



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

WRIT PETITION NO. 7641 OF 2024

1. Ashtavinayak Tours and Travels

At and Post Manikduandi, Tq. Pathardi,
District Ahmednagar,
Through its Proprietor,
Mahesh s/o Murlidhar Kulkarni,
Age : 46 years, Occupation : Business.

2. Ishwar Travels

Parijat Chowk, Savedi Ahmednagar,
District Ahmednagar,
Through its Proprietor,
Subhash Damodhar Amolik,
Age : 53 years, Occupation : Business,
R/o : Parijat Chowk, Savedi,
Ahmednagar, Dist. Ahmednagar.

3. Sayeed Sikandar Sayeed Amar

Tours and Travels,
At and Post Patoda,
Taluka Patoda,
District Beed.
Through its Proprietor,
Sayyed Sikandar Sayeed Amar,
Age : 38 Years, Occ. Business,
R/o Kranti Nagar, in front of Court,
Patoda, Tq. Patoda, Dist. Beed.

4. Kirti Sushikshit Berojgar Seva

Sahakari Sanstha, Bari Colony,
Chhatrapati Sambhajinagar,
Through its Chairman,
Imran Isaque Patel,
Age : 34 years, Occ. Business,
R/o : Beribaug, Harsool,

Chhatrapati Sambhajinagar,
District Chhatrapati Sambhajinagar.

5. Mahalaxmi Enterprises, Pune

Through its Proprietor
Nana Shivaji Randil
Age 46 years, Occ. Business,
R/o. Sr. No. 26/3, Randil Niwas,
Colony No.04, Shitaladevi Mandir,
Shitalanagar, Randil Corner,
Jambe, Pune.

6. M/s Ratnam Tours and Travels

Paratwada Tq. Achalpur,
District Amravati
Through its Proprietor
Sayyad Rafiyoddin Sayyad Bahaoddin
Age 52 years, Occ. Business,
R/o Behinf Shiya Maasjid,
Fharmanpura,
Achalpur, Tq. Achalpur,
Dist. Amravati.

...Petitioners

Versus

- 1 **The State of Maharashtra**
Through the Secretary for
Health Department
Mantralaya, Mumbai.
- 2 **The Joint Director of Health
Services** (Procurement Cell)
Mumbai,
1st Floor, Arogya Bhavan
Saint George Hospital Compound
Mumbai 400 001.
- 3 **The Commissioner of Health
Services and Director,**
National Health Mission, Mumbai
1st Floor, Arogya Bhavan
Saint George Hospital Compound,
Mumbai 400 001.

4 **The Deputy Director of Health
Service (Transport),**
8 Kennedy Road,
Naidu Hospital Road,
Pune – 411001.

...Respondents

WITH
CIVIL APPLICATION NO. 12298 OF 2024
IN
WRIT PETITION NO. 7641 OF 2024

Maharashtra Vikas Group Company

Through Proprietor Sharad Balasaheb Deore

Age : 55 years, Occu. : Business,

R/o : Flat No.701/702, A-Wing, Rutugandh Apartment,

Near Rathi Amarai, Gangapur Road,

Nashik.

...Applicant

1. Ashtavinayak Tours and Travels

At and Post Manikduandi, Tq. Pathardi,
District Ahmednagar,

Through its Proprietor,

Mahesh s/o Murlidhar Kulkarni,

Age : 46 years, Occupation : Business.

2. Ishwar Travels

Parijat Chowk, Savedi Ahmednagar,

District Ahmednagar,

Through its Proprietor,

Subhash Damodhar Amolik,

Age : 53 years, Occupation : Business,

R/o : Parijat Chowk, Savedi,

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R/o : Beribaug, Harsool,
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District Chhatrapati Sambhajanagar.

5. Mahalaxmi Enterprises, Pune

Through its Proprietor
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Age 46 years, Occ. Business,
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R/o Behinf Shiya Maasjid,
Fharmanpura,
Achalpur, Tq. Achalpur,
Dist. Amravati.

7. The State of Maharashtra

Through the Secretary for
Health Department
Mantralaya, Mumbai.

**8. The Joint Director of Health
Services (Procurement Cell)
Mumbai,**

1 st Floor, Arogya Bhavan Saint George Hospital Compound Mumbai 400 001. 9. The Commissioner of Health Services and Director, National Health Mission, Mumbai 1 st Floor, Arogya Bhavan Saint George Hospital Compound, Mumbai 400 001. 10. The Deputy Director of Health Sciences, Pune.	...Respondents
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APPEARANCES :

Advocate for the Petitioners	Senior Adv. Mr. V. D. Hon i/by Mr. A.V. Hon
Addl.GP for the Respondents/State	Mr. P.S. Patil
Advocate for the Applicant/Intervenor in CA	Senior Adv. Mr. P.R. Katneshwarkar i/by Mr. L.S. Mahajan

**CORAM : S.G. MEHARE AND
SHAILESH P. BRAHME JJ.**

Date On Which The Arguments Were Heard : 02 DECEMBER 2024

Date On Which The Judgment Is Pronounced : 10 DECEMBER 2024

J U D G M E N T (Per Shailesh P. Brahme, J.) :-

1. Rule. Rule is made returnable forthwith. With the consent of both the sides, heard finally at the admission stage considering exigency in the matter.

2. The petitioners are aspiring Contractors who are unable to

participate in the tender process due to arbitrary, stringent and unconscionable tender conditions have approached this Court under Article 226 of the Constitution of India, seeking quashment of the tender process, bearing no. E-23/DDHS (Tr.) and further seeking directions to issue fresh tender process circle wise by omitting Clause No.2.3, 2.6A and 17.3.a and 17.3.b of the tender conditions.

3. By our interim directions passed on 23.07.2024, the respondents/authorities were restrained from issuing work order. The tender process moved forward and stopped by selecting intervenor of Civil Application No.12298/2024. Intervenor is likely to be affected by the result of the present petition. We also heard Applicant-Intervenor alongwith contesting parties.

4. The tender process in question pertains to procurement of the vehicles for Rashtriya Bal Swasthya Karyakram (RBSK). The duration of the contract is three years. The respondents/authorities formulated the clusters in the State of Maharashtra. The petitioners are unable to participate in the process and they propose to challenge Condition Nos. 2.3, 2.6A and 17.a.3 of the tender conditions on various grounds. This is 4th tender process floated on 28.06.2024.

5. The earlier tender processes were recalled after the indulgence was caused by High Court. It is the case of the petitioners that due to the interim orders passed by High Court on earlier occasions, respondents/authorities strategically revoked

the processes and floated the fresh one to eliminate the petitioners. Every time, the petitioners quoted competitive rates.

6. The impugned 4th tender process commenced from 28.06.2024. The last date for obtaining tender documents was 22.07.2024 which was also final date for submission of the tender. The opening of the technical bid was scheduled on 23.07.2024. Pre-bid meeting was scheduled on 09.07.2024. The tender conditions were founded on Central Vigilance Commission of Government of India (for short CVC). In all seven bids were received and out of them, five were disqualified in the technical bid. Only two tenderer were in fray for opening of the final bids. The intervenor was declared to be successful bidder. Being aggrieved by the tender conditions and the tender process, present petition is filed.

7. Learned Senior Counsel Mr. V.D. Hon appearing for the petitioners submits that Condition Nos. 2.3, 2.6A and 17.a.3 are arbitrary, perverse and tailor-made. Those are not only stringent but designed to favour the intervenor. The impugned tender conditions are against Central Vigilance Commission and discriminatory. He would further submit that impugned tender conditions and the entire pending process are against principles of level playing field and violative of Article 14 and 19(g) of the Constitution of India. He would further submit that the decision of clubbing the districts and floating clusters wise tender was to eliminate small players like the petitioners. The impugned tender conditions are introduced for the first time.

8. It is further submitted that the conditions are so designed so as to avoid the competition and to eliminate the competitive players. The rates quoted by the petitioners to the average of about Rs.27000/- was very much moderate than the rate of the successful bidders causing great loss to the public exchequer. It is further submitted that the pre-bid meeting was surprisingly conducted on 09.07.2024 before submission of the bids, so as to deprive opportunity to challenge or to seek modification of the stringent conditions.

9. Learned Senior Counsel would further submit that the circular dated 17.09.2019 has been violated. He submits that no satisfactory explanation has been tendered in the reply to meet the challenges of the petitioners. No meetings were held to cancel the previous tender processes and without soliciting permission of High Court, the earlier process was being aborted and new process was resorted to. It is further contended that the grounds for cancellation of earlier tender processes have been supplied for the first time in the affidavit-in-reply without disclosing them earlier which is against law laid down by the Supreme Court in the matter of **Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others**, 1977 0 Supreme (SC) 350.

10. Learned Senior Counsel tenders on record the list of the rates in various districts proposed by the petitioners. He relies on the following judgments :

- i. Reliance Energy Ltd. And Another Vs. Maharashtra State Road, Development Corpn. Ltd. And Others, (2007) 8 SCC 1.

- ii. Haffkine Bio-Pharmaceutical Corporation Limited, A Government of Maharashtra Undertaking Through Manager Vs. Nirlac Chemicals through Its Manager and Others, (2018) 12 SCC 790.
- iii. Vaishnorani Mahila Bachat Gat Vs. State of Maharashtra and Others, (2019) 15 SCC 718.

11. Per contra, learned AGP appearing for Respondent Nos. 1 to 4 repels submission on the basis of affidavit-in-reply dated 13.08.2024 and surrejoinder dated 10.11.2024. It is contended that impugned tender conditions are challenged by the petitioners' case on the ground of suitability or inconvenience. Those are incorporated to test the financial strength, experience, ability to perform the work of the successful bidder. It is the prerogative and choice of the tendering authority to select the tender conditions. Learned AGP would advert our attention to paragraph nos. 5 to 7 of reply to justify the tender conditions.

12. It is further submitted that the earlier tender processes were required to be recalled for the reasons stated in paragraph nos. 5 to 7 of the surrejoinder. It is submitted that the comprehensive and cluster wise tender process was floated in view of the past experience for better coordination and smooth execution of the contract and it was not to target the petitioner. The eligibility condition of 50% turnover was incorporated with specific intention. The petitioners did not participate in the process and they are estopped from challenging the tender notice and the conditions thereof. Our attention is invited to Manual for Procurement for Consultancy and other Services and specifically

Clause No.9.15.2. Learned AGP submits that few of the petitioners were previously selected as contractors and they are still continuing with the work by obtaining the extension of time. They do not want any new contractor to take their place and hence present petition is filed. Learned AGP refers to paragraph no.11 of the surrejoinder to justify tender condition no.17.3.a.

13. Learned Senior Counsel Mr. P. R. Katneshwarkar appearing for intervenor submits that after following due procedure of law his client has been selected to be a successful bidder. He would submit that the impugned conditions are incorporated considering the nature of the work and the objects sought to be achieved. It is further submitted that parameters laid down in CVC regarding financial capacity cannot be made applicable. Those are meant for civil/electrical work. He would submit that the specific nature of the vehicles are required for the work concerned. The tendering authority has given specification which cannot be doubted or faulted. He would further submit that though it is argued by learned Counsel for the petitioners that there were mala fide, for want of pleadings and better particulars, those are not proved. The tender conditions including impugned conditions are uniformly made applicable to all the participants. The petitioners were unable to qualify the conditions and therefore they have approached this Court challenging entire processes.

14. Learned Senior Counsel relies on the following judgments :

- a. Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd. & Anr., 2022 LiveLaw (SC) 295.

- b. Gautam Mangilal Katariya Vs. The State of Maharashtra and Another, Writ Petition No.12450/2017.
- c. Michigan Rubber (India) Limited Vs. State of Karnataka and Others, (2012) 8 SCC 216.

15. We have considered rival submissions of the parties and we have gone through the respective pleadings.

16. There is no controversy as to the facts that the present petition pertains to 4th tender process and earlier processes were recalled. The petitioners are not the participants in the present process. In all five bidders participated including intervenor. Out of them five were disqualified in the technical evaluation and two could qualified financial bid. The intervenor was found to be a successful bidder. The petitioners are challenging tender process as well as tender conditions.

17. The following tender conditions are challenged by the petitioners :

“2.3. The annual turnover of the bidder shall be 50% of total Annual Value of the Contract as mentioned in the following table for three consecutive financial year's i.e. 2020-21, 2021-22 and 2022-23 to qualify per year.”

2.6. The Bidder should submit Past Performance as below -

A) The bidder should have (in hand or completed) experience of 20% (i.e. 243 Vehicles) of a minimum one work order of the below estimated quantity of total vehicles in supply of T-permit vehicles to government departments/ semi-government departments (central or state)/Local Self Government/PSU's within State of Maharashtra during any of the last three consecutive financial years (2021-22, 2022-23 and 2023-24) in the format given in Annexure-3. Per trip experience will not be considered for evaluation of experience.

The bidder should provide a work order, employer work experience certificate, contract agreement, and one year invoices of the work other period.

Experience of Goods Transport/ Livestock Transport (Animals, Birds, Poultry, etc)/ Liquid Transport (Milk, Petroleum Products, etc) will not be considered for evaluation. Only Passenger Transport (Excluding School Bus Transport) Experience shall be considered.

Along with that as per following table bidder should have provided minimum number of vehicles during any one of the financial Year out of the last three consecutive financial years (2021-22, 2022-23 and 2023-24) Bidder should provide work order and employer work experience certification for the same.

Sr.No.	Name of The Work	Number of RBSK UNIT	Experience of providing 20% of the quantity of T-permit vehicles
1	Supply of Vehicles for RBSK program, in Govt. health facilities in the State of Maharashtra as per Specifications given in Bid Document.	1213 Vehicles	243 Vehicles

17.a.3. The vehicle registration shall not be older than 5 years & it should be valid up to the end of contract. Vehicles with BS VI norms will be preferred. Vehicle engine cc not less than 1000 cc and vehicle seating capacity not less than 4+1. Vehicle type will be of monocoque body like Car, entry level Sedan, or Compact SUV/MUV/SUV (from only amongst M&M TUV 300/ M&M Bolero /TATA Zest/ TATA Tigor/ TATA Nexon/ TATA Punch/ Maruti Suzuki Dzire/ Maruti Suzuki Ertiga/ Maruti Brezza/ Hyundai Venue/ Hyundai Aura/ Toyota Urban Cruiser/ KIA Sonet) Any other model supplied, should require prior approval from the Commissioner of Health Services, Mumbai. Such vehicles provided should be in good condition considering passenger Safety & Comfort.

The bidder should either have his own T-Permit vehicles or have a tie up with the owners for 1213 T-Permit Vehicles to be supplied. The bidder should submit list of vehicles with registration number of T-Permit vehicles with name of owner. If bidder wants to replace any vehicle from this list, prior permission should be taken from the authority and appropriate decision will be taken.

18. Before appreciating the challenge to the above tender conditions, it would be necessary to consider the nature of the work. The contract is for the procurement of the vehicles. Rashtriya Bal Swasthya Karyakram (RBSK) is an initiative to protect and promote child health which seeks to put together a systematic approach to child health screening and early intervention. Rashtriya Bal Swasthya Karyakram (RBSK) aims to

cover over 2 crores children of 0-18 years of age in Maharashtra. The vehicles are needed for discharging the work in rural, tribal and hilly area of the State of Maharashtra. The work pertains to extending the medical aid to the children. The tendering authority is bound to ensure financial strength of the bidder, its capacity to discharge the work, the efficiency and sturdiness of the vehicles and smooth execution of the contract within the time stipulated.

19. The respondents/tendering authorities are the best judges of their need. They have prerogative to select the tender conditions to suit purpose for smooth execution of the contract. They are bound to consider their previous experience for molding the conditions or incorporating new conditions or upgrading earlier conditions. Though few conditions are modified from earlier round of tender process, that would not be a ground to brand the conditions in question as arbitrary or tailor-made. The respondents have that liberty. It is not the case of the petitioners that impugned conditions are violative of any statutory provisions, Rules or Regulations.

20. We have considered first impugned condition no.2.3 which pertains to annual turn over to the extent of 50%. We have gone through CVC and its clause no.5A. Its clause 5A speaks about fixing of eligibility criteria for civil/electrical work. The same cannot be made applicable to the nature of the work involved in the present tender process. It provides for minimum turn over to be 30% of the estimated costs. The impugned condition of annual turn over of 50% cannot be said to be contrary. In this regard, the

justification tendered by the respondent nos. 1 to 4 in paragraph no.5 of the affidavit-in-reply and paragraph no.8 of the surrejoinder, cannot be said to be unreasonable.

21. The objection to condition no.2.6 is exclusion of school bus transport. According to the learned AGP, school buses would be bigger in size and that those are not required for carrying out the work. A team of five to seven personnel of the health department would be traveling in the vehicle to reach needy children. Considering paragraph no.6 of the reply and paragraph no.9 of the rejoinder, we do not find any perversity in the justification.. We do not find that there is any merit in the challenge to condition no.2.6.

22. The challenge to the last tender condition no.17.a.3 is repelled by paragraph no.7 of the reply and paragraph nos. 9 to 11 of surrejoinder. The tendering authority has to ensure the sturdiness of the vehicles. Considering the nature of the work, the vehicles deployed are expected to be of good conditions and less older than five years. The same tender condition also specifies the nature of the vehicles. It is wisdom and the choice of the tendering authority. We are not impressed by the submission of learned Senior Counsel for challenging the last tender condition also.

23. Previously the tenders were district wise. Considering the past experience, respondents thought it fit to float cluster wise. The objection of the petitioners for consolidating the tenders are met with by the respondents vide their reply given in paragraph

no.07 of the surrejoinder. The present process of cluster wise tender provides single rate for entire State and there is possibility of securing qualified and efficient bidder which would ensure to achieve the object of the tender. We do not notice any illegality for cluster wise tender. There is no thumb rule or statutory provision to force the tendering authority to resort to the district wise tender only.

24. In the present tender process, five tenderer participated which is indicative of the fact that the tender conditions were agreeable to them. The petitioners preferred not to participate in the process but they are before this Court challenging few conditions. Just because a particular tender condition is not suitable or convenient to them, cannot be a ground to vitiate impugned conditions. The tender conditions are equally made applicable to all. The respondents have supplied the reasons for imposing stringent condition which is well within their discretion and wisdom. We do not find that there is violation of principles of 'level playing field'. Neither can we find any violation of article 14 and 19(g) of the Constitution of India.

25. Learned Senior Counsel for the petitioners vehemently submitted that the conditions are tailor-made and designed to eliminate the petitioners or to favour the successful bidder. We do not find any material to corroborate the submissions. On the contrary, we cannot be oblivious of the fact that few of the petitioners are still executing the work under the extension of time and possibility of dodging the successful bidders, cannot be

ruled out. After unsuccessful attempts on three previous occasions, present tender process is on the verge of conclusion. Considering the facts and circumstances, we are not inclined to cause interference.

26. The submission of the petitioners is that they have proposed moderate rate to the tune of Rs.26,700/- to 27000/-. Just because the successful bidder has quoted higher rate, it would not be imperative to quash the proceeding. After under going competition, the rate of successful bidder has been accepted. The petitioners who are proposing the rates, chose not to participate of the present tender process. There would have been some merit in the submission of the petitioners, had they been successful in the technical evaluation by participating in the tender process. We are not impressed by this submission.

27. The grievance regarding pre-bid meeting conducted on 09.07.2024 has also no substance. All the lapses in the tender process cannot be ground to vitiate the process. Some aberrations here and there need to be ignored. The scope of the judicial review has already been crystallized by the Supreme Court in the matter of **N.G. Projects Limited Vs. Vinod Kumar Jain and Others**, (2022) 6 SCC 127. The tendering authority needs to be given leverage. The writ Court cannot examine the tender process or its condition with magnifying glasses. Our jurisdiction is not meant for finding the false or lapses which are marginal in nature.

28. Our attention is adverted to circular dated 17.09.2019. It is

contended by the petitioners that the impugned conditions cut across clause no.3 and therefore they are unsustainable. The present tender process pertains to Health Services Department. The circular in question was issued by Public Works Department. We have our reservation for applying the parameters laid down in the circular to the present tender process. We find no merit in the submission in this regard.

29. It is also submitted by the petitioners that the earlier tender processes were recalled, without assigning reasons and without conducting any meetings. Learned AGP has adverted our attention that first tender process was revoked in a meeting dated 03.05.2023 vide Agenda No.12 by the reasons mentioned therein. Second tender process was revoked in a meeting dated 11.01.2024 for the reasons stated therein. Third tender process was revoked by a reason disclosed in online portal. We find that it is prerogative of the respondents to not to proceed with the tender process if there exist good and convincing in grounds. We cannot examine the validity of the reasons assigned by the respondents for revoking earlier tender process.

30. Learned Counsel for the petitioners relies on the judgment of the Supreme Court in the matter of Mohinder Singh Gill and Another (supra) and adverts our attention to the principles laid down in paragraph no.8. In the present petition, 4th tender process is under challenge. Few tender conditions are also challenged to demonstrate arbitrariness and violation of level playing field. The revocation of the earlier three tender processes is not the subject

matter of inquiry in the present case. Therefore the endeavour of the respondents to supply reasons for revoking earlier tender processes for the first time in the High Court, would be inconsequential. Earlier revocation has only nexus to show conduct of the tendering authority. The ratio laid down by the Supreme Court is not applicable.

31. Learned Counsel for the petitioners relied on the judgment in the matter of Reliance Energy Ltd. And Another (supra) and more specifically ratio laid down in paragraph no.36. The significance of the principles of 'level playing field' has been emphasized therein. The said principles undoubtedly has application to the contractual matters also. The ratio laid down cannot be disputed. However, we have also recorded that the petitioners failed to prove violation of doctrine of 'level playing field' or discrimination. The judgment is of no avail to the petitioners.

32. Learned Counsel for the petitioners also refers to the judgment of Haffkine Bio-Pharmaceutical Corporation Limited, A Government of Maharashtra Undertaking Through Manager (supra). We have gone through paragraph nos. 8 to 10. The violation of CVC guidelines is held to be sufficient to vitiate the entire tender process. In the present case, the petitioners failed to demonstrate violation of CVC guidelines. The guidelines are cited to challenge tender conditions no.2.3. We have already recorded that 30% benchmark provided by the guidelines is minimum financial capacity. The impugned condition stipulating 50% of the financial capacity cannot be said to be violative of the guidelines.

33. The reliance is placed on the matter of Vaishnorani Mahila Bachat Gat (supra). We have gone through paragraph no.49 of the judgment. The facts are distinguishable from the case at hand. In those facts and circumstances, the Honourable Supreme Court recorded that the condition under challenge was to favour the big players and that was not in the tune with spirit of act and orders of Court. The petitioners in the case at hand, failed to demonstrate that impugned conditions are designed to ensure the big players to be left in the field. Neither any provision of any statute is pointed out to show that there is violation of purport and objective of the act.

34. Learned Senior Counsel Mr. P.R. Katneshwarkar relies on the judgment in the matter of Balaji Ventures Pvt. Ltd. (supra). We have considered Paragraph Nos. 5.1 and 5.2 of the judgment which according to us applies to the case in hand. Those are as follows :

“5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

5.2 In the case of Silppi Constructions Contractors vs. Union of India, (2020) 16 SCC 489, it is observed in para 20 as under:

“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.”

35. The further reference is made to Michigan Rubber (India) Limited (supra) and more specifically to Paragraph Nos. 21 to 23.

We propose to refer to paragraph no.23 which is as follows :

“From the above decisions, the following principles emerge:

(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;

(b) fixation of a value of the tender is entirely within the purview of the executive and 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 document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

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

. We are bound by above principles.

36. A useful reference can be made to the view taken by the coordinate bench in the matter of **M/s. D.M. Gaikwad Constructions Vs. State of Maharashtra and Others**, Writ Petition No. 2399/2024. In that matter also the petitioner had challenged the tender conditions. Following observations are relevant :

“11. It would be prerogative of the tendering authority to fix the tender conditions. It is open for the tendering authority to modify or deviate from any tender condition which was existing in the earlier tender process. The tendering authority is the best Judge to select the conditions to suit its purpose. In writ jurisdiction, the conditions cannot be substituted or modified just on the ground of hardship to any party or inconvenience. It is clearly laid down in following paragraph of Supreme Court in **Airport Authority of India Vs. Centre for Aviation Policy, Safety & Research (CAPSR) & Others**; A.I.R. 2022 Supreme Court 4742.

“6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.

7. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:

In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms

governing the tender process.”

In the case of *Michigan Rubber (India) Ltd.* (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

“23. From the above decisions, the following principles emerge:

(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;

(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 document and awarding a contract, greater 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 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.”

In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

Similar views have been expressed in the case of *Educomp Datamatics Ltd.* (supra) and *Meerut Development Authority* (supra).

37. We cannot be oblivious of further guidelines of the Supreme Court in the matter of *N.G. Projects Limited* (supra). Following is the relevant paragraph :

“23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present- day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues

as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.”

38. For the above analysis, we find that petition has no merit. Hence it is dismissed. Rule is discharged.

39. Civil Application is disposed of.

[SHAILESH P. BRAHME]
JUDGE

[S.G. MEHARE]
JUDGE

40. After pronouncement of the judgment, learned Counsel for the petitioners requests for continuation of the interim relief which was in operation from 23.07.2024.

41. Learned AGP would oppose the request. He would submit that the work order could not be issued because of the interim relief.

42. We have already expressed our opinion on the merits of the

matter and dismissed the writ petition. No work order could be issued because of the interim relief. The work in question has been stalled. This is not a fit case to continue the interim relief. The request is discharged.

[SHAILESH P. BRAHME]
JUDGE

[S.G. MEHARE]
JUDGE

NAJEEB..