IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.01.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE BHARATHA CHAKRAVARTHY

W.A.Nos.180, 175, 201 to 206 of 2024

W.A.No.180 of 2024

1. Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
rep. by its Managing Director
No.144, Anna Salai, Chennai – 600 002.

2. Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
rep. by its Chief Engineer/IT & RAPDRP
No.144, Anna Salai, Chennai – 600 002. .. Appellants

Vs

EFICAA Ensmart Solutions Private Limited
rep. By its Whole Time Director, Rabinder Deshmukh
having office at Fortune 9-Tower 3, Floor 5
6-3-1091/C/1, Raj Bhavan Road
Somajiguda, Hyderabad – 500 082. .. Respondent

Prayer in W.A.No.180 of 2024: Appeal under Clause 15 of the Letters Patent against the order dated 4.1.2024 made in W.P.No.28719 of 2023 by the learned Single Judge.

and batch cases.

For the Appellants in W.A.No.180 of 2024	:	Dr.Abhishek Manu Singhvi, Senior Counsel for Mr.D.R.Arun Kumar
For the Appellants in W.A.Nos.175, 203, 204 and 206 of 2024	:	Mr.P.S.Raman, Advocate General for Mr.D.R.Arun Kumar
For the Appellants in W.A.Nos.201, 202 and 205 of 2024	:	Mr.P.Wilson Senior Counsel for Mr.D.R.Arun Kumar
For the Respondent in W.A.Nos.180, 201, 202 and 205 of 2024	:	Mr.Mukul Rohatgi Senior Counsel for Mr.S.Senthil
For the Respondent in W.A.Nos.175, 203, 204 and 206 of 2024	:	Mr.Srinath Sridevan Senior Counsel for Mr.S.Senthil

COMMON JUDGMENT

(Delivered by *the Hon'ble Chief Justice*)

All these appeals stem up from the common judgment and order delivered by the learned Single Judge dated 4.1.2024. The appeals are based on similar set of facts and involve common question of law and, as such, to avoid rigmarole, are decided by the common judgment.

2. The Ministry of Power, Government of India, launched Revamped Distribution Sector Scheme (RDSS) and issued the operational guidelines for implementation of Smart Metering as one of its components for States Pan-India. The present appellants, on or about 18.8.2023, floated a tender for appointment of Advanced Metering Infrastructure (AMI) Service Provider for Smart Prepaid Metering and Smart System Metering in the appellant/TANGEDCO on Design, Build, Finance, Own, Operate and Transfer (DBFOOT) basis under RDSS through global open tender.

3. Clause 20.1 of the tender document provided for the third stage – reverse bidding. The electronic reverse option shall be conducted on the Network Interface Card (NIC) portal for further reduction in the L1 price. All the technically qualified bidders shall be invited to participate in the e-Reverse Auction. Bid opening price (L1) as shown in the reverse tender auction during reverse tendering in e-procurement is landed price and shall be treated as inclusive of all applicable taxes. The reverse auction price will become the bid opening price for further auction. The last (latest)

successful bid price will be considered as valid price at any point of time during auction. After the auction elapse time, L1 will be determined.

4. The respondents/original writ petitioners challenged the Clause 20.1 of the tender document, i.e., e-Reverse Bidding, by filing writ petitions.

5. The learned Single Judge, under the impugned judgment and order, allowed the writ petitions on the premise that the reverse bidding method is beyond the scope of the Tamil Nadu Transparency in Tenders Act, 1998 (for brevity, "*the Act of 1998*") and the Tamil Nadu Transparency in Tenders Rules, 2000 (for brevity, "*the Rules of 2000*") and also against the Model Standard Bidding Document issued by the REC Ltd.

6. The appellants, who have floated the tender and are respondents in the writ petitions, have impugned the said judgment in the instant appeals.

7. Dr.Abhishek Manu Singhvi; Mr.P.S.Raman; and, Mr.P.Wilson, learned Senior Counsel, in their usual erudition, canvassed the submissions. The substratum of their submissions is culled out as under:

(a) The respondent in W.A.Nos.175, 203, 204 and 206 of 2024 had not participated in the bidding process and, as such, have no *locus standi* to challenge the terms of the tender. The respondent in W.A.Nos.180, 201, 202 and 205 of 2024 is technically disqualified and, as such, is not competent to participate in the tender process. Ergo, the respondents cannot assail the tender conditions. To buttress the said submission, reliance is placed on the decisions of the Delhi High Court in the cases of (i) *Consortium of M/s.Siemens Aktiengesellschaft and Siements Ltd v. Delhi Metro Rail Corporation Ltd., 2013 SCC OnLine Del 1982*, which was affirmed by the Apex Court in the case of *Siemens Aktiengesellschaft and Siemens Ltd v. DRMC Ltd., (2014) 11 SCC 288*; and (ii) *Opaque Infrastructure Pvt. Ltd v. Union of India and* *another, 2015 SCC OnLine Del 8396*.

(b) The Act of 1998 and the Rules of 2000 do not prohibit inviting offers by e-reverse auction. As the Act of 1998 does not prohibit e-reverse auction, it cannot be said that the same is beyond the scope of the Act of 1998 and the Rules of 2000. The Act of 1998 and the Rules of 2000 have to be read harmoniously so as to give effect to it. Section 10(1) of the Act of 1998 permits the evaluation of the tenders in accordance with the procedure and criteria specified in the tender document. Section 16(m) of the Act of 1998 cannot be read to prohibit on-line reverse auction. The same will have to be read in a manner that Section 16(m) of the Act of 1998 permits on-line reverse auction.

(c) Relying on the definition of "tender document" contained in Section 2(i) of the Act of 1998, it is submitted that the tender document includes the procedure and criteria as may be prescribed for evaluation and comparison of tenders, thereby encompassing the methodology of e-reverse auction.

(d) In matters of tender, the court has limited scope of judicial review. To fortify the said submission, reliance is placed on the decisions of the Apex Court in the cases of (i) *Tata Cellular v. Union of India, (1994) 6 SCC 651*; (ii) *Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517*, (iii) *Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Ltd, (2016) 16 SCC 818*; (iv) *Uflex Limited v. Government of Tamil Nadu and others, (2022) 1 SCC 165*.

(e) There are four stages of bidding as per Clause 20.1 read with Exhibit VI of the tender document. In Stage-I, only technical bids are opened to ascertain the technically qualified bidders. Stage-II (First Round Financial Bid). In this stage, financial bids of all technically qualified bids are opened to determine the L1 (first round), which becomes the base price for reverse auction. However, the identity of the L1 bidder is not disclosed. In Stage-III (Second Round Reverse Financial Bid), the second round of financial bid is conducted through e-reverse bidding for further reduction in L1 price discovered at Stage-II. As per Stage-III only, the L1 price (first round) becomes the bid opening price. After stipulated auction time elapses, then final L1 is determined and the L1 identity is revealed. In Stage-IV, the successful bidder is awarded the contract.

(f) The procedure for opening tender under Rule 22(f) of the Rules of 2000 states that tender is opened only when "name and price" is "read aloud". After Stage-II, identity of L1 bidder is not revealed. L1 bid price becomes the bid opening price for Stage-III of all qualified bidders and only at the conclusion of Stage-III process is the tender considered open as the identity and bid price is now revealed. At Stage-II, the identity of any bidder, including L1 is not disclosed. Only the initial bid price is revealed to the qualified bidders. The lowest tender price or final L1 is determined only post Stage-III as the identity of the final L1 bidder is disclosed post Stage-III.

(g) Rule 23 of the Rules of 2000 only interdicts material alterations to tendered prices and revealing of the identity after the tender is opened. Since no tender is opened or declared at Stage-II, Rule 23 of the Rules of 2000 does not apply.

(h) Section 10(3) of the Act of 1998 is inapplicable. The said provision would apply only after the stage of reverse bidding, i.e., after the identity of the final L1 bidder is disclosed. Even after the reverse bidding if TANGEDCO finds that the L1 bidder has quoted higher than the market price, it is only then the TANGEDCO has the power to further negotiate with the successful L1 bidder for a further reduction of the bid price. This has nothing to do with reverse bidding. Section 10(3) of the Act of 1998 would not apply in the present case.

(i) Before floating the tender, a communication was addressed to the Chief Project Manager, REC Ltd, Chennai, thereby intimating that the appellants had decided to incorporate reverse bidding process in the bidding document as being done in few other States to bring down the lowest price. In reply to the said letter of the appellants, the Deputy Manager, REC Ltd, Chennai, did not raise an objection to the same. The terms and conditions of the tender, more particularly of the reverse bidding process, do not violate the Act of 1998 and the Rules of 2000. The learned Single Judge has erred in holding that Clause 20.1 of the tender document is against the Act of 1998 and the Rules of 2000. The Model Standard Bidding Document issued by REC Ltd, is silent with regard to the reverse bidding and there is no provision or bar relating reverse bidding.

(j) The TANGEDCO follows the reverse auction process for more than 13 years for procurement of coal at the lowest price. The Tamil Nadu Government's e-Procurement System contains the provision of floating tenders along with reverse bidding option. For the departments of Government of Tamil Nadu, the reverse auction process is in practice. The Ministry of Power, Government of India, vide letter dated 11.6.2015 has permitted Central PSUs such as NTPC, PGCIL, REC, etc., to make mandatory e-procurements through reverse auction in their bids. Even the CVC guidelines states that e-reverse auction can be done by the departments by themselves.

(k) Interference with reverse bidding process would not only affect the financial prospect of the utility, but also infringes the public interest, i.e., the end consumers who will get cheap smart meters availability. The whole rationale behind e-reverse bidding is to get the most beneficial lowest price for the installation and implementation of Smart Prepaid Meters and Smart System Metering. Section 2(cc) of the Act of 1998 itself states that the lowest tender means the tender, which, on evaluation, is found to be the most beneficial to the procuring entity in financially quantifiable terms.

(l) The purpose of the Act of 1998 is to provide for transparency in the public procurement and to regulate the procedure in inviting and accepting tenders. By adopting the e-reverse auction, the transparency is maintained and the best possible lowest price is sought to be achieved, thereby benefitting the public exchequer.

(m) Some leverage has to be given to the principal to lay down the terms and conditions of the tender. The courts should refrain 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. In support of the said submission reliance is placed on the judgments in (i) *Tata Motors Ltd v. Brihan Mumbai Electric Supply and Transport Undertaking, 2023 SCC OnLine SC 671*; (ii) *Bharat Coking Coal Ltd and others v. AMR Dev Prabha, (2020) 16 SCC 759*; (iii) *Master Marine Services (P) Ltd v. Metcalfe & Hodgkinson (P) Ltd, (2005) 6 SCC 138*; and (iv) *N.G.Projects Ltd v. Vinod Kumar Jain, (2022) 6 SCC 127*.

8. Mr.Mukul Rohatgi, learned Senior Counsel; and Mr.Srinath Sridevan, learned Senior Counsel, appearing on behalf of the respondents, in a lucid manner, put-forth the following propositions:

(a) Section 4 of the Act of 1998 specifies that no tender shall be invited or accepted, except in accordance with the procedure specified in the Act of 1998 and the Rules of 2000. Section 10(3) of the Act of 1998 postulates that if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, the said authority may negotiate for a reduction of price with that tenderer. The negotiation is only with the lowest tenderer and not with any other tenderer.

(b) The concept of e-reverse auction is alien to the Act of 1998 and the Rules of 2000. Section 16 of the Act of 1998 specifies that the provisions of Sections 9 and 10 of the Act of 1998 shall not apply to procurement. Section 16(m) of the Act of 1998 permits on-line reverse auction only in Government e-Marketplace – Special Purpose Vehicle. The present tender is not from Government e-Marketplace (GeM). Wherever on-line reverse auction is permitted is specifically provided under Section 16(m) of the Act of 1998. Unless the Act of 1998 is amended, the appellants cannot resort to on-line reverse auction. The same would be beyond the scope of the Act of 1998 and the Rules of 2000.

(c) In other States, i.e., Karnataka, reverse auction has been introduced in the Act by way of legislative amendment in Section 6A. However, no such amendment has been brought in the Act of 1998 and in the absence thereof, such a concept cannot be read into the statute. In support of the said submission, reliance is placed on the judgment of the Apex Court in the case of *Union of India v. Rajiv Kumar, (2003) 6 SCC 516*.

(d) Rule 29 of the Rules of 2000 specifies that the tenderers who had bid the lowest evaluated price in accordance with the evaluation criteria or the tenderers scoring the highest on the evaluation criteria specified, as the case may be, shall be determined. Rule 23 of the Rules of 2000 provides that no changes/amendments, which materially alter the tendered price, shall be permitted after opening of the tender, except as per the procedure prescribed under Section 10(3) of the Act of 1998. In e-reverse auction, after the rates are quoted and after the technical bids are opened and the financial bids are opened, further opportunity is given to alter the rates. The same would be violative of Rule 23 of the Rules of 2000. If the Act of 1998 and the Rules of 2000 require a particular thing to be done in a particular manner, the same ought to be done in that manner only. Reliance is placed on the following judgments: (i) *Nazir Ahmad v. King Emperor, Vol LX 31 ILR 372*; (ii) *Appu Food Product v. P.Uma Maheshwari, 2019 SCC OnLine Mad 12378*; and (iii) *State of U.P. v. Singhara Singh, 1963 SCC OnLine SC 23.*

(e) As Clause 20.1 of the tender document providing for e-reverse auction is contrary to the Act of 1998 and the Rules of 2000, the same is arbitrary. A tender document containing an arbitrary clause deserves to be quashed and set aside.

(f) The power of judicial review is to check whether the administrative choice or decision is made lawfully and when it is found that the reverse bidding is unlawful, the court cannot exercise discretion and must always uphold the statutory process. Reliance is placed on the decision of the Apex Court in the case of *Jal Mahal Resorts (P) Ltd. v. K.P.Sharma, (2014) 8 SCC 804*; and a decision of the Andhra Pradesh High Court in the case of *Tata Power Renewable Energy Ltd v. Union of India, 2021 SCC OnLine AP 1681*.

(g) Reverse Auction is contrary to the Model Guidelines of the Nodal Agency under the tender, i.e. REC Ltd. Reverse auction is not the answer to secure the best price.

(h) The locus of the respondents cannot be questioned. Reliance is placed on the judgment of the Apex Court in the case of *Bangalore Medical Trust v. B.S.Muddappa, (1991) 4 SCCC 54*. As per the interim order of the learned Single Judge, the opening of the technical bids was subject to the outcome of the writ petitions and as the tender itself is set aside, it is not necessary to challenge the disqualification of the respondents/original writ petitioners during the technical bid.

9. We have considered the submissions canvassed by learned

Senior Counsel for the respective parties.

10. It is trite that in matters of tender this court would not readily exercise its powers of judicial review unless and until it is demonstrated that the condition in the tender document is arbitrary. Arbitrariness is antithesis to the rule of law, justice, equity, fair-play and good conscience. If the terms of the tender are arbitrary or unreasonable, the same can be set aside by the court in exercise of its powers of judicial review.

11. The Apex Court in an epoch-making judgment in the case of *Tata Cellular v. Union of India*, (supra), has laid down the principles to be observed by the courts dealing with the tender documents. The same are 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 or quasi-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."

12. It is upon the touchstone of the aforesaid principles, the matter will have to be decided.

13. The question to be considered is whether Clause 20.1 of the tender document providing the methodology of e-reverse auction is contrary to the Act of 1998 and the Rules of 2000, and *inter alia* is arbitrary.

14. It behooves us to refer to the relevant provisions of the Act of 1998 and the Rules of 2000.

15. Section 4 of the Act of 1998 reads thus:

> *"4. Regulation of Tenders.- No tender shall be invited or accepted by any authority after the commencement of this Act, except in accordance with the procedure specified in this Act and the Rules made thereunder."*

16. Section 10 of the Act of 1998 which stipulates the procedure for evaluation and acceptance of tender is as under:

> *"10. Evaluation and Acceptance of Tender.- (1) The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the tenders in accordance with the procedure and criteria specified in the tender document.*
>
> *(2) After evaluation and comparison of tenders as specified in sub-section (1), the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors specified in the tender document and giving relative weights among them:*
> *Provided that the Tender Accepting Authority shall accept the tender of domestic enterprises, not being the lowest tender, upon satisfaction of such conditions as may be prescribed, in respect only of goods manufactured or produced and services provided or rendered by them, and only to the extent of not exceeding twenty five per cent of the total requirement*

in that procurement, if such domestic enterprise is willing to match the price of the lowest tender:

Provided further that the Tender Accepting Authority shall accept the tender of a department of Government, Public Sector Undertaking, Statutory Board and other similar institutions as may be notified, not being the lowest tender, upon satisfaction of such conditions as may be prescribed, in respect only of goods manufactured or produced and services provided or rendered by them, and only to the extent of not exceeding forty per cent of the total requirement in that procurement, if such tenderer is willing to match the price of the lowest tender:

Provided also that in case of a single procurement, the total procurement under the above two provisos shall not exceed forty percent of the total requirement in that procurement.

Provided also that the Tender Accepting Authority shall accept the tender of the domestic enterprises owned by Scheduled Castes or Scheduled Tribes, not being the lowest tender, upon satisfaction of such conditions as may be prescribed, in respect of goods manufactured or produced and services provided or rendered by them, to the extent of five percent of the total requirement in that procurement, if such enterprise is willing to match the price of the lowest *tender.*

(3) Notwithstanding anything contained in sub-section (2), if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, the said authority may negotiate for a reduction of price with that tenderer.

(4) If at any time before the acceptance of tender, the Tender Accepting Authority receives information that a tenderer who has submitted tender has been banned by any Procuring Entity, the said authority shall not accept the tender of that tenderer even if it may be the lowest tender.

(5) In case where two or more tenderers quoted the same price, the Tender Accepting Authority shall split the procurement among such tenderers taking into consideration the experience and credentials of such tenderers. Where such splitting is not possible or could not be done equally, the said authority shall record reasons for the same.

(6) If the Tender Accepting Authority proposes to

accept the tender as per the provisions of this section, the said authority shall pass orders accepting the tender together with reasons for such acceptance:

Provided that if the tenderer is unable to supply the entire quantity required, the Tender Accepting Authority may follow the fixed rate contract procedure as may be prescribed.

(7) The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers."

17. Section 16(m) of the Act of 1998 mandates as under:

"16. Provisions of this Act not to apply in certain cases.- The provisions of sections 9 and 10 shall not apply to procurement,-

(a) to (l) ....

(m) from the Government e-Marketplace (GeM) - Special Purpose Vehicle through rate contract, on-line bidding, on-line reverse auction and any other mechanism provided by the said Government

eMarketplace - Special Purpose Vehicle, as may be notified by the Government."

18. Rule 23 of the Rule of 2000, which postulates that changes and alterations shall not be permitted after tender opening, is as under:

"23. Changes and alterations not to be permitted after tender opening.- No changes, amendments which materially alter the tendered prices shall be permitted after the opening of the tender, except as per the procedure prescribed in sub-section (3) of section 10 of the Act."

19. Rule 29(1) of the Rules of 2000 is reproduced hereunder:

"29. Determination of the lowest evaluated price.-
(1) Out of the tenders found to be substantially responsive after the initial examination, the tenderers who has bid the lowest evaluated price in accordance with the evaluation criteria or the tenderers scoring the highest on the evaluation criteria specified as the case may be shall be determined."

20. Exhibit-VI of the tender document gives the details of the

reverse bidding. For ready reference, the procedure for e-reverse auction, as detailed in Exhibit-VI, is reproduced below:

> *"2. E-TENDER AND E-REVERSE AUCTION*
> *2.1. In e-tender, price Bids received from Technically Qualified Bidders only will be opened, electronically. Bid prices including taxes, shall be evaluated on the basis of the lowest evaluated total all inclusive price in INR which shall be the opening price for E reverse auction. Technically Qualified Bidders only will be allowed to participate in the E-Reverse auction process.*
>
> *2.2. After opening of the Price Bid, the Bidders who shall become eligible to participate in the Reverse Auction as per the conditions stated in this Document, known as the Qualified Bidders, will be intimated about their qualification through notification on the (https://tntenders.gov.in) website within their secured login as well as a system generated email. It shall be the sole responsibility of the Bidder to regularly check the (https://tntenders.gov.in) website and log in to see whether they have qualified or not. TANGEDCO will not be responsible for non-receipt of email by the*

Bidder and its consequences.

2.3. E-Bidding is the process of inviting binding final price offers from the Qualified Bidders through internet for the purpose of determination of the lowest Bidder (i.e. the Bidder who submits the lower price Bid in the Reverse Auction). During Reverse Auction process, Bidder can change its quoted price from their initial price by a decrement of at least INR 10 Crores (or its multiples) to reduce its total price further. Such changes can be made any number of times within the e-Reverse Auction period.

2.4. The Qualified Bidder will remain anonymous to other Qualified Bidders participating in the electronic Bidding process. The Qualified Bidder will be able to see the prevailing lowest price Bid, but the name of the current L1 Bidder at any point of time will not be displayed. The Qualified Bidder shall have to put its price Bid below the displayed current L1 Bid by a decrement as above to become the L1 Bidder. The lower price obtained after completion of the Reverse Auction Process, shall be the Closing Price and the bidder quoting the same will be considered as the L1 bidder.

> *2.5. The electronic Bidding process will have a scheduled start and close time which will be displayed on screen. A Qualified Bidder will be able to put its price Bid after the start of Bid time and till the close time of electronic Bidding. The current server time (IST) will also be displayed on the screen. In the event a Bid is received during the last 5 (Five) minutes before the scheduled close time of electronic Bidding the close time of electronic Bidding will be automatically extended by 10 (ten) minutes, to give equal opportunity to all other Qualified Bidders. This process of auto extension will continue till there is a period of 10 (ten) minutes during which no price Bids are received."*

21. The instant tender document provides for four stages. The first-stage is the fulfillment of eligibility and qualification requirements and determination of substantial responsiveness to the Request for Proposal (RFP) documents. The second-stage consists of opening of the financial bids of all technically qualified bidders and determination of L1. The third-stage is reverse

bidding. All the technically qualified bidders shall be invited to participate in the e-reverse auction. The bid opening price (L1) as shown in the reverse tender auction during reverse tendering in e-procurement is landed price and shall be treated as inclusive of all applicable taxes. The reverse auction price will become the bid opening price for further auction. The last (latest) successful bid price will be considered as valid price at any point of time during auction. After the auction elapse time, L1 will be determined.

22. In the fourth-stage, the successful bidder shall be awarded the contract.

23. The Apex Court in the case of *NHAI v. Gwalior-Jhansi Expressway Ltd., (2018) 8 SCC 243,* has held that a person who has not participated in the tender process has no right to challenge the conditions of tender. The relevant portion of the said judgment reads thus:

> *"20. .... Only the entities who participate in the tender process pursuant to a tender notice can be*

allowed to make grievances about the non-fulfilment or breach of any of the terms and conditions of the tender documents concerned. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions. At the culmination of the tender process, if the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever."

As such, the respondent in W.A.Nos.175, 203, 204 and 206 of 2024, who had not participated in the tender process, does not possess the *locus standi*.

24. In the matters of tender, some leverage is to be given to the persons floating tenders. The principal is the best person to judge the eligibility. The Apex Court in *Sterling Computers Ltd. v.*

M & N Publications Ltd., (1993) 1 SCC 445, observed as under**:**

> *"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase*

of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

25. The Apex Court in the case of *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, emphatically held that 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 and 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.

26. The Act of 1998 is enacted with an avowed object, viz., to provide for transparency in the public procurement and to regulate the procedure in inviting and accepting tenders and matters connected therewith or incidental thereto. The preamble of the Act specifies the purpose and the object for enactment of the Act of 1998. The preamble of the Act states that the Act of 1998 is enacted so as to (i) maximize economy and efficiency in government procurement; (ii) to foster and encourage effective participation by tenderers in the process of tenders; (iii) to promote healthy competition among tenderers; (iv) to provide for fair and equitable treatment of all tenderers; (v) to eliminate irregularities, interference and corrupt practices in the matters relating to tender processes by providing transparency in such matters; and (vi) to promote the integrity of the process of tenders and to promote fairness and public confidence in the processing of tenders by ensuring transparency in the procedure relating to procurement.

27. The purport of floating tenders is to invite best possible offers through wide competition. The predominant object and the purpose of the Act of 1998 is to ensure transparency in the procedure relating to procurement; to promote fairness and healthy competition. The provisions of the Act of 1998 will have to be interpreted so as to achieve the avowed object of the Act.

28. The provisions of the Act and the Rules should not be given a pedantic interpretation. The e-reverse auction process is an accepted norm in commercial tenders. The e-reverse auction process is introduced so as to get the lowest price from the vying tenderers. The tender document, in its entirety, will have to be considered to conclude about the violation of the Act of 1998 and the Rules of 2000 or otherwise.

29. The procedure, as prescribed, specifies that the qualified bidder will remain anonymous to other participating in the electronic bidding process. The qualified bidder will be able to view the prevailing lowest price bid, but the name of the L1 bidder will

not be displayed. The qualified bidder has to put his price bid below the displayed current L1 bid. The lower price obtained after completion of the reverse auction process shall be the closing price and the bidder quoting the same will be considered as the L1 bidder. It would appear that though L1 price would be noted, the name of the person who has quoted that price would not be displayed.

30. The aforesaid methodology adopted in no manner would prejudice any tenderer. The same is uniform to all the tenderers. It is not advantageous to one and/or disadvantageous to another. On the contrary, the e-reverse bidding process would help in getting the most competitive price, thereby warding off any loss to the public exchequer.

31. Section 10(1) of the Act of 1998 stipulates that an objective evaluation of the tenders ought to be caused taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and

comparison of the tenders in accordance with the procedure and criteria specified in the tender document. The criteria and the procedure to be adopted is the choice of the employer/authority inviting tender. The procedure would be decided by the authority as per its commercial prudence. The authority inviting tender is the best judge of its interest. The ultimate object of the tender would be to get the best competitive price from the responsive tenderers, i.e., the tenderers technically qualified.

32. Rule 23 of the Rules of 2000 relied upon by the respondents herein would not be of any aid to them. Rule 23 of the Rules of 2000 suggests that no changes, amendments which materially alter the tender price shall be permitted after the opening of the tender. In other words, it would mean that once the tenders are opened in the presence of all the parties, no party will be entitled to tamper and/or alter the tender prices. In e-reverse auction, only the L1 rates are notified and thereafter the parties would go below the L1. However, none of the parties would know who the bidder is. As such, in strict sense, it cannot be said that

the tenders are opened. The procedure does not lack transparency, nor it would be prejudicial to the interest of any party and, in fact, would also assist in getting the most competitive price. Rule 23 of the Rules of 2000 cannot be interpreted in a narrow manner as suggested by the respondents/original writ petitioners.

33. The prohibition contained in Rule 23 of the Rules of 2000 thereby not permitting the tenderer to change or amend the tender price after the opening of the tender would mean that once the party has quoted the tender price and after the tender is opened, he would not be permitted to alter the price quoted. The said Rule in no way prohibits e-reverse auction. The tenders cannot be said to be technically opened at the time of disclosing the L1 bid because the name of L1 tenderer is never disclosed. It is through e-process only the L1 price is displayed and the parties are permitted through bid so as to go below the L1 price. In e-reverse bidding process, none of the parties would know who the bidder is and, therefore, it cannot be said that the tenders are opened.

34. Rule 29 of the Rules of 2000 provides that out of the tenders found to be substantially responsive after the initial examination, the tenderer who has bid the lowest evaluated price in accordance with the evaluation criteria shall be determined. Rule 29 of the Rules of 2000 in no way prohibits e-reverse bidding. On the contrary, Rule 29 of the Rules of 2000 proceeds on the premise that the lowest evaluated price has to be determined in accordance with the evaluation criteria, i.e., the evaluation criteria prescribed in the tender document.

35. Section 16 of the Act of 1998 is in the nature of an exemption. It enumerates the circumstances under which Sections 9 and 10 of the Act of 1998 do not apply to the procurement. Under certain eventualities as adumbrated therein, the provisions of Sections 9 and 10 of the Act of 1998 are exempted. Section 16(m) of the Act of 1998 provides for an exemption to those tenders which are placed from the Government e-Marketplace (GeM). The same also provides for the online reverse auction. Section 16 of the Act of 1998 could in no manner be interpreted to mean that the Act of

1998 or the Rules of 2000 prohibits and/or exclude the methodology of e-reverse bidding in the tender process.

36. Sub-section (2) to Section 10 of the Act of 1998 is subject to Sub-section (3). Section 10(1) of the Act of 1998 would give a discretion to the authority inviting tender to evaluate the rates in the tender document and the prevailing market rate for procurement; and compare the tenders in accordance with the procedure and criteria specified in the tender document. Section 10(1) of the Act of 1998 emphasises the discretion of the Tender Accepting Authority to provide for the procedure and criteria in the tender document. Sub-section (2) to Section 10 of the Act of 1998 further provides that after evaluation and comparison of the tenders as specified in Sub-section (1), the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors specified in the tender document. Sub-section (3) of Section 10 of the Act of 1998 further stipulates that if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or

schedule of rates, the said authority may negotiate for a reduction of price with that tenderer.

37. Section 4 of the Act of 1998 cautions that no tender shall be invited or accepted except in accordance with the procedure specified in the Act of 1998 and the Rules of 2000.

38. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The judicial review of the contractual matters has its own limitations. The same is limited to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The object is to check whether the choice of decision is made lawfully. In evaluation tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. Reference can be had to the judgment of the Supreme Court in the case of *Uflex Limited*, supra.

39. The owner should always have the choice and freedom to

provide the eligibility criteria and the terms and conditions of the bid. The court has to give weight to the opinion of the experts in stipulating the terms and conditions of the tender. The court's interference is minimal.

40. From a reading of the Act of 1998 and the Rules of 2000 in its entirety, it does not transpire that the Act and the Rules provide for the specifications or the methodology of inviting tenders. The procedure and criteria to be adopted for finalising the tender document is left to the discretion of the authority inviting offers and/or floating the tenders. The Act and the Rules do not suggest the form of tender, nor it specifies that the tender should be either by two-envelope mode and/or single-envelope mode. The same is left to the discretion of the authority concerned.

41. Navigating through the provisions of the Act of 1998 and the Rules 2000, it cannot be remotely interpreted that e-reverse bidding process is prohibited. On the contrary, none of the provisions of the Act of 1998 and the Rules of 2000, takes away the

right of the Tender Issuing Authority to prescribe the procedure and criteria, *inter alia*, the terms and conditions of the tender. E-reverse bidding is one of the terms of the tender. The same would be binding on the parties. E-reverse bidding process in no manner is beyond the purview of the Act of 1998 and the Rules of 2000. On the contrary, the Act of 1998 and the Rules of 2000 consciously give leverage to the Tender Issuing Authority to adopt its own procedure and criteria for the evaluation of the tender. The respondents/writ petitioners cannot be aggrieved by the term of e-reverse bidding process in the tender document.

42. As we have held that the Act of 1998 and the Rules of 2000 are nowhere even distantly suggestive of prohibiting the criteria of e-reverse bidding process, it cannot be said that the impugned term in the tender is violative of the Act of 1998 and the Rules of 2000.

43. In view of the conclusion arrived at, the judgments in *Nazir Ahmad* (supra); *Appu Food Product* (supra); and *Singhara*

Singh, (supra) relied upon by learned counsel for the respondents/ original writ petitions to fortify their submission that if a statute requires a particular thing to be done in a particular manner, it has to be done in that manner only and not otherwise, would not be of any avail to the respondents/writ petitioners.

44. In the light of the aforesaid, we are inclined to set aside the judgment of the learned Single Judge. The same is, accordingly, set aside. The writ appeals are allowed and the writ petitions filed by the respondents/writ petitioners stand dismissed. However, with no order as to costs. Consequently, C.M.P.Nos. 1048, 1191, 1187, 1040, 1181, 1184, 1190 and 1185 of 2024 are closed.

(S.V.G., CJ.) (D.B.C., J.)

31.01.2024

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THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY,J.

(sasi)

W.A.Nos.180, 175, 201 to 206 of 2024

31.01.2024