(2023) 07 CAL CK 0002

In the Calcutta High Court

Case No : MAT No. 894, 895 Of 2023, (I.A. NO. CAN 01 Of 2023)

Damodar Valley Corporation And Others — APPELLANT

Vs

Bla Projects Private Limited And Another — RESPONDENT

Date of Decision : 03-07-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2023) 07 CAL CK 0002

Hon'ble Judges : T.S. Sivagnanam, CJ;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Anirban Ray, Swarajit Dey, Riddhi Jain, Kishore Datta, Amitesh P. Ray, P. Saha Saha (Das)

Final Decision : Allowed

Judgement

1. These intra court appeals are directed against the common order passed in WPA No. 26117 of 2022 and WPA No. 27405 of 2022. Since the facts in both the cases are identical and common submissions were made by the learned advocates for the parties, with their consent the appeals are disposed of by this common judgement and order.

2. The first respondent in this appeal is the writ petitioner, BLA Projects Private Limited, Kolkata. The writ petitions were filed challenging the correctness of the decision taken by the appellant, DVC, as communicated to the respondent vide email dated 15.11.2022. By the said communication, the respondent writ petitioner was informed that their tender submitted for the subject work has been rejected during the technical evaluation by the duly constituted Committee for the reasons "administrative grounds". The writ petition was filed challenging the rejection of the petitioners technical bid primarily on the ground that the order of rejection did not contain any reasons. On 24.11.2022 the appellant informed the respondent the reasons for rejection in reply to the writ petitioner's letter dated 16.11.2022 wherein they sought for reasons for rejection. In the communication dated 24.11.2022 the following were the reasons for rejection:-

Reference to your letter dated 16.11.2022, the reasons on which the Technical Evaluation Committee has rejected your bid is furnished as below:

1) Fraudulent practice was noticed against you related to pilferaging of DVC's transported good quality coal and replacement of the same with some extraneous materials like boulders, mud, stones etc. While executing a coal transportation contract of RTPS, DVC. Same was proved on 01.06.2018 by RTPS officials in presence of contract's representatives. Letter was issued to you on 02.06.2018 intimating this incident of ill practice by them FIR was registered on 09.06.2018 by DVC official. The Charge Sheet/Final Report was issued by Raghunathpur PS, Dist, Purulia, W.B. on 24.10.2019.

2) You have repeatedly suppressed the above charge of pilferage and fraudulent practices.

3) Thus, you have committed a transgression through a violation of Section 3 of Integrity Pact.

4) Decision was taken on administrative grounds as per legal opinion as the above investigation towards the incident of pilferage and fraudulent practices is sub-judice at Hon'ble Calcutta High Court.

3. The writ petitioner contended that in the tender document/conditions of tender there is no clause requiring the petitioner to disclose any FIR or charge sheet. In any event the disclosure has to be made if it is within three years and in the instant case three years had lapsed from the date on which the FIR was lodged i.e. on 09.06.2018. The petitioner relied upon the stand taken by the appellant before the Hon'ble Supreme Court in Special Leave Petition arising out of an order passed by the Division Bench of this Court in WPA No. 23775 of 2022 wherein the appellant had stated that a transgression had been committed by the writ petitioner in June 2018 when the incident occurred. Therefore it is submitted that in terms of Section 5 of the tender conditions the three year period has been stipulated and the subject tender having been invited much after the period of three years, there is no requirement for any voluntary disclosure of the alleged transgression. Further by referring upon clause 2.3(iii) of the Policy for Withholding and Banning of Business Dealings, the voluntary disclosure is encouraged not with a view to reject the bid but to keep an alert watch on the bidder's action in the tender and subsequent contract. Further it was contended that the action of the appellant in rejecting tender was arbitrary and meant for certain extraneous reasons and not as per terms of tender and therefore the action is not only arbitrary but mala fide as well. Further it was contended that in terms of the tender the Integrity Pact is required to be signed by the intending bidder which does not provide for any scope for disclosure of any information along with the Integrity Pact and all that the bidder is required to do is to sign the Integrity Pact and submit the same to the tender inviting authority. It was further submitted that even assuming that there was a transgression, in terms of the clause 2.3(iii) of the Policy for Withholding and Banning of Business Dealings

it would not mean automatic disqualification of the bid as conditions stipulates that the declared conflict of interest may be evaluated and mitigating steps if possible should be taken by the procuring entity. Further voluntary reporting of previous transgression of code of integrity elsewhere should be evaluated and barring cases of various grades of debarment, alert watch may be kept on the bidder’s action in the tender and subsequent contract. Further it is submitted that the Director of the company was a person against whom the charge has been laid in the criminal case and the company is not the accused. Subsequently the criminal case has also been stayed in the proceedings initiated by the writ petitioner before this Court. Further the three year time limit prescribed in Section 5 of the conditions of tender should not be computed from the date on which the charge sheet was laid but as admitted by the appellant from the date on which the FIR was registered and if done so the subject tender having been invited much after the period of three years, the technical bid of the writ petitioner ought not to have been rejected. Further it was contended that the appellant had placed reliance on the decision of the Division Bench of this Court in MAT No. 1932 of 2022 which was an appeal arising out of the order passed in WPA No. 23775 of 2022 filed by the respondent writ petitioner and the said decision cannot be pressed into service as the respondent writ petitioner had preferred appeal to the Hon’ble Supreme Court in Special Leave to Appeal No. 3031 of 2023 and the Hon’ble Supreme Court after hearing the parties by order dated 03.03.2023 ordered that the matter requires consideration. Therefore the appellant cannot place reliance on the said decision.

4. The appellant resisted the prayer sought for in the writ petition inter alia contending that the reasons for rejection was clearly set out and communicated to the writ petitioner and the reasons cannot be said to be bad in law. It was further contended that in terms of clause 2.3 of the policy conditions the writ petitioner is obliged to disclose any previous transgression of code of integrity whether asked or not and admittedly the writ petitioner had suppressed the fact that their Managing Director had been charge sheeted under various provisions of the Indian Penal Code on 24.10.2019. Furthermore the writ petitioner’s bid has been rejected on the ground that the writ petitioner has repeatedly suppressed the fact of the FIR being registered and subsequently the laying of the charge sheet and participated in 14 previous tender in the year 2021 and 2022 and admittedly in none of those tenders writ petitioner had disclosed about the pendency of the criminal proceedings. Further by referring to the definition of the “fraudulent practise” as defined in the policy it was submitted that any omission or mis representation or making false declaration or providing false information would be “fraudulent practice”. It was contended that it is the appellant who is entitled to interpret the terms of the tender and it is not for the writ petitioner to make an independent interpretation to the said terms. Further it was contended that Section 5 of the tender conditions would have no application to the facts of the case as the order rejecting the technical bid was by referring to Section 3 of the tender conditions wherein there is no mention of any

time limit of three years and time limit prescribed in Section 5 cannot be read into Section 3 of the tender conditions. It was further submitted that Section 3 of the tender conditions contains two limbs. the first of which deals with transgression committed before or during the execution of the work through the violation of Section 2 of the conditions and the second limb is in any other form stage to put the bidder's reliability or credibility in question and in either of the contingencies the appellant is entitled to disqualify such bidder from the tender process or to terminate the contract if already signed and take action as per procedure of "Banning of Business Dealings". Thus, it was contended that suppression of material fact regarding criminal proceeding itself is a transgression and in terms of Section 3 of the Integrity Pact the appellant was entitled to reject the bid of the writ petitioner. It was reiterated that even assuming that three years period is applicable the same has not expired since three years had not lapsed after the charge sheet was laid. Furthermore the suppression by the respondent writ petitioner has led to doubt the reliability and credibility of the writ petitioner and the appellant was entitled to reject the bid in terms of Section 3 of the Integrity Pact.

5. The Learned Single Bench proceeded to decide the question as to whether the impugned rejection of the writ petitioner's technical bid falls in Section 3 of the Integrity Pact or any of the relevant clauses which was referred to by the parties. After noting Section 3 and Section 5, the learned writ court took note of clause 2.3 of the Policy for Withholding and Banning of Business and held that the from a conjoint reading of all the conditions, it is clear that the obligations on the part of the writ petitioner was to disclose past transgression which occurred in the three year period prior to the date of the tender and hence does not cover the alleged fraudulent practice which occurred before June, 2018 which is specifically the case as stated by the appellant in their letter dated 24.11.2022. Further the learned writ court held that the scheme of the terms and conditions makes it clear that the culpability with regard to the violation of any of the sections relating to transgression must relate to a fraudulent practice which is limited to three years preceding the tender. Further the court held that the sharpness of the penalty has somewhat been blunted by clause 2.3(iii) of the Policy. Thereafter the learned writ court proceeded to note the decisions of the Hon'ble Supreme Court with regard to the scope of interference of a writ court in matters of tender and held that the decision of the Hon'ble Supreme Court reinforce the view that the tender document is the best judge to understand the requirements of the Tender and the Court should not disturb the interpretation given by the Tendering Authority. The learned writ court then proceeded to point out that all the decisions of the Hon'ble Supreme Court however preserve the window for arbitrariness and a mala fide award or rejection of a Tender, including for extraneous considerations. Ultimately the learned writ court came to the conclusion that the decision to exclude the writ petitioner from participating in the Tender as arbitrary unreasonable and would call for interference by the learned writ court. With regard to the decision of the Division Bench of this court

in MAT No. 1932 of 2022, the court held that the said judgment was challenged before the Hon'ble Supreme Court and orders have been passed by the Hon'ble Supreme Court on various dates which make it clear that the matter is under consideration of the Hon'ble Supreme Court. Further the writ court came to the conclusion that the order of rejection of the technical bid of the writ petitioner amounts to virtually blacklisting the writ petitioner without giving any opportunity of hearing. Accordingly the communications which were impugned in the writ petitions were quashed and direction was issued to the appellant to evaluate the technical bid of the writ petitioner and allow the writ petitioner to participate in the Tenders. Challenging the correctness of the orders passed by the learned writ court the present appeals have been preferred.

6. We have elaborately heard Mr. Anirban Ray, learned Government Pleader assisted by Mr. Swarajit Dey and Ms. Ridhhi Jain, learned Advocates for the appellants and Mr. Kishore Datta, learned Senior Advocate assisted by Mr. Amitesh P. Ray, learned Advocate for the respondent/BLA Projects and Ms. P. Saha Saha (Das), learned Advocate for the Respondent No. 2 in MAT/895/2023.

7. The learned Advocates appearing on either side elaborately reiterated the submissions made before the learned writ court and also placed reliance on the decisions which were relied upon by them when the writ petition was heard. The issue which falls for consideration in these appeals is whether the action of the appellant in rejecting the technical bid of the respondent writ petitioner in respect of subject tenders could be called in question in a writ proceeding and if so under what circumstances and is there any limitation or embargo placed upon the learned writ court to interfere in any such matters.

8. Before we proceed to take a decision on the facts and circumstances of the case on hand, it would be necessary and beneficial to take note of the legal position which have been clearly enumerated/ adumbrated in various decisions of the Hon'ble Supreme Court. To be noted that the learned writ court in paragraph 19 of the impugned order has referred to various decisions and has held that the author of the tender document is the best judge to understand requirements of the Tender and the Court should not disturb the interpretation given by the tender inviting authority. Nevertheless the learned writ court quashed the decision of the appellant on the ground that the same is arbitrary and unreasonable as it which was a permissible a ground for the learned writ court to step in.

9. In Tata Cellular Versus Union of India (1994) 6 SCC 651 the Hon'ble Supreme Court held that the principles of judicial review would apply to exercise all the contractual powers by government bodies in order to prevent arbitrariness or favouritism, however there are inherent limitations in exercise of that power of judicial review. The government is the guardian of the finances of the State and it is expected to protect the financial interest of the State. The right to reflect the lowest offer in a tender is always available to the government but the principles laid down in Article 14 of the Constitution have to be kept in view while upsetting

or refusing tender. There can be no question of infringement of Article 14 if the government tries to get the best persons or the best quotation. The right to choose cannot be considered to be an arbitrary power and however if the said power is extraneous or for any collateral purpose, exercise of that power will be struck down. Further it was pointed out that the doubt of the court is to confine itself to the question of illegality, that it’s concern should be (i) whether the decision making authority exceeded its powers? (ii) committed an error of law (iii) committed the breach of rules of natural justice (iv) reached a decision which no reasonable tribunal would have reached or (v) abused its powers. It was held that it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of the policy is fair and it is only concerned with the manner in which those decisions have been taken. Thus, the ground on which the administrative action could be subject matter of judicial review were categorise in three categories namely illegality, irrationality and procedural impropriety.

10. In an earlier decision in the case of Ramana Dayaram Shetty Versus The International Airport Authority of India (1979) 3 SCC 489 it was held that the terms of notice inviting tender cannot be ignored as been redundant or being superfluous and they must be giving a meaning and necessary significance.

11. In Silppi Constructions Contractors Versus Union of India and Another (2020) 16 SCC 489 as it was held that the court must realise the limitations and the havoc which needless interference in commercial matters would cause. In contracts involving technical issues, the court should be even more reluctant because most of the Judges do not have the necessary expertise to adjudicate upon technical issues which is beyond the domain of the Court. Further the Court should not use a magnifying glass while scanning the tender and make small mistakes to appear as big blunders. The Court must give fair play in the joints to the government and public sector undertakings in the matter of contracts. Further that the Court should exercise restrain while exercising the power of judicial review in commercial matters. The Court will normally loathe to interfere in any contractual matters unless clear cut case of arbitrariness or mala fide or bias or irrationality has been met out.

12. In National High Speed Rail Corpn. Ltd. Versus Montecarlo Limited (2022) 6 SCC 401 the Hon’ble Supreme Court sounded a word of caution while entertaining the writ petition and/or granting stay which ultimately may delay the execution of mega projects. In Jagdish Mandal Versus State Of Orissa & Ors. (2007) 14 SCC 517 it was held that evaluating tender and awarding contracts are commercial functions; principles of equality and natural justice stay at a distance; if the decision relating to award of contract is bonafide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out; the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes.

The above decisions were noted by the Hon'ble Supreme Court in M/S N.G. Projects Limited Versus M/S Vinod Kumar Jain & Ors. (2022) 6 SCC 127. In the said decision it was held that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. It was held that satisfaction whether a bidder satisfies the tender condition, is primarily upon the authority inviting the bids, as such authority is aware of the expectations from a tenderer while evaluating the consequences of non-performance. It was further held that the Writ Court should refrain itself from imposing its decision from the decision of the employer as to whether or not to accept the bid of a tenderer. As 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 and Court 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. Further it was held that the approach of the Court should not be 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. Further, it was held that if the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering with the grant of tender, but instead relegate the parties to seek for damages for wrongful exclusion rather than to injunct the execution of the contract.

13. In Tata Motors Ltd. Versus Brihan Mumbai Electric Supply and Transport & Ors. 2023 SCC Online SC 671, the Hon'ble Supreme Court after taking note of the decision in Silppi Constructions Contractors (Supra) held that ordinarily a Writ Court should refrain from imposing its decision from the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The Court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well under way, would not be in public interest and initiate a fresh tender process may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. Further, after referring to the decision of the Hon'ble Supreme Court in Air India Ltd. Versus Cochin International Airport Limited (2000) 2 SCC 617 it was held that award of a contract, whether by a private party or by a State is essentially a commercial transaction. A State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such relaxation, further even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance on public interest and not merely on making of a legal point that the Court should always keep the large public interest in mind in order to decide whether its intervention is called for or not and only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

14. Bearing the above legal principles in mind, we now examine the facts of the case on hand. At the first instance, the writ petitioner was informed by an auto-generated mail that their tender has been rejected during technical evaluation by the duly constituted committee for the reason "administrative ground". It is no doubt true that the said communication did not set out as to what was the "administrative ground" on which the tender was rejected during technical evaluation. The explanation offered by the learned Advocate for the appellant is that it is an auto-generated mail and, therefore, it has mentioned the reason for rejection as "administrative ground" nevertheless when the appellant sought for the reasons, the same has been furnished. In the earlier portion of this judgment and order we have set out the reasons for rejection. The first among the three reasons is that fraudulent practices as noticed against the writ petitioner relating to pilferage of DVC's transported good quality coal and replacement of the same with some extraneous materials like boulders, mud, stone and etc. while executing the coal transportation contract of RTPC, DVC. The said fraudulent practice is stated to have been established/ proved on 01.06.2018 by the officials of DVC in the presence of the contractor's (writ petitioner's) representative and a letter was issued to the writ petitioner on 02.06.2018 intimating the illegality and FIR was registered on 09.06.2018 and charge sheet has been laid on 24.10.2019. The second reason for rejection is that the writ petitioners have repeatedly suppressed the said charge of pilferage and fraudulent practices. The third reason is that the appellants have committed a transgression through a violation of Section 3 of the Integrity Pact.

15. The Integrity Pact is a form which is mandatorily required to be executed by the bidder. Section 2 of the said Pact deals with commitment of the bidders/ contractors. Clause 1 of Section 2 states that the bidders/ contractors commit themselves to take all measures necessary to prevent corruption. The bidders/ contractors commit themselves to observe the principles which have been set out in Clauses (a) to (e) in Sub-section (1) of Section 2 of the Pact during participation in the tender process and during the contract execution. Section 3 deals with disqualification from tender process and exclusion from future contracts which reads as follows:

SECTION-3: DISQUALIFICATION FROM TENDER PROCESS AND EXCLUSION FROM FUTURE CONTRACTS

If the Bidder(s)/Contractor(s), before award or during execution has committed a transgression through a violation of section-II above, or in any other form such as to put his reliability or credibility in question, the Principal is entitled to disqualify such Bidder(s)/Contractor(s) from the tender process or to terminate the contract, if already signed and to take action as per the procedure or "Banning of business dealings" of the Principal.

16. Section 5 deals with previous transgression which is quoted hereunder :

SECCTION-5: PREVIOUS TRANSGRESSION

(1) The Bidder declares that no previous transgressions occurred in the last three years with any other Company in any country conforming to the anti-corruption approach or with any Public Sector Enterprise in India that court justify his exclusion from the tender process.

(2) If the Bidder makes incorrect statement on this subject, he can be disqualified from the tender process or action can be taken as per the procedure of "Banning of business dealings" of the Principal.

17. Apart from the Tender Conditions which are enumerated under different heads described as "Sections", there are other conditions which are in the nature of policy which also forms part of the Tender Conditions and the policies are to be read along with the substantive part of the Tender Conditions. In the case on hand, the Policy for Withholding and Banning of Business Dealings would be relevant. The said Policy states that the registration of contractors and their liability to participate in DVC's procurement is subject to the compliance of Code of Integrity for public procurement and good performance in contracts. The policy sets out the contingencies for debarment from bidding, the guidelines on debarment of firms from bidding, debarment of firms only in DVC. The bidders are required to sign the declaration for abiding by the Code of Integrity for public procurement in registrations applications and in bid documents with a warning that in case of any transgression of the code, their name is not only liable to be removed from the list of registered contractors but would be liable for other punitive action such as cancellation of contracts, banning and blacklisting or action in Competition Commission of India and so on.

18. In terms of Clause 2 of the policy the procuring authorities as well as the bidders should observe the highest standards of ethics and should not indulge in various prohibited practices either directly or indirectly at any stage during the procurement process or during execution of the resultant contracts. The prohibited practices have been enumerated in Clause 2.2 of the policy. Clause 2.3 deals with obligations for pro-active disclosures and the same is quoted hereunder :

2.3 Obligations for Proactive disclosures:

i) Procuring authorities as well as bidders, suppliers, contractors and consultants/ service providers, are obliged under Code of Integrity for Public Procurement to suo-moto proactively declare any conflicts of interest (coming under the definition mentioned above- pr-existing or as and as soon as these arise at any stage) in any procurement process or execution of contract. Failure to do so would amount to violation of this Code of Integrity; and

ii) Any bidder must declare, whether asked or not in a bid document, any previous transgressions of such a Code of Integrity with any entity in any country during the last three years or of being debarred by any other Procuring Entity. Failure to do so would amount to violation of this Code of Integrity:

iii) To encourage voluntary disclosures, such declarations would not mean automatic disqualification for the bidder making such declarations. The declared conflict of interest may be evaluated and mitigation steps, if possible, may be taken y the procuring Entity. Similarly, voluntary reporting of previous transgressions of Code of Integrity elsewhere may be evaluated and barring cases of various grades of debarment, an alert watch may be kept on the bidders' actions in the tender and subsequent contract.

19. On a combined reading of the three sub-clauses in clause 2.3, it is seen that the disclosure required to be made is voluntarily. Precisely, for this reason condition has been imposed that the bidders are obliged under the Code of Integrity for Public Procurement to suo-moto pro-actively declare any conflict of interest and failure to do so, would amount to violation of the Code of Integrity. Furthermore, it is stipulated that the bidder must declare, whether asked or not in the bid document, any previous transgression of such a Code of Integrity with any entity in any country during the last 3 years or of being debarred by any other procuring entity and failure to do so would amount to violation of the Code of Integrity. The Clause 2.2(iii) states that to encourage voluntary disclosure, such declarations would not mean automatic disqualification for the bidder making such declaration.

20. It is an admitted fact that for certain transgression action was initiated against the respondent writ petitioner and a criminal case was registered against its Managing Director. The FIR was investigated and offence having been made out, charge sheet has been laid. The matter has not attained finality primarily for the reason that the writ petitioner has obtained stay of the proceedings by approaching this Court. The question would be as to whether non-declaration of the adverse information against the writ petitioner would be a justifiable reason for rejecting the technical bid of the writ petitioner by the technical evaluation committee. As pointed out earlier, the learned Writ Court was of the view that alleged transgression had occurred 3 years prior to the notice inviting the subject tender and therefore, there was no such embargo on the part of the writ petitioner requiring to disclose such information. Thus, the question would be whether the time limit which is mentioned in Section 5 of the Tender Conditions could be interpolated in Section 3 of the Tender Conditions. Section 3 of the Tender Conditions deals with disqualification from tender process and exclusion from future contracts. Section 3 contains two limbs, the first of which being, if the bidder before the award or during the execution has committed a transgression through violation of Section 2, it would result in disqualification. The second limb is that if the bidder has acted in any other form such as to put his reliability and credibility in question, that would also result in disqualification. Section 5 deals with previous transgression. In terms of Clause (1) of Section 5, it is mandatory for the bidder to declare that no previous transgression occurred in the last 3 years with any other company in any country confirming to the anti-corruption approach or with any public sector enterprises in India that could justify the exclusion from the tender process. Therefore, Section 5 is a stand

alone provision dealing with previous transgression mandating the bidder to make a self-declaration of any such previous transgression occurred in the last 3 years with any other company in the country or with any other public sector enterprises in India. Therefore, the time limit of 3 years stipulated, is qua the previous transgression with any other company in the country or any other private sector enterprises in India in the last 3 years whereas the second limb of Section 3 empowers the DVC to disqualify a bidder if the action of the bidder is in a form so as to put his reliability or credibility in question. Admittedly, criminal case has been registered and charge sheet has been laid. We see no reason to fault the decision of the appellant in doubting the reliability or credibility of the respondent writ petitioner at this stage of the matter. This is so because the criminal proceedings have not attained finality and the matter has been stayed in a proceeding initiated by the writ petitioner. Therefore, unless and until the writ petitioner gets himself absolved of all the charge, it cannot be stated that DVC were wrong in doubting the reliability and credibility of the writ petitioner in participating as a bidder in the subject tenders. Therefore, the time limit prescribed in Section 5 of the Tender Conditions cannot be interpolated in Section 3 of the Tender Conditions. With regard to the Policy for Withholding and Banning of Business Dealings is concerned, though the matter has not travelled upto the said stage, in terms of Clause 2.3(iii) the time limit of 3 years is with regard to any other entity in the country or any debarment by any other procuring entity and this should be mandatorily disclosed by the bidder by way of a self-declaration. The learned Writ Court was of the view that the Clause 2.3(iii) has diluted the rigour of the debarment. We are unable to persuade ourselves to agree with the said conclusion as sub-clause (iii) of Clause 2.3 gives discretion to the tender inviting authority namely, the appellant. It has been clarified that such disqualification would not be meant automatic disqualification, the declared conflict of interest may be evaluated and mitigating steps, if possible, may be taken by the procuring entity. Similarly voluntary reporting of previous transgression of Code of Integrity elsewhere may be evaluated and barring cases of various grades of debarment, an alert watch may be kept on the bidder's action in the tender and subsequent contract. We find there is no dilution of the rigour of the provisions of debarment and all that Sub-clause (iii) of Clause 2.3 gives is a discretion to the procuring entity to evaluate the mitigating steps or to evaluate the voluntary report reporting of previous transgression. Admittedly the writ petitioner has not voluntarily reported the previous transgression. Therefore, the stand taken in the writ petition is a clear afterthought and the writ petitioner seeks to interpret the terms and conditions of tender to suit its convenience which they are not entitled to do. Above all, the Court exercising jurisdiction under Article 226 of the Constitution is not the authority to decide as to who would be best suited to perform the contract. The Court cannot take a decision sitting in the arm chair of the tender inviting authority as it is the exclusive domain of the tender inviting authority to decide upon the tenderer who would be best suitable. The learned Writ Court was of the view that the decision of the appellant was arbitrary and unreasonable and if it is so, it was permissible for the

Writ Court to interfere. In the light of the conclusion which we have arrived at namely, that the time limit prescribed in Section 5 cannot be interpolated in Section 3, we find no arbitrariness in the decision making process. Secondly, there can be no unreasonableness in the decision itself. It is not for the Writ Court to question the decision of the appellant and it is only the decision making process that that needs to be examined. The transgression which had been committed is admitted and the writ petitioner seeks to escape out of the rigour of the terms and conditions of tender by referring to the time limit prescribed in Section 5 which we have held has no application to the facts and circumstances of this case. Similarly, the time limit in Sub-clause (ii) of Clause 2.3 of the Banning Policy would apply to cases where the bidder makes voluntary declaration of the previous transgression with any other entity in the country or by any other procuring entity during the last 3 years. In the instant case, the transgression is with the procuring entity itself. One other reason which has been set out in the reasons for rejection is that repeatedly the writ petitioner has suppressed the transgression. It is an admitted fact that the writ petitioner had participated in 14 tenders floated by the appellant organization; however appears to have been unsuccessful but the fact remains that in the 14 tenders this transgression has not been disclosed. Therefore, this is one more reason for the appellant to doubt the reliability and credibility of the writ petitioner. The learned Writ Court has referred to the stand taken by the appellant to state that the starting point of the alleged transgression was when the FIR was registered and not when the charge-sheet was laid. Though, we have held the said time limit prescribed in Section 5 of the Tender Conditions, has no application to the case on hand. That apart, the transgression is continuing and the matter has not attained finality largely attributable to the writ petitioners themselves as they have obtained stay of those proceedings. Therefore, the writ petitioner cannot be permitted to probate and reprobate and take advantage of their own action and to fault the decision of the appellant in rejecting their technical bid. It was submitted by the learned Senior Advocate for the respondent writ petitioner that it is the Director of the company who has been charge-sheeted and the company is not the accused. To verify the correctness of the said submission we have perused the charge-sheet which was laid on 24.10.2019 wherein it has been mentioned that the writ petitioner had violated various provisions of the Contract and that it has been noticed that the writ petitioner had created a heap of inferior coal mixed with extraneous material with intent to commit fraudulent and corrupt practice. The Managing Director of the company has been named as the "owner" in the charge-sheet who is said to have voluntarily surrendered before the Trial Court on 13.02.2019. Therefore, it is incorrect to state that the company has not been mentioned in the charge-sheet which has been laid.

21. In the light of the above conclusion, that it may not be necessary for us to examine as to whether the decision in the respondent's own case in MAT No. 1932 of 2022 would be a good ground to dismiss the writ petition. To be noted that during the pendency of the writ petition, there was an interim order in force

from December, 2022, consequently the entire tender process has been halted. In so far as the tender which is the subject matter of MAT No. 894 of 2023 is concerned, a reverse re-auction has already been conducted and the successful bidder has been selected. On account of the order for stay, the appellants have submitted that great prejudice has been caused to the thermal power plant which is to function for 24 hours on all 7 days in a week and the fly ash which is generated and taken to the ash pond in celery form is a continuous process and the ash pond has to be cleared or otherwise the power plant will have to be shut down. Thus, on account of the interim order, public interest has definitely suffered and any disruption to the running of the power plant would undoubtedly be against public interest. It is not in dispute that there is no mala fides alleged by the writ petitioner against the appellant and therefore, the challenge to the rejection of the technical bid cannot be brought under the said head.

22. Thus, for the above reasons we are of the clear view that the decision of the appellant in rejecting the technical bid of the respondent writ petitioner was just and proper and calls for no interference.

23. In the result the appeals are allowed. Consequently, the writ petitions are dismissed and the appellant is directed to proceed with both the tenders in accordance with the procedure.

