



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.4823 OF 2022**

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SecLink Technologies Corporation ..... Petitioner

Versus

The State of Maharashtra & Ors. .... Respondents

Dr. Virendra Tulzapurkar, Senior Advocate with Mr. Mandar Soman, Mr. Suraj Iyer, Mr. Devendar Ailawadi, Mr. Jenil Shah, Mr. Abhishek Karnik i/b. Ganesh & Co. for the petitioner

Dr. Milind Sathe, Senior Advocate with Ms. Jyoti Chavan, Additional Government Pleader, Mr. Atul Vanarse, AGP, Mr. Bhushan Deshmukh and Mr. Aditya Mhase for respondent Nos.1 and 2 - State

Mr. Ravindra Kadam, Senior Advocate with Mr. Vikram Nankani, Senior Advocate, Mr. Zal Andhyarujina, Senior Advocate with Mr. Rohan Kadam, Mr. Karan Bhide, Ms. Rati Patni, Ms. Kathleen Lobo and Mr. Vikrant Dere i/b. Wadia Ghandy & Co. for respondent No.3 – Adani Properties Pvt. Ltd.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &  
AMIT BORKAR, J.**

**RESERVED ON : AUGUST 2, 2024  
PRONOUNCED ON : DECEMBER 20, 2024**

**JUDGMENT (PER : CHIEF JUSTICE)**

**Challenge:**

**1.** By instituting proceedings of this petition filed under Article 226 of the Constitution of India, the petitioner which is a Company incorporated in the Republic of Seychelles and is a Lead Member of a consortium comprising of various other

companies, assails the validity of the decision taken by the Committee of Secretaries (**CoS**) of the Government of Maharashtra (**GoM**) in its meeting held on 27<sup>th</sup> August 2020 as affirmed by the Cabinet of the State of Maharashtra vide Cabinet resolution dated 29<sup>th</sup> October 2020 whereby the tender process initiated on 28<sup>th</sup> November 2018 bearing tender Ref.No.DRP/1/2018 (hereinafter referred to as the **earlier tender**) for selection of a Lead Partner for redevelopment of Dharavi Notified Area (hereinafter referred to as "**the project**") was cancelled and it was further decided to take recourse to the process of re-tendering for development of the project.

**2.** Challenge has also been made to the Government Resolution dated 5<sup>th</sup> November 2020 issued by the Housing Department of GoM cancelling the tender as per the decision of the Cabinet dated 29<sup>th</sup> October 2020. The said Government order also embodies a decision for inviting fresh tender by making necessary changes in the terms and conditions of the earlier tender and accordingly, the Chief Executive Officer and Officer on Special Duty, Dharavi Redevelopment Project/Special Planning Authority, Mumbai (**DRP/SPA**) was directed to initiate further action.

**3.** The petitioner also questions the validity of the letter dated 11<sup>th</sup> November 2020 issued by the Chief Executive Officer and Officer on Special Duty, Dharavi Redevelopment Project/Special Planning Authority (DRP/SPA) whereby the petitioner was informed that the bid process for selection of the Lead Partner for redevelopment of the project initiated on 28<sup>th</sup> November

2018 stood cancelled. By the said letter, the petitioner was also informed to collect the Bid Security submitted to the DRP/SPA office.

**4.** After cancellation of the earlier tender process, the Housing Department of the GoM issued a Government Resolution dated 28<sup>th</sup> September 2022 whereby approval was accorded to the tender documents for fresh tender process with modified terms and conditions as per the Government Resolution dated 5<sup>th</sup> November 2018 for integrated development of the project through Special Purpose Vehicle (**SPV**) Company Model along with modified timelines for implementation of the project. Approval by the said Government Resolution was also accorded to the DRP/SPA for inviting proposals through tender process and implementation of the project. After inclusion in the tender documents of certain fresh terms and conditions, primarily relating to transfer of railway land and additional concessions including the terms and conditions of the Railway Land Development Authority (**RLDA**), the Government by issuing this Government Resolution also accorded approval to the Memorandum of Understanding (**MoU**) signed between the RLDA and DRP/SPA. The Government Resolution dated 28<sup>th</sup> September 2022 also provides for certain other provisions for completion of the project. This Government Resolution dated 28<sup>th</sup> September 2022 is also challenged herein.

**5.** On cancellation of the earlier tender process, a fresh tender was floated and the bids submitted pursuant to this tender were evaluated and accordingly a decision for selection of highest

bidder as Lead Partner for implementation of the project was taken by the CoS under the Chairmanship of the Chief Secretary, GoM on 15<sup>th</sup> December 2022. The decision for selection of the highest bidder taken by the CoS in its meeting held on 15<sup>th</sup> December 2022 was approved by the Cabinet on 22<sup>nd</sup> December 2022. The decisions dated 15<sup>th</sup> December 2022 and 22<sup>nd</sup> December 2022 of the CoS and the Cabinet respectively, selecting respondent No.3 as the highest bidder as Lead Partner for implementation of the project, have also been put to challenge in this petition.

**6.** Based on the aforesaid decision of the Cabinet dated 22<sup>nd</sup> December 2022, the GoM in the Housing Department issued a Government Resolution dated 13<sup>th</sup> July 2023 whereby approval was accorded for appointment of respondent No.3 as the successful bidder for implementation of the project in the DNA. Certain other decisions were also taken by issuing Government Resolution dated 13<sup>th</sup> July 2023, according to which the CEO and Officer on Special Duty was authorised for taking decisions on issuance of Letter of Award (**LoA**) and for immediate implementation of the project under the SPV Company Model. Validity of this Government Resolution dated 13<sup>th</sup> July 2023 has also been assailed by the petitioner.

**7.** Pursuant to the decisions taken by the CoS and the Cabinet and also in the light of the decision embodied in the impugned Government Resolution dated 13<sup>th</sup> July 2023 a LOA was issued in favour of respondent No.3 by DRP/SPA on 17<sup>th</sup> July 2023 which is also under challenge in this petition.

**8.** Thus, pithily stated, the petitioner challenges the impugned decision of cancellation of earlier tender process initiated for development of the project and also initiation of process of re-tender which has culminated in issuance of the LoA in favour of respondent No.3 for development of the project.

**Facts:**

**9.** Having noticed the challenge made in these proceedings, it will be appropriate to note certain facts which are relevant for the purpose of appropriate decision on the issues which have arisen for our consideration.

**10.** The Department of Housing, GoM, vide its resolution dated 4<sup>th</sup> February 2004 decided to redevelop Dharavi as a comprehensive integrated development project and accordingly to achieve the said purpose, the Urban Development Department of GoM appointed the Slum Rehabilitation Authority as a Special Planning Authority (**SPA**) vide Government Resolution dated 9<sup>th</sup> March 2005. The DRP was declared as a Vital Public Purpose Project by issuing Government Resolution to the said effect on 11<sup>th</sup> September 2007.

**11.** It is also to be noticed that the GoM, vide its resolution dated 4<sup>th</sup> February 2004 also established a CoS under the Chairmanship of the Chief Secretary of the State for taking policy decisions for implementation of the project. Vide Government Resolution dated 24<sup>th</sup> October 2008 the CoS was reorganized. The proposal for redevelopment of project was

submitted by the Chief Executive Officer and the Officer on Special Duty, DRP/SPA to the CoS and as per the directions of the CoS further steps were also taken. The GoM in the Department of Urban Development passed a Government Resolution on 25<sup>th</sup> June 2009 and declared the SRA (**Slum Rehabilitation Authority**) as the SPA (**Special Planning Authority**) for the project. The Cabinet approved the proposal of redevelopment of Dharavi through SPV vide its decision dated 16<sup>th</sup> October 2018 whereupon a Government Resolution dated 5<sup>th</sup> November 2018 was issued for integrated redevelopment of the project through SPV Company after giving various concessions for the project. The DRP/SPA floated the earlier tender, dated 28<sup>th</sup> November 2018 for selection of a Lead Partner for redevelopment of the project. Certain clarifications were also issued in respect of the queries made by the prospective bidders. Pursuant to the earlier tender the petitioner participated in the bid process as a Lead Member of the Consortium which comprised of (i) New Consolidated Construction Co. Ltd. (ii) Najaah Global Investment LLC (iii) Al Khalidia Real Estate (iv) Krishna Infrasol Pvt. Ltd. (v) Brick Eagle Nupree Ventures Pvt. Ltd. (vi) Med Freshe Pvt. Ltd. (vii) DSP Design Associates Pvt. Ltd. and (viii) SecLink Technologies Corporation.

**12.** As per the tender document, E-Envelope-1 was opened on 16<sup>th</sup> January 2019 and the bids submitted pursuant to the earlier tender were evaluated and accordingly a bid evaluation report dated 28<sup>th</sup> January 2019 was prepared, wherein two bidders, viz. the petitioner and respondent No.3 were found to have qualified to satisfy minimum requirements of technical and financial

capacity. The petitioner was accordingly informed by the Maha-Tenders Portal that it was found to have qualified during evaluation of the technical bid vide email dated 30<sup>th</sup> January 2019.

**13.** Financial bids pursuant to the earlier tender were opened in presence of the representatives of the technically qualified bidders on 30<sup>th</sup> January 2019. The petitioner was found to have quoted bid price of Rs.7200 crores whereas respondent No.3 was found to have quoted financial bid of Rs.4529 crores. The Bid Evaluation Committee, thereafter circulated an Office Note on 30<sup>th</sup> January 2019, whereby the highest offer of Rs.7200 crores made by the petitioner was proposed for approval of CoS. On circulation of said Office Note dated 30<sup>th</sup> January 2019, a meeting of CoS was held on 1<sup>st</sup> February 2019, where the proposal made by the DRP/SPA was considered and deliberations took place on the basis of which minutes of the said meeting of the CoS dated 1<sup>st</sup> February 2019 were drawn, wherein it was noted that the CoS had agreed to the tender process as explained, and further noted that the petitioner was the highest qualified bidder. The minutes of the said meeting also reveal that the CoS also mentioned certain additional obligations which were to be fulfilled by the successful bidder. The CoS also noted that the railway land may be made available for construction of transit tenements which was in advanced stages of the discussion with the Railway Board. The CoS further noted that as the detailed discussions on the railway land could not be concluded, it was agreed that the matter will be discussed in the next meeting of CoS for final decision. Paragraphs 11 and 13 of

the minutes of the meeting of the CoS dated 1<sup>st</sup> February 2019 are relevant to be noted at this juncture which are extracted hereinbelow:

*"11. Committee of Secretaries (CoS) agreed to the tender process as explained and noted that the SecLink led Consortium is the highest qualified bidder.*

*12....*

*13. Committee of Secretaries further noted that the railway land may be made available for construction of transit tenements and is in advanced stages of discussions with the Railway Board. As the detailed discussions on railway land could not be concluded, it was agreed that the matter will be discussed in the next meeting of CoS for final decision."*

**14.** Thus, except for noticing that the petitioner was the highest qualified bidder, the final decision was not taken in the meeting of the CoS, dated 1<sup>st</sup> February 2019 which was deferred for the reason that detailed discussions on the railway land could not be concluded.

**15.** On 3<sup>rd</sup> March 2019, the RLDA and DRP/SPA executed an MoU in respect to the railway land for being included in the project. According to this MoU, the RLDA agreed to transfer 45 acres of land to DRP/SPA on lease basis for 99 years inclusive of encumbered area of around 10.47 acres which was occupied by the slum dwellers and was also under railway quarters and other assets of the railways, which too, were to be redeveloped. The MoU further provided that DRP/SPA shall pay upfront an amount of Rs.1000 crores to RLDA in two installments out of which Rs.800 crores would be paid on the signing of the MoU and the balance Rs.200 crores would be paid within six months from the date of execution of Definitive Agreement. It was also agreed

that on payment of Rs.800 crores, the RLDA shall handover open land to the DRP/SPA and operational land within 30 days of signing of MoU. It was further agreed that the DRP/SPA shall make available the railway land for the project in lieu of the profit sharing and monetary compensation from DRP/SPA and that in case the project did not go ahead or only rehabilitation component was constructed or project got stalled in between, the State Government through DRP/SPA would indemnify the RLDA for an amount of Rs.2800 crores. It was also agreed that the State shall indemnify the RLDA towards any shortcomings in the RLDA's share of profit after project completion below Rs.2800 crores and that the upfront payment of Rs.1000 crores would be excluded for the said purpose. The parties had further arrived at an understanding that apart from constructing 812 railway quarters of different types, 10 hostel rooms and equivalent built up area of existing service buildings, which approximately admeasures 75000 sq.mtr., and further, rehabilitation of the slums shall also be done on the railway land.

**16.** The Chief Executive Officer and the Officer on Special Duty, DRP/SPA wrote two letters dated 8<sup>th</sup> march 2019 to the petitioner informing therein that the bid submitted by the petitioner was found to be the highest for the project and further that since the GoM intended to proceed with the project with speed, it would be desirable that a High Level Delegation from GoM should have a formal meeting with the Chairmen of two of its consortium members viz. M/s.Najaah Global Investment LLC and Al Khalidia Real Estate.

**17.** Thereafter, the CoS held its meeting on 17<sup>th</sup> June 2019 and discussed various aspects of the matter and noted that after the earlier meeting of the CoS held on 1<sup>st</sup> February 2019, an MoU was signed between RLDA and DRP/SPA on 3<sup>rd</sup> March 2019 for transfer and development etc. of the railway land. The Committee noticed various terms and conditions of the said MoU and further noted, *inter alia*, that obligations in the MoU such as cost of acquisition of railway land, rehabilitation of slum dwellers occupying the railway land and redevelopment of existing railway quarters, hostel rooms and service buildings on an overall area of about 75000 sq.mtr. was not part of the earlier tender documents. The Committee also noticed that though MoU between the RLDA and DRP/SPA had been signed, however, Definitive Agreement was yet to be signed and terms of the agreement were yet to be finalized for which certain clarifications were also sought by the RLDA. The Committee also noticed two letters dated 8<sup>th</sup> March 2019 issued by the DRP/SPA to the petitioner to organize a meeting between the High-Level Delegation of the GoM with the Chairmen of two other consortium members. The Committee also took note of the fact that the petitioner had been requesting the DRP/SPA to issue LoA pointing out that the Government Resolution dated 5<sup>th</sup> November 2018 provided that LoA may be issued within seven days of the opening of the financial bid, however, despite two months having elapsed, the LoA had not been issued. Considering all these aspects, the CoS noted that the detailed terms and conditions of the transfer of railway land were not part of the tender documents including the acquisition of railway

land, rehabilitation of slum dwellers and redevelopment of existing railway quarters, hostel rooms, service buildings and other area of about 75000 sq.mtrs. The Committee decided to take opinion of the then learned Advocate General of the State of Maharashtra on the issue as to whether these factors relating to railway land were not part of the bid documents and occurred after the bids were opened and evaluated and whether it would constitute material change in the bid conditions/process and further as to whether it would amount to post tender change. The CoS also decided to seek opinion of the then learned Advocate General on the issue as to whether it was required to cancel the present bid process and go for re-bid. The relevant decisions taken by the CoS in its meeting held on 17<sup>th</sup> June 2019 are extracted hereinbelow:

*"10) Committee of Secretaries noted that the detailed terms and conditions for transfer of railway land was not part of the tender documents. CoS noted that following major details in the MoU was not part of tender documents:*

- a. Cost of acquisition of railway land,*
- b. Rehabilitation of slum dwellers on railway land and*
- c. Redevelopment of existing railway quarters, hostel rooms and service buildings of around 75,000 sq.mtr.*

*11) CoS agreed that it is necessary to take the opinion of the Advocate General, Govt. of Maharashtra on following:*

- a. Whether the facts that (a) cost of acquisition of railway land, (b) rehabilitation of slum dwellers on railway land and (c) redevelopment of existing railway quarters, hostel rooms and service buildings of around 75,000 sq. mt. were not part of the bid documents and happened after the bids were opened and evaluated, constitute material change in the bid conditions/process and whether it will amount to a post tender change.*

*b. If yes, then whether it is required to cancel the present bid process and go for rebid.”*

**18.** Pursuant to the decision taken by the CoS in its meeting dated 17<sup>th</sup> June 2019, DRP/SPA decided to seek opinion from the learned Advocate General of the State of Maharashtra vide Office Note dated 21<sup>st</sup> June 2019 on the two issues mentioned in the decision of the CoS, dated 17<sup>th</sup> June 2019.

**19.** The petitioner wrote letter dated 25<sup>th</sup> June 2019 to the DRP/SPA stating therein that it had been four months since the letter of intimation dated 8<sup>th</sup> March 2019 was issued however, the petitioner did not receive the LoA and the petitioner further extended the bid by another six months seeking confirmation of the DRP/SPA. The petitioner also mentioned in the said letter certain media reports that the matter had been referred to the then learned Advocate General for his opinion on the issue as to whether to go with the earlier tender process or to go for re-tender on account of acquisition of the railway land. The petitioner also stated in the said letter that since making available railway land or any such land was the obligation of the Government before depositing investment amount in the SPV Company by the Lead Partner and signing Development Agreement, hence, the DRP/SPA should treat the petitioner as the highest bidder for development of the railway land on acquisition and that since the Government acted on railway land acquisition on its own as the Government knew that it was part of the bid document and its obligation before signing the

development agreement with the finalized bidder, it shall not amount to a material change. The petitioner through the said letter, thus, suggested that the railway land be excluded on account of the fact that the bid was for Dharavi Redevelopment and not for Railway Land Development and that it may not be feasible as only 40% of the land can be used for the reason that the balance 60% of the land was occupied by the slums and by railway quarters and other railway amenities which did not serve the purpose of acquisition done by the DRP/SPA. The petitioner also requested that in terms of the Government Resolution dated 5<sup>th</sup> November 2018 the long pending LoA be issued to the petitioner so that the petitioner could take steps in furtherance of LoA and Development Agreement and start the first phase of the project.

**20.** In response to the abovesaid letter of the petitioner, DRP/SPA issued a letter to the petitioner on 29<sup>th</sup> June 2019 informing therein that as per the Government Resolution dated 5<sup>th</sup> November 2018, approval of selection of the Lead Partner through bid process vested with the CoS under the Chairmanship of the Chief Secretary and that the final decision on the matter was yet to be taken by the said Committee. There have been various communications by the petitioner to the DRP/SPA seeking issuance of LoA in its favour. The DRP/SPA vide its letter dated 13<sup>th</sup> February 2020 intimated the petitioner that the matter will be dealt with as per the RFQ-cum-RFP of the tender documents and as per the decision of the CoS and/or GoM.

**21.** The CoS considered the matter in its meeting held on 27<sup>th</sup> August 2020 and taking note of discussion which had taken place in its earlier meetings as also the advice tendered by the then learned Advocate General, concluded that it would be in public interest to cancel the tender process initiated on 28<sup>th</sup> November 2018 for selection of a Lead Partner for redevelopment of the Dharavi Notified Area and further decided to go for re-tendering.

**22.** The CoS also instructed the DRP/SPA to present before it new tender documents with necessary changes for selection of a Lead Partner. The decision was also taken to submit the minutes of the meeting of the CoS, dated 27<sup>th</sup> August 2020 to the Cabinet for confirmation of cancellation of tender process and for initiating the tender process afresh, with necessary changes. The minutes of the meeting of the CoS dated 27<sup>th</sup> August 2020 are on record wherein after deliberating on various issues and even noticing various submissions through letters made by the petitioner, the CoS concluded that the letter dated 8<sup>th</sup> March 2019 issued by the DRP/SPA could not be considered as a Letter of Acceptance of the proposal of the bidder giving reasons that (a) the process of approval of bids has been clearly stated in the Government Resolution dated 5<sup>th</sup> November 2018 and the same was included as part of the tender wherein right of selection of successful bidder was with the CoS and that the decision on successful bidder had not been taken by the CoS and accordingly, it was incorrect to state that the bid of the petitioner had been accepted, (b) DRP/SPA, vide letter dated 29<sup>th</sup> June 2019 had communicated to the petitioner that in terms of

the provisions of the Government Resolution / bid document, it was the CoS which was the decision making body for issuance of LoA and (c) before any agreement becomes effective, there were various steps as per the tender which were required to be fulfilled and hence, in absence of fulfillment of those requirements, no agreement can be said to have existed between the petitioner and the DRP/SPA. The CoS also noticed in its meeting held on 27<sup>th</sup> August 2020 that before the agreement could become effective various steps which were not taken, were formation of SPV Company, entering into MoU with the authority, depositing Rs.100 crores in the escrow account, submitting bank guarantee of Rs. 400 crores, preparing integrated master plan with the Environment Management Plan within 90 days on signing of MoU, conducting necessary information, education and communication activities for the first phase of the project, submitting the required documents to the authority as per the Slum Act in the first phase and depositing funds as per the price bid within 30 days of satisfying the facilitation requirement for first stage of the project. In the said meeting dated 27<sup>th</sup> August 2020 the CoS also opined that in an eventuality where neither the bid had been accepted nor any decision had been taken on the selection of the bidder, nor any LoA had been issued, nor any agreement has been signed, the submissions made by the petitioner in this regard were misrepresentation of facts.

**23.** The CoS also noted and deliberated in the said meeting dated 27<sup>th</sup> August 2020 the inclusion of railway land which in the opinion of the CoS made the project more do-able and viable

and that there were numerous slum tenements on the railway land and therefore, the integrated redevelopment of the railway land along with Dharavi Redevelopment Project becomes critical and vital to overall integrated development of Dharavi Notified Area. It also opined that such integrated redevelopment along with railway land will be in public interest. The relevant extract of the minutes of the meeting of the CoS dated 27<sup>th</sup> August 2020 are quoted hereinbelow:

*"12) CoS took note of the Seclink's email dated 24.08.2020. The major points highlighted in the email which were discussed are as below:*

*a. Seclink has referred to the letter issued by DRP/SRA on 8<sup>th</sup> March 2019 as Letter of Acceptance, in which it was mentioned that Seclink Technologies Corporation led Consortium is the highest bidder and have shown DRP's intention to proceed with the project with speed and efficiency with them.*

*b. Email further mentions that their submission of Proposal in January 2019 and DRP's acceptance on 8<sup>th</sup> March 2019, results into a concluded Contract. The terms of the Contract has already been provided in the Draft of the Development Agreement and the same has been accepted by Seclink while submitting the proposal. However, further process as mentioned in the Global Tender has not been initiated by DRP for satisfying the Conditions Precedent before signing the Development Agreement despite multiple reminders and attempts to resolve the issue. Under such a condition, procedure for Dispute Resolution has been provided in the Article 9 of the Draft Development Agreement.*

*c. Seclink has referred to the Bilateral Investment Promotion and Protection Agreement (BIPPA) signed between India and Government of UAE. The Arbitration clause mentioned in the Draft Development Agreement is in conformity with the provisions of the BIPPA.*

*d. Seclink has also referred to the notification issued by the Ministry of Law and Justice (Department of Legal Affairs) of India on 17<sup>th</sup> January 2020, which declared the United Arab Emirates (the "UAE") as a "reciprocating territory" under S44A of the India Code of Civil Procedure 1908. Following the*

*Notification, the civil judgments issued by the UAE courts are now directly enforceable in India courts.*

*e. Seclink has further stated that, despite multiple reminders and our attempts to resolve the issue amicably has failed with CEO & OSD, DRP/SRA and the Chief Secretary of Government of Maharashtra, we request your confirmation within next 10 days whether you would like to have arbitration in DIFC, Dubai, UAE or in Mumbai.*

*13. CoS deliberated on the letter issued on 8<sup>th</sup> March 2019 by DRP. CoS took note that the said letter was also brought to the notice of the Hon'ble Advocate General, Government of Maharashtra. Hon'ble Advocate General, Government of Maharashtra has also taken note of the same and has opined that till actual Letter of Award is issued, no rights are created in anyone. Further, CoS concluded that such a letter cannot be considered as Letter of Acceptance of the proposal by the bidder on following grounds:*

*a. The process of approval of the bids submitted has been clearly stated in the Government Resolution dated 05/11/2018, and the same was included as part of the tender, wherein all the rights of Selection of the Successful Bidder are with the Committee of Secretaries. The decision on the Successful Bidder has not been taken by the Committee of Secretaries till date and hence it is wrong to state that the bid has been accepted. Further, DRP wide their letter dated 29/06/2019 had pointed out to Seclink the condition in the GR/Bid that COS is the decision making body for issuance of Letter of Award.*

*b. Before any agreement becomes effective, there are various steps as mentioned in the tender and hence no agreement can exist between Seclink and DRP without fulfilment of such steps:*

- i. Formation of Special Purpose Vehicle Company as per the Companies Act, 2013;*
- ii. Entering into Memorandum of Understanding with the Authority;*
- ii. Depositing Rs.100 crore (Rupees One hundred crore) in the escrow account and submitting the Bank Guarantee of Rs.400 crore (Rupees Four hundred crore) in favour of the Authority;*
- iv. Preparing Integrated master plan along with the Environment Management Plan within 90 days of signing of MoU;*

- v. *Conducting necessary Information, Education and Communication (I.E.C.) activities for the first phase of the project and has given necessary support to the Authority for conducting facilitation;*
- vi. *Submitting to the Authority required documents for Certification of Annexure-II as per Slum Act for the first phase of the Project;*
- vii. *Payment to DRP/SRA, towards cost of acquisition of private land and any associated cost for the first phase; and*
- viii. *Depositing funds as per the Price Bid, within 30 days of satisfying the facilitation requirements for 1<sup>st</sup> stage of the Project.*

*Hence, before satisfying all the above conditions there is no agreement between the Parties.*

*CoS opined that in an eventuality, where, neither the bid has been accepted, nor any decision has been taken on the selection of the Successful Bidder, nor any Letter of Award has been issued till date, nor any agreement has been signed, the letter of 24.08.2020 of Seclink Technologies Corporation is the misrepresentation of the facts.*

- 14) *CoS also took a note that Seclink has kept the Bid valid and extended the Bank Guarantee till 22.12.2020.*
- 15) *CoS noted that Clause 2.6.1 of the tender document gives rights to DRP to accept or reject any Bid and to annul the Selection Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons.*
- 16) *After detailed deliberations on all the above points, CoS discussed that inclusion of railway land makes project more doable and viable. There are numerous slum tenements on the railway land. Integrated redevelopment of the railway land along with the Dharavi project becomes critical and vital to overall integrated development of the Dharavi Notified area. CoS opined that such an integrated development along with railway land will be in public interest.*
- 17) *CoS concluded that considering the opinion of Hon'ble Advocate General, Government of Maharashtra and all correspondence with the Bidder, it is in public interest to cancel the current tender process and decided to go for retendering. CoS decisions*

are summarized below:

- a. *The CoS decided to cancel the tender process initiated on 28<sup>th</sup> November 2018 for Selection of a Lead Partner for the Redevelopment of the Dharavi Notified Area and decided to go for retendering.*
- b. *CoS instructed DRP Authority to present before the Committee of Secretaries new tender document, with necessary changes, if any, for Selection of a Lead Partner for the Redevelopment of the Dharavi Notified Area.*
- c. *CoS has directed to submit this decision of CoS to the Cabined for confirmation of cancellation of the existing tender process and for initiating the new tender process afresh, with necessary changes.*

*Meeting ended with Vote of Thanks by CEO & OSD-DRP/SRA to Chief Secretary; Government of Maharashtra and Members of the Committee of Secretaries (CoS) for DRP"*

**24.** On the basis of the decisions taken by the CoS in its meeting dated 27<sup>th</sup> August 2020, the matter was considered by the Cabinet of the State which passed a resolution in its meeting held on 29<sup>th</sup> October 2020 whereby the decision of the CoS was affirmed. On the basis of the said Cabinet decision, the impugned Government Resolution dated 5<sup>th</sup> November 2020 cancelling the earlier tender process and inviting fresh tenders was issued. The said Government Resolution dated 5<sup>th</sup> November 2020 directed the CEO and Officer on Special Duty, DRP/SPA to initiate further action.

**25.** Based on the aforesaid decision for cancellation of earlier tender process, the DRP/SPA issued impugned letter dated 11<sup>th</sup> November 2020 intimating the petitioner that it had been decided to terminate the bid process and therefore, the bid process initiated on 28<sup>th</sup> November 2018 stood terminated. The

petitioner, by the said letter was also intimated to collect the bid security submitted by it.

**26.** The State Government, in the Housing Department, thereafter issued Government Resolution dated 28<sup>th</sup> September 2022, whereby approval was accorded to the fresh tender document with the modified terms and conditions as per the Government Resolution dated 5<sup>th</sup> November 2018 for integrated development of Dharavi Notified Area through SPV Company along with modified timelines for implementation of the project. Approval was also accorded to DRP/SPA inviting proposals through fresh tender process for inclusion in the tender documents the terms and conditions of the RLDA for transfer of railway land and additional concessions and for doing necessary changes in the tender document. The approval was also accorded to the MoU dated 3<sup>rd</sup> March 2019 signed between RLDA and DRP/SPA and for including the land area in the ownership of railways in the scope of the new tender. Certain other decisions were also taken regarding transferable development rights (TDRs) etc.

**27.** The DRP/SPA, accordingly, floated fresh tender on 1<sup>st</sup> October 2022 and pre-bid clarifications were issued on 14<sup>th</sup> October 2022. In the meantime, on 18<sup>th</sup> October 2022 the lease deed was executed between the RLDA and the DRP/SPA in respect of the railway lands in terms of the MoU signed between these two parties which led to issuance of corrigendum to the tender document making the lease deed between the RLDA and DRP/SPA part of the tender document. The technical bids

pursuant to the subsequent tender were opened and on evaluation, the bids submitted by respondent No.3 and M/s. DLF Ltd. were found to have technically qualified. On 29<sup>th</sup> November 2022, the financial bid of these two bidders were opened wherein the financial bid submitted by respondent No.3 was found to be the highest. Prior to floating the subsequent tender, the instant petition was filed by the petitioner on 20<sup>th</sup> November 2020. After the financial bid of the subsequent bid was opened, the petitioner sought a prayer for amendment to the writ petition which was allowed by the Court.

**28.** Based on the decision taken for selection of the highest bidder as a Lead Partner for implementation of the project, the bids considered by the CoS on 15<sup>th</sup> December 2022 and the decision of the Cabinet on 22<sup>nd</sup> December 2022, the Government issued Government Resolution dated 13<sup>th</sup> July 2023 whereby approval was accorded for appointment of respondent No.3 as the successful bidder for implementation of the project and the CEO and the Officer on Special Duty, DRP/SPA was authorised to take decision for issuance of LoA for implementation of the project under the SPV Company Model. Accordingly, the CEO and Office on Special Duty, DRP/SPA issued the impugned LoA / Work Order on 17<sup>th</sup> July 2023 whereby respondent No.3 was informed that the price bid of Rs.5069 crores submitted by it has been accepted and respondent No.3 has been declared to be the successful bidder as Lead Partner for execution of the project. Respondent No.3 was also directed to form SPV Company for execution of the project at the earliest and communicate the same to DRP/SPA. Respondent No.3 was further directed to

submit the draft MoU and Articles of Association of the SPV Company and also the MoU which would include the work plan and timeline for the project implementation. By moving an amendment in the instant petition, the petitioner has challenged the LoA dated 17<sup>th</sup> July 2023 as well.

**29.** Thus, having noticed the facts which are relevant and have bearing on the present matter, chronologically, we now proceed to note the submissions made by learned Counsel representing the respective parties.

**Submission of behalf of the petitioner:**

**30.** Dr. Virendra Tulzapurkar, learned Senior Advocate, representing the petitioner, assailing the validity of the impugned decision to cancel the earlier bid process and inviting tender afresh, has primarily urged the following three grounds:

- (a) That the reasons given for cancellation of the earlier tender process are not sustainable as the same are non-existent and are not borne out of the record. His further submission is that cancellation of tender process has been done for extraneous reasons and hence the impugned action of cancellation is arbitrary and irrational and accordingly violative of Article 14 of the Constitution of India;
- (b) the impugned cancellation of the earlier tender was done after a long gap i.e. beyond reasonable time and in the meantime the petitioner had incurred huge expenditure;
- (c) the issuance of the letter dated 8<sup>th</sup> March 2019 by the DRP/SPA whereby the petitioner was informed that the bid submitted by the consortium headed by it was

the highest, amounted to final acceptance of the offer and as such the contract between the petitioner and the DRP/SPA stood concluded and accordingly in view of the concluded contract the impugned cancellation of the earlier tender process could not have been resorted to.

**Submissions to substantiate ground (a):**

**31.** It has been argued on behalf of the petitioner that the reasons given in the decision of the CoS in its meeting held on 27<sup>th</sup> August 2020 are unjustifiable, contrary to the material on record and arbitrary. It has further been stated that as a matter of fact the material on record would show that the reasons given that the railway land was not included in the earlier tender process, is unsustainable, as the railway land was covered under the scope of the earlier tender. Drawing our attention to clause 8 of the tender document, it has been argued that the said clause clearly provided that the land available with the railways abutting Dharavi Notified Area, of an area of approximately 35.42H, may be included as part of Dharavi Notified Area after approval of the Railway Board. Clause 8 of the tender document is extracted hereinbelow:

*"8. Land available with the Railways abutting Dharavi Notified Area ( Dadar – Matunga ) of approximately 36.42 Ha. may be included as part of Dharavi Notified area, after approval of the Railway board. Further, railway has land of 6.91 Ha. in and around Dharavi Notified area, which can be used by DRP/SRA for construction of temporary transit tenements and integrated development of such land with overall redevelopment of Dharavi, after approval of Railway Board."*

**32.** Dr. Tulzapurkar has also argued that in the pre-bid meeting it was clarified that DRP/SPA had already requested the Railways in this regard and the matter was under process and that there would not be any extension after signing the Development

Agreement except as is provided in the draft Development Agreement.

**33.** He has also submitted that in respect of another query in the pre-bid meeting, it was also informed to the bidders that the process of approval from Railway Board will be undertaken by DRP/SPA / GoM however, any cost for acquisition and associated cost shall be paid by the SPV Company/Lead Partner and that the SPV Company/Lead Partner may have to pay such amount up front.

**34.** Dr.Tulzapurkar has also referred to yet another clarification given in the pre-bid meeting where various suggestions were given by the bidders that this should be obligation of the GoM and/or DRP/SPA and that there should be no consideration payable for the railway land by SPV. Further, if there was any consideration payable, the same had to be incurred by the DRP/SPA and that the land had to be the contribution to be made by the DRP/SPA in SPV. As and when the railway land was available, the same should be amalgamated into the Dharavi Notified Area so as to ensure flexibility in finalizing master plan and since this was a very critical piece of land and would change the entire master plan of the development, the decision on inclusion of this land should be a pre-condition to infusing the bid amount into the SPV. On this suggestion, the clarification given was that the provisions of the tender documents.

**35.** Another issue to the effect that there are some structures on railway land and these structures should be permitted to be

demolished for development of the project was also discussed during the pre-bid meet. It was clarified that the same will be decided as per the agreement between the Railways and the DRP/SPA / GoM. The queries discussed and clarifications given in the pre-bid meeting which have been referred to by Dr.Tulzapurkar are extracted hereinbelow:

<b>Sr. No.</b>	<b>Volume</b>	<b>Clause No.</b>	<b>Original Clause in RFQ Cum RFP</b>	<b>Queries</b>	<b>Clarification</b>
37	I	1.2(8)	Land available with the Railways abutting Dharavi Notified Area (Dadar-Matunga) of approximately 36.42 Ha. may be included as part of Dharavi Notified area, after approval of the Railway board. Further, railway has land of 6.91 Ha. in and around Dharavi Notified area, which can be used by DRP/SRA for construction of temporary transit tenements and integrated development of such land with over all redevelopment of Dharavi, after approval of Railway Board.	What is the status of the Railway Board approval? If there is a delay in obtaining the Railway Board approval, can the stipulated tenure for completion of the Rehab buildings get extended beyond 7 years as mentioned in Clause 1.4?	DRP/SRA has already requested to the Railways in this regard and the matter is under process. There will not be any extension after signing the Development Agreement, except as provided in the Draft Development Agreement.
38	I	1.2(8)	Land available with the Railways abutting Dharavi Notified Area (Dadar-Matunga) of approximately 36.42 Ha. may be included as part of Dharavi Notified area, after approval of the Railway board. Further, railway has land of 6.91 Ha.in and around Dharavi Notified area, which can be used by DRP/Sra for	Whether CEO & OSD will obtain approval from the Railway Board or will it be the responsibility of the Developer to approach the Railway Board and tale its approval? There should be no consideration payable for the Railway land by SPV.	Process of approval will be undertaken by DRP/SRA/GoM. However, any cost for the acquisition and associated cost shall be paid by the SPV company/Lead Partner. SPV Company/Lead Partner may have to pay such amount upfront.

			construction of temporary transit tenements and integrated development of such land with over all redevelopment of Dharavi, after approval of Railway Board.		
39	I	1.2(8)	Land available with the Railways abutting Dharavi Notified Area (Dadar-Matunga) of approximately 36.42 Ha. may be included as part of Dharavi Notified area, after approval of the Railway board. Further, railway has land of 6.91 Ha. in and around Dharavi Notified area, which can be used by DRP/Sra for construction of temporary transit tenements and integrated development of such land with over all redevelopment of Dharavi, after approval of Railway Board.	This should be an obligation of GoM and/or DRP/SRA. There should be no consideration payable for the Railway land by SPV. If there is any consideration payable, the same has to be incurred by DRP/SRA. The land has to be the contribution to be made by DRP/SRA in SPV. As and when Railway land is available, the same should be amalgamated into DNA so as to ensure flexibility in finalizing master plan. Since this is a very critical piece of land and change the entire master plan of the development, the decision on inclusion of this land should be a pre-condition to infusing the bid amount into the SPV.	The provisions in the Tender Documents shall prevail.
40	I	1.2(8)	Land available with the Railways abutting Dharavi Notified Area (Dadar-Matunga) of approximately 36.42 Ha. may be included as part of Dharavi Notified area, after approval of the Railway board. Further, railway has land of 6.91 Ha. in and	It is understood that there are some structures on this Railway land. These structures should be permitted to be demolished for the development of land.	The Same will be decided as per the agreement between the Railways and the DRP/SRA/GoM.

			around Dharavi Notified area, which can be used by DRP/Sra for construction of temporary transit tenements and integrated development of such land with over all redevelopment of Dharavi, after approval of Railway Board.		
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**36.** On the basis of aforesaid submissions, it has been argued by Dr. Tulzapurkar that all the aforesaid facts which are clearly borne out from the record show that the railway land was always included in the earlier tender process without any vagueness. His further submission is that thus, inclusion of railway land was not alien to the earlier tender process and accordingly, the decision taken and the reasons given therefor by the CoS are non-existent, arbitrary which speak of non-application of mind. His submission further is that for any such decision reasons have to be justifiable, which cannot be contrary to the record and the material.

**37.** In support of this submission, Dr.Tulzapurkar has relied upon the judgments in the case of ***Tata Cellular Vs. Union of India<sup>1</sup>, Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corporation Ltd.<sup>2</sup>, Royal Power Turnkey Implements Pvt. Ltd. Pimpri Vs. Maharashtra Industrial Development Corporation, Mumbai & Ors.<sup>3</sup>, GMR Airports Ltd. & Anr. Vs. Mihan India Ltd. & Anr.<sup>4</sup>, Mihan***

<sup>1</sup> (1994) 6 SCC 651

<sup>2</sup> (2007) 8 SCC 1

<sup>3</sup> 2014(5) Mh.L.J. 399

<sup>4</sup> 2021 SCC OnLine Bom 2132

***India Vs. GMR Airport<sup>5</sup> and Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors.<sup>6</sup>***

**Submissions to substantiate ground (b):**

**38.** It has been argued by Dr.Tulzapurkar that decision to cancel the earlier tender process was taken at a very late stage after the petitioner's bid as the highest bid was accepted. It has been stated that the financial bid was opened on 13<sup>th</sup> January 2019 and in terms of clause 2.3.6 of the tender conditions, LoA was required to be issued within seven days from the opening of the financial bid i.e. by 7<sup>th</sup> February 2019. It has also been submitted that the letter stating that the petitioner was the highest bidder, was issued on 8<sup>th</sup> March 2019, whereupon despite sending various reminders for issuance of LoA, instead of issuing LoA to the petitioner, by the impugned decision the entire tender process itself has been cancelled. Clause 2.3.6 of the tender document is extracted hereinbelow on which reliance has been placed on behalf of the petitioner in this regard:

**"2.3.6** After selection, a Letter of Award ( the "**LOA**" ) shall be issued, in duplicate, by the Authority to the Selected Bidder. The Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgment thereof. In the event the duplicate copy of the LOA signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, forfeit the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA."

**39.** It has, thus, been argued that instead of issuing the LoA to which the petitioner was entitled to having been declared as the

<sup>5</sup> **2022 SCC OnLine SC 574**

<sup>6</sup> **(2012) 8 SCC 216**

highest bidder, the earlier tender was illegally cancelled and in the meantime the petitioner had incurred huge expenditure. Such an action in these circumstances, according to learned Senior Advocate for the petitioner, is not justified. It has also been argued on behalf of the petitioner that any decision which is required to be taken within a reasonable time and if such a decision is not taken within the reasonable time, it would be arbitrary and unreasonable and hence, such a decision is liable to be set aside.

**Submissions to substantiate ground (c):**

**40.** Another ground taken, as observed above, by the learned Counsel for the petitioner challenging the impugned actions on the part of the respondents is that when the letter dated 8<sup>th</sup> March 2019 was issued to the petitioner by DRP/SPA intimating the petitioner that the petitioner was the highest bidder and the Government would proceed further, the concluded contract was arrived at and accordingly, there was no question of cancelling the tender process after 8<sup>th</sup> March 2019. In support of this ground, heavy reliance has been placed by Dr.Tulzapurkar on the judgment by a coordinate bench of this Court in **GMR Airports Ltd. (supra)**, wherein an issue was formulated as to whether Letter of Acceptance issued in the said matter could be treated to be the LoA. Dr.Tulzapurkar has argued that in the facts of the said case the Letter of Acceptance was actually LoA which had resulted into a concluded contract between the parties. His submission is that facts of the present case are akin to the facts in **GMR Airports Ltd. (supra)** and accordingly, on

issuance of the letter dated 8<sup>th</sup> March 2019 intimating the petitioner that petitioner's bid was the highest, the only ministerial task which was required to be performed was to issue the LoA and accordingly, in view of the judgment in the case of **GMR Airports Ltd. (supra)** the concluded contract was arrived at in the instant case as well. In this view, Dr.Tulzapurkar stated that once the concluded contract was arrived at between the petitioner and the DRP/SPA, the tender process by the impugned decision could not have been cancelled.

**41.** In addition to the challenge to the decision canceling the earlier tender process, the challenge in the instant petition has also been made to the decision to float the tender afresh. Dr.Tulzapurkar has stated that inclusion of railway land in the facts of the case does not amount to any material change since it was always part of the earlier tender and was contemplated as part of the project since the very beginning. He has also argued that re-tender process defeats the public interest and that conditions in new tender have been embodied to favour other bidders with a view to defeat the right of the petitioner to participate in the tender process and other prospective bidders.

**42.** To buttress the aforesaid submission challenging the fresh tender process, it has been argued by Dr.Tulzapurkar that change in number of consortium members in the new tender process has been made only to oust the petitioner from participation. Similarly, the financial eligibility criteria and technical eligibility criteria have also been modified which has resulted in deliberate narrowing the participation. By these

acts, according to Dr.Tulzapurkar, only limited players in the market could participate which cannot be said to be lawful for the reason that by making certain changes in the conditions, the petitioner has been deliberately ousted from participation. It has been stated on behalf of the petitioner that in terms of the earlier tender a consortium of upto eight members could participate in the bid process which was fair and commercially viable given the huge magnitude of the project, however, in the fresh tender it has been provided that the number of consortium members should not exceed two. Similarly, in the earlier tender it was provided that the Lead Member, along with other consortium members, shall satisfy the financial eligibility whereas, in the fresh tender the condition is that the Lead Member and the consortium members shall separately satisfy the financial eligibility. Thus, it has been argued on these counts that the fresh tender was tailor-made to suit a particular tenderer and such tender conditions were included to disallow participation of the petitioner.

**43.** Based on the aforesaid submissions made and the grounds urged, Dr.Tulzapurkar has submitted that it is not only that the impugned decision of cancelling the earlier tender process is liable to be set aside but also that the fresh tender and the work order issued in pursuance thereof, are also liable to be quashed.

**Submissions on behalf of respondent No.1 - State of Maharashtra and respondent No.2 – DRP/SPA.**

**44.** Arguing on behalf of respondent Nos.1 and 2, Dr. Milind

Sathe, learned Senior Advocate, has vehemently refuted the submissions made by Dr.Tulzapurkar and has submitted that on account of inclusion of railway land in the subject project, the 'business model' got altered and as such for this reason alone the decision to cancel the earlier tender process cannot be faulted with; rather it is justified and is in the interest of the tendering authority as also in public interest. He has argued that the issues raised in the instant petition need to be considered and decided in the context of the special features relating to Dharavi Slum Rehabilitation which is to cover approximately 49,643 slum dwellers and 9,522 renewal tenements in chawls/buildings which require redevelopment as most of them have become dilapidated. He has also stated that occupants of these structures are required to be rehabilitated *in situ* i.e. at the site itself which is a huge challenge on account of space constraints for construction of transit tenements. He has further argued that in addition to the occupants of these structures, there are about 3.5 lakh to 4 lakh persons occupying this area but are ineligible for permanent rehabilitation accommodation and thus, the enormity of the challenges in the project is evident from the numbers itself. He has further argued that once the railway land became available with certainty, the project could take off much faster and hence, the bidding parameters also required change and accordingly, the decision to cancel the earlier tender process was in view of the material change in the circumstances and therefore re-tendering of the project was considered in light of the aforesaid facts.

**45.** Dr. Sathe has further stated that though the State Government has been attempting to undertake this project from the year 2004 onwards but such attempts had not fructified in past in view of the enormous challenges faced in conceptualizing and planning the project considering the requirement for transit accommodation and construction space.

**46.** Raising the objection as to the maintainability of the writ petition, it has been argued by Dr. Sathe that the petition has been instituted by M/s. SecLink Technologies Corporation which is only one out of eight consortium members who had submitted bid pursuant to the earlier tender process. He has argued that without joining the other consortium members, the petitioner being only one of the consortium members, cannot, alone file the present petition for challenging cancellation of the tender for the reason that the entity which submitted the bid in the earlier tender process is not fully represented before this Court and there is no clarity as to whether the other consortium members are also interested in challenging the impugned cancellation. Citing the judgment of the Hon'ble Supreme Court in the case of ***Gujarat Apollo Industries Ltd. Vs. State of Maharashtra***<sup>7</sup>, it has been argued by Dr. Sathe that only one constituent member of the consortium cannot maintain a petition for challenging the earlier tender without joining other constituent members. Dr. Sathe has also argued that the petitioner has challenged the new tender process however, the petitioner does not have *locus* to challenge the new tender process and the Government

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<sup>7</sup> **2023 SCC OnLine Bom 620**

Resolution, whereby terms and conditions have been revised, for the reason that it is settled position in law that one who has not participated in the tender and has not participated even in the pre-bid meeting, cannot be permitted to challenge the terms and conditions of the fresh tender. In this regard Dr.Sathe has relied upon the judgments in the case of ***A.M.Yusuf Vs. Mumbai Municipal Corporation & Ors.***<sup>8</sup> and ***Gypsum Structural India Pvt. Ltd. Vs. Brihanmumbai Municipal Corporation and Ors.***<sup>9</sup>.

**47.** Refuting the submissions made on behalf of the petitioner that the inclusion of railway land was always contemplated in the earlier tender process, it has been stated by Dr. Sathe that the said submission appears to be based on the provision contained in paragraph 5 of the Government Resolution dated 5<sup>th</sup> November 2018 and map of the railway land as given in the RFQ-cum-RFP. He has also stated that certain clarifications given in the pre-bid meeting have also been relied upon by the petitioner to buttress his submission. However, Dr.Sathe submits that the contention of the petitioner that railway land was always part and parcel of the tender process which began with issuance of the tender on 28<sup>th</sup> November 2018, is misconceived for the following reasons:

- (a) Inclusion of railway land in the project in the earlier tender was uncertain and the tender provided that "it may" be included at the cost of acquisition being born by SPV Company.

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<sup>8</sup> **2008 SCC OnLine Bom 1186**

<sup>9</sup> **2023 SCC OnLine Bom 683**

- (b) Inclusion of railway land in the project was subject to approval of the Railway Board.
- (c) Certainty about inclusion of railway land and terms on which such land was to be included in the project and the resultant rights and obligations were not in existence at the time when the earlier tender was floated and the bids were opened.
- (d) Certain developments had taken place after the financial bids in the earlier tender were opened on 30<sup>th</sup> January 2019, such as;
  - (i) in the meeting of the CoS held on 1<sup>st</sup> February 2019 it was noted that the matter relating to inclusion of railway land was not concluded and was still at the stage of discussion with the Railway Board and thus the CoS decided that the matter will be discussed in the next meeting for final decision.
  - (ii) A new development, which according to Dr.Sathe, took place after 30<sup>th</sup> January 2019 was that MoU between the RLDA and the DRP/SPA was signed on 3<sup>rd</sup> March 2019 for inclusion of certain area of railway land on upfront payment of Rs.1000 Crores by DRP/SPA along with profit sharing as per the formula and the MoU also provided for an obligation of reconsideration of railway quarters, hostel rooms etc.

**48.** Dr. Sathe has also drawn our attention to the Government Resolution issued on 28<sup>th</sup> May 2019 for payment of Rs.800 Crores out of total of Rs.1000 crores to be paid by DRP/SPA to the Railways, as MHADA's and SRA's contribution. Dr.Sathe has argued that the CoS in its meeting held on 17<sup>th</sup> June 2019 decided to take opinion of the then learned Advocate General

and accordingly, taking into consideration the opinion expressed by the then learned Advocate General, the CoS took a decision in its meeting held on 27<sup>th</sup> August 2020 to cancel the earlier tender process and invite fresh tender with revised terms and conditions.

**49.** It has further been argued on behalf of respondent Nos.1 and 2 that it has all along been in the notice and knowledge of the petitioner that the railway land was not a part of the earlier tender process and that the MoU signed between the RLDA and DRP/SPA constitutes a material change in the circumstances. In this respect, our attention has been drawn to an email addressed by the petitioner to the respondents enclosing a letter dated 25<sup>th</sup> June 2019 wherein the petitioner has, *inter alia*; stated and suggested to exclude the railway land due to the fact that the bid was for Dharavi redevelopment and not for development of railway land and also it may not be feasible as only 40% land can be used because the balance 60% is encroached by slums and occupied by railway quarters and other railway amenities which does not serve the purpose of acquisition done by the DRP/SPA/GoM. The extract of the said letter dated 25<sup>th</sup> June 2019 on which Dr.Sathe has placed reliance, is quoted hereunder:

*"Given the aforesaid fact, it is legitimately expected that the Dharavi Authority who is an organ of the state to act in fair, reasonable and transparent manner and consult us as the Highest Bidder on the Development of Railway Land Acquisition which is now perceived by Committee of Secretaries as a contentious issue and referred to AG for Opinion. The Government acted on railway land acquisition on its own due to the fact they very well knew that it was part of the Bid Document and their obligation before signing the Development Agreement with the Finalised Bidder and not a material change as claimed now by the Government for referring the file to the AG for*

*opinion.*

*Dharavi is a First of a Kind Human Upliftment Project which has failed to take off in the past 3 decades and through the current bid it is first time that too after Technical and Financial bid Qualification we as the bidder have won the bid. In the Larger Interest of Dharavi Residents and the Project we suggest you as follows:*

*To exclude the Railway Land due to the fact that the present Bid (RFP cum RFQ) Is for Dharavi Redevelopment and not for Railway Land Development, also it may not be feasible as only 40% of land can be used because the balance 60% is encroached by slums and occupied by Railway Quarters and other railway amenities which does not serve the purpose of acquisition done by the DRP/GOM.*

*As per the Government Resolution dtd. 5/11/18 Annexure – 1, issue the long pending Letter of Award so that we progress with the MOU, Development Agreement and start the first Phase as we have identified other Land Parcels of 21 Acres where we can start with the Re-hab/Transit Accommodation without further delay after signing of Development Agreement.*

*We request you to Share this important letter to the AG before his opinion is sought, withholding this letter might amount to perjury as the project is a Vital Infrastructure Project as per the Bid Document and delay in response/communication has been raising doubts on the Government's commitment to the project and its cause."*

**50.** It has further been argued by Dr. Sathe that the DRP/SPA, post opening of the financial bid, considered both the bidders who had quoted more than the stipulated amount of Rs.3150 crores and recommended the consortium led by the petitioner for approval to the CoS, which in its meeting held on 1<sup>st</sup> February 2019 considered both the bidders however, the decision was deferred. His submission is that the process as provided for in clause 2.3 of the RFQ-cum-RFP of the tender conditions of the earlier tender clearly stipulates that merely because a bidder is declared to have submitted the highest bid, it cannot be said that the bid has been accepted and that the letter dated 8<sup>th</sup> March 2019 issued by the DRP/SPA to the petitioner was only an

intimation that the petitioner was the highest bidder and it does not and cannot amount to acceptance of the petitioner's highest bid and accordingly the said letter cannot be said to have created any right in favour of the petitioner.

**51.** He has also argued that letter dated 8<sup>th</sup> March 2019 does not constitute LoA (Letter of Acceptance) because the approval of the CoS for issuance of Letter of Acceptance was mandatory as per the provision contained in the Government Resolution dated 5<sup>th</sup> November 2018 which formed part of the tender published on 28<sup>th</sup> November 2018. He has also stated that the CoS deferred the decision on account of negotiations which, at the relevant time, were going on with the Railways and accordingly in absence of any final decision by the CoS, it cannot be said that the letter dated 8<sup>th</sup> March 2019 amounted to acceptance of the bid. It has further been argued on behalf of respondent Nos.1 and 2 by Dr. Sathe that even the petitioner never construed the letter dated 8<sup>th</sup> March 2019 as being acceptance of the bid for the reason that the petitioner itself kept on writing to DRP/SPA for issuance of LoA after 8<sup>th</sup> March 2019.

**52.** Relying on Clause 2.6 of the tender dated 28<sup>th</sup> November 2018, it has been argued by Dr. Sathe that the said provision provided for right of DRP/SPA to accept or reject any bid and annul the selection process and reject all bids at any time without any liability or obligation or without any reason. Clause 2.6 of the bid document relied upon by Dr. Sathe is extracted hereinbelow:

**"2.6 Right to accept and to reject any or all Bids**

*2.6.1 Notwithstanding anything contained in this RFQ cum RFP, the Authority reserves the right to accept or reject any Bid and to annul the Selection Process and reject all Bids at any time without any liability or any obligation for such acceptance, refection or annulment, and without assigning any reasons therefor.*

*2.6.2 The Authority reserves the right to reject any Bid if :*

*a. at any time, a material misrepresentation is made or uncovered, or*

*b. the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.*

*Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member may be disqualified/rejected."*

**53.** Further submission of Dr.Sathe, opposing the contention of the petitioner that the letter dated 8<sup>th</sup> March 2019 resulted into concluded contract, is that since on the basis of the said letter, no right could be said to have been created in favour of the petitioner and there was no agreement arrived at between the petitioner and the respondents, it is not a case where any concluded contract was arrived at. He has further argued that the submission of the petitioner that respondent No.2 was bound to issue LoA within seven days of its bid being found the highest, is contrary to Clause 2.3 of the tender document. In this regard, his submission is that, as a matter of fact, period of seven days was prescribed for the selected bidder to sign and return the acceptance of LoA and it is not the time limit for issuance of the LoA at all.

**54.** Dr. Sathe has also argued that the MoU with the Railways was signed on 3<sup>rd</sup> March 2019 which defines the terms on which the railway land would be available for the project with certainty. In his submission, he has argued that availability of railway land is substantial and material change in the tender process which warranted cancellation of earlier tender process and initiation of process afresh and in any case the decision is *bona fide* decision taken in public interest on the basis of objective material which cannot be faulted with. It has further been argued on behalf of respondent Nos.1 and 2 that after the selection process if terms and conditions were changed which were warranted on inclusion of the railway land in the project with certainty, continuance of the earlier tender process would have resulted in a non-level playing field for the prospective bidders in the tender process which would have amounted to changing the rules of the game after the game had started.

**55.** So far as the contentions made on behalf of the petitioner relating to challenge to the conditions of subsequent tender is concerned, Dr.Sathe has argued that the petitioner does not have any *locus* to challenge the Government Resolution which provides for revised terms and conditions of the new tender for the reason that the petitioner had not participated in the fresh tender process; neither had it participated in the pre-bid meeting and accordingly having not participated in the new tender process, the petitioner cannot challenge the same. He has further submitted that the tender document and the tender conditions of the new tender were approved by the Cabinet and

CoS after detailed deliberations and that the challenge based on comparison of the tender conditions of the two tenders is not tenable for the reason that the earlier tender was cancelled and the new tender, being different, cannot be compared with the earlier tender for challenging the same. His further submission is that the Government Resolution, whereby terms and conditions of the fresh tender were determined, has been sought to be challenged on the ground that they are tailor-made and have been designed to oust the petitioner's participation. In this regard Dr. Sathe has argued that right to participate in the tender is not absolute right and as held by Hon'ble Supreme Court in the case of ***Uflex Ltd. Vs. State of T.N.***<sup>10</sup>, such right is subject to terms and conditions of the tender. The petitioner could have also participated in the fresh tender subject to compliance of its terms and conditions, however, the petitioner chose not to participate in the fresh tender and accordingly, the allegations that the terms and conditions of revised tender were tailor-made or to suit a particular tenderer, are clearly afterthought.

**56.** Dr. Sathe has brought to our notice that the petition was amended to challenge the terms and conditions of the fresh tender pursuant to the order dated 15<sup>th</sup> December 2022 passed by this Court by which time the financial bids of two bidders in the fresh tender were already opened on 29<sup>th</sup> November 2022. Relying on the judgment of this Court in the case of ***Kanchan India Ltd. Vs. State of Maharashtra***<sup>11</sup>, it has been argued

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<sup>10</sup> (2022) 1 SCC 165

<sup>11</sup> 2024 SCC OnLine Bom 791

that challenge to tender conditions after opening of financial bids may not be maintainable being afterthought and in any case in the fresh tender three bidders participated, out of which, two were found to be technically qualified and accordingly, the argument of the tender being "tailor-made" is not made out.

**57.** Lastly, Dr.Sathe has contended that the project to be executed as per the fresh tender process is in larger public interest for the reason that the State Government, through DRP/SPA would largely benefit from rehabilitation of 3.5 lakh to 4 lakh ineligible slum dwellers and the DRP/SPA would also get final profit as per its equity share of 20% in SPV. He has further stated that apart from this, the State Government would also get the premium calculated at 25% ready reckoner rate in respect of the entire land included in the project and that the railways would get share of DRP/SPA's profit where the minimum amount guaranteed to railways is Rs.2800 crores. He has further stated that apart from this, the Railways would get the constructed tenements for staff quarters, hostels and a separate building of about 75000 sq.mtr. as per the new tender and therefore, for these reasons, the project in terms of the new tender process, if executed, will result in achieving larger public interest.

**58.** On the aforesaid counts, it has been urged by Dr. Sathe, learned Senior Advocate representing respondent Nos.1 and 2 that the writ petition be dismissed.

**Arguments by Mr. Ravi Kadam, learned Senior Advocate representing respondent No.3:**

**59.** Opposing the prayers made in the writ petition Mr. Ravi Kadam, learned Senior Advocate representing respondent No.3 has argued that the writ petition is liable to be dismissed for the reason that (a) the decision to cancel earlier tender does not suffer from any arbitrariness or perversity, (b) the fresh tender is completely different from the earlier tender and it subserves greater public interest, (c) the fresh tender is not tailor-made, (d) there is neither concluded contract in favour of the petitioner nor any vested right had accrued in its favour under the earlier tender process.

**60.** To substantiate the aforesaid arguments, Mr.Ravi Kadam has submitted that the CoS, being the decision making authority, has extensively deliberated the issue of certainty of inclusion of railway land and definitive terms and conditions imposed for inclusion of railway land which amounted to “change in business model” and accordingly it was rightly resolved to cancel the earlier tender process. He, in this regard, has referred to the minutes of meeting of the CoS, dated 27<sup>th</sup> August 2020.

**61.** He has contended that the very premise of the challenge made by the petitioner in this case that the possibility of inclusion of railway land was not a material change and that its possible inclusion was already contemplated under the earlier tender, is highly misconceived.

**62.** Drawing attention of the Court to the minutes of the meeting of the CoS, dated 17<sup>th</sup> June 2019, it has been submitted on behalf of respondent No.3 that the CoS had deferred the decision on the selection of the bidder on account of impending MoU with RLDA which was expected to set out definitive terms for inclusion of the railway land.

**63.** Further submission of Mr.Ravi Kadam is that the CoS extensively deliberated the issues, including the opinion of the then learned Advocate General in its meeting held on 27<sup>th</sup> August 2020. According to him, the main factors which precipitated the decision for cancellation of the earlier tender process was certainty of inclusion of railway land with definitive terms and conditions of such inclusion and "change in business model" as well, on such inclusion.

**64.** On behalf of respondent No.3 it has also been argued that the fresh tender subserves the greater public interest which has exponentially enlarged the scope of work to be undertaken in the project.

**65.** Another argument made by Mr.Ravi Kadam, learned Senior Advocate, representing respondent No.3 is that an attempt has been made by the petitioner to mislead the Court by wrongly comparing the bid amount of Rs.7200 crores which is quoted by the petitioner in the earlier tender process, to the bid amount of Rs.5069 crores quoted by respondent No.3 in the fresh tender process for the reason that the price bid relates to infusion of the

finances in the project and is not a consideration to be given to the DRP/SPA/GoM. Thus, his submission is that comparison between mere numeric value of the price bids is not justified since the price bids were set keeping different considerations in mind. Mr.Ravi Kadam has strongly opposed the submissions made by learned Senior Advocate representing the petitioner relating to the alleged favouritism and/or tailor-made conditions and states that such allegations can sustain only when the terms and conditions of the tender are drafted to eliminate other tenderers and the very fact that the three tenderers participated in the tender process itself counters the arguments made by the learned Senior Advocate for the petitioner which is further substantiated by the fact that two bidders were found to have technically qualified.

**66.** As regards the concluded contract in favour of the petitioner or vested right in its favour pursuant to the earlier tender process, it has been argued by learned Senior Advocate representing respondent No.3 that the very basis of the said argument is the letter dated 8<sup>th</sup> March 2019 which is issued by the DRP/SPA which admittedly, is not the final decision making authority in terms of the provisions contained in the Government Resolution dated 5<sup>th</sup> November 2018, which envisages that final decision to award the tender could be taken after evaluation of the bids was placed before the CoS for its approval and it is only after the approval of the CoS that the LoA would be issued to the bidder. His submission is that since no approval in this case was accorded for acceptance of the bid of the petitioner by the CoS hence, merely on account of issuance of the letter dated 8<sup>th</sup>

March 2019 it cannot be said that any concluded contract was arrived at.

**67.** Mr.Ravi Kadam has summed up his arguments by stating that the decision making process in the instant case cannot be said to be arbitrary, perverse or irrational; neither is it vitiated by *mala fides*. He has also stated that the impugned decision to cancel the earlier tender process cannot be said to be a decision that no responsible authority, informed in law and acting reasonably, would take. His submission further is that the fresh tender is not tailor-made nor is it vitiated by any vice of unreasonableness, arbitrariness or perversity and that the State, as the author of the tender conditions, is best placed to know its requirements. Finally, he has stated that by issuing the fresh tender larger public interest is served which provides for rehabilitation of even ineligible slum dwellers. For these reasons, Mr.Ravi Kadam has also urged that the petition be dismissed.

**Issues:**

**68.** On the basis of the pleadings of the respective parties available on record and the submissions made by the learned Counsel representing them, the following issues arise in this matter for our consideration:

*(A) Whether the reasons given by the respondents for cancelling the earlier tender process are justified?*

*(A1) Whether the railway land was part of the earlier tender and whether its inclusion consequent upon the MoU entered into between RLDA and DRP/SPA on 3<sup>rd</sup> March*

*2019 amounted to material change and deviation from the subject matter of the earlier tender warranting its cancellation and floating tender afresh?*

*(B) As to whether issuance of the letter by the DRP/SPA to the petitioner, dated 8<sup>th</sup> March 2019 amounted to arriving at a concluded contract and therefore, cancellation of the earlier tender process on the basis of this letter was issued, is vitiated?*

*(C) Whether the gap between issuance of the letter dated 8<sup>th</sup> March 2019 and cancellation of the tender process during which the petitioner is said to have incurred huge expenditure will vitiate the cancellation of the earlier tender process?*

*(D) Whether in the facts and circumstances of the case, the decision to float the tender afresh is illegal and as to whether the fresh tender was issued with a view to defeat the right of the petitioner to participate in the tender process; the fresh tender being tailor-made to suit particular tenderer?*

### **Discussion:**

**69.** The main plank of the argument impeaching the decision of the respondents cancelling the earlier tender process as urged by the petitioner is that the reason given for cancellation of the earlier tender process is non-existent, unjustified and therefore, unsustainable on account of the fact that the railway land was covered under the scope of the earlier tender. To substantiate this argument, the petitioner has stated, *inter alia*; that Clause (8) of the tender document provided that the land available with the Railways may be included as part of Dharavi Notified Area after approval of the Railway Board and further that the Railways had land of 6.91H in and around the Dharavi Notified Area which can be used by the DRP/SPA for construction of temporary

transit tenements and integrated development of such land with over-all redevelopment of Dharavi after approval of the Railway Board. On behalf of the petitioner reliance has also been placed on certain clarifications given in the pre-bid meeting wherein the bidders were informed that the process of approval from Railway Board will be undertaken by the DRP/SPA/GoM and that the cost of acquisition and associated cost shall be paid by the SPV Company/Lead Partner and that the SPV Company/Lead Partner may have to pay such amount, upfront. Reliance has also been placed upon another clarification given in the pre-bid meeting to the suggestion given by the bidders that the Railway Land should be the obligation of the GoM and/or DRP/SPA and that there should be no consideration payable for the railway land by SPV Company/Lead Partner. To this suggestion, the clarification given was that the process of approval will be taken by the DRP/SPA/GoM and cost of acquisition and associated cost shall be paid by SPV Company/Lead Partner and further that the SPV Company/Lead Partner may have to pay such amount, upfront. Another clarification given in the pre-bid meeting which has been relied upon on behalf of the petitioner to argue that the railway land has all along been part of the earlier tender, was in respect of the availability of railway land which may be included as part of Dharavi Notified Area after approval of the Railway Board. On this suggestion the clarification given was that it will be decided as per the agreement between the Railways and the DRP/SPA/GoM.

**70.** When we examine Clause (8) of the tender document on which heavy reliance has been placed by the petitioner, what we

find is that Clause (8), which has been quoted in paragraph 31 above, clearly provides that the railway land may be included as part of Dharavi Notified Area after the approval of the Railway Board and that the railway land can be used by DRP/SPA for construction of temporary transit tenements and integrated development of such land with over-all redevelopment of Dharavi Notified Area.

Thus, from a perusal of Clause (8) of the earlier tender documents, it is clear that inclusion of railway land abutting Dharavi Notified Area was subject to the approval of the Railway Board and further that development of such railway land for construction of temporary transit tenements and integrated development of such land with over-all redevelopment of Dharavi was also subject to the approval of the Railway Board. Therefore, on closer scrutiny of Clause (8) of the tender document, without any ambiguity, we conclude that inclusion of railway land in the earlier tender was not definite; it was rather conditional, in the sense that such inclusion was subject to approval to be accorded by the Railway Board.

**71.** It is needless to say that any tender floated by a public authority or any instrumentality of the State or any other State authority needs to contain definite, explicit, express and specific conditions, in absence whereof it will become difficult and uncertain for a bidder to appropriately quote the price of the bid.

**72.** The language in which Clause (8) of the earlier tender document is couched, in our opinion, does not expressly and

explicitly include the railway land, inclusion of which was conditional and subject to the approval of the Railway Board. Accordingly, in view of absence of any definite stipulation of inclusion of the railway land in the earlier tender document, submission of learned Counsel for the petitioner that railway land was part of the earlier tender document, in our opinion, is not tenable.

**73.** As far as reliance placed by the learned Counsel for the petitioner on certain clarifications given in the pre-bid meeting, which have been extracted in paragraph 35 above, we may note that at the time when the tender was floated and clarifications were given, it was only a request made by the DRP/SPA to the railways which existed. Thus, the process of inclusion of the railway land in the earlier tender was not complete. The clarifications as extracted in paragraph 35 above which were given in the pre-bid meeting, clearly show that the process of approval from the Railway Board for inclusion of the railway land in the Integrated Development Project was to be undertaken by the DRP/SPA/GoM which means that at the time of floating of the earlier tender the approval from the railway authorities for inclusion of railway land in the redevelopment project was not in existence. At one place, in the clarifications given in the pre-bid meeting, it was clarified that the issue relating to demolition of constructions on railway land was to be decided as per the agreement between Railways and DRP/SPA/GoM and as already noticed above, the MoU in respect of inclusion of railway land in the redevelopment project was signed on 3<sup>rd</sup> March 2019, that is to say, at the time of floating of the earlier tender inclusion of

the railway land was not definite. Accordingly, we unambiguously conclude that the submission on behalf of the petitioner that railway land was part of the earlier tender document is not borne out from the record and hence, the same cannot be accepted.

**74.** We now examine the reasons given by the CoS for cancelling the earlier tender process. The decision to cancel the earlier tender process by the CoS was taken in its meeting held on 27<sup>th</sup> August 2020, minutes of which have been quoted in paragraph 23 above. If we peruse the said reasons, what we find is that the said decision is a well discussed decision by the CoS which took into account all the relevant factors including the advice tendered by the then learned Advocate General. The CoS, in the said meeting considered the fact of issuance of letter dated 8<sup>th</sup> March 2019 by the DRP/SPA to the petitioner whereby the petitioner was intimated that its bid was found to be the highest. The CoS also noted that in terms of the Government Resolution dated 5<sup>th</sup> November 2018, which was included as part of the earlier tender, the final decision about the successful bidder was to be taken by the CoS whereas the letter dated 8<sup>th</sup> March 2019 though was considered by the CoS in its earlier meetings, however, the final decision regarding the successful bidder was not taken. If we peruse the Government Resolution dated 5<sup>th</sup> November 2018 pursuant to which the entire tender process was initiated and conducted, it is the CoS which was empowered to take final decision about the successful bidder. The letter dated 8<sup>th</sup> March 2019 issued by the DRP/SPA to the petitioner was only an intimation, based on evaluation of the

bids submitted by the bidders, that the petitioner's bid was found to be the highest. In our opinion, however, such an intimation that the petitioner was the highest bidder, will not amount to declaration of the petitioner as successful bidder, which decision in terms of the Government Resolution dated 5<sup>th</sup> November 2018 was to be taken by the CoS.

**75.** The CoS, in its meeting held on 27<sup>th</sup> August 2020 also took into account the fact that though the petitioner's bid was declared to be the highest, however, no decision was taken on selection of the successful bidder, neither any letter of award was issued till that day, nor any agreement was signed. The CoS also discussed that inclusion of railway land makes the project more doable and viable as there are numerous slum tenements on the railway land and thus integrated redevelopment of railway land along with Dharavi project becomes critical and vital to over-all integrated development of Dharavi Notified Area. The CoS also found that inclusion of railway land will be in public interest. Thus, what weighed with the CoS to take decision to cancel the earlier tender process in the meeting held on 27<sup>th</sup> August 2020 was (i) that no decision till that day was taken declaring the petitioner to be successful bidder, and (ii) inclusion of railway land will be in public interest as the same would involve integrated redevelopment of railway land along with Dharavi project which would be critical and vital to the over-all integrated development of Dharavi Notified Area.

**76.** As already observed above, from the records available before us it cannot be concluded that railway land was included

in the earlier tender document. In fact, its inclusion in the project was subject to the approval of the Railway authorities and the MoU between the RLDA and DRP/SPA was signed only on 3<sup>rd</sup> March 2019 i.e. after the tender was floated and the bids were submitted. Such inclusion of railway land in the project, thus, can be said to have occurred with certainty only on 8<sup>th</sup> March 2019 and not before that. Accordingly, we find substance in the submissions made on behalf of the respondents-authorities that inclusion of railway land would change the business model for the reason that such inclusion would change the bidding parameters which would warrant changes in the tender conditions as well.

**77.** It is also to be noticed that on signing of the MoU between RLDA and DRP/SPA the project would involve redevelopment of railway land not only for the purposes of construction of transit tenements but also for construction of a hostel and certain other amenities to be used by the railways. The MoU also required payment of an amount of Rs.2800 Crores to the railways and accordingly, on account of this MoU the scope of tender, in our considered opinion, got altered extensively and therefore, on the basis of earlier tender if the redevelopment project was permitted to be carried on, that would have resulted in non-level playing field for the bidders.

**78.** In any case, if in the wake of inclusion of railway land the earlier tender was finalized and awarded, the same would have amounted to changing the rules of the game once it had already commenced.

**79.** As already observed above, in a tender for certain work floated by a public authority, the terms and conditions and, requirement and scope of work should be certain and definite and not uncertain and indefinite. In absence of definite and certain scope of work, it would be highly improper to proceed with the tender process for the reason that such a situation may pose uncertainty and difficulty in the mind of the tenderers while submitting their bid. The CoS, in its meeting held on 27<sup>th</sup> August 2020 considered all these aspects of the matter and decided to cancel the earlier tender process. The reasons, thus, given by the respondents for cancelling the earlier tender process, in our opinion, cannot be said to be non-existent or unjustified or based on any perversity.

**80.** As a matter of fact, it appears to us that the fact that the railway land was never included in the earlier tender with certainty has all along been known to the petitioner which is abundantly clear from the contents of the letter dated 25<sup>th</sup> June 2019 of the petitioner, extracts of which have been quoted in paragraph 49 above. In the said letter, it was stated by the petitioner, *inter alia*; that *"in the Larger Interest of Dharavi Residents and the Project we suggest you as follows: To exclude the Railway Land due to the fact that the present Bid (RFP cum RFQ) Is for Dharavi Redevelopment and not for Railway Land Development, also it may not be feasible as only 40% of land can be used because the balance 60% in encroached by slums and occupied by Railway Quarters and other railway amenities which does not serve the purpose of acquisition done by the DRP/GOM."*

**81.** In view of the contents of the aforesaid letter dated 25<sup>th</sup> June 2019, what we notice is that the petitioner itself had requested and suggested for exclusion of the railway land giving the reason that the bid was for Dharavi redevelopment and not for railway land development and also that it may not be feasible as only 40% of land can be used because the balance 60% of the railway land was in encroachment by slums and was occupied by the Railway Quarters and other railway amenities. The contents of the said letter have not been denied by the petitioner and accordingly, for this reason as well, in our opinion, the railway land did not form part of earlier tender which fact was not only known to the petitioner but had even been acknowledged by it by writing letter dated 25<sup>th</sup> June 2019.

**82.** Accordingly, we find that the reason given by the CoS for cancelling the earlier tender and all consequential actions of the respondent authorities cancelling the tender and requiring the petitioner to collect the bid security amount cannot be said to be bereft of tenable and valid reasons; neither can it be said to be suffering from the vice of arbitrariness, unreasonableness or perversity.

**83.** It is well settled as has been held by the Hon'ble Supreme Court in the case of ***Indian Railway Construction Co. Ltd. Vs. Ajay Kumar***<sup>12</sup> that for a decision of an authority to be reasonable what needs to be examined is as to whether the authority concerned has left out relevant factors or taken into

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<sup>12</sup> (2003) 4 SCC 579

account irrelevant factors. The Hon'ble Supreme Court has further held in this case that decision of the authority concerned should be within law and not one which no sensible person could have reasonably arrived at and that decision should be a *bona fide* one. It has further been observed by the Hon'ble Supreme Court that the decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

**84.** In ***Indian Railway Construction Co. Ltd. (supra)***, the Hon'ble Supreme Court has summarized the tests of judicial review in administrative action and has observed that the grounds for such judicial scrutiny are (i) illegality (ii) irrationality and (iii) procedural impropriety. The Hon'ble Supreme Court has further gone on to say that to term a decision as irrational, the decision has to be "so outrageous" that it has to be in total defiance of logic or of moral standards. The Apex Court reiterated the well-established principle governing judicial review by stating that the test is to see whether there is any infirmity in decision making process and not the decision itself. Paragraph 18 to 21 of the judgment in the case of ***Indian Railway Construction Co. Ltd. (supra)*** are extracted hereinbelow:

*18. Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view.*

**19.** *The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case [(1984) 3 All ER 935 : 1985 AC 374 : (1984) 3 WLR 1174 (HL)] as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows : (All ER p.950h-i)*

*"Judicial review as I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community;"*

*Lord Diplock explained "irrationality" as follows : (All ER p. 951a-b)*

*"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

**20.** *In other words, to characterize a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.*

**21.** *These principles have been noted in the aforesaid terms in Union of India v. G. Ganayutham [(1997) 7 SCC 463 : 1997 SCC (L&S) 1806] . In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself."*

**85.** So far as the principle relating to judicial review by this Court of a decision by an authority in a tender matter is concerned, the law as evolved is that in such matters the Court

should be cautious and slow to interfere for the reason that it is the tendering authority which knows its requirements and further that the technicalities involved in the work in respect of which the tender is issued can be best assessed by the tendering authority and not by the Court as many a times some or the other kind of expertise is needed to evaluate such matters. Reference in this regard may be had to the judgment of the Hon'ble Supreme Court in the case of **N. G. Projects Ltd. Vs. Vinod Kumar Jain & Ors.**<sup>13</sup> Paragraph 23 of the said judgment is relevant which is extracted hereinbelow:

*"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."*

**86.** In **Maa Binda Express Carrier & Anr. Vs. North-East Frontier Railway & Ors.**<sup>14</sup>, it has been held by the Hon'ble Supreme Court that on cancellation of the tender process the competent authority cannot be said to have violated any

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<sup>13</sup> (2022) 6 SCC 127

<sup>14</sup> (2014) 3 SCC 760

fundamental right of the participating bidders. The Apex Court was of the view that if a contract is awarded despite the deficiencies in the tender process serious question touching the legality and propriety affecting the validity of tender process would arise. Thus, in our opinion, fact circumstances in a tender matter where the tender process has been cancelled is to be viewed and considered differently than the fact circumstances where a tender has been awarded despite deficiency in the tender process. Paragraph 12 of the said judgment in **Maa Binda Express Carrier (supra)** is quoted hereunder:

*"12. As pointed out in the earlier part of this order, the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. Inasmuch as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order [Maa Binda Express Carrier v. Union of India, WP (C) No. 4668 of 2011, order dated 4-2-2012 (Gau)] passed by the Single Judge and dismissing the writ petition."*

**87.** We may also refer to another judgment of Hon'ble Supreme Court in **Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation & Ors.**<sup>15</sup>, where the view taken by the High Court that if any term of the tender is deleted after the players entered into the arena it would be like changing the rules of the game after it had begun and therefore, on alteration of conditions a fresh process of tender was the only alternative permissible, was upheld by the

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<sup>15</sup> (2000) 5 SCC 287

Apex Court. Paragraph 12 of the **Monarch Infrastructure (P) Ltd. (supra)** is extracted hereunder:

*"12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered."*

**88.** Regarding the conditions of tender being certain and definite, we may quote observations made in paragraph 38 of the judgment of the Hon'ble Supreme Court in **Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corporation Ltd. & Ors.**<sup>16</sup>, which runs as under:

*"38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".*

**89.** Having regard to the aforementioned legal principles as enunciated by the Hon'ble Supreme Court and applying the same

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<sup>16</sup> (2007) 8 SCC 1

to the facts of the instant case, we have no hesitation to conclude that since inclusion of railway land consequent upon the MoU entered into between the RLDA and DRP/SPA on 3<sup>rd</sup> March 2019 was a material change and deviation from the earlier tender and therefore, reason assigned by the respondent authorities for cancelling the earlier tender process cannot be faulted with.

**90.** The next issue which we proceed to consider is as to whether issuance of the letter dated 8<sup>th</sup> March 2019 to the petitioner by DRP/SPA amounted to arriving at a concluded contract and therefore, cancellation of the earlier tender process is vitiated? In this regard, Mr. Tulzapurkar, learned Senior Advocate representing the petitioner has argued that on evaluation of the financial bid of the technically qualified bidders by the DRP/SPA, it was communicated to the petitioner vide letter dated 8<sup>th</sup> March 2019 that the petitioner was the highest bidder and thereafter issuance of LoA was a formality. In his submission he stated that on issuance of the letter dated 8<sup>th</sup> March 2019, the contract between the petitioner and the respondent authorities was arrived at and accordingly, the earlier tender process could not have been cancelled, which in his view amounted to cancelling the concluded contract itself.

**91.** For scrutinizing the said submission made on behalf of the petitioner, we need to examine the contents of the letter dated 8<sup>th</sup> March 2019. The said letter dated 8<sup>th</sup> March 2019 was issued by the Chief Executive Officer and Officer on Special Duty, Dharavi Redevelopment Project/SRA to the petitioner, which is

quoted hereunder:

*"Dharavi Rehabilitation Project  
Slum Rehabilitation Authority  
5<sup>th</sup> Floor, Grihanirman Bhavan,  
Bandra (E), Mumbai 400 051  
Tel: 022-26592875/ 26591087/  
26590588  
Fax: 022-2659 0586  
E-mail: [Info@sra.gov.in](mailto:Info@sra.gov.in)  
Date: 8<sup>th</sup> March, 2019*

*Sub: Selection of Lead Partner for Dharavi Redevelopment  
Project – Letter of intimation/ meeting*

*Tender Ref. No. DRP/1/2018*

*Dear Sir,*

*With reference to the above mentioned subject wherein your consortium has participated in the bid, we have pleasure in informing you that the bids have been opened. Your consortium has bid the highest amount for Dharavi Redevelopment Project.*

*Since the Government intends to proceed with the project with speed and efficiency, it would be desirable that a High Level delegation from Government of Maharashtra should have a formal meeting with his Highness Shaikh Zayed Bin Saeed Bin Zayed AI Nahyan, Chairman of Najaah Global Investment LLC.*

*Kindly organize the same and communicate to us at the earliest.*

*With regards,*

*Yours sincerely*

*Sd/-*

*S. V. R. Srinivas, IAS  
Chief Executive Officer & Officer on Special Duty  
Dharavi Redevelopment Project.*

*To,  
Mr. Nilang Shah,  
Seclink Technologies Corporation,  
3808/3809 Citadel Business Tower,  
AI Abraj Street,  
Business Bay,  
Dubai – UAE."*

**92.** A perusal of the said letter would reveal that the DRP/SPA had only informed the petitioner that the consortium of the petitioner had bid the highest amount for the project. In our opinion, the said letter is only a communication that the bid of the consortium of the petitioner was the highest and it will not amount to acceptance. It nowhere states that the petitioner was declared to be the successful bidder and accordingly, on the basis of the said letter it cannot be said that any concluded contract between the petitioner and the DRP/SPA was arrived at.

**93.** There is yet another reason to conclude that the letter dated 8<sup>th</sup> March 2019 did not amount to arriving at a concluded contract between the parties and the reason is that undisputably, it was the CoS which was empowered and entrusted to take final decision in the matter of declaration of the successful bidder and not the DRP/SPA. The letter dated 8<sup>th</sup> March 2019 and evaluation of the bids conducted by DRP/SPA were discussed by the CoS in its meeting held on 1<sup>st</sup> February 2019 however, final decision was not taken and it was noted that the consortium led by the petitioner was the highest qualified bidder, however, finally, it was further noted that railway land may be made available for construction of transit tenements which was in advanced stages of the discussions with the Railway Board and since the detail discussions on the railway land could not be concluded, the CoS agreed that the matter will be discussed in the next meeting for final decision. Clauses 11 and 13 of the Minutes of Meeting of CoS, held on 1<sup>st</sup> February 2019 which are relevant to be mentioned, have already been quoted in paragraph No.13 of this judgment above.

**94.** Thus, the CoS, in its meeting held on 1<sup>st</sup> February 2019 did not take any final decision in the matter. The matter was again discussed by the CoS in its meeting held on 17<sup>th</sup> June 2019 where various aspects of the matter were taken into consideration including signing of the MoU between RLDA and DRP/SPA on 3<sup>rd</sup> March 2019. The terms and conditions of the MoU were also taken note of. In the Minutes of Meeting, the fact that various obligations mentioned in the MoU entered into between the RLDA and DRP/SPA such as cost of acquisition, rehabilitation of slum dwellers on railway land and redevelopment of existing railway quarters, hostel rooms and service buildings of around 75000 sq.mtr. were not mentioned in the tender document, was also noted. It was also noticed in the said minutes of the meeting that the RLDA, vide its letter dated 16<sup>th</sup> April 2019 had pointed out that though the MoU had been signed, a definite agreement was yet to be signed and the terms of the agreement were yet to be finalized for which certain clarifications were sought.

**95.** The CoS, in the meeting dated 17<sup>th</sup> June 2019 finally decided to obtain opinion of the then learned Advocate General on the issues relating to (a) cost of acquisition of railway land (b) rehabilitation of slum dwellers on railway land, and (c) as to whether redevelopment of existing railway quarters, hostel rooms and service buildings of around 75000 sq.mtr., which were not part of the bid document which happened after the bids were opened and evaluated, would constitute a material change in the bid condition/process. In these circumstances, it was

decided by the CoS to seek opinion of the then learned Advocate General as to whether such aspects will amount to post tender change and if yes, then whether it was required to cancel the bid process and go for re-bid. The relevant extract of the minutes of the meeting of the CoS held on 17<sup>th</sup> June 2019 have already been quoted in paragraph No.17 above.

**96.** On receipt of the opinion of the then learned Advocate General, the matter was finally considered by the CoS in its meeting held on 27<sup>th</sup> August 2020, extracts of which have already been quoted in paragraph 23 of this judgment. Based on the discussions which took place in the meeting of the CoS held on 27<sup>th</sup> August 2020, the final decision was taken to cancel the earlier tender process. Accordingly, since it was the CoS which was entrusted to take final decision regarding the successful bidder and the CoS in its meeting held on 27<sup>th</sup> August 2020 took a decision to take recourse to re-tender, in our opinion, in absence of final decision regarding petitioner being the successful bidder, on account of issuance of the letter dated 8<sup>th</sup> March 2019 by the DRP/SPA to the petitioner, it cannot be said that any concluded contract was arrived at.

**97.** In similar circumstances, Hon'ble Supreme Court in the case of ***State of Punjab & Ors. Vs. Mehar Din***,<sup>17</sup> has held that the State or its instrumentality is not bound to accept the highest bid of the tenderer and right of highest bidder is always provisional to be examined in the context in which auction has been held. The Hon'ble Supreme Court while making the said

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<sup>17</sup> (2022) 5 SCC 648

observation, has taken note of the rules applicable in the said case and has in paragraph 18 and 19 held as under:

**"18.** *From the Scheme of Chapter III of the 1976 Rules, it is apparent and explicit that even if the public auction has been completed to the highest bidder, no right is accrued till the confirmation letter is issued to him as the acceptance of the highest bid is provisional, subject to its confirmation by the competent authority. Undisputedly, the competent authority (Sales Commissioner) has failed to confirm the bidding process and after recording its satisfaction cancelled the auction bid under its order dated 2-7-1993.*

**19.** *This Court has examined right of the highest bidder at public auctions in umpteen number of cases and it was repeatedly pointed out that the State or authority which can be held to be State within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender of bid. The acceptance of the highest bid or highest bidder is always subject to conditions of holding public auction and the right of the highest bidder is always provisional to be examined in the context in different conditions in which the auction has been held. In the present case, no right had accrued to the respondent even on the basis of statutory provisions as being contemplated under Rule 8(1) (h) of Chapter III of the Scheme of the 1976 Rules, and in terms of the conditions of auction notice notified for public auction."*

**98.** In the instant case as well, thus, merely on account of declaration by the DRP/SPA vide its letter dated 8<sup>th</sup> March 2019 that the petitioner was the highest bidder, no right can be said to have vested in the petitioner; neither would it amount to concluded contract. As already noticed above, final decision as to the successful bidder was to be taken by the CoS which on the basis of certain material, as discussed above, took the decision to cancel the tender process rather than to declare/recommend the petitioner as the successful bidder.

**99.** At this juncture, we may also observe that it is well settled principle that a bidder participating in the tender process cannot insist that its tender should be accepted only because of it being the highest or the lowest. Reference in this regard may be made

to the judgment in the case of **Maa Binda Express Carrier & Anr. (supra)** and also in the case of **Gujrat Apollo Industries Ltd. Vs. State of Maharashtra**<sup>18</sup>, paragraph 13 whereof is relevant to be extracted, which runs as under:

**"13.** *The Supreme Court has held in catena of judgments that the scope of judicial review in tender and contractual matters is extremely narrow. This court would not be justified in interfering in the decision of the tendering authority unless the same is found to be arbitrary, unjust or irrational. The tendering authority would be the best judge to decide whether the tender process initiated 3 years ago should still be continued or fresh tender process should be adopted. In Maa Binda Express Carrier v. North South Frontier Railway, (2014) 3 SCC 760 the Apex Court has held as under:—*

*8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize 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.*

*9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine*

<sup>18</sup> **2023 SCC OnLine Bom 620**

*whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.”*

**100.** Heavy reliance has been placed by Mr.Tulzapurkar, learned Senior Advocate appearing for the petitioner on a judgment rendered by a coordinate bench of this Court in the case of ***GMR Airports Ltd. & Anr. Vs. MIHAN Inida Ltd. & Anr.***<sup>19</sup> It has been argued that almost in similar fact circumstances it was held by this Court in the said case that there was a concluded contract between the parties and therefore, it was not open for the employer of the contract to go back on its terms and cancel the contract. In the said case the authority concerned had already accepted the bid of the petitioner and therefore, it was observed by the Court that there was no question of annulment of the bidding process under the clause which permitted that the authority reserves the right to reject any bid and to annul the bidding process and reject all the bids at any time without any obligation for such acceptance, rejection or annulment and without assigning any reasons therefor. The observation of the Court in this case, thus, was based on the fact that the bid by the authority concerned was accepted, however, in the present case, since the final authority for declaring the successful bidder and accepting the bid was the CoS, as such, at no point of time the bid of the petitioner could be said to have been accepted resulting into any concluded contract between the parties. We may also observe that mere declaration that the petitioner was the highest bidder would not amount to acceptance of its bid in the facts of the present case for the reason that the final act of

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<sup>19</sup> **2021 SCC OnLine Bom 2132**

acceptance of bid was to be done by the CoS, which on consideration of relevant factors decided to cancel the earlier tender process and to resort to bidding process afresh. In absence of acceptance of bid of the petitioner, in our opinion, the judgment of this Court in the case of **GMR Airports Ltd. (supra)** which was upheld by Hon'ble Supreme Court in the case of **Mihan India Ltd. Vs. GMR Airports Ltd. & Ors.**<sup>20</sup> does not help the cause of the petitioner.

**101.** In view of these circumstances, it cannot be said that issuance of the letter dated 8<sup>th</sup> March 2019 amounted to arriving at a concluded contract and therefore, the submissions made by the learned Counsel for the petitioner on the basis of these grounds, merits rejection.

**102.** Another ground urged by the learned Counsel for the petitioner is that decision to cancel the earlier tender process was taken at a very late stage after the petitioner was declared to be the highest bidder and in terms of Clause 2.3.6 of the tender process LoA was required to be issued within seven days from the opening of the bid i.e. 7<sup>th</sup> February 2019. It has been submitted that such a long gap resulted into incurring heavy expenditure made by the petitioner and thus, instead of issuing LoA in favour of the petitioner, the earlier tender process has illegally been cancelled. Reliance in this regard has been placed on Clause 2.3.6 which provides that after selection, an LoA shall be issued by the authority to the selected bidder and thereafter the selected bidder shall, within seven days, sign and return the

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<sup>20</sup> **2022 SCC OnLine SC 574**

duplicate copy of the LoA in acknowledgment thereof. It further provides that in the event the duplicate copy of the LoA signed by the selected bidder is not received within the stipulated time, the authority may forfeit the bid security of such bidder on account of failure of the selected bidder to acknowledge the same. Clause 2.3.6 of the tender document has already been quoted in paragraph 38 above.

**103.** A closer scrutiny of Clause 2.3.6 of the tender conditions of the earlier tender would reveal that the LoA in duplicate was to be issued by the authority to the selected bidder after its selection. In the instant case, we have already held that though the petitioner was intimated to be the highest bidder, it was never declared to be the selected bidder for the reason that the decision in this regard was to be taken by the CoS, which never decided to declare the petitioner to be the selected bidder. Merely because certain expenditure might have been incurred by the petitioner, in our opinion, will not vitiate the impugned action on the part of the respondents authorities to cancel the earlier tender process for which we have already stated the reasons above.

**104.** On behalf of the petitioner, lastly, Mr. Tulzapurkar, learned Senior Advocate has argued that fresh tender was issued with a view to defeat the right of the petitioner and other prospective bidders to participate in the fresh tender process for the reason that the conditions embodied in the fresh tender are such that the same favour a particular bidder inasmuch it is tailor-made with a view to defeat the right of the petitioner and other

prospective participants. In this regard the submission is that in the fresh tender, number of consortium members has been altered only to oust the petitioner from participation and further that the financial eligibility criteria and technical eligibility criteria have also been modified which has resulted in narrowing the participation. It is also stated that in terms of the earlier tender, the consortium of upto eight members could participate in the bid which was fair and commercially viable given the magnitude of the project but in the fresh tender it is provided that the number of consortium members should not exceed two and similarly, the earlier tender required that the Lead Member along with other consortium member shall satisfy the financial eligibility whereas in the fresh tender the condition is that the Lead Member and the consortium members shall separately satisfy the financial eligibility.

**105.** To examine the said submission, we first need to consider as to at what stage challenge to the fresh tender has been made in the instant writ petition. Admittedly, the petitioner chose not to participate in the fresh tender process. It is settled position of law that one who has not participated in the tender and has also not participated even in the pre-bid meeting, cannot be permitted to challenge the terms and conditions of the tender.

**106.** The petitioner challenged the terms and conditions of the fresh tender pursuant to the order passed by the Court on 15<sup>th</sup> December 2022 by which time the financial bids qua the fresh tender were already opened on 29<sup>th</sup> November 2022.

**107.** In *Kanchan India Limited & Anr. Vs. Government of Maharashtra & Ors.*<sup>21</sup>, the Hon'ble Supreme Court has held that on account of non-participation of the petitioner in the subject tender process of the said case, exclusion of the petitioner had occurred on account of its negligence and therefore, such exclusion cannot be said to be at the instance of the State authorities.

**108.** If the petitioner in any manner was aggrieved by the bid conditions of the fresh tender, it was always open to it to have challenged it at an appropriate time and thus, having not challenged the bid condition before opening of the financial bid *qua* the fresh tender, challenge to the tender condition, in our opinion, at a subsequent stage, will not be permissible.

**109.** As far as the submissions made on behalf of the petitioner that tender conditions were tailor-made to suit a particular tenderer, we may observe that in response to the fresh tender three bidders had participated out of which two bids were found to be technically qualified. Meaning thereby, at least two bidders fulfilled the technical conditions and therefore, since there were more than two bidders in the field who participated out of which two technically qualified, it cannot be said that the tender conditions were tailor-made so as to suit only a particular bidder. Reference in this regard may be had to the judgment in the case of *S. Motilal Plywood House Vs. State of Maharashtra Nashik Municipal Corporation & Anr.*<sup>22</sup> paragraph 21 of which is extracted hereinbelow:

<sup>21</sup> **2024 SCC OnLine Bom 791**

<sup>22</sup> **2010 SCC OnLine Bom 666**

**"21.** *To get over this position, the argument of the Petitioners is that the third tender, as has been received, is a dummy bid and by a person who may not be eligible. It is not possible to proceed on such assumption. The fact remains that there would be more than one bidder in the field who would compete for the best price to be offered to the Corporation. In that sense, it is not possible to take the view that the terms and conditions were tailor made only to make one of them eligible. That is not the case before us. Even if on account of such strict terms and conditions, only two persons would become eligible, it is still a process of competition between similarly placed persons and more so who are qualified in all respects as per the requirements of the Corporation. Moreover, the observation in Paragraph 17 of the above said decision will have to be understood to mean that the terms and conditions were so tailor made so as to suit only "one particular person" with a view to eliminate all others from participating in the bidding process. That would impinge upon the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons. The mere fact that the terms provided in the impugned tender notice are onerous, that alone cannot be the basis to find fault with the same."*

**110.** Even otherwise, as has been held by Hon'ble Supreme Court in ***Michigan Rubber (India) Ltd. Vs. State of Karnataka***<sup>23</sup> in the matter of formulating conditions of tender document and awarding a contract greater latitude is to be given to the State authorities and unless the action of the tendering authority is found to be malicious or misuse of its powers, interference by this Court is not warranted. The said view of Hon'ble Supreme Court in ***Michigan Rubber (India) Ltd. (supra)*** has been referred to and reiterated in ***Uflex Ltd. Vs. Government of Tamil Nadu & Ors.***<sup>24</sup> Paragraph 2, 3 and 4 whereof are relevant to be quoted, which are as under:

*"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*

<sup>23</sup> **(2012) 8 SCC 216**

<sup>24</sup> **(2022) 1 SCC 165**

*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]*

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 (India) Ltd. v. State of Karnataka [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] as under : (SCC p. 229, para 23)*

*"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 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."*

**111.** It is equally settled that the Court does not sit like a Court of appeal over the appropriate authority in the matters relating to tender and that the Court must realize that the authority floating the tender is the best judge of its requirements and therefore, the Court's interference should be minimal.

**112.** In ***Silppi Constructions Contractors Vs. Union of India & Anr.***,<sup>25</sup> it has been held by the Apex Court that the Courts must give "fair play in the joints" to the Government and public sector undertakings in matters of contract and the Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. Paragraph 20 of the report in ***Silppi Constructions Contractors (supra)*** is relevant to be quoted at this juncture, which is extracted hereinbelow:

*"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*

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<sup>25</sup> **(2020) 16 SCC 489**

*prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”*

**113.** In view of these reasons, the submissions made by Mr. Tulzapurkar that the conditions of fresh tender were such that they were embodied only to oust the petitioner from participation and to suit a particular tenderer, in our opinion is misconceived, to which we are unable to agree.

**Conclusion:**

**114.** For the discussion made and the reasons given above, we conclude that the grounds urged in support of the petition lack force and accordingly, the challenge to the impugned action on the part of the respondents – authorities, whereby the earlier tender process was cancelled and fresh tender process has been resorted to, fails.

**115.** Resultantly, the writ petition is hereby dismissed.

**116.** There will, however, be no order as to costs.

**117.** Interim application(s), if any, also stand disposed of.

**(AMIT BORKAR, J.)**

**(CHIEF JUSTICE)**