



IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7495 OF 2023

(Arising out of S.L.P. (Civil) No. 21467 of 2022)

State of Jharkhand,
through its Secretary,
(Mines & Geology) and Another

... Appellant(s)

VERSUS

SOCIEDADE DE FOMENTO
INDUSTRIAL PVT. LTD.
and Others

... Respondent(s)

J U D G M E N T

S.V.N. BHATTI, J.

1. The Civil Appeal arises from the Judgment dated 24.08.2022 in L.P.A. No. 165 of 2022 in the High Court of Jharkhand at Ranchi. The State of Jharkhand and the Director of Mines and Geology, Ranchi/Respondents in the L.P.A are the Appellants herein.

2. SOCIEDADE DE FOMENTO Industrial Private Limited, Margao, Goa/the Respondent herein filed Writ Petition (C) No. 5152/2021 praying

for an appropriate writ directing the first Appellant to proceed with the second round of auction as per Sub-Rules (10) to (12) of Rule 9 of the Mineral (Auction) Rules, 2015, as amended by Mineral (Auction) Amendment Rules, 2017* and for a further direction restraining the Appellants herein from taking any action to defeat the rights of the Respondent in the subject tender process. In the given circumstances, on 22.04.2022, the Writ Petition was dismissed by holding that the Respondent's technical bid even if found to be compliant, the bid cannot be taken to the next stage of the tender process. The Respondent, hence, filed L.P.A No. 165/2022 and by the Impugned Judgment, the L.P.A was allowed. The Impugned Judgment, among other reasons, held that the Appellants are bound by the statutory obligation under the second proviso to Sub-Rule (12) of Rule 9 of M(A) Rules and the bid of the Respondent is considered further. The Division Bench held that the decision-making process of the Appellants to annul tender no. MSTC/RNC/DEPARTMENT OF MINES AND GEOLOGY/42/RANCHI/19-20/35661, and the auction notice dated 28.01.2020, is vitiated. Hence, the Civil Appeal at the instance of the State and the Director of Mines and Geology.

* M(A) Rules.

3. We have perused the record and the judgments in Writ Petition No. 5152/2021 and L.P.A. No. 165/2022. We are of the view that to appreciate the contentions canvassed by the Appellants in the Civil Appeal, a chronology of the admitted circumstances is prefaced.

4. The first Appellant, on 25.10.2019, issued a notice inviting tender* to allocate and grant mining lease through e-auction of bauxite mineral located in Lodhapat, Jobhipat and Hethilodha blocks over an area of 75.193 hectares*. The last date for submission of the technical bid and IPO was 16.12.2019. The NIT dated 25.10.2019 specifically invited the expression of interest through the digital platform on the MSTC website and submission of a physical copy of the uploaded bid documents at the office of the second Appellant. It is admitted by the parties that in response to tender notice 25.10.2019, the Respondent has not uploaded the technical bid and IPO through the digital platform of MSTC. The Respondent, however, submitted the bid letter dated 13.12.2019, which was acknowledged by the MSTC by e-mail dated 16.12.2019.

5. As per the applicable format of evaluation of the bid documents, the Tender Evaluation Committee* was constituted. In the meeting dated 17.12.2019, the TEC in evaluation recorded that the Respondent

* NIT.

* The Subject Mining Lease.

* TEC.

submitted the technical bid physically at the Department. The Respondent did not submit the technical bid on the electronic platform – MSTC website. The TEC, referring to clause 13.1.2 of the tender document, stated that the technical bid must have been submitted electronically, and physical copies have been filed by the deadline. The minutes of the even date also mention the consequences of not communicating the expression of interest in the way the tender document specified, meaning that if the mode and the manner of the communication of the expression of interest are not followed, the technical bid will be deemed not received. The TEC in the meeting of the even date recommended annulment of the auction initiated through auction notice dated 25.10.2019.

5.1 The Appellants, following the recommendations of the minutes of the meeting dated 17.12.2019, issued a notification dated 28.01.2020, inviting bids for the subject mine blocks. This is referred to as second attempt of auction in the pleadings of the parties. The present schedule of tender is that the last date of submission of the technical bid and IPO on the MSTC website was 13.03.2020. The date of opening the tender was 16.03.2020. The original tender evaluation schedule, which was affected by the COVID-19 pandemic, was changed through a letter dated 08.06.2020. The schedule for technical evaluation was changed. It

was noted by the TEC in the meeting held on 11.06.2020, that in response to the NIT dated 28.01.2020, only one expression of interest was received, i.e., from the Respondent herein and further resolved as follows: -

“At the outset, the members of the Tender Evaluation Committee were welcomed and briefed about the agenda for the meeting.

Lodhapat, Jobhipat & Hethilodha Bauxite Block Gumla district was put up for second attempt of auction on 28th January, 2020 vide Tender No. MSTC/RNC/DEPARTMENT OF MINES AND GEOLOGY/42/RANHCI/19-20/35661. The following bidder has uploaded its technical bid on the electronic platform and submitted the physical copy at the department on/before the Bid due date:

- i. M/s Sociedade De Fomento Industries Pvt. Ltd., Margao.*

Further, Rule 9 (12) ___ of Mineral (Auction) Amendment Rules, 2017 states that, during the second attempt of auction process the bidding shall continue to the second round even in case the number of technically qualified bidders is less than three.

The Committee evaluated the documents submitted by the bidder and found that all the documents were as per the eligibility criteria mentioned in the tender document. The committee therefore recommended that the following bidder shall be declared as technically qualified bidder and suggested that the future course of action shall be undertaken as per the decision of the Government:

- i. M/s Sociedade De Fomento Industries Pvt. Ltd., Margao.”*

6. The Appellants, by letter dated 27.12.2021, advised MSTC to upload the decision of the State Government to annul the auction initiated through tender dated 25.10.2019 and 28.01.2020. In other words, the Appellants have decided to annul the auction without processing further as desired by the TEC in the meeting dated 11.06.2020.

7. The Respondent filed Writ Petition No. 5152/2021 canvassing two grievances, namely, the inaction of the Appellants in finalising the tender in terms of the recommendation of the TEC dated 11.06.2020, and for consideration of the Respondent's bid in terms of the second proviso to Sub-Rule (12) of Rule 9 of M(A) Rules. The Respondent contends that the decision of the TEC dated 17.12.2019 resulted in the annulment of the first attempt of the auction process initiated through NIT dated 25.10.2019. The Appellants in terms of Rule 9, Sub-Rule (12) have two options: Firstly, to annul the whole process initiated through NIT dated 25.10.2019, i.e., to conduct a fresh auction with *de novo* terms and conditions. Alternatively, to conduct the second attempt of auction with the already notified terms and conditions. The Appellants in the case on hand, decided to conduct the second attempt of auction, incorporating the same terms and conditions as in the first annulled attempt of auction. The Appellants, hence, issued the NIT dated 28.01.2020 by following

Rule 9, Sub-Rule (11), Clause (b); therefore, the Appellants have rightly reissued the NIT with the same terms and conditions as covered by the NIT dated 25.10.2019. Having issued a second attempt of auction, it is averred that the statutory obligations attached to such process are also adhered by the Appellants.

7.1 We notice that only one response to the NIT dated 28.01.2020 was received, and the decision of the TEC to take the auction process to the next stage. Therefore, the TEC recommended for further consideration of the case of the Respondent as may be decided by the Appellants. Hence, the Respondent prayed for the prayers referred to in para no. 2 hereinabove.

7.2 The Appellants opposing the Writ prayers, inter alia averred that in response to the NIT dated 25.10.2019, no expression of interest/bid was received in terms of the subject tender document dated 25.10.2019. In other words, the consideration by the TEC on 17.12.2019 is merely a perfunctory consideration, because no technical bid in terms of the tender document was received or was made available for evaluation. The steps taken from 25.10.2019 till 17.12.2019 cannot be considered as the first attempt of auction in terms of the subject Rules. In response to the NIT dated 28.01.2020, the Respondent alone submitted the technical bid and the IPO. The TEC found that the

document submitted by the Respondent satisfies the eligibility criteria and is compliant with the tender document. The TEC, therefore, has resolved that the future course of action on the compliant technical bid may be undertaken as per the decision of the Appellants. The Appellants assert that the minutes of the meeting dated 11.06.2020 are recommendatory and not mandatory. The Appellants instead of proceeding further on the lone bid of the Respondent, decided to notify a fresh auction after annulling the tender process initiated through NIT dated 25.10.2019, because there was only a single bid of the Respondent. The Appellants had also noted that the rights for mineral extraction are conferred on a third party and the decision so taken conforms to the public interest. The mineral in question is bauxite, which is of great value, both, monetarily and as a natural resource. Taking the single bid of the Respondent forward by the Appellants would result in substantial loss to the exchequer. The decision to annul the auction notice dated 25.10.2019 is in public interest. It conforms to the rules applicable to the tender process and the scope of judicial review in award of contracts is very limited. Therefore, no case is made out warranting judicial review. The Appellants further canvassed that they must have the freedom of contract and even the acceptance of the technically qualified highest bid is looked through the prism of public

interest, and the comparison with the procedure adopted in other states is no reason or a guide to consider the price bid of the Respondent. The Appellants specifically contended that in the first attempt of the auction, there was no bid at all; in the second attempt, there was only one bid. Therefore, the consideration of the technical bid of the Respondent in terms of the second proviso to Sub-Rule (12) of Rule 9 did not arise.

7.3 We notice that the Learned Single Judge looked at the issue in the Writ Petition from the right perspective, and the summary of analysis of the judgment of the Learned Single Judge is noted hereunder:-

- (i) That, the initial NIT issued in 2019 received no electronic technical bids, leading to the annulment of the first auction attempt. Subsequently, a new NIT was issued in 2020.
- (ii) That, Sub-Rules (10), (11), and (12) of Rule 9 of the M(A) Rules, 2015, as introduced by the Rules, 2017, specifically address situations where there are “technically qualified bidders less than three.” In such cases, the highest initial price offers of the technically qualified bidders are taken as the reserve price for the second attempt of the auction. However, if there are no technically qualified bidders, there is no basis for a second auction attempt. In the present case, the State Government issued a fresh NIT after annulling the first auction attempt.

- (iii) That, there were no “technically qualified bidder” in the first NIT for both the blocks and as such there was no question of second attempt of auction. The factual context of the case suggests that there has been no deviation from the literal meaning of the relevant provisions of the Rules, 2015 as amended by Rules, 2017.
- (iv) That, since the first NIT was already annulled on 27.01.2020, there was no need to issue another annulment letter for the first NIT. Further, a fresh NIT was issued for the Lodhapat Bauxite Block, supporting the Petitioner’s argument that the NIT dated 28.01.2020 for both blocks were indeed annulled.
- (v) Therefore, if the Government decides to cancel a tender and issue a fresh one, on the ground of lack of adequate competition and to make it more competitive in the interest of revenue, the said decision does not require interference under writ jurisdiction of the High Court unless the same is found to be mala fide or arbitrary. In this case, the Respondents have not alleged anything mala fide against the Government and have failed to make out any case of arbitrariness against the Petitioners.

8. The Division Bench in the L.P.A., filed against the judgment in W.P. No. 5152/2021, framed the following issues-

“(I).Whether the State Government has gone into second attempt of auction process in pursuance to notification vide orders dated 27.12.2021 and 21.01.2022?

(II).Whether the State can be allowed to go for the fresh tender even though the State Government has resorted to the process in terms of provision as contained under Rule 9(11)(b) of the Rules by resorting to the second attempt of auction process?.”

8.1 The summary of findings recorded by the Division Bench is stated thus: -

- (i) That, the Appellants made their decision based on a note found in a file dated 27.12.2001, which indicated that there were less than two or three bidders. This decision is not valid because the proviso to Sub-Rule (12) of Rule 9 of the M(A) Rules specifies that a decision should be made for a second attempt at the auction process, even if there are less than two or three bidders. This means that even if there is only one bidder, according to this provision, the decision should be made for a second attempt in the auction process. Considering this legal provision, the TEC had already decided to go for the second attempt of the auction process on 11.06.2020.

- (ii) That, once the TEC decided to have a second attempt at the auction process, the State Government cannot use the excuse of resorting to a completely new tender process. Not following the TEC's findings, even when they are provided for in a statutory provision, is unreasonable and arbitrary.
- (iii) That, the Single Judge dismissed the Writ Petition, stating that allowing a single bidder in the auction process would go against public policy. This conclusion is incorrect because the Single Judge failed to recognize that allowing the tender process to proceed with a single bidder does not necessarily contradict public policy. What would be against public policy is if the TEC is required to take action under the statutory provisions and fails to do so. In this case, the TEC's decision should not be considered contrary to public policy, because it was made in accordance with the statutory provisions.

The Division Bench allowed the L.P.A. No. 165/2022.

9. We have heard the Learned Senior Counsel, Mr. Arunab Chowdhury and Mr. Dhruv Mehta, for the Appellants and the Respondent, respectively.

10. Mr. Arunab Chowdhury contends that the Impugned Judgment is wholly illegal, and it liberally exercised the power of judicial review in matters dealing with the conferment of contracts and largess of the State. The case is governed by the Mines and Mineral (Development and Regulation) Act, 1957* and the M(A) Rules. The Division Bench erred in not appreciating the structured and compartmentalised consideration of the bidding process under Rule 9, Sub-Rules (6), (11) and (12) of the M(A) Rules in conducting auctions of minerals. The Impugned Judgment directed itself more on finding out whether the Appellants were correct in law in annulling the NIT dated 25.10.2019, contrary to the decision/recommendation made by the TEC, than finding out the effect of admitted circumstances from the inception. The Appellants did not decide for *de novo* tender contrary to the recommendations of the TEC. To reiterate, it is pointed out that the Impugned Judgment records that the recommendation of the TEC should have been examined and the tender process taken forward for price evaluation, since the decision of the TEC is in accord with the extant Rules. According to the Learned Counsel for the Appellants, the Division Bench ignored all crucial circumstances including the inconsistency or impracticability in examining the lone response of the

* The MMDR Act.

Respondent herein and going forward with a lone price bid. In the absence of communication of the technical bid in terms of Clause 13.1.2 of the tender document, there is no bid present for evaluation before the TEC in the meeting dated 11.06.2020. The TEC recommended the annulment of the first attempt of the auction. The first proviso of Sub-Rule (12) of Rule 9 prescribes that the highest initial price and offer of a technically qualified bidder, if any, in the first annulled attempt shall be the reserved price in the first round of the second attempt. In the case on hand, during the first round of auction attempt, the highest initial price is not available, as no offer is received from anyone, including the Respondent. The consideration of the price bid of the Respondent pursuant to the NIT dated 28.01.2020, in this scenario, and making it obligatory for the State Government to perforce consider the price bid of Respondent is illogical, illegal and unsustainable, apart from being against public interest and a loss to the public exchequer. Therefore, he prays for setting aside the impugned judgment.

11. Mr. Dhruv Mehta argues that the auction was conducted in accordance with the MMDR Act and M(A) Rules and to appreciate the obligation fastened on the Appellants by Sub-Rule (12) of Rule 9 of the M(A) Rules and the unamended Rule 9 of M(A) Rules, is appreciated. According to him, the Appellants have, pursuant to the decision dated

17.12.2019 of the TEC, decided to annul the NIT dated 25.10.2019 and proceed with the second attempt of the auction. The Appellants, by choice, decided to opt for annulling only the first attempt but not the process initiated through NIT dated 25.10.2019. The Appellants issued the second NIT with the same terms and conditions as in the annulled first attempt of auction. Therefore, the second attempt of auction proceeds with the mandate of Sub-Rules (11) and (12) of the M(A) Rules. The Rules are intended to ensure certainty in the finalisation of the mining leases, and for all purposes, the absence of a minimum number of bidders in second attempt of auction pales into insignificance. Even if there is just one response, the Appellants are obligated to process the price bid and decide the bid in accordance with the Rules. Replying to the argument of the Appellants on the decision-making process of the State Government, Mr. Dhruv Mehta contends that the Division Bench is right in finding fault with the decision-making process of the Appellants because the auction process was annulled, contrary to the decision of the TEC dated 11.06.2020. The decision of the TEC was not to annul the tender process but recommend for further consideration subject to the Appellants' decision. Therefore, the decision-making process is vitiated by the incorrect application of the recommendations of the TEC. He prays for dismissing the appeal.

12. The Appellants, through the subject NITs, have set in motion the process of granting lease by auctioning the subject bauxite mines. Natural resources, including mines, minerals, etc., are considered national wealth for the common good and benefit of society through a systematic, scientific and legal exploitation of the natural resources. Grant of mining leases/permits for exploitation of natural resources is one of the sources of revenue for the State Government. It has been consistently held by this Court that the exploitation of natural resources must be in accordance with the law, including environmental and local laws. The economy and economic exploitation, as per the mining plan, is again a guiding factor to the Appellants in awarding contracts concerning natural resources. The bottom line is public interest and maximum validation from exploitation of minerals and natural resources. Therefore, the Rules prescribe the mode and manner in which the bidding process for granting mining lease is taken up, continued and concluded by the Appellants. The tender document lays down the mode and manner of communication of expression of interest/bid both online and filing of physical copy of the document submitted online. The bid filing since conditioned by a definite manner and mode of communication, the mode and the manner would become an important essence not only for communication but how the communication

happens, by whom did the communication happen, etc. These are essential requisites in appreciating the bid documents filed by a party; therefore, the Court keeps in perspective these requisites while according a definite status to the first attempt of auction pursuant to the NIT dated 27.10.2019. The above narrative is detailed, but the issue for consideration on the Writ Prayers of the Respondent is in a limited sphere. Rule 9 of the M(A) Rules reads thus: -

“9. Bidding Process. -

(1) Subject to the provisions of rule 5, the State Government shall issue a notice inviting tender, including on their website, to commence the auction process and such notice shall contain brief particulars regarding the area under auction, including, -

(a) particulars of the area identified and demarcated using total station and differential global positioning system divided into forest land, land owned by the State Government, and land not owned by the State Government; and

(b) estimated mineral resources and brief particulars regarding evidence of mineral contents with respect to all minerals discovered in the area during exploration in accordance with the provisions of the Minerals (Evidence of Mineral Contents) Rules, 2015.

(2) The tender document issued by the State Government shall contain,

(a) geological report pursuant to the Minerals (Evidence of Mineral Contents) Rules, 2015 specifying particulars and estimated quantities of all minerals discovered in the area; and

(b) revenue survey details of the area identified and demarcated using total station and differential global positioning system divided into forest land, land owned by the State Government, and land not owned by the State Government.

(c) the schedule date of commencement of production in case of auction in mining lease in respect of an area having existence of mineral contents established in accordance with rule 5 of the Minerals (Evidence of Mineral Contents) Rules, 2015.

(3) The bidders shall be provided a fixed period, as notified by the State Government, to study the tender document and such reports and the bidding process shall commence only on expiry of such period.

(4) The auction shall be an ascending forward online electronic auction and shall comprise of attempts of auction with each attempt of auction consisting of a first round of auction and a second round of auction.

(5) In the first round of auction, the bidders shall submit,-

(a) a technical bid comprising amongst others, documentary evidence to confirm eligibility as per the provisions of the Act and the rules made thereunder to participate in the auction, bid security and such other documents and payments as may be specified in the tender document; and

(b) an initial price offer which shall be a percentage of value of mineral dispatched.

(6) Only those bidders who are found to be eligible in accordance with the terms and conditions of eligibility specified in rule 6 and whose initial price offer is equal to or greater than the reserve price, referred to as

“technically qualified bidders”, shall be considered for the second round of auction.

(7) The highest initial price offer amongst the technically qualified bidders shall be the floor price for the second round of online electronic auction.

(8) The technically qualified bidders shall be ranked on the basis of the descending initial price offer submitted by them and the technically qualified bidders holding the first fifty percent of the ranks (with any fraction rounded off to higher integer) or the top five technically qualified bidders, whichever is higher, shall qualify as qualified bidders for participating in the second round of electronic auction.

Provided that if the number of technically qualified bidders is between three and five, then all the technically qualified bidders shall be considered as qualified bidders:

Provided further that in the event of identical initial price offers being submitted by two or more technically qualified bidders, all such technically qualified bidders shall be assigned the same rank for the purposes of determination of qualified bidders and in such case, the aforementioned fifty percent shall stand enhanced to the extent of tie occurring within the first fifty percent.

(9) Where the total number of technically qualified bidders is three or more, the auction process shall proceed to the second round of auction which shall be held in the following manner, namely:-

(i) the qualified bidders may submit their final price offer which shall be a percentage of value of mineral dispatched and greater than the floor price:

Provided that the final price offer may be revised till the conclusion of the auction as per the technically specifications of the auction platform;

(ii) The auction process shall be annulled if none of the qualified bidders submits a final price offer on the online electronic auction platform;

(iii) The qualified bidder who submits the highest final price offer shall be declared as the “preferred bidder” immediately on conclusion of the auction.

(10) Where the total number of technically qualified bidders is less than three, then no technically qualified bidder shall be considered to be qualified bidder and the first attempt of auction shall be annulled.

(11) On annulment of the first attempt of auction, the State Government may decide to –

(a) commence the auction process de novo with a separate set of terms and conditions and reserve price as it may deem fit and necessary; or

(b) conduct the second attempt of auction

(12) In case the State Government decides to conduct the second attempt of auction as per clause (b) of sub-rule (11), the terms and conditions of the second attempt of action shall remain the same as in the first annulled attempt of auction.

Provided that the highest initial price offer of the technically qualified bidders if any in the first annulled attempt shall be the reserve price in the first round of the second attempt.

Provided further that the bidding shall continue to the second round even in case the number of technically qualified bidders is less than three.”

13. Sub-Rules (1) to (4) of Rule 9 of the M(A) Rules provide-

- (i) The mode of issuing a notice inviting tender, details, etc.
- (ii) The documents accompanying the tender documents.
- (iii) The time provided for studying the details and documents by prospective bidders.
- (iv) The online electronic auctions is on the basis of ascending forward.

13.1 Sub-Rules (1) to (4) of Rule 9 are not stated in detail for no issue arises on these Sub-Rules. Sub-Rule (5) of Rule 9 is the next compartmentalised stage of consideration in the bidding process under the M(A) Rules. Sub-Rule (5) mandates that the bidders comply with the requirements set out in the bid document and quote an initial price offer, which shall be a percentage of the value of the mineral dispatched. This Sub-Rule from a plain reading includes the mode and the manner of submitting the said documents.

13.2 Sub-Rule (6) stipulates the criteria for declaring the bidders as technically qualified bidders for the second round of auction.

13.3 Sub-Rule (7) sets out the benchmark floor price of the highest initial price for the second round of online e-auction.

13.4 Sub-Rule (8) outlines the criteria for identifying technically qualified bidders, determined by their initial price offers arranged in descending

order. The technically qualified bidders occupying the first fifty percent of the rankings consist of the top five technically competent bidders or whichever is greater. Second Proviso to Sub-Rule (8) provides that in the event of identical initial price offers submitted by two or more technically qualified bidders, the similarly placed bidders are assigned the same ranks.

13.5 Sub-Rule (9) is the further stage of consideration and is reached upon when bids pass through the preceding stages.

13.6 If one construes the above Sub-Rules and juxtaposes the stages of consideration, it would amply and abundantly be clear that there are responses to the NIT; such responses are evaluated stage by stage; arranged as mandated by these Sub-Rules. In other words, to proceed to the next stage, there must be three or more qualified bidders, and then the auction proceeds, i.e., to the next stage.

13.7 Sub-Rule (9) from a plain reading elevates the consideration of process to the second round of auction, subject to minimum number of three qualified tenders being shortlisted.

13.8 Sub-Rule (10) of Rule 9 stipulates the procedure to be followed where the number of technically qualified bidders is less than three. Sub-Rule (10) of Rule 9 prescribes that where the minimum number of

qualified bidders is not available, then no bidder shall be considered as a qualified bidder, resulting in annulment of first attempt of auction. We take note of the expressions, namely first round of auction and the first attempt of auction used in the scheme of Sub-Rules (5) to (10) of Rule 9 of the M(A) Rules.

13.9 There is no dispute on the two-pronged options available to the Appellants in the first round of auction, the number of technically qualified bidders is less than three, *viz.* (i) either to annul the first round of auction and proceed with *de novo* auction, with changed or modified conditions; (ii) to conduct the second attempt of auction without making changes in terms and conditions, of the first attempt of auction.

13.10 The sole limitation should the State wish to proceed with a second auction attempt is that the terms and conditions of the first attempt of auction are maintained or continued. The limitation operating from the first proviso to Sub-Rule (12) of Rule 9, is the highest initial bid offered by technically qualified bidders, if any, in the first cancelled attempt, shall serve as the minimum reserve price for the first round of the second attempt, is complied with for second attempt of auction. From the flow of requirements, as per Rule 9, the stage for consideration is reached if the preceding stages *viz.*, Sub-Rules (1) to (8) are satisfactorily complied with. On the contrary, Sub-Rule (10) is attracted, (a) when the

technically qualified bidders are less than three; (b) none of the technically qualified bidders shall be considered; (c) the first attempt of auction shall be annulled. The *sine qua non* for a decision under Sub-Rule (10) is the availability or the non-availability of technically qualified bidders. The consequences of Sub-Rule (10) of Rule 9 are attracted only when the number of technically qualified bidders is less than three in a responsive tender. If the above conditions are satisfied, then the second proviso to Sub-Rule (12) of Rule 9 is attracted and becomes operational, and the bidding process shall continue to the second attempt of auction, even if the number of technically qualified bidders is less than three. The construction or interpretation of Rule 9 of the M(A) Rules in any other way firstly would be defeating the plain meaning of Rule 9 and also the purpose of bid-cum-e-auction through which the rights in mineral extraction is granted by the State/Appellants.

14. After adverting to the scheme of Rule 9, we would juxtapose each one of the admitted milestones to appreciate whether the claim of the Respondent for taking up its technical bid into the second round in the second attempt is legal and valid.

15. In Clause 13.1.2 of the NIT dated 25.10.2019 requires that-

- (i) the technical bid shall be submitted on the electronic platform,

- (ii) the duly executed original copies of the bid shall be sent to the address of the Directorate on or before the bid due date and time,
- (iii) non-compliance with the specified mode and manner for submitting the bid document results in the technical bid being considered as not received.
- (iv) On 13.12.2019, the Respondent did not submit the bid document through the electronic platform; instead, provided a physical copy with a letter showing expression of interest.

15.1 On 13.12.2019, the Respondent had not submitted the bid document on the electronic platform. The physical copy was made available. Therefore, the TEC, in the meeting dated 17.12.2019, recorded that no technical bid was received till the due date/time and recommended the annulment of the first attempt of the auction process. The minutes of the meeting dated 17.12.2019 recommended the annulment of the first attempt of the auction process. Irrespective of the reasons given by the TEC, the course suggested conforms to the outcome expected from insufficient number of technically qualified bids. The NIT dated 25.10.2019, at best, remains a non-responsive tender process. The recommendation dated 17.12.2019 of the TEC, recommended to the Appellants to annul the first attempt of auction by duly appreciating and applying Sub-Rule (10) of Rule 9 of the M(A)

Rules. We have difficulty in accepting that even a non-responsive NIT, if annulled, falls within the criteria of Sub-Rule (10) of Rule 9 of the M(A) Rules. The annulment of a tender notification arises when the required number of technically qualified bidders is less than three. In other words, there could be less than three bidders, but it does not include a case where there is none, as in the present case, otherwise the Appellants are confronted by a very peculiar situation *viz.*, no responsive bid in the first attempt and in the second attempt one bid/response is available and without a floor rate or reserved price or auction the rights in mineral extraction to third parties. It is a case of no bid. No value can be ascribed so as to constitute a reserve price. Secondly, an effort may yield revenue, but the question remains unanswered is whether the award of contract satisfies the commercial value of the natural resource tendered or auctioned by the State/Appellants.

15.2 In the case in hand, the first attempt of the auction was similar to being void, not for want of requisite number of technically qualified bidders, but for want of a valid bidder and any financial bid. The first attempt did not result in a bid or an offer price. As per the respondent, the appellants, notwithstanding the aforesaid position, had chosen to pursue the second auction attempt with the same terms and conditions. At the outset, we observe that similarity of the auction terms and

conditions should not be read as an indication that the authorities had decided to proceed with the second attempt at auction and the NIT dated 28.01.2020 was not a *de novo* auction. We have subsequently examined and interpreted the second proviso to Sub-Rule (12) to Rule 9. Even assuming that the contention of the respondent that the authorities had decided to pursue the second attempt at auction, it is evident from the record that the Appellants faced challenges in objectively proceeding with the tender evaluation, particularly when they received only one response to the second auction attempt through the NIT dated 28.01.2020. The TEC in the meeting dated 11.06.2020, resolved that the technical bid of the Respondent satisfied the eligibility criteria and recommended for further action as per the decision of the Appellants. Appreciating the said recommendation in the circumstances persuading contemporaneously, the recommendation does not go that far to bind the Appellants to process the price bid of the Respondent under second proviso to Sub-Rule (12) of Rule 9. But the error we notice from the impugned judgement is that the recommendations dated 11.06.2020 are understood as obligating the Appellants to process the price bid of the Respondent as per proviso to Sub-Rule (10) of Rule 9 of the M(A) Rules.

16. The State Government is assumed to know the commercial value of the natural resources tendered/auctioned, along with the commercial propensity to earn in a future point of time. Therefore, the statutory rules envisage the method of the bid cum e-auction process by shortlisting not only the technically qualified bidders, but also particular bids satisfying the eligibility criteria even for allowing their participation in e-auction. There are several inbuilt safeguards in the subject Rules to ensure transparency and objectivity in the bid process.

16.1 This Court, in ***Jagdish Mandal v. State of Orissa***¹ dealt with a controversy pertaining to the legitimacy of the tender for Upper Indravati Irrigation Project granted to the Appellants therein by the Water Resources Department, as challenged by the unsuccessful bidder. This Court allowed the Appeal and set aside the High Court's judgement wherein the agreement between the Department and Appellant (Jagdish Mandal) was quashed. The question of law examined by this Court was *viz.*, "scope of interference in judicial review of tender processes and award of contracts", and held as follows:-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is

¹ Jagdish Mandal v. State of Orissa and Others, (2007) 14 SCC 517.

“sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

16.2 In *Michigan Rubber (India) Ltd. v. State of Karnataka*² this Court held that a Court, when interfering in tender or contractual matters, in exercise of power of judicial review, should itself post the following questions;

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

(ii) Whether the public interest is affected?

17. Let us also examine the argument of the Respondent viz., the Appellants are obliged to operate the second proviso of Sub-Rule (12) of Rule 9 and process the price bid of the Respondent from the following circumstances:-

² Michigan Rubber (India) Ltd. v. State of Karnataka and Others, (2012) 8 SCC 216.

- a. Sub-Rule (12) of Rule 9, *firstly* provides for the course of actions the State Government must follow in the event of a decision to conduct the second attempt of auction *viz.*, the terms and conditions in the second attempt shall remain same as in the first annulled attempt of auction.
- b. The first proviso stipulates that the initial price offer of the technically qualified bidders, if any, in the annulled first attempt, becomes the reserve price for auction in the second attempt.
- c. The second proviso enables the State to continue the second round of second attempt of auction even if the number of qualified bidders is less than three. The argument of the Respondent begs the very question whether the first annulled attempt ought to be reckoned as a valid first attempt, assuring so, whether the Appellants could be compelled to evaluate the single bid without initial price offer/reserve price or without competition/auction among technically qualified bidders.
- d. The availability of the highest initial price is also a requirement. Being so, it can be held that the Appellants in the terms of the second proviso of Sub-Rule (12) of Rule 9

consider proceeding to the second round of the second attempt even if the number of technically qualified bidders is less than three. In the case on hand, the first attempt initiated through the NIT dated 25.10.2019, in our appreciation and application of Rule 9, cannot be considered as a first attempt, which is not annulled for want of technically qualified bidders, but annulment was for want of bidders' responses. That being the case, in the second attempt of the auction, there is only one technically qualified bidder. The Respondent cannot insist upon conducting auction only for one technically qualified bidder by operating second proviso to Sub-Rule (12) of Rule 9 of M(A) Rules. Therefore, the Appellants were right in annulling the tender process initiated through 25.10.2019 and deciding to auction the blocks in accordance with the Rules.

- e. The Appellants are governed by the MMDR Act and M(A) Rules, for identifying, auctioning the blocks and granting mining lease rights to successful participants. The first and foremost obligation on the Appellants is to act in trust and advance the public interest while granting mining leases. The Court insists upon strict adherence to statutory rules.

Through our judicial view, the Court avoids exercising the very discretion vested with the jurisdictional authority under the Rules. The directions issued in the writ jurisdiction ought not to become a substitute to the executive discretion of the authorities.

- f. In the case on hand, the effect of allowing the Writ Petition is that the directions of Writ Court compel the Government to open the price bid and evaluate the feasibility of awarding the subject Mining Lease to the Respondent. Once the NIT dated 27.10.2019 is held as a non-responsive tender, then the Sub-Rule (12) of Rule 9 of the M(A) Rules is not attracted, and the Appellants are not compelled to evaluate the sole price bid of the Respondent in terms thereof.
- g. In our considered view, the Impugned Judgment did not appreciate the want of a bidder in the first round of auction in the first attempt but examined the decision-making process of the Appellants in annulling the tender process and had set aside the well-considered judgment of the Learned Single Judge; which according to us, for the above discussion, is erroneous and unsustainable.

18. For the above reasons, the judgment under appeal is unsustainable and is set aside.

19. Civil Appeal is allowed. No order as to costs.

.....J.
[SANJIV KHANNA]

.....J.
[S.V.N. BHATTI]

**NEW DELHI;
NOVEMBER 20, 2023.**