IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2263 OF 2024

BHALCHANDRA ATMARAM TAYDE
PROP. M/S. B.K. GROUP
VERSUS
MAHARASHTRA STATE POWER GENERATION CO.LTD.
THROUGH IT'S CHAIRMAN AND MANAGING DIRECTOR
AND OTHERS.

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Mr. Satish S. Manale, Advocate for petitioner.
Mr. P.S. Patil, AGP for respondents.

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CORAM : SMT. VIBHA KANKANWADI
& S.G. CHAPALGAONKAR, JJ.

DATE : 6th MARCH, 2024.

P.C. :-

1. The petitioner approached this Court under Article 226 of the Constitution of India thereby assailing the qualifying conditions for "Group A" and "Group B" bidders, particularly, Sr. No.1 to 3 in Clause No.5.1 and 5.2 and seeks directions to permit the petitioner to participate in the tender process. The petitioner contends that he is dealing in supply of building material through a registered firm namely, M/s. B.K. Group. The petitioner intends to be in the business of fly ash to small and medium industries. However, because of the arbitrary conditions incorporated in the tender notice baring No. RDX/3000045295 issued by the respondent No.1, the petitioner and similarly situated firms/businesses are not in a position to participate in the tender process. The petitioner contends that there is no rationale behind putting

qualifying criteria as indicated in clause 5 of the tender notice. It is a step to monopilise the business. In fact, if the traders like petitioners are allowed to participate in the tender process, there would be fair competition that will fetch maximum value for the fly lash and the small consumers would be benefitted. The petitioner has placed on record few invoices to indiate that successful bidders who are procuring fly ash from the respondents are selling it in the open market. According to petitioner only a class of people is allowed to participate in the bid process by imposing the impugned conditions. Further, the action on the part of the respondents violates Article 14 and 19(1)(g) of the Constitution of India.

2. Mr. Manale, the learned counsel for the petitioner invited our attention to the notification dated 14.9.1999 issued by the Ministry of Environment and Forsts to contend that as per the policy promulgated by the Government, the Central Government had issued directions for use and disposal of fly ash, bottom or pond ash in manufacture of brick and other construction activities. The plants which manufacture clay bricks or tiles or blocks situatted within the radius of 50 kms from the coal or lignite thermal power plants were compelled to mix atleast 25% of ash in their products and the Regional Office of State Pollution Control Boards or Committees were given the authority to deal with te non compliance o aforesaid directions. He would further invite our attention to the notification dated 31.12.2021 to contend that although the previous notifications are superceding the policy of the Government remains the same as far as disposal of fly ash is concerned. Mr. Manale would further submit that the attempt to monopolize businesses have been deprecated by the various judgments of the Supreme Court of India

and such policies have been struck down in the light of Article 19(1)(g) and Article 14 of the Constitution of India. To buttress his submisionss, he relies upon the judgment of the Apex Court in the following cases :-

1] Rasbihari Panda Vs. State of Orissa , AIR 1969 SC 1081.

2] Ramanna Dayaram Shetti Vs. International Airports Authority of India AIR 1979 SC 1628

3] Union of India Vs. Hindustan Development Corporation AIR 1994 SC 988;

4] Kasturi Lal Laxman Reddi Vs. State of J. & K. AIR 1980 SC 1992;

5] Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517

3. We have considered the submissions advanced. The respondent No.1 issue E-tender notice for sale of dry flly ash from Bhusawal Unit (6) 1/660 MW. The intent of tender is to utilize the dry fly ash through sale as per MoEF guidelines. The evacuation of dry fly ash and collection in to the Silo is a continuous process as long as units are on load and ESP is in service. The approximate quantity of fly ash available in Unit-6 is 2250 Metric Ton per day. Further the approximate quantity Gypsum available in Unit-6 is 300 Metric Ton per day. The estimated rate is prescribed at Rs. 205 Per Metric Ton with escalation of 10% per year. The bidders who satisfy the qualifying requirement were invited to quote the competitive offer in the price bid. The contract period is for 5 years. Clause No. 5 of the tender notice prescribes for qualifying requirement for bidders. Clause No. 5.1 prescribes for requirement of Group as follows :-

S.N.	QR	Description
1.	Nature of Business	Bidder should be bulk ash users such as cement industries, cement clinker grinding units, fly ash processing / grinding unit.
2.	Consumption capacity	Should have consumed minimum average fly lash of 600 MT/ day during last 3 year. Bidder should produce documentary

		evidence of same.
3.	Turnover	The financial turnover of bidder for the last three years ending 31st March of the previous financial year should be Rs. 10.7 Cr (Rs Ten crore seventy lakh only)
4.	Eligibility	1. There should not be pending dues/dispute in the existing contracts of ash lifting with MAHAGENCO. 2. Required quantity of ash to be calculated based on their requirement for existing plant or new capacity added as per total plant ash consumption capacity reduced by already contracted ash quantity with MAHAGENCO.
5.	MPCB Consent	Bidder should produce relevant license for their business (i.e. consent to operate) from Pollution Control Board of respective area.

Similar conditions are applicable to Group B bidders. However, the minimum consumption capacity is prescribed as 25 Metric Ton per day for last 3 years and financial turn over in previous year is prescribed to Rs.3.69 Crores Or for last one year 1.23 Crores. Clause 5.3 prescribes qualifying requirement for Group C which deals with project affected or land affected people who can use ash in their business. However, we are concerned with qualifying conditions oaid down for "Group A" and "Group B" only.

4. The contention of the petitioner is that entry is restricted to fly ahs users such as cement industris or manufacturers of cement, bricks, tiles, wall pannels etc. The entry of the traders is barred. Condition No.2 further prescribes minimum consumption during last 3 years. As such, only htose who are in the business of industries using fly ash as raw material in the manufacturing process are permitted to participate, that creates monopoly of existing fly ash users.

5. Mr. Manale would further submit that, in fact, the successful bidders who are receiving fly ash from respondent No.1 are trading in the fly ash and selling it in open market, which is not monitored or

controlled by the respondent No.1. In such situation, there is no impediment if the traders like petitioners are permitted to participate in the bid and offer more competitive rates, that will ultimately benefit the respondent No.1 and consumer of electricity and that should be the ultimate object of the respondent authorities.

6. It is pertinent to note that the notification dated 31.12.2021 issued by the Ministry of Environment, Forests and Climate change prescribes for the mode and manner of ash utilized by cold and lignite thermal power plants. The notification is purported to be issued under the powers conferred by sub-section (1) and clause (2) of sub section (2) of Section 3 of the Environment Protection Act, 1986 read with Rules of 1986. The thermal power plants are put under obligation to dispose of fly ash generated by power plants in an eco-friendly manner and and permit use of ash only for eco-friendly purposes, namely, fly ash based products, cement manufacturers, construction of road, construction of dam, filling up of low lying areas, filling of mine voids; manufacturing of sintered or cold bonded ash aggregate, control of soil testing and construction of shoreline and any other eco-friendly purposes as notified from time to time. The notification further provides that the thermal power plant is responsible to utilize 100% ash. /the fly ash user agencies are required to submit compliance report of environmental clearance. Clause E(3) of the said notification provides for constitution of Committee under the Chairmanship of Central Pollution Control Board and including members from Ministry of Power, Coal, Mines, Environment Climate Change, Road Transport and Heavy Industries.

7. The survey of aforesaid notification clearly demonstrates

that disposal of fly ash in environment friendly manner has been the prime consideration in the policies of the Government. In the light of aforesaid policies and mode of disposal prescribed under the Government notification dated 31.12.2021, it is apposite for the respondent No.1 to ensure compliances and for that purpose, incorporate necessary conditions in the tenders issued for disposal of flly ash. In the present case, clause No.5 prescribes for qualifying requirement for the bidders as per the categorization in 3 groups. The Group A is cement manufacturing industries which are larges consumers of fly ash. For that purpose minimum consumption @ 600 Metric Tons per day during last 3 years is the condition. Similar is the case with Group B, which consists of manufacturers of Cement bricks, cement sheets, construction products like wall tiles etc. For that also, minimum consumption of 25 Metric Ton per day during last 3 years has been the condition. The third group is for project or land affected people who can use ash for their businesses. Considering the large production of fly ash and its mandated disposal @ 100%, the respondent No.1 will have to search for the big consumers of fly ash. Therefore, the conditions incorporated in the tender notice appear to be in tune with the object sought to be achieved. Although the petitioner contends that the businessman like him may also be permitted to participate in the tender, by declaring the impugned conditions as arbitrary and illegal, it is difficult to countenance with the submissions. As indicated above, disposal of fly ash is monitored and being environment related subject, it many not be suitable to dispose fly ash to the traders by which the actual disposal of the fly ash would be beyond control and hazardous to environment.

8. Although reliance is placed on behalf of the petitioner on

various judgment as indicated above, none of the said judgments can be applied in the facts of the case. There cannot be any dispute that the proposition that the public authority cannot monopolize the business or avoid competition in the tender process. However, in the facts of the present case, we do not find that the impugned conditions are arbitrary, malafide and not in public interest or same creates monopoly in favour of a particular contractor. Reading of the terms and conditions of tender, clearly shows that the bidders with large capacity of utilization of fly ash in manufacturing process are sought to preferred, which appear to be in tune with the environmental policies and regulations issued by the Government of India.

9. In fact, it is well settled that the tendering authority is the best judge of the conditions to be incorporated while inviting the bids. The judicial review in such matters can be in exceptional circumstances. At this stage, the observations of the Supreme Court of India in the case of ***" Michigan Rubber (India) Limited Vs. State of Karnataka and others" (2012) 8 SCC 216*** can be referred, which read thus :-

> *"23. From the above decisions, the following principles emerge :*
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> *(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 descernible 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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> *(b) Fixation of a value of the tender is entirely within the purview of the executive and the Courts hardly have any role to play in this process except for striking down such action of the*

executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender the document and awarding a contract, grater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain pre-conditions 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."

*Similarly, recently, the Supreme Court of India in the case of **N.G. Projects Ltd. vs. Vinod Kumar Jain and others (2022)6 SCC 127**, after referring to various previous judgments observed as under :-*

"22. The satisfaction 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 malafide. 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.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."

10. Thus, it has been held that writ Court should refrain itself from imposing its decision over the decision of the employer, as to whether or not to accept bid of bidder. The Court does not have expertise to examine terms and conditions of present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with the contracts involving technical issues as there is requirement of necessary expertise to adjudicate upon such issues. Approach of the courts should not be to find fault with magnifying glass in its hands, rather, the court should examine, as to whether decision process is after complying with the

procedure contemplated by the tender conditions. Further, in ***Galaxi Transport Agencies Vs. New J.K. Roadways (2021) 16 SCC 808***, the Supreme Court observed that the authority who authors the tender document is the best person to understand and appreciate its requirement and judicial review in such matters is seldom adopted.

11. Applying the aforesaid principles of law to the facts of the present case, we are of the considered view that no case is made out for interference in the impugned tender process. Writ petition sans merit, hence stand summarily dismissed.

[S.G. CHAPALGAONKAR, J] **[SMT. VIBHA KANKANWADI, J]**

grt/-