

(2023) 03 BOM CK 0078

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 4209 Of 2023

Gypsum Structural India Pvt. Ltd And Others

APPELLANT

Vs

Brihanmumbai Municipal Corporation Engineering Hub
Building And Others

RESPONDENT

Date of Decision : 23-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Specific Relief Act, 1963 — Section 7, 10, 41, 41(ha)

Citation : (2023) 03 BOM CK 0078

Hon'ble Judges : S. V. Gangapurwala, J;Sandeep V. Marne, J

Bench : Division Bench

Advocate : Venkatesh Dhond, Bimal Rajasekhar, Rashmi Raghavan, Narendra Walawalkar, Shilpa Redkar, Virag Tulzapurkar, Amir Arsiwala, Nupur Shah, Vineet Naik, Dhaval Deshpande, Yash Jariwala, Milind V. More

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. Rule. Rule made returnable forthwith. With the consent of the parties, the petition is taken up for final hearing.

2. Petitioner has filed the present petition seeking following reliefs:

"a. For a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction to Respondent no.1 to cancel the Impugned Tender and issue a fresh tender for the same subject matter with non-arbitrary, reasonable and unbiased terms and conditions insofar as the permitted technologies are concerned;

b. Pending the hearing and final disposal of this writ, an order or direction restraining Respondent no.1 from awarding the contract under Tender No: 7200042659 for rehabilitation of existing about 100 years old storm water arch drains by geopolymer lining trenchless technology in city area ["Impugned

Tender'] to any bidder allied with/ who has entered into a MOU with Respondent no.2:

c. If such contract has already been awarded, for a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction quashing any notice or other communication issued by Respondent no.1 awarding the contract under the Impugned Tender to any bidder allied with/ who has entered into a MOU with Respondent no.2.

d. for costs of the Petition and orders thereon; and

e. for such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

3. Petitioner is essentially aggrieved by the decision of the Respondent Municipal Corporation in choosing 'Geopolymer Lining Trenchless Technology' (geopolymer technology) for execution of the work of rehabilitation of 100-year-old storm water arch drains. Petitioner contends that respondent No.2 – GeoTree Solutions, an American company has developed GeoSpray-Geopolymer brand and has a monopoly in use of geopolymer technology. That the tender conditions are tailor-made to favour Respondent No. 2 as the bidders procuring its GeoSpray Geopolymer technology alone would be eligible to bid in the tender process. Petitioner desires non-specification of a particular technology for execution of the work so as to provide a level playing field to all the bidders. Petitioner accordingly seeks cancellation of the impugned tender process.

4. Facts of the case as captured from the pleadings are that petitioner No.1 company is in the business of providing infrastructure and engineering services for the last 29 years and claims to have executed other high value projects. Petitioner No. 2 is its director. For the sake of brevity and convenience, Petitioner Nos. 1 and 2 are hereinafter referred to as 'Petitioner'. Petitioner claims to have qualified for the same tender issued in the year 2021.

5. Municipal Corporation Greater Mumbai (MCGM) has undertaken work of rehabilitation of storm water arch drains which are in existence for over 100 years and issued e-tender notice on 27th December 2022. The work for which the bids are invited is 'Rehabilitation of existing about 100 years old of storm water arch drains from Geopolymer lining trenchless technology in city area including 5 years comprehensive maintenance' (Work). Petitioner participated in pre-bid meeting held on 3rd January 2018 and raised several queries. One of the queries was about specification only of geopolymer technology for execution of the work. MCGM issued a corrigendum dated 23rd January 2023 and extended dates in respect of impugned tender process. The last date for submission of bids was revised to 1st February 2023, opening of packet 'A' and packet 'B' scheduled on 2nd February 2023 and opening of packet 'C' was scheduled on 10th February 2023. MCGM responded to pre-bid queries raised by various bidders by publishing an Addendum on 24th January 2023. Objection raised by petitioner about use of only geopolymer technology met with a response 'Tender Condition

Prevails'. So far as the query with regard to 'structural standalone Type II or only structural standalone' raised by petitioner was concerned, response directed reference to Corrigendum IV. On 25th January 2023, MCGM issued Corrigendum-IV and paragraph 1.2 of Section 10 amending the condition relating to acceptable techniques from 'structural type II standalone lining' to 'structural standalone lining'. Thus the condition of use of 'type II technology' was deleted. Similarly in the heading 'scope of work' the words 'GeoSpray Geopolymer Technology' was replaced with 'Geopolymer Trenchless Technology'.

6. Petitioner did not submit its bid till the last date of 1st February 2023. Instead, it addressed letter dated 2nd February 2023 urging initiation of inquiry in the matter of floating of tender and requested for the tender being put on hold till outcome of the inquiry. On 2nd February 2023, MCGM opened packet A and packet B and apparently found 3 bidders qualifying the eligibility criteria. MCGM further went ahead and opened the financial bids (packet C) on 10th February, 2023. The Intervener- Mishigan (JV) claims to have been found L1 upon opening the financial bids and accordingly has filed Interim Application No.8720 of 2023 seeking intervention in the present petition. On 10th February 2023, petitioner filed the present petition seeking cancellation of the tender process and direction for issuance of fresh tender process with non-arbitrary, reasonable and unbiased terms and conditions relating to permitted technologies.

7. Appearing for petitioner, Mr. Dhond the learned senior advocate would submit that use of Geopolymer Technology for execution of the work is deliberately specified by MCGM so as to enable the bidders having MOU with respondent No.2 alone to bid in the tender process. That the condition for use of Geopolymer Technology for execution of the work is tailor-made to suit the interests of Respondent No.2, who enjoys monopoly in Geopolymer Technology and has developed a brand 'GeoSpray-Geopolymer'. That on account of specification of above technology for execution of the work, the bidders not intending to use the technology of Respondent No.2 are being thrown out of tender process thereby restricting the bidding process to few chosen associates of the Respondent No.2 alone. He would invite our attention to letter dated 1st February 2018 where the MCGM had rejected the use of GeoSpray Geopolymer Technology suggested by one N. K. Shah Infraprojects in respect of work of rehabilitation of sewer lines. That having rejected similar technology in the year 2018, the MCGM could not have specified use of that technology alone for execution of similar work of rehabilitation of storm water drains.

8. Mr. Dhond would invite our attention to tender invited for same work in the year 2022 where the technology specified was 'structural standalone type II liner'. That in the past tender, there was no limitation of use of technology. In the impugned tender however, the Municipal Corporation has deliberately specified use of Geopolymer Technology so as to limit the competition. Inviting our attention to scope of work under Section 7 of the impugned tender, Mr. Dhond would contend that the MCGM went to the extent of specifying the brand of

responded No.2 by using the words 'GeoSpray Geopolymer Technology'. That in order to wriggle out of allegation of bias and favour to Respondent No.2, MCGM subsequently deleted word 'GeoSpray' by issuing Corrigendum dated 25th January 2023. However according to Mr. Dhond, use of Geopolymer Technology actually means use of 'GeoSpray' brand. That this assertion of petitioner is buttressed by the fact that all 3 eligible bidders have MOU with respondent No.2. That in a quest to favour respondent No.2, MCGM is bleeding the public exchequer as the schedule of rates in the impugned tender is Rs.37400 per sq. mtr, as against the rate of Rs. 21025 per sq. mtr. fixed in the past tender in 2021.

9. Referring to the affidavits filed by MCGM, Mr. Dhond would seek to demolish the theory of MCGM of prescription Geopolymer Technology in view of advice of experts like VJTI, IIT Bombay and TAC of respondent No.1. He would submit that the IIT report relied upon by MCGM was procured by a third party vendor M/s Rohitash Rajesh Jaiswal Pvt. Ltd., Nagpur in February 2021. That the material supplied by such private agency to IIT Bombay for procuring report is unknown. Mr. Dhond would then highlight the chronology of events of receipt of various expert reports. That the confirmation of earlier IIT's report of 2021 was sought by Municipal Corporation on 22nd November 2022 which was received on 23rd November 2022. That the VJTI's report was received by the Municipal Corporation on 22nd November 2022. Immediately on 23rd November 2022, Technical Advisory Committee of the Municipal Corporation met and took a decision on the following date i.e. 24th November 2022. MCGM thereafter took decision to prescribe use of Geopolymer Technology alone for execution of the work. Mr. Dhond would submit that speed with which the decision for use of Geopolymer Technology was taken within 3-4 days would indicate pre-decision of the MCGM to favour respondent No.2 and that procurement of expert opinions was merely a farcical show. Referring to the IIT and VJTI's report, Mr. Dhond would submit that the opinion is in respect of 'GeoSpray' which is brand whereas Cured in Place Pipe (CIP), Machine Wound Spiral Lining (MWSL), Glass Reinforced Pipe (GRP) are technologies. That so called expert opinion was procured specifically favour the brand of respondent No.2. Mr. Dhond would also invite our attention to the note on the basis of which decision was taken for use of Geopolymer Technology produced at Exh. D to the affidavit in reply of MCGM dated 22nd February 2023. He would submit that the note envisages visit by chosen contractor to the 'GeoSpray Geopolymer lining material manufacturing plant' of respondent No.2 which leaves no matter of doubt that the technology envisaged for execution of the work is of respondent No.2 alone. He would further highlight the fact that MCGM obtained rate analysis from 3 dealers of respondent No.2, once again showing use of brand of Respondent No. 2 alone. Mr. Dhond would therefore submit that the impugned tender process suffers from acts of arbitrariness, favourism, irrationality and bias and therefore the same deserves to be set aside. In support of his contentions, Mr. Dhond would rely upon the following judgments.

i) Shimnit Utsch India Private Ltd. & Anr. Vs. West Bengal Transport

Infrastructure Development Corporation Ltd. & Ors. (2010) 6 SCC 303

ii) Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors. (2012) 8 SCC 216

iii) Meerut Development Authority Vs. Association of Management Studies and Anr. (2009) 6 SCC 171

10. The petition is resisted by the respondent Municipal Corporation by filing two affidavits in reply dated 17th February 2023 and 22nd February 2023. Mr. Walwalkar, the learned senior advocate appearing for Municipal Corporation would question the locus standi of petitioner to file the present petition. He should submit that the petitioner has not submitted its bid in pursuance of the tender process and being a stranger, would have no locus to challenge the same. He would further highlight though petitioner participated in the pre-bid meeting and raised queries therein, chose not to submit its bid. That the present petition is filed long after last date of submission of bid and opening technical bids. That the same filed only on the date on which the financial bids were opened. That despite being aware of use of particular technology in the impugned tender issued on 27th December 2022, petitioner failed to challenge the same for a long time up to 10th February 2023.

11. Mr. Walawarkar would further submit that use of Geopolymer Trenchless Technology for execution of the work is chosen by the respondent Municipal Corporation on the basis of advice of experts. That use of a particular technology is highly technical matter, of which the tendering authority alone is the best judge. That this court would not interfere in the decision of the tendering authority in choosing a particular technology for execution of the work. He would invite our attention to the opinions of IIT Bombay, VJTI and Technical Advisory Committee.

12. Mr. Walwalkar would then deal with allegation of pre-decision by MCGM to choose technology of Respondent No. 2 before procurement of experts' opinions. He would submit that IIT's report of February 2021 was brought to the notice of MCGM, after which MCGM requested IIT to confirm the same by its letter dated 20th November 2022. Thereafter MCGM itself solicited services of IIT seeking its opinion on 29th September 2022 and that IIT responded on 11th November 2022. That MCGM thereafter obtained the rates from 3 dealers. He would therefore submit that the decision for use of Geopolymer Technology is taken by MCGM based on the advice of the experts.

13. Mr. Walwalkar would further submit that the work undertaken by MCGM is of utmost public importance. It involves rehabilitation of 100 years old storm water arch drains, and the work is urgently required to be executed and commenced prior to onset of monsoon. Relying on provisions of Section 41 of the Specific Relief Act Mr. Walwalkar would urge that this court would loath in interfering with execution of work of public importance. In support of his contentions Mr. Walwalkar would rely upon following decisions.

i) N. G. Projects Ltd. Vs. Vinod Kumar Jain & Ors. (2022) 6 SCC 127

ii) M/s. A. M. Yusuf Vs. Mumbai Municipal Corporation Writ Petition (Lodging) No.2666 of 2008, decided on 11th December 2008.

14. Mr. Tulzapurkar, the learned senior advocate appearing for respondent No.2 would also oppose the petition. He would submit that the prayers in the petition are couched in such a manner that would completely shun use of geopolymer technology for execution of the work. He would submit that the scope of judicial review in tender condition is extremely limited. That the employer is the best judge to decide the exact technology to be employed for execution of the work and that this court would be loath to interfere with the decision of the tendering authority. He would rely upon the judgments of the Apex court in Uflex Limited Vs. Government of Tamil Nadu and Ors. (2022) 1 SCC 165.

15. Mr. Vineet Naik, the learned senior advocate appearing for Intervener in Interim Application No.8726 of 2023 would submit that the intervener is L1 after opening the financial bids (packet C). He would highlight the delay on the part of petitioner in filing the the present petition, which is filed only after opening of financial bids. He would also question Petitioner's locus to file the present petition as Petitioner is a stranger to the tender process. In support of his contention Mr. Naik would rely upon following judgments:

(i) Afcons Infratsructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818.

(ii) Agmatel India Pvt. Ltd. Vs. Resoursys Telecom (2022) 5 SCC 362.

16. Rival contentions of the parties now fall for our consideration.

17. Petitioner is challenging the impugned tender process essentially on account of choice of particular technology by the Municipal Corporation for execution of work of rehabilitation of storm water arch drains. The technology chosen by the Municipal Corporation is 'Geopolymer Lining Trenchless Technology'. Petitioner contends that previously in the year 2021, no particular technology was specified and all that was provided was to offer structural standalone type-II liner. Petitioner alleges arbitrariness on behalf of MCGM in choosing Geopolymer Technology with a view to favour respondent No.2, an american manufacturer of brand 'GeoSpray – Geopolymer'. Petitioner has placed on record printout of relevant page of website of respondent No.2 stating that 'Geo-Tree Solutions has developed the state-of-art Geopolymer Mortar-GeoSpray that exploits the physical and chemical advantages of geopolymeric materials in a form that is easy to use and employed in the field.' There is no dispute to the factual position that 'GeoSpray Geopolymer' is the brand of respondent No.2.

18. Perusal of the impugned tender documents however indicates that what is specified is the technology and not a particular brand. The work in respect of which tender notice is issued is described as under:-

"Name of Work: CT-64: Rehabilitation of Existing about 100 years old Storm Water Arch Drains by Geopolymer Lining Trenchless Technology in City area including 5 years comprehensive maintenance."

19. In scope of work, the requisite technology is described as under:-

"Shall be Structurally Standalone (approved WRc design) cast in situ Robotic Spraying Mortar Geopolymer to withstand combined ground water (hydrostatic) load and traffic load in its own right without requiring any structural contribution from parent SWD and shall have ability to resist corrosion in the SWD atmosphere."

20. Thus, the scope of work in respect of which impugned tender notice is issued does not mandate use of 'Geopray Geopolymer' brand of respondent No.2. What is mandated is use of geopolymer technology.

21. Petitioner has drawn an inference that even though the word 'GeoSpray' is avoided in the scope of work by MCGM, what is expected is use of GeoSpray brand of respondent No.2. Petitioner's inference stems out of following factors:

- (i) The word 'GeoSpray' is used in Section 7 of the impugned tender notice.
- (ii) IIT and VJTI reports are issued in respect of 'GeoSpray Geopolymer' brand of respondent No.2.
- (iii) In file notings approving use of geopolymer technology, names of 3 dealers of respondent No.2 are mentioned from whom rates were obtained making it clear that the bidders are expected to procure the material and technologies from respondent No.2 alone.
- (iv) file notings also envisage visit by the chosen contractor to 'Geosparay Geopolymer Lining material manufacturing plant'

22. Though the inference drawn by petitioner appears to be attractive in the first blush, the same is unfounded. True it is that the word 'GeoSpray' was used in Section 7 of the tender notice. However MCGM later issued corrigendum on 25th January 2023 deleting the word 'GeoSpray', stating that work is intended to be executed with geopolymer trenchless technology. Even though the words 'GeoSpray Geopolymer' are used in the reports of IIT and VJTI, the same are used essentially to opine about efficacy of geopolymer technology and the reports do not, in any manner, seek to opine about the brand itself. In this regard, we reproduce IIT's opinion:-

4. Opinion

Based on the submitted records, documents, literature and certificates from WRC, we have gone through both the techniques for pipe lining rehabilitation. The lining rehabilitation requirement of Mumbai storm water drains and sewerage drains are special and site specific, since they are not of single type of conduit, they vary in size and shape. Hence, a single thickness lining method may not be

a suitable method for most of the rehabilitations.

Based on the mentioned documents/references, we suggest MWSL lining for rehabilitation of circular sewer drains (their experience shows only circular sewer rehabilitation in India). It is also to be mentioned that different type of MWSL material has to be used for different diameters as inferred from WRC certificates.

Based on the mentioned documents/certificates/references, we suggest Geospray Geopolymer lining for rehabilitation of surface water and sewer drains of numerous type of infrastructure”

23. IIT has thus compared MWSL and Geopolymer technologies and the comparison is not with respect to a particular brand as such. Similarly, VJTI has compared the 4 technologies and opined that the geopolymer lining system is best suited for rehabilitation of storm water arch drains over the other mentioned technologies. It may be possible that for comparing the 4 technologies, IIT and VJTI might have used brand of respondent No.2. However, it cannot be stated that the two expert agencies have recommended use of brand of respondent No.2 alone. The 3rd factor for raising inference about use of GeoSpray brand for procurement of rate analysis from 3 dealers of respondent No.2. Such a course is adopted by respondent Municipal Corporation only for the purposes of comparing rate analysis for preparation of tender document. It is not that the rates are procured from the proposed bidders. They are procured from dealers supplying geopolymer trenchless technology. Therefore, no inference can be drawn that the MCGM has selected GeoSpray brand for execution of its work. The allegation of pre-decision to choose geopolymer technology of Respondent No. 2 based on the speed of decision, is belied by the fact that MCGM had already contacted IIT Mumbai and engaged its services for opinion. MCGM has not blindly relied upon IIT's report of February 2021 procured by third party. It has independently solicited opinion of IIT. Therefore, the tender process for execution of vital work of public importance cannot be interfered with based on surmises and conjectures raised by Petitioner based on file notings. Provisions of Section 41 (ha) of the Specific Relief Act, 1963 are also required to be borne in mind prohibiting grant of injunction where progress of completion of infrastructure project is likely to be impeded or delayed.

24. Petitioner itself has produced on record a document (Page 434 to 436) which shows that 'GeoKrete' is another brand which also uses geopolymer trenchless technology. This demolishes the case of petitioner that GeoSpray brand of respondent No.2 has a monopoly in use of geopolymer trenchless technology. We therefore find the contention raised by petitioner about arbitrariness, bias or favouritism on the part of the MCGM to be totally unfounded. Even if MCGM was to specify a particular brand for use of geopolymer technology for execution of work, it would have been difficult to hold such an action to be arbitrary in absence of any fetter on bidders from procuring the branded technology from Respondent No. 2. Mr. Dhond has fairly admitted that Petitioner could procure the technology from Respondent No. 2 if it were to submit its bid. Contract is not

to be awarded to Respondent No. 2 and therefore the allegation of favour to Respondent No. 2 becomes baseless. Therefore, even if Respondent No. 2 was the only entity to offer geopolymer technology (which does not appear to be true as GeoKere brand also offers geopolymer technology), in absence of any restriction for bidders to procure the technology from Respondent No. 2, the allegation of favouritism is completely unfounded.

25. In tender and contractual matters, the scope of interference by courts is in a narrow compass. In examining challenge in tender matters, this court would be concerned more about adherence to the procedure. Unless arbitrariness, irrationality or bias is demonstrated, this court would not interfere in tender matters. It is also equally well settled that the tendering authority is the best judge to determine the tender conditions. This court would not sit as an appellate authority over the tender conditions prescribed by the tendering authority. Petitioner expects MCGM to use the technology of its choice whereas MGM has chosen Geopolymer trenchless technology to be used for execution of the work. We are of the considered view that that MCGM is entitled to do so and we would not sit in appeal over that decision.

26. In catena of judgments, the Apex Court has repeatedly held that the scope of judicial review and interference in the decision of tendering authority is extremely narrow. In *Uflex Ltd.* (supra), a somewhat similar issue was involved where prescription of particular patented technology was challenged on the ground that only two bidders had the license to use that patented technology. The Apex Court held in paragraph No.45 and 46 of the judgment as under:

"45. We are concerned with sale of liquor. The objective has been set out by the State Government, i.e., use of such technology as would prevent spurious liquor from being sold. It is a well-known fact that a large revenue collection comes in Tamil Nadu through sale of liquor. It thus must be left to the State Government to see how best to maximize its revenue and what is the technology to be utilized to prevent situations like spurious liquor, which in turn would impede revenue collection, apart from causing damage to the consumers.

46. A grievance was made about what was stated to be "patented technology". At the stage when the concerned committees were still looking to the objections/suggestions of the parties, Kumbhat and Alpha rushed to the Court. The State Government did provide relief by issuing a corrigendum to address the issue relating to hidden text being visible only through Polaroid, as colour change background viewable with film as an identifier did not attract the rigour of this stated patented technology. The issue was actually over with that corrigendum."

(emphasis ours)

27. In *Uflex* the Apex Court has also discussed general principles on scope of judicial review in tender matters and has held in paragraph 2 and 3 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 fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

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."

28. In *Montecarlo Ltd.* (supra) the Apex Court has held that discretion has to be conceded to the authorities who have to enter into contract giving them the liberty to assess the overall situation for the purpose of taking a decision as to whom contract has to be awarded and at what terms. The Apex Court held in paragraph No.17 to 24 as under:-

"17. ----- In this regard, we may usefully refer to certain authorities.

In *Sterling Computers Limited v. M/s M & N Publications Limited & Ors*, the Court has held that under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. It has also been observed that by way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.

18. In *Tata Cellular* (supra) a three-Judge Bench after referring to earlier decisions culled out certain principles, namely, (a) the modern trend points to judicial restraint in administrative action, (b) the court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (c) the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible, and (d) the Government must have freedom of contract and that permits a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Hence, the Court has laid down that the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

19. In *Jagdish Mandal v. State of Orissa and Ors* the Court has held that a contract is a commercial transaction. Evaluating tenders and awarding contracts

are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide 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.

20. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr*, it has been ruled that the 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 a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. 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 of public interest and not merely on the making out of a legal point.

21. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.* a two-Judge Bench, after referring to series of judgments has culled out certain principles which include the one that where a decision has been taken purely on public interest, the court ordinarily should apply judicial restraint.

22. In *Michigan Rubber (India) Ltd.* (supra) the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest.

23. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* a two-Judge Bench eloquently expounded the test which is to the following effect:-

"We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

29. In *Agmatell India Pvt. Ltd.* (supra) the Apex Court has held that if the interpretation of the author is manifestly in consonance with the language of the tender document or sub-serving the process of the tender, the court would prefer to keep restraint. It is further held that even if interpretation given to the tender document by the author is not acceptable to the constitutional courts, that would

not be a reason for interfering with the interpretation given so long as the interpretation is not arbitrary or whimsical.

30. In the present case, we would not interfere with MCGM's opinion that geopolymer trenchless technology would be the best possible technology to be employed for execution of the work. We are not experts in the field. The decision is taken based on opinion of experts. Storm water arch drains which are sought to be rehabilitated are more than 100 years old. Mumbai receives heavy monsoon every year and use of best possible technology for proper rehabilitation and maintenance of storm water arch drains would be of paramount importance. Mere incurring of extra cost over other available technology would not be a valid reason to eschew the better technology. Therefore, additional costs involved in adopting chosen technology would not entail presumption of favouritism to Respondent No.2.

31. MCGM has taken a decision to use a particular technology for execution of the work and has also obtained opinion of experts. Petitioner cannot insist that MCGM cannot choose that technology must and opt for other available technologies. Reliance placed by the petitioner on letter dated 1st February 2018 rejecting GeoSpray Geopolymer technology for rehabilitation of man entry sewer lines is misplaced. Careful reading of that letter would indicate that the design for GeoSpray Geopolymer technology offered by the concerned bidder was based on formula derived by a consultant, which formula did not ensure the structural standalone type II design as per guidelines. The formula of the consultant was held to be not the one approved of by Water Research Centre. It therefore cannot be held that the Municipal Corporation had altogether rejected the use of GeoSpray Geopolymer technology in the year 2018 even with regard to work of rehabilitation of man entry sewer lines. Based on the opinions received from experts, the Municipal Corporation has now formed an opinion that use of Geopolymer trenchless technology is best suited for execution of the subject work. We do not see any arbitrariness, irrationality, favouritism or bias in choosing that technology by MCGM.

32. Another aspect which is required to be borne in mind is the fact that the petitioner has not submitted its bid in pursuance of the impugned tender process. It is not that petitioner cannot procure material/technology from respondent No.2 or from other entities who offer the same. Petitioner could have procured geopolymer trenchless technology from available sources and participated in the tender process. However, even after participating in the pre-bid meeting, it chose to stay away from the tender process. Having not participated in the tender process, petitioner is a stranger to the same. In such a situation, petitioner cannot be permitted to question the tender process. In this regard the reliance placed by Mr. Walwalkar on judgment of Division Bench of this Court in A.M. Yusuf (supra) is apposite. This court held in paragraph 14 and 15 as under:-

"14. The doctrine of Locus Standi is well established in administrative law, law of

contract and other allied laws. A person prejudicially affected would have a cause of action while in the specified class of cases a third party may be able to bring an action in public interest despite the fact that he may not have personal interest. But in the cases of present kind, the cause of action would be personal to the aggrieved party and not a cause of action in rem. Even if Litmus Test Principle is not strictly applied keeping in view the developing law, still it is difficult for us to hold that the Petitioner without being an Applicant to the tender process could maintain the present Writ Petition, in the peculiar facts and circumstances of the case. As such an approach would neither subserve the public interest and would also hold in avoidance of public mischief.

15. Examined from the view of public interest, we see no infirmity. The Corporation has admitted to protect the larger interest by raising EMD deposit. The Petitioner having opted of his own accord not to participate in the tender process can hardly be permitted to challenge the said process now at this stage. It is expected of every vigilant litigant or whose rights are effected to approach the Court at an appropriate time. Firstly, there is no indefeasible right vested in the Applicant and secondly, even if right of participation/consideration was available to the Petitioner, the Petitioner has voluntarily given up such right by his conduct. No reason whatsoever has been stated as to why the Applicant did not participate in the tender process or raise protest at an appropriate stage. Despite the fact that the concept of locus standi has since undergone a substantial change, still the basic rule that the person aggrieved or a person directly affected is the person who has right to invoke jurisdiction of the Court under Article 226 of the Constitution holds good. The impugned action normally should produce a change in the Petitioner's legal right and more particularly adversely. We have already discussed that the variation effected by Corrigendum dated 11th November, 2008 has no way prejudicially effected any of the applicants and it provided a fair and equal opportunity to the Applicants to participate in the tender process. The Petitioner having lost that opportunity of his own accord can hardly be permitted to raise a grievance now.

33. We therefore proceed to hold that Petitioner, being a stranger to the tender process, cannot question the tender condition.

34. The stage at which petition is filed also assumes importance. The tender was floated on 17th December 2022. Petitioner noticed requirement of use of Geopolymer trenchless technology on 27th December 2022, but chose not to challenge the tender process immediately. It participated in the pre-bid meeting of 3rd January 2023 and even after MCGM maintained use of Geopolymer technology for execution of work by answering the pre-bid queries on 24th January 2023, Petitioner chose not to challenge the tender condition immediately. It further waited till the technical bids (packet A and packet B) were opened on 2nd February 2023. It again waited for opening of financial bids (packet C) on 10th February 2023 and on the same day, filed the present petition. The action of the petitioner in not participating in the tender process by

submitting its bid and waiting for reasonably long period from 27th December 2022 to 10th February 2023 to file present petition is clearly fatal to its case.

35. What remains now is to deal with the judgments cited by Mr. Dhond.

i) *Shimnit Utsc Pvt. Ltd. (supra)* is cited in support of contention that a policy of government cannot be faulted if it is founded on reasonableness and otherwise not arbitrary, irrational and perverse. It is further held that though the government has discretion to take different policy or alter or change its policy in public interest, such change must be in conformity with *Wednesbury Associated Provincial Pictures Houses Ltd. Vs. Wednesbury Corp. (1948) 1 KB 223* unreasonableness free from arbitrariness, irrationality, bias and malice. There can be no dispute to this proposition. However, after considering the facts and circumstances of the case, we have already arrived at a finding that there is no arbitrariness, irrationality, bias or malice in the action of Municipal Corporation in prescribing use of geopolymer technology for execution of the work. The judgment would therefore have no application to present case.

ii) *Mishigan Rubber India Ltd. (supra)* is cited in support of contention that if decision taken by the authority is malafide or to favour someone, the court can interfere. The Apex Court held in paragraph No.24 as under:-

Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.

In the present case however, petitioner has been unsuccessful in demonstrating that the tender condition is tailormade so as to favour a particular bidder. The judgment is therefore inapplicable to the facts and circumstances of the present case.

iii) *Meerut Development Authority (supra)* is cited in support contention that if the terms of invitation of tender are so tailormade to suit convenience of a particular person with a view to eliminate all others from participating in the bidding process, judicial review will be available. In paragraph 26 to 29 the Apex Court held as under:-

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial

scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."

Again there can be no dispute to the proposition that this court would be justified in interfering in matters where the tender condition is tailor made to suit a particular bidder. In the present case however, it is not petitioner's contention that prescription of Geopolymer technology is for suiting a particular bidder. It is petitioner's case that prescription of that technology is to suit the manufacturer (who is not a bidder). We have already held above that Geopolymer technology can be provided by other manufacturers as well. Even if a particular manufacturer was to be prescribed by MCGM, it could not be said that the condition was tailor made to suit a particular bidder when all bidders are in a position to procure the technology from such manufacturer. The judgment therefore has no application to the present case.

36. In prayer clause (c), petitioner has sought setting aside award of contract to any bidder allied with or who has entered into MOU with Respondent No.2. Mr. Tulzapurkar has construed this prayer to mean an absolute bar against Respondent No.2 from providing its technology to any bidder. However since Mr. Dhond has not stretched his submissions to seek such an absolute bar against Respondent No.2, we have not heard Mr. Tulzapurkar on this issue. Also of relevance is the fact that the contract is yet to be awarded to any bidder and

therefore prayer clause (c) is otherwise premature. If the technology of Respondent No.2 suits the specification in the tender document, it is for MCGM to accept the same.

37. Resultantly, we find the tender conditions to be unexceptionable. The Writ Petition is devoid of merits. It is dismissed with no order as to costs.

SANDEEP V. MARNE, J.

S. V. GANGAPURWALA, ACJ

38. At this stage, the learned counsel for the petitioner submits that the present judgment be stayed for a period of four weeks.

39. There was no stay operating during the pendency of the writ petition. Only statement was made by the learned senior advocate for the Corporation. Moreover, the petitioners have not participated in the tender process.

40. In view of that, request made for stay of the judgment is rejected.