In the High Court for the State of Telangana

Writ Petition No. 44552 of 2022

Between:

Sewer Cleaning Machines Owners Association
& another

... Petitioners

and

The State of Telangana,
Rep. by Principal Secretary,
Municipal Administration & Urban Develoopment Department,
Telangana & others

...Respondents

Date of Judgment Pronounced: 28-12-2022

Submitted for Approval:

Hon'ble Smt. Justice LALITHA KANNEGANTI

Whether Reporters of Local newspapers may be allowed to see the judgments ?	No
Whether the copies of judgment may be marked to Law Reporters/Journals	Yes
Whether Her Lordship wish to see the fair copy of the Judgment ?	Yes

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(LALITHA KANNEGANTI, J)

* Hon'ble Smt. Justice LALITHA KANNEGANTI

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…Respondents

! Counsel for the petitioner : Sri A. Krishna Kaundinya,
Senior Counsel for
Sri Sathvik Makunur

^ Counsel for the respondents : Special Government Pleader

<GIST:

>HEAD NOTE:

? Cases cited:
(2022) 6 SCC 127
(2022) 6 SCC 401

THE HON'BLE SMT. JUSTICE LALITHA KANNEGANTI

WRIT PETITION No. 44552 OF 2022

O R D E R:

This Writ Petition is filed seeking the following relief:

" (a) .... to declare the action of the Respondent Nos. 2 & 3 in issuing amendment No. 1/CGM(E)O&MC.III/DGM(E)/2022-2023 dated 03.12.2022 in so far as deleting the facility which allowed 'MOU between bidder and Equipment manufacturer (OEM)" in placing bids for Tender bearing IFB No. 364/CGM(E)/O&MC-III/DGM(E)/MSCM/2022-23 dated 15.11.2022 & 67 others (eTN Nos. 364 to 431/2022-2023) for the purpose of engaging "Mini Sewer Cleaning Machines having letting, Grabber with Hopper and Roding Facility" as being violative of Article 14, 19(1)(g) of the Constitution of India and against the principles of natural justice and fair play;

(b) consequently, set aside Amendment No. 1/CGM(E)O&MC.III/DGM(E)/2022-2023/dated 03.12.2022 in so far as deleting the facility which allowed "MOU between bidder and Equipment manufacturer (OEM)" in placing bids for Tender bearing IFB No. 364/CGM(E)/O&MC-III/DGM(E)/MSCM/2022-23 dated 1511.2022 & 67 others (eTN Nos. 364 to 431/2022-2023) for the purpose of engaging "Mini Sewer cleaning Machines having Jetting, Grabber with Hopper and Roding facility" as being unfair, unjust, arbitrary, discriminatory, illegal and mala fide,

(c) Alternatively, to direct the Respondent Nos. 2 & 3 to permit the petitioners to participate in the tenders bearing IFB No. 364/CGM(E)/O&MC-III/DGM(E)/MSCM/2022-23 dated 15.11.2022 & 67 (total 68 tenders) by inviting persons for engagement of "Mini Sewer cleaning Machines having Jetting, Grabber with Hopper and Roding facility", by accepting MoU between bidder and Equipment Manufacturer (OEM) in the interest of justice."

2. Sri A. Krishna Kaundinya, learned Senior Counsel representing Sri Sathvik Makunur, learned counsel for petitioners submits that petitioner Association is an Association of reputed contractors, providing services to the Hyderabad Metropolitan Water Supply & Sewerage Board and petitioners have demonstrated track record and experience on the field of providing Big Airtech machines to Respondent No. 2 for its sewerage treatment purpose. All through the eligibility criteria for public tenders in respect of engaging Big Airtech machines contain basic parameters to the extent of establishing the *bona fides* of the contractor, technically and financially. The said eligibility criteria continues till date in respect of the Big Airtech machines, being utilised by the 2nd respondent. In the year 2016, the respondents have come up with a proposal to engage Mini Sewage Cleaning Machines with only Jetting capability as part of its operations. The eligibility criteria stipulated for the public tenders calling for such Mini Sewage Cleaning Machines was similar to that of the big Airtech machines. The technology, functioning, operation and skill set required for the Big Airtech and the mini sewage machines is largely similar and identical and not different in any way. The successful bidders were awarded the contract to supply mini sewage cleaning machines

for a period of one year as per the tender conditions. The said contract was unilaterally extended in favour of the same individuals on a yearly renewal basis for a period of five years as against the actual contract award term of one year. It is submitted that as a result of such unwarranted extensions, for the additional period of five years from its actual contract award term of one year, the same individuals were entrusted with the work of providing the said services of mini sewage machines to the 2nd respondent. It is submitted that in the year 2022, after a lapse of six years, the 3rd respondent had floated 68 new tenders for engaging mini sewage cleaning machines with an add-on feature of "Grabber with Hopper and Roding facility" in addition to the usual Jetting capacity. In the said tender, there was a requirement of prior experience of mini sewer cleaning machines for a minimum period of five years during the last ten financial years in any government departments, municipal corporations, etcetera. In respect of the big machines, the said clause was not incorporated. Then the petitioners filed Writ Petition No. 43512 of 2022 before this Court and upon completion of arguments of the petitioners' counsel on 03.12.2022, learned Standing Counsel had requested an adjournment. Thereafter, on the next date of hearing i.e. on 05.12.2022, it was informed to the Court

that after filing the said Writ Petition, the Board has decided to delete the minimum experience clause and recording the same, the Writ Petition was disposed of.

Learned Senior Counsel submits that on the same day, the impugned amendment clause was made public wherein the minimum experience clause was deleted but the facility which allowed "MoU between bidder and Equipment manufacturer (OEM)" was also deleted by amending it to "Self Declaration of Possessing of own Sewer Cleaning Vehicle of 4.00 Tonne capacity…". Though the impugned amendment was dated 03.12.2022 but was only uploaded after Writ Petition No. 43512 of 2022 was disposed of on 05.12.2022. Learned Senior Counsel submits that this particular clause has been incorporated only with an intention to facilitate the existing contractors, who are working from 2016 and who are already having the machines. It is submitted that in respect of big machines, the same clause was not incorporated and such amendment was not carried out. According to the learned Senior Counsel, this is a tailor-made condition to suit only the existing contractors in respect of these mini machines. He submits that as per the earlier clause, permitting the MoU between bidders and equipment manufacturers would not

prejudice the work in any manner, and they will be able to procure the machines immediately upon being successful in the bid as two months time is granted to them It is submitted that the said tender condition which is clearly *mala fide* has to be set aside.

3. A counter-affidavit is filed on behalf of the respondents by the Additional Advocate General. Learned Special Government Pleader appearing on behalf of the respondents submits that government has emphasized that no sewerage employee shall be allowed to enter the manholes while attending the sewer line works / desilting / chokage works so as to avoid deaths of sewerage workers and instructed that the HMWSSB shall provide safety equipments to the departmental workers and to the contracting agencies while carrying out the sewerage work. He submits that earlier they have invited tenders in the year 2016 for reengaging 70 machines for a period of one year. After expiry of one year, the agreements were extended every year from time to time on hire basis with the government approval. On the basis of past experience, they have decided that the existing mini sewer jetting cleaning machines working in various O&M divisions needs to be modified and updated with latest technologies adopted by

various Indian cities to have better cleaning of sewerage system and accordingly, written to the Government of Telangana for permission. The Managing Director, HMWS&SB has constituted a Technical Committee comprising of senior engineers of the Board for finalization of modalities, technical specifications, rates, terms and conditions, etcetera and also accorded permission for extension of existing agreements for further period of three months i.e. up to 30.09.2022. The Committee members met on 24.08.2022 and 10.10.2022 at Board Office, Khairatabad, Hyderabad and perused the different types of technical specifications furnished by various manufacturers on various parameters for hiring of Mini sewer cleaning machines having facility of jetting, grabbing cum hopper and Roding machine including the technical specifications, rates, terms and conditions recommended. Thereafter, basing on the recommendations, the tender document is revised and it was decided to invite *e* tenders for engaging 86 numbers of vehicles in core city areas by the Chief General Manager (Engg.) O&M Circle-II and 9 numbers of vehicles in peripheral area. Hence, they have issued the amended notification dated 03.12.2022.

It is submitted that questioning the said amendment, when the petitioners have filed this Writ Petition,

this Court has granted an interim order dated 14.122022 and for vacating the said order, they have come up with I.A.No. 2 of 2022.

Learned Special Government Pleader submits that tender for uploading MoU between the bidder and the equipment manufacturer has been deleted with a view to give opportunity to more number of tenderers. They also do not deny the fact that the petitioners are existing contractors for the bigger machines. He submits that inclusion of clause of "Self Declaration of Possessing of own Sewer Cleaning Vehicle of 400 tonne capacity" was introduced on the basis of the past experience so that the tenderers can be finalised at an early date as there was an urgency in engaging the vehicles and more over, as it is a specialised work in nature and the respondents desired to hire skilled personnel. He also submits that as per the clause in the tender, the respondents have authority to make change in the said tender conditions. He submits that for incorporating the said clause, they have taken into consideration larger public interest and they have not made such condition to suit any of the individuals. It is submitted that according to them, there are about 100 machines which are available and if the petitioners enter into MoU with the

manufacturer and as per the clause in the tender, the vehicles have to be given within two months from the date of finalisation of the tenderer. According to the learned Government Pleader, it is not possible for the petitioners that they will be able to produce the vehicles within two months and in such case, it would cause great hardship to the general public. He submits that it is for the Authority to incorporate the relevant clauses in the tender document and time and again, the Hon'ble Apex Court has discouraged the practice of entertaining the writ petitions in tender matters as it has got its own cascading effects. He also submits that the said clause is not incorporated in respect of big machines and for big machines, the earlier clause with regard to "MoU between the bidder and equipment manufacturer" remains to be the same. As far as the bigger machines are concerned, they have already issued notification. According to them, the requirement is 46 and he submits that in the city, 46 machines are available. He does not dispute the fact that such a condition was not incorporated for the said machines and there is no *mala fide* intention nor the amendment is made to suit particular group of persons.

Learned Special Government Pleader has relied on the judgment of the Apex Court in N.G. Projects Limited v. Vinod Kumar Jain[1]. The Hon'ble Apex Court has observed that:

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

[1] (2022) 6 SCC 127

courts but that by itself is not a reason for interfering with the interpretation given."

13. The Hon'ble Apex Court sounded a word of caution in another judgment reported as *Silppi Constructions Contractors* v. *Union of India* [*Silppi Constructions Contractors* v. *Union of India*, (2020) 16 SCC 489] , wherein it was held that the courts must realise their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical issues, the courts should be even more reluctant because *most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain*. As laid down in the judgments cited above, the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. The courts must also not interfere where such interference would cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should

be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case."

(emphasis supplied)

14. In *National High Speed Rail Corpn. Ltd.* v. *Montecarlo Ltd.* [*National High Speed Rail Corpn. Ltd.* v. *Montecarlo Ltd.*, (2022) 6 SCC 401] , the Hon'ble Apex Court sounded a word of caution while entertaining the writ petition and/or granting stay which ultimately may delay the execution of the mega projects. It was held as under : (SCC para 48)

"*48*. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any

appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved."

15. In *Uflex Ltd.* v. *State of T.N.* [*Uflex Ltd.* v. *State of T.N.*, (2022) 1 SCC 165] , the Apex Court stated that the enlarged role of the Government in economic activity and its corresponding ability to give economic "largesse" was the bedrock of creating what is commonly called the "tender jurisdiction". The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Court held as under : (SCC pp. 173-74 & 189-90, paras 2-3 & 42)

"*2.* The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality,

unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance. [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517]

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, 'attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted'. [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517]

42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic

activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them."

(emphasis supplied)

16**.** In *Galaxy Transport Agencies* v. *New J.K. Roadways* [*Galaxy Transport Agencies* v. *New J.K. Roadways*, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , a three-Judge Bench again reiterated that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. It was observed as thus : (SCC paras 17-18 & 20)

"*17*. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench [*New JK Roadways* v. *UT of J&K*, 2020 SCC OnLine J&K 733] ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "*both*" appearing in Condition No. 31 of the NIT. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

17**.** Therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed

from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of Respondent 1 that the format for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that Respondent 1 was singled out. The said contention has found favour with the courts below.

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts

involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. 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 the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

26**.** A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

Learned Special Government Pleader has also relied on the judgment of the Hon'ble Apex Court in *National High*

Speed Rail Corpn. Ltd. v. Montecarlo Ltd.[2], the Hon'ble Apex Court held as under:

" 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.

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[2] (2022) 6 CC 401

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] .

28.2**.** In *B.S.N. Joshi & Sons Ltd.* v. *Nair Coal Services Ltd.* [*B.S.N. Joshi & Sons Ltd.* v. *Nair Coal Services Ltd.*, (2006) 11 SCC 548] , after considering the various decisions of this Court on the point enumerated in para 66, this Court has observed and held as under : (SCC pp. 571-72)

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

(*i*) if there are essential conditions, the same must be adhered to;

(*ii*) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(*iii*) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

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

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

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

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

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 23 and 24, this Court has observed and held as under : (*Michigan Rubber case* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] , SCC p. 229)

"*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."

28.6. In *Maa Binda Express Carrier* v. *North-East Frontier Railway* [*Maa Binda Express Carrier* v. *North-East Frontier Railway*, (2014) 3 SCC 760] , this Court had an occasion to consider the scope of judicial review in the matters relating to award of contracts by the State and its instrumentalities. In paras 8 to 10 this Court has observed and held as under : (SCC pp. 764-65)

"*8*. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that

award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advice, we rest the

matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved."

Relying on these judgments, learned Special Government Pleader submits that when the State acts within the bounds of reasonableness and rationality, the Court has to take into consideration the larger public interest. He submits that if a decision relating to award of contract is *bona fide* and is in the public interest, the Courts shall not exercise the power of judicial review even if the tender condition or its clauses are challenged. The power of judicial review shall not be permitted to invoke or protect private interest at the cost of public interest. He submits that in the larger public interest and for the effective implementation of the said work, they have incorporated the said condition. As such there is no illegality or any arbitrariness in amending the tender conditions. It has been repeatedly submitted by the learned Special Government Pleader that if the said amendment is not carried out and when once the successful bidder fails to get the vehicle equipped with required specifications, their work would be hampered. As such, taking all these works into consideration the said original clause has been deleted and new clause was incorporated.

4. In response to the same, learned Senior Counsel submits that petitioners have entered into a MoU on 15.12.2022 with the manufacturer. It is submitted that they are ready to provide the vehicle equipped with all requirements within four weeks from the date of confirmation of order and that they will deliver the mini sewerage machines within two weeks from the date of conformation of the order. He submits that the respondents only with an intention to facilitate the existing mini contractors, have amended the tender conditions. Relying on the very judgment of the Apex Court in *National High Speed Rail Corpn. Ltd.'s case* (supra), learned Senior Counsel submits that in the said judgment, the Hon'ble Apex Court has also relied on the order passed in Michigan Rubber (India) Ltd. v State of Karnataka (2012) 8 SCC 216 and other judgments and held that 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 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. He submits that the interference of courts in formulation of

conditions of tender document and awarding of contract by the State can be done if the tender-issuing authority is found to be acting maliciously and is misusing the statutory powers. He submits that in this case, in respect of two machines, one is the mini machine and the other is big machine, when two tenders were called for and initially with regard to the experience, in respect of the mini machines, a clause was incorporated, the petitioner has come before this Court and the same was withdrawn. While withdrawing that, again to facilitate the existing contractors, the respondents have amended the tender as far as this mini machines are concerned, they have removed the earlier clause. He submits that the existing contractors are having the required machines and they have conveniently continued them for six years. Even as per the clause No. 75 of the tender conditions, "the successful agency shall deliver the mini sewer cleaning machines fitted with necessary equipments in all respects as per specification to HMWS&SB within sixty days from the date of receipt of Letter of Acceptance failing which action will be initiated as per Tender conditions." He submits that even as per them, there was a time period of 60 days and when the manufacturer himself is ready to give machines to the petitioners, the respondents only with an

intention to facilitate the existing contractors have amended the clause. On the face of it, it is the *mala fide* intention of the respondents and this Court has to interfere with the said arbitrariness on behalf of the State.

5. The issues that falls for consideration is whether there is any arbitrary, mala fide act on the part of the State in amending the conditions and whether this Court while exercising jurisdiction under Article 226 of the Constitution of India can interfere in the tender matters.

6. At this juncture, it is appropriate to look at the original and amended tender condition.

Original condition:

MoU between bidder and equipment manufacturer (OEM) (Both chassis and fabrication) (as per format) / Self Declaration possessing of sewer Cleaning Machines (as per Format)(Copies of Registration Certificate, Valid Fitness certificate and Valid Insurance, Valid permit shall be uploaded). If the equipment is not already fitted on the chassis, the bidder shall invariably upload MoU between bidder and manufacturer of equipment (Jetting, Grabber with hoper and Roding machine)

Amended Condition:

Self Declaration possessing of own Sewer Cleaning Vehicle of 400 Tone Capacity and shall invariably uploaded Registration Certificate as per RTA Rules along with Self Declaration (As per Format).

7. According to the petitioners, this particular clause is amended to benefit the existing contractors. According to the State, if such clause is not incorporated, after 60 days as per Clause 75, if they fail to produce the vehicle, the work of the department would be stalled which would cause greater inconvenience to the larger public. It is an undisputed fact that even in tender condition of the bigger machines, similar clauses with regard to MoU between tenderer and manufacturer is still existing. But when it comes to the mini machines, they have amended the same by virtue of this amendment, so that a person, who is in possession of a sewer cleaning vehicle as on the date of this tender is entitled to participate in the tender. The explanation or the argument that is advanced by the learned Special Government Pleader for differentiating the two machines with regard to this clause, this Court is not able to appreciate as the same is not satisfactory. As per clause 75, the successful tenderer has 60 days to produce the vehicle with

required specifications. According to the petitioners, they have already had an agreement with the manufacturer and they will be delivering the vehicle within four weeks from the date of confirmation of the order. They have already placed the order on 15.12.2022. It appears that more on assumptions and presumptions the respondents have amended the said clause. If that is the intention of the State, the respondents ought to have incorporated the same condition in respect of the bigger machines also but surprisingly, the respondents have not amended the same in respect of the bigger machines. When a specific stand is taken by the petitioners on this, the same is not answered by the respondents in the vacate petition. It appears that a group of contractors are continuing from 2016 till now in respect of the mini machines. Undoubtedly, this clause will only be helpful to the existing contractors as they are already working and they have the machine. The same contractors who are providing mini vehicles can participate for the big machines. Because the respondents have given enough time for them to procure the said machines by incorporating the clause, they can have an MoU with the manufacturer and that would be sufficient to participate in the tender. When coming to the mini machines, that particular clause is amended. This

Court finds force in the argument of the learned Senior Counsel for the petitioner. If the condition is amended with an intention to see that the work is not hampered in case, if they fail to produce the vehicle, it would cause inconvenience to the respondents, the State would have incorporated the same condition for big machines also. Further, during the course of hearing, on the last occasion, it was submitted by the learned Special Government Pleader that after looking at the difficulties faced earlier, the Committee constituted by the respondents has taken the decision and this Court had called for the said Committee report. The Committee report except recommending for this amendment is silent on what made them to recommend the same. Further, even the Committee cannot come to such a conclusion that there were some difficulties earlier because they have floated the tenders for the last time in the year 2016. From 2016 till now the same contractors are continuing, the question of facing any difficulty earlier which made them to incorporate such a clause also has no legs to stand.

8. Coming to the decisions relied upon by the learned Special Government Pleader this Court is conscious of the limitations in entertaining the Writ Petition in respect of a contractual and tender matters. The overwhelming public

interest would be the factor that shall be taken into consideration and this Court can never sit on appeal over the decision taken by the authorities and fix the tender conditions. Further, if the Courts exercise the jurisdiction under Article 226 of the Constitution basing on the application of an unsuccessful tenderer, it will definite delay the work. The progress or for completion of any project the authority which has floated the tender is competent and can alone understand the requirements of the said work and the condition that has to be imposed in the said tender. However, this Court while exercising the jurisdiction under Article 226 of the Constitution can always look at the arbitrariness, unreasonableness in the said action of the respondents particularly if the same is incorporated to suit a particular person and if the action of the authorities is whimsical to suit a particular person, when the answer is affirmative, without any hesitation this Court can interfere with the said process. In this case, between two set of tenderers, one is for the mini machines and one is for the bigger machines, which are floated for the purpose of carrying out the sewerage work and there are existing contractors for mini machines for six years by virtue of the clause incorporated for bigger machines, they have been facilitated to participate for the

bigger machines as well, whereas the contractors of the big machines by virtue of the amended clause are not in a position to participate in the tender for mini machines. If it is the apprehension of the respondents that the contractor may not be able to supply the machine, as per clause 75 within two months, they ought to have incorporated a condition stating that the person who has become successful tenderer if he fails to supply the machine, he would be blacklisted from participating in future tenders or that his EMD would be forfeited.

9. Basing on the entire material that is placed before the Court and the arguments of the learned Special Government Pleader, this Court comes to an irresistible conclusion that the respondents have amended the condition to suit a particular section of people. The amended clause *"Self Declaration possessing of own Sewer Cleaning Vehicle of 400 Tone Capacity and shall invariably uploaded Registration Certificate as per RTA Rules along with Self Declaration (As per Format)"* is struck down as being violative of Articles 14 and 19(1)(g) of the Constitution of India and the respondents shall permit the petitioner to participate in the tender as per the original condition *"MoU between bidder and equipment manufacturer (OEM) (Both chassis*

and fabrication) (as per format) / Self Declaration possessing of sewer Cleaning Machines (as per Format)(Copies of Registration Certificate, Valid Fitness certificate and Valid Insurance, Valid permit shall be uploaded). If the equipment is not already fitted on the chassis, the bidder shall invariably upload MoU between bidder and manufacturer of equipment (Jetting, Grabber with hoper and Roding machine)".

10. The Writ Petition is accordingly, allowed. No order as to costs. Consequently, I.A.No. 2 of 2022 is dismissed.

LALITHA KANNEGANTI, J

28th December 2022

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