IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO.4046 OF 2020

BVG India Ltd.)
Bharat Vikas Group)
a company incorporated under)
the provisions of Companies Act)
having registered office at BVG House)
Premier Plaza, Pune-Mumbai Road,)
Chinchwad, Mumbai-411019)
through its Authorized representative)
Sangram Sawaant) …**Petitioner**

Versus

1. The State of Maharashtra)
through its Chief Secretary,)
Mantralya Mumbai)

2. The Commissioner,)
Navi Mumbai Municipal Corporation,)
having its office at NMMC Bhavan,)
Sector 15A, CBD Belapur)

3. Medical Officer of Health,)
Navi Mumbai Municipal Corporation,)
having its office at NMMC Bhavan,)
Sector 15A, CBD Belapur.)

4.Navi Mumbai Municipal Corporation)
having its office at NMMC Bhavan,)
Sector 15A, CBD Belapur) …**Respondents**

WITH

WRIT PETITION (STAMP) NO. 98746 OF 2020

M/s.BVG India Pvt.Ltd.)
a registered Company having office)
at BVG House, Premier Plaza,)
Pune-Mumbai Road, Chinchwad,)
Pune – 411 019.)
By and through)
Shri.Sangram Shivajirao Sawant)
The Assistant General Manager,)
Operations) …**Petitioner**

Versus

1. Navi Mumbai Municipal)
Corporation, by and through its)
Commissioner, NMMC Bhavan,)
Sec-15A, CBD, Belapur.)

2. The State of Maharashtra)
Through the Principal Secretary,)
Urban Development Department,)
Mantralaya, Mumbai)
(Copy of Respondent No.2 to be)
served on the G.P. (Writ Cell))
Appellate Side, High Court, Bombay) …**Respondents**

Mr.V.A.Thorat, Senior Advocate with Mr.Ashutosh M.Kulkarni and Mr. Sarthak S. Diwan for the Petitioner.

Mr.Sandeep Marne, for the Respondents.

Mr.P.P.Kakade, Government Pleadert with Ms.R.A.Salukhe, AGP for State.

CORAM : DIPANKAR DATTA CJ &
G. S. KULKARNI, J.

RESERVED ON: MARCH 5, 2021.

PRONOUNCED ON: MARCH 19, 2021.

JUDGMENT: (Per G.S.Kulkarni,J.)

1. The petitioner who was awarded a contract by the respondent-Navi Mumbai Municipal Corporation (for short '**the Corporation**') in January 2016, for a period of five years for the work of mechanised housekeeping and multi-purpose (patient care) services in its health centres (three general hospitals and three maternity and child health centres), and which came to be terminated by the Corporation on 15 March 2017, for non satisfactory performance, is before the Court in these two petitions. The issue in these writ petitions revolves around a fresh tender issued by the Corporation for the same work, *interalia* prescribing a pre-qualification criteria being an eligibility condition providing that "the contractors whose work contract is terminated due to unsatisfactory services or are black listed would not be eligible to participate in the tender". The cause of action in both these petitions is identical namely the new tender for the abovesaid work, albeit the tender notices issued by the Corporation are of different dates.

2. The factual antecedents in which the controversy arises may be illustrated by the following facts :

The Municipal Corporation runs three general hospitals at

Vashi, Airoli and Nerul and three maternity and child health centres at Belapur, Kopar Khairane and Turbhe. For a period of five years from 2015-16 upto 2019-20, a tender was issued by the Corporation for the work of "Mechanised Housekeeping & Multipurpose (Patient Care) Services" for its health centres. The petitioner had participated in such tender and was awarded contract for the five year term from 1 January 2016 to 31 December 2020. An agreement to that effect came to be executed between the parties on 2 January 2016. However, immediately within a period of ten months from the award of the said contract, that is, on 5 November 2016, a show cause notice was issued by the Corporation to the petitioner calling upon the petitioner to show cause as to why such agreement be not terminated for six breaches and shortcomings in the execution of the contractual work as undertaken by the petitioner. On 15 November 2016, the petitioner submitted its reply to the show cause notice as also requested for a personal hearing before the Municipal Commissioner. The Municipal Commissioner heard the petitioner on 27 January 2017.

3. Considering the petitioner's case in the reply to the show cause notice as also at the personal hearing, the Municipal Commissioner by a detailed order dated 15 March 2017, terminated the petitioner's contract. However, in doing so, considering that the work in

question concerned the health centres, the petitioner was directed to continue with the contract work till a new arrangement was made by the Corporation. The following is the operative part of the termination order:-

> "17. I therefore pass the following orders:-
> (a) The work/work order for Mechanised Housekeeping & Multipurpose (Patient Care) Services in Navi Mumbai Municipal Corporation hospitals sanctioned in BVG stands terminated forthwith.
> (b) The agreement between Navi Mumbai Municipal Corporation and BVG dated 02.01.2016 also stands terminated forthwith.
> (c) Without prejudice and in addition to clauses (a) and (b) hereinabove, I hereby direct that the work/work order of BVG for Mechanised Housekeeping & Multipurpose (Patient Care) Services in Navi Mumbai Municipal Corporation hospitals is not extended beyond 31-12-2016.
> (d) BVG shall continue the present work of Mechanised Housekeeping & Multipurpose (Patient Care) Services in NMMC hospitals till the new arrangement for the said work is made by the Corporation."

4. The Corporation thereafter resorted to a fresh exercise to invite bids for the said work by issuing a new tender, so that a new contractor can be appointed, to perform the said work. It appears that the immediate tenders as issued by the Corporation did not materialise, hence the Corporation continued the services of the petitioner.

5. The petitioners being aggrieved by the termination of its contract by the Corporation initiated arbitration proceedings against the Corporation. Mr.Justice R.Y.Ganoo (retired) was appointed as a sole Arbitrator. The learned sole Arbitrator published an award dated 15

April 2019 rejecting the claims as made by the petitioner.

6. After the conclusion of the arbitral proceedings, a tender notice dated 11 September 2019 bearing ref. no. NMMC/health/73/2019-20 was issued by the Corporation re-inviting tenders for the said work The petitioner also moved an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Court of learned District Judge at Thane, interalia praying for the following reliefs:-

> "29. It is further submitted that in light of the aforesaid, it is just and necessary that pending the hearing and final disposal of the present Arbitration Petition, in the alternative to the above and without prejudice, this Hon'ble Court be pleased to direct the Respondents to permit the Applicant to take part in the Tender Process initiated vide the said Tender Notice dated 11.09.2019 bearing ref. no. NMMC/health/73/2019-20 issued by Respondent No.2.
>
> 30. In the circumstances, it is respectfully submitted that this Hon'ble Court may be pleased to allow the present Application, and the same be made absolute with cost."

7. Section 9 application, however, came to be withdrawn by the petitioner, as permitted by the learned District Judge in terms of the following order dated 4 February 2020:-

> : ORDER BELOW EXH.6.:
>
> 1) After arguments were heard for sometime on application Exh. 6, learned Advocate for the applicant passed endorsement "Not pressed with liberty to move appropriate application."
>
> 2) In view of the aforesaid endorsement Exh. 6 is disposed of."

8. As the earlier tender process undertaken by the Corporation could not materialise, again a fresh tender notice came to be issued by the Corporation on 4 December 2019 being ref. no. NMMC/health/81/2019. In such tender, three bidders participated. The petitioner also participated in the pre-bid meeting and requested for some clarifications. The petitioner says that however, there was no response from the Corporation to the queries as made by the petitioner in the pe-bid meeting. Thereafter on 12 December 2019, the petitioner addressed a letter to the Medical Officer of the Corporation, requesting that the petitioner be permitted to participate in the re-tender (ref. No. NMMC/Health/81/2019) In reply to the said letter the Corporation by its letter dated 9 January 2020 informed the petitioner that the Corporation has refused to grant permission to the petitioner to participate in the said re-tender.

9. The petitioner has contended that thereafter the Corporation on 13 February 2020 issued a fresh tender notice bearing ref. no.NMMC/health/21/2020 for the said work. The petitioner intended to participate in the said tender. On 18 February 2020, the petitioner addressed a letter to the Medical Officer making pre-bid queries. The petitioner has contended that the petitioner was given to understand that in view 'note' in Clause 4(g) of 'Schedule A' of the re-

tender notice, the petitioner was not eligible for participate in the said tender as the note incorporated a condition that the contractors whose work contract is terminated due to unsatisfactory services or are blacklisted are not eligible to participate in the tender.

10. It is the petitioner's case that if the petitioner is held to be ineligible by application of the said note in Clause 4(g) of the pre-qualification criteria, it would lead to a consequence that the petitioner cannot participate in such contracts of the Corporation although the petitioner is not blacklisted or debarred and yet is being prohibited to participate in such re-tender.

11. It is primarily on such premise that the petitioner approached this Court in February 2020 by the first petition (Writ Petition (st) no.4046 of 2020), interalia praying for a writ of mandamus to be issued to the respondents to allow the petitioner to participate in the re-tender notice No. NMMC/health/21/2020 and the bids submitted by the petitioner be considered. In the alternative it is prayed that the impugned condition Clause 4(g) of the 'Schedule A' of the re-tender notice (ref.no.NMMC/health/21/2020) be declared to be not applicable to the petitioner, and the petitioner be permitted to participate and bid in the said re-tender. This petition was moved before the Co-ordinate

Bench of this Court on 5 March 2020 when the Court stood over the matter to 13 March 2020, however no interim relief was granted. The record indicates that the said petition thereafter was not moved and/or was not listed.

12. The petitioner thereafter filed the second petition (Writ Petition (st) no.98746 OF 2020) for the same reliefs, this time in view of a fresh tender notice as issued by the Municipal Corporation for the same work, being re-tender Notice No.NMMC/health/80/2020. This petition was filed on 18 December 2020. The prayers in this petition are almost identical to the prayers as made in the first petition. The prayers as made in this second petition read thus:

> "(a) to issue Rule and call for Records;
>
> (b) to hold and declare tha the impugned Note contained in pre-qualification criterion at Clause No.4(g) in Schedule 'A' read with Clause 10 of Detailed Tender Notice contained in the tender being Re-Tender Notice No.NMMC/health/80/2020 floated by the first Respondent for the purpose of mechanized housekeeping & multipurpose (patient care) services for Navi Mumbai Municipal Corporations' General Hospitals & MCH Hospitals is illegal, arbitrary, unreasonable, illogical and unconstitutional and to quash and set aside the same entirely with costs;
>
> (c) to direct the first Respondent to allow the Petitioner to participate in the tender viz. Tender being Re-Tender Notice No.NMMC/health/80/2020 floated by the first Respondent for the purpose of mechanized housekeeping & multipurpose (patient care) services for Navi Mumbai Municipal Corporations' General Hospitals & MCH Hospitals, without insisting upon the impugned Note contained in pre-qualification criterion at Clause No.4(g) in Schedule 'A' read with Clause 10 of Detailed Tender Notice contained in the said tender;"

13. Mr. Thorat, learned Senior Counsel for the petitioner has limited arguments in support of the prayers as made in the petition. He submits that the pre-qualification criteria as contained in Clause 4(g) of Schedule 'A' (for short '**the impugned condition**') deserves to be declared as illegal, inasmuch as by virtue of such condition, the petitioner stands prohibited from participating in the tender in question issued by the Corporation. He submits that the real effect of the impugned condition is that the petitioner stands blacklisted, without the petitioner being heard which is the basic requirement of the principles of natural justice. The impugned condition is nothing but blacklisting of the petitioner without following due process of law namely strict adherence to the principles of natural justice. Mr.Thorat would hence submit that in the absence of a show cause notice being issued to the petitioner by the Corporation and the petitioner being not granted an opportunity of personal hearing, the Corporation could not have in such manner blacklisted the petitioner, so as to bar the petitioner from participating in its tender in question. In supporting this contention reliance is placed on the decisions of the Supreme Court in (i) **UMC Technologies Pvt. Ltd. Vs. Food Corporation of India & Anr., 2020 SCC OnLine SC 934",** (ii) **M/s. Daffodills Pharmaceuticals Ltd. & Anr. Vs. State of U.P. & Anr., (Civil Appeal No.9417 of 2019, order dt.13**

December 2019); and (iii) **VETINDIA Pharmaceuticals Ltd. Vs. State of Uttar Pradesh & Anr., (Civil Appeal no.3647 of 2020, Order dt.6 November 2020)**.

14. On behalf of the Corporation, a reply affidavit is filed in the second writ petition. At the outset, it is contended that the petitioner could not have filed the second petition challenging the very same condition in the tenders issued by the Corporation. It is contended that as no interim relief was granted in the first petition as clear from the the order dated 5 March 2020, the second petition came to be filed for the same cause of action. It is contended that even in the second petition, the petitioner has not disclosed of the filing of the earlier petition. The Corporation has also contended that there is a strong apprehension that to delay the tender process, the petitioner had set up one M/s. Kanak Enterprises who filed in this Court Writ Petition (lodg) No.95177 of 2020. This for the reason that on such petition, the respondent had appeared and a fresh schedule of tender was required to be declared, by having the sale of tender and bid preparation from 7 November 2020 to 24 November 2020, the pre-bid meeting being rescheduled to 12 November 2020 and opening of the tenders on 25 November 2020. It is contended that despite such change of the tender schedule M/s.Kanak Enterprises neither attended the pre-bid meeting

nor submitted a bid. From such conduct of M/s. Kanak Enterprises, it can be certainly inferred that such firm was set up by someone, who was interested to delay the tender process, which according to the Corporation in the circumstances is none other than the petitioner. The reply has set out reasons as to why the attempts of the Municipal Corporation to appoint a new contractor to replace the petitioner, could not succeed and as to why the tender condition being objected by the petitioner was necessary and justified. The Corporation has contended that the petitioner by such repeated attempts intends to secure the same contract, which was terminated by the Corporation, as the petitioner had breached the terms and conditions, and its work was found to be totally unsatisfactory. It is contended that the petitioner was unsuccessful even in the arbitration and that the petitioner has now challenged the arbitral award in a petition filed under Section 34 of the Arbitration and Conciliation Act,1996, which is pending before the Court of learned District Judge, Thane. It is submitted that also an application under Section 9 of the Arbitration and Conciliation Act,1996 was filed by the petitioner seeking reliefs on the fresh tender in question, and when the learned District Judge was not inclined to grant any reliefs, the application was not pressed by the petitioner and was withdrawn with liberty to move an appropriate application.

15. The Corporation has contended that in regard to the re-tender (No. NMMC/health/80/2020), seven bidders including the petitioner had participated by submitting their respective bids. The technical bids were opened by the Corporation on 18 December 2020. The technical committee found three bidders namely All India Services Global, Eximium Management Pvt.Ltd. and Krystal Integrated Services Pvt. Ltd. as technically qualified. The petitioner was declared ineligible for the reason that its contract was terminated due to unsatisfactory services. It is submitted that the price bids of the said three bidders were opened on 21 December 2020 and the bid of Eximium Management Pvt. Ltd. was found to be lowest. Thereafter the Corporation has issued a letter dated 21 December 2020 to the successful bidder to negotiate the rates. It is thus contended that the Corporation intends to proceed to complete the tender process to appoint a new contractor to replace the petitioner. Thus, justifying the inclusion of the tender condition as assailed by the petitioner, to be in public interest and the Corporation being the best judge of its requirements, the Corporation has prayed for dismissal of the Writ Petitions.

16. Mr.Marne, learned Counsel for the Municipal Corporation would submit that the contentions as urged on behalf of the petitioner

are *per se* untenable. He would submit if the plea as urged on behalf of the petitioner is accepted, it would amount to facilitating a backdoor entry of the petitioner for the same work, which the petitioner performed in breach of the contract conditions, resulting into termination of the petitioner's contract by the Corporation. He submits that such re-tender process came to be initiated only on account of the petitioner's contract being terminated, hence such tender necessarily included the unexpired period of the petitioner's contract. Mr.Marne would submit that the impugned condition is incorporated in public interest, considering the past experiences of the Corporation and nature of the work which would be required to be undertaken by the contractor at the hospitals/health centres. He submits that the work is such which would require meticulous adherence to the contract conditions, hence the Corporation was justified and within its authority to insert such eligibility conditions to exclude participation of those bidders whose contract had been terminated. It is submitted that the Corporation being the tendering authority has the freedom to insert a tender condition which is in the best interest of the Corporation, hence there is nothing arbitrary and/or illegal to impose such condition in the present tender. Mr.Marne would submit that the petitioner having not disclosed in the second petition of filing of the earlier petition as also not disclosing that the Section 9 petition was filed for the same

reliefs, there is suppression on the part of the petitioner of relevant and material facts which would dis-entitle the petitioner to any equitable reliefs being prayed for under Article 226 of the Constitution. He has hence prayed for dismissal of the writ petitions.

DISCUSSION AND CONCLUSION

17. Having heard the learned Counsel for the parties and having perused the record, at the outset it would be appropriate to extract the impugned tender conditions being Condition no.10 of the 'detailed tender notice' providing for eligibility and Condition no.4(g) of Schedule A respectively. Such conditions read thus:-

> 10. Eligible Tenderers
> **Only those tenders who fulfill the eligibility criteria as mentioned in Schedule 'A' of the Tender Notice are eligible to submit their tenders for this work.** The documents indicated against each of the eligibility criteria shall be required to be submitted along with the technical bid to establish the eligibility of the tenderer. However, all criterions mentioned in the eligibility criteria of the tender document over rides all other criterions.
> … … … …

4.	Pre Qualification Criteria		
a.	….	….	….
b.	….	….	….
c.	….	….	….
d.	….	….	….
e.	….	….	….
f.	….	….	….
g.	**Experience**	1. Satisfactorily completed work of Mechanised	Work order along with

	Note: **Contractors whose work contract is terminated due to unsatisfactory services or black listed are not eligible to participate in the tender.**	Housekeeping/ Multipurpose (Patient care) Services in Government, Semi-Government, Central PSU Hospital, ULB Hospitals, Private Hospital in last 5 financial years Having - **a.** Three similar completed works of costing not less than the amount equal to Rs.765/- Lakhs each - OR **b.** Two similar completed works of costing not less than the amount equal to Rs.957 Lakhs each - OR **c.** One similar completed works of costing not less than the amount equal to Rs.1531 Lakhs-	performance certificate/ completion certificate

(emphasis supplied)

18. In the facts and circumstances of the case as noted by us, the following questions would fall for determination of this Court in the present proceedings:

(I) Whether the Municipal Corporation is entitled in law to impose a pre-qualification criteria as contained in Condition 4(g) (supra) to the effect that 'the contractors whose work contract is terminated due to unsatisfactory services are not eligible to participate in the tender' ?

(II) Whether imposing of such impugned condition would amount to blacklisting of the petitioner ?

19. In so far as the first question is concerned, at the outset, we discuss the legal principles on the authority of the State and its instrumentalities to enter into contracts and the principles of judicial review in such context. It is well settled that the power of judicial review in contractual matters concerning the State is limited. The concern of the Court in exercising such powers would be to prevent any arbitrariness, discrimination, malafides in the tender process, so as to ensure adherence of fairness in the State action. The power of judicial review is thus exercised to rein in unbridled executive functioning. In exercising such powers the superior Courts are concerned with reviewing not the merits of the decision but the decision making process itself. It is not the function of the Court to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administration. The duty of the court is to confine itself to the question of legality of the tender process on the touchstone of Article 14 of the Constitution. Its concern should be whether a decision-making authority has exceeded its powers in arriving at an arbitrary decision or had committed a serious error of law or has acted in breach of the rules of natural justice or has reached a decision which no reasonable body of persons could have reached or has acted in complete abuse of its powers. It is thus not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair.

It is only concerned with the manner in which such decisions have been taken. The grounds upon which an administrative action is subject to control by judicial review is classified on three counts **firstly**, Illegality: This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it; **secondly** Irrationality, namely, Wednusbury unreasonableness, that is when a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.; and **thirdly** Procedural impropriety. The Court does not sit as an appellate authority over the tendering authority, but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct an administrative decision and if a review of the administrative decision is permitted it would be substituting its own decision, without the necessary expertise with the Court, which itself may be fallible. It is also settled that the "terms of the invitation to tender" cannot be open to judicial scrutiny as an invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The Government must

have freedom of contract, in other words, a fair play in the joints is a necessary concomitant for an administrative body, functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. Quashing decisions may impose heavy administrative burden on the administration and would lead to increased and unbudgeted expenditure. These are the principles as enunciated in the decision of the Supreme Court in **Tata Cellular vs Union Of India, 1994 SCC (6) 651**.

20. In **BSN Joshi & Sons Ltd. vs. Nair Coal Services Ltd., (2006) 11 SCC 548,** the Supreme Court taking a review of the authorities and more particularly on the prescription and adherence of essential conditions has laid down the following principles of judicial review in contractual matters:-

> "66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :
>
> i) If there are essential conditions, the same must be adhered to;
>
> ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint."

21. In **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. & Anr., (2016) 16 SCC 818** the Court reiterated the principles of law to hold that judicial review is only of the decision making process and the Court would interfere only if the decision making process suffers from malafides or is intended to favour someone or if the decision is arbitrary or irrational or is such that no responsible authority acting reasonably and in accordance with law could have reached such a decision. It was recognized to be a well settled principle of law that mere disagreement with decision making process or decision

of the administrative authority is no reason for the Constitutional Court to interfere in contractual matters. The threshold of malafides, intention to favour someone or arbitrariness, irrationality or perversity are the tests which are required to be met before the Constitutional Court interferes with the decision making process. It was also accepted to be well settled that the words used in the tender document cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance. It was held 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 are malafides or perversity in the understanding or appreciation or in the application of the terms of the tender conditions, no interference is called for. In such context, the Court referred to the celebrated decision in ***Ramana Dayaram Shetty vs. International Airport Authority of India, (1979) 3 SCC 489,*** which opened a new jurisprudential Chapter and constitutional philosophy on the subject of interference of superior Courts in contractual matters in relation to the State and its instrumentalities.

22. In a decision of a recent origin in **JSW Infrastructure Ltd. &**

Anr. vs. Kakinada Seaports Ltd. & Ors., (2017) 4 SCC 170, the Supreme Court reiterated the principles of judicial review and/or of interference in matters of Government contracts and tenders. The Court referring to the decision of the Supreme Court in Tata Cellular vs. Union of India *(supra),* held that superior Courts while exercising their powers of judicial review must act with restraint while dealing with contractual matters and keep in mind the following principles as noted by their Lordships in paragraphs 8 to 10 of the report:-

> "8.We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A Three Judge Bench of this Court in *Tata Cellular vs. Union of India (1994)6 SCC 651,* held that:
>
> (i) there should be judicial restraint in review of administrative action;
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> (ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process;
>
> (iii) the court does not usually have the necessary expertise to correct such technical decisions;
>
> (iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.
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> 9. In *Jagdish Mandal vs. State of Orissa(2007)14 SCC 517* this Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bonafide and taken in the public interest the superior courts should refrain from exercising their power of judicial review. In the present case there are no allegations of mala fides and the appellant consortium has offered better revenue sharing to the employer.

10. In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr. (2016)16 SCC 818* This Court held as follows :-

> "13.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.
>
> *** *** ***
>
> 15. 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.
>
> 16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court...."

The view taken in *Afcons* was followed in *Montecarlo Ltd. Vs. NTPC Ltd. (2016)15 SCC 272* . Thus it is apparent that in contractual matters, the writ courts should not interfere unless the decision taken is totally arbitrary, perverse or mala fide."

23. In **Manohar Lal Sharma vs. Narendra Damodardas Modi & Ors., (2019) 3 SCC 25**, it is held that the Court would confine its

scrutiny of the decision making process on the parameters of unreasonableness and malafides. The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions which implies that terms subject to which tenders are invited are not open to judicial scrutiny, unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers. In paragraphs 7 and 8, Their Lordships observed thus:

> "7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In *Jagdish Mandal vs. State of Orissa and Ors., (2007) 14 SCC 517* this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the decision making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. **The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers.** [See Maa Binda Express Carrier & Anr. Vs. North-East Frontier Railway &Ors.2]
>
> **8. Various Judicial pronouncements commencing from *Tata Cellular vs. Union of India, (1994) 6 SCC 651*, all emphasise the aspect that scrutiny should be limited to the Wednesbury Principle of Reasonableness and absence of malafides or favouritism."**
>
> (emphasis supplied)

24. We may thus observe that the terms and conditions of a tender can undoubtedly be fixed and arrived at by the tendering authority depending upon the need, expectations, exigencies and other surrounding circumstances in relation to a work being tendered. Such a freedom to arrive at legitimate terms and conditions in inviting public offers cannot in any manner be taken away. The cherished principles of free play in the joints and the liberty to choose a contractor, on terms and conditions fixed by the tendering authority in public interest, cannot be taken away. Hence, for a given work, as to what would be the ideal terms and conditions for a contract to be entered into, is completely within the domain of the tendering authority. The Court would not have any expertise to sit in appeal over the tender conditions, the role of the Court is triggered only qua the decision making process. The decision making process would be tested on the touchstone of Wednesbury unreasonableness, malafides and apparent arbitrariness. In the event there is material before the Court indicating that any tender condition is inserted malafide or to suit the needs of a particular bidder and which violates the principles of fairness, non-discrimination and non arbitrariness as enshrined in Article 14 of the Constitution, the Court would certainly exercise powers of judicial review to test the decision making process.

25. Adverting to such principles as discussed above, we now examine as to whether there is any material to infer that the Corporation in the present facts has acted either malafide or arbitrarily or with material illegality in having a condition to restrict participation of a bidder whose contract is terminated due to unsatisfactory services. From a reading of the impugned condition, it cannot be conceived that such a condition is imposed only to displace the petitioner. The condition is clearly applicable to all the bidders, if the condition equally applies to all such bidders, whose previous contract for such works elsewhere was terminated, we do not find as to how it can be said to be illegal and resulting only in the ouster of the petitioner. To our mind the object of the Corporation in providing for such condition is quite clear, namely that considering the nature of the contractual work, the Corporation does not desire that a party whose previous work of such nature stood terminated, should at all participate. For such reason, in our opinion, the impugned condition becomes imperative and/or a vital condition considering the nature of the contract. The Municipal Corporation is not desirous to have a situation that it would appoint a contractor who has not satisfactorily performed such work. In our opinion, there is nothing wrong much less arbitrary for the Corporation to have such mindset to provide such condition, qua the work in

question. The expertise and experience of the Corporation qua its requirements needs to be respected, more particularly when the Corporation is the custodian of the public good and public finances. What would be paramount in providing for such condition is safeguarding of public benefit, public finances and ultimately achieve public interest. The nature of the contractual work is at the hospitals /health centers of the Corporation, hence the Corporation is free and within its authority to have stricter conditions, when the work concerns touching public health and hygiene. In any event there is no material whatsoever which would persuade us to take a different view that the incorporation of such condition by the Corporation is in any manner arbitrary and illegal, so as to interfere in the tendering liberty of the Municipal Corporation when tested on the legal principles as discussed above.

26. For such reasons, in answering the first question we hold that the Corporation is entitled in law to impose a pre-qualification criteria as contained in Condition 4(g) (supra) to the effect, that 'the contractors whose work contract is terminated due to unsatisfactory services are not eligible to participate in the tender.

27. Now we examine the case of the petitioner on the second

question, that imposing of the impugned condition, has resulted in blacklisting the petitioner from participating in the tender in question. We may observe that blacklisting is a method/phenomenon by which the tendering authority intends not to enter into a contractual relationship with a party. It is a business decision. As an order of blacklisting results in civil consequences, it is held to be a settled principle of law that a contractor cannot be blacklisted for having breached the terms and conditions of the contract unless a fair hearing was accorded to the party being blacklisted in due adherence to the principles of natural justice. (**See: Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal 1975 (1) SCC 70; Southern Painters Vs. Fertilisers and Chemicals Travancore Ltd., 1994 Suppl (2) SCC 699, and Gorkha Security Services. Vs. Government (NCT OF DELHI) & Ors., (2014)9 SCC 105**)). Thus, blacklisting operates qua a particular party against whom a decision is taken by a tendering authority to blacklist such party, by following a due procedure in law. The present case is certainly not a case that the petitioner can be said to be blacklisted by the Corporation. The case of the petitioner is of an implied blacklisting by the Corporation by prescribing of a pre-bid criteria that a contractor whose work contract is terminated due to unsatisfactory performance, is not eligible to participate in the tender. In our opinion, providing for such condition by the Corporation would not amount to labeling a

contractor or the petitioner who falls within such condition to be blacklisted. This, for more than one reason. Firstly a bare reading of the condition itself indicates that it is not applicable only qua the petitioner so as to entail a consequence of the sole ouster of the petitioner akin to a blacklisting. The condition is applicable to any prospective bidder who may have been awarded such contract by any other entity and who has suffered a termination on account of unsatisfactory services. Secondly, it cannot be overlooked that the petitioner is not debarred from participating in other tenders of the Corporation and cannot be said to be in any manner barred much less blacklisted from participating in other works which may be tendered by the Corporation. The Court cannot be unmindful of the rationale in providing for such condition by the Corporation. It is not unreasonable for the Corporation to contend that this Court suspending the application of the impugned condition, would in fact pave a way for the petitioner who has suffered a termination, interalia, for unsatisfactory performance, to have an entry for such work in the present tender. In our opinion the Corporation is correct in its contention that permitting participation of the petitioner for the work in question, would not only result in the Court overlooking and/or not recognizing the past objectionable performance of the petitioner qua the same work. It would be certainly not in public interest to question such wisdom of the Municipal Corporation in these

circumstances, to apply the impugned condition to the petitioner's bid, in the tender in question. To provide for such condition as a pre-qualification criteria is a commercial decision taken by the Corporation and as noted above a free play in the joints with the Corporation to prescribe such condition is required to be recognized. The Court would not have any expertise either to question the commercial efficacy or the commercial wisdom vested with the Corporation to stipulate such condition qua the tender in question. It is also fallacious for the petitioner to label such condition as a condition of an implied blacklisting of the petitioner in future tenders to be issued by the Corporation. This is only a presumption of the petitioner. The condition has been imposed only qua the present tender, hence, there is no material for the petitioner to possess any mind set, of any future prohibition in the Corporation's tender.

28. Now we discuss the decisions on which reliance is placed by Mr.Thorat. In **UMC Technologies Pvt. Ltd. vs. Food Corporation of India and Anr.(supra)**, the Supreme Court was dealing with a case of the appellant whose contract as awarded by the respondent-Food Corporation of India (FCI), for the tender work of conducting recruitment of watchman for FCI came to be terminated. The termination order also stated that the appellant was blacklisted from

participating in any future tenders of the FCI for a period of 5 years. The appellant had approached the High Court in assailing the blacklisting order but was unsuccessful. The appellant approached the Supreme Court assailing the order of High Court. The Supreme Court considering the blacklisting issue observed that there was no notice issued to the appellant calling upon him to show cause as to why it should not be blacklisted from participating in any future tenders of the FCI for a period of 5 years. The Court also held that the disqualification condition as contained in the instructions to bidders was merely an eligibility criteria and did not grant any power of blacklisting . Taking a review of the authorities laying down the principles of law, on the issue of blacklisting of a contractor, the Court held that the action of FCI was in breach of principles of natural justice, as the FCI never expressed its mind in informing the appellant of the proposed action of blacklisting nor any opportunity of hearing in that regard was accorded to the appellant. We wonder as to how this decision would assist the petitioner in the present facts, as there is no order of the Corporation of a nature known to law, in the present case to blacklist the petitioner. What is sought to be applied by the Municipal Corporation is the pre-qualification criteria as contained in the tender conditions.

29. In **M/s. Daffodills Pharmaceuticals Ltd. & Anr. vs. State of**

U.P. & Anr. (supra), Daffodills was a pharmaceutical supplier who had participated in a tender process undertaken by the State, inviting bids from interested parties willing to supply various categories of pharmaceuticals products. The successful bidder was required to supply medicines to various hospitals, under the control of the Medical and Health Department, for a period of one year. Daffodills was one of the 56 bidders, its bid was accepted by the State. A declaration affidavit was required to be submitted by every bidder to the effect that there is no Court case/vigilance case/CBI case pending against the firm. M/s. Daffodills Pharmaceuticals had furnished such declaration in terms of the tender. Sometime after the award of the contract, a letter was issued by the Principal Secretary to the Government of Uttar Pradesh stating that a First Information Report (FIR) has been lodged against Daffodills alleging that it had committed an offence and that the Central Bureau of Investigation (CBI), was inquiring into the issue. In pursuance thereto,the offices under the Department of Health were directed to desist and stop all procurements from the Daffodills. The case of Daffodills was to the effect that such action on the part of the State was arbitrary inasmuch as the criminal case was filed against one of the erstwhile Director, who ceased to have any connection with Daffodills since almost three years prior to the award of the tender. Daffodils also contended that the decision not to procure the pharmaceuticals from

Daffodills, amounted to blacklisting, as it was issued without notice or a pre-decisional hearing and hence was liable to be set aside. Daffodils had accordingly approached the High Court, however, the challenge to the decision of the State could not succeed, as Daffodill's writ petition came to be rejected. It is in this context the Supreme Court examined the issue of blacklisting and held that the decision of the State that no purchases be made from Daffodills certainly amounted to blacklisting without observance of the principles of natural justice, as enunciated in the decisions of **Erusian Equipments and Chemicals Ltd. vs. State of West Bengal**,(supra) ; **Raghunath Thakur vs. State of Bihar & Ors., 1989 (1) SCC 229** and in **Southern Painters vs. Fertilizers & Chemicals Travancore Ltd**.(supra). In our opinion, in the present facts the petitioner in not qualifying with the impugned condition, which is a pre-qualification criteria, is differently positioned from how Daffodil was placed, who suffered a communication from the Department of Health directing all the other departments to desist and stop all procurements from Daffodills. Thus the reliance on this decision on behalf of the petitioner is not well-founded.

30. **VetIndia Pharmaceuticals Ltd. vs. State of Uttar Pradesh & Anr. (supra)** is also a case wherein an indefinite order of blacklisting

was issued by the State which was the only issue. The High Court had dismissed the Writ Petition in limine only on the ground of delay, the writ petition having being preferred 10 years later. It is in this context referring to the settled principles of law as also referring to its decision in M/s. Daffodills Pharmaceuticals Ltd. *(supra)* and the decisions earlier to it, the Supreme Court held that the order of blacklisting was illegal being passed without issuance of a show cause notice and following the principles of natural justice.

31. In view of the above deliberation, we reject the contention as urged on behalf of the petitioner of any blacklisting of the petitioner by the Corporation by providing the impugned pre-qualification criteria.

32. Before parting, we also uphold the contention as urged on behalf of the Corporation, as to how the petitioner could file two petitions for the same cause of action. Although for the sake of completeness and considering the justice in the matter, we have examined the merits of the petitioner's contention, however, we would be justified in observing that the second petition for the same cause of action could not have been filed by the petitioner, when an earlier petition was filed praying for the same reliefs, concerning the very

work in question, as sought to be tendered by the Corporation. Further the petitioner has also suppressed in the second petition that it has filed an earlier petition praying for similar reliefs. Thus, the petitions also deserve to be dismissed on the principles of *suppressio veri or suggestio falsi*.

33. The Writ Petitions fail. They are accordingly rejected. No order as to costs.

34. At this stage Mr.Kulkarni, learned Counsel for petitioner prays for continuation of the interim order. In the facts and circumstances of the case, the prayer is considered and rejected.

(G.S.KULKARNI, J.) **(CHIEF JUSTICE)**