(2019) 12 JH CK 0001

In the Jharkhand High Court

Case No : Letter Patent Appeal No. 730, 734 Of 2018

Balaji Enterprises APPELLANT

Vs

State Of Jharkhand And Ors RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 98, 98(1), 98(2)
High Court Of Jharkhand Rules, 2001 — Rule 41
Constitution Of India, 1950 — Article 14, 136, 226

Citation : (2019) 12 JH CK 0001

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Sumeet Gadodia, Indrajit Sinha, Ajit Kumar, Aparajita Bhardwaj, Anil Kumar Sinha, Sweety Topno

Final Decision : Allowed

Judgement

The present Letters Patent Appeals have been referred before this Court in the capacity of third Judge by the administrative decision of Hon'ble the Acting Chief Justice dated 03.09.2019 reason being that the appeals (both) have been allowed by a concurring judgment but both the Hon'ble Judges have differed with each other on one issue which has necessitated these appeals to be listed before a third Judge and in pursuance thereto, the matter has been placed before the Hon'ble the Chief Justice in the Administrative Side, for assigning the matter to a third Hon'ble Judge, for ready reference, the aforesaid administrative order is reproduced below :-

Hon'ble The Acting Chief Justice

My Lord,

PUC may kindly be perused.

PUC is an order dt.30.04.2019 passed by Hon'ble Division Bench comprising Hon'ble Mr. Justice H.C. Mishra and Hon'ble Mr. Justice S.K. Dwivedi in L.P.A. No.

730 of 2018 with L.P.A. No. 734 of 2018 in the aforesaid order, Their Lordships have been pleased to observe as under:-

"Judgment has been delivered in open Court today, according to which, both these appeals are allowed by us, by a concurring Judgment. We have, however, preferred to differ with each other on one issue, which has necessitated these appeals to be listed before a third Judge.

Let these matters be placed before the Hon'ble the Chief Justice in the administrative side, for assigning the matter to a third Hon'ble Judge."

L.P.A. No. 730 of 2018 with L.P.A. No. 734 of 2018 has been preferred against the order dated 02.08 2018 passed in WP (C) No.986 of 2018 with W.P. (C) No.888 of 2018 passed by Hon'ble Mr.Justice Rajesh Shankar.

Under the aforesaid facts and circumstances, perhaps Your Lordship may feel inclined to assign in L.P.A. No. 730 of 2018 with L.PA. No. 734 of 2018 to be listed before a third Hon'ble Judge of this Court.

Submitted before Your Lordship for kind perusal and necessary orders/directions.

Sd/- 3.9.19

(Sanjeev Kumar Das)

Joint Registrar (List &Computer)

Assigned to Mr. Justice Sujit Nr. Pd.

Sd/- 3.9.19

Hon'ble The Acting Chief Justice

2. Hon'ble the Acting Chief Justice has taken such decision in pursuance to the power conferred under Rule 41 of High Court of Jharkhand Rules, 2001 which reads hereunder as :-

"41. When in an appeal in any civil matter heard by a Bench of two Judges, a difference of opinion arises between them on a point of law, if either of the Judges desire that the appeal be referred, it shall be referred to and heard and determined by such Judge or Judges as the Chief Justice may appoint. The appeal shall be re-argued before the Judge or Judges to whom it is so referred either sitting apart from or with the referring Bench as the Chief Justice directs."

3. This Court, before expressing its opinion about the views of the Hon'ble Judges, deems it fit and proper to refer some factual aspect.

The factual aspect giving rise to prefer appeal is that writ petitions have been filed by one Mandeepa Enterprises, Respondent No.5 to the appeal, hereinafter referred as the writ petitioner/Respondent No.5, for seeking a writ in the nature of mandamus for quashing the tender notice dated 12.02.2018 being Tender Reference No. RCD/Seraikela/188 issued by the Executive Engineer, Road

Construction Department, Road Division, Seraikella-Kharsawan and further direction upon the respondents to issue the Letter of Award (LOA) in favour of the petitioner as found suitable twice by the Tender Committee as also for restraining the respondents to proceed further in pursuance to the Tender Notice dated 12.02.2018 (Annexure-8 to the writ petition), in relation to the work of collection of user fee in Kandra-Chowka Section 5 + 780 Km for two years.

The occasion to file the writ petitions was that even in spite of the decision taken by Tender Committee meeting which was convened under the Chairmanship of Engineer-in-Chief, Road Construction Department, Jharkhand for consideration of candidature of one or the other bidders which was opened on 09.10.2017 and the petitioner since was single bidder, as such by virtue of decision dated 06.12.2017, the bid of the petitioner was considered by the Tender Committee who had taken decision to open financial bid of the petitioner. The petitioner has received the Tender Summary Reports on 11.02.2018 through internet and his selection for toll operation of Kandra-Chowka Road was finally found to be responsive and in consequence thereof, Letter of Award has been issued.

4. But at that juncture, a complaint was made by one HSM Holding Pvt. Ltd. on 13.12.2017 addressing to the Engineer-in-Chief, Road Construction Department, Jharkhand complaining therein regarding the technical bid submitted by the writ petitioner by pointing out the anomalies in the technical bid, in pursuance thereto, an enquiry was directed to be conducted which resulted into submission of a detailed verification report by the petitioner who in turn has submitted a detailed explanation to the Executive Engineer, Road Construction Department on all queries but nothing was found adverse against the petitioner but thereafter when Letter of Award has not been issued, representations have been but no decision has been taken, rather, the writ petitioner has come to know on 13.02.2018 about the decision of the authority for fresh competitive bidding against which the writ petition has been filed questioning the said decision that once the Tender Committee has taken decision clarifying the writ petitioner technically qualified, merely on account of a complaint, non-issuance of Letter of Award is not proper.

5. The writ court has issued notice to the respondent State of Jharkhand who had put its appearance and filed detailed counter affidavit inter alia therein the stand has been taken about declaring the petitioner to be a responsive bidder but on the complaint made by HSM Holding Pvt. Ltd. it was found on re-examination of documents that there was a difference in the net worth certificate and the balance-sheet submitted by the petitioner and the main difference was the amount mentioned about the claim of net worth which was Rs. 1.65 crores whereas in the balance-sheet submitted by the petitioner, the net worth shown as Rs.1.018 crores and subsequently it was also found that the solvency certificate submitted by the petitioner through the Syndicate Bank there it has been mentioned that the bank will not take any kind of responsibility and guarantee which is a conditional clause in the tender and as such not acceptable.

In pursuance to the aforesaid reason, the bid of the petitioner was rejected on 08.02.2018 and the respondent authorities have come out with a fresh Re-e-tender being reference No.RCD-SARAIKELLA/188 dated 12.02.2018 but the petitioner on the date of filing of the counter affidavit had not applied.

6. The State has taken a specific stand that since there is mismatch in the net worth certificate and the balance-sheet submitted by the petitioner, as such the same is in violation of the condition of the Standard Bid Document as contained under condition No.2.5.2, more particularly the condition pertaining to financial capacity as stipulated under Clause 2.5.2.1 thereof.

It has further been stated that after cancellation of the candidature of the petitioner by virtue of 3rd call, fresh applications have been invited by way of 4th call on 14.06.2018. The writ court has passed an order on 02.08.2018 by quashing the decision of the Tender Committee dated 08.02.2018 with regard to the rejection of the bid of the petitioner and in consequence thereof, remitted the matter to the Tender Committee to provide an opportunity of hearing to the petitioner/his representative to explain/clarify the issues which were earlier considered by the said committee. The fresh decision taken by the Tender Committee shall be placed before the Secretary, Department of Road Construction, Government of Jharkhand. Till the final decision is taken in this regard by the Secretary, the respondents shall not proceed further with the subsequent tender i.e. the Notice Inviting e-Tender for the 4th Call vide e-Tender Reference No.RCD/SERAIKELLA/712 dated 14.06.2018.

7. It is evident from the material available on record that in pursuance to the order passed in the writ petition being W.P.(C) No.888 of 2018, the opportunity of hearing was provided to the writ petitioner, the fresh decision was taken by the Tender Committee on 29.11.2018 which was placed before the Secretary, Road Construction Department in terms of the direction of the writ court and after approval of the Secretary of the department, decision was taken to award the tender to the writ petitioner for the work in question.

8. The appellant Balaji Enterprises has filed two Letters Patent Appeals being L.P.A. No. 730 of 2018 and L.P.A. No.734 of 2018 along with interlocutory applications. I.A. No.11116 of 2018 (in L.P.A. No.730 of 2018) and I.A. No.11166 (in L.P.A. No.734 of 2018) have been filed for leave to prefer appeals against the common judgment delivered in the two writ petitions. The Hon'ble Division Bench of this Court vide order dated 20th December, 2018 held Balaji Enterprises, the appellant herein, interested party so far as the subject of writ petition is concerned and accordingly allowed leave to prefer appeal as also condonation of delay.

9. The Hon'ble Division Bench has been pleased to condone the delay but refused to stay the operation of the order passed by the writ court, rather, it has been directed not to stall the writ petitioner's work as the subject of these litigations involve work having strong public interest element. However, the Deputy

Commissine, Saraikella-Kharsawan has been appointed as Special Officer to supervise the toll collection process in respect of works involved in both the tenders.

10. The order dated 20.12.2018 has been assailed by the writ petitioner under Article 136 of the Constitution of India before Hon'ble Supreme Court being Special Leave to Appeal (C) No. 6434-6435 of 2019 and vide order dated 11.03.2019, the Special Leave Petitions have been dismissed as withdrawn with the liberty to the writ petitioner to approach appropriate legal forum as per law.

11. The Letters Patent Appeals have been heard by this Court and by appreciating the argument of the learned counsel appearing for the parties and the finding recorded by the writ court, both the Hon'ble Judges have agreed to the point about non-sustainability of the order passed by the writ court but with respect to the other direction to the effect that after setting aside of the order passed by the writ court, it will be open for the State Government to continue with the same work arrangement which has been entered into with the writ petitioner/respondent No.5 by issuing the Letters of Allotment in its favour. The State Government shall also be within its powers to revisit the same, in view of the law laid down in State of Jharkhand & Ors. Vs. CWE-SOMA Consortium reported in (2016) 14 SCC 172, as there was only one responsive bid and there being only one bidder, in order to make the tender more competitive, the State Government may decide to cancel the tenders and invite fresh tenders. In case, the State Government decides to revisit the tender process, we direct that exercise would be taken afresh by issuing fresh notices of e-tenders, giving equal opportunity to all. It would be appropriate for the respondent State to take a final decision in this regard at an early date, so that the work arrangements, as directed by this Court vide order dated 20.12.2018 passed in these appeals, may finally come to an end.

12. The other Hon'ble Judge (Hon'ble Mr. Justice Sanjay Kumar Dwivedi) has disagreed with the view taken by Hon'ble Judge (Hon'ble Mr. Justice H.C.Mishra) on the ground that even after setting aside the judgment passed by the writ court, the writ petitioner/Respondent No.5 can be allowed to continue with the works of collecting the user fee on both spans of the State highway.

The Hon'ble Judge, while showing the disagreement, has considered the eligibility criteria as provided under Clause 2.5.2 and the mandate to obey it. The reason for it, on earlier occasion, on an enquiry made in pursuance to the complaint made by HSM Holding Pvt. Ltd., the candidature of the petitioner has been found to be not technically qualified, subject matter of the writ petition and subsequently the same has been quashed. The Hon'ble Judge has considered the condition as reflected under Clause 2.5.2.1 pertaining to financial capacity mandatory to be complied with and by making reference of the judgment passed by the Hon'ble Supreme Court in the case of Kanhaiya Lal Agrawal Vs. Union of India and others, reported in (2002) 6 SCC 315 and the case of G.J.Fernandz Vs. State of Karnatka and others, reported in (1990) 2 SCC 488 wherein ratio has been decided about the consequence of non-fulfilment of the requirement which warrants the rejection of tender.

13. The matter has been posted before this Court under the capacity of third Judge due to the said difference in opinion amongst the two Hon'ble Judges.

14. Mr. Sumeet Gadodia as also Mr. Indrajit Sinha, learned counsel appearing for the appellant have supported the views of Hon'ble Mr. Justice Sanjay Kumar Dwivedi by emphatically arguing that once the condition as has been stipulated in the Standard Bid Document pertaining to the financial capacity which is different for the proprietor firm vis-à-vis the individual.

The admitted fact herein is that the writ petitioner had participated in the third process of bid (3rd call) in the capacity of proprietorship firm and as per the condition stipulated under Clause 2.5.2, the financial capacity for the proprietorship firm is to be shown minimum net worth of 25% of annual potential collection which admittedly was not available and as such, the condition being mandatory, has not been complied with, therefore, the technical committee who has taken decision initially, has been reviewed on complaint made by one HSM Holding Pvt. Ltd. and, therefore, the candidature of the writ petitioner has rightly been rejected by reviewing the earlier decision.

Further submission has been made by them that once candidature of the writ petitioner has been found to be not acceptable in terms of the mandatory condition of the Standard Bid Document, the work cannot be allotted in his favour and as per the decision referred by Hon'ble Mr. Justice Sanjay Kumar Dwivedi while differing with the judgment of Kanhaiya Lal Agrawal Vs. Union of India and others (Supra) which speaks about the observance of the condition stipulated in the document and, therefore, the Hon'ble Mr. Justice H.C. Mishra has agreed to that point about observance of the condition stipulated in the Standard Bid Document about the financial capacity of the proprietary firm (under which the writ petitioner had submitted his bid) and the order passed by the writ court has been quashed but the question herein is that once the order passed by the writ court has been quashed, there cannot be any direction upon the State Government by leaving it open upon the State Government to continue the work with the same arrangement which has been entered into with the writ petitioner/respondent No.5, by issuing the Letters of Appointment in its favour.

According to them, once the Hon'ble Judge has come to the conclusion that the writ court has committed an error in allowing the petition which led in passing the order by setting aside the order passed by the writ court, there is no occasion to pass such direction again upon State Government and if, in such circumstances, the aforesaid view has been differed with by Hon'ble Mr. Justice Sanjay Kumar Dwivedi, it cannot be said to suffer with infirmity, rather, that view is fit to be approved.

15. Mr. A.K.Sinha, learned senior counsel appearing for the writ petitioner/ respondent has argued with emphasis that the finding recorded either by Hon'ble

Mr. Justice H.C. Mishra or Hon'ble Mr. Justice Sanjay Kumar Dwivedi is not proper. He submits by referring to paragraph 17 of the judgment wherein the Hon'ble Court has passed an order by recording a finding by limiting the scope of judicial review in the matter of contract awarded by the Government while on the other hand, at paragraph 19 the order passed by the writ court has been set aside.

Further submission has been made that if the paragraphs 17 and 19 would be read together, then it would be evident that since the scope of judicial review being limited, therefore, the opinion expressed by Hon'ble Mr. Justice H.C. Mishra leaving it open for the State Government to continue with the work with the same arrangement entered into with the writ petitioner by issuing Letters of Allotment in his favour, cannot be said to suffer from infirmity.

It has been submitted that when the Hon'ble Mr. Justice Sanjay Kumar Dwivedi is accepting the view of Hon'ble Mr. Justice H.C. Mishra pertaining to finding given by him, then there was no occasion for the Hon'ble Judge (Hon'ble Mr. Justice Sanjay Kumar Dwivedi) to differ with the opinion leaving it open to the State Government to continue with the same work arrangement.

He has further submitted that the entire matter be decided on merit by taking into consideration the finding recorded at paragraphs 17 and 19 of the judgment.

He has referred to the order passed by the Hon'ble Apex Court since the writ petitioner has preferred S.L.P.(C) No. 13701-13702 of 2019 against the order passed in the L.P.A. and by referring to an order passed by Hon'ble Apex Court on 15.07.2019, the observation made by Hon'ble Apex Court therein to the effect "pendency of this petition will not preclude the learned third Judge to decide the matter on merits pending before the High Court".

In view of such order, submission is that since the Hon'ble Apex Court has left it open upon the third Judge to decide the matter on merits meaning thereby that the entire issue is to be decided on merit afresh by the third Judge.

16. This Court, before expressing its opinion, deems it fit and proper to first deal with the jurisdiction of the third Judge as to whether the issue on merit can be looked into by the third Judge more particularly when the appeal is pending before the Hon'ble Apex Court under Article 136 of the Constitution of India.

17. This Court deems it fit and proper to refer to the provision of Section 98 of the Code of Civil Procedure as also Rule 41 of the Jharkhand High Court Rules, 2001 before answering the aforesaid question. This Court further deems it fit and proper to refer both the provisions which reads hereunder as :-

Section 98 of the C.P.C. reads hereunder as :-

"98. Decision where appeal heard by two or more Judges. - (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such

Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

Rule 41 of the High Court of Jharkhand Rules, 2001 reads hereunder as :-

"41. When in an appeal in any civil matter heard by a Bench of two Judges, a difference of opinion arises between them on a point of law, if either of the Judges desire that the appeal be referred, it shall be referred to and heard and determined by such Judge or Judges as the Chief Justice may appoint. The appeal shall be re-argued before the Judge or Judges to whom it is so referred either sitting apart from or with the referring Bench as the Chief Justice directs."

It is evident from the provision of Section 98(1) and (2) of the Code of Civil Procedure that the difference of opinion between Judges who constitute the Bench hearing the appeal and in case of difference in opinion on the point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it, meaning thereby, the third Judge is only to decide the point of law upon which the difference has been shown by the two Hon'ble Judges.

The provision of Section 98 of the Code of Civil Procedure thus, demonstrates that the third Judge has got no adjudicatory power or to look into the error, if any, recorded in the finding.

Further, in the present case, the appeal having been preferred by the writ petitioner under Article 136 of the Constitution of India and, therefore, in my opinion, it would not be appropriate to delve into the issue of legality and propriety of the judgment in entirety.

Further also for the reason that in the administrative side while referring the matter before the third Judge, the issue only upon the difference of opinion and as per the provision of Section 98 of the Code of Civil Procedure read with Rule 41 of the High Court of Jharkhand Rules, the argument which has been advanced by Mr. A.K.Sinha, learned senior counsel appearing for the writ petitioner is held to be not sustainable. Accordingly, rejected.

18. This Court, after going through the terms of reference as also in view of the provision of Section 98 of the Code of Civil Procedure read with Rule 41 of the High Court of Jharkhand Rules, is now proceeding to look into the opinion of two Hon'ble Judges which is to be approved on the basis of the settled position of law.

19. Since the difference of opinion pertains to the eligibility criteria, therefore, it would be appropriate to refer the criteria stipulated in the Standard Bid Document pertaining to eligibility of bidders which is under Clause 2.5 which reads hereunder as :-

2.5 Eligibility of Bidders

2.5.1 For determining the eligibility Bidders for their qualification hereunder, the following shall apply :

(i) The Bidder may be a

(a) Company registered under the Indian Companies Act, 1956;

(b) Partnership Firm registered under the Indian Partnership Act, 1932;

(c) Partnership Firm registered under the Limited Liability Partnership Act, 2008;

(d) Cooperative Society/Ex-servicemen Society registered under any Cooperative Societies Act (of any state in India) or under Multi State Cooperative Societies Act, 2002 (of any state in India) or under Mutually Aided Cooperative Societies Act (of any state in India)

(e) Proprietary Firm; or

(f) Individual

(ii) The Bidder may be a single entity or a group of entities (the "Consortium").

However, no Bidder applying individually or as a member of a Consortium, as the case may be can be member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium.

(iii) The entities/pertners (in case of partnership firm) which were removed/ debarred/black listed by any Deptt. Of Govt. of Jharkhand / any other State govt. / Central Govt. / NHAI / Govt. PSUs based on the basis of their performance in toll collection or any other assignment or for any other reason including fraudulent and corrupt practices etc. are not eligible to submit their Bids.

2.5.2 Qualification criteria for eligible bidders.

2.5.2.1 Financial Capacity

A Bidder shall have

(i) a minimum Net Worth of 25% of the Annual Potential Collection (APC) at the close of the preceding financial year.

(ii) positive net cash accruals during any two financial years out of the last three financial years, as indicated in Annexure

In case of Partnership firm/Proprietary firm the net worth of the firm and not of the individual partners shall be considered. In case of Individuals, the capacity of the individual for the applicable financial year shall be considered on the basis of valuation certificate from registered valuer and certification of the same by Chartered Accountant.

Note : (i) Net Cash Accruals shall mean Profit after Tax + Depreciation.

(ii) Net Worth shall mean (Subscribed and Paid-up Equity + Reserves) Less (Revaluation reserves + miscellaneous expenditure not written off + accrued liabilities not accounted for).

2.7 Documents to be submitted online with Technical and Financial Bid :-

(i) ... ...

(ii) ... ...

(iii) ... ...

(iv) ... ...

(v) In case of individual, valuation certificate of the assets in the name of the individual duly certified by a registered valuers and certification of the same by the Chartered Accountants is required. The assets shall be valued at circle rate. In case circle rates are not available, the rates taken in any registration shall be considered and copy of such registrations are to be provided. Copy of the Registration Certificate of the valuer shall be enclosed.

2.8 Documents to be submitted in Original (in envelope) in addition to submission in electronic form (to be uploaded on e-portal)

(i) ... ...

(ii) ... ...

(iii) ... ...

(iv) ... ...

(v) ... ...

(vi) ... ...

(vii) In case of individual, valuation certificate of the assets in the name of the individual duly certified by a registered valuers and certification of the same by the Chartered Accountants is required. The assets shall only be valued at circle rate. In case circle rates are not available, the rates taken in any registration shall be considered and copy of such registrations are to be provided. Copy of the Registration Certificate of the valuer

It is evident from the eligibility criteria wherein the category of Bidder may be (a) Company registered under the Indian Companies Act, 1956, (b) Partnership Firm registered under the Indian Partnership Act, 1932, (c) Partnership Firm registered under the Limited Liability Partnership Act, 2008, (d) Cooperative Society/Ex-servicemen Society registered under any Cooperative Societies Act (of any state in India) or under Multi State Cooperative Societies Act, 2002 (of any state in India) or under Mutually Aided Cooperative Societies Act (of any state in India) (e) Proprietary Firm; or (f) Individual.

The other condition is that the Bidder may be single entity or a group of entities (the Consortium). However, no Bidder applying individually or as a member of a Consortium, as the case may be can be member of another Bidder.

The term 'Bidder' used herein would apply to both a single entity and a Consortium.

Condition No. 2.5.2 stipulates about qualification criteria for eligible bidders whereunder 2.5.2.1 the "financial capacity" has been referred under which a Bidder shall have (i) a minimum Net Worth of 25% of the Annual Potential Collection (APC) at the close of the preceding financial year, (ii) positive net cash accruals during any two financial years out of the last three financial years, as indicated in Annexure II of Appendix I.

In case of Partnership firm/Proprietary firm the net worth of the firm and not of the individual partners shall be considered.

In case of Individuals, the capacity of the individual for the applicable financial year shall be considered on the basis of valuation certificate from registered valuer and certification of the same by Chartered Accountant.

20. This Court has also looked into the condition as to whether the said condition is mandatory or desirable and if entire eligibility criteria as contained under Clause 2.5.1 and 2.5.2 is seen, it is mandatory in nature - the reason being that the Bidder has been classified under six categories and here the concern is of proprietary firm and of an individual.

The proprietary firm is under the definition of Bidder as under 2.5.1 (i) (e) while individual is under 2.5.1 (i) (f).

Further it would be evident that the Bidder is to be treated as a single entity or a group of entities with an embargo that no Bidder applying individually or as a member of the consortium, as the case may be, can be the member of another Bidder.

The qualification criteria for eligible Bidders so far as it relates to financial capacity, has been referred under Clause 2.5.2.1 and it begins with a Bidder shall have a minimum Net Worth of 25% of the Annual Potential Collection at the close of the preceding financial year with the further condition

It is further stipulated that in case of the partnership/proprietary firm, the Net Worth of the firm and not of the individual partners shall be considered.

It is evident therefrom that the Bidder since has been classified in six categories and under Clause 2.5.2.1 the sentence begins with "a Bidder shall have" meaning thereby under the six categories of the Bidders, the qualification criteria for eligible Bidders would be equally applicable to all the Bidders and as such there cannot be any overlapping to meet out the criteria of minimum Net Worth of 25% of the annual potential collection at the close of the preceding financial year.

It is further evident that the condition cannot be said to be obligatory, rather, it is mandatory due to insertion of the words "a Bidder shall have a minimum Net Worth of 25% of the Annual Potential Collection" and further the Bidder since has been categorized in six categories, therefore, the specific and explicit insertion has been made about the words "in case of partnership firm/proprietary firm, the act worth of the firm and not of the individual partners shall be considered". The word "shall" also mandates by looking to the six criteria of the Bidder that the financial capacity of minimum net worth of individual partners shall not be considered to look into the minimum net worth of partnership firm or proprietary firm.

It is further evident that in case of individual, valuation certificate of the assets in the name of the individual duly certified by the registered valuer and certification of the same by Chartered Accountant is required.

21. In the light of the aforesaid interpretation of the condition of eligibility of Bidders, this Court has proceeded towards the finding recorded by two Hon'ble Judges of this Court.

22. In order to agree or disagree with the view of one or the other Hon'ble Judges it needs to refer certain legal position which has been settled by Hon'ble Apex Court in catena of decisions, some of them are being referred for ready reference.

The Hon'ble Apex Court in the case of Air India Ltd. v. Cochin International Airport Ltd. reported in (2000) 2 SCC 617, wherein, it has been laid down that the State can fix its own terms of invitation of tenders and that it is not incumbent to judicial scrutiny and the same is strictly to be adhered to.

In the case of Directorate of Education and Others v. Educomp Data Matics Ltd. and others reported in (2004) 4 SCC 19, it has been held therein that the courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice the court cannot order change in them.

In the case of Kanhaiya Lal Agrawal-Vs.-Union of India and Others reported in (2002) 6 SCC 315, it has been held therein at paragraph 6 by taking note of the judgment rendered by the Hon'ble Apex Court in the case of G.J. Fernandez-Vs.-State of Karnataka and Ors. reported in (1990) 2 SCC 488 that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term.

"6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in G.J. Fernandez v. State of Karnataka."

This Court also deems it fit and proper to make reference of the judgment rendered in the case of Rashmi Metaliks Limited and another Vs. Kolkata Metropolitan Development Authority and Others reported in (2013) 10 SCC 95 wherein the issue fell for consideration pertaining to decision of rejection of the bid on the ground that one of the condition was of submission of the latest income tax return and the return was not submitted along with the bid document but the Hon'ble Apex Court has been pleased to hold therein that by going through the condition of Standard Bid Document which stipulates a condition for requirement for income tax return to be submitted but the bidder has not submitted the latest income tax return and on that ground it was rejected and in that circumstances it has been laid down by Hon'ble Apex Court that when the requirement to furnish the income tax return without any stipulation to submit latest income tax return, the bid cannot be cancelled, rather, the cancellation would be after providing an opportunity of hearing to submit the latest income tax return. Therefore, the issue in the said case was about condition being mandatory or not but, according to my opinion, the condition stipulated about the financial viability is mandatory.

23. It requires to refer herein the scope of judicial review by the High Court under Article 226 of the Constitution of India in the matter of awarding contract. There is no dispute about the fact that the scope of judicial review by the High Court under the aforesaid provision is very limited but the same can be exercised if there is any error in the decision making process and not in the decision taken by the authority but certainly if there is any error in the decision making process basis upon which any decision has been taken, the same will be amenable under the power of judicial review under Article 226 of the Constitution of India, reference in this regard be made to the judgment rendered in the case of Jagdish Mandal Vs. State of Orissa and Others reported in (2007) 14 SCC 517 and in the

case of Meerut Development Authority Vs. Association of Management Studies and Another reported in (2009) 6 SCC 171.

In the case of Jagdish Mandal Vs. State of Orissa and Others (supra), the Hon'ble Apex Court at para 22 has held which reads hereunder as :-

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

In yet another judgment rendered in the case of Meerut Development Authority Vs. Association of Management Studies and Another (supra), the Hon'ble Apex Court has held as under :-

"41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether `decision making process' was reasonable, rational, not arbitrary and violative of Article 14."

24. Now this Court has proceeded by referring to the finding, Hon'ble Mr. Justice H.C. Mishra has dealt with about the power of judicial review at paragraph 17 of the judgment while at paragraph 19 the judgment passed by the writ court has been set aside.

This Court is not expressing its view about the observation made by the Hon'ble Judge at paragraph 17 since the same is not the point of difference in between the two Hon'ble Judges and more particularly, the writ petition has already approached before the Hon'ble Apex Court under Article 136 of the Constitution of India.

25. The question herein is that when the order passed by the Hon'ble writ court is held to be not sustainable, even then it has been left open with the State Government to continue with the same work arrangement which has been entered into with the writ petitioner/Respondent No.5 by issuing the Letters of Allotment in its favour which has been differed with by Hon'ble Mr. Justice Sanjay Kumar Dwivedi.

The reason of difference has been reflected in the part of the order which has been dictated by Hon'ble Mr. Justice separately and while doing so, the qualification criteria for eligible bidders has been referred as stipulated under Clause 2.5.2 of the Standard Bid Document.

It has been discussed therein that the minimum net worth of 25% of the annual potential collection is to be seen by the Tender Committee in the capacity of the candidature. If the candidature is in the capacity of the partnership firm/ proprietary firm, the financial capacity of minimum net worth of 25% of the annual potential collection is to be seen of the partnership firm / proprietary firm as because the bidders have been classified in six categories and partnership/ proprietary firm is in the separate category.

The writ petitioner is admittedly is applicant in the capacity of proprietary firm which is under different category under 2.5.1 (i)(e) while the bidder in the individual capacity has been put in separate category of Clause 2.5.1 (i)(f), therefore, the question of minimum net worth of 25% of the annual potential collection at the close of the preceding financial year is required to be disclosed by the bidder. Herein, the writ petitioner had applied in the capacity of proprietary firm and not in the capacity of individual which is a different category of bidder.

26. This Court since has come to the finding about the nature of the aforesaid condition pertaining to eligibility criteria under the financial viability as held to be mandatory and it is admitted case of the writ petitioner that the bid has been submitted by way of proprietary firm, therefore, he cannot be allowed to take advantage of the net worth in the individual capacity, which cannot be in absence of any such condition stipulated in the N.I.T.

27. This Court is further of the view that if the view of Hon'ble Mr. Justice H.C.Mishra would be accepted, it would amount to relaxing the terms and conditions as stipulated under the Standard Bid Document since as has been held by Hon'ble Apex Court in the case of State of Orissa and Another Vs. Mamata Mohanty reported in (2011) 3 SCC 436 that in the absence of an enabling provision of grant of relaxation, no relaxation can be made. Even if such a power is provided under the statute, it cannot be exercised arbitrarily. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provision or executing its command. Further it has been held therein that relaxation tantamount to changing the selection criteria after initiation of selection proves, which is not permissible at all in view of the fact that the rules of the game cannot be changed after the game is over (K.Manjusree Vs. State of A.P. reported in (2008) 3 SCC 512 and Ramesh Kumar Vs. High Court of Delhi reported in (2010) 3 SCC 104). However, it is required to be clarified that the judgment pertaining to the issue that the rules of the game cannot be changed after the game is over is under reference before the Constitution Bench of Hon'ble Apex Court in the case of Shiv Nandan Vs. High Court of Kerala [(2018) 1 SCC 239] and so long as the matter is lying pending for consideration, the rule laid down in the case of K.Manjusree Vs. State of A.P. or Ramesh Kumar Vs. High Court of Delhi is to be relied upon.

Further, if such eventuality would be allowed, it will be said to be relaxing the terms and conditions which cannot be, otherwise the other candidates who are lacking the minimum net worth of 25% either in the capacity of a bidder categorized in either of the capacity, will be said to be lost their chance for consideration. If such relaxation would be granted to the writ petitioner, question is why not to others by giving benefit of the minimum net worth of the 25% by taking aid of either of the bidders irrespective of the application made in either of the capacity. It will be nothing but in the teeth of Article 14 of the Constitution of India.

28. Therefore, this Court is of the opinion that the view expressed by Hon'ble Mr. Justice Sanjay Kumar Dwivedi is to be concurred. Accordingly, the same is

concurred.

29. The reference as has been made by the administrative order of the Hon'ble the Acting Chief Justice is being answered as above.

30. Before parting with the order, this Court also deems it proper to deal with the argument advanced on behalf of senior counsel appearing for the writ petitioner/ Respondent No.5 to the effect that in pursuance to the order passed by the writ court the State Government has taken a decision on 29.11.2018 but that is not under challenge. Upon which, submission has been made by the learned counsel appearing for the appellant that since the order dated 29.11.2018 has been passed in terms of the order passed by the writ court and the order passed by the writ court has been set aside with the concurrence opinion, even if the said order has not been challenged, the order dated 29.11.2018 will lose its force on the ground that when the foundation will go, the effect of consequence will automatically lose its force.

Learned counsel for the appellant has further submitted that the State Government has taken such decision which is contrary to the stand taken by them in the counter affidavit filed before the writ court but subsequently complete contrary view has been taken by the respondent State of Jharkhand in the intra-court appeal and as such, the State cannot be allowed to take two different stand before two different courts.

31. This Court is consciously not answering this issue since this is not the subject matter of reference and further, the matter is pending before the Hon'ble Apex Court.

