2024:BHC-NAG:9985-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

WRIT PETITION No.5189/2023

WITH

WRIT PETITION No.5726/2023

WRIT PETITION No.5189/2023.

Sai Pond Ash Transporting Company,
Quadripura Barhan Bes, Balapur,
Dist. Akola – 444302 through its
Proprietor Fazal Ur Rehman. …. PETITIONER.

VERSUS

1.Maharashtra State Power Generation
Company Private Ltd., through its
Chief Managing Director, Prakashgad,
Bandra East, Mumbai.

2.Maharashtra State Power Generation
Company Private Ltd., through its
Managing Director (Pra Va Su) Urja
Bhawan, Urja Nagar, Chandrapur-442404.

Respondent No.2 deleted as per order dated 15.09.2023

3.Maharashtra State Power Generation
Company Private Ltd., Urja Bhavan,

Urja Nagar, Paras Thermal Power
Station, Paras deep Vidyut Nagar,
Paras, Dist. Akola, through its
Chief Engineer.

4.The Collector,
Collectorate Akola.

5.The Superintendent of Police,
Office of the Superintend of Police,
Akola.

6.M/s. Balaji Vit Center, (32306),
Balapur, Dist. Akola: 444302,
mahendralavhare@gmail.com;
Mob.No.09422162427.

7.M/s. K.G.N. Ajmeri Building Material
Supplier, (32311), Balapur, Dist. Akola-
444302,
sameeribraheem2710@gmail.com,
Mob.No.09552030133.

8.M/s. Kashelani Corporation, (32346)
Shegaon, Dist. Buldhana,
mfkashelani@gmail.com,
Mob. 09923213786.

9.M/s. Bhushan Manoj Gujrati, (31803),
Balapur, Dist. Akola,
bhushangujarathi9@gmail.com;
Mob.No.07841973548.

10.M/s. Nilesh Sheshrao Wakale (32309),
Shegaon, Dist. Buldhana
nileshwakale07@gmail.com;
Mob.No.09765045270.

Respondent No. 6 to 10 added as per order Dated 08.09.2023

11.Afsar Mohammad Yusuf,
Prop. Mohammad Afsar Construction,
Aged about 52 yrs., Occ. Business,
R/o. Ballochpura, Tq. Balapur,
Dist. Akola – 444302.

Respondent No. 11 added as per order dated 04.01.2024.

... **RESPONDENTS**

Mr. M.M. Agnihotri, Advocate for the Petitioner.
Mr. M.P. Khajanchi, Advocate for Respondent Nos. 1 & 3.
Mr. A.S. Fulzele, Addl. G.P. for Respondent Nos.4 & 5.
Mr. M.I. Dhatrak, Advocate for Respondent Nos. 6 to 10.
Mr. Firdos Mirza, Senior Advocate for Respondent No.11/intervenor.

WITH

WRIT PETITION No.5726/2023

Afsar Mohammad Yusuf,
Prop. Mohammad Afsar Construction
Aged about 52 yrs., Occ. Business,
R/o. Ballaochpura, Tq. Balapur,
Dist. Akola – 444 302. .... **PETITIONER.**

VERSUS

1.Chief Engineer,
MSPGCL, Thermal Power Station,
Parasdeep, Vidyut Nagar, Paras,
Tq. Balapur, Dist. Akola 444109.

2.Chief Managing Director,
MSPGCL, HO Mumbai
H.D.I.L. Building, 4th Floor,
A Wing, Bandra (E),
Mumbai-400015.

3.Sai Pond Ash Transporting Company,
Quadripura, Barhan, Bes, Balapur,
Dist. AkolA 444302, through its Proprietor
Fazal Ur Rehman.

4.KGN Dispoal,
Kasarkhed Chudi Mahal, Balapur,
Dist. Akola, 444302

5.M/s. KGN Ajmeri Building Material Supplier
(32311), R/o. Old City, near Anjuman School,
2nd Main Road, near Khatib Pat Sanstha,
Balapur, Dist. Akola – 444302
M.No.9552030133,
mail id: sameeribhaheem2710@gmail.com.

6.M/s. Kashelani Corporation (32346),
R/o. Shivaji Chowk, near Akot Way Bridge,
Shegaon, Tah. Shegaon, Dist. Buldhana,
M.No.9823213786,
mail id: mfkashdani@gmail.com.

7.M/s. Nilesh Sheshrao Wakale (32309),
R/o. Rokadiya Nagar, near Murarka
College, Shegaon, Tah. Shegaon,
Dist. Buldhana. M.No.9765045270,
mail id: nileshwale07@gmail.com.

8.M/s. Balaji Vit Center (32306),
R/o. near Main Police Station, Balapur,

Respondent Nos. 3 to 9 added as per order dated 01.09.2023.

Corrected address of respondent Nos. 5 to 9 added as per order dated 15.09.2023.

Tah. Balapur, Dist. Akola 444302,
M.No.9422162427,
mail id: mahendarlavhare@gmail.com

9.M/s. Bhushan Manoj Gujrait (31803),
R/o. State Bank Road, near SBI ATM.,
Balapur, Tah. Balapur, Dist. Akola,
444302, M.No.7841973548,
mail id: bhushangujarthi9@gmail.com.

Mr. Firdos Mirza, Senior Advocate for the Petitioner.
Mr. M.M. Agnihotri, Advocate for Respondent No.3
Mr. M.P. Khajanchi, Advocate for Respondent Nos. 1 & 2.
Mr. M.I. Dhatrak, Advocate for Respondent Nos. 5 to 9.
Mr. A.S. Fulzele, Addl.G.P. for Respondent No.4.

CORAM : VINAY JOSHI AND M. W. CHANDWANI, JJ.

DATE : 03.09.2024.

ORAL JUDGMENT (PER VINAY JOSHI, J.) :

Heard. **Rule**. Rule made returnable forthwith. The issue involved in both petitions is one and the same, rather the parties have stalled rival claims against each other, hence for the sake of convenience both petitions are heard together and taken up for final disposal by consent of the learned Counsel appearing for the parties.

2. The petitioner in Writ Petition No.5189/2023 namely Sai Pond Ash Transporting Company (Sai Pond Ash) is a proprietary concern indulging into business of trading in “Pond Ash” which is generated by respondent Nos.1 to 3 in their thermal power generation plant. Respondent Nos.1 to 3 (Writ Petition No.5189/2023) is a Government Owned Company which is in the business of thermal power generation. Respondent Nos.1 to 3 (MAHAGENCO/tenderer) is operating a Power Generation Plant at Paras within the area of Tahsil Balapur, District Akola. The said thermal plant is based on Coal. During power generation process, two types of scrap material yielded “Pond Ash” and “Fly Ash”. Both waste products are being sold by inviting tender by respondent MAHAGENCO.

3. On 04.05.2023 a notice inviting tender was published by MAHGENCO. As per tender notice, estimated quantity of Pond Ash for sale was of 9,00,000 Metric Ton (‘MT’). The upset price was fixed @ Rs. 50/- per MT. Sai Pond Ash was one of the willing buyer of Pond Ash at Paras Thermal Plant. The e-auction was initially

scheduled on 03.06.2023, however it was postponed, and held on 07.06.2023. In all 16 bidders including petitioner Sai Pond Ash had participated in e-auction process. The petitioner has started quoting initial bid for the quantity of 63,000 MT at the rate of Rs. 59/- per MT. However, the last bid of the petitioner was for 8,50,000 MT quantity of Pond Ash @ Rs. 419/- per MT. Petitioner Sai Pond Ash was declared to be the highest bidder (H1). As per tender conditions, two other bidders have matched with the price of the petitioner (H1), whilst others have refused to match the highest price of the petitioner @ Rs. 419/- per MT.

4. On 14.06.2023, respondent MAHAGENCO has issued amended sale order for allotment of total quantity of 7,20,000 MT of Pond Ash to the petitioner as against its bid of 8,50,000 MT. MAHAGENCO has allotted quantity of 45,000 MT of Pond Ash each at the same rate to other two willing bidders on account of matching of the price as per tender condition. Respondent No.11 Afsar Mohammad Yusuf [petitioner of Writ Petition No.5726/2023] is one of the two bidders to whom a quantity of 45,000 MT was

allotted. The other bidder was K.G.N. Company to whom same quantity of 45,000 MT pond ash was allotted as per tender condition.

5. It is petitioner's (Sai Pond Ash) contention that as per tender condition No.16, he being H1 bidder, is initially entitled for maximum 25% legacy available for e-auction, and as per condition No.17, remaining 75% shall be distributed among the bidders who matches the higher rate and would comply the condition of security deposit. It is petitioner’s contention that as per condition No.18, the balance quantity has to be compulsorily lifted by H1 i.e. petitioner. Thus, it is petitioner’s case that he is also entitled for remaining quantity of 90000 MT which is still not allotted.

6. The petitioner would submit that as per tender condition No.16, at first instance, he is entitled for 25% i.e. 2,25,000 MT of Pond Ash whilst remaining 6,75,000 MT shall be distributed among the rest. Since only two bidders i.e. respondent No.11 [H3] and one KGN Company (H2) have lifted 45,000 MT each, the total allocation was to the extent of quantity of 8,10,000 MT i.e. 7,20,000 MT to

petitioner and 45,000 MT each to H2 and H3. The balance would be 90,000 MT of Pond Ash which is yet to be allotted. It is petitioner's contention that in pursuance of condition No.18, he is entitled for the said balance quantity of 90,000 MT of Pond Ash, as per condition No.18 of the tender conditions. The petitioner Sai Pond Ash urged to direct respondents to modify the sale order dated 14.06.2023 by allotting total quantity of 8,50,000 MT instead of 7,20,000 MT.

7. The respondent MAHAGENCO has also allotted 45000 MT to respondent Nos. 6 to 10 each though they initially declined to match the price. According to the petitioner the said allotment is illegal and requires to be set aside. It is petitioner's contention that allotment made to respondent Nos. 6 to 10 would reduce their quantity, hence the said allotment is illegal. In the meantime, respondent No.4 Collector vide communication dated 07.07.2023 directed MAHAGENCO to reserve 3,00,000 MT Pond Ash to be sold to local Kiln owners @ Rs. 100/- per MT. The petitioner contended that the Collector has no authority to issue said communication which would equally reduce the petitioner's quantity

of Pond Ash.

8. Coming to the another Writ Petition No.5726/2023, it is filed by Afsar Mohammad, who is respondent no.11 in connected Writ Petition No.5189/2023 (lead petition). The petitioner Afsar Mohammad has stated preliminary facts regarding publication of online tender notice for 9,00,000 MT legacy ash at PARAS Thermal Power Station. He has reiterated other admitted facts that total 16 bidders have participated in the auction process held on 07.06.2023. Sai Pond Ash was declared to be the highest bidder @ Rs.419/- per MT, who is primarily entitled for 25% of the quantity as per the tender condition. In the said background, it is the case of the petitioner Afsar Mohammad that on 08.06.2023 the respondent MAHAGENCO has issued e-mails to all remaining 15 bidders [including the petitioner Afsar Mohammad], asking their willingness to match the highest bidder's rate i.e. Rs.419/- per MT for quantity of 45,000 MT in terms of the tender condition No.17. The petitioner Afsar Mohammad responded to the mail by showing his willingness to purchase 45,000 MT pond ash by matching the price of the highest

bidder.

9. In pursuance of the acceptance of the petitioner Afsar Mohammad, the respondent MAHAGENCO has issued sale order to him for 45000 MT. Similarly one another bidder namely KGN Company has equally agreed to purchase 45,000 MT of pond ash by matching the aforesaid price. Thus, the respondent has issued sale orders to both of them for a quantity of 45,000 MT each. The petitioner Afsar Mohammad, has deposited the security amount within the stipulated period.

10. It is the contention of the petitioner Afsar Mohammad, that rest of the bidders [13 in numbers] have not shown interest in purchasing the pond ash by matching the highest price, as either they have communicated their refusal or had not responded to the e-mail offer of the respondent MAHAGENCO. In such a background it is the case of the petitioner Afsar Mohammad that as per tender condition No.17, the remaining quantity i.e. 75% of the legacy ash available for e-auction is required to be distributed amongst

others i.e. in between the petitioner Afsar Mohammad and KGN Company, to whom 45,000 MT each was already allotted. In other words, the petitioner would submit that as per the tender condition No.17, the petitioner is entitled for 37.5% of the balance quantity i.e. equal distribution of remaining 75% of the quantity in two willing bidders. The petitioner would submit that despite following tender conditions, the respondent under misconception has allotted 80% quantity to Sai Pond Ash, which is arbitrary and illegal. It is further submitted by the petitioner Afsar Mohammad that Sai Pond Ash [H1 bidder] is only entitled for 25% of the legacy ash i.e. 2,25,000 MT as per tender condition No.16. The remaining quantity ought to have been distributed amongst only two willing bidders i.e. the petitioner Afsar Mohammad and KGN Company in equal proportion, which the authority did not done.

11. The petitioner Afsar Mohammad has also urged that for violation of the tender condition, Sai Pond Ash – H1 bidder has to be disqualified from the process. Despite repeated reminders Sai Pond Ash has not deposited the requisite amount and therefore, it is dis-

entitled and not eligible for the allotment of any quantity. Another challenge raised by the petitioner Afsar Mohammad, is that during the process, the respondent MAHAGENCO has additionally allotted 45,000 MT pond ash to 5 bidders, who initially refused to accept to match the price. Therefore, these 5 bidders are not entitled for allotment of any quantity. The petitioner Afsar Mohammad has also raised a challenge to the letter of Collector for allotting 3,00,000 MT pond ash to the local brick owners. For these reasons the petitioner Afsar Mohammad has claimed the following reliefs :

> *"A] It is thus most humbly prayed that the Hon'ble Court be pleased to disqualify the highest bidder and one other bidder who failed to deposit the amount as per sale order.*
>
> *B] The Hon'ble Court be pleased to issue the appropriate writ direction or order to Respondents directing to cancel the allocation to five bidders.*
>
> *C] The Hon'ble Court be pleased to issue the appropriate writ direction or order to Respondents directing not to allot the pond ash to any association, more specifically at the rates below petitioner.*
>
> *D] The Hon'ble Court be pleased to issue the appropriate writ direction or order entire pond ash to the Petitioner who has fulfilled all the terms and conditions within the*

time period prescribed by Respondents.

E] Pending final decision of this Petition, the Respondent be restrained from providing pond ash to any other the bidders/union.

F] Costs of the petition be awarded to the petitioner.

G] Any other relief, which the Hon'ble High Court deems fit and expeditious be also be granted to the petitioner."

According to the petitioner since H1 bidder Sai Pond Ash has violated the tender condition of depositing amount within the stipulated period, it is liable for disqualification and the entire pond ash should be allotted to him i.e. 100% pond ash.

12. Both petitions have been resisted by the respondent MAHAGENCO on various grounds. Apart from the technical objection, it is contended that multiple challenges have been raised in both petitions which cannot be entertained in single writ jurisdiction. Several disputed question of facts are involved. Moreover, the tender document contains an Arbitration clause, which ought to have been invoked. The objection regarding mis-joinder and non-joinder of necessary parties has been raised, however, during the pendency of the

petitions, necessary parties have been added.

13. The respondent MAHAGENCO primely canvassed that petitioners have suppressed material facts, therefore they are not entitled for the discretionary relief. In particular, petitioners have entered into an agreement dated 04.07.2023 with MAHAGENCO, however, the same was suppressed. Petitioners have consented for lifting of the quantity as per their agreement, as well as they consented to lift the allotted quantity by issuance of letter, and thus, they are estopped from raising challenge. It is also submitted that the contract was concluded, which cannot be reopened. It is contended that in pursuance of agreement, from last 9 months the parties are lifting the pond ash, therefore, the said position cannot be reversed. Moreover, by citing various decisions, it has been argued that the writ Court should be slow in interpreting the terms of tender/contract. Petitioners have accepted and acted upon the sale orders for lifting of definite quantity of pond ash, therefore, they cannot claim any relief.

14. On facts it is contended that after declaring Sai Pond Ash

as H1 bidder, they had sent e-mails to remaining 15 bidders calling their willingness to purchase 45000 MT pond ash by making equal distribution, by way of matching the price of H1 bidder. The respondent MAHAGENCO has received reply of 4 bidders out of 15 bidders that they are not interested in purchasing the pond ash by matching the price of H1 bidder. 7 bidders have not responded, whilst 2 bidders though initially agreed, however, did not come forward to deposit the security amount, and in one way declined the offer. In the circumstances, as per tender condition No.16, initially 25% of the legacy pond ash i.e. 2,25,000 MT was allotted to Sai Pond Ash [H1 bidder]. Since the remaining 75% of the quantity of 6,75,000 MT was to to be distributed by equal distribution amongst 15 bidders, offer was sent to each one to buy 45,000 MT quantity. Afsar Mohammad and KGN Company accepted the offer, deposited the security amount and accordingly sale orders have been issued to them. Out of the balance quantity of 65%, since two more bidders have shown their inclination to purchase, 10% quantity i.e. 90,000 MT was kept balance and as per condition No.18 the remaining balance quantity of 4,95,000 MT was additionally allotted to the Sai Pond Ash, and thus, the allotment made to Sai Pond Ash is proper.

15. So far as the subsequent allotment made to 5 more bidders, it is contended that the said allotment was not from the quantity for which the e-tender process was undertaken, meaning thereby, it was of some extra quantity derived later. Therefore, both petitioners have no right to claim any relief in that regard. Likewise, it is contended that though the Collector has directed to reserve 3,00,000 MT of pond ash, however, the Collector has no authority to that extent, and that does not pertain to e-auction process.

16. The real dispute revolves in between the petitioner Sai Pond Ash and another petitioner Afsar Mohammad. Though multiple reliefs have been claimed, the real dispute is as to who is entitled for the balance quantity of 90,000 MT. Both have raised their claims by justifying their respective stand. In order to appreciate the rival claims which are essentially based on the tender condition, we prefer to reproduce the tender conditions Nos. 16 to 18, as below.

> *"16. Maximum 25% of legacy ash available for e-auction shall be allotted to bidder who quote highest rate (H1) for a contractual period.*
>
> *17. Remaining quantity i.e. 75% of legacy ash available for e-auction shall be distributed properly among the bidders who have matched highest rate (H1) and submitted payment of security deposit considering demanded quantity and remaining available quantity for contractual period.*
>
> *18. H1 Bidder will have to lift compulsorily, all balance quantity, if proportionate quantity is balance."*

It is the contention of the petitioner Sai Pond Ash, that as per condition No.18, he is entitled for entire balance quantity. To simplify the stand of Sai Pond Ash, it can be stated that as per condition No.16, at first place he is entitled to 25% of the pond ash i.e. 2,25,000 MT pond ash out of total quantity of 9,00,000 MT, and then as per condition No.18 balance quantity. It is argued that though offer was given to remaining 15 bidders, however, only 2 bidders i.e. Afsar Mohammad and KGN Company have accepted the offer in real sense to whom 5% [each] was allotted, and thus, the balance quantity i.e. 5,85,000 MT ought to have been allotted to him, in addition to his initial quantity of 2,25,000 MT, which comes to 8,10,000 MT.

Per contra, Afsar Mohammad to whom 45,000 MT was allotted, has claimed that in terms of condition No.17, after allotment of initial 25% i.e. 2,25,000 MT to the petitioner, he along with another bidder KGN Company are entitled for remaining entire 75% in equal proportion. Moreover, he took a stand that since Sai Pond Ash has not deposited the requisite amount within the stipulated period, it is disqualified. Hence entire 100% of Ash quantity shall be allotted to him. It is to be clarified that another bidder namely KGN Company to whom 45,000 MT was allotted, who is sailing in the same boat like Afsar Mohammad, did not raise demand for additional quantity.

17. Though the petitioner Sai Pond Ash would submit that initially they were not aware about the entire quantity of pond ash, however, it reveals from the petition itself, that they were well aware about the total quantity of 9,00,000 MT on the basis of which the claim is made. Undisputedly, the petitioner Sai Pond Ash entered into

an agreement on 04.07.2023 with the respondent MAHAGENCO for allotment of 7,20,000 MT quantity. Not only that by communication dated 18.09.2023, petitioner was permitted to lift 7,20,000 MT quantity of pond ash at Paras Thermal Power Station, which he accepted. In the said background, the claim of Sai Pond Ash is to be assessed.

18. For the sake of convenience the availability of pond ash as per tender notice and its distribution made so far, is placed in tabular form, which is as under :

Sr.No.	Bidder	Pond Ash Allotted (In Metric Tonnes)	Percentage.
As per Tender Notice (Available at the time of Auction Pg.351)		9,00,000 MT	100%
1.	H1 Bidder	7,20,000 MT	80%
2.	H2 Bidder	45,000 MT	5%
3.	H3 Bidder	45,000 MT	5%
Balance		90,000 MT	10%

19. It is not in dispute that the petitioner Sai Pond Ash is the highest bidder (H1), who has quoted highest rate of Rs.419/- per MT

and his bid capacity was 8,50,000 MT. It is not in dispute that besides petitioner Sai Pond Ash other 15 bidders have participated in the process. There is no dispute that KGN Company was H2, whilst Afsar Mohammad was H3 to whom on their consent 45,000 MT was allotted. There is no dispute that out of remaining 13 bidders, 4 have replied that they are not interested, 7 did not responded to the e-mail, whilst 2 bidders initially agreed, but, since had not deposit the security amount, they were out of fray. In the light of this factual position and settled legal norms in the field, the matter requires scrutiny.

20. We have also kept in mind that e-auction was finalized on 07.06.2023, whilst vide communications dated 18.09.2023, permission for lifting pond ash was issued and the process of lifting pond ash is going on till date. Though contract was for a period of one year, however, two months period was extended. But, the fact remains that from 18.09.2023, lifting process has already began.

21. We have gone through the various decisions cited by the parties to substantiate their respective stand. More particularly the

respondent MAHAGENCO has relied on various decisions of Supreme Court to impress that interference in contractual matters shall be very minimal. In the matters relating to tender or award of contract of commercial nature, the Court should not exercise powers of judicial review even if a procedural error in assessment had occurred.

22. In order to emphasize restricted scope of interference in contractual matters, reliance is placed on the decision of the Supreme Court in case of **Jagdish Mandal Vs. State of Orissa and ors., (2007) 14 SCC 517** with special emphasis to paragraph no.22 which reads as below:-

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to*

award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. 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. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

> *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.'*

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

23. It is submitted that the tenderer would be in right position to interpret the terms of tenderer. Mere disagreement with decision making process is no reason for the Courts to interfere. For this purpose, reliance is placed on the decision of the Supreme Court in case of **Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and another, (2016) 16 SCC 818** with emphasis to paragraph no.15, which reads as below:-

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that

> *the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."*

24. On the same line, reliance is placed on the decision of the Supreme Court in case of **Silppi Construction Contractors Vs. Union of India and anr., (2020) 16 SCC 489** of which paragraph nos.19 and 20 read as below:-

> *"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal*

of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

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."*

25. Similarly reliance is also placed on the decision in case of **Utkal Suppliers Vs. Maa Kanak Durga Enterprises and ors., (2021) 14 SCC 612** wherein the law laid down in case of Silppi (*supra*) has been reiterated with special reference to above quoted paragraph no.20.

26. It is submitted that the High Court in writ jurisdiction shall not act like a Court of appeal over the decision of competent authority since tenderer is best judge of its requirements, therefore interference has to be very minimal. In this regard the reliance is placed on the decision of the Supreme Court in case of **State of Punjab and ors. Vs. Mehar Din, (2022) 5 SCC 648**, of which the relevant paragraph nos.20 to 22 are reproduced as under:-

"20. The scope of judicial review in the matters of tenders/public auction has been explored in depth by this Court in a catena of cases. Plausible decisions need not be overturned and, at the same time, latitude ought to be granted to the State in exercise of its executive power. However, allegations of illegality, irrationality

and procedural impropriety would be enough grounds for Courts to assume jurisdiction and remedy such ills.

21. In Tata Cellular v. Union of India it was held that judicial review of government contracts is permissible in order to prevent arbitrariness or favouritism. It was fearlessly opined in this case as under:-

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. 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.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is

a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."
(emphasis in original)

22. The exposition of law on the subject has been consistently followed by this Court even in the later decisions holding that superior Courts should not interfere in the matters of tenders, unless substantial public interest was involved or the transaction was malafide. It was consistently stressed by this Court that the need for overwhelming public interest should always be kept in mind to justify judicial intervention in contracts involving the State and its instrumentalities and while exercising power of judicial review in relation to contracts, the Courts should consider primarily the question whether there has been any infirmity in the decision-making process."

27. The last reliance is on the decision of **Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and ors., 2023 SCC Online SC 671** to contend that the Constitutional

Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. The observation made in paragraph no.48 reads as below:-

> *"48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big*

> *blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489)."*

28. Reverting to the tender condition nos. 16 to 18 around which the entire issue revolves, there can be no confusion about tender condition No.16 which lays that H1 bidder shall be allotted maximum 25% of the legacy ash available for e-auction. In other words the available quantity for e-auction was 9,00,000 MT, out of which H1 bidder is entitled for 25% i.e. 2,25,000 MT, for which there is no dispute. The confusion arose, rather it falls for interpretation of condition nos. 17 and 18, which are inter related to each other. Condition No.17 lays that out of balance 75% of the quantity, it shall be distributed "**properly**" amongst the bidders who have matched the highest rate and tendered security deposit for demanded quantity. The term "properly" is to be read in its general sense, which only conveys that in proportion, which means

appropriate distribution. In order to distribute balance 75% [6,75,000 MT], the respondent MAHAGENCO has considered that there were 15 other bidders to whom they had offered equal distribution of remaining quantity of 6,75,000 MT, which comes to 45,000 MT to each bidder. However, the process was not executed in a simplified manner, since only 4 bidders out of 15 have consented, whilst remaining 11 did not. Later on out of 4 consenting bidders, 2 have actually deposited the security amount, whilst 2 though consented, have backed out by their action of not depositing the security amount. Despite such a development, the respondent MAHAGENCO has not reviewed the offer, but, as per initial distribution they issue sale order of 45,000 MT to two willing bidders i.e. Afsar Mohammad and KGN company. However, the respondent MAHAGENCO by deducting the quantity of 4 willing bidders i.e. 45,000 x 4 = 1,80,000 MT, they have allotted the remaining balance quantity of 4,90,000 MT additionally to H1 bidder i.e. 2,25,000 + 4,95,000 total 7,20,000 MT. The said additional allotment was as per condition No.18. However, later on out of 4 willing bidders, two did not comply the condition, and thus 45,000 MT each was allotted to two willing bidders i.e. Afsar Mohammad and KGN Company, in the result 90,000 MT remained balance with the respondent MAHAGENCO for which the dispute.

29. The learned Counsel appearing for the petitioner Sai Pond Ash would submit that as per condition No.17, the proper distribution would be 45,000 MT each to two willing bidders and the remaining entire quantity ought to have been allotted to them, as per condition No.18. Thus, they claim that successful bidder Sai Pond is also entitled for balance 90,000 MT, by virtue of condition No.18.

30. Per contra, the petitioner Afsar Mohammad would contend that the respondent MAHAGENCO has not made proper distribution in terms of condition No.17. According to him, after allotting initial 25% to H1 bidder, the remaining quantity has to be distributed equally amongst the willing bidders in terms of condition No.17. It is argued that the respondent MAHAGENCO has unnecessary considered the existence of remaining 13 bidders by making proportionate distribution of 5% each from the balance quantity of 75% of the total quantity. According to the petitioner Afsar Mohammad, the remaining 75% quantity ought to have divided in equal proportion i.e. 50% to him and 50% to KGN Company, who actually have agreed to buy the quantity in terms of condition No.17 of the tender notice.

31. Our attention has been invited to condition No.6 of the qualifying requirement of the tender condition, which reads as under :

> "*6. All qualifying / participating bidders who matches with the rate of H1 bidder shall be allotted the proportionate of their bidding quantity.*"

This condition provides assistance as to how the distribution shall be made to the remaining bidders in terms of condition No.17. This condition provides relevance of other bidders about their bidding quantity. For our assistance, last bidding quantity of H1 to H3 with last quoted price has been extracted from the record as under :

Sr. No.	Name of Bidder	Last Bid Quantity (in MT)	Last rate quoted (In Rs.)
1.	H1 Bidder Sai Pond Ash Trading Company (Petitioner)	8,50,000 MT	Rs.419/-.
2.	H2 Bidder KGN Disposal.	50,000 MT	Rs.419/-.
3.	H3 Bidder Mohd. Afsar (Respondent No.11)	2,25,000 MT	Rs.290/-.

So far as H2 KGN Company is concerned, his last bidding quantity was only 50,000 MT, to whom already 45,000 MT was allotted, as well as he never claimed additional quantity, thus, for him the chapter is closed. Last bidding capacity of petitioner Sai Pond and petitioner Afsar Mohammad is quite excess then what has been allotted and thus, they are in the fray. In other words, they can lay hand for claiming the balance quantity of 90,000 MT, which is yet to be distributed.

32. As regards to the claim of Sai Pond is concerned, if condition No.17 is implemented in its true letter and spirit, nothing would be remained to give effect to the condition No.18. We fail to understand that as per condition No.18, if the allotment is made of balance quantity of 75% to who so ever, then nothing will remain to give effect. In the circumstance, it is difficult to comprehend as to how again there would be a balance quantity to give effect to condition No.18. Be that as it may, same analogy was implemented by the respondent MAHAGENCO at first place without verifying the willingness of remaining 15 bidders. They have distributed the pond ash equally to the extent of 45,000 MT from 75% balance quantity.

33. As observed in the aforesaid decisions, we are not prepared to comment on the said procedure adopted by the respondent

MAHAGENCO, since they are the best judge to interpret tender conditions. Unless the condition is unjust, arbitrary or favours a particular bidder, we cannot interpret, though some other interpretation may be possible.

34. As regards to the claim of Afsar Mohammad, it is his contention that as per condition No.17, the respondent MAHAGENCO ought to have distributed the entire balance 75% quantity only in two bidders who have actually accepted the offer, as well as deposited the security amount. Thus, according to Afsar Mohammad, the balance 75% quantity i.e. 6,75,000 MT ought to have been equally distributed, meaning thereby 37.5% each to he himself and to KGN Company. As stated above, the method adopted by the respondent MAHAGENCO to give an offer to all 15 persons/ bidders by proportionately distributing balance 75% cannot be irrational. They could have distributed the same at later stage by calling willingness, but, it is a matter of interpretation and as we stated above, it is the domain of the respondent authority, which cannot be faulted unless there is arbitrariness.

35. Be that as it may, now the question is about distribution of 90,000 MT, which is yet a balance. In above background, it needs consideration whether petitioner Sai Pond is entitled or Afsar Mohammad is entitled for that. As noted above in terms of condition No.16, the entitlement of H1 bidder i.e. Sai Pond is restricted to the extent of 25% only. Though condition No.18 permits H1 to lift the balance quantity, however, after making equal distribution as per condition No.17, nothing would remain. We have also considered the bidding capacity of the petitioner Afsar Mohammad, which is much more i.e. 2,25,000 MT then the quantity which was allotted to him. In the circumstances, the balance quantity needs to be allotted [90,000 MT] to Afsar Mohammad by logically interpreting condition No.17 of the tender document.

36. After two months from the allotment, the respondent MAHAGENCO has allotted 45,000 MT to 5 other unsuccessful bidders who initially denied to match the H1 and accepted the quantity which was offered. Despite that, later on again by matching H1 price, 45,000 MT each has been allotted. Both petitioners have challenged said allotment also.

However, the respondent MAHAGENCO made it clear that the said allotment pertains to some other additional pond ash, which was not the part of auction process. Thus, the auction quantity of 9,00,000 MT is intact, therefore, said challenge being out of the purview of the tender process, needs no consideration.

37. Similarly, challenge was raised to the communication dated 07.07.2023, issued by the Collector, directing to reserve 3,00,000 MT pond ash for distributing to local kiln owners @ Rs.100/- per MT. This time also the respondent MAHAGENCO clarified that though it has initially challenged the jurisdiction of the Collector, however, stated that it has no effect on the quantity of 9,00,000 MT to be allotted as per the tender. The challenge to the distribution of pond ash to local kiln owner @ Rs.100/- is kept open, since the said allotment is out of the purview of the existing tender process. Hence, we see no reason to decide the legality of the said communication, as it would not affect the rights accrued under the tender in question.

38. Though Afsar Mohammad challenged the entire allotment of Sai Pond Ash on account of non depositing of security amount within requisite period, however, on repeated request the amount was deposited

and accepted by the respondent MAHAGENCO. The petitioner Sai Pond has shown justification for such delay which has been accepted by the respondent MAHAGENCO, hence, for the said lapse he cannot be disqualified from the entire process. We have taken a special note that admittedly from last 9 months pond ash lifting is going on, which we cannot unsettle on hyper-technicality.

39. The petitioner Sai Pond has claimed the excess pond ash by stating clause no.3.2 of the agreement. He would submit that even the ash which was allotted to 5 others, is excess still he is entitled. However, clause No.3.1 says that there is no assurance to the quantity and moreover petitioner has accepted 7,20,000 MT pond ash.

40. The petitioner Sai Pond Ash has also challenge certain communications issued by the respondent MAHAGENCO principally about allotment of pond ash to project affected persons by a separate Writ Petition No.347/2024. So far as the challenge raised in the said writ petition, which are not dealt with in this judgment, raise a distinct issue which requires separate consideration on its own merits. Therefore, Writ Petition No.347/2024 is being de-tagged for independent adjudication.

41. In view of above, Writ Petition filed by Sai Pond Ash (Writ Petition No.5189/2023) stands dismissed. Writ Petition No.5726/2023 filed by Afsar Mohammad is partly allowed. It is held that the petitioner Afsar Mohammad is entitled for balance pond ash of 90,000 MT @ Rs.419/- per MT. Rest of the prayers stands rejected.

Writ Petition No.347/2024, is de-tagged and is ordered to be listed before appropriate Court.

JUDGE **JUDGE**