REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.4862-4863 OF 2021

UFLEX LTD. **… Appellant**

Versus

GOVERNMENT OF TAMIL NADU & ORS. **…Respondents**

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual

rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fide*. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.[1]

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and

[1] Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517.

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."[2]

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in ***Michigan Rubber v. State of Karnataka***[3] as under:

> "23. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
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> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is

[2] *Id.*
[3] (2012) 8 SCC 216

> proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
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> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
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> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

5. One other aspect examined by this Court is whether the terms and conditions of the tender have been tailor-made to suit a person/entity. In fact, this is what is sought to be contended in the facts of the present case by the respondents who were the original petitioners before the Court. In order to award a contract to a particular party, a reverse engineering process is evolved to achieve that objective by making the tender conditions such that only one party may fit the bill. Such an endeavour

has been categorized as "Decision Oriented Systematic Analysis" (for short 'DOSA').[4]

6. The burgeoning litigation in this field and the same being carried to this Court in most matters was the cause we set forth an epilogue in ***Caretel Infotech Ltd. v. Hindustan Petroleum Corporation Limited & Ors.***[5] Even if it amounts to repetition, we believe that it needs to be emphasized in view of the controversy arising in the present case to appreciate the contours within which the factual matrix of the present case has to be analysed and tested.

> "37. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and public sector enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government

[4] Misrilall Mines Pvt. Ltd. & Anr. v. MMTC & Ors, 2013 SCC OnLine Del 563.
[5] (2019) 14 SCC 81.

and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the public sector.

38. In ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.***[6], this Court has expounded further on this aspect, while observing that the decision-making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision-making process would not suffice.

39. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of Respondent No.1 must prevail. Respondent No.1 itself, appreciative of the wording of Clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own interpretation of the contract to be thrust on Respondent No.1, or ask the Court to compel Respondent No.1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the constitutional Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under:

[6] (2016) 16 SCC 818.

> "*15.* We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is *mala fide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

40. We may also refer to the judgment of this Court in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr.,***[7] authored by one of us (Sanjay Kishan Kaul, J.). The legal principles for interpretation of commercial contracts have been discussed. In the said judgment, a reference was made to the observations of the Privy Council in ***Attorney General of Belize v. Belize Telecom Ltd.***[8] as under:

> "*45. … 16.* Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. …"
>
> ....

[7] (2018) 11 SCC 508.
[8] (2009) 1 WLR 1988.

"*19.* .....In ***Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board***[9] Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

> "…the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

41. ***Nabha Power Limited (NPL)***[10] also took note of the earlier judgment of this court in ***Satya Jain v. Anis Ahmed Rushdie***[11], which discussed the principle of business efficacy as proposed by Bowen, L.J. in the ***Moorcock***[12]. It has been elucidated that this test requires that terms can be implied only if it is necessary to give business efficacy to the contract to avoid failure of the contract and only the bare minimum of implication is to be there to achieve this

[9] (1973) 1 WLR 601 (HL).
[10] *Nabha* (supra).
[11] (2013) 8 SCC 131.
[12] (1889) LR 14 PD 64 (CA).

goal. Thus, if the contract makes business sense without the implication of terms, the courts will not imply the same.

42. The judgment in ***Nabha Power Limited***[13] concluded with the following observations in para 72:

> "*72*. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to

[13] *Nabha* (supra).

somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."[14]

7. It may also be pertinent to note the principles elucidated in the case of ***Tata Cellular v. Union of India***:

"*94.* The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

[14] *Caretel* (supra).

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."[15]

8. On having set forth the contours of our analysis we now proceed to deal with the factual matrix so that we do not deviate from the path we have set for ourselves aforesaid.

The facts:

9. On 24.08.2020 *vide* G.O. (Ms.)/No.23 (for short 'G.O.') issued by the Government of Tamil Nadu *inter alia* appointed the Joint Commissioner-II as the Tender Inviting Authority while the

[15] (1994) 6 SCC 651.

Commissioner of Prohibition and Excise was appointed as the Tender Accepting Authority apart from the appointment of a Technical Specification Committee (for short 'TSC') and a Tender Scrutiny and Finalisation Committee (for short 'TSFC') for purposes of production and supply of polyester based hologram excise labels on turnkey basis. The stickers were to be pasted across the caps of bottles of liquor sold by the State Government through one of its instrumentalities, the Tamil Nadu State Marketing Corporation (for short 'TASMAC'). The tender required the prospective bidders and existing suppliers of hologram excise labels to submit necessary documents on the label features and security standard by 07.09.2020.

10. The first meeting of the TSC was held on 09.09.2020 where it was *inter alia* decided that it would be appropriate to have technical specifications which are generic in nature so as to ensure wider participation by incorporating those features that are available with at least three bidders. In the second meeting held on 18.09.2020, three technical specifications for non-holographic features along with hidden text on colour change background were formulated, which read as under:

i. A stripe of design transferred, but not laminated, on the top of the hologram with visual holographic design on top;

ii. Hidden texts/images encrypted on second layer on different colour background; and

iii. The hidden colour should change at every 45 degree angle, this hidden text "Tamil Nadu Excise" should be visible only through a special Polaroid identifier.

11. The TSC thereafter sought to determine the eligibility criteria for the commercial bid in addition to the already existing criteria so as to "enhance the security features, ensure better participation, and to restrict fly-by-night operators." Thus, in the third meeting held on 23.09.2020 it was recommended that supplier should have been continuously doing business activities in the same field for the past 8 to 10 years. The draft tender document consisting of technical specification, product specification, eligibility criteria and general terms and conditions was approved in the fourth meeting held on 24.09.2020 and a Notice Inviting Tender (for short 'NIT') was issued on 01.10.2020 with various technical specifications and eligibility criteria. The pre-bid meeting was held on 08.10.2020 wherein the respondents before us conveyed their objections

and concerns highlighting that wider participation as mandated by the G.O. should be adhered along with making a grievance about some arbitrary conditions in the tender notice.

12. However, without waiting for the final decision in respect of the aforesaid, two of the prospective tendering parties, viz., M/s. Kumbhat Holographics (for short 'Kumbhat') and M/s. Alpha Lasertek India LLP (for short 'Alpha') filed writ petitions in October, 2020 where intervention was also permitted by two other parties. These petitions were dismissed by the learned single Judge vide order dated 10.02.2021.

13. The material aspect to be taken note of is that there were certain developments during the pendency of the petition. But we must note what is the principal grievance made by these parties before the learned single Judge. The primary contention both by Kumbhat and Alpha was that the terms of the tender were skewed in favour of Uflex Limited (for short 'Uflex') and Montage Enterprises Private Limited (for short 'Montage'). The grievance which was made was that certain requirements were introduced in the tender to ensure that only Uflex and Montage would be able to qualify under the tender requirements, i.e.: (i) requirement of 8 years of experience in the field of manufacture of

security holograms; (ii) requirement of bidders to have supplied full polyester based security hologram labels to the tune of at least Rs. 20 crores to any state excise department during any one of the last three financial years (with additional requirement under Clause 4.6 in Part 4 of the NIT that the said supply should only have been made to any of the state excise departments to be considered valid for this purpose); and (iii) the bidders should also submit a satisfactory performance certificate from the competent authority or the end user.

14. The other aspect was the grievance made about the technical requirement of a "Hidden Text on Colour Change Background" feature stated to be based on a patented technology. Holograms with this feature were supplied to other public sector undertakings such as the IRCTC in the past by the suppliers other than Uflex and Montage. However, those suppliers had never supplied to any State excise department and, thus, could not meet the two conditions cumulatively. Montage and Uflex were alleged to be the only two bidders who would qualify under the existent tender conditions as they held the license to use the patented technology. The writ petition was resisted by the State *inter alia* on the ground of *bona fide* exercise and the factum of a clarification being

issued on 27.10.2020 on the objections of Kumbhat and Alpha, petition having been filed even without waiting for the clarification to be issued. Corrigendum 2 to the tender conditions was issued whereby the condition as to the identification of hidden text by special Polaroid identifier was relaxed by providing that in addition to Polaroid identifier, the hidden text could also be identified by film. The grievance about only limited companies being permitted to participate was also met by permitting LLPs to participate in the tender.

15. In the course of scrutiny by the learned single Judge, the respondents were permitted to accept the bids from prospective bidders and process the same with the report being submitted with details of qualified bidders under the technical specifications of the tender. The report of the TSC dated 24.12.2020 was, thus, submitted, which recorded that among the three bidders who had submitted the bids, all three satisfied all the technical and product specifications as per NIT including Uflex and Montage. The High Court while dismissing the writ petition noted that the requirement of having minimum three successful bidders was thus satisfied.

Writ Appeal Round:

16. The aforesaid conclusion by the learned single Judge in the conspectus of facts gave rise to writ appeals being filed by Kumbhat and Alpha impugning the order dated 10.02.2021.

17. The grievance *inter alia* was that a copy of the report dated 24.12.2020 had not been furnished to either Kumbhat or Alpha depriving them of the opportunity to scrutinize the report. In effect, the allegation of DOSA *qua* Uflex and Montage was once again made while alleging that there had been deviations from the mandate of setting generic technical specification as per the G.O.

18. The financial structure of Uflex and Montage was sought to be examined by lifting the corporate veil and contending that the annual report of Uflex for 2019-20 showed that it had invested approximately Rs.152 crores in preference share capital of Montage and thus exercised considerable influence in the affairs of Montage. The third bidder who constituted the *Trimurti* along with Uflex and Montage was Hololive Corporation Industries (for short 'Hololive'). It was actually not eligible to participate on multiple parameters as it was a partnership firm registered on 01.07.2017 and thus did not meet the requirement of being either a limited company or an LLP.

19. The report called for by the learned single Judge was on technical specifications and, thus, while Hololive fulfilled those technical specifications, it had not qualified as per commercial terms on the aforesaid account. Further, Kumbhat being a partnership firm, sought to contend that the exclusion of partnership firms was arbitrary. The relationship between Uflex and Montage was in breach of the spirit of Rule 15 of the Tamil Nadu Transparency in Tender (Public-Private Partnership Procurement) Rules, 2012 (hereinafter referred to as the 'Rules'), which pertains to conflict of interest even though the Rules did not apply to the facts of the case. The said Rule reads as under:

> "**15. Conflict of Interest**.- (1) It shall be the responsibility of Tender Inviting Authority and Tender Accepting Authority to ensure that the prospective tenderers do not have a conflict of interest that affects the Tender Proceedings.
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> (2) An Applicant or prospective tenderer shall be deemed to have a Conflict of Interest, if,-
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> (a) any other prospective tenderer or a member of consortium or any associate or constituent thereof have common controlling shareholders or other ownership interest; or
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> (b) a constituent of such prospective tenderer is also a constituent of another prospective tenderer.
>
> Provided that 'constituent' in such cases will not include the provider of a proprietary technology to more than one applicant; or

(c) such prospective tenderer, or any associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Applicant or Respondent, or any associate thereof has provided any such subsidy, grant, concessional loan or subordinated debt to any other Applicant or Respondent, its member or any associate thereof; or

(d) such prospective tenderer has the same legal representative for purposes of the Tender Proceedings as any other prospective tenderer; or

(e) such prospective tenderer, its member or any associate thereof, has a relationship with another prospective tenderer, or any associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other's information about, or to influence the Response of either or each other; or

(f) such prospective tenderer, its member or any associate thereof, has participated as a consultant to the Tender Inviting Authority and Tender Accepting Authority in the preparation of any documents, design or technical specifications of the Public Private Partnership (PPP) Project; or

(g) if any legal, financial or technical advisor of the Tender Inviting Authority and Tender Accepting Authority in relation to the Project is engaged by the prospective tenderer, its member or any associate thereof, as the case may be, in any manner for matters related to or incidental to the Project:

Provided that this clause shall not apply where such advisor was engaged by the Applicant or Respondent, its member or associate in the past but such engagement expired or was terminated 6 (six) months prior to the date of issue of concerned Tender Document or where such advisor is engaged after a period of 3(three) years from the date of commercial operation of the Project."

20. An alternative argument which Kumbhat sought to develop was that it is registered as a Small Industry in terms of the classification under the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act') and, thus, qualifies as a domestic enterprise as defined in the Tamil Nadu Transparency in Tenders Act, 1998 (hereinafter referred to as the 'Tender Act'). Thus, as per proviso to sub-section 2 of Section 10 of the Tender Act, it was entitled to be called upon to supply a maximum of 25% of the total procurement if it was willing to match the price of the lowest bidder. Rule 30-A of the Tamil Nadu Transparency in Tender Rules, 2000 (hereinafter referred to as the 'Tender Rules') was also relied upon to contend that the purchase preference is required to be extended to domestic enterprises.

21. On the other hand, it was urged by Uflex that Alpha and Kumbhat lack the locus as they did not even participate in the tender. Alpha did not qualify as it did not have the requisite experience in supplying holograms and its business was actually in the nature of trading. In one of the relevant financial years, the income and expenditure statement showed a zero turnover from the sale and manufacture of goods. The participation by LLPs was permitted which enabled Alpha to bid but in

case of Kumbhat it was only a partnership firm without being an LLP. It was sought to be contended that it was justifiable for a Government entity to procure goods exclusively from corporate entities so as to ensure stability and existence of such entities.

22. The grievance regarding patented technology, Uflex contended, does not subsist in view of the corrigendum having been issued whereby film could be used for identification of the hidden text in addition to Polaroid. The technology of producing latent images which are invisible to the naked eye and can be viewed only through polarizer is generic and Uflex and Montage do not have a monopoly over the same. Technology not infringing the patent could be deployed, thereby meeting the technical requirements.

23. The other aspect arising from lifting the corporate veil and referring to the investment of Uflex in Montage was dealt with by the submission that the investment was in redeemable, non-voting, non-participating preference shares of Montage and, thus, Uflex was neither a holding company nor an associate company of Montage.

24. Insofar as the rejection of the bid of Hololive was concerned, the counsel for the State sought to explain the same by submitting that the

bid was only rejected at the second stage against the requirement of Part 4 of the tender.

25. The Division Bench, however, allowed the writ appeal in terms of the impugned judgment dated 29.04.2021 giving the State four months time to float a fresh tender while permitting the existing successful tenderers to continue to provide the supplies under the same terms and conditions. The fresh tender was directed to be floated with technical specifications that are generic so as to ensure wider participation or, if the State was of the view that the technical specifications are at the heart of the tender, opt for a single source procurement, albeit by adhering strictly to the requirements of the Tender Act, which has been enacted to provide transparency in public procurement and to regulate the procedure in inviting and accepting the tenders and matters connected therewith or incidental thereto.

26. The rationale of the judgment of the Division Bench can be summarized as under:

a. The Government Order had stated that technical specification should be such that "multiple vendors" qualify whereas the Commissioner of Prohibition and Excise has used the phrase

"more than three bidders". The phrase "multiple vendors" was used as a rough equivalent of expression of "more than three bidders" and the minutes of the second and third meeting did not contain any discussion as to whether the proposed changes would make the technical specification non-generic. Thus, TSC was held to have deviated from the mandate of prescribing generic technical qualifications.

b. The technical requirements as per NIT had features which were not noticeable from specifications as was explained by the patenting process. However, it was noticed that wherever technical specifications were substantially if not wholly similar to the impugned specifications, the successful bidder was always Uflex or Montage.

c. The material on record supported an inference that the impugned technical specifications, when coupled with the requirements of having made such supplies of a specified minimum value to a State Excise Department in any of the preceding three years had the effect of eliminating all bidders other than Uflex or Montage.

Thus, eliminating reasonable competition came within the domain of judicial review.

d. Technical bid evaluation was done on the same day as the report dated 24.12.2020 but yet the learned single Judge was not informed that Hololive did not fulfill all the technical specifications. Had the single Judge been aware of this a different view may have been taken by the learned single Judge who proceeded on the premise of three eligible bidders.

e. Uflex and Montage were not sister or associate companies in the technical sense. However, the High Court proceeded to examine the nexus between the two entities and whether the same would impair the integrity of the tender process. Montage's total equity share capital was about Rs.6 crore and Uflex's investment of about Rs.152 crore in preferential share capital of Montage brought in the possibility of Uflex exercising influence over Montage, which could not be disregarded. Uflex was a public listed company and Montage was one of Uflex's top non-promoter shareholders with a holding of approximately 4%.

f. Uflex and Montage both derived their technology for producing the latent image from a common source, i.e., patented technology of ATB Latent Export Import Limited (for short 'ATB'). This aspect had to be read with what has been stated aforesaid.

g. The existing records result in a definitive conclusion that tender conditions were tailor-made in favour of Uflex and Montage and, thus, judicial review was necessary and in public interest and the same undermining the tendering process.

Contentions before us:

Submissions on behalf of Uflex:

27. The broad contours of the submissions advanced on behalf of Uflex assailing the impugned order are as under:

i. Learned counsel for the appellant relied on the judgment in ***Tata Cellular v. Union of India***[16] to submit that Alpha and Kumbhat have failed to demonstrate any public interest, any flaw in the tender process or for that matter any *mala fide* or arbitrariness. In the face of this submission, the terms of the NIT were not open to judicial scrutiny and the Court can only review the decision-making process.

[16] *Id.*

ii. The endeavour of Alpha and Kumbhat is an attempt to use the judicial process to somehow frustrate the award of the tender to Uflex, having not succeeded as a competitive commercial enterprise. The same was true not only in this case but even in other tenders, as is reflected from their submission that Uflex has been successful in a number of tenders across the country. Their endeavour to challenge the tender on similar grounds was unsuccessful in Writ Appeal No.509/2016 before the Madras High Court itself against which the Special Leave Petition was dismissed. A similar fate was met in their endeavour before the Madhya Pradesh High Court in WP No.4448/2016 where also the SLP was dismissed.

iii. The petitioner has invested a huge amount of about Rs. 10 crore and has employed 87 people after the grant and issuance of work order. The adjudication of a civil dispute, the present one being really akin to the same, is based on the preponderance of probabilities. The impugned order visits Uflex with adverse civil consequences based on some "justifiable doubts" as is found in the impugned judgment. In this behalf, reference was invited to para 47 of the impugned judgment opining so, i.e., "the evidence on record is insufficient to draw the definitive

conclusion that the tender conditions were tailored to suit only the two eligible bidders, although there is sufficient basis for justifiable doubts on that count."

We may note that these observations have, however, been followed by observations to the effect that evidence was sufficient to conclude that the tender specifications were not generic and had, thus, not been prepared with the mandate of the G.O.

iv. The approach adopted by the Division Bench of the High Court in what may be categorized as lifting the corporate veil and then endeavouring to threadbare scrutinize the business relations of the two companies, i.e., Uflex and Montage, is not an appropriate approach. Not only that, the alleged nexus had been examined by the Madhya Pradesh High Court in WP No.4448/2016 and judgment was pronounced on 06.09.2016 opining that Uflex and Montage are neither a holding – subsidiary company nor associate company. The SLP filed against the same, as noted above was dismissed.

v. There was a failure on part of Alpha and Kumbhat to establish that the technical specifications were patented and Uflex and Montage had monopoly over the same.

vi. The counsel for Uflex placed reliance on the judgment in ***Tata Cellular***[17] and the principles culled out hereinabove at the inception while submitting that this view has been followed in various judicial pronouncements, viz., ***Air India v. Cochin International Airport***[18]***, Raunaq International Ltd. v. IVR Construction Ltd.***[19]***, Master Marine v. Metcalfe and Hodkinson***[20]***, Michigan Rubber***[21] and ***Bharat Cooking Coal v. AMR Dev***[22].

Submissions on behalf of Montage:

28. Montage sought to support the plea of Uflex largely aggrieved by the High Court's findings to the effect that Uflex and Montage are related entities as it may have an adverse impact on Montage in other contractual and tender matters. This is more so in the context that in various tenders these two companies have actually competed against each other

[17] (supra)
[18] (2000) 2 SCC 617.
[19] (1999) 1 SCC 492.
[20] (2005) 6 SCC 138.
[21] (supra).
[22] (2020) 16 SCC 759.

successfully. Damaging observations were made to the effect that even the qualification under the NIT was restricted to the two eligible bidders. This raises questions as to the integrity and reliability of the NIT, which has thus seriously been assailed.

The observations of the Madhya Pradesh High Court referring to aforesaid holding that Uflex and Montage are separate legal entities was again emphasized. Uflex had made a financial investment of about Rs.152 crore worth of preference shares in Montage due to Montage's acquisition of Uflex's subsidiary, Utech Developers Limited. These preference shares are 7.50% redeemable, non-cumulative, non-participating, non-convertible preference shares and the same does not allow Uflex to exert any influence on Montage.

29. Similarly, supporting the plea of Uflex, Montage also contended that the allegation of common source of patent technology through ATB has no basis as Montage does not have any license arrangement with the said Company nor had it paid any license fee to ATB. It has, however, access to technology to produce latent images because it procured the requisite machinery.

Submissions on behalf of Kumbhat:

30. On the other hand, Kumbhat sought to emphasise the following aspects in support of the impugned judgment:

i. The mandate of the G.O. stipulated that technical specifications have to be generic in nature to ensure wider participation by incorporating those features which are available with more than three bidders and the same was accepted by the Government by reiterating that there must be multiple bidders. The factum of Hololive disqualification on certain conditions of the NIT was not raised before the learned single Judge and, thus, erroneous conclusion was arrived at as there were less than three bidders. There were only two eligible bidders.

ii. The scenario of there being only two eligible bidders and award going to the same party is apparent from the award of tenders with same specifications by four other States. Thus, Uflex and Montage seem to be monopolizing the business.

iii. The two bidders are closely related to each other as found by the Division Bench and even in income tax proceedings before the High

Court of Delhi in the order dated 06.09.2018, Montage had taken the plea that Uflex was a sister company.

iv. The earlier judgment of the Madras High Court in Writ Appeal No.509/2016 was not relevant as there were five qualified bidders and the tender had dissimilar conditions. There was also a subsequent amendment to the Tender Act, 2017 by introduction of Section 2(aa) read with the proviso to Section 10(2), which introduced the participation by Domestic Enterprises. In this behalf, the relevant provisions are reproduced hereinunder:

> "2. Definitions.- In this Act, unless the context otherwise requires,-
>
> xxxx xxxx xxxx xxxx xxxx
>
> [(aa) 'Domestic Enterprise' means any micro and small enterprise as defined in the Micro, Small and Medium Enterprises Development Act, 2006 (Central Act 27 of 2006), which manufactures or produces goods, provides or renders services within the State and filed Part II of the Entrepreneurs Memorandum in the District Industries Centres or filed Udyog Aadhaar portal.]"
>
> ....
>
> "10. Evaluation and Acceptance of Tender.-
>
> xxxx xxxx xxxx xxxx xxxx
>
> (2) After evaluation and comparison of tenders as specified in sub-section (1), the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors

specified in the tender document and giving relative weights among them:

[Provided that the Tender Accepting Authority shall accept the tender of domestic enterprises, not being the lowest tender, upon satisfaction of such conditions as may be prescribed, in respect only of goods manufactured or produced and services provided or rendered by them, and only to the extent of not exceeding twenty five per cent of the total requirement in that procurement, if such domestic enterprise is willing to match the price of the lowest tender:

Provided further that the Tender Accepting Authority shall accept the tender of a department of Government, Public Sector Undertaking, Statutory Board and other similar institutions as may be notified, not being the lowest tender, upon satisfaction of such conditions as may be prescribed, in respect only of goods manufactured or produced and services provided or rendered by them, and only to the extent of not exceeding forty per cent of the total requirement in that procurement, if such tenderer is willing to match the price of the lowest tender:

Provided also that in case of a single procurement, the total procurement under the above two provisos shall not exceed forty percent of the total requirement in that procurement.]"

Kumbhat being an MSME, thus, seeks a right to participate in tenders in Tamil Nadu.

31. We may note at this stage that Kumbhat did not even apply and could not have applied being a partnership firm while Alpha could have applied being an LLP but did not apply.

Submissions on behalf of Alpha:

32. Alpha sought to reiterate the submissions made by Kumbhat and sought to give examples from other States to support its adequacy of manufacturing capacity: L-3 in 2019 in Chhattisgarh tender, L-2 in Tamil Nadu in 2011 and 2015 tenders, and L-3 in 2021 in Andhra Pradesh tender. These tenders had generic specifications unlike the present tender. Alpha only got disqualified due to the technical specifications and its past experience, i.e. clauses 4.6(b) and 4.6(c), which serve to eliminate all bidders except two.

33. Alpha sought to emphasise the aspect of public interest as a ground for judicial intervention by relying upon certain judicial pronouncements, viz., ***Monarch Infrastructure v. Ulhasnagar Municipal Corp.***[23] and ***Jagdish Mandal***[24].

Submissions on behalf of the Government of Tamil Nadu:

34. Let us now turn to the most important stand which is of the Tamil Nadu Government, which is the tendering entity. In this behalf what has

[23] (2000) 5 SCC 287.
[24] (supra).

been sought to be emphasized at the threshold is public interest itself as the tender conditions seek to prevent spurious liquor being pushed into the market. Since 1999, only one supplier, Holostik India, had been successful in all tenders except the present tender where it chose not to participate despite having the technical capability to do so and three firms ultimately participated, i.e., Uflex, Montage and Hololive.

35. The State of Tamil Nadu sought to emphasise the importance of transparency of the decision-making process. The TSC comprised of eminent scientists in holography and printing technology and the NIT was formulated after their deliberations and after receiving input from prospective bidders. The non-holographic feature of 'hidden text on colour change background' was suggested by technical experts from IIT and Anna University as the same is the latest and most secure feature. The objective was to reduce chances of the hologram being counterfeited.

36. On the aspect of clauses 4.1, 4.5, 4.6(a) and 4.6(b), which formed part of the general terms and the conditions of the technical bid and dealt with the aspect of the past experience in supply and turnover, it was submitted that these very conditions formed a part of the 2015 tender as well. These were challenged by Kumbhat and the writ appeal was

dismissed, and this order was affirmed in the SLP, as already set out hereinbefore.

37. It was emphasized that Alpha's grievance *qua* the door being shut on them was addressed through corrigendum 2, which permitted LLPs to participate in the tender. The same very corrigendum addressed the issue relating to hidden text being visible only through Polaroid by adding film. It was submitted that the Division Bench wrongly noted that the hidden colour specification was patented and there were no eligible bidders who would qualify the same as the counter affidavit contains a list of tenders which had similar conditions and parties had succeeded in the same. For example, the 2019-22 Excise Department Chhattisgarh tender had similar conditions and Prizm Holography succeeded. The same tender had two other entities who had qualified, including Alpha.

38. On the aspect of tender conditions being tailor-made and the principles of DOSA applying, it was submitted that the latitude must be greater where such high security features are involved.[25]

39. Lastly it was submitted that there was nothing so extraordinary or unique which was being done by the respondents and the practice followed were similar to the practices of other States. The impugned

[25] Association of Registration Plates v. Union of India (2005) 1 SCC 679.

technical specifications have been utilized by several states and public sector undertakings in the past and the tenders were awarded to other players also apart from Uflex and Montage. This would belie the contention that the technology was patented and only a few selected companies were eligible. Not only that, in view of corrigendum 2, colour change background viewable with film as an identifier did not attract the rigour of a patented technology. In almost an identical tender floated by the State of Chhattisgarh, Uflex and Montage did not succeed during the tendering process.

Conclusion:

40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even

more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in ***Tata Cellular***[26] and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

41. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen

[26] (supra).

into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a Court ought to play.

42. The checks and balances before the tendering process itself has been provided by constitution of the various committees, more specifically the TSC and the TSFC. The objective is to keep the role of these Committees separately defined.

43. We are concerned with sale of liquor. The objective has been set out by the State Government, i.e., use of such technology as would prevent spurious liquor from being sold. It is a well-known fact that a large revenue collection comes in Tamil Nadu through sale of liquor. It thus must be left to the State Government to see how best to maximize its revenue and what is the technology to be utilized to prevent situations like spurious liquor, which in turn would impede revenue collection, apart from causing damage to the consumers.

44. A grievance was made about what was stated to be “patented technology”. At the stage when the concerned committees were still looking to the objections/suggestions of the parties, Kumbhat and Alpha rushed to the Court. The State Government did provide relief by issuing a corrigendum to address the issue relating to hidden text being visible

only through Polaroid, as colour change background viewable with film as an identifier did not attract the rigour of this stated patented technology. The issue was actually over with that corrigendum.

45. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate. The prohibition arising from only a Limited company being permitted to participate was again addressed by the corrigendum permitting LLPs to participate. If entities like Kumbhat and Alpha want to participate they must take some necessary actions. Alpha is already an LLP. Kumbhat cannot insist that it will continue to be a partnership alone and, thus, that partnerships must necessarily be allowed to participate.

46. Insofar as Kumbhat's plea based on the Tender Act is concerned, a reading of the provisions would show that some benefit is sought to be given to MSMEs to the extent of 25% of the order based on their willingness to match the price of the lowest tender. However, to be able to avail of that benefit, it must be an entity which is capable of bidding in

terms of the tender conditions. There is no prohibition against limiting the participation to Limited companies of LLPs. Domestic enterprise in the Tender Act is defined to mean any micro and small enterprise as defined in the MSMED Act. This argument also appears to be an afterthought, as it is not as if Kumbhat participated claiming such right as an MSME.

47. Now coming to the issue of the requirement of three bidders or more than three bidders, the factual position is that there were three bidders and that one of them met the technical specifications but did not succeed further on financial issues and turnover under Part 4 of the NIT. The same cannot be used to nullify the whole tendering process. We are dealing with a tender of a nature where there cannot be a vacuum. If there is less participation than necessary, it cannot be said that *ipso facto* the terms and conditions of tender have followed a DOSA, and to somehow give the tender to one of the parties. Similar terms have been set out in many tenders of different States and there have been varying succeeding parties. No doubt, the success rate of the two successful parties before us is definitely higher but we fail to appreciate how that can form the basis to come to a conclusion that something must be done

to let other people get a tender. If one may say, it will then become a DOSA to see that the most competitive party does not succeed in the tender but that other parties who keep approaching the Court must get some share of the pie. This cannot be the objective.

48. We have also noticed the submissions based on the fact that repeated endeavours of Alpha and Kumbhat have failed not only before the Madras High Court but before different High Courts based on a similar challenge. Broadly, similar tender conditions have been upheld. It cannot be that every time a tender is floated, Kumbhat and Alpha would be permitted to seek a toehold on one pretext or the other. As noticed, it is not really the function of the Court to vet the terms of the NIT, as it is the decision-making process which can be reviewed in judicial scrutiny.[27]

49. A lot of emphasis has been placed by the Courts below in seeking to go into the financial linkages between the two companies, i.e., Uflex and Montage. The correct way of examining this issue should have been that whether under the terms of the NIT, any of the aspects which were examined by the Courts could be said to be a disqualification. In our view, the answer to the same was in the negative. One company had invested in another through certain preference shares without having any

[27] Tata Cellular (supra).

controlling interest, this cannot be the basis of judicial scrutiny. The present case is not one of an intercorporate battle or of minority shareholders claiming the rights or any debts due, where the principle of lifting the corporate veil should be applied. What one may have said in some income tax proceedings, whether a small percentage of the funds of one company have been utilized as investment in the other are hardly the principles which should come into play in such a tender matter.

50. We are thus unequivocally of the view that the impugned order cannot be sustained for all the aforesaid reasons and must be set aside and the appeals are accordingly allowed.

Costs:

51. The costs following cause is a principle which is followed in most countries. There seems to be often a hesitancy in our judicial system to impose costs, presuming as if it is a reflection on the counsel. This is not the correct approach. In a tussle for enforcement of rights against a State different principle apply but in commercial matters costs must follow the cause.

52. The aspect of awarding the costs has received consideration of the Law Commission of India in its Report No.240, specifically in relation to civil litigation. The trigger for this were the observations of the Supreme Court in ***Ashok Kumar Mittal v. Ram Kumar Gupta***[28] and ***Vinod Seth v. Devinder Bajaj***[29]. The judicial pronouncements took note of the levying meager costs in civil matters which did not act as a deterrent to vexatious or luxury litigation borne out of ego or greed or resorted to as a 'buying time' tactic. These two judicial pronouncements were followed in ***Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust***[30]. In the said proceeding the Law Commission also presented its views. It is in that context that this Court observed that appropriate changes in the provisions relating to costs contained in the report of the Law Commission of India should be followed up by the Parliament and the respective High Courts.

53. We may note that the common thread running through all these three cases is the reiteration of salutary principles: (i) costs should ordinarily follow the event; (ii) realistic costs ought to be awarded

[28] (2009) 2 SCC 656.
[29] (2010) 8 SCC 1.
[30] (2012) 1 SCC 455.

keeping in view the ever increasing litigation expenses; and (iii) the cost should serve the purpose of curbing frivolous and vexatious litigation.[31]

54. We may note that this endeavour in India is not unique to our country and in a way adopts the principle prevalent in England of costs following the event. The position may be somewhat different in the United States but then there are different principles applicable where champerty is prevalent. No doubt in most of the countries like India the discretion is with the Court. There has to be a proportionality to the costs and if they are unreasonable, the doubt would be resolved in favour of the paying party[32]. As per Halsbury's Laws of England, the discretion to award costs must be exercised judicially and in accordance with reason and justice.[33] The following principles have been set out therein:

> "In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:
>
> (i) The conduct of all the parties;
>
> (ii) Whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (iii) Any payment into court or admissible offer to settle made by a party which is drawn to the court's attention.

[31] Report No.240 of the Law Commission of India.
[32] U.K. Civil Procedure Rule 44.2.
[33] Vol. 10, 4th Ed. (Para 15).

The conduct of the parties includes:

a. Conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

b. Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

c. The manner in which a party has pursued or defended his case or a particular allegation or issue; and

d. Whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."[34]

55. We may add that similar principles are followed in Australia, Hong Kong and Canada largely based on the Common Law principle. In fact in Canada, the Manitoba Law Commission Report analysed the 'Costs Awards in Civil Litigation' and referred to six broad goals as under:

a. indemnification – successful litigants ought to at least be partially indemnified against their legal costs;

b. deterrence – potential litigants should carefully assess the merits of the claim and should refrain from taking any unnecessary legal actions;

c. rules should be made decipherable and simple to understand;

d. early settlement of disputes should be encouraged;

[34] 10th Vol. 4th Ed. (Para 17).

e. the costs regime should facilitate access to justice; and

f. there should be flexibility in rules to ensure that justice can be done.[35]

56. We have set forth the aforesaid so that there is appreciation of the principles that in carrying on commercial litigation, parties must weigh the commercial interests, which would include the consequences of the matter not receiving favourable consideration by the courts. Mindless appeals should not be the rule. We are conscious that in the given facts of the case the respondents have succeeded before the Division Bench though they failed before the learned single Judge. Suffice to say that all the parties before us are financially strong and took a commercial decision to carry this legal battle right up to this Court. They must, thus, face the consequences and costs of success or failure in the present proceedings.

57. The best reflection of what costs have been incurred is what the parties have paid towards the counsel fee and out of pocket expenses. The present proceedings do arise from a writ proceeding under Article 226 of the Constitution but it is really a commercial dispute. Thus, the failing

[35] Law Commission (supra).

party cannot hide behind the veneer of the present dispute being in the nature of a writ proceeding. The tender jurisdiction was created for scrutiny of commercial matters and, thus, where continuously parties seek to challenge award of tenders, we are of the view that the succeeding party must get costs and the party which loses must pay costs. This was really a battle between two commercial entities on one side seeking to get set aside an award of a tender to two other entities. What else would be commercial interest!

58. It is with the aforesaid objective that we had asked the parties to file their bill of costs vide order dated 17.08.2021. The objective was to bring forth this principle into force by quantifying actual costs for the succeeding party.

59. We have scrutinised the bill of fee and costs. We are inclined to allow actual costs. However, we have modulated the costs insofar as appellant is concerned to the extent of the indicated amount of the Advocate-on-Record and allow 50% of the same. The total costs, thus, payable to the petitioner/appellant would be Rs.23,25,750/- (Rupees twenty three lakh twenty five thousand seven hundred fifty only). The State Government cannot be left behind so far as their compensation of

costs in defending such a litigation is concerned and we, thus, allow the costs of Rs.7,58,000/- (Rupees seven lakh fifty eight thousand only).

60. The costs be accordingly paid within a period of four weeks by Kumbhat and Alpha in equal share to the two parties as aforesaid.

....J.
[Sanjay Kishan Kaul]

....J.
[Hrishikesh Roy]

New Delhi.
September 17, 2021.