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Restrictive Judicial Review in Contracts involving Complex Technical Issues –BTL EPC Ltd. Case

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1. INTRODUCTION

1.1 A three-judge bench of the Supreme Court of India (SC) has recently in its judgment dated 18.09.2023 in the case of **BTL EPC Ltd. v. Macawber Beekay Pvt Ltd & Ors. 2023 SCC OnLine SC 1223** expounded on the limited scope of judicial review by Courts in complex commercial or contractual matters.

1.2 The Bench while allowing the appeal in favour of BTL EPC Ltd. (**Appellant**) noted that the Courts should not readily interfere in commercial and contractual matters, especially those involving complex technical issues.

2. BRIEF FACTS

2.1 Telangana State Power Generation Company Limited (TSPGCL) awarded a contract to Bharat Heavy Electrical Limited (BHEL) for setting up the Yadadri Thermal Power Station. For subcontracting a part of the work i.e., designing, engineering, manufacturing and supply works pertaining to Ash Handling Plant, BHEL published Notice Inviting Tenders dated 24.06.2022 (**Tender**), inviting bids from the prospective bidders.

2.2 The Tender included certain pre-qualification requirements for the bidders. Clause 01.00.00 of the tender documents included technical criteria to be an eligible bidder, and clause 01.01.01 contained four specific requirements that the prospective bidders were required to fulfil for their bids to be considered by BHEL.

2.3 Further, clause 01.01.02 specifically contemplated conditions for the bidders, who did not fulfil the aforesaid technical requirements, to become eligible to participate in the tender process, by collaborating/associating with a party that meets the requirements of clause 01.01.01. Therefore, even if the bidder itself was not able to meet the technical criteria, such non-compliance would be obviated if the bidder collaborated or associated, through furnishing a consortium agreement, with a party that meets those

technical criteria of clause 01.01.01, either individually or in conjunction with the bidder himself.

2.4 On 23.07.2020, Public Procurement Division in the Department of Expenditure of Union Ministry of Finance (**DoE**) issued an Order that imposed a requirement of registration with the Competent Authority in India for a bidder which shares a land border with India to be eligible to bid in procurement of goods and services. Subsequently, the Ministry of Finance published a clarification through OM dated 08.02.2021, which excluded the procurement of goods and services from the ambit of earlier order dated 23.07.2020.

2.5 BHEL awarded the Tender to Appellant vide Letter of Intent dated 29.09.2022 (**LOI**).

2.6 Macawber Beekay Pvt. Ltd. (**Respondent No.1**) challenged this award of contract through a writ petition under Article 226 of the Constitution before the High Court of Karnataka (**HC**) contending that the award of contract was in breach of the conditions imposed on the bidder as per the DoE's Order dated 23.07.2020, as the Chinese company collaborating with the Appellant was not registered with the Competent Authority in India.

2.7 The Single Judge of the HC dismissed the writ petition by ruling that the OM dated 08.02.2021 had clarified that raw material can be procured from an entity even if it is not registered with the Competent Authority, and since Appellant only sought support for design, erection and commissioning, the bid did not violate the procurement order. The Single Judge further observed that the Court's scrutiny was limited to decision-making process and since it not arbitrary and, the process did not merit interference by the court.

2.8 However, the judgment was challenged in appeal before the Division Bench, which reversed the decision of Single Judge, on the ground that the requirement of mandatory registration with the Competent Authority had not been

done away with by the OM dated 08.02.2021 and the same was overlooked by BHEL; thus, the decision-making was flawed. The Division Bench set aside the award of contract in favour of the appellant and further directed BHEL to process the bid submitted by Respondent No.1.

3. ISSUE(S)

3.1 The issue before the SC was that whether the HC was correct in holding that the bid submitted by the Appellant was liable to be rejected on the ground that the Chinese company with whom it had entered into a consortium agreement was not registered with the Competent Authority in terms of the DoE's Order dated 23.07.2020.

4. JUDGMENT & DISCUSSION

4.1 The SC noted that though the Appellant did not fulfil the technical requirements as stipulated in clause 01.01.01 of the tender documents, the Appellant took aid of eligibility relaxations given under clause 01.01.02, by furnishing a consortium agreement jointly executed by the Appellant and the Chinese company which fulfilled the technical criteria.

4.2 The bidding consortium, in terms of clause 7.2 of the pre-qualification requirements, required to have at least 51% ownership stake in the associate company, which was absent since the consortium agreement did not involve any stake of the Chinese company to be held by the Appellant. Thus, the SC held that this agreement was not in the form of consortium agreement, as stipulated in clause 7.2 of the tender documents; but rather, a pure and simple agreement in terms of clause 01.01.02.

4.3 In relation to the applicability of the conditions imposed viz. Order dated 23.07.2020, the SC opined that the primary decision on whether the appellant meets the technical requirement, on account of the fact that the collaborator i.e., Chinese company was not registered, rests with BHEL; which did not find any infirmity on the part of the Appellant. SC also noted that, both, BHEL and TSPGCL found that the agreement was in the nature of a service agreement and not a "consortium". Thus, the SC held that since the Appellant's bid was not in the nature of a joint bid, but rather a standalone bid, the registration requirement as per the OM dated 23.07.2020 did not apply in the present case. SC further took into consideration the fact that BHEL had examined Appellant's manufacturing units and approved Appellant's bid after due consideration and satisfaction.

4.4 Thereafter, SC relied on its previous judgment in the case of **Tata Motors Limited vs Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others, 2023 SCC OnLine SC 671**, to highlight the settled principle of law that in cases involving complex technical issues, such as the one in the present case, the Courts should exercise restraint in exercising its power of judicial review. The Courts ought to defer to the discretion of the tender inviting authority which is best placed to interpret the terms of tender. Rather than delving into the complex technical issues, the Courts ought to restrict its judicial review to the decision-making process opted by the tendering authority and to examine arbitrariness or mala fides, if any. Therefore, the SC opined that in the circumstances of the present case wherein the question involved complex technical issues, the interference of Division Bench of the HC was not warranted.

4.5 Thus, the SC considering the above-mentioned limited scope of judicial review and taking note of the fact that a major chunk of the work allotted to the Appellant has been completed and that any altercation would go against the interest of both, BHEL and TSPGCL, allowed the appeal and set aside the order passed by the HC.

5. CONCLUSION

5.1 This judgment highlighted the important aspect of limited judicial review in matters involving complex technical issues wherein, *albeit* one of the parties to contract is a "State" within the meaning of Article 12 of the Constitution of India, the Courts should exercise restraint in exercising its discretionary powers of judicial review and the courts must restrict itself to issue involving arbitrariness, irrationality, mala fides and bias in the processes.

A copy of the judgment is annexed hereto at **page 3 to 19**.

2023 SCC OnLine SC 1223

In the Supreme Court of India

(BEFORE DR D.Y. CHANDRACHUD, C.J. AND J.B. PARDIWALA AND MANOJ
MISRA, JJ.)

Civil Appeal No. 5968 of 2023

(Arising out of SLP (C) No. 18100 of 2023)

BTL EPC Ltd. ... Appellant;

Versus

Macawber Beekay Pvt. Ltd. and Others ...
Respondents.

With

Civil Appeal No. 5969 of 2023

(Arising out of SLP (C) No. 18574 of 2023)

And

Civil Appeal No. 5970 of 2023

(Arising out of SLP (C) No. 19227 of 2023)

Civil Appeal No. 5968 of 2023 (Arising out of SLP (C) No. 18100 of
2023), Civil Appeal No. 5969 of 2023 (Arising out of SLP (C) No.
18574 of 2023) and Civil Appeal No. 5970 of 2023 (Arising out of
SLP (C) No. 19227 of 2023)

Decided on September 18, 2023

Advocates who appeared in this case:

For Petitioner(s) Mr. Mukul Rohatgi, Sr. Adv.

SLPC 18100/2023 Mr. Shyam Divan, Sr. Adv.

Mr. M. Dhyan Chinnappa, Sr. Adv.

Mr. Mahesh Agarwal, Adv.

Mr. Rishi Agrawala, Adv.

Mr. Pranjit Bhattacharya, Adv.

Mr. Abhirup Dasgupta, Adv.

Mr. Rishabha Raj Thakur, Adv.

Mr. Chirag Nayak, Adv.

Mr. Ishaan Duggal, Adv.

Ms. Mukta Halbe, Adv.

Mr. E.C. Agrawala, AOR

SLPC 18574/2023 Mr. Gourab Banerjee, Sr. Adv.

Ms. Mayuri Raghuvanshi, AOR

Mr. Vyom Raghuvanshi, Adv.

Ms. Akanksha Rathore, Adv.

Mr. Dhruv Sharma, Adv.

Mr. Venkata Supreeth, Adv.

Mr. Shubro, Adv.

SLPC 19227/2023 Mr. V. Giri, Sr. Adv.

Mr. D. Abhinav Rao, AOR

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Mr. Devadipta Das, Adv.

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SLPC 18100/2023, SLPC 18574/2023 & SLPC 19227/2023 Mr. Harish Salve, Sr. Adv.

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Mr. Sandeep Grover, Adv.

Mr. Aditya Nayyar, Adv.

Mr. Tarang Agarwal, Adv.

Mr. Abhishek Arora, Adv.

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SLPC 18574/2023 & SLPC 19227/2023 Mr. Mukul Rohatgi, Sr. Adv.

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Mr. Rishabha Raj Thakur, Adv.

Mr. Chirag Nayak, Adv.

Mr. Ishaan Duggal, Adv.

Ms. Mukta Halbe, Adv.

Mr. E.C. Agrawala, AOR

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, C.J.:— Leave granted.

2. These appeals arise from a judgment dated 27 July 2023 of a Division Bench of the High Court of Karnataka. The High Court set aside a judgment of a Single Judge, in a writ appeal¹. As a consequence of the impugned judgment, a Letter of Intent² which was issued by Bharat Heavy Electricals Limited³, in favour of the appellant has been quashed and BHEL has been directed to consider the bid submitted by the first respondent in terms of a Notice Inviting Tenders dated 24 June 2022.

3. BHEL was awarded a contract for setting up the 5 × 800 MW Yadadri Thermal Power Station. A part of the work was sought to be subcontracted. BHEL invited bids for undertaking the work of design, engineering, manufacturing, supply and other related works pertaining to an Ash Handling Plant. The appellant submitted its bid. On 29 September 2022, a letter of intent was issued to the appellant for a total contract value of Rs. 378.64 crores.

4. The controversy in the present case turns on the pre-qualification requirement for bidders, notified by BHEL. Clause 01.00.00 deals with the technical criteria. Clauses 01.01.01, 01.01.02, and 01.01.03 are material in the present case. Clause 01.01.01 contains certain specific requirements that bidders had to fulfill. It read as follows:

“The bidder should have executed at least one (1) number Ash Handling Plant (AHP) in India/abroad for a thermal power station using sea water/plain water involving design, engineering, manufacture, procurement, supply, erection & commissioning (or supervision of erection & commissioning) comprising the following systems which should be in successful operation for at least (1) year as on date of submission of the bid:

- a. Bottom ash handling system comprising jet pump system in conjunction with water impounded bottom ash hopper designed from minimum 50 TPH (on dry ash basis) capacity or more for pulverized coal fired boilers.

AND

- b. First stage fly ash handling system for conveying fly ash from ESP hoppers to Intermediate Surge Hopper (ISH) by vacuum conveying system designed for minimum 30 TPH capacity (dry ash basis) per stream.

AND

- c. Second stage fly ash handling system for conveying fly ash from Intermediate Surge Hopper (ISH) to Fly ash silos by pressure conveying system designed from minimum 20 TPH

capacity (dry ash basis) per line for a distance not less than 500 mtrs.

AND

d. High Concentration Ash Slurry Disposal (HCSD) System for minimum 40 TPH capacity (dry ash basis) per line.

The above Clauses 01.01.01 (a), (b), (c) and (d) can be in one single plant or in a combination of plants.”

5. Clause 01.01.02 stipulated that a bidder who is a supplier of a bulk material handling system, but does not fulfill the requirements under clause 01.01.01 could also participate, subject to certain stipulations. The clause is extracted below:

“Bidder who is a supplier of bulk material handling system but does not meet the requirements under clause 01.01.01 above in part or in full can also participate provided he has executed at least the following systems design, engineering, manufacture, supply, erection & commissioning (or supervision of erection & commissioning):

a. Fly Ash Handling System for conveying Fly Ash from ESPs in dry form (vacuum conveying or pressure conveying system) or in wet slurry mode

OR

b. Bulk material handling system, comprising of belt conveyors having a minimum design capacity of 800 TPH

The systems mentioned at 01.01.02 (a) or (b) above should be in successful operation in at least two (2) plants for at least two (2) years as on date of submission of bid and should have been installed for pulverized coal fired boiler units in India/abroad generating not less than 40 TPH of Ash per boiler.

AND

Collaborate(s)/Associate(s) with party(ies) who meet(s) either the total requirement under 01.01.01 (a), (b) and (c) above or any of the above requirement under 01.01.01 (a), (b) and (c), which the bidder himself is not able to meet.

In such a case, the Bidder shall be required to furnish consortium agreement jointly executed by the Bidder and the collaborator (s)/Associate(s) and each executant, shall be jointly and severally liable to employer for successful performance of the relevant system, as per the format (Annexure-A) enclosed along with bid. The collaboration agreement should be submitted along with the bid. In such a case, each Collaborator/Associate shall be required to furnish a bank guarantee at the time of placement of order as follows:

i. INR 10 Lakh (Rupees Ten Lakh) for Collaborator/Associate for Jet pumping system

- ii. INR 25 Lakh (Rupees Twenty Five Lakh) for Collaborator/Associate for Vacuum conveying system
- iii. INR 25 Lakh (Rupees Twenty Five Lakh) for Collaborator/Associate for Pressure Transportation system

AND

Collaborate(s)/Associate(s) with party who meets the requirement under 01.01.01 (d) above which the bidder himself is not able to meet.

In such a case, the Bidder shall be required to furnish Agreement of Support jointly executed by the Bidder and the collaborator/Associate for successful performance of the HCSD system as per the format (Annexure-B) enclosed along with bid. The Agreement of Support should be submitted along with the bid.

In case bidder collaborates/associates for more than one system with a party, then the Collaborators/Associate shall be required to furnish a bank guarantee for an amount arrived at by adding up the amounts for the relevant systems as above."

6. Clause 01.01.03 then provided as follows:

"The activity of design and engineering under 01.01.01 (a), (b) and (c) should have been carried out by the bidder and not through any external design agency/agencies. The activity of design and engineering under 01.01.01 (d) should have been carried out by the bidder or through any external design agency having experience of HCSD system.

For design and engineering activity referred under paras 01.01.02 the activity should have been carried out by either the bidder or through design agency/agencies having experience for reference systems. In case of collaborator(s)/associate(s) meeting the balance part of total requirement under clause 01.01.01 (a), (b), (c) and (d) the activity of design and engineering for the reference systems should have been carried out by them.

Bidders qualifying under SI No. 01.01.02 and collaborating/associating with party(s) meeting total/balance part of 01.01.01 (a), (b), (c) and (d) shall follow the following for supply and manufacturing of equipment. Bidder shall manufacture from their manufacturing set up based on collaborator(s)/associate(s) drawing for the clause which bidder himself is not meeting the requirement but the collaborator(s)/associate(s) is meeting the requirement, then the collaborator(s)/associate(s) shall approve bidder's manufacturing facilities and manufacturing quality standards. Also after the manufacture of the items, the product shall be inspected by the respective collaborator(s)/associate(s) and furnish certificate of conformance (COC) for the product.

Also, BHEL/Customer shall approve manufacturing facilities of the equipment of the vendor's self-manufacturing items in case the items are being manufactured by bidder as per collaborator (s)/associate(s) design and manufacturing drawing."

7. These clauses were followed by the documents which were required to be furnished. Among them, if the bidder had entered into a consortium agreement in order to meet the requirements of clause 01.01.01 as permitted by clause 01.01.02, a copy of the consortium agreement was to be submitted along with the tender documents. If the bidder was a foreign party, there was a mandatory requirement of having a collaboration/consortium agreement with an Indian agency for erection and commissioning at site.

8. Clause 01.01.02 permitted a bidder who did not meet the criteria specified in 01.01.01, to enter into a consortium agreement. Accordingly, the appellant entered into a consortium agreement with a Chinese company by the name of Fujian Longking Company Limited, the fourth respondent. Annexure 1 of the agreement specified the rights and responsibilities of the appellant on the one hand and the Chinese company on the other in the following terms:

"1. The first party (M/s. BTL EPC Ltd. Kolkata) shall undertake complete works as detailed in NIT which includes detailed design & engineering, manufacturing, supply, erection, testing, commissioning, trial run, demonstration of PG test and handing over for complete ash handling plant.

2. The second party (M/s. Fujian Longking, China) shall undertake basic design, vetting of detail engineering, Support in manufacturing, Support/Supervision of erecting, commissioning & PG test for complete AHP (excluding HCSD system)."

9. On 23 July 2020, the Public Procurement Division in the Department of Expenditure of the Union Ministry of Finance issued an Order imposing certain restrictions under Rule 144(xi) of the General Financial Rules, 2017, whereby a prospective bidder from a country that shares a land border with India, would be eligible to bid, only if such bidder is registered with the Competent Authority. The Order, which is described as "Public Procurement No. 1" specified a requirement of registration in the following terms:

"Requirement of registration

1 Any bidder from a country which shares a land border with India will be eligible to bid in any procurement whether of goods, services (including consultancy services and nonconsultancy services) or works (including turnkey projects) only if the bidder is registered with the Competent Authority, specified in Annex I.

2 This Order shall not apply to (i) cases where orders have been placed or contract has been concluded or letter/notice of award/acceptance (LoA) has been issued on or before the date of this order; and (ii) cases falling under Annex II.”

10. Clause (6) of the Order defined a “bidder” as follows:

“Bidder” for the purpose of this Order (including the term ‘tenderer’, ‘consultant’, ‘vendor’ or ‘service provider’ in certain contexts) means any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.”

11. Similarly, clause (8) contains a definition of the expression “bidder from a country which shares a land border with India” in the following terms:

“Bidder from a country which shares a land border with India” for the purpose of this Order means

- a) An entity incorporated, established or registered in such a country; or
- b) A subsidiary of an entity incorporated, established or registered in such a country; or
- c) An entity substantially controlled through entities incorporated, established or registered in such a country; or
- d) An entity whose beneficial owner is situated in such a country; or
- e) An Indian (or other) agent of such an entity; or
- f) A natural person who is a citizen of such a country; or
- g) A consortium or joint venture where any member of the consortium or joint venture falls under any of the above.”

12. The first respondent instituted a writ petition⁴ under Article 226 of the Constitution before the High Court of Karnataka contending that the award of the contract to the appellant was in breach of the conditions which were imposed in the Order dated 23 July 2020 of the Union Ministry of Finance. The contention was that the Chinese company which had entered into a consortium agreement with the appellant so as to enable the appellant to fulfill the eligibility conditions under the tender floated by BHEL was required to be registered with the competent authority, according to the Public Procurement Order dated 23 July 2020. It was urged that in the absence of such registration, the tender submitted by the appellant did not meet the technical requirements and could not have been considered by BHEL.

13. The Single Judge of the Karnataka High Court dismissed the writ

petition by a judgment dated 2 November 2022. The Single Judge held that

- (i) Entering into a consortium agreement was permissible under the terms of the tender;
- (ii) The submission of the tender by the appellant, along with the copy of the agreement, was proper;
- (iii) On the issue of mandatory registration under the Public Procurement Order, a clarification dated 8 February 2021 stated that a bidder can procure raw material, as opposed to finished goods, from an entity such as the fourth respondent even if the latter was not registered with the competent authority;
- (iv) Since the appellant was not even procuring raw materials but only sought support for design, erection and commissioning requirements, the bid did not violate the procurement order;
- (v) The Court's scrutiny was limited to the decision-making process;
- (vi) The financial bid of the appellant was Rs. 58 crores lower in value than the financial bid submitted by the first respondent; and
- (vii) The decision-making process was not arbitrary and did not merit interference, in line with the principle of limited judicial scrutiny of the discretion vested in a tendering authority.

14. The judgment of the Single Judge was carried in appeal.

15. The Division Bench of the High Court reversed the decision of the Single Judge and allowed the writ appeal. The respondent (who was the appellant before the Division Bench) argued that

- (i) The consortium agreement between the appellant and the Chinese entity was meant to confer eligibility on the appellant, which did not possess the requisite qualifications on its own;
- (ii) Thus, by way of the consortium agreement, a bidding consortium was created where the Chinese entity was a joint bidder;
- (iii) As such, according to the Public Procurement Order the Chinese company was required to register with the competent authority in order to participate in the tender process; and
- (iv) In the absence of registration, the bidding consortium comprising the appellant and the Chinese Company did not meet the technical criteria of the tender.

16. The appellant on the other hand, maintained that

- (i) The agreement was not a consortium agreement in the technical sense (clause 7 of the pre-qualification requirements);
- (ii) It was called a consortium agreement only because it was styled in accordance with the template for a consortium agreement, appended to the tender document;

- (iii) If it were actually a consortium agreement in the strict sense, the Chinese company would have contributed to the bid and had a share in the profits as well;
- (iv) the nature of the agreement was more like a service contract than like a consortium agreement strictly speaking;
- (v) The Chinese company was a mere associate who was providing services in relation to the designs under the terms of the agreement; it did not contribute to the bid and was not entitled to any profits that accrued in favor of the appellant;
- (vi) The bid was submitted and awarded in favour of the appellant as a standalone bidder and not as a part of a bidding consortium; and
- (vii) Considering the nature of the contract and the Chinese company's limited role, the non-registration under the Procurement Order was inconsequential.

17. By its impugned judgment dated 27 July 2023, the Division Bench reversed the decision of the Single Judge. The Division Bench observed that

- (i) The agreement between the appellant and the Chinese Company is an undertaking to the tendering authority as to the due performance of the contract;
- (ii) The agreement is central to the appellant's bid and is thus a consortium agreement;
- (iii) The bid was thus made on behalf of the bidding consortium;
- (iv) According to the Single Judge, the requirement of registration was not applicable in view of the clarification by the subsequent Office Memorandum dated 23 July 2020; this subsequent clarification applied in respect of import of raw material and whether the goods procured would be considered raw material or finished goods was relevant only after the award of the contract;
- (v) The requirement of mandatory registration had not been done away with by the clarification contained in the Office Memorandum dated 23 July 2020;
- (vi) The Chinese company, as a part of the bidding consortium was required to register in the absence of which the bidding consortium was ineligible to participate in the tender process; and
- (vii) BHEL, in awarding the tender, had overlooked this violation and wrongly based its decision only on the financial bid.

18. The Division Bench thus, set aside the Single Judge's decision. The LoI which was awarded to the appellant has been set aside with the consequential direction to process the bids submitted by the first respondent in terms of the Notice Inviting Tenders. In the meantime, *albeit* in pursuance of interim directions to the effect that no equities

would be created in favour of the successful bidder, work has proceeded apace. The stage of the work and the impact, if any, it should have on the outcome of these proceedings would be considered subsequently.

19. Besides this appeal which has been filed by the successful party to whom the contract was awarded by BHEL, a companion Special Leave Petition has been filed before this Court by BHEL and by the Telangana State Power Generation Company Limited. The latter had awarded the contract for the construction of a 5 × 800 MW Thermal Power Station to BHEL and in its submission, the project is likely to get affected by the orders which have been passed by the High Court in relation to the setting up of the Ash Handling Plant.

20. We have heard Mr. Mukul Rohatgi, Mr. Gaurab Banerjee and Mr. V Giri, senior counsel appearing on behalf of the appellants in support of the appeals. Mr. Harish N Salve and Mr. Neeraj Kishan Kaul, senior counsel have appeared on behalf of the original petitioner before the High Court, namely, the first respondent. For convenience of reference, the parties as they appear in the lead appeal are referred to in these proceedings.

21. The controversy in the present case lies in a narrow frame. Clause 01.01.01 stipulates four requirements that each bidder has to fulfill. All the requirements are cumulative as is indicated by the use of the word "and" after sub-clauses (a), (b) and (c). Evidently, it is not in dispute that the appellant did not fulfill the technical requirements specified in clause 01.01.01. However, this was not the end of the matter for the reason that clause 01.01.02 specifically contemplated such an eventuality. This clause stipulates that a bidder which is a supplier of bulk material handling systems, but does not meet the requirements under clause 01.01.01 in part or in full, could also participate provided such a bidder had executed at least the systems design, engineering, manufacture, supply, erection and commissioning of projects of the nature described in either (a) or (b). Apart from having experience of the projects that were specified under clause 01.01.02, there was an additional condition which was that such a bidder must collaborate/associate with a party or parties who meet all the requirements of sub-clauses (a), (b), and (c) of clause 01.01.01. In other words, though the bidder itself was not able to meet the requirements of clause 01.01.01, such non-compliance would be obviated if the bidder collaborated or associated with an entity that met the requirements of sub-clauses (a), (b) and (c) either individually or in conjunction with the bidder himself. In that case, the bidder was required to furnish a consortium agreement jointly executed with the collaborator/associate so as to accept joint and several responsibilities towards the tendering authority. Clause 01.01.03 contains certain stipulations in regard to the activity of design and engineering under

clause 01.01.01.

22. Clause 7.2 of the pre-qualification requirements contains specific stipulations in regard to the nature of the bidding consortium. Clause 7.2 is in the following terms:

“The members of bidding Consortium should have entered into a Memorandum of Association (MOA) between themselves. One of the members of Consortium, holding at least 51% of the equity/ownership stake shall be authorized and nominated as the ‘Lead member’ (Lead Member) to act and represent all the members of the Consortium for bidding and implementation of the Project.”

23. The agreement between the appellant and the Chinese company, it is common ground, did not involve an equity, stake, or ownership of the Chinese company. This aspect has not been disputed. The issue which fell for determination before the High Court was whether the bid submitted by the appellant was liable to be rejected on the ground that the Chinese company with whom it had entered into a consortium agreement was not registered with the competent authority in terms of the Public Procurement Order dated 23 July 2020.

24. At this stage, it would be material to note that the Procurement Order dated 23 July 2020 has been clarified by an OM dated 8 February 2021. The OM stipulates that in terms of paragraph 11 of the Order dated 23 July 2020, in the case of a works contract including a turnkey contract, the contractor shall not be allowed to sub-contract the work to any contractor from a country that shares a land boundary with India unless the contractor is registered with the competent authority. The OM clarifies the earlier order by stipulating that:

“However, no such restriction is stipulated in the Order regarding other procurements i.e. procurement of Goods, Services, etc.”

25. The High Court went on to decide whether the registration requirement applied even after the clarification and whether the absence of such registration vitiated the bid and the decision to award the contract to the appellant.

26. The submissions which have been urged on behalf of the appellant are that:

- (i) The appellant was at all material times the sole bidder to whom a LoI was awarded by BHEL on 29 September 2022;
- (ii) There was no bidding consortium within the meaning of clause 7.2 of the pre-qualification requirements;
- (iii) The Chinese company with whom a consortium agreement was entered into by the appellant had no equity in the project which was being contracted for by the appellant;
- (iv) The Procurement Order dated 23 July 2020 with the clarification which was issued thereafter on 8 February 2021 requires only a

registration and does not impose a disqualification; and

(v) As a matter of public interest, the High Court ought not to have interfered consistently with settled legal principles since a large part of the work has already been completed.

27. These submissions have been opposed on behalf of the respondents who have urged that:

- (i) The appellant did not qualify under clause 01.01.01 and could bid for the project only in pursuance of the experience of the Chinese entity with whom a collaboration agreement was entered into;
- (ii) The consortium agreement with the Chinese company specifically stated that the appellant did not qualify in terms of clause 01.01.01;
- (iii) The definition of the expression 'bidder' in the OM dated 23 July 2020 is broad enough so as to encompass a consortium agreement;
- (iv) The above position would be amplified by the responses submitted by the appellant in the course of the queries that were raised in the tendering process;
- (v) Clause 52 of the Special Conditions of Contract specifically emphasizes the conditions that were set out in the OM;
- (vi) The responses which were furnished by the appellant to the pre-qualification requirements contain a specific statement that the appellant had entered into a consortium agreement with the Chinese company; and
- (vii) Likewise, the Chinese company in its letter dated 18 July 2023 clarified that it had entered into a consortium agreement in pursuance of which it was undertaking joint and several liability towards BHEL.

28. The bid which was submitted by the appellant was lower than the bid submitted by the first respondent in the vicinity of Rs. 58 crores. During the course of the hearing, it has been submitted on behalf of the first respondent that the first respondent would be willing to match the bid which was submitted by the appellant and if the contract is awarded to it in pursuance of the impugned judgment of the Division Bench of the High Court, it would take over the contract from the stage where it was left by the appellant. However, BHEL and Telangana State Power Generation Company have stated that since the ongoing work is design intensive, substituting a new entity would require redesigning of the whole project at a significant cost to the exchequer.

29. In assessing the validity of the rival submissions, it needs to be noted that the Procurement Order issued by the Union Ministry of Finance on 23 July 2020 imposes a requirement of registration where a

bidder shares a land border with India. The order specifies that such a bidder would be eligible to bid in any procurement of goods, services (including consultancy and non-consultancy services), or works, including turnkey projects if the bidder is registered with the competent authority as set out in Annexure I. The expression 'bidder' is defined in clause (6) in broad terms so as to encompass any member of a consortium or joint venture. Similarly, clause (8) also incorporates a consortium or joint venture.

30. Clause 11 of the Order contains the following provision in relation to the sub-contracting of works contracts in the following terms:

"In works contracts, including turnkey contracts, contractors shall not be allowed to sub-contract works to any contractor from a country which shares a land border with India unless such contractor is registered with the Competent Authority. The definition of "contractor from a country which shares a land border with India" shall be as in paragraph 8 above. This shall not apply to sub-contracts already awarded on or before the date of this Order."

31. The above requirement in clause 11 was subsequently clarified in the OM of the Union Ministry of Finance dated 8 February 2021 so as to exclude from its ambit the procurement of goods and services. According to the appellant, the relaxation which was granted on 8 February 2021 would enure to its benefit. At this stage, it would be material to note that clause 01.01.02 of the pre-qualification requirements enables bidders who otherwise do not fulfill the requirements of clause 01.01.01 to submit a bid so long as they fulfill the requirements of having experience in the commissioning of projects as spelt out in the paragraph and in addition, they would have to have a collaborator or an associate who meets the requirements of clause 01.01.01. In such a case, the bidder is required to furnish a consortium agreement jointly executed with the collaborator or associate. It was in pursuance of the above requirement that the appellant submitted a consortium agreement with the Chinese company.

32. Clause 7 of the bid documents stipulates that a bidder may collaborate or tie up in any legal form with other parties. As part of this requirement, clause 7.2 envisages that a Memorandum of Association should be executed between the members of a bidding consortium in which one of the members holding at least 50% of the equity/ownership stake would be treated as a lead member to act for and represent all the members of the consortium. The agreement between the appellant and the Chinese company does not fall within the description of clause 7.2 since the Chinese company has no ownership or equity in the project, no MoU as required by the clause was executed between the appellant and the Chinese entity and it has

no contribution in the bid. The agreement was pure and simple, an agreement in terms of the requirements that were imposed by clause 01.01.02.

33. Neither Telangana State Power Generation Company Limited nor for that matter BHEL raised any dispute in regard to the eligibility of the appellant to bid for the contract. The challenge was addressed by the first respondent who is a competing bidder whose bid was admittedly higher than the bid which was submitted by the successful bidder by approximately Rs. 58 crores. The Procurement Order dated 23 July 2020 imposes a registration requirement and also states that the bidder would not be eligible unless it is registered in the event that it belongs to a country that shares a land border with India. The primary decision on whether the appellant meets the technical requirements of the tender on account of its collaborator/associate being a Chinese company that was not registered had to be determined by BHEL. BHEL has not found that there was a breach of the OM dated 23 July 2020 which, as noted earlier, has been relaxed by the subsequent OM dated 8 February 2021. In this context, it has been submitted on behalf of the appellant that out of a total contract value of Rs. 378.64 crores in the contract between BHEL and the appellant, the Chinese sub-contract for carrying out design and other related aspects of the Ash Handling Plant is to the extent of US dollars 95,000 corresponding approximately to Rs. 78 lakhs, which is only 0.2% of the entire contract value. BHEL and the Telangana State Power Generation Company found that the agreement with the Chinese company was in the nature of a service agreement and not a "consortium" under clause 7.2 of the pre-qualification requirements. The bid was made by the appellant as a standalone entity and not in a consortium comprising the unregistered Chinese entity. It was neither a joint bid nor a bid made by a bidding consortium. Thus, the registration requirement did not apply. Further, in accordance with the pre-qualification requirements, the appellant's manufacturing facilities were duly examined and approved by BHEL, and the bid was approved after due consideration and satisfaction of BHEL, the tendering authority. The Union Government by its subsequent OM dated 8 February 2021 has diluted the rigours of the earlier Procurement Order dated 23 July 2020 by stipulating that the earlier order shall not affect the procurement of goods and services *per se*.

34. In this view of the matter, we are of the considered view that the Division Bench which was considering an appeal against a judgment of a Single Judge rejecting the writ petition ought to have proceeded with circumspection.

35. It is settled law that in contracts involving complex technical issues, the Court should exercise restraint in exercising the power of

judicial review. Even if a party to the contract is 'State' within the meaning of Article 12 of the Constitution, and as such, is amenable to the writ jurisdiction of the High Court or the Supreme Court, the Court should not readily interfere in commercial or contractual matters. This principle has been reiterated in a recent judgment of this Court. Justice J B Pardiwala, speaking for the Bench in *Tata Motors Limited v. BEST* held:

"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.⁵"

36. The Court ought to defer to the discretion of the tender inviting authority which, by reason of having authored the tender documents, is best placed to interpret their terms. The Courts ought not to sit as courts of appeal but review the decision-making process and examine arbitrariness or mala fides, if any.⁶

37. Even in a writ appeal, it is well settled that the Division Bench would ordinarily not interfere with the judgment of a Single Judge unless it suffers from perversity or error.

38. Hence, having considered the rival submissions, and for the above reasons, we are of the view that the interference of the Division Bench in the judgment of the Single Judge was not warranted. That

apart, during the course of the hearing, it has emerged before this Court that the contract is under implementation. Paragraphs 39 and 40 of the affidavit which was filed before the High Court by BHEL are extracted below:

39. Of the total Project work, 80% of the civil work, 72% of the structural work and 65% of the supply work of the Project in totality has been completed. BTL has completed around 80% of the mechanical engineering, supply and work worth about INR 50,00,00,000 so far.

40. Further, 99% of the Engineering for the Wet Ash system has been completed by BTL. Moreover, 50% of the Civil and Structural Works of the Power station, being completed by BHEL, is already in place”

39. At this stage, the High Court has, while setting aside the award of the contract to the appellant, directed that the bid which was submitted by the first respondent shall be considered in terms of the Notice Inviting Tenders. Though during the course of the hearing, the first respondent has made a statement through senior counsel that it would match the bid which was submitted by the appellant, there can be no gainsaying the fact that this will cause insuperable difficulties in the implementation of the contract since the work under the contract has progressed. While the appellant was placed on notice that this would not create any special equities in its favour, there is apart from the interest of the appellant which is a private entity, the interest of both the Telangana State Power Generation Company Limited and of BHEL, both of which are public entities which have invested funds for the realization of the project involving the setting up of the 5 × 800 MW thermal power plant.

40. For the above reasons, we allow the appeals and set aside the judgment of the Division Bench of the High Court of Karnataka. The judgment of the Single Judge dismissing the writ petition shall stand restored. There shall be no order as to costs.

41. The civil appeals are accordingly allowed.

42. Pending applications, if any, stand disposed of.

¹ Writ Appeal No. 1169 of 2022 (GM-TEN)

² “LoI”

³ “BHEL” (the second respondent)

⁴ Writ Petition No. 20333 of 2022 (GM-TEN)

⁵ *Tata Motors Limited v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST)*,

2023 SCC OnLine SC 671.

⁶ *Monte Carlo Limited v. National Thermal Power Corporation Limited*, (2016) 15 SCC 272.

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