

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.9202 OF 2023
WITH
INTERIM APPLICATION NO.18412 OF 2023
IN
WRIT PETITION NO.9202 OF 2023**

M/s. Balaji Surgical,
Through its Proprietor,
Mr. Prasanna Sudam Shinkar,
Add.: Sr. No. 98, Plot No. 3, Gilankar Nagar,
MG Petrol Pump Road, Opp. MSG College,
Malegaon Camp, Nashik – 423203

: Petitioner

Vs.

1. State of Maharashtra,
Through the Government Pleader,
Bombay High Court, Fort, Mumbai-32.
2. Malegaon Municipal Corporation,
Through its,
Commissioner and Health Department,
Add.: Sapati Bazar, Malegaon-423203
3. M. S. Pharma,
Add.: Shop No.1, DVS Tower,
Near Sankalp Hospital, Malegaon,
Nashik-423203.
4. Om Medicines,
Add.: Shop No. 8, Tirupati Complex,
Mosam Bridge Road, Malegaon,
Nashik – 423203.

5. The Nasik Medical Agencies,
Add.: 480/20 Parijat House, Gole Colony,
Nashik – 422002. : Respondents.

Mr. Amit A Gharte for the Petitioner.
Mr. P. P. Kakade, GP a/w Mr. O. A. Chandurkar, Addl. GP and Mr.
M. M. Pabale, AGP for Respondent No.1-State.
Mr. S. S. Patwardhan for Respondent No.2.
Mr. Sanjiv A Sawant i/by Mr. Abhishek P Deshmukh for
Respondent No.4.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.
DATE : 6th FEBRUARY, 2024**

JUDGMENT.: (PER ARIF S. DOCTOR, J.)

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel for parties, the present Writ Petition is taken up for final hearing.

2. The Petition essentially impugns the Petitioner's disqualification from the tender process floated by Respondent No. 2 - Malegaon Municipal Corporation for the supply of medicines, materials, laboratory chemicals and equipment's for hospitals/clinics ("the said tender") on the ground that the

Petitioner had failed to submit a "*No Conviction Certificate*" in terms of a corrigendum dated 19th April, 2023 issued by Respondent No. 2.

3. Before advertizing to the rival contentions, it is useful to set out the following facts, viz.

- i. Respondent No.2 had vide a notice dated 15th April 2023 published an advertisement for calling for bids in respect of the said tender for which the last date for submission of bids was 5.00 p.m. on 21st April 2023.
- ii. It is not in dispute that (a) Respondent No. 2 thereafter on 19th April 2023 at 9.11 p.m. i.e. effectively one day prior to the submission of bids, issued a corrigendum by which Respondent No. 2 required as a mandatory eligibility criteria bidders to submit a "*No Conviction Certificate*" and (b) that this corrigendum was neither published/advertised nor communicated to the Petitioner but was merely

uploaded on the website of Respondent No. 2.

- iii. Though strictly not relevant to the present challenge, it is the Petitioner's contention that the Petitioner was made aware of this corrigendum by one of the officers of Respondent No. 2 only on 20th April 2023 and that the said corrigendum prior to 25th April 2023 was not opening on the website of Respondent No. 2. It is the Petitioner's contention that the said corrigendum opened for the first time only on 25th April 2023.
- iv. On 26th April, 2023, three things happened (a) the Petitioner's technical bid was opened and the Petitioner was held to be technically qualified (b) the Petitioner requested the Food and Drugs Administration, Maharashtra to issue a "*No Conviction Certificate*" to the Petitioner and (c) the Petitioner requested Respondent No. 2 to extend the time for submission of the "*No Conviction Certificate*".

- v. It is again not in dispute that thereafter by a letter dated 12th May 2023 Respondent No. 2 granted the Petitioner an extension of time till 16th May 2023 to submit the said "*No Conviction Certificate*" and that the Petitioner thereafter infact submitted the said "*No Conviction Certificate*" dated 4th May 2023 issued by the Food & Drugs Administration, Nashik Zone 3 District on 12th May, 2023 i.e. within the extended time.
- vi. However, despite the above, i.e., submission of a "*No Conviction Certificate*" by the Petitioner within the extended time, Respondent No. 2 (a) published its scrutiny letter dated 13th July 2023 disqualifying the Petitioner on the ground that the Petitioner had not submitted "*No Conviction Certificate*" and (b) published its Tender Summary Report on 19th July 2023 disqualifying the Petitioner on technical grounds and accepting Respondent Nos. 3, 4 and 5 as technically qualified. Respondent No. 4 was thereafter, it appears

declared as the successful bidder.

4. It is in the aforesaid factual matrix that the Petitioner has essentially impugned (i) the Scrutiny Letter dated 13th July 2023 and (ii) the Tender Summary Report dated 19th July 2023.

5. Before proceeding further, we must at this stage note that this Court had vide an order dated 25th July 2023 *inter alia* granted interim relief by directing that if the work order had not been granted, the same should not be issued till the next date. Thereafter after a detailed hearing on interim reliefs this Court had vide an order dated 4th November 2023 *inter alia* held that the conduct of Respondent No. 2 in not opening the Petitioner's technical bid was not only truly unreasonable in the wednesbury sense but also perverse and directed Respondent No. 2 to open the technical bid of the Petitioner and submit a report. Thereafter by an order dated 18th January 2024, this Court directed Respondent No. 2 to open the Petitioner's financial bid.

6. Respondent No. 4 filed a Special Leave Petition¹ (SLP) challenging both the order dated 4th November 2023 and the order dated 18th January 2024. The SLP was however dismissed by the Hon'ble Supreme Court by an order dated 29th January 2024.

7. It is essential to note that Respondent No. 2 thereafter in compliance with the orders passed by this Court albeit after some delay, opened the financial bid of the Petitioner and filed its Affidavit dated 29th January 2024 placing on record that "*the Petitioner would have been the L1 bidder, had his bids been considered*²."

8. Hence from the above facts the admitted position that emerges is that the Petitioner would have been declared L1 had the Petitioner not been disqualified by Respondent No. 2 on the ground that the Petitioner had not submitted a "*No Conviction Certificate*" as required by the said corrigendum dated 19th April, 2023. Thus, what falls for our consideration is whether in the

1 SLP (C) Nos.2178-2180/2024

2 Para 3 page 266 -Additional Affidavit of Respondent No. 2 dated 29th January 2024

aforesaid facts, the Petitioner's disqualification can be said to be justified *or* whether the same was arbitrary, unfair, and irrational and thus susceptible to challenge and judicial review.

9. Mr. Gharte, at the outset submitted that requirement for submission of a "*No Conviction Certificate*" admittedly was not part of the tender conditions as published. He then submitted that such a substantive term could never be introduced by way of a corrigendum, much less in the manner that had been done by Respondent No. 2 i.e., at 9.11pm effectively one day before the last date of submission and without notice to the Petitioner. In support of his contention that a corrigendum was meant only to correct typographical and clerical errors and could never introduce substantive terms in a tender/contract, he placed reliance upon a judgement of the Hon'ble Supreme Court in ***State of Andhra Pradesh (Now State of Telangana) Vs. A. P. State Wakf Board and others***³.

10. Mr. Gharte then submitted that the entire conduct of

3 2022 SCC OnLine SC 159

Respondent No. 2 smacked of malafides and was clearly only to favour Respondent No. 4. In support of this contention, he first pointed that the corrigendum was issued effectively one day prior to the last date for submission of bids and was without intimating the Petitioner nor publishing and/or advertising the same. He then submitted that even though time to submit the "*No Conviction Certificate*" was extended and the Petitioner had admittedly submitted the same within the extended time, Respondent No. 2 had disqualified the Petitioner on the sole ground that the certificate was dated after 21st April 2023. He thus submitted that this conduct apart from being completely arbitrarily, unreasonable, and illogical also reeked of malafides.

11. Mr. Gharte then took pains to point out that the said contract awarded to Respondent No. 4 was a rate contract which had been stayed by this Court by the order dated 4th November 2023. He submitted that the rates quoted by the Petitioner were much lower, than those submitted by Respondent No.2, in his submission 60% lower. He submitted that for the period upto 4th

November 2023, Respondent No. 4 would be entitled to payments for the supplies made, however for work orders pending post November 2023, the same should be awarded to the Petitioner. He submitted that not only would no prejudice be caused to any party, but infact the state exchequer would benefit substantially since the rates quoted by the Petitioner were admittedly lower than the rates at which Respondent No. 4 was effecting supplies.

12. Mr. Gharte then submitted that clause 24 of the tender conditions specifically provided that Respondent No. 2 could extend the present contract at its sole discretion. He submitted that given the manner in which Respondent No. 2 had acted to favour Respondent No. 4, there was every reason for Petitioners to believe that Respondent No. 2 would infact extend the term of the contract to favour Respondent No. 4 and to the detriment of the public exchequer.

13. Mr. Gharte then placed reliance upon a judgment of

the Hon'ble Supreme Court in the case of ***Maa Binda Express Carrier and another Vs. North-East Frontier Railway and others***⁴ to submit that all the participating bidders were entitled to fair, equal and non-discriminatory treatment in matters of evaluation of a tender and/or their bids. He submitted that in the event it was found that the authority concerned had acted in an arbitrary, unfair or unreasonable basis, the tender evaluation process was open to judicial scrutiny. It was his submission that in the present case, the Petitioner had been discriminated against and had been treated arbitrarily and unfairly only to benefit Respondent No. 4. Basis this, he submitted that the conduct of Respondent No. 2 was not only completely arbitrary, irrational and unreasonable but was plainly biased and perverse. It is thus he submitted that the same was liable to be judicially reviewed.

14. *Per contra*, Mr. Patwardhan, Learned Counsel appearing on behalf of Respondent No.2 did not dispute the fact that (a) the original tender did not have any requirement for

4 (2014) 3 SCC 760

submission of a "*No Conviction Certificate*" (b) the Corrigendum was uploaded only at 9.11 p.m. on 19th April 2023 without notice to the Petitioner nor was the same published in any newspaper (c) that Respondent No. 2 had extended the time for submission of the "*No Conviction Certificate*" and (d) that the Petitioner had infact submitted the certificate within the extended time. He, however, justified the rejection on the ground that the certificate ought to have been date prior to 21st April 2023 i.e., the last date for submission of bids. It was his submission that since the Petitioner had only applied for the certificate post 21st April 2021 the Petitioner could not be said to have acted diligently and in conformity with the corrigendum which contained a mandatory condition of the tender.

15. Mr. Patwardhan further submitted that the requirement of submitting the "*No Conviction Certificate*" being a mandatory precondition failure to comply with the same justified Respondent No. 2 in disqualifying the Petitioner. In support of his contention that the Court shall not interfere in a decision of

disqualification of tenderer if such tenderer has failed to comply with a mandatory condition of the tender, he placed reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Ram Gajadhar Nishad Vs. State of U.P. and Others***⁵.

16. Mr. Sawant, Learned Counsel appearing on behalf of Respondent No.4 submitted that the term of the contract awarded to Respondent No. 4 was to come to an end on 31st March 2024. He submitted that the bulk of the tenure of the contract was thus already over and therefore no interference at this stage was warranted. He invited our attention to the order dated 29th January 2024 passed by the Hon'ble Supreme Court and pointed out that the Hon'ble Supreme Court had specifically recorded that this fact could be brought to the attention of this Court at the time of the hearing of the present Petition.

17. Mr. Sawant then pointed out that Respondent No. 2 had on 18th January 2024 infact floated a fresh tender for the supply of medicines, materials, laboratory chemicals and

5 (1990) 2 SCC 486

equipment for hospitals/clinics which was to commence from April 2024. He pointed out that the Petitioner had participated in the said tender, the question of the Petitioner proceeding with the present Writ Petition did not arise. He placed reliance upon the judgements of the Hon'ble Supreme Court in the case of namely, *Jagdish Mandal Vs. State of Orissa and Others*⁶, *N. G. Projects Limited Vs. Vinod Kumar Jain and Others*⁷ and *Tata Motors Limited Vs. The Brihan Mumbai Electric Supply & Transport undertaking (Best) and Others*⁸ to submit that the scope of judicial review in tender matters was extremely limited and that a contract was a commercial transaction and once entered into if *bona fide*, the Courts would be loath in their exercise of power of judicial review to interfere, even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. He submitted that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes.

6 (2007) 14 SCC 517

7 (2022) 6 SCC 127

8 2023 SCC OnLine SC 671

18. Mr. Sawant then submitted that it was not open to Respondent No. 2 to consider the "*No Conviction Certificate*" since the same was submitted after the last date of submission of bids. He submitted that any act of Respondent No. 2 in doing so would itself be arbitrary and illegal. In support of his contention, he placed reliance upon a judgment of Punjab and Haryana High Court in case of *M/s. Zimidara Transport Company Vs. State of Punjab and others*⁹.

19. Mr. Sawant then additionally submitted that the Petitioner had infact accepted the condition for submission of a "*No Conviction Certificate*" and not challenged the same. He submitted that the Petitioner thus having accepted the condition was necessarily required to comply with the same. He submitted that the requirement of submission of a "*No Conviction Certificate*" was introduced at the discretion of Respondent No. 2 and to ensure sanctity of the tender process is maintained and it was not open to the Petitioner to now make any grievance in

9 2015 SCC OnLine P&H 10654

that regard. He further submitted that the requirement for submission of a "*No Conviction Certificate*" was a technical requirement/issue with which the Courts should not interfere with. Basis the above, he submitted that the present Petition must necessarily be dismissed.

20. We have heard learned Counsel at length, considered the rival contentions as also the case law cited by them. We are conscious of the fact that the scope of judicial intervention in tender and/or contractual matters is extremely limited. However, when it is found that a public authority and/or body has acted in an arbitrary, unreasonable and unfair manner, such conduct can be set right by judicial review as held by the Hon'ble Supreme Court in the case of *Tata Cellular vs Union of India*¹⁰ as also when there exists a clear -cut case of malafide conduct on the part of a public authority as held in the case of *Tata Motors Ltd.* (supra) In the facts of the present case, we find as already recorded by us in our order dated 4th November 2023, that the conduct of Respondent No. 2 is not only arbitrary, irrational and

10 (1994) 6 SCC 651

unfair but also perverse. It is thus that we are inclined to interfere in the extraordinary jurisdiction vested in us under Article 226 of the Constitution of India, for the following reasons viz.

- A. As we have noted above, Respondent No. 2 has in its affidavit dated 29th January 2024 admitted "*the Petitioner would have been the L1 bidder, had his bids been considered.*" It is not in dispute that the only reason for disqualifying the Petitioner was that the Petitioner had not submitted a "*No Conviction Certificate*" in terms of the corrigendum dated 19th April, 2023. We have in our order dated 4th November, 2023 recorded the reasons as to why such conduct on the part of Respondent No. 2 was not only arbitrary, unreasonable and unfair, but also was perverse, the same is extracted and reiterated herein, viz.

"We say so because (a) the original tender did not have any condition for submission of a "No Conviction Certificate"; (b) the condition was inserted by way of a corrigendum (neither published nor communicated to the Petitioner) at the

nth hour (c) the Petitioner is granted time to submit such "No Conviction Certificate" which the Petitioner does within the extended time granted (d) despite this, the Petitioner is disqualified on the ground that the certificate bears a date posterior to the last date of submission. Such conduct can only be termed as arbitrary and unreasonable given the fact (i) the corrigendum did not require the date of the "No Conviction Certificate" to be prior to submission of the bids and (ii) even assuming it did, what is crucial is the factum of the Petitioner having never being convicted under proceedings qua the FDA and not the date of the certificate. The date of the certificate is entirely irrelevant to the issue at hand. There is today no dispute by any party qua the bona fides or genuineness of the said certificate. Hence, the condition required by the said corrigendum was duly satisfied by the Petitioner. Given this background, for Respondent No.2 to now contend that the certificate ought to have been dated before 21st April, 2023 can only be termed to be irrational and without any justification".

In the order extracted, the word "posterior" should be read as "post". As already noted above, the SLP from the said order was dismissed. However, what is manifestly clear is that Respondent No.2 had surreptitiously introduced a material tender qualification condition without notice to the Petitioner. Additionally, there is no dispute that (a) the Petitioner had technically qualified (b)

the Petitioner had obtained the "*No Conviction Certificate*" and (c) submitted the same within the extended time despite which the Petitioner was disqualified. Thus, Respondent No. 2 proceeded to disqualify the Petitioner despite not disputing the fact that the Petitioner was never convicted, only on the ground that the certificate ought to have been dated prior to 21st April, 2021. This to our minds is entirely unreasonable in the wednesbury sense, irrational and perverse. Such conduct and the manner in which Respondent No. 2 has sought to justify the same make it abundantly clear that Respondent No. 2 has not acted in a fair, transparent, and non-discriminatory manner but strongly leads us to believe that Respondent No. 2 has acted only to favour Respondent No. 4. Such conduct in our view cannot be condoned and/or countenanced as it would give an impetus to public authorities and/or bodies to act in a completely, arbitrary, unreasonable, and unfair manner and as a result thereof cause loss to the public

exchequer.

B. Hence in the above given facts of the present case, we find that the judgements in the case of ***Jagdish Mandal*** (supra) , ***N. G. Projects Limited*** (supra) and ***Tata Motors Limited*** (supra) relied upon by Mr. Sawant on behalf of Respondent No. 4 would be of no assistance to him. Infact we must note that the judgement in the case of ***Jagdish Mandal*** (supra) itself caveats that judicial review shall not be foreclosed when it can be established *inter alia* that the process adopted, or decision made is malafide or to favour someone or where the decision is so arbitrary and irrational that no responsible authority acting reasonably could have reached such decision. The judgement in the case of ***N.G. Projects*** (supra) also calls upon Courts to refrain from interference when such interference would cause loss to the public exchequer. In the facts of the present case, the situation is infact to the contrary since the rates at which Respondent No. 4 is effecting supplies

is much higher than the rates offered by the Petitioner. Thus, the continuation of the contract would cause a loss to the exchequer. As we have already noted above, the Hon'ble Supreme Court in the case of *Tata Motors* (supra) expressly lays down that in cases of clear-cut arbitrariness, irrationality, malafides and bias, judicial intervention is permissible. In the present case as noted above, each of these parameters for interference exist. Mr. Sawant also relied upon the decision of the Punjab and Haryana High Court in the case of *Zimidara Transport Company* (supra) to submit that the act of the tendering authority in considering documents after the closing of bids would be illegal. However, the said judgement would also not be applicable for two reasons, firstly, in the facts of that case, the tendering authority had not extended time as has been submitted in the present case and the financial bid of the Petitioner was opened under orders of the Court and not the authority. Equally we find that the judgment in the case of *Ram Gajadhar Nishad* (supra)

relied upon by Mr. Patwardhan is entirely inapplicable to the facts of the present case since again in that case documents were submitted after the closing of the bid, whereas in the present, it is not in dispute that (i) the time for submission was extended and (ii) the Petitioner submitted the "*No Conviction Certificate*" within the extended time.

C. Additionally, we must note that the contention of Respondent No. 4 that most of the tenure of the contract is over and thus this Court ought not to interfere at this stage is also equally untenable for three reasons (i) the work order issued to Respondent No. 4 is a rate contract which contemplated supplies to be made thereunder from time to time (ii) this Court had vide the order dated 4th November, 2023 stayed further work orders from being issued to Respondent No. 4 and (iii) the rates quoted by the Petitioner are substantially lower (stated to be 60% lower) than those quoted by Respondent No. 4. This

coupled with the fact that we have found the conduct of Respondent No. 2 to be manifestly arbitrary and perverse and clearly to favour Respondent No. 4, in these circumstances allowing the contract to continue even for a day would effectively mean perpetuating such illegality. Also, we must note that if Respondent No. 4 is permitted to make further supplies under the rates offered, a direct loss would be caused to the state exchequer. On the other hand, no prejudice would be caused to Respondent No. 4 since Respondent No. 4 would be entitled to payment for the supplies already effected. Therefore, we find that every principle of justice, equity and good conscious would demand that no further work orders be issued to Respondent No. 4.

D. Having found that the conduct of Respondent No.2 to be arbitrary, unreasonable and accentuated by bias and/or *mala fides* if such conduct is to be condoned, it would embolden the Authorities to continue to act in an arbitrary

and/or unreasonable manner when awarding public contracts as also to favour certain entities which has been done in the present case at a huge loss to the exchequer. This conduct in awarding tenders, to our mind, is entirely impermissible and if allowed to be perpetuated, would amount to putting a premium on dishonesty and thus cannot be countenanced. Thus, the fact that a fresh tender has been floated in which the Petitioner has participated would also by itself make no difference and cannot be used as a reason to perpetuate an illegality.

21. In view of the aforesaid observations, we pass the following order :-

- (i) Writ Petition is allowed in terms of prayer clauses (a) and (b).
- (ii) It is directed that no further work orders shall be granted to Respondent No. 4 under the subsisting contract.

(iii) Respondent No. 2 is directed to consider the
Petitioner as L1.

22. Rule is made absolute accordingly.

23. In view of disposal of the Writ Petition, the Interim
Application does not survive and the same is accordingly
disposed of.

24. After the pronouncement of this order, Mr. Sawant
Learned Counsel appearing on behalf of Respondent No. 4
sought a stay on this order for the period of two weeks. For the
reasons already mentioned above the request is rejected.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)