with regard to construction of basement + ground floor + 3 upper floors. The said bidders, however, had indicated experience of constructing multi-storeyed buildings. For that reason, 5th and 6th respondents had shown possession of concrete static / stationary pumps while 7th respondent had shown possession of concrete boom pumps. It is further seen that on 12th May 2023, the 5th as well as 6th respondent had issued communications to the Tendering Authority along with requisite documents in that regard. This was in response to the shortfall in documents indicated by the Tendering Authority to the bidders. According to the Tendering Authority, it took aid of the Government Resolution dated 27th September 2018 and

especially Clause 4.5.2 thereof. Under this clause, it was permissible for the Tendering Authority to take into consideration experience of a bidder of earlier work undertaken and to consider the same under the present bid. We do not find that there is any irregularity or illegality on the part of the Tendering Authority in doing so. Since the Tendering Authority is the one that seeks execution of the proposed work, it is deemed to be in a better position to determine its needs and requirements. If it was satisfied with the documents submitted by the 5th to 7th respondents after taking aid of the Government Resolution dated 27th September 2018 that has been issued by the Public Works Department, we do not find that on this basis, the decision of the Tendering Authority deserves to be interfered with. It is also to be noted that the petitioner's bid was held to be technically qualified and it had also participated in the Financial Bid. In absence of any specific allegations of mala fides or favouritism as regards other bidders, we do not find this reason to be so overwhelming to warrant interference on this basis.

13. It is to be further noted that, according to the Tendering Authority, by accepting the bid of the 5th respondent, it would be saving an amount of Rs.4,03,84,535.28 of Government funds. This aspect has not been disputed on record. It is, therefore, clear that it is rather in public interest for this Court not to interfere with the grant of Work Order to the 5th respondent, as held by the Hon'ble Supreme Court in the decisions referred to hereinabove. Interference under Article 226 of the Constitution of India would be justified if such

interference furthers public interest and not otherwise. The observations of the Division Bench in *Universal Cables Ltd. and Anr. (Supra)* support this conclusion. We may also note that in *M/s. Om Gurusai Construction Company (Supra)*, it has been held that the owner of the 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 by the employer unless there is mala fide or perversity in the understanding or appreciation of the same. Similar view has been taken in *Agmatel India Pvt. Ltd. (Supra)*. As observed in *Silppi Constructions Contractors Vs. Union of India, (2020) 16 SCC 489*, the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. The Courts must give "fair play in the joints" to the Government and Public Sector Undertakings in the matters of contract. It is only if unnecessary loss is likely to be caused to the public exchequer, that interference is warranted. We may also note that in the earlier Tender Notice issued by the 2nd respondent, the bid of the petitioner had been accepted and during the said bid process, the Financial Bids had been opened immediately after evaluation of the Technical Bids was made known. At that point of time, the petitioner was a beneficiary of the said process since he had been granted the said work. The petitioner was thus aware of the practice being followed by the 2nd respondent during the bidding process.

14. For the aforesaid reasons, we do not find that there is any exceptional case made out for this Court to exercise jurisdiction under Article 226 of the Constitution of India. The challenge thus fails. The Writ Petition stands dismissed. Rule stands discharged with no order as to costs.

(ABHAY J. MANTRI, J.) **(A.S. CHANDURKAR, J.)**

Dixit