

HIGH COURT FOR THE STATE OF TELANGANA
WRIT PETITION Nos.37932 of 2022 and 4930 of 2023

Between:

M/s Excel Sports,
1&2 Majestic Circle, K.G.Road,
Bengaluru-560009, Karnataka,
Rep. by its Sole Proprietor,
Rajinder Singh Khanuja.

.. Petitioner

Vs.

The Managing Director,
Sports Authority of Telangana State,
Lal Bahadur Stadium,
Hyderabad-500001 & 3 others.

.. Respondents

DATE OF THE ORDER PRONOUNCED: **28.04.2023**

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| 1. Whether Reporters of Local newspapers may be allowed to see the judgment? | No |
| 2. Whether the copies of judgment may be marked to Law Reporters/Journals | Yes |
| 3. Whether his Lordship wish to see the fair copy of the judgment? | Yes |

*** HON'BLE SRI JUSTICE J. SREENIVAS RAO**

+ WRIT PETITION Nos.37932 of 2022 and 4930 of 2023

% DATED 28th April, 2023

M/s Excel Sports,
1&2 Majestic Circle, K.G.Road,
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.. Petitioner

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.. Respondents

<Gist:

>Head Note:

! Counsel for the Petitioners : Sri Prasad Rao Vemulapalli

^Counsel for Respondents : The Advocate General and
J. Ashvini Kumar
T. Chaitanya Kumar

? CASES REFERRED:

- 1.1979 AIR 1628
2. 1994 SCC (6) 651
3. 1994 1 SCC 1
4. 1994 SCC Online Cal 138
5. 2022 5 SCC 648
6. 2022 6 SCC 127
7. 2022 6 SCC 401

HON'BLE SRI JUSTICE J. SREENIVAS RAO**WRIT PETITION No.37932 of 2022 and 4930 of 2023****ORDER:**

These two writ petitions are filed seeking following reliefs:

W.P.No.37932 of 2022

This writ petition is filed seeking Writ of Mandamus declaring the action of the 1st Respondent in disqualifying the Petitioner from the tendering process in pursuance and furtherance of NIT No.1/DE/SATS/2022-23 dated 14.07.2022 as arbitrary, illegal, contrary to the tender conditions and violates Article 14 of Constitution of India. Consequently the Hon'ble Court will be pleased to direct the 1st Respondent to open the financial bid submitted by the Petitioner and award the contract if the Petitioner is eligible.

W.P.No.4930 of 2023

This writ petition is filed seeking Writ of Mandamus declaring the action of the 1st Respondent rejecting the representation of the Petitioner dated 26.09.2022 on 04.11.2022 the representation dated 07.11.2022 on 24.12.2022 without

considering the accompanying documents in proper perspective, which otherwise meet the tender requirements as arbitrary, illegal, contrary to the tender conditions, not in public interest and violates Article 14 of Constitution of India. Consequently, the Hon'ble Court will be pleased to direct the 1st Respondent to open and consider the financial bid of the Petitioner, if it is in order.

2. Heard, Sri Prasad Rao Vemulapalli, learned counsel for the petitioner, learned Assistant Government Pleader representing learned Advocate General Office, appearing on behalf of respondent Nos.1 and 2, Sri J. Ashvini Kumar, learned counsel appearing for respondent No.3, Sri L. Ravichander, learned Senior Counsel appearing on behalf of Sri T. Chaitanya Kumar, learned counsel for respondent No.4.

3. Brief Facts of the case are:

The petitioner submits that the petitioner firm is a proprietary concern and conducting a business of manufacturing and supply of sports goods, sports kits, hosiery connected therewith for the last more than 20 years. The petitioner firm was registered with Department of Industries and Commerce, Government of Karnataka

bearing No.AC-1629 dated 16.10.2000. Respondent No.2 called for tenders on behalf of respondent No.1 on 14.07.2022 through NIT No.1/DE/SATS/2022-23 and the same was published in Eenadu, Hindu and Siasat newspapers on 15.07.2022 for procurement of Sports kits vide tender ID No.337445 which is extracted here under:

Bill calling date	15.07.2022
Downloading of Bid document	16.07.2022 from 05.00 pm
Pre-bid conference date/time	22.07.2022
Last date for submission of queries	23.07.2022
Bid closing date/time	02.08.2022 at 3.30P.M.
Bid validity period	90 days from the date of opening of bids
Period of completion of project	3 months
Technical Bids opening date/time	02.08.2022 at 04.00 P.M.
Date and time for submission of Sample TKP Sports Kit	On the next day of the bid closing date & time i.e., on or before 03.08.2022 by 3.30 P.M.
Earnest Money Deposit(EMD)	Rs.90.00 Lakhs DD/BG issued by any scheduled bank having a branch in Hyderabad/Secunderabad in favor of the VC & MD, SATS, Hyderabad.
Bid Transaction Fee	Non-refundable transaction fee to M/s. Telangana State Technology Service, the service provider for e-pronouncement platform as per Government Orders from time to time
Contact person	Sri Deepak, Dy.Executive Engineer, SATS. Ph.No.040-23450247, Cell No.9440832393

4. Respondents Nos.1 & 2 conducted bid meeting on 22.07.2022. With the consent of prospective bidders, the tender finalization committee has taken a decision to extend the time upto 05.08.2022 for submission of tenders.

5. The general eligibility criterion of prospective bidders is provided in Section-V of tender document, which are extracted hereunder:

1. The bidder should be in business of manufacture or supply as the case may be for a minimum period of three(3) years in India as on bid calling date.

2. The bidder should have achieved a minimum supply of similar items of value for Rs.8.75crores in any one year during the last three years period. (Supporting experience/completion/performance certificate issued by competent authority of Govt. organizations only to be uploaded). Similar items means items related to Kit i.e. items specified in Section-III

3. The bidder shall have the minimum average turnover during the last three financial years i.e.,2019-20, 2020-21 and 2021-22 of Rs. 30.00 crores in the specified similar consumer products. The evidence should be supported by a certificate issued from Chartered Accountant, which shall be uploaded on e-procurement portal.

4. The bidder shall scan and upload the copy of Liquid assets/credit facilities/Solvency certificate issued from any nationalized/scheduled commercial bank having at least one branch in Hyderabad of value not less than Rs.20.00 crores in the prescribed proforma and certified by chartered Accountant.

5. In terms of clause 7.7 of Section-VII of the tender, during

the evaluation of the bids, SATS may, at its discretion, s the bidder for clarification of its bid. However, no change in price or substance of the bids shall be sought, offered or permitted.

Submission of the all the above documents is mandatory and a prerequisite for considering the technical bid. Any non-compliance of any of the above will attract disqualification.

6. The petitioner further submits that pursuant to the said NIT, he submitted his bid and uploaded all the required documents as per the tender notification. He entered into Consortium agreement with M/s Ramchand & Co., Jalandhar and submitted all the relevant documents including the documents mentioned in Section-IA of the tender. He further submits that in e-procurement, the contents of the bids will be visible online for any inquisitive onlooker once they are uploaded, after the last date and time, who as access to the site, curious to know about the qualifications, experience and the information related to tender and other bidders. The petitioner opened the site and found certain anomalies in the bids submitted by Kendriya Bhandar/respondent No.3 one of the two qualified bidders, Cosco India Pvt, Ltd., Abhilasha Commercial Pvt. Ltd., Bharat Sports India Pvt. Ltd., National Federation of Farmers Procurement Processing and Retailing Cooperative of India Ltd., Readers Stores India Pvt. Ltd., and National Co-operation Federation of India who were not qualified.

7. Immediately the petitioner submitted a letter on 16.08.2022 to respondent No.1 pointing out the anomalies in respect of respondent No.3 which are extracted below:

- a) Work Completion Certificate pertaining to Kendriya Bhandar supply orders not submitted.
- b) Balance sheet of Kendriya Bhandar as on 2021-22 not submitted,
- c) Credit facility certificate not submitted,
- d) IT return of consortium partner i.e, M/s Sterling Sports Industries for the year 2019-20 was not submitted,
- e) Past experience certificate of Sterling Sports Industries reflects only 10% of tender requirement of Rs.8.75/- crores related to items reflected in Section-III of tender document and
- f) The liquidity certificate/credit facility was not submitted. Instead a self declaration was submitted stating that the said condition is not applicable to it without any substantiation.

8. He further submits that respondent No.3 did not submit the work completion certificate for the requisite value, credit facility certificate and past experience certificate. He further states that respondent No.4 who is the other successful bidder did not submit audited balance sheet for the year 2019-20 but only a provisional balance sheet of its consortium partner, M/s I Fit sports Pvt. Ltd, which is contrary to the corrigendum. The petitioner further submits that neither respondent No.3 nor respondent No.4 complied the tender conditions and in spite of the

same respondent Nos.1 and 2 declared them as successful bidders.

9. He further submits that respondent No.1 sent SMS to the petitioner on 24.09.2022 informing that, result of the Technical Bids was uploaded in the online website on 24.09.2022 and the petitioner came to know about his disqualification on 25.09.2022 at about 5.10 P.M,. The reasons given for disqualifying petitioner are:

- a) The consortium partner M/s Ramchand & Co. had entered into multiple consortium partnership with other bidders
- b) Supporting experience/completion/performance not meeting the eligibility criteria.

10. He addressed a letter to respondent No.2 on 26.09.2022 through e-mail requesting them to reconsider his tender stating that Consortium partner of the petitioner did not enter into any consortium agreement with any other bidder. He also submits that respondent Nos.3 and 4 did not meet the required eligibility criteria. The experience certificate produced by respondent No.3 of its consortium partner M/s. Sterling Sports indicate that it has supplied only two items out of 23 items listed in Schedule-I of Section-III and thus the Court is competent to review the decision making process. The awarding of contract by splitting the

quantity is dealt in Clause 3.3 of Section-I of tender document. As per the tender document if there are two technically qualified bidder, SATS will have absolute right to split the bid between two successful bidders in ratio of 60:40 to L1 and L2 respectively. If there are more than two successful bidders, the supply will be split in the ratio of 50:30:20 in respect of L1, L2 and L3 respectively, provided L2 and L3 agree for supplying the material at the rates quoted by L1. The action of respondent No.1 in disqualifying the petitioner cannot be termed as fair and in public interest but fraught with arbitrariness and nepotism and clear violation of tender condition and also violative of Article 14 of the Constitution of India.

11. He further submits that this Court granted interim order on 10.10.2022 and the operative portion of which is extracted as below:

To direct the official respondents not to take any further action pursuant to the Tender Document No.1/DE/SATS12022-23 dt.14.07.2022, till the representation of the petitioner and the objections submitted by the petitioner with regard to other bidders are considered. The respondents shall consider all the documents produced by the petitioner and if required, call for clarifications, if

any, from the petitioner and thereafter conclude the tender process.

The official respondents shall also issue notices to the respondents 3 and 4, if necessary, before finalization of the tender. The entire exercise shall be completed within a period of two (2) months from the date of receipt of a copy of this order.

12. Pursuant to the interim order, respondent No.1 constituted a committee to decide the matter afresh but respondent No.1 without considering the objections raised by the petitioner and also without verifying the documents issued *vide* letter No. 11/SATS/T&S/2022-23 dated 04-11-2022 stating that the petitioner is not eligible for awarding of the tender as the essential conditions of the tender documents are not met by the petitioner company.

13. He further submits that subsequently the petitioner submitted a representation on 07.11.2022 to respondent Nos.1 and 2 requesting them to reconsider the decision. Respondent No.2 issued reply *vide* Lr.No.11/SATS/T&S/2022-23 reiterating the same as mentioned in his letter dated 04.11.2022 and informed the petitioner that he is not eligible for awarding of the tender as the essential conditions of the tender documents are not met by his company. At that stage, the petitioner filed W.P.

No.4930 of 2023 questioning the action of respondent No.1 rejecting the representation of the petitioner dated 26.09.2022 on 04.11.2022 and representation dated 07.11.2022 on 24.12.2022 without considering the documents in proper prospective.

14. Respondent No.1 filed counter on his behalf and on behalf of respondent No.2 denying the allegations made by the petitioner inter alia contending that the writ petition filed by the petitioner is not maintainable under law, especially invoking jurisdiction of this Court under Article 226 of Constitution of India. Pursuant to the interim order granted by this Court in W.P.No.37932 of 2022 dated 10.10.2022 respondent No.1 after considering the representation submitted by the petitioner dated 26.09.2022 passed detailed order on 04.11.2022.

15. He further submits that tender is in Two bid system that is technical (technical eligibility, lab test report and sample verification) and financial. As per the terms and conditions of the tender, the financial bids of the technically qualified bidders shall only be opened and as such financial bids of two technically qualified bidders i.e. respondent Nos.3 and 4 were opened. Since the petitioner did not fulfill the eligibility in the technical criteria

the lab test reports and sample verification were not verified. Accordingly, the financial bids of petitioner were not opened and therefore, the rate quoted by the petitioner is not known and will not be considered as per the tender document.

16. He further submits that as per the tender Schedule, Clause 33 Section-I bid splitting is for technically qualified bidders only subject to matching of L1 rates. Since the petitioner disqualified in the technical stage, bid splitting does not arise and it is applicable only for successful bidders in technical stage. Accordingly, respondent Nos.1 and 2 after following the transparent procedure in every stage of tender i.e., constitution of seven member tender finalization Committee, finalization of specifications of sports items, terms and conditions of eligibility criteria, vetting of tender document of TSMIDC, conduct of pre bid meeting with the prospective bidders and in the pre bid meeting also the petitioner himself attended and no objections were raised with regard to eligibility criteria and even he requested in the pre bid queries raised by him to restrict the eligibility criteria to “single order of 8.75 Cr. can be submitted related to sports material of any work completion certificates”, considering the representations of the prospective bidders in the pre-bid, issue of corrigendum and

technical evaluation of the bids as per the terms and conditions of the tender document. He further submits that respondent No.2 issued reply to the representation submitted by the petitioner on 04.11.2022 and 24.12.2022. He further submits that respondents after following the due procedure awarded the work in favor of respondent Nos.3 and 4. Hence, the writ petition filed by the petitioner is not maintainable under law and is liable to be dismissed.

17. Respondent No.4 filed counter contending that the writ petition filed by the petitioner is not maintainable either in law or on facts. The subject matter of writ petition is relating to the tender and as such the scope of entertaining the writ petition under Article 226 is very limited and the same is liable dismissed in limini. The allegation made by the petitioner that respondent No.4 did not submit its audited balance sheet for the year 2019-20 but only a provisional balance sheet of its consortium partner M/s. I Fit sports Private limited is contrary to corrigendum issued on 05.08.2022 is denied and respondent No.4 submitted relevant documents as per the terms and conditions of the tender. The tender finalization committee after examining the documents and objections raised by the petitioner on 15.10.2022, respondent No.1

passed the order on 04.11.2022. Respondent Nos.1 and 2 after following the due procedure and after verifying the entire documents rejected the tender of the petitioner and he was technically disqualified and he is not entitled to question the awarding of the work order in favour of respondent Nos.3 and 4. He further submits that the petitioner is not a bonafide bidder who participated in the tender process and the credentials of the petitioner is questionable.

17.1 He further submits that pursuant to the interim order dated 10.10.2022 passed by this Court in W.P.No.37932 of 2022, the Respondent Nos.1 & 2 have examined the objections/claims of the petitioner and rightly rejected its claim by its order dated 04.11.2022. Entire tender process was carried out by respondent Nos.1 and 2 in transparent manner and after affording a fair and reasonable opportunity, the tender committee has finalized the tender in favour of respondent Nos.3 and 4. Hence, the petitioner is not having any semblance of right to question the awarding of the contract in favour of respondent Nos.3 and 4. Admittedly, the petitioner was disqualified in technical bids stage only. Respondent Nos.1 and 2 after opening the price bid declared the respondent Nos.3 and 4 as successful bidders and after following

terms and conditions of the tender awarded the contract in favour of respondent Nos.3 and 4. He further stated that the petitioner has not questioned the awarding of the contract in favour of respondent Nos.3 and 4. Hence, the cause in the writ petitions does not survive and the same are liable to be dismissed.

18. Sri Vemulapalli Prasad Rao, learned counsel for the petitioner vehemently contended that respondent Nos.1 and 2 rejected the bid of the petitioner on the following grounds:

- a) The consortium partner M/s Ramchand & Co. had entered into multiple consortium partnership with other bidders
- b) Supporting experience/completion/performance not meeting the eligibility criteria.

18.1 He further contended that petitioner has produced relevant documents to satisfy the objections raised by respondent Nos.1 and 2 as mentioned above. Later, respondent No.2 has satisfied after verification of the documents specified in so far as the objection one (i) is concerned. In so far as financial requirements is concerned the petitioner appeared before tender committee and submitted representation requesting them to consider the same. He further contended that respondents did not raise the issue of financial credentials during the meeting held on 20.10.2022 though the petitioner submitted the letter on 07.11.2022 clarifying

the issue and also enclosed the relevant GSTR 3B monthly returns supported by e-way bills for the month of February 2019-20.

18.2 He further contended that the petitioner has supplied the sports material of specified value and specification during the financial year 2019-20 to the Sports Development Authority of Tamil Nadu (SDAT). Though the supplies were made during financial year 2019-20, due to covid-19 restrictions the bills were raised again altogether for entire supplies on 03.08.2020 and were paid. During the financial year 2019-20 the petitioner had also supplied sports goods worth Rs.8.5 crores to Government of Karnataka. If the total value of above supplies is taken together the petitioner has supplied more than the required amount of Rs.8.75 crores in any one of financial year of three preceding years.

18.3 He also contended that pursuant to the orders passed by this Court in W.P.No.37932 of 2022, dated 10.10.2022, the petitioner has submitted detailed objections. Respondent No.1 without following the procedure as contemplated under law erroneously rejected the claim of the petitioner by its letter No.11/SATS/T & S /2022-2023 dated 04.11.2022. Subsequently

the petitioner filed W.P.No.No.4930/2023 questioning the action of respondent No.1 in rejecting the representation of the petitioner dated 26.09.2022 on 04.11.2022 and representation dated 07.11.2022 on 24.11.2022 and sought consequential direction to direct the respondent No.2 to open and consider the financial bid of the petitioner.

18.4 He further contended that the respondent Nos.3 and 4 are also not having experience and the documents enclosed along with their tender are also not genuine. Respondent No.2 without verifying their documents, declared them as successful bidders and awarded the contract and the same is not permissible under law.

18.5 He further contended that petitioner bid was not rejected on the ground that the petitioner has not supplied material to the states of Tamil Nadu and Karnataka. The Clause No.5.1 deals with the financial eligibility criteria for Rs.8.75 crores, though the petitioner satisfied the said condition by producing the relevant documents, same were not considered by the respondents. The petitioner supplied more than Rs.8.75 crores and also produced the work order issued by the State of Karnataka and State of

Tamil Nadu though the material supplied by the petitioner in 2020 and received the payment in next financial year i.e. 2021. Respondent Nos.1 and 2 without considering those documents rejected the bid of the petitioner. Learned counsel for the petitioner contended that the writ petition filed by the petitioner is very much maintainable under law. In support of his contentions he relied upon the following judgments:

(i) Ramana Dayaram Shetty Vs.The International Airport Authority Of India And Ors¹

(ii) Tata Cellular vs Union Of India²

19. Learned Assistant Government Pleader vehemently contended that the writ petition filed by the petitioner invoking the extraordinary jurisdiction of this Court Article 226 of Constitution of India is not maintainable. He further contended that Respondent Nos.1 and 2 after duly following the tender conditions enumerated in NIT No.1/DE/SATS/2022-23 dated 14.07.2022 and after verifying all the documents of the respective bidders opened the technical bids wherein the petitioner was disqualified. The petitioner has not satisfied the conditions enumerated in the

¹ 1979 AIR 1628

² 1994 SCC (6) 651

tender by producing the required documents. He further contended that the petitioner after participating in the tender process, is not entitled to raise the ground that the condition of inclusion of eligibility criteria for Rs.8.75 crores was enumerated only to debar the petitioner as well as similar contractors.

19.1 He further contended that the petitioner suppressed several material facts including his litigative history while submitting the tenders pursuant to the tender notification and also before this Court by filing the writ petitions and the petitioner approached this Court with clean hands and he is not entitled to seek any relief much less the relief sought in the writ petition. The petitioner is a chronic litigant and he filed several cases before the High Court for the State of Karnataka in W.P.Nos.35068 of 2015, 22882 of 2017, 59328 of 2015 and W.P.No.11918 of 2019 and W.P.No.22970 of 2018.

19.2 He further submits that pursuant to the order dated 10.10.2022 passed by this Court in the W.P.No.37932 of 2022, respondent Nos.1 and 2 have considered the representations/objections of the petitioner and passed detailed order on 04.11.2022 and the same has become final. The

petitioner without questioning the rejection order passed by respondents dated 04.11.2022 and 24.11.2022 and also without questioning the awarding of the contract in favour of respondent Nos.3 and 4, he is not entitled to seek any relief in the writ petition and the cause in the writ petitions does not survive and the petitioner raised several disputed questions of fact and the same cannot be adjudicated in the writ petition. In such circumstances, the petitioner ought to have approached the competent Civil Court. In support of his contentions he relied upon the following judgments:

***(i) S.P Chengalvaraya Naidu vs Jagannath*³**

***(ii) Damodar Valley Corporation and Others Vs. BLA Projects Private Limited and Another*⁴**

***(iv) State of Punjab and Others Vs. Mehar Din*⁵**

***(v).N.G.Projects Limited Vs. Vinod Kumar Jain and Others*⁶**

(vi) W.P.No.46306 of 2022 and 43886 of 2022 and batch dated 31.01.2023.

³1994 1 SCC 1

⁴ 2023 SCC OnLine Cal 138

⁵ 2022 5 SCC 648

⁶ 2022 6 SCC 127

19.3 Sri L. Ravichander, learned Senior Counsel appearing for respondent No.4, contended that the petitioner filed W.P.No.37932 of 2022 questioning the action of respondent No.1 in disqualifying the petitioner technically. During the pendency of the said writ petition, the petitioner filed another W.P.No.4930 of 2023. In view of the filing of subsequent writ petition the earlier writ petition No.37932 of 2022 has become infructuous. Similarly, the subsequent W.P.No.4930 of 2023 is also not maintainable on the sole ground that pursuant to the interim order granted by this Court in W.P.No.37932 of 2022 dated 10.10.2022 the respondents have considered the objections raised by the petitioner and passed detailed orders vide Lr.No.11/SATS/T&S/2022-23 dated 04.11.2022 and 24.12.2022 and the petitioner has not questioned the said orders and the same have become final. Similarly, the petitioner had not questioned the awarding of contract in favour of respondent Nos.3 and 4. In the absence of challenging the same, the petitioner is not entitled to claim the relief sought in the writ petition.

19.4 He further contended that respondent Nos.1 and 2 after following due procedure as contemplated under law and as per the terms and conditions of the tender (NIT) conditions only awarded

the contract in favour of respondent Nos.3 and 4. The petitioner has not approached the Court with clean hands and he is not entitled to seek equitable relief under Article 226 of Constitution of India. He further submits that the dispute raised by the petitioner is purely disputed question of fact and the petitioner ought to have approached the competent Civil Court but not by way of writ petition and this Court is not having jurisdiction to adjudicate the disputed questions of fact in the writ petition.

20. Sri J. Ashvini Kumar learned counsel for respondent No.3 contended that the writ petition filed by the petitioner is not maintainable under law to invoke extraordinary jurisdiction of this Court under Article 226 of Constitution of India. He also submits that the petitioner after participating in the tender process and after completion of the entire process including awarding of the contract in favour of respondent Nos.3 and 4 he is not entitled to the reliefs sought in the Writ Petition especially the petitioner has not questioned the rejection orders dated 04.11.2022 and 24.11.2022 and also awarding of contract. In support of his contentions he relied upon the judgment of Apex Court in ***National High Speed Rail Corporation Limited Vs. Montecarlo***

***Limited & Anr.*⁷**

21. Having considered the rival submissions made by respective parties and after perusal of the records, the points that arise for consideration in this writ petition are :

1. Whether the writ petitions filed by the petitioner is maintainable under law without questioning the rejection orders dated on 04-11-2022 and 24-11-2022 as well as awarding of the contract in favour of unofficial respondents?
2. Whether the Petitioner is entitled to the relief sought in the writ petition after completion of the entire tender process?
3. To what relief?

22. Points 1 to 3:

22.1 Admittedly respondent No.2 issued tender notification inviting the tenders for procurement of about 25,000 sports kits to Telangana Kreedha Pranganams for the State of the Telangana for a period of three months during the years 2022 and 2023 from the bidders who shall be Manufacturers of related products in the Kit as in Schedule-I of Section III only, through NIT No.1/DE/SATS/2022 -23 dated 14.07.2022.

22.2 Pursuant to the same the petitioner and respondent Nos.3 and 4 and others submitted their bids.

⁷ 2022 6 SCC 401

22.3 Tender committee pre bid meeting was held on 22.07.2022 after explaining the tender conditions to the participants, with their consent, extended the time for submission of bids from 02.08.2022 to 05.08.2022. Except this there is no change in the conditions mentioned in the tender as stated earlier.

22.4 Respondent Nos.1 and 2 after following due procedure opened the technical bids on 05.08.2022 wherein the petitioner's bid was disqualified on two grounds:

- a) the consortium partner M/s Ramchand& Co. had entered into multiple consortium partnership with other bidders
- b) Supporting experience/completion/performance not meeting the eligibility criteria.

22.5 As per the tender conditions clause 5.1 reads as follows:

The bidder should have achieved a minimum supply of similar items of value for Rs.8.75 Cr. In any one year during the last three years period. (supporting experience/completion/performance certificate issued by competent authority of Govt. organizations only to be uploaded).

The above clause clearly envisages the terms that the petitioner has not satisfied and the respondents had rightly rejected his technical bid. Once the petitioner disqualified in technical bid he

is not entitled to seek consideration to open his financial bid.

22.6 As per the terms and conditions of the tender document the participant has to mention the previous litigation history but the petitioner has not given any particulars of his previous litigation history while submitting the tender nor in the writ petition. The learned Assistant Government Pleader has rightly contended that the petitioner submitted tender without furnishing the previous litigation history. It is also undisputed fact that pursuant to the interim directions issued by this court in W.P.No.37932 of 2022 dated 10.10.2022 the petitioner submitted objections on 26.09.2022 and the same was considered and the respondent No.1 has passed detailed order on 04.11.2022 and awarded the contract in favour of respondent Nos.3 and 4. The petitioner subsequently submitted another representation on 07.11.2022 and the same was also rejected by respondent No.1 on 24.12.2022. The entire process including awarding of the contract is concluded pursuant to the Tender Notification dated 14-07-2022. Hence, the petitioner is not entitled to the reliefs sought in the writ petitions. It is also pertinent to mention here that the petitioner has not questioned the rejection orders passed by respondent No.1 dated 04.11.2022 and 24.12.2022 and the said

orders have become final.

23. In *Ramana Dayaram Shetty (supra)* the Hon'ble Apex Court held as follows in para Nos.20 and 21:

20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3 : (1974) 2 SCR 348] and *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* where the learned Chief Justice pointed out that

“the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in

trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods”.

It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground.

24. In ***Tata Cellular(supra)*** the Hon’ble Apex Court held as follows at para Nos.70, 71, 73:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The

right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; 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.

25. In ***S.P. Chengalvaraya Naidu v. Jagannath (supra)***, the Hon'ble Supreme Court held as follows:

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

26. In *Damodar Valley Corpn. v. BLA Projects (P) Ltd.,(supra)*

the Hon'ble Supreme Court held as follows:

9. Having heard the learned counsel for the parties and on perusal of the records this Court finds that the Learned Single Judge erred in asking DVC to cancel the communication made to the writ petitioner/respondent No. 1 by letters dated 31.10.2022 and 5.11.2022 rejecting the respondent No. 1's bid and to permit the petitioner to participate in the tender and evaluate the technical bid put in by the petitioner. The Courts must realise their limitations and the havoc which needless interference in commercial matters could cause. 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, as long as there are no malafide/arbitrariness etc. Thus, the terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

10. This Court in an unreported judgment dated 09.09.2022 passed in MAT No. 1184 of 2022 (*Airport Authority of India v. Masti Health and Beauty Private Limited*) held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. The writ court should refrain itself from imposing its decision over the decision of the employer/principal as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State. Courts should be even more reluctant in interfering with the contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for wrongful exclusion rather than to injunct the execution of contract. Therefore, it is the discretion of DVC to reject or accept the tender of the writ petitioner by way of interpreting the Integrity Pact which was not in compliance with the terms of the NIT. Moreover, the rejection of technical bid has been made by the tender committee for reasons supplied by the Chief Engineer, C&M. Hence, such a decision has been complied with the procedure contemplated in the tender conditions.

11. The above analysis clearly leads to the conclusion that on a combined consideration of the facts of this case as also the tender condition, if reasons are to be given at every stage of the tender procedure then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Moreover, the facts of the case also do not indicate that the condition was tailor-made to oust the respondent No. 1/writ petitioner. Owing to such limited scope of jurisdiction of judicial review, the Learned Single Judge ought not to have quashed the letters of rejection by appellant No. 1 and permit respondent No. 1/writ petitioner to participate in the tender process. Hence, we are unable to sustain the judgment of the Learned Single Judge.

27. In ***State of Punjab v. Mehar Din (supra)*** the Hon'ble Supreme Court held as follows:

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 mala fide. 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.

28. In ***N.G. Projects Ltd. v. Vinod Kumar Jain, (supra)*** the Hon'ble Supreme court held as follows:

12. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held 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. It was held as under : (SCC p. 825, paras 13 & 15)

"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason

for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

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.”

29. In *National High Speed Rail Corporation Limited(supra)*, the Hon’ble Supreme Court held that, the writ court itself is not entitled to question the contractual disputes by invoking extraordinary jurisdiction of this Court under Article 226 of Constitution of India and the same is not maintainable under law. Relevant paragraphs are extracted here under:

3.12. Shri Mehta, learned Solicitor General has further vehemently submitted that in the facts and circumstances of the case, the High Court has materially erred in interfering with the tender process in exercise of powers under Article 226 of the Constitution of India. It is submitted that in the present case the High Court has exceeded in its jurisdiction in exercise of powers under Article 226 of the Constitution of India and has deviated the scope of judicial review in contractual matters. It is submitted that the High Court while exercising the powers under Article 226 of the Constitution of India and interfering with the administrative process with respect to the foreign sovereign funded contract/project has not at all appreciated

and/or considered the difference between the foreign funded contracts and the ordinary public works contracts funded from Public Exchequer.

3.17. It is submitted that in the impugned judgment and order the High Court has applied the doctrine of substantial compliance, equity and fair play. It is submitted that however the doctrine of substantial compliance shall not be applicable in commercial contracts. It is submitted that it would tantamount to violation of the essential conditions of the contract. It is submitted that when a condition which is specifically imposed by a foreign funding party for an infrastructural project, such condition being non-negotiable in nature and forms an integral part to the contract, the adherence of such condition has to be in totality as it is not permissible either for the executing authority in India to approve a bid document despite there being a clear breach of a condition imposed by the foreign funding party.

3.18. It is submitted that doctrine of substantial compliance, thus, cannot be negotiated with the foreign funding party; though in public works which are funded from Consolidated Fund of India/public money the same may be possible and/or may be permissible. It is submitted that the High Court has not properly appreciated the facts while allowing the doctrine of substantial compliance to creep in such foreign funded international projects which would result in seriously jeopardising the willingness of the foreign State to finance an infrastructure project of this magnitude. It is submitted that as such the scope of judicial review on the parameters laid down for judicial review of contractual matters and projects funded solely from the Consolidated Fund of India where the decision-making authority is solely an Indian Governmental authority will not be applicable in such cases.

3.19. It is submitted that in cases like the present one, the terms offered by the foreign sovereign, on the basis of which it proceeds to finance an infrastructural project, becomes sacrosanct and cannot be deviated from and in such cases, the compliance has to be strict and not substantial. It is submitted that any insistence on substantial compliance may affect the willingness of the foreign sovereign to finance such a project and to share technical know-how regarding the same.

3.21. It is further submitted that with the aforesaid limited scope of judicial interference/intervention in exercise of the powers under Article 226 of the Constitution of India, the decision taken in the present case to reject the bid of original writ petitioner at technical stage on the ground that the same is non-responsive is to be considered. It is submitted that considering the relevant clauses of ITB/bid document, it is ultimately for the investor and/or the appropriate authority to consider whether the bid complies with the terms and conditions of the bid document and/or whether there is a substantial compliance and/or whether there is any material deviation or not. Once there is an application of mind on the aforesaid aspects and the appropriate authority/investor comes to the conclusion that there is a material deviation in the bid submitted by the bidder, unless there are allegations of mala fide and the same are established and proved, the interference of the Court in exercise of powers under Article 226 of the Constitution of India with respect to such a conscious decision is not warranted. It is submitted that it is ultimately for the employer to have a conscious call or decision whether the bid is technically responsive or there is a material deviation or not.

28. At this stage, few decisions of this Court on the interference by the courts in the tender matters are required to be referred to:

28.1. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* [*Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818], this Court in paras 11 to 13 and 15 has observed and held as under : (SCC pp. 824-25)

“11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] , it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In *Dwarkadas Marfatia & Sons v. Port of Bombay* [*Dwarkadas Marfatia & Sons v. Port of Bombay*, (1989) 3 SCC 293] , it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , as mentioned in *Central Coalfields Ltd. v. SLL-SML (Joint Venture*

Consortium) [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] .

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

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.”

28.3. In *Michigan Rubber (India) Ltd. v. State of Karnataka* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216] , after considering various other decisions of this Court on the point, more particularly, after considering the decisions in *Jagdish Mandal* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] and *Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa* [*Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa*, (2012) 6 SCC 464] , in paras 9, 23, 24 and 35.

9. It is the grievance of the appellant Company that the pre-qualification criteria as specified in Conditions 2(a) and 2(b) [amended Conditions 4(a) and 4(b)] of the tender in question are unreasonable, arbitrary, discriminatory and opposed to public interest in general. It is also their grievance that the said conditions

were incorporated to exclude the appellant Company and other similarly situated companies from the tender process on wholly extraneous grounds which is unsustainable in law. In other words, according to the appellant Company, the decision of KSRTC in restricting their participation in the tender to original equipment manufacturer (OEM) suppliers is totally unfair and discriminatory.

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:

(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.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.

30. In the above judgments the Hon’ble Apex Court specifically held that the scope of judicial review is very limited in respect of contractual and tender matters and interference under Article 226

of Constitution of India. The Hon'ble Supreme Court has further held that in contractual and tender matters the High Courts are not supposed to interfere with the decision of the competent authorities, unless the decision is totally arbitrary or unreasonable, until otherwise, it is not open for the High Court to sit like a Court of Appeal over decision of competent authority, as such competent authority which floats the tender, is the best judge of its requirements.

31. The judgments relied upon by the learned counsel for the petitioner are not in support of his contentions. The said judgments were followed in subsequent judgment in ***National Highspeed Rail Co. Ltd.*** (*supra*) which supports the contentions of the respondents.

32. It is already stated *supra* that respondent No.2 issued tender notification on 14.07.2022 and technical bids were opened on 05.08.2022 and wherein the petitioner was technically disqualified and after opening financial bids and also after following due process awarded the contract *vide* Lr.No.20/SATS/T&S/2022-23 in favour of respondent Nos.3 and 4 on 05.11.2022. The entire tender process including awarding of

the contract is concluded pursuant to the Tender Notification. Hence, the petitioner is not entitled to the reliefs sought in the writ petitions as the petitioner has not questioned the rejection orders passed by respondent No.1 dated 04.11.2022 and 24.12.2022 and also not questioned the awarding of the contract in favour of successful bidders. Admittedly, the petitioner raised several disputed questions of facts in the writ petition and the same are not amenable under the jurisdiction of this Court under Article 226 of Constitution of the India. The petitioner has to prove and establish the same by adducing necessary evidence before the competent Civil Court.

33. In view of the foregoing reasons as well as the law laid down by the Hon'ble Apex Court, both the writ petitions are liable to be dismissed.

34. Accordingly, both the writ petitions are dismissed. No costs.

As a sequel thereto, miscellaneous applications, if any, pending in this writ petition shall stand closed.

JUSTICE J SREENIVAS RAO

28th April, 2023

Note:

L.R. copy to be marked: 'Yes'

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PSW

HON'BLE SRI JUSTICE J. SREENIVAS RAO

WRIT PETITION Nos.37932 of 2022 and 4930 of 2023

28th April, 2023

PSW

Note:

L.R. copy to be marked: 'Yes'