

(2019) 04 JH CK 0040

In the Jharkhand High Court

Case No : Letter Patent Appeal No. 730, 734 Of 2018, I.A. No. 2025 Of 2019

Balaji Enterprises

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 30 Rule 1, Order 30 Rule 4, Order 30 Rule 10
Constitution Of India, 1950 — Article 12, 14, 298

Citation : (2019) 04 JH CK 0040

Hon'ble Judges : H.C. Mishra, J; Sanjay Kumar Dwivedi, J

Bench : Division Bench

Advocate : Sumeet Gadodia, Indrajit Sinha, Ajit Kumar, Aprajita Bhardwaj, Anil Kr. Sinha, Sweety Topno

Judgement

Both these appeals arise out of the common Judgment dated 2.08.2018, passed by the Writ Court, in W.P.(C) No.986 of 2018 and W.P.(C) No.888 of 2018, whereby both the writ applications were disposed of, quashing the decision dated 8.2.2018, taken by the Departmental Tender Committee, rejecting the bids of the writ petitioner, and the matter was remanded to the Departmental Tender Committee to take the decision afresh, after providing an opportunity of hearing to the petitioner / his representative.

2. It may be stated that the matter relates to award of contract for the purpose of collection of user fee through fee collecting agency, on two spans of the State Highway, one being from KMs 5 to KMs 780 of Kandra-Chowka Section, and the other being in the State Highway No.5 from KM 0.00 to 47.86 in Chaibasa-Kandra Section. The appellant in both these appeals was not a party to the writ applications and as such, his prayer for leave to challenge the impugned order passed in the writ applications was challenged at the very first instance, when these appeals were taken up by a co-ordinate Bench on 20.12.2018. Upon hearing the parties, including the writ petitioner, it was held that the appellant is an interested party, so far as the subject matter of the writ petition is concerned,

and it had sufficient interest in the subject litigation and was permitted to present these two appeals. Against the said order passed by this Court, the petitioner respondent No.5 moved before the Hon'ble Supreme Court of India in Special Leave to Appeal C. Nos. 6434-6435 of 2019, and by order dated 11.03.2019, the petitions were dismissed as withdrawn with liberty to the petitioner to approach the appropriate legal forum as per law. It may further be added that at the time of final hearing also, the question of locus standi of the appellant to challenge the impugned order, was seriously raised on behalf of the writ petitioner respondent No.5, placing reliance upon the decision of the Hon'ble Supreme Court of India in Vinoy Kumar Vs. State of U.P. & Ors., reported in (2001) 4 SCC 734. However, in view of the fact that this issue has already been decided by a co-ordinate Bench of this Court by order dated 20.12.2018 passed in these appeals, and the challenge to said order also did not find favour from the Apex Court, this is practically a closed chapter now. The only question that remains to be considered is whether the appellant being an interested party, thus, having the locus to challenge the impugned order, can succeed in these Letters Patent Appeals, on merits or not.

3. The necessary facts are common to both these appeals. Notices inviting e-tender for selection of bidder for collection of user fee through fee collecting agency on the basis of the competitive bidding, were published by the Executive Engineers of Road Construction Department, Road Division, Saraikela-Kharsawan and Chaibasa, for both the aforesaid spans of road in Candra-Chowka Section and Chaibasa-Kandra Section in the State of Jharkhand. The writ petitioner was the single bidder for both the sections and his bids were also found to be technically and financially responsive by the Departmental Tender Committee. However, a complaint was made against the petitioner by a company, namely, HSM Holding Pvt. Ltd., which appears to be entertained by the State Government, even though the said company was not a bidder in any of the notices inviting e-tender. No Letter of Award (LOA) was issued in favour of the writ petitioner, and another set of notices inviting e-tender (2nd call) were issued for the same sets of works by the Executive Engineers, Road Construction Department, Saraikela-Kharsawan and Chaibasa. The petitioner challenged the second call of tender in the writ applications being W.P.(C) No.888 of 2018 and in W.P.(C) No.986 of 2018, and during the pendency of the writ applications, it transpired that the Department tender Committee, vide its resolution dated 8.2.2018, had made recommendations of rejecting the bid of the writ petitioner. On 15.02.2018 again, by way of 3rd call, again the notices inviting e-tender for the same set of works were issued by the respondent Executive Engineers, Road Construction Department, and the petitioner challenged both these actions of the respondent State in the said writ applications itself, by way of filing interlocutory applications, which were allowed. However, during the pendency of the writ applications, the 3rd call of e-tenders was again cancelled, as the Departmental Tender Committee had rejected the bids of all the bidders on technical ground. Accordingly, by way of 4th call, again the notices inviting e-tenders for the same

set of works were issued by the respondent Executive Engineers, Road Construction Department, on 14.06.2018, in which, this appellant also submitted his tender. As in view of the impugned Judgment passed by the Writ Court, the 4th call inviting the e-tenders had become infructuous, those tenders were not even opened by the State Government. This is how the appellant has preferred these Letter Patent Appeals, aggrieved by the impugned Judgment passed by the Writ Court on 2.08.2018, in both the writ applications.

4. The Judgment impugned in these Letter Patent Appeals shows that on the basis of complaint submitted by HSM Holding Pvt. Ltd., against the respondent writ petitioner, bid documents of the writ petitioner were re-examined and it was found that there was difference in the Net Worth Certificate and the Balance Sheet submitted by the writ petitioner. The writ petitioner had submitted the Net Worth Certificate of Rs. 1.65 crores, but in the Balance Sheet submitted by the writ petitioner, it's net worth was shown to be Rs. 1.018 crores. It was also found that the Solvency Certificate issued by the Syndicate Bank in favour of the writ petitioner was conditional one, as it was mentioned therein that the Bank would not take any responsibility and guaranty. Thus having found the aforesaid two infirmities of the tender documents of the writ petitioner, the Tender Committee decided on 08.02.2018 to reject the bids of the petitioner, and the 2nd call of notices inviting e-tender were published.

5. It was argued before the Hon'ble Single Judge by the respondent State that Clause 2.5.2 of the notice inviting e-tenders prescribed the 'Qualification criteria for eligible bidders', which provided that in case of Partnership firm / Proprietary firm, the net worth of the firm and not of the individual partner shall be considered. In case of individuals, the capacity of individual for the applicable financial year was to be considered on the basis of valuation certificate from the registered valuer and the certification of the same by Chartered Accountant. As the writ petitioner had submitted the bid in the capacity of Proprietary establishment, it was not fulfilling the net worth requirement of a Proprietary establishment, as it was only Rs. 1.018 crores, as against the required Rs. 1.60 crores. But in the individual capacity, the owner of the business was fulfilling the requirement. Before the Writ Court the stand of the respondent State was that his net worth as individual could not be considered, and this was precisely the argument of the learned Advocate General before the Writ Court.

6. The Hon'ble Single Judge has referred the decision of the Hon'ble Supreme Court in Ashok Transport Agency Vs. Awadhesh Kumar & Anr., reported in (1998) 5 SCC 567, on the basis of which, the writ petitioner claimed that there was no difference between the Proprietorship firm and individual, and as such, his case ought to have been treated as individual. On the second point regarding the Solvency Certificate, reliance was placed by the Writ Court, upon a decision of Andhra Pradesh High Court, in Sree Sairam Enterprises Vs. Government of A.P. & Ors., reported in 2004 (2) ALD 494, holding that the Solvency Certificate is issued with regard to the financial capacity of any person considering his past

conduct / transaction with the issuing Bank. The certifying officer does not undertake any liability on behalf of the person in whose favour, the Solvency Certificate is issued. The Writ Court held that in view of these facts, the writ petitioner was required to be afforded sufficient opportunity to explain / clarify the issues, which arose on re-examination on the tender documents, more so when initially the bids of the petitioner were found responsive and subsequently on the application of a stranger, the respondents decided to re-examine the documents of the petitioner. The Hon'ble Single Judge held that the principles of natural justice shall come into play and it was required by the respondent authorities to provide proper opportunity of hearing to the petitioner to clarify the doubts. Accordingly, the decisions of the Tender Committee dated 08.02.2018 with regard to rejection of the bids of the writ petitioner was quashed, and the matter was remanded 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. It was further directed that the fresh decision taken by the Tender Committee shall be placed before the Secretary, Department of Road Constructions, Government of Jharkhand, and till the final decision is taken in this regard, the respondents shall not proceed with the 4th call of the notices inviting e-tender, published on 14.06.2018.

7. As after the aforesaid direction of the Hon'ble Single Judge, the matter was reconsidered by the respondent authorities and the Letters of Allotment (LOA) were issued in favour of the writ petitioner allotting the work of collection of user fee with respect to both the aforesaid spans of roads, the 4th call of the notices inviting e-tender died their natural death. The appellant herein, being the bidder in the 4th call of the notices inviting e-tender, has challenged the decision of the Hon'ble Single Judge and has also questioned the allotment of the work to the writ petitioner, respondent No.5, in both these appeals.

8. Sri Sumeet Gadodia and Sri Indrajit Sinha, learned counsels appearing in both these appeals, submitted that in the contract matters, the decision of the State Government is final. It is submitted that the State Government has full authority to reject or accept any tender without assigning any reason and that action of the State Government is not open to judicial review, unless the decision making process is vitiated by mala fide, unreasonableness or arbitrariness. It is submitted by learned counsels that in the entire writ application filed by the respondent No.5, there was no whisper that the stand of the State Government, while rejecting the bids of the writ petitioner, was suffering from either of the aforesaid vices. It is submitted that in that view of the matter, the Hon'ble Single Judge, could not have entered into the arena of examining the reasons of cancelling the bids of the writ petitioner, by the Departmental Tender Committee, as the same could not be questioned, and as such, the impugned order of the Writ Court cannot be sustained in the eyes of law. In support of their contention, learned counsels placed reliance upon the decision of Hon'ble Supreme Court of India in South Delhi Municipal Corporation Vs. Ravinder Kumar & Anr., reported in

(2015) SCC 545, wherein where the law has been laid down as follows:-

"18.6. ----- the Government being guardian of public finance it has the right to refuse the lowest or any other tender bid or bids submitted by the bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of the Constitution of India. The appellant Corporation's decision in cancelling its earlier tender is not in violation of Article 14 of the Constitution of India, as the High Court did not find any mala fide intention on the part of the appellant Corporation to favour someone in taking such decision. The appellant Corporation's decision in cancelling the earlier tender notice ----- inviting fresh bids from eligible persons for the same works was with a bona fide intention to get better and reasonable rates from the bidders for the execution of the works and not to show favouritism in favour of any bidder."

In this connection, learned counsels have also placed reliance upon the decision of the Hon'ble Supreme Court in State of Jharkhand & Ors. Vs. CWE-SOMA Consortium, reported in (2016) 14 SCC 172, wherein the law has been laid down as follows:-

"14. The appellant State was well within its rights to reject the bid without assigning any reason thereof. This is apparent from Clause 24 of NIT and Clause 32.1 of SBD which read as under:

"Clause 24 of NIT.-'Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof.'

* * *

Clause 32.1 of SBD.-'... the employer reserves the right to accept or reject any bid to cancel the bidding process and reject all bids, at any time prior to award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employer's action.'"

In terms of the above Clause 24 of NIT and Clause 32.1 of SBD, though the Government has the right to cancel the tender without assigning any reason, the appellant State did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the Government to cancel the tender.

15. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the State found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the Tender Committee decided to

cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness."

Learned counsels have pointed out that in the present case also, the notice inviting tender provided as follows:-

"2.10 Rejection of Bids

2.10.1 Notwithstanding anything contained in this RFP, the Authority reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons thereof. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder."

9. Learned counsels further submitted that it is equally well settled principle of law that in the contract matters, if a bid is cancelled, there is no need to give an opportunity to show-cause at that stage and in support of this contention, learned counsels have placed reliance upon the decision of the Hon'ble Supreme Court in Jagdish Mandal Vs. State of Orissa & Ors., reported in (2007) 14 SCC 517. It is also submitted that in the case of Central Coalfields Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium) & Ors., reported in (2016) 8 SCC 622, the Apex Court has gone to the extent of holding that the matters of evaluating tenders and awarding contracts are essentially commercial functions, in which, the principles of equity and natural justice stay at a distance. Placing reliance on these decisions, learned counsels submitted that as no right of hearing accrued to the writ petitioner, the same could not have been given by the Writ Court. Learned counsels have pointed out that in fact, it is not a case that the decision rejecting the bid of the petitioner was taken by the State Government without affording any opportunity to the writ petitioner, rather prior to the cancellation of its bids, the writ petitioner was given an opportunity to explain its position, and only thereafter the decision was taken by the competent authority. Learned counsels have drawn our attention to the writ applications and has pointed out that in paragraph-11, it was stated that the Executive Engineer, Road Construction Department, Road Division Saraikela-Kharsawan / Chaibasa, had asked for verification from the petitioner upon the complaint received from HSM Holding Pvt. Ltd., and in response to the said letter, the petitioner had submitted a detailed explanation to the Executive Engineer on 16.12.2017. It is thus submitted that even though the requirement of natural justice was not required to be followed, the opportunity was given to the writ petitioner to explain his case, which the writ petitioner also explained and only thereafter, his bid was rejected by the State Government. As such, there was no requirement of giving any further opportunity of hearing to the writ petitioner by the Hon'ble Single Judge. Learned counsels accordingly, submitted that the Hon'ble Single Judge has committed manifest errors of law, firstly in entering into the arena of examining the reasons of cancelling the bids of the writ petitioner submitted in response of the 1st call, and secondly asking the State Government to give an

opportunity of hearing to the writ petitioner and to reconsider the allotment of contract, which has resulted in making the 4th call infructuous, which was legally made by the State Government, in which, the appellant was also a bidder.

10. Further, placing reliance upon the decisions of the Hon'ble Supreme Court in TRF Limited Vs. Energo Engineering Projects Limited, reported in (2017) 8 SCC 377, and Chairman-cum-Managing Director, Coal India Limited & Ors. Vs. Ananta Saha & Ors., reported in (2011) 5 SCC 142, learned counsels for the appellants submitted that it is a well settled legal proposition that if the initial action is not in consonance with law, the subsequent proceedings would not sanctify the same, and in such a situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructure is bound to collapse. Learned counsels accordingly, submitted that it is fit case, in which, not only the impugned order passed by the Hon'ble Single Judge be set-aside, rather the subsequent action of the State Government in allocating the works of collecting the user fee to the respondent No.5, in both the spans of the State Highway, be quashed.

11. Learned Advocate General arguing for the State Government has taken a quite contrary stand in these appeals, than the ones taken by the State Government in the writ applications. Though in the writ applications, the stand of the State Government was that in case of Partnership firm / Proprietary firm, the net worth of the firm and not of the individual shall be considered, but in these appeals, the stand of the State Government and also supported by learned Advocate General, relying upon the decision in Ashok Transport Agency's case (*supra*), is that there is no difference between the individual and the Proprietary business, and in case of Proprietary business, the net worth of the owner of the business, i.e., the individual shall be considered. This change in the stand is presumably in view of the fact that after the decision rendered by the Hon'ble Single Judge, the Letters of Allotment (LOA) have been issued in favour of the writ petitioner. Learned Advocate General submitted that initially the bids of the writ petitioner were rejected for two reasons, firstly there was difference in the Net Worth Certificate and the Balance Sheet submitted by the petitioner, and secondly the Solvency Certificate issued by the Syndicate Bank was a conditional one. Though, it is agreed by the learned Advocate General that the Net Worth Certificate, which was submitted by the writ petitioner proprietary business, was not qualifying the requirements of Clause 2.5.2 of the notice inviting e-tender, as the minimum net worth of the petitioner proprietary business was less than 25% of the Annual potential Collection (APC), but the net worth of the individual owner was satisfying the said condition. Learned Advocate General argued that it has been rightly considered by the Hon'ble Single Judge that there is no difference between the individual and the proprietary business. It is submitted that as per the prescribed 'Qualification criteria for eligible bidders', in case of Partnership firm / Proprietary firm, the net worth of the 'firm' and not of the 'individual' partner was to be considered, but in case of proprietary business, there is no question of having a 'partner', and accordingly, the net worth of the

individual owner of the business was required to be considered. Learned Advocate General also submitted that Solvency Certificate issue was also wrongly rejected by the State Government earlier, and pursuant to the decision of this Court, the wrongs committed by the State Government have been corrected. As it was found that the bids submitted by the writ petitioner were technically and financially sound, and there was no good reason for cancelling the same, after reconsideration of the matter, the Letters of Allotment (LOA) have already been issued by the State Government in favour of the writ petitioner respondent No.5, and they are carrying out the work with the condition as imposed in order dated 20.12.2018 passed by this Court, whereby, it was directed that during the pendency of these appeals, the writ petitioner shall work in the capacity of an agent of the Deputy Commissioner of Saraikella-Kharsawan, who was appointed as Special Officer in the matter, directing the writ petitioner to furnish the accounts on the weekly basis to the Deputy Commissioner, which is being done by the petitioner.

12. Learned Advocate General has also placed reliance upon the decision of Hon'ble Supreme Court in Meerut Development Authority Vs. Association of Management Studies & Anr., reported in (2009) 6 SCC 171, wherein the law has been laid down as follows:-

"What is the nature of rights of a bidder participating in the tender process?

26. ----- . The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovementioned ground, the reason being the terms of the invitation to tender are in the realm of the contract. -----.

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29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, ----- but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.

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Scope of judicial review in contractual matters

37. A large number of authorities have been cited before us in support of the

submission that even in contractual matters the State or "other authorities" are bound to act within the legal limits and their actions are required to be free from arbitrariness and favouritism. The proposition that a decision even in the matter of awarding or refusing a contract must be arrived at after taking into account all relevant considerations, eschewing all irrelevant considerations cannot for a moment be doubted. The powers of the State and other authorities are essentially different from those of private persons. The action or the procedure adopted by the authorities which can be held to be "State" within the meaning of Article 12, while awarding contracts in respect of properties belonging to the State, can be judged and tested in the light of Article 14. Once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14. -----.

38. The executive does not have an absolute discretion, certain principles have to be followed, the public interest being the paramount consideration.

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40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.

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. The 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 the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14." (Emphasis supplied)

13. Reliance has also been placed by the learned Advocate General upon the decision of the Apex Court in M/s Star Enterprises & Ors. Vs. City and Industrial Development Corporation of Maharashtra Ltd. & Anr., reported in (1990) 3 SCC 280, wherein the law has been laid down as follows:-

"10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control

and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. -----."

Placing reliance on these decisions, learned Advocate General submitted that as the earlier rejection of the bids of the writ petitioner were illegal, the same has been corrected pursuant to the judicial review by this Hon'ble Court. It is further submitted by learned Advocate General that it is not open to the appellant to challenge the action of the State Government, either in rejecting, or reconsidering the bids of the writ petitioner, particularly, in view of the fact that the appellant was not a bidder either in the 1st, 2nd, or the 3rd calls, rather the appellant has come in picture only in the 4th call, which was not even opened by the State Government. As such, no right of the appellant is infringed, once the bids submitted by the petitioner in response to the 1st call itself is accepted.

14. Learned senior counsel, Sri Anil Kumar Sinha, appearing for the writ petitioner-respondent No.5, has supported the stands taken by learned Advocate General, and further, vehemently challenged the locus of the appellant in challenging the impugned action of the State Government accepting the bids of the writ petitioner and issuing the work orders in its favour. It is submitted by learned senior counsel that granting leave to file these appeals cannot be ground for allowing the appeals, in as much as, the appellant has to show his own bonafides challenging the issuance of the work orders in favour of the writ petitioner, accepting his bids submitted in response of the 1st call, in which, the appellant was nowhere in picture. The appellant came in picture only in response of the 4th call, which was never even opened by the State Government, and as such, no vested right had accrued in favour of the appellant. Learned senior counsel, in support of his contention, placed reliance upon the decision of the Apex Court in HUDA Vs. Orchid Infrastructure Developers (P) Ltd., reported in (2017) 4 SCC 243, laying down the law as follows:-

"15. This Court in Om Prakash Sharma case has held that in the absence of a concluded contract which takes place by issuance of allotment letter, suit could not be said to be maintainable as there is no vested right in the plaintiff without approval of the bid by the competent authority. -----." (Emphasis supplied)

15. Learned senior counsel further submitted that while rejecting the first bid of the writ petitioner, the principles of natural justice were not at all followed. Though an opportunity was given to the writ petitioner by calling his response vide letter dated 15.12.2017, to the complaints made by HSM Holding Pvt. Ltd., which is only a shell company, and had not submitted any tender for the works in question, but while rejecting the bids of the petitioner, the reply given by the petitioner was not at all considered and as such, the requirement of natural

justice was not followed at all. Learned senior counsel pointed out that it is well settled principle of law that even in the matters of contract, though the State Government is entitled to reject or accept any tender, without assigning any reasons and it has also the power to accept or not to accept the lowest offer, but it is equally well settled law that this power cannot be exercised whimsically and arbitrarily. In support of his contention, learned senior counsel relied upon the decision of the Hon'ble Supreme Court in Union of India & Ors. Vs. Dinesh Engineering Corporation & Anr., reported in (2001) 8 SCC 491, laying down the law as follows:-

"15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. -----.

16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. -----." (Emphasis supplied).

Learned senior counsel further placed reliance upon the decision of the Hon'ble Supreme Court in TATA Cellular Vs. Union of India, reported in (1994) 6 SCC 651, laying down the guiding principles of the judicial review in the matter of contract as follows:-

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any

collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

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77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers." (Emphasis supplied).

Placing reliance on these decisions, learned senior counsel submitted that thus, there is no illegality in the impugned order passed by the Writ Court, which has correctly exercised the power of judicial review. The respondent authorities have only corrected their mistake, by reconsidering the bids of the writ petitioner and issuing the Letters of Allotment (LOA) in its favour, which cannot be challenged by the appellant.

16. Having heard learned counsels for both the sides and upon going through the records, we find that notice inviting e-tenders, in clause 2.5.2 prescribed the 'Qualification criteria for eligible bidders'. As regards the financial capacity, it was mentioned in clause 2.5.2.1 that the bidder shall have the minimum net worth of 25% of the Annual Potential Collection (APC) at the close of the preceding financial year. Admittedly, this comes to Rs.1.60 crores, which was the minimum required net worth of a bidder. The said qualification also prescribed that in case of Partnership firm / Proprietary firm, the net worth of the firm and not of the individual partner shall be considered. In case of individuals, the capacity of the individual for the applicable financial year was to be considered on the basis of valuation certificate from registered valuer and certification of the same by Chartered Accountant. Admittedly, the writ petitioner M/s Mandeepa Enterprises submitted the bid documents in the capacity of Proprietary business, and its sole proprietor is Mr. Madan Satya Das, whose net worth was qualifying the requirement of the e-tender, though net worth of M/s Mandeepa Enterprises was not qualifying for the same. The reliance placed by learned Advocate General for State as also the learned senior counsel for the respondent No.5, upon the decision in Ashok Transport Agency's case (supra), for arriving to the conclusion that there is no difference between an individual and the Proprietary business, and in case of Proprietary business, the net worth of the owner of the business,

i.e., the individual shall be considered, is misconceived and cannot be accepted. We have gone through the decision of Ashok Transport Agency's case (supra), and we find that there is no such ratio laid down by the Hon'ble Supreme Court in that case. That decision is in quite a different context, holding as hereunder:-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

This clearly shows that the decision of Hon'ble Apex Court is in a different context, and there can be no dispute to the fact that the legal entity of the proprietary concern and its proprietor / owner is the same. The expressions 'Partner' and 'Firm' for a Proprietary business appears to not have been used in the strict sense of the term, as there can be no dispute to the fact that Proprietary business is not a 'Firm' and there is no 'partner' in a Proprietary business. But in the present case, in the notice inviting e-tender, a distinction was made between an individual and a proprietary concern, clearly indicating that in the case of proprietary concern, the net worth of the individual shall not be taken into consideration. The 'Eligibility of Bidders' mentioned in clause 2.5.2 of the notice inviting e-tender clearly stated that the bidder may be a:-

- (a) Company registered under the Indian Companies Act,
- (b) Partnership firm be registered under the Indian Partnership Act,
- (c) Partnership firm registered under the Limited Liability Partnership Act,
- (d) Corporative societies,
- (e) Proprietary Firm, or
- (f) Individual.

As such, the notice inviting e-tender clearly differentiated between the 'Proprietary Firm' and 'Individual', and entitled both of them to submit the tender. The State was within its rights to differentiate between the two, allowing both of them to submit tenders separately, and prescribing that net worth of the bidders shall be considered in accordance with their own category. There may be a case that an individual may have only one proprietary business, or even more than one, or several proprietary businesses, having different net worth of each proprietary business, which may be different than that of the individual. In case, the tender is submitted by any one of the proprietary business, out of several proprietary businesses, the net worth of that proprietary business only, has to be considered and if the bid is filed in the individual capacity, the net worth of the individual has to be considered. In the present case, we find that in spite of the fact that the net worth of the 'proprietary business' had to be considered, which was earlier considered correctly while rejecting the tenders of the writ petitioner, but now the net worth of the 'individual' has been taken into consideration, which, in our considered view, is contrary to, and not in consonance with the condition prescribed in clause 2.5.2.1 of the notice inviting e-tender. This has resulted solely due to the direction of the Writ Court. The contention of the learned Advocate General for State, as also the learned senior counsel for the respondent No.5, that there is no difference between M/s Mandeepa Enterprises, the writ petitioner and its proprietor Mr. Madan Satya Das, is just for an argument shake, as even the writ petition has been filed by the petitioner Mandeepa Enterprises, not through its owner, but through its Operations Manager Sri Mahesh Nayak, which clearly shows that the writ petitioner itself differentiated between itself and its owner. We find that according to the writ petitioner itself, upon the complaint filed by HSM Holding Pvt. Ltd., notice was given to him by the concerned Executive Engineer, Road Constructions Department on 15.12.2017, which was also replied on 16.12.2017. Simply because in the decision regarding the rejection order of the bids, there was no mention of the reply, it could not be said that the reply submitted by the petitioner was not considered by the Department Tender Committee. In the facts of the case, there was a limited scope of following the principles of natural justice, and we are of the considered view that the requirement of natural justice, was fully complied with by giving notice to the petitioner before rejecting the bids. We find from the impugned order passed by the Writ Court that there is no mention of this notice therein, and we take it that the Hon'ble Single Judge's attention escaped from these statements made in the writ applications. Accordingly, though there was no need of giving of any further opportunity of hearing, but the Hon'ble Single Judge, slipped into the error of law by directing to provide a fresh opportunity of hearing to the writ petitioner / his representative. Accordingly, the impugned Judgment passed by the Hon'ble Single Judge cannot be sustained in the eyes of law.

17. Let it be made clear that in spite of the fact that we have found that the net worth of the petitioner 'proprietary business' and not of the 'owner' was required

to be considered, but the fact remains that following the direction of the Writ Court, the State Government has taken a conscious decision in this regard, awarding the works of collection of user fee on both the spans of the State Highways to the writ petitioner, and the same cannot be said to be mala fide, or arbitrary, or unreasonable, or amounting to violation of Article 14 of the Constitution of India. Having regard to the limited scope of judicial review in the matters of contract awarded by the Government, as held in the various decisions referred to above, holding that the Courts cannot examine the details of the terms of the contract and the Courts have inherent limitations on the scope judicial review, no case is made out for any further interference in the same by the Writ Court, and I have consciously kept myself confined to look into the legality or otherwise of the impugned Judgment passed by the Writ Court only. I do not wish to enter into the domain of legality or otherwise of awarding the contract to the writ petitioner Respondent No.5, particularly in view of the fact that awarding the contract is in the exclusive domain of the State Government, and the writ petitioner was the sole bidder in response to the 1st call, and there was no other bidder having any vested right. There is nothing on the record to show that the contracts were awarded to the writ petitioner respondent No.5, mala fide, or arbitrarily, or in unreasonable exercise of the power, amounting to violation of Article 14 of the Constitution of India.

18. In course of arguments, there was no challenge to the findings of the Writ Court, on the issue of Solvency Certificate issued by the Syndicate Bank in favour of the writ petitioner, which was said to be conditional one. We find that this issue has been correctly decided by the Hon'ble Single Judge, holding that the Solvency Certificate is issued with regard to the financial capacity of any person considering his past conduct / transaction with the issuing Bank, and the certifying officer does not undertake any liability on behalf of the person in whose favour, the Solvency Certificate is issued.

19. It is made clear that though we are setting aside the impugned order passed by the Writ Court, in my opinion, it shall be open for the State Government, to continue with the same work arrangements which have been entered into with the writ petitioner respondent No.5, by issuing the Letters of Allotment (LOA) 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*, (supra), 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 the this Court in order dated 20.12.2018 passed in these appeals, may finally come to an end.

20. In view of the foregoing discussions, the impugned Judgment dated 2.8.2018, passed by the Hon'ble Single Judge, in W.P.(C) No.968 of 2018 and in W.P.(C) No.888 of 2018, is hereby, set aside.

21. Both the aforesaid appeals are accordingly, allowed with the observations / directions as above. I.A. No.2025 of 2019, which was filed for calling for the original documents submitted by the appellant in 4th call bidding process, stands dismissed.

(H.C. Mishra, J.)

S.K. Dwivedi, J.:- I have the privilege of going through the detailed draft Judgment passed by brother H.C. Mishra, J. I fully agree with the findings given by brother H.C. Mishra, J., that the Hon'ble Single Judge while deciding the writ application, slipped into an error of law by directing to provide a fresh opportunity of hearing to the petitioner / his representatives, and on that count, the impugned order passed by the Hon'ble Single Judge cannot be sustained in the eyes of law.

However, I very respectfully disagree with the view taken by Hon'ble H.C. Mishra, J., 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 fees on both spans of the State Highways.

I think it proper to examine the condition stipulated in Clause 2.5.2 and 2.5.2.1 which is being reflected here under:

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 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.

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)

It transpires from Annexure-15 of the memo of appeal, i.e., audit report containing Balance Sheet and Profit & Loss Account that Mandeep Enterprises was having net worth of the proprietorship firm i.e., only Rs.1,01,89,155.02, which was much below the minimum requirement of Rs 1.60 crore and of Proprietor as individual was Rs 1,75,41,086.47. Considering this, on re-examination, it was found by the Tender Committee that there was difference in Net Worth Certificate and the Balance Sheet Submitted by the writ petitioner and as such Tender Committee by its decision dated 8.2.2018, rejected the technical bid of the writ petitioner. In the said order it was also pointed out that Solvency Certificate given by the Bank was not accepted by the Tender Committee as the Bank stated in its Solvency Certificate that it does not take any responsibility and guarantee of the writ petitioner. The State accepted these facts in the counter affidavit filed in the writ petition. Thus, State came out with the 4th call of the tender. The 4th call was not challenged by the writ petitioner and in such a situation it was not proper to direct the state not to proceed with the 4th call.

In the case of *Kanhaiya Lal Agrawal Versus Union of India and others*, reported in (2002) 6 SCC 315 by taking note of the judgment rendered by the Hon'ble Apex court in the case of *G.J.Fernandez Versus State of Karnataka and ors.*, reported in (1990) 2 SCC488, at paragraph 6 it has been laid down that if non fulfilment of the requirements, results in rejection of the tender, then, it would be an essential part of the Tender.

The conditions stipulated under Clause 2.5.2.1 are essential one.

The writ petitioner (respondent No.5) participated in the tender process in the capacity of proprietorship business and not as individual. In view of this Tender Committee rightly cancelled its technical bid.

I find force in the submission of the learned counsel of the appellant relying upon the decisions in *TRF Ltd. (Supra)* and *Chairman-cum-Managing Director, Coal India Ltd. (Supra)*, that the maxim *sublato fundamento cadit opus* shall be applicable to the facts of this case. Once very foundation of issuing the Letters of Allotment (LOA) in favour of the writ petitioner respondent No.5, i.e. the order passed by the Hon'ble Single Judge is set aside, the subsequent action of the respondent State, in issuing the Letters of Allotment (LOA) in favour of the writ petitioner (respondent No.5), cannot be sustained. Accordingly, after setting-aside of the order of the Hon'ble Single Judge, the writ petitioner respondent No.5 cannot be allowed to continue with the work of collection of user fees on both spans of the State Highway. Consequently, the Letters of Allotment (LOA) issued in favour of the writ petitioner respondent No.5, by the respondent authorities allotting the contract of collecting the user fees on both the spans of State Highway, are hereby, set aside.

Till the finalisation of new incumbent the arrangement made by this Court by order dated 20.12.2018 shall continue.

I agree with the view of Hon'ble H.C. Mishra,J, that the exercise of allotting the

contract should be taken afresh by issuing the fresh notices of e-tenders, giving equal opportunity to all.