

Supreme Court of India

Tata Motors Limited vs The Brihan Mumbai Electric Supply ... on 19 May, 2023

Author: J.B. Pardiwala

Bench: Surya Kant, J.B. Pardiwala

REPORT

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3897 OF 2023  
(arising out of SLP(C) NO. 15708 OF 2022)

TATA MOTORS LIMITED

... APPELL

VERSUS

THE BRIHAN MUMBAI ELECTRIC  
SUPPLY & TRANSPORT  
UNDERTAKING (BEST) AND OTHERS

...RESPONDE

WITH

CIVIL APPEAL NO. 3899 OF 2023  
(arising out of SLP(C) No. 11871 OF 2022)

CIVIL APPEAL NO.3898 OF 2023  
(arising out of SLP(C) No. 11933 OF 2022)

JUDGMENT

J. B. PARDIWALA, J.:

1. Leave granted.

Signature Not Verified Digitally signed by VISHAL ANAND

2. As the issues raised in all the captioned appeals are common and the Date: 2023.05.19 challenge is also to the self-same order passed by the High Court of Judicature 17:01:56 IST Reason:

at Bombay dated 05.07.2022 in the Writ Petition (L) No. 15548 of 2022, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

3. The Appeal arising out of SLP(C) No. 15708 of 2022 is at the instance of TATA Motors Limited (for short, "TATA Motors") (Original Writ Petitioner before the High Court).

4. The Appeal arising out of SLP(C) No. 11871 of 2022 is at the instance of EVEY Trans Pvt. Ltd. (for short, "EVEY") (Original respondent No. 2 before the High Court).

5. The Appeal arising out of SLP(C) No. 11933 of 2022 is at the instance of the Brihan Mumbai Electric Supply & Transport Undertaking (for short, "BEST") (Original respondent No. 1 before the High Court), a statutory corporation operating under the provisions of the Mumbai Municipal Corporation Act, 1888.

## FACTUAL MATRIX

6. BEST floated a tender bearing No. DMM(T-II)/08/TCU/73169/2021- 2022/Advt. dated 26.02.2022 for the supply, operation and maintenance of 1400 (+50% variation) Single Decker AC Electric Buses with driver, for the purpose of public transport service within the city of Mumbai along with other civil infrastructure development at the BEST depots for a period of 12 years (hereinafter referred to as, 'the Tender').

7. The Tender document provided for Technical specifications as stipulated under Clause 3.5(e) and Clause 12 of Section 2 of Schedule IX, under which the bidders were required to provide Single Decker Buses which can run 200 Kms in single charge without interruption in actual conditions for the relevant Gross Vehicle Weight (GVW) with air conditioning with not more than 80% battery being consumed. Clause 3.5(e) and Clause 12 respectively are reproduced hereunder:

### "SCHEDULE IX TECHNICAL SPECIFICATIONS ....

#### Section 2: Technical specifications of SD AC Electric Buses under Wet Lease Scheme ....

Sr. No.	Description	Specifications
3.5	Electric Propulsion System	Electric propulsion system motor rating/power sufficient to provide:
(e)	Minimum Operation Range per bus per day	The minimum operating Km of the buses offered in single charge will be 200 Km, for SD buses respectively with (80% SoC). These offered buses should run above mentioned minimum Km without any interruption.
12	xxx Operating range	xxx Presently the BEST buses operate for around an average of 200 km. per day (mostly uninterrupted). Keeping the above in mind, the EV manufacturers have to provide vehicles which can run 200 km. in

single charge for SD AC Buses in actual conditions for the relevant GVW with Air Conditioning. The Operating schedule shall be provided by BEST and the successful bidder has to ensure the uninterrupted operation of the schedules through adequate spare buses.

In case the successful bidder is unable to maintain uninterrupted operation of schedules for want of charging, then BEST shall take suitable action by levying additional penalty by non-payment towards assured kms for that entire day per instance and if the instance keeps on recurring for a long period of time then the BEST may resort to even termination of Contract.”

8. In all, eight market players participated in the Tender process, including EVEY and TATA Motors. In the pre-bid meeting held on 11.03.2022, TATA Motors submitted its pre-bid points, wherein under Point 1, it requested BEST to consider its bid for 200 Kms per day with 75-minutes of opportunity charging time during the day operations and range testing conditions as per AIS 040/FAME II.

9. On 15.03.2022, BEST published the minutes of the pre-bid meeting. BEST revised certain specifications, however, the modifications as requested by TATA Motors were rejected. BEST opted for a specific reference to “in actual conditions” and excluded any reference to “AIS 040” or “Standard Conditions” in the Tender specifications. It is pertinent to note that the AIS 040 certification would be upon standard testing conditions and not on the actual road conditions, which would account for passenger load, temperature, traffic conditions, etc.

10. On 27.04.2022, BEST issued Corrigendum No. 8 specifying the end of submission of bids for the Tender as 02.05.2022 and the date of opening the technical bid as 04.05.2022.

11. TATA Motors submitted its bid on 25.04.2022, wherein it guaranteed operating range of 200 Kms with 80% State of Charge, “SoC” (i.e. 20% reserve left upon running 200 Kms in single charge), however, the same was achieved “in standard test conditions as per AIS 040”. This was a deviation from the Tender specifications.

12. EVEY submitted its bid on 02.05.2022, claiming that the same was submitted without any deviation from the Tender conditions including the condition of minimum operating range of 200 Kms in a single charge. EVEY claimed that the TATA Motors was the only bidder which, referenced “standard test conditions” instead of “actual road conditions”, while stating that it complied with the Tender requirement of minimum operating range.

13. Under Clause 5.1.1 of the Schedule II (Definitions and Instructions to Bidders) of the Tender, the mode and manner of submission of the bid proposal has been provided. The said clause also provided for certain annexures to be submitted along with the bid. Pertinently, Annexure Y, which is an undertaking to be given by the Operational Equipment Manufacturer (OEM) for the operating range of the buses, was not required to be submitted along with the bid but was only required to be submitted by the successful bidder. The purpose of the undertakings under Clause 3.5 (e) and Clause 12 of Section 2 of Schedule IX (Technical Specifications) and Annexure Y is to confirm that the requirement of meeting the 200 Kms range in single charge is satisfied.

14. EVEY along with its bid dated 02.05.2022 submitted Annexure Y, wherein the OEM gave an undertaking for the operating range which included a table that mentioned that the operating range for a single decker bus would be 200 Kms with the opportunity charging time of 1 hour. The same

was done in accordance with the specifications of the earlier tender dated 20.08.2021, which allowed for an opportunity time of 60 minutes.

15. EVEY vide email dated 06.05.2022, provided a revised Annexure Y as per the Single Charge Requirements mentioned in the Tender along with an explanation for the same holding it to be a mere “clerical error”.

16. The Tender bids were opened on 04.05.2022 and the technical suitability evaluation was announced on 06.05.2022. BEST in its technical suitability evaluation dated 06.05.2022, held TATA Motors along with four other bidders, to be “technically non-responsive”. TATA Motor’s bid was rejected on account of technical deviation with respect to the operating range in its Annexure F and Annexure Y, respectively. The bid offered by EVEY in the said report was deemed to be “technically responsive”.

17. Thereafter, on 06.05.2022, the price bids of the eligible bidders were opened, and EVEY was declared to be the L1 bidder. The price bid of TATA Motors was not opened in accordance with Sr. No. 7 of the Schedule I (Invitation for Proposal) and Sr. No. 15 of the Schedule II (Definitions and Instructions to Tenderers) of the Tender document. Sr. No. 7 of Schedule I reads as under:

“7. The Bidders/Tenderers who meet the mandatory technical and commercial eligibility criteria as mentioned in Schedule III of Tender Document shall only be held eligible for opening of price bids.”

18. Sr. No. 15 of Schedule II (Definitions and Instructions to Tenderers) of the Tender document, reads as under:

“15. The Bidders shall accept unconditionally BEST's 'Conditions of Tender & Conditions of Supply' in TOTO, failing which their financial bids shall not be considered for · opening. Bidders are requested to go through the same carefully.”

19. Aggrieved by the technical suitability evaluation issued by BEST by which it rejected the bid of TATA Motors, the latter approached the High Court of Judicature at Bombay by way of a writ petition bearing WP(L) No. 15548 of 2022 dated 10.05.2022. TATA Motors prayed for the following reliefs:

“18. The Petitioners therefore pray that this Hon'ble Court may be pleased to:

(a) Issue a writ of Certiorari or any other writ, order or direction in the nature of Certiorari to call for the records of the case and quash and set aside the decision dated 06.05.2022 taken by the Respondent No. 1 declaring the bid submitted by the Petitioner No. 1 as “technically non-responsive”;

(b) Issue a writ of mandamus or writ in the nature of mandamus or any appropriate writ, order or direction under Article 226 of the Constitution of India directing

Respondent No. 1 to reconsider the bid submitted by the Petitioner No. 1 for the purposes of the Tender;

(c) In the alternative to prayer (b) issue a writ of mandamus or writ in the nature of mandamus or any appropriate writ, order or direction under Article 226 of the Constitution of India directing Respondent Nos. 1 to cancel the Tender and float a fresh tender;

(d) During the pendency of the Petition, restrain Respondent No. 1 from taking any steps towards award of contract under the Tender;

(e) ad-interim reliefs in terms of prayers in clause (d) above;

(f) Cost of the present Petition; and

(g) such further and other reliefs as the nature and the circumstances of the case may require be granted to the Petitioner.”

20. During the pendency of the aforesaid writ petition BEST awarded the Tender in favour of EVEY with the Letter of Acceptance dated 20.05.2022. EVEY accordingly submitted the required Performance Bank Guarantee on 23.05.2022. An agreement for operation of Stage Carriage Services for public transport of Single Decker AC Electric Buses with Driver in the city of Mumbai and its extended suburbs on Gross Contract Cost (GCC) model for 12 years was entered into between the EVEY and BEST on 26.05.2022.

21. A subsidy bank guarantee dated 02.06.2022 was submitted by EVEY and BEST released the requisite amount to the EVEY's account towards subsidy on 10.06.2022. The EVEY even provided the BEST with 8 buses between 04.07.2022 and 05.07.2022.

22. The High Court vide its impugned order and judgment dated 05.07.2022, took the view that the requirement for the operating range to be more than 200 Kms in a single charge in “actual conditions” was unambiguous. Accordingly, the High Court upheld the disqualification of TATA Motors and rejected their claim from being considered as an eligible bidder as they failed to comply with the technical requirements of the Tender. The High Court in paragraphs 9 and 13 respectively of the impugned order observed thus:

“9. Reading the aforesaid, it is unambiguous that operating range provided in the tender document is that the electric vehicles manufacturers have to provide the vehicles which can run 200 kms in single charge for SD air conditioning buses in actual conditions for relevant GVW air conditioning. The prima donna requirement of the tender document it appears is that the electric vehicle offered should run 200 Kms in a single charge for Single Decker air conditioning bus in actual conditions with 80% SoC without any interruption.

Xxx xxx xxx

13. Petitioner No.1 did not submit its bid for 200 Kms@ 80% SoC in single charge on actual condition but at standard test conditions as per AIS 040. As per the tender condition if a person to whom the contract is awarded i.e. lessee does not comply with the condition of achieving range of 200 Kms at 80% SoC in single charge then he is penalized for the same. Meaning thereby, Respondent No.1 was conscious that the standard test conditions as per AIS 040 is different than the actual condition. The tender of the Petitioner certainly was not compliant with the said clause. The Petitioner has deviated from the material and the substantial term of the tender. The Petitioner, as such, is rightly disqualified for deviating from the material requirements stipulated in the tender.” (Emphasis supplied)

23. The High Court, after holding as above proceeded further to discuss as to why the bid of EVEY also should have been rejected. The High Court noted EVEY’s contention that Annexure Y submitted along with the technical bid was an incidental document, however, rejected such contention. The High Court while referring to Clause 16 of Schedule I held that once the final date for the submission of the bid expires, there can be no additions/corrections/ submissions of documents by the bidders. Clause 16 of Schedule I of the Tender is produced hereinbelow:

“SCHEDULE I Invitation for Proposal ...

16. Interested Bidders are advised to study this Tender document carefully before submitting their proposal in response to this Tender document. Submission of a proposal in response to this tender shall be deemed to have been after careful study and examination of this document with full understanding of its terms, conditions and implications. No addition / correction, submission of documents will be allowed after opening of technical bid”

24. The High Court as a result, held that the email dated 06.05.2022 ought not to have been entertained, and the technical bid evaluation, which was released on the same day did not depict fairness in the actions of BEST. The High Court in paragraphs 20 – 22 respectively held as under:

“20. It has been contended by Respondent No.1 that letter issued by Respondent No.2 on 6th morning did not influence the decision to hold the bid of Respondent No.2 responsive in the afternoon of 6th May 2022. The same is not borne-out from the facts and circumstances of the case. Clause-16, as stated above specifically and categorically prohibits additions / corrections / submission of documents after opening of technical bid. Technical bids have been opened on 4th May 2022. Thereafter no such letter could have been entertained. The proximity of the time i.e. 6th May at 11.35 am. the letter issued by Respondent No. 2 along with the modified Annexure-Y and after two hours, the bid of Respondent No.2 held responsive, does not support the contention of Respondent No.1 that the said revised Annexure-Y and the letter written on 6th May morning did not weigh in holding Respondent No.2's

bid responsive. First of all, accepting the letter from Respondent No.2 by Respondent No.1 on 6 May morning itself was against the specific terms of the tender (clause 16). It is further the case of Respondent No.1 that on 6 th morning revised Annexure-Y forwarded by Respondent No.2 was sou motu and not at the instance of Respondent No.1, may not be relevant here. The fact remains that Respondent No.2 was allowed to submit the letter and revised Annexure-Y after two days of the opening of technical bids. It is also the fact that on 28th April Respondent No.2 had submitted the bid and on 2nd May it had submitted the revised bid, however, with the same Annexure-Y clearly stating that it would require opportunity charging tune of one hour. The same would not be in tune with the tender conditions.

21. From the aforesaid facts, it is clear that; (i) the tender documents submitted by the Petitioner contained deviation in Annexure-Y i.e. the undertaking from OEM stating that one hour charging time would be required for achieving operating range of 200 Kms.; and (ii) Respondent No.2 submitted the revised Annexure-Y on 6th morning i.e. two days after the opening of technical bids and after acceptance of revised Annexure-Y on 6th May morning, the technical bid of Respondent No.2 was accepted in the afternoon of the same day.

22. The aforesaid does not depict fair play in action. The facts create doubt about, whether the decision was a fair one or was the decision reached fairly? The same does not appear to be so in view of the facts discussed above while accepting the bid of Respondent No.2 as responsive.” (Emphasis supplied)

25. In view of the aforesaid, the High Court thought fit to declare EVEY also as an unsuccessful bidder. The High Court in paragraphs 23 and 24 respectively held as under:

“23. We are aware that the principle of equity and natural justice stay at a distance and no judicial interference is warranted in case of an error in assessment. However, the same holds good, if the decision is bona fide. We are also aware that interference of the Court would lead to some delay. It would be seen that earlier also the tenders were issued. However, because of non-sanction of subsidy, the earlier tender process was scrapped and fresh tender process was issued. For accepting the bid of Respondent No.2, 90 days’ time is provided to it for getting the prototype vehicle. The said period is not over. It is not even one month. The Respondent No.2's tender is accepted. The Courts upon coming to the conclusion that the decision making process was not fair. The same lacked fair play in action and arbitrary, will have to step in.

24. In the light of the above, we set aside the decision of the Respondents of acceptance of tender of Respondent No.2. Respondent No.1, if it so desires, may proceed with a fresh tender process.” (Emphasis supplied)

26. In such circumstances referred to above, all the three parties are here before this Court with their respective petitions.

27. It is pertinent to note that during the pendency of the proceedings before the High Court and after submitting the subsidy guarantee, EVEY had already supplied total 8 buses between 04.07.2022 to 05.07.2022. However, this Court by an interim order dated 14.07.2022 granted an interim stay of the impugned judgment insofar as EVEY is concerned. This Court observed that, the supply of the buses, if any, by EVEY would be subject to the result of these petitions and EVEY shall not claim any equity at a later stage.

#### SUBMISSIONS ON BEHALF OF THE "EVEY"

28. Mr. Rohatgi, the learned Senior counsel appearing for EVEY placed strong reliance on the decision of this Court in *W.B. State Electricity Board v. Patel Engineering Co. Ltd. & Ors.*, reported in (2001) 2 SCC 451 to submit that the equitable relief can be granted to the bidder where it has made a material mistake of fact in the bid and upon discovery of that mistake he has acted promptly and rectified his mistake. He submitted that, Clause 16 of Schedule I of the Tender would not apply to a document, like Annexure Y, which was originally required to be submitted by the "Successful Bidder" after the evaluation of the bid. Furthermore, the learned Senior counsel proceeded to submit that, even in the original Annexure Y as submitted on 02.05.2022, his client had mentioned that, "These offered buses will run above mentioned minimum Kms without any interruption".

29. He submitted that, Annexure F specifies that "If the variations specified herein, are found to be in nature of contradiction to BEST's requirements/specifications then such Bids will be treated as Non-responsive" and therefore, the bidder would have to essentially comply with the specifications mentioned in Annexure F otherwise the bid would be treated as "technically non-responsive". He submitted that Annexure F can be rightly termed as an essential condition of Tender. He placed strong reliance on the decision of this Court in the case of *Kanhaiya Lal Agrawal v. Union of India and Others*, reported in (2002) 6 SCC 315, to submit that whether a condition is essential, or collateral could be ascertained by reference to the consequence of non-compliance thereto. It was submitted that if non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. He further submitted that, non-compliance of the conditions mentioned in Annexure Y would lead to levy of penalty and if the instance keeps on recurring, it may lead to termination of contract and therefore, Annexure Y should be treated as a collateral term of the Tender. Under Clause 5.1.1 of Schedule II (Definitions and Instructions to Bidders) of the Tender document Annexure Y was not required to be submitted along with the bid documents but the same was to be submitted by the "Successful Bidder".

30. He submitted that, in view of the decision of this Court in, *N.G. Projects Limited v. Vinod Kumar Jain and Others*, reported in (2022) 6 SCC 127, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether to accept the bid of a tenderer and that contract of public service should not be interfered with lightly. The injunction or interference in the Tender leads to additional costs on the State and is also against public interest.

31. He submitted that the allegations of favouritism levelled by TATA Motors by pointing towards the fact that apart from EVEY, there were two more parties who were technically qualified and were L2 and L3 viz., Switch Mobility Automotive Limited and PMI Electro Mobility Solutions Private



Limited respectively, EVEY was declared L1 and awarded the Tender only after opening of the price bids at a later stage are reckless and baseless.

32. Relying on the decisions of this Court in Raunaq International Ltd. v. I.V.R. Construction Ltd. and Others reported in (1999) 1 SCC 492 and S.S. & Company v. Orrisa Mining Corporation Limited reported in (2008) 5 SCC 772, he submitted that once the High Court found TATA Motors to be technically non-compliant, it ought not to have entertained a challenge to the tendering process at the instance of an unsuccessful party. The writ petition was filed against the technical evaluation, whereas, the contract is now well underway at the stage of performance. He submitted that interfering with the technical evaluation at this stage would make the contract redundant and cause loss of exchequer's money.

33. In the last, the learned Senior counsel submitted that till date EVEY has supplied 20 tailor-made buses and the civil infrastructure for these buses has also been put in place.

#### SUBMISSIONS ON BEHALF OF THE "TATA MOTORS"

34. Dr. Abhishek Manu Singhvi, the learned Senior counsel, appearing for TATA Motors vehemently submitted that the contract awarded by BEST to EVEY is per se illegal. The learned Senior counsel argued that the acceptance of the EVEY's revised Annexure Y after the expiry of the bid submission end date and technical bid opening date is contrary to the Tender conditions. Clause 16 of Schedule I (Invitation for Proposal) of the Tender prohibits any addition, correction or submission of document after the technical bid opening. However, the same was not followed and by allowing a bidder to correct errors at a later stage may lead to unequal treatment of bidders. The decisions of this Court in Poddar Steel Corporation v. Ganesh Engineering Works and Others, reported in (1991) 3 SCC 273 (Para 6); W.B. State Electricity Board (supra) (Paras 27 and 28), were relied upon to substantiate the aforesaid contention.

35. He submitted that the actions of BEST could be termed as arbitrary, discriminatory, unfair, and that his client has locus to challenge the same as no legitimacy should be granted to tender processes tainted with malice. The learned Senior counsel relied upon the decision of this Court in Monarch Infrastructure (P) Ltd v. Commissioner, Ulhasnagar Municipal Corporation and Others, reported in (2000) 5 SCC 287 (Paras 10 and 14); Meerut Development Authority v. Association of Management Studies and Another, reported in (2009) 6 SCC 171 (Paras 27, 28, 45 and 76); Maa Binda Express Carrier and Another v. North-East Frontier Railway and Others, reported in (2014) 3 SCC 760 (Paras 8, 9 and 12) to fortify the submission.

36. He argued that the High Court in paragraph 19 of the impugned judgment has rightly observed that the battery range guarantee can be given only by the OEM from whom the bidder is purchasing the battery, and in such circumstances, the same cannot be said to be incidental. The same was considered as an important part of the technical evaluation by BEST.

37. He vociferously submitted that Annexure Y was a part of the bid document and once submitted, could not have been permitted to be altered after the bid submission end date i.e., 02.05.2022. The

argument that Annexure Y was optional and not required at the time of submission of the bid is an afterthought, and the same being a question of fact or at the most a mixed question of fact and law cannot be raised for the first time in a Special Leave Petition. He relied on the decision of this Court in Jagannath Behera & Ors. v. Raja Harihar Singh Mardaraj Bhramarbara Roy, reported in 1958 SCR 1067 (Paras 17 and 19); Karanpura Development Co. Ltd v. Raja Kamakshya Narain Singh Etc., reported in 1956 SCR 325 (Para 24); Vasantkumar Radhakisan Vora v. Board of Trustees of Port of Bombay, reported in (1991) 1 SCC 761 (Para 24); Steel Authority of India Ltd v. Gupta Brother Steel Tubes Ltd, reported in (2009) 10 SCC 63 (Paras 32 and

34).

38. He submitted that the High Court was justified in saying that a fresh tender in the present matter is warranted more particularly in view of the arbitrary tender process and delay in supply of the buses as per the timeline prescribed under the Tender. He submitted that a fresh tender would be in public interest as there has been a breach of delivery timeline by EVEY as prescribed under the Tender. It is alleged that there is a deficit in the supply of 1,030 buses till date. BEST has failed to take necessary steps against EVEY for the delay, and the same showcases that the two contracting parties have colluded with each other. The fresh tender would allow for more competitive price bids and there would not be any financial burden on BEST in the event of termination, as the Tender provides for forfeiture of Earnest Money Deposit (EMD) and encashment of performance guarantee.

39. In the last, the learned Senior counsel submitted that the High Court while upholding the disqualification of his client on the sole basis that it guaranteed the operating range in ‘standard test conditions as per AIS 040’ committed an error. It was submitted that TATA Motors had complied with the essential conditions and certain departures under the Tender were permissible.

#### SUBMISSIONS ON BEHALF OF THE “BEST”

40. Mr. Tushar Mehta, the learned Solicitor General, appearing for BEST submitted that the Tender document provided for mandatory eligibility conditions for being declared as a qualified bidder at the stage of technical bid, and the said eligibility conditions were stipulated in sub – clauses (iv) and

(v) of Clause 5.1.1 respectively of the Tender Document.

41. He further submitted that Clause 5.1.1 (v), providing for Annexure F was a mandatory condition for being qualified as a bidder at the Technical Bidding stage. The mandatory requirement reads as under:

“5.1.1 The Proposal should be submitted in the following manner:

Bid 1: Technical Submissions, which would include:

i) Schedule of Guaranteed Performance & Other Technical Particulars as shown in the prescribed format in Annexure-A incorporated in the Tender document (in case of a consortium that of a lead

member),

ii) Schedule of Performance of the Bidder (in case of consortium experience of any member) as in Annexure C,

iii) Proforma for certification for Minimum Average Annual Turnover (“MAAT”) from Chartered Accountant as in Annexure D. (in case of consortium for lead member and in case of Aggregator, Networth certificate or Investible fund certificate),

iv) Aggregator have to submit back-to-back agreement with OEM for complete contract period for the maintenance of buses. Aggregator have also to submit Manufacturer Authorization Form (if aggregator is a sole bidder or lead bidder then such bidder shall submit Manufacturer Authorization Form) from OEM,

v) Schedule of Departures from technical specification as in Annexure F,

vi) General details of Bidder with registration proof and credentials (in case of Consortium, this would need to be provided by the lead members) as in Annexure G & H,

vii) Bid Security/EMD as in Annexure I,

viii) The Annexure-L. (undertaking of the Bidder not being involved/engaged in any corrupt or fraudulent malpractices or not being black-listed with any Government or Public Sector Units in India or outside India)

ix) In case of Consortium, proforma of Consortium Agreement to be entered into between members as in Annexure N,

x) Covering Letter cum Project Undertaking as per Annexure Q stating the Proposal Validity Period,

xi) Power of Attorney for Signing of the Proposal (in case of Consortium, this would need to be provided by all the members) as in Annexure R.”

42. He submitted that TATA Motors deviated from the mandatory requirement while filing the said Annexure F. He highlighted the portion of the Annexure which states that if variations are found contradicting BEST’s requirements then such bids would be treated as non-responsive. The non-compliant deviation was as under:

“Shall meet the operating range requirement of 200 KMS @ 80% SOC in single charge as certified per AIS 040.”

43. He submitted that none of the bidders including EVEY (successful bidder) deviated from this mandatory condition. Hence, TATA Motors was declared a non-responsive bidder at the technical stage itself. On 06.05.2022, BEST undertook the technical evaluation and took a decision that of all

the bidders found eligible and responsive, EVEY had quoted the lowest rates and accordingly the contract was awarded in its favour.

44. The learned SG further submitted that the successful bidder was required to fill up Annexure Y. However, Annexure Y was neither a condition precedent for being a responsive bidder nor a mandatory condition for awarding the contract.

45. EVEY rectified its mistake, explaining that the Annexure Y submitted by it was inadvertently placed after doing a cut-and-paste job from the previous tender. EVEY filed a revised/fresh Annexure Y strictly in accordance with the Tender.

46. The learned SG vehemently submitted that to ask BEST to issue a fresh tender notice would be against public interest. In the contract given to EVEY in May 2022, BEST was to pay Rs. 46.81/KM to EVEY. BEST examined the possibility of re-tendering and found that in the recent past, one similar tender was issued by the Convergency Energy Services Limited (CESL), a Government of India undertaking. As per the recent contract awarded by CESL, it ended up paying Rs. 1,200 Crore more than the present rate at which “BEST” awarded the instant contract. Therefore, it would be commercially imprudent to opt for re-tendering.

#### ANALYSIS

47. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is : Whether the High Court after upholding the disqualification of TATA Motors from the Tender was justified in undertaking further exercise to ascertain whether EVEY also stood disqualified and that BEST in its discretion may undertake a fresh tender process?

48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: Silppi Constructions Contractors v. Union

of India, (2020) 16 SCC 489)

49. It is not in dispute that the first and the foremost requirement of the Tender was the prescribed operating range of the single decker buses which would operate for around and average of 200 Kms in a single charge in “actual conditions” with 80% SoC without any interruption. Then materials on record would indicate that the TATA Motors in its bid deviated from this requirement and had informed BEST that it could carry the operating range in the “standard test conditions” which was not in accordance with the Tender conditions. The High Court has rightly observed in its impugned judgment that the bid of the TATA Motors failed to comply with the said clause. TATA Motors deviated from the material and the essential term of the Tender. It may not be out of place to state at this stage that it is only TATA Motors who deviated from the condition referred to above. However, we are of the view that the High Court having once declared TATA Motors as “non-responsive” and having stood disqualified from the Tender process should not have entered into the fray of investigating into the decision of BEST to declare EVEY as the eligible bidder. We are saying so because the High Court was not exercising its writ jurisdiction in public interest. The High Court looked into a petition filed by a party trying to assert its own rights. As held by this Court in Raunaq International Ltd. (supra), that grant of judicial relief at the instance of a party which does not fulfil the requisite criteria is something which could be termed as misplaced. In Raunaq International Ltd. (supra), this Court observed as under:

“27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced . Even if the criteria can be relaxed both for M/s Raunaq International Ltd. and M/s I.V.R. Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Ltd.” (Emphasis supplied)

50. We take notice of the fact that Annexure Y was originally required to be submitted by the “Successful Bidder” after the evaluation of the bid and the same did not figure in the list of documents and annexures to be included in the technical submissions, as provided under Clause 5.1.1 of Schedule II of the Tender. Further the format provided for Annexure Y in the Tender documents in its heading states that the “Successful Bidders shall upload a Letter of Undertaking on their letter head as below”. Therefore, we are of the view that the restriction on revision of documents under Clause 16 of Schedule I, which states, “No addition/correction, submission of documents will be allowed after opening of technical bid,” is only limited to the documents necessary to be included in the technical bid and would not be applicable to any such document which does not form a part of the technical bid.

51. We are of the view that the High Court should have been a bit slow and circumspect in reversing the action of BEST permitting EVEY to submit a revised Annexure Y. We are of the view that the BEST committed no error or cannot be held guilty of favoritism, etc. in allowing EVEY to submit a revised Annexure Y as the earlier one was incorrect on account of a clerical error. This exercise itself was not sufficient to declare the entire bid offered by EVEY as unlawful or illegal.

52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates v. Union of India and Others*, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

54. As observed by this Court in *Jagdish Mandal v. State of Orissa and Others*, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of

contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

55. In such circumstances referred to above, we set aside that part of the judgment and order passed by the High Court by which the decision of BEST to accept the tender of EVEY was set aside and it was left to the discretion of BEST to undertake a fresh tender process.

56. The Appeal filed by TATA Motors accordingly fails and is hereby dismissed. Whereas the Appeals filed by EVEY and BEST are allowed to the aforesaid extent.

57. There shall be no order as to costs.

58. Pending application, if any, stands disposed of accordingly.

.....CJI.

[Dr. Dhananjaya Y. Chandrachud] .....J.

[Pamidighantam Sri Narasimha] .....J.

[J. B. Pardiwala] New Delhi;

May 19, 2023