

(2019) 12 BOM CK 0024

In the Bombay High Court

Case No : Writ Petition No. 11547 Of 2019

M/S. AGC-SCCPL JV A Joint Venture Of M/S. A.G.
Construction & Sharda Construction & Corporation Pvt. Ltd

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Indian Contract Act, 1872 — Section 4
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 12 BOM CK 0024

Hon'ble Judges : S.V. Gangapurwala, J;Avinash G. Gharote, J

Bench : Division Bench

Advocate : Girish K. Thigle-Naik, P.S. Patil

Judgement

Avinash G. Gharote, J

Rule. Rule made returnable forthwith. Heard the learned Counsel for the parties finally with their consent.

1. The present petition has been filed by claiming a relief of issuance of a writ of mandamus or other appropriate writ, directing the respondents to accept submission of bid of petitioner physically for tender process of proposed (RFP) construction and widening of existing Beed bypass road, part of Aurangabad-Jalna road, new Aurangabad city, including service road and VUP's, Taluka and District Aurangabad, in pursuance to notice for Hybrid Annuity Mode (HAM) (online) Tender, vide E-Tender Notice No.5/2019-2020 or in the alternative to set aside the tender process being contrary to law and more particularly the Government Resolution dated 27.09.2018.

2. The petitioner is a joint venture bidder. The respondents vide publication dated 27.08.2019, issued a notice inviting tender for the above work. The petitioner claims that being duly qualified to bid in the tender process, it has paid the tender fees, downloaded the tender form and participated in the pre-bid process,

procured bank guarantee in the name of J.V. from Bank of Maharashtra, started uploading documents, which were required as per the RFP.

3. It is further submitted, that the online submission of the tender involves the following stages :

i) procurement of all the necessary documents and scanning.

ii) uploading of the documents on the described portal with due verification of digital signature.

iii) submission of hash i.e. finger print verification and click of submission of bid button.

4. The petitioner submits, that except for the hash and submission of bid button, it has submitted all the other documents and the process was completed, however due to error i.e. problem in the server maintained by the respondents, the portal service was not available after approximately 12.00 p.m. due to which an error message was received, which was intimated to the respondents by e-mail stating that due to "500-internal server error" the bid could not be submitted with a further request for extension of time for submission of bid due to server failure.

5. It is submitted neither there was response to the request nor any extension was granted. When the bid was tried to be physically tendered, the same was not accepted, being aggrieved by which the present petition has been filed.

6. It is the contention of the petitioner, that the time limit for uploading of the documents, was upto 01.00 p.m. on 16.09.2019, however, due to internal server error no.500 the hash verification of the petitioner could not be completed, and since the portal was unavailable till the last time limit of 1.00 p.m. on 16.09.2019, the petitioner therefore, relying upon the principle of "Lex Non Cogit Ad Impossibilia", i.e. a person cannot be expected to perform an impossible act, contends that as the fault was on the part of the server maintained by the respondents, the petitioner had been denied an opportunity to compete for the work, to which it was otherwise eligible. It was, therefore, submitted, that since the fault lay with the respondents, it was necessary to extend the time or accept the bid in the physical form. Refusal of the respondents to do so, was therefore illegal, and resulted in denying the rights of the petitioner, in participating in the tender process, which was unsustainable in law.

7. Relying upon the Government Resolution dated 27.09.2018, it is submitted that for the works of the value of more than rupees hundred crores, it was mandatory to (a) publish the notice, in newspapers having nationwide circulation and (b) such publication was to be at least 45 days prior to submission of the bids. It is contended that in the instant case, the notice was not published in newspapers having nationwide circulation and it was published on 27.08.2019 and the last date for submission of the bid was 16.09.2019 i.e. less than 19 days, resultantly the mandate of the Government Resolution dated 27.09.2018

stood violated and therefore the entire process ensuing thereafter stood vitiated.

8. The respondent Nos.2 to 4, filed their reply on 25. 09.2019 and additional reply on 11/10/2019 and opposed the petition. It is submitted that the Govt. Resolution dated 27/09/2018 provides guidelines for the procedure for E-tender by superseding all earlier Govt. Resolutions regarding the same and now there is no scope for physical handling of the tender process, as everything is done online. It is submitted that though the Govt. Resolution dated 27/09/2018 requires 45 days time between the date of publication of the tender notice and the date of submission of the bid, however, the Government by letter dated 31/05/2019 has specifically reduced this time period, for Hybrid Annuity Mode (HAM) works, considering the urgency for completion of works, to 15 days between publication of tender notice and submission of tender.

9. It is further submitted that the tender notice was widely published in National Level, State level and District Level newspapers, which included the "Indian Express" on 25/08/2019, "The Hindu" on 26/08/2019, "Punya Nagari" on 24/08/2019, "Lokmat Times" on 26/08/2019 and other newspapers, as mentioned in para 6 of the affidavit dated 25/09/2019, due to which the requirement of wide publication of the tender notice was satisfied.

10. It is further contended that the bids were to be initially submitted upto 10.09.2019, however, on 09/09/2019 considering the request of bidders made in the pre-bid meeting held on 05/09/2019, the time period for submission came to be extended upto 01.00 pm of 16/09/2019. It is further submitted that the allegation of the petitioner, that the web portal was not available after approximately 12.00 pm on 16/09/2019 and, therefore, the petitioner was not able to submit his tender/bid through online process was incorrect for the reason that the web portal was fully working and operational, which could be demonstrated from the fact that one of the bidders, namely GNI Infrastructure Private Limited had submitted/uploaded his tender on 16/09/2019 at 12:38:07 seconds and the second bidder, namely, Kalyan Toll Infrastructure Limited had submitted/uploaded his bid on 16/09/2019 at 12:46:08 seconds. The online receipts of the submission of these two bidders were enclosed with the reply as Exh-R-2. It was, thus, submitted that there was nothing wrong with the website portal and the fault lay with the petitioner.

11. It is further submitted that initially the respondents were making use of sifynextenders.com's website portal, use of which though had been stopped by the Government vide communication dated 12/04/2017, with a direction to use the web portal of Mahatenders.in, however, considering the problems which arose in the use of NIC login, the Government had vide letter dated 13/06/2017 again permitted the use of services of sifynextenders.com for the process of E-tendering.

12. The petitioner filed rejoinder affidavit dated 03/10/2019 and submitted that hash submissions of the petitioner is shown to have been recorded as successful

alongwith bid No. of the petitioner in the documents as submitted by the respondents and, therefore, there was no reason not to include the petitioner in the list of qualified bidders, therefore, entitling its bid to be opened.

13. We have heard learned Counsel Mr. G.K. Naik Thigle for the petitioner and, Mr. P.S. Patil, learned Addl. Govt. Pleader for the respondents and also perused the record.

14. The scope of judicial review, in tenders, has been a matter of consideration by the Courts in various judicial pronouncements :

(a) Ramana Dayaram Shetty Vs. International Airport Authority of India , (1979) 3 SCC 489;

(b) G.J. Fernandez Vs. State of Karnataka, (1990) 2 SCC 488;

(c) Poddar Steel Corporation Vs. Ganesh Engineering Works, (1991) 3 SCC 273

(d) Tata Cellular / Union of India, (1994) 6 SCC 651

(e) West Bengal Electric Board / Patel Engineering, (2001) 2 SCC 451

(f) Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517

(g) Meerut Development Authority Vs. Association of Management Studies, (2009) 6 SCC 171

(h) Michigan Rubber (India) Ltd. Vs. State of Karnataka (2012) 8 SCC 216

(i) Rashmi Metaliks Ltd. Vs. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95

(j) U.P. Awas Evam Vikas Parishad and others Vs Omprakash Sharma. (2013) 5 SCC 182.

(K) Bakshi Security and personal Services (P). Ltd. Vs. Devkisan Computed (P.) Ltd. (2016) 8 SCC 446.

15. In the case of West Bengal Electricity Board (supra), while considering a case of the project undertaken for public benefit, the Hon'ble Apex Court held as under :

"36.....The project undertaken by the appellant is undoubtedly for the benefit of public. The mode of execution of the work of the project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and on the other hand it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work.

Above all it eliminates favouritism and discrimination in awarding public works to

contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal.

It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored".

16. In Meerut Development Authority (supra), the Hon'ble Apex Court, while considering the scope of judicial review has 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 favouritism.

39. The law has been succinctly stated by Wade in his treatise, Administrative Law:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of

malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground, though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good." [Administrative Law, 9th Edn., H.W.R. Wade & C.F. Forsyth.]

40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.

41. The distinction between appellate power and a judicial review is well known but needs reiteration. 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. The courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14. (See *Sterling Computers Ltd.* [(1993) 1 SCC 445])

42. It may be worthwhile to notice the leading judicial review case in relation to grant of licences by competitive tender in *R. v. Independent Television Commission, ex p TSW Broadcasting Ltd.* [1996 JR 185 : 1996 EMLR 291] The leading speeches in the House of Lords were delivered by Lord Templeman and Lord Goff. Lord Templeman stated:

"Where Parliament has not provided for an appeal from a decision-maker the courts must not invent an appeal machinery. In the present case Parliament has conferred powers and discretions and imposed duties on ITC. Parliament has not provided any appeal machinery. Even if ITC make mistakes of fact or mistakes of law, there is no appeal from their decision. The courts have invented the remedies of judicial review not to provide the appeal machinery but to ensure that the decision-maker does not exceed or abuse his powers.... But the rules of

natural justice do not render a decision invalid because the decision-maker or his advisers make a mistake of fact or a mistake of law. Only if the reasons given by ITC for the decision to reject the application ... disclosed illegality, irrationality or procedural impropriety ... could the decision be open to judicial review."

In the concluding section of his speech, he added:

"Of course in judicial review proceedings, as in any other proceedings, everything depends on the facts. But judicial review should not be allowed to run riot. The practice of delving through documents and conversations and extracting a few sentences which enable a skilled advocate to produce doubt and confusion where none exists should not be repeated."

43. One has to bear in mind the caution administered by Lord Scarman in *Nottinghamshire County Council v. Secy. of State for the Environment* [1986 AC 240 : (1986) 2 WLR 1 : (1986) 1 All ER 199 (HL)] that: (AC pp. 250 H-251 A)

"... Judicial review is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."

44. It is equally necessary that the following observations of Benjamin Cardozo, should always be kept in mind:

"The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial (sic primordial) necessity of order in the social life'.

Wide enough in all conscience is the field of discretion that remains." (The Nature of Judicial Process, p. 141)

45. There cannot be any disagreement that unjustified discriminations violate the Constitution and unreasonable decisions are susceptible to be interfered with and corrected in judicial review proceedings. But general propositions do not decide concrete cases as has been famously put by Oliver Wendell Holmes, J. in *Lochner v. New York* [49 L Ed 937 : 198 US 45 at p. 76 (1904)] . It remains to be decided which acts of discrimination are justified and which are not. It is for the court to decide in the given facts and circumstances whether the action complained of is unreasonable? How to do that is always a complex and complicated one.

46. It would be unnecessary to burden this judgment of ours with various precedents and super precedents cited at the Bar in support of the general propositions that the authority's action must be free from arbitrariness. It always depends upon the contextual facts. In law, context is everything. We shall bear these parameters in mind and proceed to determine the question whether the

decision of the Authority is vitiated by any abuse of power".

17. The Judicial pronouncements at a to d, f, h, I and k mentioned above, have been considered by the Hon'ble Apex Court, in *Central Coalfields Ltd / SLL - SML*, (2016) 8 SCC 622 and the position has been summed up as under:

"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance.

As pointed out in *Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]* followed in *Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216]* .

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]* .

However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not

prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in *Nazir Ahmad v. King Emperor* [*Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41] , namely: (SCC OnLine PC)

"... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

There is no valid reason to give up this salutary principle or not to apply it *mutatis mutandis* to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad* [*Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41] that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above".

18. The Hon'ble Apex Court in the Case of *Michigan Rubber (India) Ltd.* (*supra*) has held as under:

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

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

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226 ".

19. The law is thus well settled that there is limited scope available to the Courts to interfere in matters involving tenders and contracts, except on the principles as enumerated above.

20. It is further trite that in relation to a tender process by the electronic mode, the valid uploading of the bid within the time prescribed, would be an essential condition and it is only those documents which have been submitted in the electronic mode, which alone can be considered.

21. In so far as the contention of the petitioner regarding violation of the Govt. Resolution dated 27/09/2018, are concerned, we do not find any substance therein, in light of the fact that notice inviting tender was published in the newspapers "Indian Express", "The Hindu", "Lokmat Times", "Punya Nagari", "Divya Marathi", etc. , as listed in para 6 of the affidavit-in-reply dated 25/09/2019 of the respondents No. 2 to 4 which have a wide circulation. That apart, it is not the contention of the petitioner that it has been prejudiced in any manner whatsoever, by the publication of the notice inviting tender in the above said newspapers, rather on the contrary, it is the publication in these newspapers, which has brought to the notice of the petitioner, the knowledge about the work under the NIT, as a result of which, it had downloaded the tender documents from the web portal, as listed in the notice.

22. A perusal of the letter dated 31/05/2019 as filed on record by the respondents reveals that considering the impending imposition of the Code of Conduct in the likelihood of election of the Maharashtra Legislative Assembly being declared and the various works sanctioned and remaining, for which tenders were to be invited, in a meeting dated 26-27/05/2019 chaired by the Hon'ble Minister for public works, the Government had granted approval for reduction of the notice period for the purpose of inviting tenders for Hybrid Annuity Mode (HAM) works, and had reduced the notice period to 15 days, in consonance with which the notice inviting tender in the present case, was published on 27/08/2019 and the last date of submission of bid was 10/09/2019, which on the request of the bidders made in the pre-bid meeting held on 05/09/2019, came to be extended upto 1.00 pm of 16/09/2019. It is not the case of the petitioner that it had not participated in the pre-bid meeting held on 05/09/2019 or was not aware of the extended time upto 1.00 pm of 16/09/2019. On the contrary, the conduct of the petitioner in uploading some of the documents on 16/09/2019 itself substantiates that the petitioner was fully aware that the last date of the submission of the bid, as extended in the pre-bid meeting dated 05/09/2019 was 16/01/2019 upto 1.00 pm. Thus, the contention of the petitioner that the requirements of the Govt. Resolution dated 27/09/2018 were violated, resulting in the entire tender process being vitiated, is clearly unsustainable and is, thus, rejected. The petitioner having participated in the tender process, without any objection whatsoever cannot now be permitted to call into question the same on some purported violation of the requirements of the Government Resolution dated 27.09.2018 which even otherwise, as pointed out above are none.

23. In so far as the submission regarding there being error in the web portal resulting in non-uploading of the documents and resultant generation of hash, which alleged error is being attributed to the respondents, it is material to note that Exhibit R-4, as filed by the respondents, in relation to the petitioner, shows that the bid hash submission by the petitioner, is still "in process", which would indicate that the said action had not been completed. This is so for the reason, that had the action been completed, the petitioner would have received the bid

hash receipt, as has been the case, in respect of other two tenderers, namely Kalyan Toll Infrastructure Ltd. , which is dated 16/09/2019, at 12:49:08 for envelope No.1 and 12:49:48 for envelope No.2 and GNI Infrastructure Pvt. Ltd. which is dated 16/09/2019 at 12:38:39 for envelope No.1 and 12:38:07 for envelope No.2, which bid hash receipts have been placed by the respondents on record vide Exhibit R-2. This clearly indicates that the web portal being used for e-tendering by the respondents, was not defective or in error at the relevant time, for had it been so, the other bidders would not have been successful in uploading their bids and completing the process by generation of the hash receipts, indicating successful uploading of their bids. | Thus, the contention of the petitioner that the web portal was in error after 12.00 pm of 16/09/2019, is clearly erroneous and cannot be accepted. It is further material to note that none of the other bidders have made any grievance of whatsoever nature regarding functioning of the web portal used for e-tendering by respondents No.2 to 4 for the relevant time. The fault clearly appears at the end of the petitioner, who was unable to complete the process as required for successfully tendering its bid. The entire process of submission of the bids now being online, respondents No. 2 to 4 could not have accepted the bid of the petitioner physically, as that was clearly impermissible in the given circumstances. The petitioner may have been otherwise qualified, as claimed by it, however, in absence of successfully uploading its bid by successful completion of the process by generation of the bid hash receipt, cannot be said to have tendered for the work in question. Though the petitioner has filed several documents and relied upon them to contend that his bid was accepted in the e-tender, however, except the bid hash receipt, no other document would be of assistance to the petitioner, in contending that its bid was received by the respondent Nos.2 to 4. Indeed that is not even the case of petitioner, as is apparent from prayer clause (A) of the petition, which seeks relief of acceptance of the bid of the petitioner physically.

24. In e-tendering the entire process is online and all the documents including those necessary for envelopes 1 & 2 are required to be uploaded online, and on a successful uploading, the requisite receipt is duly generated, which forms a proof of the successful uploading. The electronically uploading of the documents is clearly an essential condition in an e-tendering process. Once the e-tendering process has begun, it would be impermissible for the authority inviting the tender, to make any change in the norms and parameters governing the process, and permitting documents/bid to be accepted in a physical form would certainly defeat the very basis of calling for the tender on e-procurement platform. That such a course is impermissible is clearly reflected from the dictum of the Hon'ble Apex Court in the case of Central Coal Fields Ltd. Vs. SLL - SML (supra), in which relying upon Ramana Dayaram Shetty's case, it has been held as under :

"35. It was further held that if others (such as the appellant in Ramana Dayaram Shetty case) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the

eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 - treatment that was constitutionally impermissible. Expounding on this, it was held: (SCC p. 504, para 10)³

"10. ... It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege." (emphasis supplied)

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the "privilege" of participation."

25. It is further material to note that the petitioner certainly is not computer illiterate as, for submission of the bid, it had to download the NIT and its accompaniments, prepare the documents in digital form and ensure their successful uploading to generate a bid hash receipt, certifying the successful uploading of the bid. The petitioner, except for generating the bid hash receipt, claims to have done everything, though it is denied by the respondents. Thus, the petitioner clearly had all the expertise available with it, as was normally required in the matter, for successfully uploading the tender document. That being the case, in our opinion, the petitioner now cannot be permitted to raise a bogey of the web-portal being non-operational/functional from 12 noon onwards of 16/09/2019 and specifically when the other bidders had successfully uploaded their bids after 12.00 noon of 16/09/2019.

26. The matter can also be considered in light of the provisions of Section 4 of the Contract Act. Under Section 4 of the Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. In the instant case, admittedly, the hash bid receipt in respect of the proposal of the petitioner, has not been generated as a result of which, it cannot be said that the communication of the petitioner's proposal was complete. Reliance can be placed on U.P. Awasthi Vs Vikas Parishad and others Vs Omprakash Sharma (supra), the relevant portion of which reads as under :

"36. Further, the communication under Section 4 of the Contract Act speaks of when the communication will complete. It says:

"4. Communication when complete. - The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,--

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer." The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case.

Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. In this regard, this court in *Haridwar Singh v. Begum Sumbrui*[16] has held that the communication of acceptance of the highest bid is necessary for concluding the contract. In view of the aforesaid factual and legal proposition of law and the highest bid offered to take the property on lease for a period of 90 years with renewal for further 20 years for construction of the cinema hall, the same was neither accepted by the competent authority nor was the same communicated".

In the instant matter, it is apparent, that the submission of the bid by the petitioner in the online process, was not complete, as the petitioner admittedly had not received the hash bid receipt, which indicated the successful transmission of the bid from the computer being used by the petitioner and receipt by the web portal to which it was to be sent. This being so, it cannot be said that the communication of the proposal was complete, in the sense as is contemplated by Section 4 of the Contract Act.

27. In this context, this Court vide order dated 11.10.2019, considering the rival submissions being advanced before it, had directed the respondents to place an affidavit of authorised signatory of Nextenders (India) Pvt. Ltd. clarifying whether the documents submitted by the petitioner can be retrieved irrespective of the stage at which the proceedings were on 11.10.2019. In pursuance to the above directions, one Vikas s/o Vinodkumar Tandan, Project Manager Implementation of Nextenders (India) Pvt. Ltd., on 15th October 2019, filed an affidavit, paras 3 and 4 of which being material are quoted as under:

"3. That the Hon'ble High Court of Judicature at Bombay, Bench at Aurangabad has directed vide oral order dated 11.10.20 in Writ Petition No. 11547 of 2019 to place on affidavit of authorized signatory of Nextenders (India) Pvt. Ltd. to clarify whether the documents submitted by the petitioner in tender no. 88968 can be retrieved irrespective of the stage that the subject tender is at today.

4. That I hereby certify and declare that the documents submitted by the Petitioner in Bid Preparation Stage (Stage 3) in the tender no. 88968 cannot be now retrieved since the said stage no.3 was incomplete from the bidder side, as already explained in our letter dated 04.10.2019 signed by the undersigned and submitted to the Executive Engineer, World Bank projects Division, Aurangabad. A copy of the said letter is attached". (emphasis is ours).

28. It is thus clear, that the process of submission of bid was incomplete from the side of the petitioner, in view of which, it cannot be said, that the respondents had received the proposal / bid of the petitioner. Thus, when no proposal / bid of the petitioner was received by the respondents, the question of considering the same did not arise at all.

29. In so far as the arguments canvassed by the learned Counsel for the petitioner Mr. G.K. Thigle that by applying the maxim 'lex non cogit ad impossibilia' the bid of the petitioner be directed to be accepted in the physical form, it would be necessary to consider the meaning of the maxim, and its applicability in the factual background of the present matter. The maxim 'lex non cogit ad impossibilia' has been expressed to mean that -the law does not compel one to do that which one cannot possibly perform. By contending that the web portal of the respondents No.2 & 3 was non operational from 12.00 pm onwards of 16/09/2019, it is submitted that, it was therefore impossible for the petitioner to upload its tender for no fault on its part, for which reason the petitioner's tender ought to be accepted physically. The argument has to be noted to be rejected as we have already considered this contention and found that the web portal of the respondents No.2 & 3 was fully operational and functional on 16/09/2019 till 1.00 pm which was the closing time. Thus, there was no impediment of whatsoever nature in the matter of uploading of the tender by the petitioner.

30. Mr. G.K. Thigle, learned Counsel for the petitioner, has placed reliance upon the judgment in the case of M/s. Scania Commercial Vehicles India Private Limited Vs. Government of Karnataka, in Writ Petition No. 48493 of 2016, decided on 10th November 2016 and contended that in similar circumstances, the Court had directed to make provision to access the bid submitted by the petitioner and available as draft in the procurement portal of the respondent therein and thereafter to consider the same. However, in the present case, in the affidavit of Mr. Vikas Vinodkumar Tandan, Project Manager Implementation of next tenders (India) Pvt. Ltd. dated 15/10/2019, it has already come on record that since that the documents submitted by the petitioner in bid preparation stage (Stage 3) cannot be now retrieved since the said stage No.3 was incomplete from bidder side. This being the situation, it is not possible to follow the course as done in M/s. Scania Commercial Vehicles India Private Limited Vs. Government of Karnataka, (supra) even if it was permissible, in the facts of the present matter in light of what we have held about non communication of the offer.

31. It is a matter of record that the work in question is for the construction and widening of existing Beed bypass road and public interest would be adversely affected if the clock is set back, now for whatsoever reason, the public interest would suffer.

32. The scope of judicial interference being limited as indicated in the judgments above, the work in question being in public interest, and the fact that the

proposal/bid of the petitioner was not received at all by the respondents, in light of which when we pose to assess the questions as stated in para 24 in Michigan Rubber India Pvt. Ltd., the answer is against the petitioner. The petition is, therefore, does not warrant any interference and being without any merits whatsoever, is dismissed. In the circumstances, there will be no order as to costs.

33. Rule is discharged.

(AVINASH G. GHAROTE) (S.V. GANGAPURWALA)

JUDGE JUDGE

At this stage, Mr. Thigle, learned Counsel for the petitioner, seeks continuation of the interim orders passed earlier. The public work is stopped.

Considering the above, we are not inclined to extend the interim orders passed earlier.