

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SAIDE

Present:
Hon'ble Justice Shampa Sarkar

W.P.A. 18137 of 2024
M/s. Sharma Transport Agency and another
vs.
Damodar Valley Corporation and others

For the petitioners : Mr. SubhabrataDatta,
Mr. Subhojit Seal,
Mr. Ajeyo Chowdhury

For the respondent No.1 : Ms. Vineeta Meharia,
Mr. Shounak Mukhopadhyay,
Mr. Amit Meharia,
Ms. Paromita Banerjee,
Ms. Subika Paul,
Mr. SayanDey,
Mr. Tamoghna Chattopadhyay

Hearing concluded on : 27.09.2024
Judgment on : 07.10.2024

Shampa Sarkar, J.:-

1. The writ petition has been filed challenging the rejection of the petitioners' bid in the technical evaluation round by the tendering authority of the Damodar Valley Corporation (DVC). The decision was communicated to the petitioners via e-mail on July 12, 2024. The ground for such rejection was poor performance at Raghunathpur Thermal Power Station (RTPS).

2. The Notice Inviting Tender (NIT) was for, empanelment of transportation agencies with rate contract for evacuation of 40 LMT ash from ash ponds MTPS, DVC, and nuisance free

transportation along with disposal of the same in abandoned open cast mines/Store Quarries/NHAI project sites/ any other designated places outside plant boundary of MTPS, DVC. The NIT was published on March 6, 2024, in respect of Mejia Thermal Power Station (MTPS). The technical qualification as per the conditions of the NIT was that, the bidder should have the experience of completing similar works within India during the last 7 years, ending on the last day of the month previous to the one in which offer was invited.

3. Mr. Datta, learned Advocate for the petitioners submitted that page 254 of the writ petition would indicate that the petitioners' bid had been filed on time and received by the authority. Referring to the various documents annexed to the writ petition, the petitioners contended that they had vast experience in executing similar nature of work in the past for different thermal power stations under DVC. The reason assigned by the authority for cancellation of the bid was arbitrary and contrary to the terms and conditions of the NIT. The technical evaluation was rejected on the ground of poor performance in the work awarded by a tendering process of 2021 at RTPS. The petitioners had themselves prayed for closure of the contract on February 21,

2024, as they were unable to execute the work due to local disturbances. Instead, penalty was imposed on March 20, 2024 and the bank guarantee was invoked on March 21, 2024. Thus, all the steps that were taken in respect of the alleged poor performance in RTPS were subsequent to publication of the NIT dated March 6, 2024. The disqualification clause 37(b) of the NIT provided that the bidder would be disqualified, if either the bidder or the constituent partner of the bidder was found to have record of poor performance during the past five years across DVC as on the date of publication of the bidding document. Poor performance would include abandoning the work, rescission of the contract for reasons attributable to the non-performance of the contractor, inordinate delay, history of litigation or financial bankruptcy, etc. In the petitioners' case, the inability to perform was not on account of either delay or negligence on their part.

4. Records of poor performance after March 6, 2024, would not be relevant for technical evaluation of the present bid. Referring to Clause 29 of the conditions, it was submitted that the authority had enquired as to whether the performance rating of the petitioners along with some other bidders were unsatisfactory or not, and whether those bidders could or could not be

recommended for the next two years. The answer to such query was in the negative. The communication indicated that, that, there was no record of unsatisfactory work against the petitioners. Clause 29 of the conditions would not be attracted in such a case. The authority was of the view that the petitioners had not got an unsatisfactory rating in a single contract, for two consecutive bidding cycles, and as such, could not be kept away from participating in the bidding process. By referring to Clause 37, it was contended that the tendering authority had enquired about the petitioners' performance in other DVC projects. Coal Mines Associated Private Limited, the alleged L-1 bidder, who was the favoured contractor of the authority was not mentioned in the list. In other words, only to avoid any negative comment against the said bidder, no query was made. With a view to protect and favour the said bidder from any adverse report, the name of the said bidder was excluded from the enquiry list.

5. It was next contended that the steps taken by the respondents in respect of an earlier contract were set aside by a learned Coordinate Bench, in WPA 9302 of 2023 with WPA 9306 of 2023. Thus, the ground of rejection of the subject bid, by citing poor performance in an RTPS project, could not be sustained in

view of quashing of all penal steps, including the invocation of bank guarantee and the decision of debarment from participating in future tenders. Most importantly, in four different tenders floated by DVC in respect of the same nature of work, the petitioner No.1 was selected in the technical round. The relevant dates of those NITs were February 21, 2024, February 22, 2024, February 28, 2024 and April 19, 2024. The selections were communicated via emails between May, 27, 2024 and June 15, 2024. At that juncture, the alleged poor performance at RTPS was not a deterrent, during the technical evaluation.

6. In case of the NIT of November 30, 2021 for an identical nature of work, the petitioner had been given 20% of the work as one of the successful bidders, but he was precluded from executing the work due to the atrocities of the Durlavpur Truck Owners' Association. The Truck Owners Association was running a syndicate. When the petitioners brought such fact to the knowledge of the authorities, steps were taken against the petitioners, namely, suspension followed by termination, debarment, black listing and invocation of the bank guarantee. The High Court, by judgment dated April 16, 2024, set aside the entire process of termination and black listing. The allegation of

poor performance was a non-issue after the order of the High Court.

7. Mr. Datta relied on the following decisions:-

(i) ***Bharat Singh and Ors. vs State of Haryana and Ors.***
reported in ***(1988) 4 SCC 534***

(ii) ***Subodh Kumar Singh Rathour vs Chief Executive Officer and Ors.*** reported in ***2024 SCC Online SC 1682***

8. Ms. Meharia, learned Advocate appearing for the tendering authority submitted that the technical evaluation was not rejected on the ground that the petitioner had failed to perform well in the NIT dated November 30, 2021. The steps taken by the authority against the petitioners in respect of the NIT dated November 30, 2021, was a contract with MTPS. The penal steps were quashed by a Coordinate Bench on the ground of violation of the principles of natural justice. In any event, the poor performance at RTPS which has been referred to in the letter of rejection, pertains to NIT dated December 3, 2021 and consequent supply order dated April 8, 2022. In respect of the said work also, the bank guarantee was encashed by DVC, but the said action of DVC was not challenged by the petitioner. Rather, the petitioner admitted that he had performed poorly in

the contract arising out of the said NIT. Imposition of penalty and/or invocation of bank guarantee were consequences of poor performance in the work arising out of NIT dated December 3, 2021 at RTPS, which the petitioners failed to challenge. On the contrary, the petitioners demanded that even if their performance was poor in the said contract at RTPS, the same should not be a ground for rejection of the subject bid as the said ground was not raised in case of four other tenders.

9. According to Ms. Meharia, Article 14 could not be applied in the negative. Even if the authority had found the petitioners technically eligible in four other tenders, the poor performance of the petitioners in the contract arising out of NIT dated December 3, 2021, could always be a ground to reject the bid, even if the said ground was not taken into consideration at an earlier stage. Only because the authority failed to take into consideration such non-performance in the other NITs floated by DVC, that would not create a right in favour of the petitioners to claim eligibility. The poor performance in the contract arising out of the NIT dated December 3, 2021, was a matter of record and came to the knowledge of the authority on June 24, 2024. The authority

always reserved the right to evaluate a bidder's past record and disqualify the bidder for proper reasons.

10. Ms. Meharia referred to the communication received from the concerned authority, which indicated that although the petitioners were issued the supply order on April 8, 2022, in accordance with the NIT dated December 3, 2021, the petitioners could not perform satisfactorily and the bank guarantee had been invoked as a penalty for shortfall in execution of the work. A proposal for further penal action had also been initiated. This feedback was received by the tendering authority after the technical bids in the four other NITs, had been opened. To substantiate her case that, Ms. Meheria submitted that the petitioners had acknowledged their poor performance in the work arising out of the supply order dated April 8, 2022. Paragraph 19A of the writ petition had been placed. Further, ground Nos. 4 and 5 were also placed to substantiate that the petitioners wanted the tendering authority to ignore the poor performance, just like the same was ignored in case of four other tenders. The tendering authority had the exclusive jurisdiction to choose the best contractor for the best price.

11. Referring further to page 197 of the writ petition, Ms. Meherya submitted that the petitioners wrote to the General Manager (Civil) DVC, RTPS, informing the authority that, during execution of the work arising out of supply order dated April 8, 2022, it was observed that transportation was restricted only during daylight, without any scope to continue the work at night. Due to restrictions imposed by the Raghunathpur market committee, all the loaded trippers were not allowed to ply during the day. Only one trip per day could be undertaken, as a result of which the petitioners were incurring losses. On account of such difficulties, the petitioners did not want to continue the work. Although, the validity of the bank guarantee had been extended and a performance security deposit had been made, the petitioners prayed for closure of the contract. The agency also offered to pay the penalty by way of a demand draft, for release of the bank guarantee. The General Manager (Civil) DVC, RTPS informed the petitioners that the shortfall in the execution of the work was solely attributable to the petitioners and emphasized the need for invocation of the bank guarantee. By a letter dated March 20, 2024, the petitioner agreed to pay penalty of Rs.6,98,500/- either through RTGS or demand draft. The

petitioners prayed that the bank guarantee should not be invoked. Such request of the petitioners was denied by the authority and the bank guarantee was invoked.

12. Thus, according to Ms. Mehria, the action taken by the authority in rejecting the technical bid of the petitioners was not arbitrary at all. The poor performance in respect of the supply order dated April 8, 2022, was evident from the petitioners' correspondence. The NIT involved in this litigation is dated March 6, 2024 and the poor performance was almost a year prior to publication of the present NIT. The decision of the High Court was with regard to the contract arising out of NIT dated November 30, 2021 and not December 3, 2021.

13. Ms. Mehria placed reliance on the following decisions:-

- (i) ***Montecarlo Limited vs National Thermal Power Corporation Limited*** reported in ***(2016) 15 SCC 272***,
- (ii) ***N.G.Projects Limited vs Vinod Kumar Jain and Ors.*** reported in ***(2022) 6 SCC 127***,
- (iii) ***Silppi Constructions Contractors vs Union of India and Anr.*** reported in ***(2020) 16 SCC 489***, and

- (iv) ***National High Speed Rail Corporation Limited vs Montecarlo Limited and Anr.*** reported in ***(2022) 6 SCC 401.***

14. The issue before this court is whether the disqualification of the petitioners at the technical round should be set aside on the grounds of arbitrariness, unreasonableness and favouritism.

15. The petitioners are engaged in the business of providing transportation services, inter alia, in respect of removal of ash from the ash ponds in the thermal power projects of DVC. In the past, the petitioners had been engaged as empanelled transportation agency for removal and evacuation of ash from the ash ponds of such projects.

16. In one such NIT dated November 30, 2021, a letter of award dated February 14, 2022 was issued to the petitioners. According to the respondents, the petitioners failed to perform their obligation and blamed various other factors like problems created by the syndicate of bus owners, restricted trips, etc. DVC cancelled the work order, terminated the contract and issued a suspension notice, thereby, debarring the petitioners from participating in any tenders of DVC. The petitioners filed two written petitions, challenging the actions of the respondent

authority. A Coordinate Bench was pleased to set aside the actions taken by the authority and held that the petitioners should not be debarred from participating in any other future tenders of the DVC. Hence, the petitioners were allowed to participate in other tender processes.

17. The thrust of the argument of Mr. Datta was the fact that the authorities were approbating and reprobating. On the one hand, the respondents had accepted the technical bid of the petitioners in respect of four tenders, i.e., NIT No. DVC/Tender/Head Quarter/PH Civil-2/CMM/Works & Service/00016, NIT No. DVC/Tender/Head Quarter/CIVIL-POWER HOUSE U#7 & 8/CMM/Works& Service/00024, NIT No. DVC/Tender/Head Quarter/Power House Civil/CMM/Works & Service/00042 and NIT No. DVC/Tender/Head Quarter/Power House Civil/CMM/Works & Service/00084, but on the other hand, the evaluation committee found the petitioners to be unsuitable at the technical round in the present NIT on the ground of poor performance at RTPS. In respect of the earlier notice inviting tender dated November 30, 2021, the steps taken by the respondents with regard to alleged poor performance at MTPS had been set aside by the High Court. The High Court had

taken note of the fact that, in view of deterioration in the law and order situation at the behest of Durlavpur Truck Owners Association, a syndicate of truck owners led by the ruling political dispensation, the petitioners failed to commence the work. The petitioners' contention that they were obstructed from plying the vehicles for transportation of the ash from the ash ponds and dispose of the same at different locations in coal mines, etc., had been accepted by the High Court in the judgment delivered on April 16, 2024.

18. According to the petitioners, after the High Court had set aside the penal actions, the question of rejecting the technical bid on the ground of poor performance was unfounded, baseless, arbitrary and mala fide. The petitioners were singled out and disqualified, as a backlash to the decision of the High Court.

19. The specific contention of Mr. Datta was that, once the respondents had elected not to disqualify the petitioners on the grounds of alleged poor performance in earlier project, in respect of four other tenders, the subsequent action was not justified and deserved to be set aside. Mr. Datta relied on the decision of the Hon'ble Apex Court in the matter of **Subodh Kumar Singh Rathore** reported in **2024 SCC Online SC 1682**, in support of

his contention that the scope of judicial review was wide enough to include the situation which is now before this court. The paragraphs relied upon are quoted below:-

“59. Therefore, what can be culled out from the above is that although disputes arising purely out of contracts are not amenable to writ jurisdiction yet keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, it is now well settled that when contractual power is being used for public purpose, it is certainly amenable to judicial review.

69. To ascertain whether an act is arbitrary or not, the court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action.

70. One another way, to assess whether an action complained of could be termed as arbitrary is by way of scrutinizing the reasons that have been assigned to such an action. It involves overseeing whether the reasons which have been cited if at all genuinely formed part of the decision-making process or whether they are merely a ruse. All decisions that are taken must earnestly be in lieu of the reasons and considerations that have been assigned to it. The Court must be mindful of the fact that it is not supposed to delve into every minute details of the reasoning

assigned, it need not to go into a detailed exercise of assessing the pros and cons of the reasons itself, but should only see whether the reasons were earnest, genuine and had a rationale with the ultimate decision. What is under scrutiny in judicial review of an action is the decision-making process and whether there is any element of arbitrariness or mala fide.

71. Thus, the question to be answered in such situations is whether the decision was based on valid considerations. This is undertaken to ensure that the reasons assigned were the true motivations behind the action and it involves checking for the presence of any ulterior motives or irrelevant considerations that might have influenced the decision. The approach of the court must be to respect the expertise and discretion of administrative authorities while still protecting against arbitrary and capricious actions. Thus, now the only question that remains to be considered is whether the action of the respondent to cancel the tender could be termed as arbitrary?

ii. Whether the action of cancelling the tender is arbitrary or unfair and in consequence of violation of Article 14 of the Constitution?

72. The principal contention of the appellant is that the notice of cancellation dated 07.02.2023 that was issued by the respondent is manifestly arbitrary, unreasonable and influenced by mala fide and extraneous considerations.

73. Before we proceed to determine whether the cancellation of tender could be termed as arbitrary, it is necessary to understand the stance of the respondent in the present litigation, as discernible from their pleadings, which has left us quite perplexed. The argument of the respondent is two-fold:—

- (i) First, that the tender had to be cancelled as there was a technical fault. The tender was found to be ‘non-specific’ & ‘not well defined’ as a result it created ambiguity resulting in financial losses to the respondent.
- (ii) Secondly, the cancellation was also on account of a change in policy whereby, the operation &

maintenance of the concerned underpasses had been handed over to another authority.

74. The primary thrust of the respondent's contention is that the decision to cancel the tender was taken in view of the technical faults in the same, more particularly the ambiguity as to whether the advertisement boards could be put up beyond the area of the concerned underpasses.

75. The learned Single Judge of the High Court in its order dated 24.04.2023 observed that there was an ambiguity in the Special Terms & Conditions of the Memorandum of Tender more particularly clauses 10 and 14 respectively which gave rise to a conflicting interpretation as to the placement of the signboards. This in the opinion of the High Court was a technical fault, which the respondent sought to rectify by way of cancelling the tender. The relevant observations read as under:—

“18. [...] In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering authority, has a right to rectify the ambiguities in the bid document by cancelling the same.”

(Emphasis supplied)

76. However, interestingly, the Notice of Cancellation dated 07.02.2023 that came to be issued by the respondent makes no mention of any such lacuna. In fact, there is no reference to the aforementioned clauses or any conflict in their interpretation. The aforesaid notice only states that the tender was found to be ‘non-specific’ and ‘not well defined’ which created ambiguity due to which the respondent is incurring losses, and nothing is stated either about the ambiguity in putting up the advertisement boards or for that matter which aspect of the tender is non-specific.

77. It is also apposite to mention that just a month prior to cancelling the tender, the respondent on 24.01.2023 issued a notice to the appellant, asking him to stop all work in respect of the tender. Remarkably, in the said notice, there is no whisper about there being any of the aforementioned technical faults in the tender floated by the respondent. In fact, a close reading of the aforesaid notice would reveal that the orders to stop the work had been issued for an altogether different reason - i.e., handing over of the operation & maintenance of the concerned underpasses to another authority i.e., KMC.”

20. According to Mr. Datta, the State could not play Doctor Jekyll and Mr Hyde. The State would always be haunted by the mandate of Article 14 of the Constitution of India, i.e., to act fairly. State action must be struck down by judicial interference in matters of contract on the facts of each case. On the one hand, the authority qualified the petitioners at the technical round in four other tender processes, whereas, disqualified the petitioners on the ground of poor performance in an earlier project, without making such poor performance an issue in respect of the other four contracts. This approach of the authority was contrary to Article 14 of the Constitution of India. The decision was unreasonable and did not display fair play in action.

21. Hence, the court should undoubtedly be guided by the overwhelming need to obviate arbitrary State action, and to prevent miscarriage of justice arising out of the palpably arbitrary

action of the authority in rejecting the technical bid of the petitioners on the flimsy ground of poor performance. The arbitrariness and mala fide in the action of DVC was further sought to be emphasized by Mr. Dutta, on the ground that while the past performance of 13 bidders had been enquired into in terms of clause 37 of the Notice Inviting Tender, the performance of the selected bidder was never questioned and no information with regard to the past performance of the L1 bidder had ever been called for. Such action demonstrated favouritism in respect of the selected bidder.

22. The respondents, on the other hand, have relied on notes to serial No. 13(b) of the conditions, in support of the contention that the DVC reserved the right to assess the technical capabilities and capacities of the bidders at any stage of the bid evaluation process.

23. The relevant portion is quoted below:-

“NOTES of Sl. No. 13 (b):

- i) During bid evaluation the Employer (DVC) may, at its discretion, ask the Bidder for a clarification on its bid. The request for clarification and the response there to shall be through e-mail/CPMP only, and no change in the price or substance of the bid shall be sought, offered or permitted.
- ii) Notwithstanding anything stated above, the Employer (DVC) reserves the right to assess the capabilities and capacity of the Bidder to perform the contract at any

stage during the entire bid evaluation period and prior to award of Contract, should the circumstances warrant such assessment in the overall interest of the Employer (DVC).”

24. By invoking such provision, a query with regard to the past performance of the petitioner had been made. In this case, NIT was published on March 6, 2024. The scheduled date for submission of the bid was April 3, 2024. The petitioners submitted their bid within the scheduled time. The techno-commercial bids were opened on April 5, 2024 at 12.00 hours. While considering the bids in respect of tender No.- DVC/Tender/Head Quarter/FUEL 1/CMM/Works and Service/00030, the respondent authority issued an internal email communication on or about June 20, 2024, to the power stations, seeking report as to whether any of the 13 agencies mentioned in the letter had poor performance in respect of the projects in the power stations. In response to the email communication, information was issued that in Raghunathpur Thermal Power Station (RTPS), the petitioners had a record of poor performance.

25. The RTPS wing of the respondent authority informed the tendering authority that the petitioner No.1 had failed to perform the contract awarded in his favour in respect of RTPS against NIT

dated December 3, 2021, letter of award dated January 13, 2022 and supply order dated April 8, 2022. Under the said letter of award, one of the supply orders placed by the RTPS wing of the respondent authority on April 8, 2022, was not satisfactorily performed by the petitioners, for which penal action was taken. The petitioners themselves sought for closure of the said contract awarded to it on 13 January, 2022, by a letter dated February 21, 2022, in respect of RTPS, on various grounds. Such grounds, according to the authorities, were found to be false and frivolous, and the authority refuted the allegations made by the petitioners. The authorities denied the existence of the hindrances pointed out by the petitioners. The authorities were of the view that none of the other empanelled transporters in respect of RTPS had ever encountered such hindrances which the petitioners claimed to have faced. Penalty was thus imposed on the petitioners No.1. The petitioners accepted such penalty by letter dated March 20, 2024. The respondent authorities also invoked the bank guarantee in respect of the said supply order dated 8 April, 2024, by a letter issued to the banker on March 21, 2024. The petitioner No.1 never challenged any of such penal actions which were taken by the authority on the ground of unsatisfactory

performance at the RTPS. Upon receipt of such information of poor performance of the petitioners at RTPS, the decision to disqualify the petitioners at the technical ground was taken. The disqualification was informed to the petitioners on July 12, 2024. The respondent authorities in the affidavit-in-opposition and the supplementary affidavit-in-opposition have elaborately discussed the reason as to why the decision to disqualify the petitioners had been taken.

26. The contention of Mr. Datta that once the High Court had set aside the earlier decisions with regard to the notice-inviting tender dated November 30, 2021, the question of poor performance would not be raised, is not accepted. First and foremost, the failure of the petitioners to perform on the basis of the work order issued pursuant to the notice-inviting tender dated November 30, 2021, was not the ground for disqualifying the petitioner in the subject NIT. Secondly, the decision of the High Court with regard to the actions taken by the DVC against the petitioners in respect of another NIT, does not have any bearing on the evaluation of the present technical bid of the petitioners. Clause 37 of the notice-inviting tender is quoted below:

“DISQUALIFICATION:

Even if an applicant meets the eligibility criteria and QR, he shall be subject to disqualification if bidder or any of the constituent partners is found to have;

a) Made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements; and/ or;

b) Records of poor performance during the last five years across DVC, as on the date of publication of Bidding Documents, such as abandoning the work, rescission of the contract for reasons which are attributable to non-performance of the contractor, inordinate delays in completion, consistent history of litigation resulting in awards against the contractor or any of the constituents, or financial failure due to bankruptcy, and so on. The rescission of a contract of venture JV on account of reasons other than non-performance, such as the most experienced partner (major partner) of JV pulling out;

c) On account of currency of extant debarment Policy of DVC.

d) "In case where the business firm happens to have been banned/suspended by 'Any establishment of DVC' / 'Ministry of Power- Govt. of India' / 'Department of Expenditure (DoE), Ministry of Finance (MoF) - as displayed on Central Public Procurement Portal (CPPP) and the ban / suspension is still in force on the date of bid opening of techno-commercial bid or on the date of issuance of LOA/PO/Work Order/ LOA-cum-Work Order, the offer of the business firm/ authorized agent/distributor/dealer/affiliates shall not be considered for all establishments of DVC."

27. The rejection was on the basis of the information received in the course of evaluation of another tender bearing No.- DVC/Tender/Head Quarter/FUEL 1/CMM/Works and Service/00030, dated May 24, 2024, in which the petitioners and some other bidders had performed. The L-1 bidder who had been

selected in the subject tender was not one of the participants in the said tender. The document at page 19 of the affidavit-in-opposition being Annexure A clarifies such position. The Senior Manager (M) Contracts and Materials, HQ, DVC, made a query on June 20, 2024, with regard to the performance of the bidders, who participated in the said NIT. Such information was sought for in respect of 13 participants and the concerned DVC project station was requested to give the performance report. Mr. N. Mandal, GM(C), RTPS informed one of the officials who made the query, that performance of the petitioners regarding evacuation of posh ash was not satisfactory for the reasons which are quoted below:-

“1. The Agency was empanelled for transportation of Pond Ash from RTPS Ash pond and subsequently Supply Order was placed on 08.04.2022

2. However, the Agency could not perform satisfactory and BG has been invoked as penalty due to shortfall in execution of work.

3. Proposal for further penal action has also been initiated.”

28. The query was made with regard to a particular tender dated May 24, 2024 in which the L1 bidder had not participated. Thus, the absence of the name of the L1 bidder from the list of agencies in respect of whom the query was made, was not to either protect him or favour him.

29. Records also show that the petitioners had been asked by a letter dated May 21, 2022, to start the work at RTPS immediately, in respect of the supply order dated April 8, 2022, failing which, the authorities reserved the right to take necessary action. The letter dated May 21, 2022 clearly indicates that even after 42 days from issuance of the work order, the petitioners had not started the work. Removal of ash and evacuation of the pond ash were urgent and the reluctance on the part of the petitioners, was condemned. Annexure B to the affidavit-in-opposition is relevant in this regard. Another communication was issued to the petitioners on November 28, 2022, informing the petitioners that the evacuation work at the RTPS ash pond had totally stopped and in spite of several persuasions, the petitioners did not respond. The casual approach of the petitioners was taken seriously and the final warning was given to the petitioners to resume the work.

30. By an email dated December 16, 2022, the petitioners informed the authority that they did not want to continue the work for another 90 days beyond the ART period at the same rate, and on the same terms and conditions of the agreement. Thus, the fact that the work at RTPS pertaining to the supply

order of April 8, 2022, had not been executed and the authorities had taken penal steps against the petitioners on account of such failure, are matters of record.

31. Class 37 of the tender document permitted the authority to make a query with regard to the past performance of a contractor. The letter dated June 9, 2022, issued by the petitioner to the Chief Engineer I.I. and H.O.P. C.E. Office 1 RTPS., DVC is relevant in this regard.

“To

The Chief Engineer-II &HOP

CE Office-1, RTPS

Damodar Valley Corporation

Sub: Request for resolve the obstacles

Ref. Work Order No. DVC/SO/RTPS/C&M Purchase & Contract/00011 Dated 08.04.2022

Respected Sir,

With due respect I hereby draw your kind attention to the fact that we have started our work since last month but unfortunately while continuing our job we are facing the below mentioned obstacles.

They are as follows:

i) Road from Ash pond to weigh bridge is still under construction and half of the road is Dirty road, in such a scenario continuous movement of vehicle is problematic. In this coming monsoon that will be a major issue.

ii) For continuous Ash evacuation process light setup at Ash pond site is required.

iii) Continuous availability of operator at Weigh Bridge is required. Irregularity working of Weigh Bridge is hampering the trip.

iv) At ash pond site there is local demand by the residence.

v) Due to long distance of Ash pond to Weigh Bridge we are unable to maintain under-load in our vehicle.

Due to these above reasons the vehicles that were mandatorily hired from "Raghunathpur Tripper Owner's Welfare Association" are demanding absurd fares for less number of trips for above reasons.

Thanking you

Yours faithfully
M/s. Sharma Transport Agency

32. The complaint of the petitioners was that the Raghunathpur Tripper Owners Welfare Association imposed absurd fares for less number of trips. The letter itself indicates that the petitioners were not being able to execute the work as per the terms of the tender. The request for closure of contract and refund of security deposit made by the petitioners on February 21, 2024. The relevant portions of the said letter are quoted below to demonstrate that the petitioners were not inclined to perform the work, as follows :-

“In this context to start the operation of evacuation and nuisance free transportation of ash from RTPS plant to different destination as per assignment, we have engaged requisite numbers of tippers to commence the work diligently. But during execution, it has been observed that transportation work was restricted only within the day lights/without any scope left to continue the work in Night hours. And on the other hand due to restriction of Raghunathpur Market loaded tripper are not allow to ply on day time, In this unpredictable circumstances, it was merely possible to transport only one trip per day with no utilisation of hired tippers covering half of the day. As a result in consequences of above constraint, to prevent recurring losses we have approached the unit Management for removal of the difficulties, for gainful utilisation of fleet including Night hours.

But finding no resolution, it was not possible to continue the work suffering losses, however we continuing the work as per the work order term & condition with lots of hindrances and our mutual discussion to maintain the good business relation. After completion of the original work period we discontinued the work, and we could not accept any further time extension due to lots of hindrances. However, as per advice of Management we have extended the validity of Bank Guarantee, already submitted as performance security deposit and requested for closure of the contract, without further extension to our Agency.

In this regard, we have come to know, that without realising the actual difficulties and without analysing the problem of contractor, Management has decided for encashment of the performance security Bank Guarantee under the custody of finance department.

In view if all above, to avoid such unjustified decision for encashment of the BG, you are requested to enquire the actual constraint preventing us to continue the work suffering losses and also solicited to undertake corrective steps for closure of the contract. Accordingly during closure of the contract, if any amount of penalty is applicable, we are ready for payment of the same through Demand draft for release of the BG without encashment, to maintain the goodwill of our company, already engaged in the different contract of Coal India Ltd and other Government undertaking.”

33. The Manager (civil) DVC, RTPS, informed the petitioners that frivolous excuses had been made for not carrying out the work. The petitioners were informed that during preparation of the hindrance register, all the site hindrances were taken care of judiciously and all the four empanelled transporters including the petitioner No.1, signed on the hindrance register after full

satisfaction. Accordingly, penalty calculation was done as per the provisions of the contract.

34. By the letter dated March 20, 2024, the petitioners agreed to pay the penal amount of Rs.6,98,500/- in respect of non-performance of the supply order dated April 8, 2022, and requested the authorities to allow the petitioners to pay the money through RTGS or demand draft, instead of encashment of the bank guarantee. By a letter dated March 21, 2024, the banker was asked to encash the bank guarantee. These documents clearly indicate that the allegation of poor performance in respect of the supply order dated April 8, 2022, has a reasonable foundation. Although, the query with regard to past performance was made on June 20, 2024, the fact remains that the past performance was in respect of a supply order dated April 8, 2022, which was within the previous 5 years from the base month, that is, March 6, 2024.

35. Under such circumstances, this court is of the view that an exceptional case of unjust treatment could not be made out by the petitioners. The authority reserved the right to evaluate the bid documents upon making an enquiry with regard to past performance in any of the projects under the DVC. With regard to

the supply order of April 8, 2022, the poor performance was reported. Adequate documents have been annexed to the affidavit-in-opposition with necessary pleading which indicate that the performance of the petitioners was not satisfactory in the RTPS project. The order of the High Court with respect to the other NIT of MTPS dated November 30, 2021, does not have any bearing on the decision to disqualify the petitioners on the ground of poor performance. Only because the petitioners' technical bids were accepted in respect of four other tenders, the same cannot be a ground for the writ court to interfere with the decision of the authorities in the facts and circumstances of the case. The decision was not against public interest.

36. The tendering authority was the best judge to decide the capacity, capability and the integrity of any bidder. Time and again, the petitioners had failed to complete the works awarded. The fact that the petitioners were found technically suitable in other contracts, is of no consequence as the tendering authorities, had the right to make their own evaluation and come to their conclusion. All that the writ court can assess is whether the reason supplied by the authorities for cancellation of the tender at the technical round, was justifiable or not.

37. The facts which have been discussed hereinabove, would clearly indicate that the authorities had a reason to disqualify the petitioners, upon obtaining the report from the RTPS plant.

38. The employer (DVC) had the right to choose the best contractor for the best price. Under such circumstances, the DVC was within its right to decide not to accept the petitioners' technical bid on the ground that on an earlier occasion, the petitioners did not perform well, which led to the invocation of the bank guarantee. The communications also indicate that the petitioners had accepted the penal amount and offered to pay the same either by RTGS or by demand draft. The reliance of the petitioners in the decision of ***Bharat Singh and ors. (supra)*** is also misplaced. The relevant paragraph relied upon by the petitioner is quoted below:-

“13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he

is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit.”

39. In this context, it is found that the pleadings in the affidavit-in-opposition, the supplementary affidavit and the annexures thereto, sufficiently support the decision of the authority. Adequate materials have been disclosed in support of the decision impugned before this court.

40. In ***Silppi Constructions Contractors v. Union of India, reported in 2019 SCC OnLine SC 1133***, the Hon’ble Supreme Apex held as follows:-

“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.”

41. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, reported in **(2012) 8 SCC 216**, the Hon’ble Apex Court observed as follows:-

“(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;

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(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 a fundamental right to carry on business with the Government.”

42. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* reported in **(2016) 16 SCC 818**, the Hon’ble Apex Court held as follows:-

“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.”

43. A writ court cannot direct the authorities to reverse its decision by asking the authorities to ignore the facts pertaining to the RTPS contract.

44. In the matter of ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., reported in (2022) 6 SCC 401***, the Hon'ble Apex Court held as follows:-

“22. whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.”

45. In the matter of ***Uflex Ltd. vs Government of Tamil Nadu and Ors.*** decided in ***Civil Appeal No. 4862-4863 of 2021***, the Hon'ble Apex Court held as follows:-

“1. The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred

by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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.

40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular*²⁶ and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”

46. In *Jagdish Mandal v. State of Orissa* reported in **(2007) 14 SCC**

517 the Hon’ble Apex Court held as follows:-

“**22.** ... 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.”

47. The decision in ***Subodh Kumar Singh (Supra)*** is distinguishable on facts. Relevant paragraphs are quoted below for convenience and in order to appreciate why the decision does not assist the petitioners.

97. From the above narrated sequence of events, it is evident that it was none other but the concerned minister who suggested to cancel the tender. The respondent was reluctant to immediately cancel the tender for work and continued to insist on obtaining the opinion from its legal cell. Even though the opinion of the legal cell was yet to be obtained, the respondent, despite its initial reluctance, undertook immediate steps to cancel the tender after the concerned minister personally instructed the officials to do so.

98. Thus, it is evident that the Notice of Cancellation dated 07.02.2023, issued to the appellant, was at the behest of the concerned minister. The respondent clearly recorded that, because instructions for cancellation had been received from the higher-ups, there was no option but to proceed with the cancellation. Even before the respondent could properly and thoroughly explore the possibility of acceding to such request by consulting its legal cell, the tender was cancelled only at the instance and specific instructions of the concerned minister.

99. The aforesaid aspect can be looked at from one another angle. The concerned Minister-In-Charge had instructed to cancel the tender in view of the change in policy whereby the operation & maintenance of the underpasses was vested in another authority. To ascertain whether the decision of the concerned minister to cancel the tender was arbitrary or not, we must first consider whether the reason for such cancellation was genuinely on the basis of the aforesaid change in policy or whether it was driven by some personal discretion or motives. This can be discerned by first understanding the change in policy that took place.

100. The Urban Development and Municipal Affairs Department by way of its Order dated 01.12.2022 decided that the maintenance of the roads and drainage of the E.M. Bypass shall be handed over by the respondent to the KMC.

101. As per the Note #91 dated 30.12.2022, the concerned minister for the first time proposed cancellation of the tender in view of the aforesaid change in scenario as a result of the maintenance of the E.M. Bypass being handed over from the respondent to the KMC.

102. However, it is pertinent to note that in the aforesaid order of the Urban Development and Municipal Affairs Department it has been specifically stated that the right to collect revenue from the advertisements as-well as the control of the E.M. Bypass shall continue to remain with the respondent herein.

103. Thus, the respondent at the relevant point of time was not only in control of the two underpasses, but was also empowered to continue collecting revenue from the advertisements displayed at the underpasses. As such the respondent even after the change in policy, remained well within its rights to continue charging license fee in lieu of the advertisement rights by way of the aforesaid tender that was issued to the appellant.

104. When the respondent issued the work stop orders to the appellant on 24.01.2023 in view of the handing over of the maintenance of the E.M. Bypass to the KMC, the appellant in response, pointed out that the work stop orders were completely misconceived as the respondent continued to retain the custody as-well as the advertisement rights of the concerned underpasses.

105. It was only after the appellant highlighted why the work stop orders were misconceived and uncalled for, that the respondent immediately flipped its stance and in its notice of cancellation that was issued just 1-month later, it attributed 'technical faults' in the tender floated.

106. At the relevant point of time, there could have been no occasion for the respondent to cancel the tender on the basis of the Urban Development and Municipal Affairs Department's order dated 01.12.2022. We say so because:—

(i) First, as per the aforesaid order, it was explicitly clarified that the respondent would continue to retain the operation & maintenance as-well as the advertisement rights of the concerned underpasses.

(ii) Secondly, only the structural maintenance and restoration of the E.M. Bypass's carriageway, roads, underground drainage etc. were to be handed over to the KMC. Indisputably, the tender that was issued in favour of the appellant was distinct from the maintenance that was handed over to KMC inasmuch as the scope of work of tender was limited to cleaning the roads, walls, floors etc., maintaining the electric-fixtures and upkeep of the gardens.

(iii) Thirdly, despite the stance of the respondent of “change in scenario” due to the handing over of the maintenance, we find that after cancelling the tender and during the pendency of the present appeal, it was the respondent who floated fresh tender for the work of maintenance in respect of the same underpasses and not KMC, thus fortifying our view that the aforesaid change in policy had no bearing on the cancellation of the tender.

107. It is only on 16.09.2023 i.e., much after the cancellation of the tender that the Urban Development and Municipal Affairs Department, Government of West Bengal modified its earlier order whereby both, the control along with the right to revenue for the said structures were handed over to KMC from the respondent. This leaves no manner of doubt in our mind that the concerned minister's decision to cancel the tender on account of purported ‘change in policy’ was without any application of mind, capricious and influenced by malice.”

48. Under such circumstances the writ petition is dismissed.

49. Authorities are liberty to proceed in accordance with law.

50. There will be no order as to costs.

51. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)