

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 6533 of 2022**

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SUMESH ENGINEERS PRIVATE LIMITED

Versus

MADHYA GUJARAT VIJ COMPANY LIMITED

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Appearance:

MR AJAY MEHTA, with MR ANMOL A MEHTA(8390) for the Petitioners

MR SHALIN MEHTA, SENIOR ADVOCATE with MR ANAL S SHAH(3988) for
the Respondent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE****ARAVIND KUMAR**

and

HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 06/05/2022

CAV ORDER**(PER : HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI)****CAV ORDER**

1. By way of this petition under Article 226 of the Constitution of India, the petitioners have questioned the legality and validity of the impugned communication dated 23.3.2022 and have prayed for quashing of the same with consequential reliefs, which reads as under:

- (A) to quash and set aside communication no. MGVCL/Tech/1013 dated 23.03.2022 (Annexure 5) declaring the action of the Respondent holding the Petitioner No.1's bid to be invalid and be further pleased to declare the Petitioner's bid as being valid, responsive and entitled for further consideration in respect of Tender Nos. MGVCL/Proc/CPP/22-23/3137/10 KVA DTR and MGVCL/Proc/CPP/22-23/3138/5 to 500 KVA DTR;
- (B) to direct the Respondent to open and consider the Petitioner No 1's price bids for Tender Nos. MGVCL Proc CPP/22-23/3137/10KVA DTR and MGCVL/Proc/CPP/22-23/ 3138/5 to 500 KVA DTR along with all other bidders;
- (C) pending hearing and final disposal of the present Special Civil Application to stay the further tender process and/or any further action by the Respondent for Tender Nos. MGVCL/Proc/CPP/22-

23/3137/10 KVA DTR and MGVL/Proc/PP/22-23/3138/5 to 500 KVA DIR:

- (D) pending hearing and final disposal of the present Special Civil Application prohibit the Respondent from issuing any Letter of Acceptance (LOA) / Acceptance of Tender (AT) in favour of any bidders for Tender Nos. MGVL/Proc/PP/22 -23/3137/ 10 KVA DTR and MGVL/Proc/PP/22-23/3138/5 to 500 KVA DTR:
- (E) to grant ex-parte ad-interim interim relief in terms of paragraphs 7(C) and (D) hereinabove:
- (F) to provide for costs of the present Special Civil Application;
- (G) to pass such other and further orders as this Hon'ble Courts deems fit and proper in the facts and circumstances of the case.

2. The case of the petitioners is that petitioner No. 1 has been a registered vendor/manufacturer to GUVNL, MAHA DISCOM since the past many years and last registration which was renewed with the respondent was on 13.5.2021. Respondent herein floated a tender No.3137 calling upon the registered manufacture of India having GST registration on behalf of DISCOMS (viz. DGVCL, MGVL, UGVCL and PGVL) under the Centralized Procurement Process ("CPP"). The said tender was for procuring 11/0.433 KV, three phase 10KVA (Aluminium wound) CRGO/Amorphous Core distribution transformers with BIS marking and certification. Total quantity originally required by the respondent was 83593 transformers. But, later on, by way of a corrigendum, the quantity required was enhanced to 88693 transformers. The last date for submission of online bid prescribed in the tender document was 4.1.2022 which was revised to 14.2.2022. Whereas the tentative date of opening the technical and price bid in online mode was 14.1.2022, but the petitioners were not informed about the new date for opening

the technical and price bids of the bidders by the authority.

3. It is the case of the petitioners that similarly, the respondent also floated tender No.3138 for procuring 11/0.250kV single phase 5KVA (Copper wound) Level-2, 11/0.433kV three phase 16kVA to 200KVA (Aluminium wound) and three phase 500 KVA (Copper wound) Level-2/Star- rated CRGO/Amorphous Core distribution transformers. Here, also, total quantity required by the respondent of different categories of KVAs was 74450 transformers and in the same manner, by way of corrigendum, said quantity was enhanced to 76773/- transformers. The last date of this tender No.3138 was 6.1.2022, which was again revised to 15.2.2022. Whereas, the tentative date for opening the technical and price bid in online mode was 17.1.2022. Here also, the petitioner was not informed about the new date of opening the technical and price bids and to the best knowledge of the petitioners, till date (i.e till 8:00 PM on 29/03/2022) for tender No.3138, the price bids have not been opened.

4. By annexing the afore-mentioned tender documents, petitioner has contended that under these two tenders, procurement process consisted of three parts, namely (i) Preliminary Stage, (ii) Technical bid and (iii) Price bid. According to the petitioners, it has filled in the bid for tender Nos.3137 and 3138 and submitted it online on 14.2.2022 and 15.2.2022 respectively and respondent is stated to have uploaded on the online n-procure portal on 28.2.2022 the list of the bidders who qualified in the preliminary stage. Petitioner No.1 is said to have been duly qualified in the said preliminary stage/scrutiny.

Screen-shot of the online portal is annexed to the petition to indicate that petitioner No.1 has cleared at preliminary stage.

5. It is the case of the petitioners that on 23.3.2022, petitioner No.1 had received a communication indicating that petitioner No.1's bid for tender Nos.3137 and 3138 cannot be considered as it has violated clause 1.3.6 of the tender notice and clause No.2.3.6 of the Purchase Policy and as such respondent had disqualified the petitioner No.1 from both the tenders. In view of the vendor registration application dated 3.4.2021, petitioner had submitted NSIC certificate, factory license, GST certificate consisting of names of the Directors, i.e. Mr. Sureshchandra Ambalal Vyas and Smt. Ansuyaben Vyas and during scrutiny, it was found from the documents submitted along with the two tenders, names of the Directors were (i) Kinjal Uchit Patwa (ii) Mili Suchikumar Pawar and (iii) Shraddhaben Hirenkumar Patwa with effect from 12.7.2021 and petitioner had not informed the office of the respondent about such change and scrutiny of documents also indicated that NSIC certificate was not yet uploaded and names of the new Directors were not mentioned therein.

6. Having received such impugned communication dated 23.3.2022, petitioners, on that day itself forwarded a communication to the respondent mentioning clearly that by virtue of earlier email dated 19.8.2021, change of the Directors was already communicated forthwith with all supporting documents and it was also informed that such change was brought to the notice of the respondent authority within 37 days

from the date of change of the Directors of petitioner No.1 company. Even petitioners submitted a latest GST certificate, factory license, BIS license in compliance with the tender terms and conditions and petitioner had also applied to NSIC way back on 1.10.2021, but on account of some internal issue at their end, same had not been modified, which is beyond the control of the petitioner. On the very next day, i.e. on 24.3.2022, respondent by its email acknowledged the fact that it was in receipt of such earlier intimation dated 19.8.2021 indicating the change of Directors, but to cover up, respondent had created a new theory by indicating that due to inadequate documents attached with email/ communication dated 19.8.2021, petitioner No.1 was telephonically guided by informing to submit all required documents. It is emphatically submitted by the petitioner that such telephonic conversation has not taken place nor any telephonic call is received from the office of the respondent, but the authority with a view to cover up the issue, created a story of such telephonic guidance.

7. It has further been submitted that petitioner has responded to the letter of authority dated 24.3.2022 on the very next, i.e. on 25.3.2022, *inter alia* indicating that petitioner had never received any telephonic call and further that clause 2.3.6 of the Purchase Policy and Annexure-III to clause 1.3.6 were never supplied to the petitioner either prior to tendering the bid or thereafter and same according to the petitioner were not forming part of even the tender notice and as such, even on that count also, it was not possible to be supplied. Petitioner by way of this communication requested the respondent authority to reconsider

the decision and also sought for urgent appointment with the Managing Director so as to resolve the issue amicably. The respondent according to the petitioner, considered the same by giving an appointment to the petitioner on 28.3.2022 and in the meantime, on 12.3.2022, respondent sought some technical clarification on the aspect of 10 KVA DTR transformers and later on, petitioner addressed a letter in detail on 26.3.2022 prior to appointment, which was given to the petitioner. Despite repeated requests, the price bids for tender Nos.3137 were opened late in the evening on 25.3.2022 and as per the information available on the n-procure portal, petitioner No.1 would have been L-1 bidder in regular category since it has quoted the rate as Rs.47,275/-, whereas the price of other lower bidder who was disqualified was Rs.49,485/- and on account of such price variation, if petitioner's bid price is not considered, there would be possibility of loss to the public exchequer approximately to the extent of Rs.23 crores. It was brought to the notice of the authority about all the issues, but the authority was not in a mood to reconsider.

8. Further, petitioner No.1 is currently undertaking the work of supplying of transformers to the very respondent arising from Acceptance of Tender/ Letter of Acceptance (LoA) dated 28.7.2021, under which also, the agreement has been executed for this work between the petitioner and the respondent under the authority of these new Directors of petitioner company itself, this respondent was quite aware and as such, authority's action being apparently arbitrary, illegal and perverse, petitioners have filed this petition under Article 226 of the Constitution of India

challenging disqualification of petitioner No.1 in respect of tender No.3137 and 3138 communicated vide communication dated 23.3.2022.

9. This Court after hearing learned advocate for the petitioners and learned senior advocate Mr. Shalin Mehta, assisted by learned advocate Mr. Anal Shah, who was on caveat, passed an order on 31.3.2022 and granted interim prayer as prayed for in paragraph 7(D) till next date of hearing, which reads as:

“pending hearing and final disposal of the present Special Civil Application prohibit the Respondent from issuing any Letter of Acceptance (LOA) / Acceptance of Tender (AT) in favour of any bidders for Tender Nos. MGCVCL/Proc/PPP/22 -23/3137/ 10 KVA DTR and MGCVCL/Proc/PPP/22-23/3138/5 to 500 KVA DTR:”

After completion of the pleadings, as per the request of learned advocates appearing for both the sides, the Court heard the matter.

10. Learned advocate Mr. Ajay R. Mehta appearing with Mr. Anmol A. Mehta for the petitioners has vehemently contended that the impugned communication and the decision of declaring petitioner No.1 firm as disqualified for tender Nos.3137 and 3138 respectively is absolutely arbitrary, unreasonable, irrational and beyond the scope of clauses which have been tried to be relied upon. Mr. Mehta has submitted that impugned decision is taken so as to see that the person of their choice can be placed into zone of consideration for tender work. It is submitted that the reason which has been assigned in the impugned communication dated 23.3.2022, reflecting on page 254 of the petition

compilation, is that the discrepancy is found by the authority in respect of names of Directors during technical scrutiny stage and has submitted that present Directors, three in numbers, as indicated in the communication in paragraph 3 were not found in NSIC certificate No.135, dated 12.8.2021 and said change of director/ ownership of the firm though has been effected since 12.7.2021, not communicated or informed to the office and thereby the authority found that there is a violation of Purchase Policy clause 2.3.6 a guideline for vendor registration/ re-registration mentioned in tender notice as Appendix-1 clause 1.3.6 and according to the respondent authority, in case of change in the name or ownership or control of the firm of registered vendor, having valid registration shall be informed in writing along with separate document within 90 days of such change and according to the respondent authority, this having not been observed by the petitioners, the petitioner firm is stated to be not a registered vendor as per the Purchase Policy and as such, petitioner's bid is not considered for tender process. Mr. Mehta has submitted that this was the sole reason to oust the petitioner from the tender process in the second stage, whereas on the basis of the very same material and the names, preliminary stage was already cleared by the respondent authority and as such, this action is an afterthought, just with a view to keep the petitioners out of the process of tender in question.

11. Leaned advocate Mr. Ajay Mehta has vehemently contended that this reason is also not available for the respondent authority to justify their action of disqualification of

petitioner for the simple reason that authority has forgotten rather has not applied its mind to the specific communication dated 19.8.2021, whereby the change of Directors has been specifically communicated along with the Board's resolution dated 31.7.2021 and Company Master data as per MCA. By referring to page 259 of the petition compilation, it has been submitted that this was well within the knowledge of the respondent authority and yet without application of mind, in an absolutely arbitrary manner, despite having specific knowledge, the authority has declared the petitioner as disqualified and as such, action of respondent being erroneous, deserves to be quashed and set aside.

12. Learned advocate Mr. Ajay Mehta has further submitted that just with a view to give an eyewash to come out from the said knowledge of change, right from 19.8.2021, a lame excuse is tried to be projected that the petitioners were telephonically guided to submit all relevant documents duly stamped and signed, but same has not been submitted and as such, has violated the Purchase Policy clause 2.3.6 (Annexure-III). To this communication reflecting on page 264 of the petition compilation, a clear assertion on oath has been made by the petitioners that such telephonic conversion has not been made by the respondent authority at any time nor petitioner had received any call from the office of the respondent, on the contrary, this appears to be a lame excuse, to shield their irregularity otherwise, on 19.8.2021 itself, with all necessary documents, change has been intimated to the office.

13. Learned advocate Mr. Ajay Mehta has also submitted that the reason which has been assigned is not palatable for a further reason that on the basis of this very change of Directors, petitioner No.1 was already undertaking ongoing work of supplying transformers in connection with LoA dated 28.7.2021 and hence, under which circumstance, the petitioner is declared as disqualified and as such, according to Mr. Ajay Mehta, this is nothing but a clear arbitrariness and unreasonableness, irrationality on the part of the respondent authority, aimed only to oust the petitioner from the tender process.

14. Additionally, learned advocate Mr. Mehta has further submitted that clauses which have been relied upon are also not at all applicable in view of the fact that apparent reading of clause 2.3.6 is dealing with name or ownership or control of the firm of registered vendor. Mere change in the name of Director has not altered either name or ownership or control of the firm and furthermore, even assuming that such change is required to be informed within 90 days, then also here, the petitioner had already informed the respondent on 19.8.2021, i.e. within a period of almost 37 days only, and as such also, decision taken by the authority to disqualify petitioner is quite perverse and arbitrary which deserves to be interfered with as same is not sustainable.

15. Learned advocate Mr. Mehta has further drawn attention of this Court to Annexure-III, which, according to him, relates to another tender clause No.1.3.6 relied upon by the authority while passing the impugned communication and has reiterated that

neither name or ownership of the firm of the registered vendor has taken place nor the control and such mere change of Directors is already communicated within 37 days. Now, in the context of clause 1.3.6 related Annexure-III, referred to in this clause, if to be seen, annexed to the petition compilation at page 347, a bare reading of the same would indicate that as and when change in the name of the company or firm is taking place, said change will have to be informed to the authority and according to Mr. Ajay Mehta, both clauses which have been relied upon while communicating the impugned decision are not possible to be pressed into service by the authority in any case and as such, the action being violative of principles of fair-play and apparent arbitrary act, deserves to be corrected by this Hon'ble Court.

16. Learned advocate Mr. Mehta has submitted that an agreement with this respondent authority in connection with the other ongoing work came to be executed and same has been signed by the authorized signatories and reference is made to such agreement from Page 274 and Board's resolution at Page 280 and as such, Mr. Mehta has submitted that authority has apparently remained arbitrary and unreasonable. Mr. Mehta has submitted that price bid, if to be looked into, what has been offered by petitioner No.1 was Rs.,47,275/-, whereas the price of other lowest bidders who were not disqualified was Rs.49,485/- and as such, there is sizable difference of Rs.2210/- in price quoted by the petitioners and the price quoted by current regular L-1 bidder and if 18% GST is to be added to the difference, same would come to aggregate amount of Rs.23 crores, a clear loss to public exchequer only in respect of tender No.3137 and same

according to Mr. Mehta is also almost similar in another tender No.3138 and as such, when such a huge and massive loss would be suffered by the respondent authority, Hon'ble Court's interference is desirable irrespective of the other circumstances as well. Mr. Mehta has submitted that jurisdiction under Article 226 of the Constitution of India is not that much circumscribed whereby authorities such apparent arbitrary action sustaining huge loss to public exchequer be allowed at the whims of the authority of respondent. Hence, he prays for quashing of the impugned communication by granting the consequential reliefs as prayed for in the petition.

17. To substantiate the contention about financial possible loss to the public exchequer, Mr. Mehta has drawn the attention of this Court to few documents attached to the compilation on page 270 and 369 as also the assertions made in paragraph 19 of the affidavit-in-reply filed by the respondent authority dated 9.3.2021, reflecting on page 306 and on overall consideration of his submission on the basis of the relevant record, Mr. Mehta has reiterated his prayer for grant of the relief as prayed for in the petition. No other submissions have been made.

18. As against this, learned senior advocate Mr. Shalin Mehta, appearing with learned advocate Mr. Anal S. Shah for respondent No.1 has vehemently opposed the petition mainly on the ground that in respect of contractual matters, extraordinary jurisdiction may not be exercised in view of the settled position of law and as such, looking to the proposition of law laid down in respect of judicial review, in contractual matters, Hon'ble Court may not

entertain the petition. In addition to this, it has been submitted by Mr. Shalin Mehta that petitioner having participated in the process, was well aware about the terms and conditions of the tender and was also aware about the disqualification clause and as such, cannot raise a grievance about non-assigning of reason as the petitioner itself was aware about its own situation and as such, though a clear reason is assigned in the impugned communication, non-assigning of detailed reason is of no consequence and as such, it is not open for the petitioner to raise grievance in that regard.

19. While contending this, Mr. Shalin Mehta has referred to the impugned communication dated 24.3.2022, reflecting on page 264, and has submitted that inadequate documents were attached and though telephonically guided to supply the same, petitioner did not supply and in view of the Purchase Policy clause, such infirmity dis-entitles the petitioner to participate further and this fact petitioner was well aware of it from the beginning. Apart from this, Mr. Shalin Mehta has further drawn attention of this Court to clause 2.3.6 of the Purchase Policy, relevant page is 316 of the petition compilation, in which, petitioner was under an obligation to inform the respondent authority about any change which is taking place in the firm. The wordings of this clause 2.3.6 are sufficient enough to indicate that in view of this clause, petitioner could not be treated as having valid vendor registration and that being so, petitioner has been rightly held to be dis-entitled to participate any further in the tender process. After referring to clause 2.3.6, Mr. Shalin Mehta has also drawn our attention to page 347, which is

indicating the form to be filled in by petitioner as a part of tender condition as Annexure-III, consisting of list of documents required for change of name. By referring to related clause on this very page in the form of 'Undertaking', petitioner was required to disclose about any change, which is taking place in the firm and even if there is no change, then also, it was obligatory on the part of petitioner to fill in Annexure-III and such undertaking undisputedly having not been filled in, the authority has rightly taken decision which is impugned in the petition.

20. Learned senior advocate Mr. Shalin Mehta has further submitted that change of Directors which has taken place is certainly changing the control of the firm of registered vendor as well and even if there is no change in the name of the firm, *at least*, this change which has substantially altered the control of the firm ought to have been brought to notice of respondent. That having not been done by petitioner by filing an undertaking, as required, no equitable jurisdiction be exercised in favour of petitioner. This form is a mandatory requirement of the terms of tender document and that having not been observed, it is not open for petitioner to raise any grievance.

21. Further, learned senior advocate Mr. Shalin Mehta has contended that there is a clear admission on the part of petitioner, which is reflecting from their own documents, reflecting on page 381 dated 26.3.2022 and there is a clear assertion in this communication that undertaking as per Annexure-A is not provided as there is no change in name of the firm. Hence, a plain reading of the terms of undertaking would

clearly indicate that it was an obligation of the petitioner to fill in as a part of mandatory requirement and as such, having not done so, the authority has rightly treated the petitioner as not having any valid registration. Since this situation is very much apparent, the other grievances need not be gone into and even apart from that, this aspect is not cogently explained by petitioner. Hence, in view of this peculiar background of the fact, there is hardly any substance in the plea raised by petitioner. Additionally, Mr. Shalin Mehta has submitted that even clause 1.3.6 of the tender document, reflecting on page 56, contained in Chapter of the Guidelines for vendor registration/ re-registration, has clearly indicated that the firm shall have to confirm that there is neither change in infrastructure facilities nor in the product/ items and that change is only in the name/ ownership/ control of the firm and that has to be submitted as a part of proof and this legitimate requirement having not been observed by petitioner, hardly any case is made out to call for any interference.

22. Learned Senior advocate Mr. Shalin Mehta has submitted that there is no apparent arbitrariness of any nature, nor there is any favouritism nor there is any malafide attributed. Hence, in absence of these elements, extraordinary jurisdiction may not be exercised in view of the settled position of law. No other submissions have been made.

23. Having heard learned advocates appearing for the parties and having gone through the material on record, few circumstances which are apparent from the record are worth to

be considered while coming to an ultimate conclusion:

- (1) Petitioner has communicated clearly to the respondent authority on 19.8.2021, about the change of names of Directors and said change has taken place on account of retirement of old Directors Shri Sureshchandra Ambalal Vyas and Smt. Ansuyaben Vyas and in their place, new Directors have been inserted by virtue of specific resolution dated 31.7.2021. Said resolution has been effected in various documents, including Company Master Data as per M.C.A.. This email dated 19.8.2021 is in respect of such change of Directors and said letter has been attached with Board's resolution and the other Master Data, as indicated.
- (2) In a further communication dated 24.3.2022, on page 264, respondent authority has written a letter to petitioner indicating that though change of Directors intimation is given, but due to inadequate documents attached with said email dated 19.8.2021, telephonically petitioner was informed to supply duly stamped and signed documents but till date, it has not been submitted. In response to this, it appears that on very date, on 25.3.2022, by Most Urgent communication, it has been clearly asserted by petitioner that change of Directors has been informed well within 37 days only and there was no telephonic guidance received from the authority and informed also that Annexure-III is with respect to change of name of the company but not relating to Directors and vendor

registration is already continuing and as such, there was a clear valid vendor registration and that is the reason why preliminary stage has been cleared. On the contrary, at no point of time, it has been guided nor received any telephonic conversation with regard to this and in any case, even if assuming that there is a change, which is required to be brought to notice, same has been undisputedly informed by petitioner and acknowledged by authority about such intimation vide communication dated 19.8.2021 and said communication was attached with Board's resolution and Company Master Data as per M.C.A. and further, it has been clearly informed that petitioner is a small MSME Vadodra based, whose livelihood is depending upon the decision of GUVNL orders and hence, it is an undisputed position that change of Directors intimation had already reached the respondent well within time, which is even acknowledged by the authority. Only thing is that same has not been informed in format, otherwise, intimation is clearly received.

- (3) Further, it also appears that petitioners are dealing with this very respondent authority since long and in an ongoing contract, the very respondent and petitioner No.1 have entered into an agreement on 28.7.2021 under the authority of current Directors. Said agreement is, reflecting on page 274, with very respondent authority, signed on 31.8.2021 by one Jeetu K. Barwal (Sales Manager), authorized by these very current Directors which change of Directors is already acknowledged by the

respondent authority. Delegation of signing power to Mr. Jeetu Barwal was by Board's resolution reflecting on page 280 and same is by current Directors. This aspect is also not in dispute which is very much reflecting from the record and as such, on one hand, the respondent authority is not considering the bid of the petitioner under the guise of such change having not been informed, whereas on the other hand, in the ongoing contract, very respondent is entering into an agreement with the petitioner company with present Directors.

- (4) Further, by communication dated 26.3.2022, reflecting on page 381 of the petition compilation, a clear intimation is given to the respondent authority by petitioner which is in furtherance of earlier intimation dated 19.8.2021, even renewed factory license, Memorandum of Article of Association, List of Directors and documentary evidence about change of name of the Directors were again supplied in addition to earlier intimation, as referred to, and it has been clearly mentioned that undertaking as per Annexure-A is not provided as there is no change in the name of the firm. This is immediately informed to the respondent which fact is also not in dispute, and as such, undisputed position is that within the prescribed period, by way of specific communications dated 19.8.2021, change has already been intimated with all necessary documents and receipt of such is not in dispute and that being so, the stand taken by the respondent authority despite having such specific knowledge appears to be

arbitrary, irrational and hyper-technical in nature.

- (5) Further, ongoing contract has been executed as indicated above with this very petitioner through changed Directors and as such, neither there is any change in the name of the company nor there is any material change of ownership or control of the firm. The reason assigned by the respondent authority while discarding the petitioner from the tender process appears to be apparently arbitrary.
- (6) No-doubt, the Constitutional Courts are not expected to interpret the terms of the tender nor are expected to substitute or modify the terms of tender but on the basis of material on record, if decision making process is found to be somewhat unfair, reflects clear arbitrariness and unreasonableness, then Court cannot shut its eyes to such apparent irregular decision making process at the whims of officers or authority especially when the work relates to public importance.
- (7) A perusal of clause 1.3.6 is indicating that if there is change in the name, ownership or control of the firm of registered vendor, having valid registration, such firm would be required to inform the respondent in writing with supporting documents within 90 days and about unchanged situation also, the firm is expected to intimate. Clause 2.3.6 is also almost similar in line, which is contained in the Purchase Policy. A perusal of this clause

even if technically be applied, then also, undisputed position reflects that well within 90 days, petitioner firm has already informed the respondent with all necessary documents and said receipt of communication is also clearly admitted by virtue of communication dated 24.3.2022. Only infirmity which even if taken as it is, is that it might be not in the format as per Annexure-A. Nonetheless, effect of change is already well within the knowledge of the respondent authority and necessary renewed factory license, Memorandum of Article of Association and other all relevant documents are also undisputedly received by the respondent authority and hence when on the basis of the very same change, if on one hand, the respondent authority is executing an ongoing contract by specific execution of agreement on 31.8.2021, there is hardly any justifiable reason for discarding the petitioner from present process of tender, particularly when petitioner has been cleared in preliminary stage and Court sees no justification in the stand taken by the respondent authority.

- (8) Apart from that, there appears to be a possible circumstance that the undertaking Annexure-A might not have been provided as there was no change in the name of the firm or company as was aware about the fact of change, but this disputed version, the Court is not inclined to dwell much in view of the fact that there is a clear admission about receipt of the intimation of change dated 19.8.2021. Hence, the case appears to have been clearly

made out by petitioner which may fall within the parameters prescribed by the Hon'ble Apex Court. Accordingly, we are of the considered opinion that too technical view appears to have been taken by the authority just to oust the petitioner from the ongoing tender process.

- (9) Additionally, we see that this is a huge contract of public importance floated by tender notice, as such, when there is a huge difference between the bid of petitioner and other lowest bidders, we are not inclined to permit the respondent authority to ignore such impact on public exchequer on the basis of such hyper-technicality or whims of the officers of the respondent authority. It has been clearly asserted and fact remains that a tabular chart which has been provided is clearly indicating that there is a sizable difference between the quotes of petitioner and other bidders. Petitioner appears to have quoted the rates of Rs.47,275/-, whereas, the price opened of regular L-1 is Rs.49,485/- and looking to quantity of supply, apparently, there appears to be a huge difference and there would be an apparent loss to public exchequer, running into crores. It may be that petitioner has made out a case of difference of approximately Rs.23 crores which might go upto Rs.34 crores, as indicated in a chart on page 369. But, nonetheless, there appears to be some huge difference likely and as such, the Court cannot ignore such material aspect especially when the decision appears to be clearly arbitrary, irrational and hyper-

technical. The authority appears to be acting on some irrelevant considerations and trying to take disadvantage on hyper-technicality and as such, we see that a case is made out by petitioner which can fall within the parameters of exercising the judicial review even in these contractual matters.

- (10) We have further found that decision making process is not germane to law, same is based upon non-consideration of relevant material and on account of some irrelevant reasons and considerations. Hence, we deem it proper to interfere in exercise of our extraordinary jurisdiction.

24. On the basis of the aforesaid apparent situation which is prevailing on record, while coming to conclusion, we are having the assistance of the proposition of law laid down by the Hon'ble Apex Court prescribing the parameters in which the Courts can intervene.

25. It is no-doubt true that normally, Court would be loath to interfere in contractual matters unless a clear-cut case of arbitrariness or malafides or bias or irrationality is made out and Court must realize their limitations and the havoc which needless interference in commercial matters can cause. But, at the same time, it is also the proposition of law that Constitutional Court being the guardian of the fundamental rights, is duty bound to interfere when there is arbitrariness, irrationality, malafides and bias and as such, a duty is cast upon the Court in such circumstances that whenever any specific arbitrariness or

irrationality is visible in public interest, Court can exercise powers of judicial review. It is true that Court must not interfere where such interference will cause unnecessary loss to public exchequer. But at the same time, here in the case on hand, situation appears to be other way round that non-consideration of the relief may not be in the interest of public exchequer as well. Of-course, we are not definitely opining on this issue, but apparent figures which are indicating there appears to be huge and substantial difference in the amount between the petitioner and L-1, as indicated from the pleadings, and as such, we see valid reason to exercise our judicial review on the decision making process of the respondent authority.

26. At this juncture, we may quote hereunder the observations contained in paragraph 19 of the decision of Hon'ble Supreme Court delivered in the case of **Silppi Constructions Contractors Vs. Union of India and Another** reported in **(2020) 16 SCC 489:-**

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of 12 2019 (6) SCALE 70 restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges robes do not have the

necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give fair play in the joints to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

27. Yet, another proposition of a very recent time propounded by the Hon'ble Apex Court in the case of **Uflex Limited Vs. Government of Tamil Nadu and others** reported in **(2022)1 SCC 165**, wherein also, few observations contained in relevant paragraphs, we may deem it fit to quote hereunder:-

1. 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 (hereinafter referred to as the Reason: Constitution), 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 Public Interest Litigation (PIL) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.
4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in *Michigan Rubber v. State of Karnataka*³ as under:

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 courts hardly have any role to play in this process except for striking down such action of the executive as is Id. (2012) 8 SCC 216 [3] 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 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 fundamental right to carry on business with the Government.

28. On the basis of the aforesaid proposition of law laid down by the Hon'ble Apex Court on the issue of exercise of powers of judicial review, we are of the opinion that case on hand this Court deems it proper to interfere in the peculiar background of facts which are analyzed herein-above. Accordingly, we are inclined to accept the stand of the petitioner.

Hence, we proceed to pass the following order:-

ORDER

- (1) Special Civil Application is **ALLOWED** and impugned communication dated 23.3.2022 (Annexure-5) is quashed and we hereby direct the respondent authority to consider first petitioner's bid for further consideration in the tender process in respect of the tender

Nos.MGVCL/Proc/ CPP/22-23/3137/10 KVA DTR and
MGVCL/Proc/ CPP/22-23/3138/5 to 500 KVA DTR and
take appropriate decision at the earliest.

- (2) However, we make it clear that since the direction is issued for further consideration in the aforesaid tenders process, we make it clear that we have not expressed any opinion with regard to merits AND it is clarified that while carrying out further process, the respondent authority is at liberty to take decision on merits and we are leaving it open to the respondent authority to take independent appropriate decision in accordance with law as per terms stipulated under subject tender.
- (3) No order as to costs.

Sd/-
(ARAVIND KUMAR,CJ)

Sd/-
(ASHUTOSH J. SHASTRI, J)

OMKAR

THE HIGH COURT
OF GUJARAT

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