

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

WRIT PETITION NO.10371 OF 2024

Indo Allied Protein Foods Pvt. Ltd. ... Petitioner
V/s.
The State of Maharashtra, through
Food, Civil Suppliers and Consumer
Protection Department ... Respondent

**WITH
WRIT PETITION (ST.) NO.21115 OF 2024**

Gunina Commercials Pvt. Ltd. ... Petitioner
V/s.
The State of Maharashtra, through
Food, Civil Suppliers and Consumer
Protection Department ... Respondent

**WITH
WRIT PETITION (ST) NO.21119 OF 2024**

Kendriya Bhandar ... Petitioner
V/s.
The State of Maharashtra, through
Food, Civil Suppliers and Consumer
Protection Department ... Respondent

Mr. Sharan Jagtiani, Senior Advocate with Mr. Mayur Khandeparkar, Mr. Aniesh S. Jadhav, Mr. Siddharth Joshi and Mr. Rushikesh S. Kekane for the petitioner in WP/10371/2024

Mr. Girish Godbole, Senior Advocate with Dr. Abhinav Chandrachud and Mr. Jayan Jain i/by Mr. Ashish S. Vernekar for the petitioner in WPST/21119/2024.

Mr. Gautam Ankhad, Senior Advocate with Mr. Aniesh Jadhav, Ms. Samruddhi Lodha, Mr. Ankur Shah, Mr. Mahadji Phalake and Mr. Nikhil Adkine for the petitioner in WPST/21115/2024.

Dr. Birendra Saraf, Advocate General with Mr. P.P. Kakade, Government Pleader, Mr. O.A. Chandurkar, Additional G.P., Mrs. G.R. Raghuwanshi, Additional G.P. and Mr. Jay Sanklecha,

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B-Panel counsel for respondent No.1- State in all matters.

Mr. Santosh Gaikwad, Deputy Secretary, Food & Civil Supply & Consumer Protection Department, is present.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
AMIT BORKAR, J.**

**RESERVED ON : JULY 31, 2024
PRONOUNCED ON : AUGUST 5, 2024**

JUDGMENT (PER : CHIEF JUSTICE)

1. Heard learned counsel representing the respective parties.

(A) CHALLENGE:

2. Challenge in this batch of petitions instituted under Article 226 of the Constitution of India has been made to a tender condition described in Clause 4 (PQ5) of the Request for Proposal (hereinafter referred to as the **RFP**) floated on 18th July 2024 by the Department of Food and Civil Supply and Consumer Protection of the Government of Maharashtra for supply of food kits (Anandacha Shidha) for Gauri Ganpati festival in the Financial Year 2024-2025.

3. The impugned condition in the RFP is as follows:

4. Qualification Criteria

The bidder must meet the following pre-qualification requirements to become eligible for the commercial evaluation.

#	Basic Requirement	Eligibility Criteria	Documents to be submitted
PQ5	Other Experience	The experience of loading, unloading or handling of food grains, food items etc. to be provided by bidder. Hence, bidder should have experience of providing at least 300 labourers in 70 multiple locations in Government and Semi-Government establishment within Maharashtra in single work order completed during last 3 years (upto the last date of submission of tender). The value of such work shall not be less than Rs.25 crores.	Bidder shall submit the following documents – 1. Relevant Work Orders or Contract agreements of Award of Contract or LoI 2. Experience or Completion certificates should be submitted clearly stating the scope of work performed.

4. The impugned condition is a pre-qualification criterion which requires the tenderers to have experience of providing at least 300 labourers in 70 multiple locations in Government and semi-Government establishments within the State in a single work order which ought to have been completed during the last three years. It further stipulates that the value of such work shall not be less than Rs. 25 Crores.

(B) FACTS:

5. The facts which are relevant for proper appreciation of the issues and controversies involved in this batch of writ petitions need to be noted, which are as under:

6. An RFP was issued by the State Government on 18th July 2024 for supply of food kits which are to be distributed during Gauri Ganpati festival commencing from 7th September 2024. The supplier is required to provide food kits containing (i) 1 kg pack of sugar, (ii) 1 kg pack of rawa, (iii) 1 kg pack of chana dal, (iv) 1 litre pouch of edible soyabean oil with 1 polypropylene bag containing these items. The food kits are to be supplied during the festival at various delivery points across all the districts in the State. According to RFP, the selected supplier will be responsible for packaging, transportation and deliver of these food kits to different locations to be specified by the Department.

7. Clause 4 of the RFP gives in detail the pre-qualification criteria which have been summarized in a chart which includes the impugned criterion viz. criterion No.PQ5. The Instructions to the Bidders contained in the RFP provide that the bidding

process will be on-line in two steps and the bid will comprise of two envelopes viz. (a) Envelop 1 : Pre-qualification, and (b) Envelop 2 : Commercial Proposal.

8. Clause 7 of the RFP describes scope of work. It also describes the quantity to be supplied according to which the total requirements would be around 1,70,82,086 food kits for the festival which are to be delivered at godowns across the Districts in the State. It further provides that four commodities with polypropylene bag should be supplied in a single consignment. Clause 7 also describes delivery schedule according to which successful bidder will be required to supply the quantity of items for food kits as per prescribed specifications within 30 days of receiving supply order. Clause 7 of the RFP is extracted hereunder:

"7. Scope of Work :

Following is an indicative Scope of Work for supply pack of Sugar, Chana Dal, Rawa & Soyabean Oil along with a new polypropylene bag to various taluka godowns in the districts of Maharashtra state.

Item to be Supplied (Constitutes of Food Kit)

For Gauri Ganpati festival, the supplier is required to food kits containing:

*1 Kg pack of Sugar
1 Kg pack of Rawa
1 Kg pack of Chana Dal
1 Litre pouch of edible Soyabean Oil*

1 polypropylene bag to contain the above items

Quantity to be Supplied.

The total requirement of Food Kits would be around 1,70,82,086 for Gauri-Ganapati festival to be delivered at taluka godowns across all districts in Maharashtra by the successful supplier. All four commodities with new (PP) Polypropylene bag should be supplied in a single consignment to the designated godowns.

Delivery Schedule and Penalties:

1. Delivery Timeline:

The successful bidder shall supply the ordered quantity of items for food kits as per the prescribed specifications within 30 days of receiving the supply order from the Department."

9. Clause 7 of the RFP also prescribes certain delivery obligations, according to which supply of the ordered quantity has to be made within 30 days of receiving of the supply order and further that the supplier shall be responsible for packaging, handling, loading, transporting and delivering the goods to the designated godowns in the concerned Districts. It also describes unloading process according to which the unloading of supplied items at the designated godowns will be handled by the agencies to be appointed by the respective District Supply Officers (DSO). The delivery obligations which form part of clause 7 of RFP are quoted hereunder:

"Delivery Obligations:

1. Supply Timeline:

The successful bidder shall supply the ordered quantity of Sugar, Chana Dal, Rawa and Soyabean Oil, along with new Polypropylene

(PP) bags, within 30 days of receiving the supply order from the Department.

2. Logistics Responsibility:

The Supplier shall be responsible for packaging, handling, loading, transporting, and delivering the goods to the designated Godowns in the concerned districts.

3. Compliance with Order Specifications:

The successful bidder must supply the ordered quantity of each commodity (Sugar, Chana Dal, Rawa, and Soyabean Oil) in strict accordance with the Quality & Quantity parameters specified in the supply order issued by the state government.

4. Packaging Specifications:

The successful bidder shall supply:

- 1 Kg (net weight) pack each of Sugar, Chana Dal, and Rawa*
- 1 Litre pouch of Soyabean Oil*

Alongwith a polypropylene bag

5. Product Integrity:

The Supplier must ensure that there is no damage to the packed bags/pouches during transportation and handling.

6. Transit Liability:

Any transit losses will be borne by the Supplier on a no-recourse basis.

7. Storage and Transportation Precautions:

The successful suppliers should take adequate precautions to prevent damage or deterioration of supplied commodities during storage and transportation. The supplier is responsible for ensuring the stock's integrity during transit at their own cost.

8. Consolidated Delivery:

All items (Sugar, Chana Dal, Rawa, Soyabean Oil, and polypropylene bags) should be supplied in a single consignment to the designated warehouse/storage place as per the purchase order/indent issued by the Food & Civil Supplies Department, Maharashtra State.

9. Unloading Process:

The unloading of supplied items at the designated Godowns will be

handled by agencies appointed by the respective District Supply Office (DSO)."

10. The RFP also contains two other relevant clauses described as "Assaying" and "Change in Scope of work". Said clause is also extracted hereunder:

ASSAYING

- i) *The Supplier shall, on his own and at his cost, arrange for inspecting and certification of Sugar Chana Dal, Rawa & Soyabean Oil in accordance with quality parameters as specified in above, from any of the NABL accredited food testing laboratories as per the list notified by Food Safety and Standards Authority of India. Please refer to Annexure for the list of laboratories. The stocks which qualify the parameters as per quality specifications shall only be supplied. Each consignment shall accompany such Assaying Certificate issued by NABL accredited food testing laboratory.*
- ii) *The Food, Civil Supplies & Consumer Protection Department may randomly collect the samples at the depots and get the samples tested in any of the NABL accredited laboratories independently anytime after the delivery by the supplier. The quality of each commodity will be evaluated based on specified quality parameters. The results of such testing will be final and binding on the suppliers. The stocks and whole consignment which fail the test have to be taken back by the Supplier at his own cost within 2 days from the date of intimation by the respective District Supply Officer of the Food, Civil Supplies & Consumer Protection Department. In this case, cost to assaying will be borne by the Department.*
- iii) *In such cases payment will be made for such stocks which are in accordance with quality parameters as certified by the Assaying agency.*
- iv) *The supplier shall arrange to record tare weight and gross weight and gross weight on electronic weighbridge before loading and after loading of the consignment. The copies of weigh bridge receipt along with copy of invoice / delivery challan and assaying report from the NABL accredited laboratories shall be handed over to Depot Manager of the Food, Civil Supplies & Consumer*

Protection Department at the time of giving delivery. Deliveries without valid documents will be rejected by the concerned Depot Manager.

- v) *Consignment will be unloaded at the designated warehouse during working hours only i.e. between 10 AM and 5 PM. On arrival of the consignment the Depot Manager of The Food, Civil Supplies & Consumer Protection Department will verify the documents and the assaying report. On confirming the authenticity of the consignment and after being satisfied with the quality based on the assaying report submitted by the Supplier, directs the representative of the supplier to arrange for recording the gross weight of the consignment on an electronic weighbridge before unloading.*
- vi) *In case if the Depot Manager of The Food, Civil Supplies & Consumer Protection Department is not satisfied with the quality supplied then he would arrange to draw samples and forward the same for testing and certification as per quality specification above, anytime after the receipt of the goods.*
- vii) *After unloading, the tare weight of the truck is recorded on the same electronic weighbridge. The copies of the Weigh Bridge receipts at the unloading point along with other documents i.e. invoice / delivery challan, assaying report and weighbridge receipts at the loading point shall be handed over to the Depot Manager of The Food, Civil Supplies & Consumer Protection Department*
- viii) *In case of any quality claim by Godown keeper / concern authority the supplier can provide Quality report of the truck and get the samples verified by concerned authority. In case of final rejection, the supplier would have to replace the material or provide fresh supplies. The rejected supplies which are not unloaded would stand cancelled.*

Change in Scope of Work

- a) *The Department may at any time at its convenience and without assigning any reason whatsoever, change or modify the Scope of Work of the Supplier by providing an intimation in writing to the Supplier specifying inter alia the nature and scope of the modification of the Scope of Work ("Modification Intimation")*
- b) *Upon receipt of the Modification Intimation by the Supplier relating to a reduction in the Scope of Work, the Supply Contract with the Supplier shall be deemed to have been modified to the extent of reduction in the Scope of Work of the Supplier. Further, in the*

event of abovementioned reduction of the Scope of Work, the Total Supply Payment that the Supplier is entitled to receive under the terms of the Supply Contract shall also be proportionately reduced

- c) *After receipt of the Modification Intimation by the Supplier relating to an increase in the Scope of Work, the Supplier shall perform such increased Scope of Work at the rate equivalent to the Financial Proposal of the Supplier which has been accepted by the DEPARTMENT; and*
- d) *The Supplier shall implement the change in Scope of Work promptly and in compliance with the terms of the Supply Contract and the Supply Order."*

11. The petitioners, as observed above, are aggrieved by condition No.PQ5 which is a pre-bid condition according to which a tenderer will have to submit the documents evidencing that the tenderer has experience of providing at least 300 labourers in 70 multiple locations in the Government and semi-Government establishments within the State in single work order which ought to have been completed during the last three years.

12. The petitioners are said to have raised objection in the pre-bid meeting held on 22nd July 2024 to the inclusion of condition No.PQ5 under clause 4 of the RFP. However, as per the petitioners, no heed was paid to the said objection. The petitioners, after raising their objections to the impugned condition, have filed instant petitions, however, they have also

submitted their bids before the last date of submission. According to the petitioners, non-participation in the bid process would have rendered the petitioners non-suited to file these petitions and accordingly, while challenging the impugned tender condition by filing these writ petitions, they have also participated in the tender.

(C) Submissions on behalf of the petitioners:

13. Arguments on behalf of the petitioners have been led by Mr. Sharan Jagtiani, learned Senior Advocate, who, while drawing our attention to various provisions of the RFP, has submitted that the impugned pre-qualification condition of having experience of providing at least 300 labourers at 70 multiple locations is completely against the very scope of the work which is apparent from a bare reading of RFP where the scope of work has been described. In this regard, it has been stated by Mr. Jagtiani that scope of work as described in RFP only stipulates (i) packaging, (ii) handling, (iii) loading, (iv) transporting, and; (v) delivering the goods and it does not include unloading the goods at the designated godowns. Drawing our attention to Logistic Responsibility, which has been extracted hereinabove, it has categorically been submitted by Mr. Jagtiani that since unloading

the goods does not form part of the scope of work, hence the impugned condition requiring experience of providing 300 labourers at 70 multiple locations is not only arbitrary but it is also that the same does not have any nexus with the object to be achieved and hence, it is violative of Article 14 of the Constitution of India.

14. To buttress the ground based on violation of Article 14 of the Constitution of India, our attention has also been drawn to a clause relating to Unloading Process which occurs in Clause 7(9) of the RFP. It has been submitted that as per the said clause, unloading of supplied items is to be handled by the agencies which are to be appointed by the respective DSOs at the designated godowns and not by the supplier to be selected in terms of the subject tender. It is, thus, his submission that once the work relating to unloading of the goods supplied at the respective godowns is to be handled by separate and distinct agency to be appointed by the respective DSOs, putting a condition of providing 300 labourers at 70 multiple locations in the State, has no relevance with the scope of work for the simple reason that scope of work to be performed by the successful bidders does not include any task relating to unloading.

15. Mr. Jagtiani has also argued that as per the scope of the work for which subject tender has been floated, the successful bidder is only expected to (i) procure the goods viz. rawa, chana dal, edible oil, (ii) to pack these items and to put the eatables in a polypropylene bag and further (iii) to load it on their own delivery vehicles or trucks, and (iv) to transport it to the godowns, where supply is to be received by the Government officials. He, thus, submits that however, once the supply of these items reaches the godown concerned at the designated places, unloading of the supplied items is to be done by a different agency to be appointed by the DSOs in terms of what has been prescribed in Clause 7(9) of the RFP.

16. On the strength of the aforesaid submissions, it has been argued that since the scope of work does not require the successful bidder to carry out unloading of supplied goods hence, there is no rationale in putting a condition of having experience of supplying at least 300 labourers at 70 multiple locations. He has further argued that as per the scope of work, the successful tenderer will procure and store the goods to be supplied at his own facility, package them and thereafter transport and deliver

them to the specified destinations. This process, according to the petitioners, does not involve unloading for which a specific provision has been made in the RFP according to which unloading of supplied items is to be done by a separate agency to be appointed for the said purpose by the respective DSOs.

17. The petitioners have, thus, stated that such a condition is absolutely arbitrary, irrational and further that it does not have any nexus with the object sought to be achieved and hence, does not meet the requirement of said action being in conformity with the requirement of Article 14 of the Constitution of India. Drawing our attention to a division bench judgment of this court in the case of ***Health-O-Wonder Private Limited Vs. The Commissioner, Medical Education and Ayush & Ors.***¹, it has been submitted by Mr.Jagtiani that even in tender matters, State action has to be necessarily free from arbitrariness and irrationality otherwise the same cannot be sustained. Other learned Counsel representing the petitioners have adopted the submissions made by Mr.Jagtiani.

18. In addition to the submissions made by Mr.Jagtiani,

¹ **decided on 14th March 2024 in wp No.2445 of 2024**

Mr. Girish Godbole, learned Senior Advocate appearing for the petitioner in writ petition (ST) Nos.21119 of 2024 and 21115 of 2024, has submitted that it is settled law that if there are essential conditions, the same must be adhered to; and further that if there is no power of general relaxation, however, if a deviation from a condition is made in relation to all the parties, ordinarily power of relaxation may be held to be existing. To advance this submission, Mr.Godbole has relied on paragraph 21 of the judgement of the Hon'ble Supreme Court in the case of ***Municipal Corporation, Ujjain and Anr. Vs. BVG India Ltd. & Ors.***², which is quoted hereunder:

21. *Likewise, in B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548] , this Court while summarising the scope of judicial review and the interference of superior courts in the matter of award of contracts, observed thus:*

"65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

- (i) if there are essential conditions, the same must be adhered to;*
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;*
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;*

² **(2018) 5 SCC 462**

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

19. He has further relied on the supreme court judgement in the case of ***Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation & Ors.***³ and submitted that ordinarily, the Courts would not, though interfere with the matters of administrative action, however, if the Government action is found to be arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is found to be *mala fide*, interference by the Court in administrative action is permissible. Paragraph 11 of the said judgment relied on by Mr. Godbole is extracted hereinbelow:

"11. *Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy*

³ (2000) 5 SCC 287

adopted has no nexus with the object it seeks to achieve or is mala fide."

20. On the strength of the aforesaid submissions, the petitioners have thus urged that the impugned condition no. PQ5 being absolutely arbitrary, irrational and having no nexus with the object sought to be achieved, deserves to be quashed.

21. Learned Counsel for the petitioners have also prayed, in the alternative, that the petitioners may be permitted to participate in the tender process with a direction to respondents to accept their technical bid without insisting upon the impugned condition No. PQ5. It has also been prayed that, alternatively, respondents may be directed to invite fresh tenders for supply of food kits for Gauri Ganapati festival in the Financial Year 2024-2025.

(D) Submissions made on behalf of State Respondents:

22. Dr. Birendra Saraf, Learned Advocate General, along with Mr. O. A. Chandurkar, Learned Additional Government Pleader representing the State Respondents has opposed the prayers made in the writ petitions denying the contentions of the petitioners that the impugned condition No. PQ5, in any manner,

suffers from the vice of either arbitrariness or irrationality. He has argued, *inter alia*; that considering the volume of work required to be undertaken under the subject tender, requirement of experience of providing 300 laborers at 70 different locations is only in furtherance of ensuring that the supplies to be made by the supplier reach the beneficiaries in time without any hassle. He has drawn our attention to the scope of our work as described in clause 7 of RFP and has submitted that the said clause gives "indicative scope of work" for supply of goods under the subject tender and accordingly, in his submission, he has submitted that the logistic responsibilities of the supplier cannot be said to be confined only to packaging, handling, loading, transporting and delivering the goods to the designated godowns. Learned Advocate General, thus, states that unloading is, though, specifically not provided as one of the logistic responsibilities in the scope of work, however, considering the mammoth task which will be required for distribution of 1,70,82,086 number of food kits during Gauri Ganapati festival throughout all the districts in the State, the State may require the supplier to have the experience of providing at least 300 laborers at 70 different locations.

23. He has also submitted that supply of such food kits during such festivals is a regular feature which is undertaken by the State in past and since in the past supplies made during such occasions, various complaints were received of untimely delivery and distribution of food kits, the State authorities in their wisdom thought it proper to put a condition of experience of providing 300 labourers at 70 different locations. He has also submitted that this figure of 70 locations bears a rationale for the reason that it has been thought proper and appropriate by the State authorities to have such number of locations considering the fact that the State of Maharashtra comprises of 35 Districts and for smooth supply and distribution of food kits, at least 2 locations in each District may be required.

24. Dr. Birendra Saraf has also argued that scope of judicial review of administrative action of the State in the matters relating to tenders is very limited. He has further stated that tendering authority is the best judge of the conditions to be stipulated in a tender for the reason that it knows better the nature of work, logistics involved therein and yardsticks to judge the capacity of a tenderer to execute the work and accordingly,

interference in a tender condition is not permissible unless it is found to be absolutely arbitrary or it suffers from the vice of *mala fide*. It is his submission that the impugned tender condition in the subject tender has been provided for to evaluate the capacity of the supplier to execute the work and having regard to the volume of work to be executed pursuant to the subject tender, the impugned tender condition cannot be said to be arbitrary or irrational. He has, thus, urged the Court to dismiss the writ petitions at their threshold.

(E) DISCUSSION:

Scope of interference by this Court under Article 226 of the Constitution of India, in tender matters:

25. Hon'ble Supreme Court in a latest judgment in the case of ***Subodh Kumar Singh Rathour Vs. Chief Executive Officer & Ors.***,⁴ after reviewing the entire law on the subject, has come to a conclusion that there has been a considerable shift in the scope of judicial review by the Courts in respect of contractual disputes where one of the parties is State or its instrumentality. It has been observed by the Hon'ble Supreme Court that where State action is challenged on the ground of

⁴ **2024 SCC OnLine SC 1682**

arbitrariness, unfairness and unreasonableness, the State would be under an obligation to comply with the basic requirements of Article 14 of the Constitution and not act in an arbitrary, unfair or unreasonable manner. The Hon'ble Supreme Court has further emphasized that there is a jural postulate of good faith in business relations and undertakings which is given effect to by preventing arbitrary exercise of powers by the public functionaries in contractual matters with private individuals.

26. The Hon'ble Supreme Court in ***Subodh Kumar Singh Rathour (supra)*** has further emphasized that in matters relating to modalities of a contract, such as required work, execution methods, material quality, timeframe, supervision standards and other aspects impacting the purpose of tender, the Court usually would refrain from interference. Further observation in this regard made by the Hon'ble Supreme Court is that stipulations or terms of the underlying purpose of the contract are part of a consensual aspect which need not be entertained by the Court in its jurisdiction and the parties may be relegated to private law remedies for the reason that the judicial review does not extend to fixing the contractual stipulations but it only ensures that the public authorities act

within their power.

27. Laying down the test for interference in such matters, Hon'ble Supreme Court has further observed that the difference between private law element and public law element in such matters should be assessed by ascertaining whether the dispute or the controversy pertains to consensual aspect of the contract or tender or not and that judicial review is permitted only to prevent arbitrariness and to ensure that public authorities do not abuse their powers even in contractual transactions. The apex Court further observes in ***Subodh Kumar Singh Rathour (supra)*** that ordinarily, the disputes arising purely out of contracts are not amenable to writ jurisdiction, however, having regard to the obligation of the State to act fairly, it is well settled that when contractual power is being used for public purpose it is certainly amenable to judicial review. Paragraph 56 to 59 of the said report are relevant in the context of the facts of this case, which are reproduced hereunder:

***“56.** What can be discerned from the above is that there has been a considerable shift in the scope of judicial review of the court when it comes to contractual disputes where one of the parties is the State or its instrumentalities. In view of the law laid down by this Court in >ABL (supra), Joshi Technologies (supra) and in M.P. Power (supra), it is difficult to accept the contention of the respondent that the writ petition filed by the appellant before the High Court was not maintainable and the relief prayed for was rightly declined by the High*

Court in exercise of its Writ jurisdiction. Where State action is challenged on the ground of being arbitrary, unfair or unreasonable, the State would be under an obligation to comply with the basic requirements of Article 14 of the Constitution and not act in an arbitrary, unfair and unreasonable manner. This is the constitutional limit of their authority. There is a jural postulate of good faith in business relations and undertakings which is given effect to by preventing arbitrary exercise of powers by the public functionaries in contractual matters with private individuals. With the rise of the Social Service State more and more public-private partnerships continue to emerge, which makes it all the more imperative for the courts to protect the sanctity of such relations.

57. *It is needless to state that in matters concerning specific modalities of the contract — such as required work, execution methods, material quality, timeframe, supervision standards, and other aspects impacting the tender's purpose — the court usually refrains from interference. State authorities, like private individuals, have a consensual element in contract formation. The stipulations or terms in the underlying contract purpose are part of the consensual aspect, which need not be entertained by the courts in writ jurisdiction and the parties may be relegated to ordinary private law remedy. Judicial review does not extend to fixing contract stipulations but ensures that the public authorities act within their authority to prevent arbitrariness.*

58. *Thus, the demarcation between a private law element and public law element in the context of contractual disputes if any, may be assessed by ascertaining whether the dispute or the controversy pertains to the consensual aspect of the contract or tender in question or not. Judicial review is permissible to prevent arbitrariness of public authorities and to ensure that they do not exceed or abuse their powers in contractual transactions and requires overseeing the administrative power of public authorities to award or cancel contracts or any of its stipulations.*

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."*

emphasis supplied

28. In ***Subodh Kumar Singh Rathour (supra)***, Hon'ble Supreme Court has also touched upon the contours of arbitrariness in State action in contractual disputes and has

observed that whether an action is arbitrary or not, has to be answered on the facts and circumstances of a given case and an obvious test to be applied in such matters is to see whether there is any discernible principle emerging from the act complained of and if it is so found, it has to satisfy the test of reasonableness. The Court, further observes that every State action must be informed by reasons. In securing the balance between accountability and autonomy of State action it has also been observed by the Hon'ble Supreme Court in ***Subodh Kumar Singh Rathour (supra)*** that the balance between accountability and autonomy of State action should be maintained for ensuring the efficiency in administration. The Court further emphasizes that either would impinge upon public efficiency. The Court has also observed that undermining the accountability would give immunity to the State to act as it pleases.

29. It has also been observed by the Hon'ble Supreme Court in ***Subodh Kumar Singh Rathour (supra)*** that the Court should carefully attend to the facts and circumstances of the case to find out whether the action complained of unerringly points to arbitrariness. The Court further observes that another

way to assess if the impugned action on the part of the State authorities is arbitrary or not, is by way of scrutinizing the reasons assigned by the State to such an action which process will involve analyzing whether the reasons given genuinely form part of the decision-making process. In other words, the Court states as a principle of law in the said judgment that the question to be answered in such case is whether the impugned decision is based on valid considerations. Paragraph 65 to 71 of the judgment in the case of **Subodh Kumar Singh Rathour** (*supra*) are also relevant to be quoted which run as under:

"65. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned action is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, the performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you.

66. Control of administrative discretion is an important concern in the development of Rule of Law. According to Wade and Forsyth, the Rule of Law has four meanings, and one of them is that "government should be conducted within a framework of recognized rules and principles which restrict discretionary power".

67. To enthuse efficiency in administration, a balance between accountability and autonomy of action should be carefully maintained. Overemphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to act as it pleases with the public at whim or vagary. Whether the

public authority acted bona fide would be gauged from the impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness and reasonableness. Test of reasonableness is more strict. The public authorities should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion has been established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [See : Mahesh Chandra v. Regional Manager, U.P. Financial Corporation : (1993) 2 SCC 279]

68. *The dictum as laid in Tata Cellular v. UOI reported in (1994) 6 SCC 651 is that the judicial power of review is exercised to rein in any unbridled executive functioning. It was observed that the restraint has two contemporary manifestations viz. one is the ambit of judicial intervention and the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. It was held that the principle of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It was held that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. It was held that the duty of the court is to confine itself to the question of legality and its concern should be whether a decision-making authority exceeded its powers; whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached or, abused its powers. The grounds upon which an administrative action can be subjected to judicial review are classified as illegality, irrationality and procedural impropriety. In that very decision, while deducing the principles from various cases referred, it was held that the modern trend points to judicial restraint in administrative action; that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made; that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; and, that the government must have freedom of contract, i.e. a free-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury*

principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides. Moreover, quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

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?*

30. Referring to an earlier judgment in the case of **Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517**, Hon'ble

Supreme Court in the case of ***Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors.***⁵ has summed up the principles to be applied by the Court when it is faced with a challenge to a State action in contractual/tender matters. Paragraphs 23 and 24 of the said judgment are extracted hereinbelow:

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.*

24. *Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*

⁵ (2012) 8 SCC 216

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

Emphasis supplied

31. Thus, one of the considerations which ought to weigh with the Court while considering the matters like the present one, is as to whether the public interest is affected. Hon'ble Supreme Court in **Michigan Rubber (India) Ltd. (supra)**, has observed that the Court, before interfering in the tender or contractual matters, should pose to itself not only a question as to whether the process adopted or decision made by the authorities was mala fide or is intended to favour to someone or the process or decision made is arbitrary or irrational but it should also pose a question whether the public interest is affected. Thus, the public interest is one of the primary considerations which should be taken into account by a Court before interfering in a tender matter. Hon'ble Supreme Court in paragraph 24 of the judgment in the case of **Michigan Rubber (India) Ltd.** has categorically held that if answers to both the

questions as spelt out in the said paragraph are in negative, then there should not be any interference in tender matters under Article 226 of the Constitution of India.

Emphasis supplied

32. In Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd. and Anr.⁶, Hon'ble Supreme Court has quoted with approval the judgment in the case of ***Silppi Constructions Contractors Vs. Union of India (2020) 16 SCC 489.*** In ***Silppi Constructions Contractors (supra)***, the Apex Court has held that *the power of judicial review in such matters should be exercised with restraint and caution and that need for overwhelming public interest to justify judicial intervention in the matters of contract involving State instrumentalities has to be given due weightage.* The Supreme Court further observes that the tendering authority is the best judge of its requirements and therefore, the Court's interference should be minimum, that is to say interference is permissible only to prevent arbitrariness, irrationality, bias, *mala fide* or perversity. Paragraph 10 of Balaji supra is extracted hereinbelow:

⁶ **2022 SCC OnLine SC 1967**

"10. *In the case of Silppi Constructions Contractors v. 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."*

33. The scope of interference by High Court under Article 226 of the Constitution of India in tender/contractual matters was discussed by Hon'ble Supreme Court in ***Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others***⁷, where it has been held that writ Court, ordinarily should refrain itself from imposing its own decision over the decision of the tendering authority as to whether or not to accept the bid of a tenderer unless something very gross or palpable is found. The apex Court further observes in the said judgment that to set at naught the entire tender process at the stage when the contract is well underway, would

⁷ **2023 SCC OnLine SC 671**

not be in public interest and that initiating fresh tender process at this stage may consume lot of time and loss to the public exchequer to the tune of crores of rupees. The Court has further observed that financial burden/implications which the State may have to meet with if the Court directs for issuing a fresh tender, should be one of the guiding factors that should be kept in mind by the Courts. In ***Tata Motors Limited (supra)***, the Hon'ble Supreme Court has gone to the extent of laying down the principle that even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point and that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. The Apex Court has also laid down that only when the Court comes to a conclusion that overwhelming public interest requires interference, the Court should interfere. It has also been held that if the decision complained of is in public interest the Court will not interfere by exercise of powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The Court

also stated in this judgment that power of judicial review will not be invoked to protect private interest at the cost of public interest. Paragraph 52 to 54 of **Tata Motors Limited (supra)** are extracted hereinbelow:

"52. Ordinarily, a 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 unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates v. Union of India*, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

54. As observed by this Court in *Jagdish Mandal v. State of Orissa*, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of

judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

Emphasis supplied

34. Having noticed the principles evolved by the Hon'ble Supreme Court in the aforementioned judgments relating to scope of interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India in tender or contractual matters where the State or its instrumentality is party, we will now discuss as to whether any interference in these petitions will be in public interest and further as to whether the impugned tender condition No.PQ5 is so irrational and arbitrary that it vitiates the entire tender process.

35. The supplies of food kits are to be made for distribution during Gauri Ganpati festival which is celebrated in the entire State of Maharashtra. The said festival is to commence from 7th September 2024. The volume to be supplied is 1,70,82,086 food kits which is a huge number. The task to be performed by the selected bidder for executing the work in reference to the subject tender is through-out the State in all its districts at various destinations where the festival is to be held and the work to be executed for distribution will necessarily involve firstly;

procurement of huge quantity of the food items, their packaging, loading to supply vehicles and transportation to the designated places and thereafter unloading. Once the supplies of these food items reach the designated godowns maintained by the Government/semi-Government agencies, the food kits are to be unloaded and thereafter distributed amongst the beneficiaries. The task, thus, is humungous and ultimate goal of the scheme under which the food items are to be distributed is to benefit the beneficiaries, that too in a limited period of time since as per the RFP, supplies are to be made by the successful bidder within 30 days from the date work order is issued.

36. Festival is to commence from 7th September 2024 that is to say, it is hardly a month left when the distribution of food kits are to start and accordingly; having regard to such a short time left for distribution of food kits in terms of the subject tender, unless we find that the impugned tender condition No.PQ5 is manifestly arbitrary or irrational, in our considered opinion, interference in the instant matter at this juncture would not be warranted as it will not be in public interest. We have already noticed that the Hon'ble Supreme Court in ***Tata Motors Limited (supra)*** has observed that even when some defect is

found in the decision making process the Court must exercise its discretionary powers under Article 226 of the Constitution of India with great caution and such powers should be exercised only in furtherance of public interest and not merely on the making out of a legal point.

Emphasis supplied

37. While forming an opinion whether in the present matter the Court should intervene, the larger public interest has to be borne in mind. Hon'ble Supreme Court in ***Tata Motors Limited (supra)*** has also emphasized that the *Court will not interfere in exercise of its powers of judicial review in tender matters even if a procedural aberration or error in assessment or prejudice to a tenderer is made out if the decision complained of is found to be in public interest.* We are, thus, conscious of these principles which entrust the Court to exercise the power of judicial review only to farther the public interest and as such even if some error or prejudice to a tenderer is made out, the powers under Article 226 cannot be invoked to protect private interest at the cost of public interest. We may also notice that in case at the instance of the petitioners the impugned tender condition is quashed by the Court, it would entail a direction to re-tender the subject

work, however, having regard to the constraint of time for the reason that the festival is to start from 7th September 2024, in the facts of the present case any order of re-tendering will not be in public interest.

38. As far as the submissions made by the learned Counsel for the petitioners that the bid should be evaluated without insisting on the impugned tender condition No.PQ5, we may only observe that such a direction, if issued by the Court, would not be in conformity of Article 14 of the Constitution of India as it would create a non-level playing and uneven field for the reason that there may be many entities/parties which could have participated in the tender process had the impugned condition No.PQ5, which provides for having experience of providing 300 labourers at 70 different locations, not been stipulated in the RFP at its inception. In case such a direction is issued, such entities/parties will be deprived of participation in the tender which will be in direct conflict with Article 14 of the Constitution. Such a direction as has been prayed for by the petitioners, in our opinion, will be impermissible to be issued by the Court.

39. Coming to the impugned tender condition No.PQ5, we

would only observe that it is a prequalifying condition and requires bidders to possess the experience of providing 300 labourers at 70 different locations. The task of supplying 1,70,82,086 food kits throughout the State in 35 districts and many taluka places is extremely large and if the State authorities, based on their past experience where they were flooded with complaints of untimely supply and not so smooth distribution of food kits, have prescribed such a condition, in our opinion, same is not liable to be interfered with, especially keeping in view the limited time available within which re-tender process would not be possible and hence, it would not be in public interest to interfere with such condition. Even otherwise, as held by Hon'ble Supreme Court in various judgments including ***Agmatel India Private Limited Vs. Resoursys Telecom and Others***⁸, author of the tender document is taken to be the best person to understand and appreciate its requirements. Thus, in the said view of the matter as well, we are unable to appreciate the prayer made by the petitioners to interfere in the impugned tender condition and the tender process, at this juncture.

⁸ (2022) 5 SCC 362

(F) CONCLUSION:

40. In light of what has been discussed above, we are of the considered opinion that in the facts and circumstances of the case especially having regard to the stage of the tender and the short time left for ensuring timely and smooth supply and distribution of the food kits, any interference in this matter in exercise of our discretionary jurisdiction under Article 226 of the Constitution of India, is not called for.

41. Thus, we are not inclined to interfere in these petitions.

42. Resultantly, the writ petitions are dismissed.

43. However, there will be no order as to costs.

44. Interim Application(s), if any, stand disposed.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)

45. After the judgment was pronounced, Shri Sharan Jagtiani, learned Senior Advocate representing one of the petitioners, prays that for a week or so interim protection may be granted directing the respondents not to open/finalize the bid.

46. We have considered the said prayer, however, we are unable to grant the said prayer for the reasons already assigned in the judgment dismissing the writ petitions.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)