

(2021) 10 JH CK 0004

In the Jharkhand High Court

Case No : Latter Patent Appeals No. 112, 113, 119, 234 Of 2020

M/s Agrawal Global Infratech Private Limited And Others

APPELLANT

Vs

Ramiya And Others

RESPONDENT

Date of Decision : 07-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 226
Negotiable Instruments Act, 1881 — Section 18

Citation : (2021) 10 JH CK 0004

Hon'ble Judges : Aparesh Kumar Singh, J;Anubha Rawat Choudhary, J

Bench : Division Bench

Advocate : Vikash Singh, Dipika Aliya, D.K. Chakraverty, Rajiv Ranjan, Piyush Chitresh, Sumeet Gadodia, Krishna Murari

Final Decision : Dismissed

Judgement

Aparesh Kumar Singh, J

1. These four appeals arise out of common judgment dated 14.01.2020 passed in WPC No. 5408/2019 and WPC No. 5689/2019 by the learned Single Judge. By the common judgment dated 14.01.2020, four writ petitions i.e. W.P. (C) No. 5408 of 2019, W.P.(C) No.5416 of 2019, W.P.(C) No. 5689 2019 and W.P.(C) No.5894 of 2019 were decided. W.P (C) No. 5408/2019 and W.P (C) No. 5689/2019 from which these four appeals arise, two each by the Respondent State and private Respondent, are in relation to the NIT pertaining to 'Reconstruction of Meral- Bana-Ambarkhoriya Road (MDR-14)' which have been referred to as W-1 work by the learned Single Judge. In order to make the records straight, it is pertinent to mention here that out of common impugned judgment dated 14.01.2020 passed in other two writ petitions i.e. W.P. (C) No. 5416/2019 and W.P.(C) No. 5894/2019, three other appeals have arisen. WPC No. 5416/2019 relates to the work pertaining to 'Reconstruction of Nagaruntari-Dhurki-Ambakhoriya Road (MDR-139)' which have been referred to as W-2 work by the learned Single Judge. WPC No. 5894/2019 relates to 'Reconstruction of

Dandai Bazar to Panghatwa P.W.D Road via Lawahikala Road' which have been referred to as W-3 work. By the instant judgment, these four appeals concerning W-1 work are being decided together.

2. Learned Single Judge, by the impugned judgment in these two writ petitions WPC No. 5408/2019 and WPC No. 5689/2019, has quashed the decision of the Tender Committee dated 03.10.2019 in relation to W-1 work of 'Reconstruction of Meral-Bana-Ambakhoriya Road (MDR-140)'. All the consequential action of the State respondents including the award of the tender in favour of the private respondent i.e. M/s Agrawal Global Infratech Private Limited have been also quashed. The State respondents were directed to issue fresh tender for the said work and to proceed accordingly. The appellant M/s Agrawal Global Infratech Private Limited in LPA No. 112/2020 and LPA No. 113/2020 is represented by learned Senior Counsel Mr. Vikash Singh, whereas learned Advocate General represents the appellant State in LPA No. 119/2020 and LPA No. 234/2020.

Arguments of the appellants in LPA Nos. 112/2020 and 113/2020 Learned senior counsel Mr. Vikash Singh has delineated the facts and legal propositions concerning this case which are briefly encapsulated hereunder:

3. An NIT was issued vide E-Tender Reference No. RCD/Garhwa/508/19-20 on 07.06.2019 after cancellation of first NIT for reconstruction of Meral-Bana-Ambakhoriya (MDR-140) Road (Length 0.00 to 36.629 km) under Central Road Fund for the year 2019-20 for a value of Rs. 13357.97884 lakh with a bid security of Rs. 133.58 lakh and the stipulated period of completion was 24 months including rainy season. This E-tender notice was cancelled. A fresh E-tender notice was again issued on 20.08.2019 by the State of Jharkhand. The appellant and the private Respondent / writ petitioner including other bidders, participated in the said tender.

Respondent / writ petitioner (hereinafter referred to as 'P-1') was disqualified in the Technical Bid. P-1 being aggrieved, filed WPC No. 5408/2019 challenging the decision of the Tender Committee dated 03.10.2019, whereby his bid was declared non-responsive vis-à-vis W-1 work because of alleged non-submission of Bid Security and Bank Guarantee, as per tender document. Learned Single Judge, by the impugned judgment dated 14.01.2019, was of the considered view that decision making process of the State Respondents in rejecting the Technical Bid of the petitioner and accepting the Technical Bid of the private Respondent / appellant as well as other bids suffered from arbitrariness and unreasonableness. It was further held that the State Respondents had adopted pick and choose method, which is not permissible in the eye of law so as to satisfy the requirement of Article 14 of the Constitution of India. Learned Single Judge at para-30 of the impugned judgment while dealing with W-1 work, observed that the appellant herein had presented the Bank Guarantee in the name of Executive Engineer, Road Division, Garhwa, whereas other bidders submitted the Bank Guarantee in the name of Executive Engineer, Road Division, Garhwa. The State Respondent had contended that by an addendum, Bank Guarantee was to be

issued in the name of Executive Engineer, Road Construction Department, Road Division, Garhwa. Even if the said contention of the State was accepted, they had deviated from terms of the Standard Bid Document (in short 'SBD') by accepting the Technical Bid of other bidders who had presented the Bank Guarantee in the name of Executive Engineer, Road Construction Department , Road Division, Garhwa.

4. In respect of the same W-1 work involved in WPC 5689/2019, learned Single Judge at paragraph-41 to 43, after quoting the relevant provisions of Addendum / Amendments to the Instruction to Bidders (ITD) to SBD i.e. Clause 2.6.7, 2.6.8 (Litigation History) and 2.7.1(ii) requiring the individual members of Joint Venture to satisfy the requirement of Clause 2.6.7 and 2.6.8 at para-43 of the judgment, held that litigation history submitted by P-2 Ramiya-HS (JV), a joint venture, indicated in the following term "No Litigation History of Either J.V. Member". Learned Single Judge held that the State Respondent had arbitrarily rejected the Technical Bid of P-2. Since the litigation history was required to be filed by the applicant and the applicant was the joint venture namely, Ramiya-HS (JV), the said litigation history furnished in the letter head of Ramiya-HS (JV) disclosing the litigation history of both the partners was in order. Writ petitioner-Ramiya-HS (JV) (hereinafter referred to as 'P-2') had preferred WPC No. 5689/2019 concerning the same W-1 work since its Technical Bid was declared as non-responsive due to alleged non satisfaction of clause 2.7.1(ii) of the Addendum/Amendments to the Instruction to Bidders (ITB) to SBD. It had further prayed for a direction upon the State to declare its Technical Bid as responsive as it satisfied all the criteria of SBD and consequently to open the Financial Bid of P-2 as well as to declare him as L-1 inasmuch as it had quoted the bid price of Rs.107,55,36,040.91/- as against the minimum bid quoted by the appellant at Rs. Rs.111,78,68,989/-.

5. Learned Senior Counsel for the appellant has placed reliance on a number of clauses of the NIT and Addendum to NIT to show that the findings of the learned single Judge suffers from serious errors of facts. That the learned single Judge has erroneously chose to step into the shoes of the Employer in undertaking construction of terms of the NIT which are beyond the scope and powers of judicial review. Learned Senior Counsel for the appellant has submitted that as per the NIT, the bidder was advised to read and examine carefully all Instructions including Addendum / Amendments to ITB, conditions of contract, data, forms, terms, technical specification, bill of quantity, etc., in the bid document before bidding. As per clause-7 of the NIT, if the bid was not accompanied by acceptable bid security, it shall be strictly treated as non-responsive. As per Addendum to the Standard Bid Document, bid security should be in favour of "Executive Engineer, Road Division, Garhwa" and not in the name of "Executive Engineer, Road Construction Department, Road Division, Garhwa" i.e. amended clause 16.1 of the SBD. It is submitted that the bid was not accompanied by acceptable bid security and therefore, was liable to be rejected by the Employer as non-responsive in terms of clause 16.3. Respondent No. 1 (P-1) had submitted an

amended bank guarantee in favour of "Executive Engineer, Road Construction Department, Road Division, Garhwa". There was a discrepancy in the amount written in figures and words i.e. 'Rs. 1,34,000,00/-' and 'Rupees one crore and six lakhs only' in the forwarding letter of the Bank which was an integral part of the original bank guarantee. This discrepancy was contrary to section 18 of the Negotiable Instruments Act, as per which, if the amount undertaken or ordered to be paid is stated differently in figures and words, the amount stated shall be the amount undertaken or ordered to be paid. As such, the bid security was only for Rs. 1.06 Crores instead of requirement of Rs. 133.58 lakhs. Learned counsel has also pointed out second discrepancy in the bid document of the Respondent No. 1 (P-1) in relation to the undertaking furnished by him. As per the Addendum to the SBD Clause 3.1, P-1 did not submit an undertaking on Rs. 100.00 non-Judicial stamp paper duly notarized. Technical Bid of the petitioner (P-2) in WPC No. 5689/2019 was declared as non-responsive due to non-satisfaction of Clause 2.7.1(ii) of Addendum / amendments to ITB. P-2 had failed to satisfy the requirement of Clause 2.6.7 and 2.6.8 as individual members of the joint venture had not separately submitted the litigation history of either of the JV Member, instead it had stated "No litigation history of either JV Member". Learned single Judge committed serious error in law by interpreting the terms of the SBD to hold that the petitioner no. 2 had specifically stated that there was no litigation history of either JV Member, though as per the requirement of Clause 2.7.1 (a) (ii), individual members of joint venture must each satisfy the requirement of Clause 2.6.7 and 2.6.8.

6. On the other hand, it is submitted that the bank guarantee submitted by the appellant was original bank guarantee which satisfied the requirement of Clause 16.1 read with the Addendum. There was no discrepancy as regards the undertaking submitted by the appellant. Learned counsel for the appellant has relied upon the following decisions in support of his submission.

i. W.B. State Electricity Board versus Patel Engineering Co. Ltd. And others: [(2001) 2 SCC 451, Para 24]:

ii. Glodyne Technoserve Limited Versus State of Madhya Pradesh and Others [(2011) 5 SCC 103 Para 45 to 47]

iii. Bakshi Security and Personnel Services Private Limited versus Devkishan Computed Private Limited and others: [(2016) 8 SCC 446 para 19 and 20]

iv. Galaxy Transport Agencies Contractors, Traders, Transports and Suppliers Versus New J.K. Roadways, Fleet Owners and Transport Contractors and Others: [2020 SCC Online SC 1035, para-14, 18 and 19]

7. It is submitted that considering the nature and magnitude of the work under the NIT, technical evaluation of the bid should have been best left to the technical experts. It is submitted that rejection of the technical bid of the petitioner nos. 1 and 2 was not arbitrary if the bid did not conform to the technical specifications. In view of the principles of Judicial Review laid down in

the above judgments, the writ court ought not to have second guessed the requirement of the NIT laid down by the employer and instead come to a finding that the action of the Respondent State was arbitrary and illegal. The writ court while exercising the powers of judicial review, specifically concerning such a highly technical bid, where construction of large public projects are involved, should have refrained from interfering in an award of contract, unless the decision making process suffered from perversity, mala fides, irrationality or palpable illegality. Learned Senior Counsel for the appellant submits that the work awarded to the appellant had progressed to a considerable extent, however, learned single Judge has quashed the entire agreement while directing the State to re-tender the work. Appellant is still willing and ready to execute the remaining work if it succeeds in this appeal on the same terms.

Argument of the Appellant-State in LPA Nos. 119/2020 & 234/2020

8. Learned Advocate General in support of his submission, has also placed reliance on the same terms and conditions of the NIT and SBD pointed out by the learned senior counsel for the appellant in the other two appeals. Learned Advocate General has referred to the format of the Bid Security (bank guarantee) and its addendum and pointed out that it nowhere mentions about the amended bank guarantee as was submitted by the petitioner no. 1. As per Clause 32 of Instructions to Bidders (ITB), employer has the right to reject any or all bids. He has also referred to Clause 2.7.1(ii) of Addendum / amendments to I.TB which according to him, stipulates that each of the partners of joint venture are required to satisfy the requirement of para 2.6.7 & 2.6.8. He has also pointed out to the Addendum to Clause

16.1, as per which, Bid Security was to be submitted in favour of the "Executive Engineer, Road Division, Garhwa", but the P-1 submitted an amended bank guarantee addressed to the "Executive Engineer, Road Construction Department, Road Division, Garhwa" which was not as per the terms of the SBD. It is submitted that the technical bid of the P-2 was disqualified as it did not satisfy the requirement of Clause 2.7.1(ii), as per which, each of the partners of the joint venture were to satisfy the requirement of para 2.6.7 and 2.6.8 regarding submission of affidavit and undertaking. Learned Advocate General has also placed Addendum to the Clause 2.3.1 regarding submission of affidavits and undertaking. He reiterated the submission of learned senior counsel for the appellant in the other two appeals that P-1 did not submit an undertaking on Rs. 100/- non-judicial stamp paper duly notarized. He submits that since the Bid Security (bank guarantee) and undertaking submitted by the P-1 was not in accordance with the requirement of SBD, his Bid was declared as non-responsive during technical evaluation. Bid document of the P-2 did not conform to the requirement of Clause 2.7.1(ii) as none of the members of the joint venture submitted the litigation history in terms of clause 2.6.8. Therefore, Technical Evaluation Committee, upon due scrutiny of these significant deviations in the Bid Document, declared their Bids as non-responsive. Learned Advocate General

has also placed reliance upon the following decisions of the Apex Court in support of his submissions.

- i. Montecarlo Limited versus National Thermal Power Corporation Limited: [(2016) 15 SCC 272, para-19, 20, 21]
- ii. Municipal Corporation, Ujjain and Another versus BVG India Limited and Others [(2018) 5 SCC 462, para-16]
- iii. Master Marine Services (P) Ltd. Versus Metcalfe & Hodgkinson (P) Ltd. And another: [(2005) 6 SCC 138, para-12]:
- iv. Jagdish Mandal versus State of Orissa and Others: [(2007) 14 SCC 517, para-22]:
- v. Villianur Iyarkkai Padukappu Maniyam Versus Union of India: [(2009) 7 SCC 561, para-167]:
- vi. Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and another: [(2016) 16 SCC 818, para-13, 15, 16]:
- vii. Tajas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another: [(2012) 6 SCC 464, para-33 and 34]:
- viii. Central Coalfields Limited and another versus SLL-SML (Joint Venture Consortium) and others: [(2016) 8 SCC 622]

He submits that the impugned judgment suffers from serious error of law and on facts while interfering in an award of work of such a highly technical specification involving construction of public project of such magnitude. He has submitted that the public interest has suffered on account of interference by the writ court and ongoing work under the contract awarded to the P-1 has been closed in midway leading to huge delay and escalation in the cost of construction.

Argument on behalf of Respondent No. 1 (P-1)

9. Learned counsel for the Respondent No. 1 (P-1) Mr. Sumeet Gadodia has also placed reliance upon Clause 7 of NIT. Clause 16.1 read with the Addendum, Appendix to the ITB defines the expression "Employer" as the "Chief Engineer (Com), Road Construction Department, Jharkhand". He has also referred to the format of the bank guarantee, as per which, validity of the bank guarantee was extendable by the employer. The Bid validity was to remain for 120 days+45 days after the deadline date. It is the case of the P-1 that pursuant to the cancellation of earlier NIT, the same bank guarantee was re-submitted with extended validity period; only paragraph-1 of the bank guarantee was amended. In fact, amended bank guarantee was in substance a new bank guarantee except that earlier bank guarantee number was retained. He submits that there are three vital ingredients of any bank guarantee (i) beneficiary, (ii) amount covered with the Bank Guarantee and (iii) the period of validity. Mr. Gadodia has submitted that other three successful bidders did not name the addressee

correct. Instead the bank guarantee was furnished in the name of the beneficiary "Executive Engineer, Road Construction Department, Road Division, Garhwa". The bank guarantee of the appellant also did not have the validity period, as per the NIT. He has pointed to the 'notwithstanding clause' in the bank guarantee submitted by the appellant. In substance, it is the submission of the writ petitioner that the Bid Security Document (bank guarantee) submitted by the appellant and other three successful bidders in the technical bid also did not strictly conform to the terms and conditions of the NIT. There is no pleadings on behalf of the State in the counter affidavit that the tender evaluation committee consciously took the decision to permit certain deviation while disallowing others. Therefore, the approach of the Tender Evaluation Committee was arbitrary. It had adopted pick and choose method in disqualifying the P-1 while qualifying the technical bid of the appellant and other three successful bidders. He has placed reliance upon the decision in the case of Ramana Dayaram Shetty versus International Airport Authority of India and others [(1979) 3 SCC 489] and in the case of Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and another [(2016) 16 SCC 818, para-14] and submitted that an executive authority must be rigorously held to the standards by which he professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

10. According to the writ petitioner, learned single Judge has taken note of deviations in the bank guarantee by other successful bidders while passing the impugned judgment. Reference has been made in particular to para-23, 25 and 30 thereof. The Appellate Court should not interfere in the impugned judgment if the findings of the learned single Judge are not perverse. He has referred to the case of Management of Narendra & Company Private Limited versus Workmen of Narendra & Company [(2016) 3 SCC 340 para-5] and B. Venkatamuni versus C.J. Ayodhya Ram Singh and others [(2006) 13 SCC 449, para-11 & 12]. It is submitted that the learned single Judge has held that the decision making process suffered from arbitrariness and therefore rightly quashed all the consequential action of the State Respondent in award of work in favour of the private Respondent / appellant M/s Agrawal Global Infratech Private Limited and further directed for issuance of a fresh tender. This relief was covered under "any other relief" sought for by the writ petitioner. The relief granted by the learned single Judge finds support from the decision rendered in the case of Satya Narain Singh versus District Engineer, PWD Ballia and another [AIR 1962 SC 1161, para-4 & 9]. It is submitted that the principle of privilege of participation was also taken into consideration while quashing the tender. He submits that the writ court has the power to do complete justice in a cause. Such an approach is commended by the Supreme Court in the case of B.C. Chaturvedi versus Union of India and others [(1995) 6 SCC 749, para-21 to 23] and in the case of

Shangrila Food Products and another versus Life Insurance Corporation of India and another [(1996) 5 SCC 54, para-11]. It is submitted that the public interest had also suffered on account of the award of work to the appellant since there was a difference of Rs. 13.00 crore (approximately) between the bid offered by the appellant herein and the P-1. Affidavit of the State recognizes that P-2 is a working contractor in Jharkhand. The appellant cannot claim any equity in such matter. Bills submitted by the appellant has not been endorsed by the Engineer-in-charge or the Executive Engineer to claim of equity. Moreover, the haste with which the agreement was executed without furnishing of performance security and additional security, smacks of mala fide at the time of issuance of letter of acceptance to the appellant. Further, the amount of performance security required to be submitted was reduced to 2% from 5% and the validity of such security was also reduced to November 2021 instead of November 2024. The Agreement was executed on the very next date on 18.10.2019 of disqualification of the technical bid of the P-1. In such circumstances, there is a presumption of mala fide if such an act is undertaken in undue haste. He has relied upon para-25 of Bahadursinh Lakhubhai Gohil versus Jagdishbhai M. Kamalia and others [(2004) 2 SCC 65]. It has been submitted that the plea regarding submission of an undertaking which was not notarized, was never raised by the State. The appellant is taking a new plea at this stage. Learned counsel for the P-1, during course of submission, also sought to place reliance upon the decisions cited on behalf of the appellant-State on the scope and powers of judicial review.

Arguments on behalf of the Respondent No. 1 (P-2) in LPA No. 112/2020 and 234/2020

11. Mr. Krishna Murari, learned counsel for the Respondent No. 1 in these appeals and petitioner in WPC No. 5689/2019 (P-2) has supported the findings recorded by the learned Single Judge in respect of disqualification of P-2 during technical bid on the sole ground of non-furnishing of litigation history of either of the partners of the joint venture in terms of Clause 2.7.1(ii) of Addendum / amendment to the Instructions to Bidders (ITB) to SBD. He submits that as per Clause 2.7.1, the joint venture was required to comply with the requirement of clause 2.6.7 and 2.6.8. As per clause 2.6.8, applicant was required to provide accurate information on any litigation or arbitration resulting from contracts completed or under execution by him over the last five years. It was not the requirement that individual partners of joint venture should separately submit litigation history. Therefore, the submission of the applicant bidder clearly stating "No litigation history of either JV Member" was in proper compliance of the requirement of Clause 2.7.1(ii). Learned single Judge discussed the case of the P-2 at para-43 of the impugned judgment and rightly arrived at a finding that the technical bid of P-2 was arbitrarily rejected. The specific plea raised by the P-2 in the writ petition has not been specifically replied in the counter affidavit of the State. It is submitted that the financial bid of Rs. 107,55,36,040.91 submitted by P-2 was substantially less than the bid submitted by the appellant i.e. Rs.

111,78,68,989.00/- . Learned counsel for P-2 has placed reliance upon the decision in the case of Mohinder Singh Gill and Another versus The Chief Election Commissioner, New Delhi and Others [(1978) 1 SCC 405, para-8 & 9 followed in the case of United Air Travel Services through its Proprietor A.D.M. Anwar Khan Versus Union of India through Secretary (Ministry of External Affairs) [(2018) 8 SCC 141, para-11] in support of the proposition that the reasons contained in the impugned order cannot be supplemented through an affidavit. He has also relied upon the following decision in support of his submission.

Rashmi Metaliks Limited and another versus Kolkata Metropolitan Development Authority and others: [(2013) 10 SCC 95, para-18 & 19]:

Relying upon the decision in the case of Reliance Energy Ltd. And another versus Maharashtra State Road Development Corpn. Ltd. And others [(2007) 8 SCC 1, para-36], it is submitted that laying down a level playing field in business is an important doctrine in larger public interest and governed by the rule of law. The Apex Court at para-38 of the judgment has also held that legal certainty is a requirement in invitation of any tender and is an important aspect of rule of law. Learned counsel submits that rejection of the technical bid suffers from arbitrariness as the same is not based on relevant grounds with proper reasonings. He has referred to the case of Asha Sharma Versus Chandigarh Administration and others [(2011) 10 SCC 86, para-12 & 14]. Mr. Krishna Murari has further relied upon the decision in the case of Urban Improvement Trust, Bikaner versus Mohan Lal [(2010) 1 SCC 512]; State of Punjab and Another versus Brijeshwar Singh Chahal and another [(2016) 6 SCC 1, para-19 and 39] and Shaik Janimiya versus State Bank of India, SAM Branch II, Rep by its Authorized Officer, Kachiguda, Hyderabad [(2020) 4 ALD 397 para-42 & 43]. Learned counsel for the P-2 has summarized his argument based on the aforesaid facts and the legal proposition. Learned counsel Mr. Krishna Murari has submitted that the findings of the learned Single Judge contained in the impugned judgment do not suffer from any perversity or error. The appeal being devoid of merit, deserves to be dismissed.

Reply on behalf of appellants in LPA Nos. 112/2020 & 113/2020

12. Mr. Vikash Singh, learned senior counsel for the appellants in these two appeals submits that the entire argument of bias is not emanating from the pleadings of the writ petition, rather it is based on the rejoinder filed by the P-1 in the writ petition. The case of the petitioner should be built upon the pleadings in the writ petition and not based on the rejoinder. He has relied upon the case of M.S.M. Sharma versus Krishna Sinha and Others [1959 Supp.(1) SCR 806, para-33; Union of India and Others Versus Devjee Mishra [(2016) 10 SCC 445, para-15]; Purushotam Kumar Kaundal Versus State of Himachal Pradesh and Others [(2014) 13 SCC 286, para-13]. Learned counsel for the appellant has taken exception to the plea raised by the learned counsel for the P-1 during course of argument in relation to the notwithstanding clause contained in the bank guarantee submitted by the appellant. He has pointed out similar

notwithstanding clause in the bank guarantee submitted by the P-1. He has categorically pointed out to the two significant discrepancies in the bank guarantee submitted by P-1 i.e. it was not an original bank guarantee but was an amended bank guarantee contrary to the requirement of the NIT. Secondly, the words and figures mentioned in the forwarding letter of the bank were differing which was also not in terms of the bid security required to be furnished on the part of P-1 and was in teeth of section 18 of Negotiable Instrument Act, 1881. He has submitted that all other successful bidders had submitted fresh bank guarantee. Therefore, it was not permissible for P-1 to point out any discrepancy in the bank guarantee submitted by the appellant or other bidders who qualified in the Technical Bid.

13. Learned Advocate General has, in reply, submitted that view of the Tender Evaluation Committee has to be respected. The course adopted by the learned single Judge was not backed by the authority of law. Learned A.G has also submitted that the petitioner no. 1 and 2 both should have first crossed the threshold of being successful in the technical bid to compete with the other successful tenderers. P-1 has not been able to show as to how rejection of its technical bid was in any way contrary to the terms of NIT or suffering from any arbitrariness or perversity. Similar is the case of the P-2. It is submitted that quashing of the tender and all consequential action including award of work to the appellant M/s Agrawal Global Infratech Private Limited has resulted in delay of execution of the work and substantial increase in the cost of construction. Such an approach on the part of the writ court has proved detrimental to the public interest at the behest of unsuccessful tenderers. The appeals therefore deserve to be allowed.

Discussion:

14. On consideration of the submission of the learned counsel for the parties and the pleadings on record, the following facts emerge:

That a fresh e-tender notice was issued on 20.08.2019 by the State of Jharkhand after cancellation of earlier NIT dated 07.06.2019 for construction of Meral-Bana-Ambarkhoriya Road (MDR-140) Road (length 0.00 to 36.629 km) under Central Road Fund for the year 2019-20 for a value of Rs. 13357.97884 lakh. P-1 was disqualified in the technical bid for non-submission of bid security and bank guarantee, as per the tender document. In the same W-1 work, P-2 was disqualified during technical bid as the joint venture had submitted its litigation history in the letter head of Ramiya-HS (JV) disclosing the litigation history of both the partners "No litigation history of either JV Member". The Technical Bid Evaluation Committee found it to be contrary to the requirement of Clause 2.7.1(a) (ii), whereunder individual members of the joint venture must each satisfy the requirement of Clause 2.6.7 and 2.6.8. Both the writ petitioners preferred separate writ petitions being WPC No. 5408/2019 by P-1 and WPC No. 5689/2019 by P-2. P-1 sought quashing of the decision of the Tender Committee dated 03.10.2019, whereunder its technical bid was declared as non-responsive

to Clause 16.3 of Instructions to Bidders (ITB) to the Standard Bidding Document (SBD) in respect of the W-1 work. Further prayer was made for issuance of a direction upon the Respondent State to declare its technical bid as responsive and consequently to open its price bid and award the work in question to it by issuing Letter of Intent / work order after its financial bid was found to be lowest. Petitioner had also prayed for grant of any other relief or relief (s), as may be deemed fit and proper to which the petitioner is entitled under the facts and circumstances of the case and in the interest of justice.

15. Petitioner no. 2- Ramiya-HS (JV) sought quashing of the Government e-Procurement System Tender Summary Report in connection with the same NIT dated 20.08.2019 for award of contract in respect of W-1 work qua the petitioner (P-2), whereby its technical bid was declared as non-responsive due to non-satisfaction of clause 2.7.1 (a) (ii) of the Addendum/Amendments to the Instruction to Bidders (ITB) to SBD. It further prayed for issuance of a direction upon the State to declare the technical bid of P-2 as responsive and consequently to open its Financial Bid as well as to declare it as L-1 inasmuch as it had quoted the bid price of Rs.107,55,36,040.91/- as against the bid price quoted by the Respondent / appellant herein M/s Agrawal Global Infratech Private Limited of Rs. 111,78,68,989/-. P-2 had formed a joint bidding agreement dated 02.09.2019 to participate in the NIT dated 20.08.2019 for W-1 work. As per the joint venture agreement and the power of attorney executed by and between the parties of joint venture M/s RAMIYA Construction Pvt. Ltd. had been designated as a lead partner with power of attorney to conduct, participate and transact in the entire tender process through one of its Directors namely Mr. Vineet Yadav. P-2 also pointed out that the bank guarantee of M/s N.G. Projects Limited was not in the proper format. Additional condition in the bid document reserving the right of the employer to get the bank guarantee extended without notice of such extension to the bank had also been changed and instead it was mentioned that bank guarantee could be extended only at the banker's sole discretion. The bank guarantee submitted by M/s M.G Contractors Private Limited Private Limited as well as M/s RKC Infra-built Private Limited also showed that they were exactly in the same format to that of the petitioner, but those bank guarantees were accepted. The disqualification of its technical bid was in violation of principles of natural justice since the State Respondent did not mention in the rejection order as to which clause of SBD have been violated by P-2. Clause 2.6.8 related to litigation history of the bidders either jointly or severally in the case of joint venture.

16. On the part of the State, the impugned action against the P-1 was defended on the ground that the amended bank guarantee could not have been accepted as it was not in the prescribed format. Correspondence with the Bank on the clause contained in the forwarding letter of the bank whether it formed integral part of the original guarantee remained unresponded. According to the State, bank guarantee of the Respondent No. 5 / appellant M/s Agarwal Global Infratech Pvt. Ltd. was in the prescribed format and as such, it was awarded the work

being L-1. Whereas in the case of P-1, there was discrepancy in the letter of the bank with regard to the amount of bank guarantee as the amount was written as Rs. 1,34,00,000/- in figures, however in words, it was written as Rupees One crore six lakhs only. Appellant M/s Agarwal Global Infratech Pvt. Ltd. has contended that the agreement was executed in respect of W-1 work by the State Respondent after its bid was found to be lowest and the work order had also been issued on 18.10.2019. The work had already started on 20.10.2019 and substantial part of it had been carried out. Periodic bills were also submitted before the Executive Engineer, Road Division, Garhwa. It had also invested huge amounts in execution of the work. That there was no question of opening the financial bid of those participants who did not succeed in the technical bid and any claim by P-1 to the effect that its financial bid was lower than the Respondent No. 5 / appellant M/s Agarwal Global Infratech Pvt. Ltd. was imaginary and could not be considered. Rival parties also cited certain decisions in support of their contentions.

17. Learned writ court upon consideration of the rival case of the parties, proceeded to decide the issue, whether there was any arbitrariness, unreasonableness, mala fide or biasness in the decision making process of the State asking for interference. If so, what appropriate orders could be passed in the facts and circumstances of the present case? It took note of the contention of P-1 that its technical bid in another work (W-3) was held to be responsive despite the fact that the amended bank guarantee was furnished and its financial bid was found to be lowest, whereas its technical bid for W-1 and W-2 works was held to be as non-responsive as it did not fulfil the requirement of Clause 16.3 of SBD. P-1 had also contended before the learned single Judge that the State Respondent took a different approach for similar works in relation to the same defect. However, the State Respondent hurriedly cancelled the W-3 work and issued 3rd call tender. Therefore, its decision was arbitrary and unreasonable. As regards the W-1 work and disqualification of P-1, learned single Judge dealt with the issue at para-30 of the impugned judgment in the following manner.

"30. So far as the work W-1 is concerned, it appears that M/s. Agrawal Global Infratech Pvt. Ltd. (respondent no.5 in W.P.(C) No. 5408/2019) presented the bank guarantee in the name of the Executive Engineer, Road Division, Garhwa, whereas other bidders submitted the bank guarantee in the name of the Executive Engineer, Road Division, Garhwa. The State respondents have contended that it was provided by an addendum that the bank guarantee is required to be issued in the name of the Executive Engineer, Road Construction Department, Road Division, Garhwa. Even if the said contention of the State respondents is accepted, they have deviated from the terms of SBD by accepting the technical bid of other bidders, who had presented the bank guarantee in the name of the Executive Engineer, Road Construction Department, Road Division, Garhwa. Apart from it, the respondent no.5 had put a "notwithstanding clause" in the bank guarantee, which was certainly a deviation from the format of the bank guarantee. M/s. N.G. Projects Limited [respondent no.5 in W.P.(C)

No.5416/2019], whose technical bid was also found responsive, also deviated from the format of the bank guarantee by changing the condition of the bank guarantee by providing that the bank guarantee can be extended only at the "banker's sole discretion". It further appears that in the bank guarantee of M.G. Contractors Private Limited and RKC Infra built Private Limited, whose technical bids were also found responsive, there were deviations from the prescribed format, which were relaxed by the State respondents."

18. At para-35 of the impugned judgment, it was held that rejection of the technical bid of P-1 and acceptance of the technical bids of the private Respondent as well as other bidders suffered from arbitrariness and unreasonableness, more so when there were infirmities in the bid document of all the bidders. It was also observed that State Respondents appeared to have adopted pick and choose method which was impermissible in the eye of law and Article 14 of the Constitution of India. Learned writ court then proceeded to discard the submission of the Respondent State that since the work had already been awarded to the private Respondent, no relief can be granted to P-1, since P-1 had confined its prayer to the opening of its technical bid. Relying upon certain decisions of the Apex Court i.e. in the case of Satya Narain Singh versus. District Engineer, PWD & Others., [1962 Supp.(3) SCR 105]; B.C. Chaturvedi versus Union of India & Others [(1995)6 SCC 749] and Shangrila Food Products Ltd. & Another Versus Life Insurance Corporation of India & Another (1996)5 SCC 54, learned single Judge held that for rendering complete justice in exercise of powers under Article 226 of Constitution of India, High Court may pass appropriate orders as it may deem fit in the facts and circumstances of the case. Moreover, petitioners in their respective writ petitions had prayed for "any other relief (s)" which would certainly have an exhaustive meaning. As regards the merit of the case of P-2, learned single Judge referred to Clause 2.6.7 and 2.6.8 and 2.7.1(a)(ii) and held that the joint venture applicant Ramiya-HS (JV) had specifically stated in its bid document "No litigation history of either JV Member". Litigation history was required to be filed by the applicant and therefore, Ramiya-HS (JV) had furnished it in its letter head disclosing the litigation history of both the partners. Based on the aforesaid findings, learned single Judge quashed the decision of the Tender Committee dated 03.10.2019 in relation to W-1 work including award of tender in favour of the private Respondent M/s Agrawal Global Infratech Private Limited / appellant herein and State was directed to issue a fresh tender.

Be it once again mentioned that by the common impugned judgment, learned single Judge decided two other writ petitions i.e. WPC No. 5416/2019 and WPC No. 5894/2019 relating to W-2 i.e. "Reconstruction of Nagaruntari-Dhurki-Ambakhoriya Road (MDR-139) and W-3 work i.e. "Reconstruction of Dandai Bazar to Panghatwa P.W.D. Road via Lawahikala Road" which arose out of different NIT. The decision of the Tender Committee dated 03.10.2019 in relation to W-2 work was also quashed along with all consequential actions with a direction to the State Respondent to issue a fresh tender and proceed

accordingly. The 3rd call tender issued by the State Respondent, subject matter of WPC No. 5894/2019, was quashed and the State Respondents were directed to proceed with the petitioner, as per the terms and conditions of the said tender.

19. Before us in appeal, the issue to be decided is, whether quashing of the decision of the Tender Evaluation Committee in respect of W-1 work and the consequential orders passed by the learned single Judge is proper in the eye of law and on facts or not?

Learned counsel for the rival parties have placed reliance upon more or less the same terms and conditions of the NIT. Certain more terms have also been referred to support their contentions in the individual cases. For better appreciation of the issue involved in the present appeals, it is deemed proper to extract the relevant terms and conditions of the NIT and the Standard Bid Document.

Clause-3 of the NIT dated 20.08.2019 being e-Tender Reference No. RCD/Garhwa/726/19-20 (2nd Call) reads as under:

"3. Bids must be accompanied by security of the amount specified for the work in the column 4 of the above table drawn in favour of

"Executive Engineer, Road Construction Department, Road Division, Garhwa". Bid security will have to be in any of the forms as specified in the bidding document and shall have to be valid for 45 days beyond the original validity of the bid in accordance with the SBD (I.T.B) Clause-15.1."

20. NIT required the bidder to read and examine carefully all Instructions including Addendum / amendments to ITB, conditions of contract, contract data, forms, terms, technical specifications, bill of quantity, etc. in the bid document before bidding. Clause-7 of the NIT is also extracted hereunder for better appreciation of the case of the parties.

"7. Bids shall be strictly treated as non-responsive if

(i) Bid is not accompanied by an acceptable bid security (with validity for a period of not less than 45 days beyond the validity of bid) and not secured as indicated in sub clause 16.1 and 16.2 of the Bidding Document.

(ii) The undertaking regarding validity of bid, for a period of 120 days after the dead line date for bid submission specified in clause 20 of the bidding document, is not submitted."

As per Clause-7, bid should be accompanied by acceptable bid security with validity for a period of not less than 45 days beyond the validity of bid and secured as indicated in sub clause 16.1 and 16.2 of the ITB, failing which it shall be treated as non-responsive. As per Clause 7(ii), if the undertaking regarding validity of bid for a period of 120 days after the deadline date for bid submission is not submitted, bid shall be treated as non-responsive. Clause 16 of the NIT which relates to Bid Security is also extracted hereunder:

"16. Bid Security

16.1. The Bidder shall furnish, as part of his Bid, a Bid security in the amount as shown in column 4 of the table of IFB for this particular work. This bid security shall be in favour of Employer as named in Appendix and may be in one of the following forms (SECOND SENTENCE IS REPLACED):

- a. Receipt in challan of cash deposit in the Govt. Treasury in India.
- b. Deposit-at-call Receipt from any scheduled Indian Bank or a foreign Bank located in India and approved by the Reserve Bank of India.
- c. Indian Post Office / National Saving Certificate duly endorsed by the competent postal authority in India.
- d. Bank Guarantee from any scheduled Indian bank, in the format given in Volume III
- e. Fixed Deposit Receipt, a certified cheque or an irrevocable letter of credit, issued by any Scheduled Indian Bank or a foreign Bank approved by the Reserve Bank of India.

16.2. Bank Guarantees (and other instruments having fixed validity) issued as surety for the bid shall be valid for 45 days beyond the validity of the bid (Amended)

16.3. Any bid not accompanied by an acceptable Bid Security and not secured as indicated in Sub-Clauses 16.1 and 16.2 above shall be rejected by the Employer as non-responsive."

Since the name of the addressee in the bid security had been replaced by the Addendum to clause 16.1., the same is also quoted hereunder.

"16.1. The second sentence is replaced by, This bid security shall be in favour of Executive Engineer, Road Division, Garhwa and may be in any one of the following forms".

As per amendments to ITB, the Bid Security was to be furnished in favour of the "Executive Engineer, Road Division, Garhwa" and not in the name of "Executive Engineer, Road Construction Department, Road Division, Garhwa". It is also relevant to quote clause 23 relating to Bid Opening and amendments thereto.

"23. Bid Opening

23.1 The Employer will open all the Bids received including modifications made pursuant to Clause 22. In the event of the specified date of Bid opening being declared a holiday for the Employer, the Bids will be opened at the appointed time and location on the next working day. (Amended)

Amendment

23.1 Replace the word 'Employer' by "Chairman", e-procurement cell, Road

Wing, Jharkhand, Ranchi".

23.3 "Technical Bid" shall be opened. If the bid security furnished does not conform to the amount and validity period as specified in the invitation for Bid (ref. Column 4 and paragraph 3), and has not been furnished in the form specified in Clause 16, the remaining technical bid and the financial bid will be returned to the bidder. (Amended).

Amendment

23.3. This sub-clause is replaced by the followings:-

"The Technical Bid shall be opened online. If the bid validity period as specified in the Invitation for Bid (ref. Column 4 and paragraph-3), and has not been furnished in the form specified in Clause 16, the remaining technical bid and the financial bid will be deemed as 'Rejected'".

21. On the part of the appellant M/s Agrawal Global Infratech Private Limited (hereinafter referred to as 'M/s Agrawal') additional ground has also been taken that the undertaking submitted by the P-1 was not in the format prescribed on non-judicial stamp paper of Rs. 100/- and duly notarized, as per requirement of Clause 3.1 read with its Addendum. Clause 3.1 and amendment thereto, as per addendum, are extracted hereunder.

"3.1 Bidders should provide any additional information to fulfill the requirements of Clause 4 of the instructions to the Bidders, if applicable.

(i) Affidavit (REPLACED)

(ii) Undertaking (REPLACED)

Clause 3.1(i) Affidavits:- (As per sample format at page-35) shall be submitted on Rs. 100.00 non Judicial stamp paper duly notarized.

(ii) Undertakings as per sample format at Page-36) shall be submitted on Rs. 100.00 non Judicial stamp paper duly notarized."

However, it is not in dispute that the Tender Evaluation Committee did not specifically refer to this infirmity of P-1 in holding its technical bid as non-responsive. It is also necessary to extract Clause 2.6.8 and 2.7.1(a)(ii) which deals with the requirement of furnishing of litigation history:

"2.6.8 Litigation History

The Applicant should provide accurate information on any litigation or arbitration resulting from contracts completed or under execution by him over the last five years. A consistent history of awards against the Applicant or any partner of a joint venture any result in failure of the applicant.

2.7.1 Joint ventures must comply with the following requirement;

(a) Following are the minimum qualification requirements;

(ii) The joint venture must satisfy collectively the criteria of para 2.6.4 and 2.6.5 above for which purpose the relevant figures of each of the partners shall be added together to arrive at the joint venture's total capacity. Individual members must each satisfy the requirements of para 2.6.7 & 2.6.8."

22. P-1 submitted a bank guarantee with a forwarding letter of the State Bank of India dated 30.08.2019. Much has been argued in respect of discrepancy in the bank guarantee submitted by P-1 on two counts i.e. (i) that it was an amended bank guarantee and (ii) there was a difference in the figures and words on the liability undertaken under this bank guarantee i.e. Rs. 1,34,000,00/- and Rs. 1,600,00,00/-respectively. The letter dated 30.08.2019 is extracted hereunder:

"To

30.08.2019

Sub: Amendment of Bank Guarantee No. 45/2019-20 dt. 09.07.2019 for Rs. 1,34,00,000/-At the request of customer, we hereby amend above mention bank guarantee as follows: "Text Amendment"

Please read Para No. 1 as follows:

"Whereas, M/s Vinod Kumar Jain Head Office College, Road, Jashpur Nagar, Chhattisgarh-496331 & Raipur Office A-3, Jeevan Vihar, Opp Airport Road, Telibandha, Raipur, Chhattisgarh-492006 [name of Bidder] (hereinafter called "the Bidder") has submitted his Bid dated 04.09.2019 [date] for the "Reconstruction of Meral-Bana-Ambakhoriya (MDR-140) Road (Length-0.00 to 36.629 km) under Central Road Fund for the year 2019-2020 (job No. CRF-JHR-2018-19/50), E-tender Ref No. RCD/Garhwa/726/19-20 (2nd Call) dt. 20.08.19" [name of Contract hereinafter called "the Bid"].

All the other terms & condition of the original bank guarantee remain unchanged. This letter forms an integral part of the original guarantee referred above. "Notwithstanding anything contained herein above:

- a) Our liability under this Bank Guarantee shall not exceed Rs. 134,00,000/- (Rupees One Crore Six Lacs Only);
- b) This Bank Guarantee shall be valid up to 08.03.2020; and
- c) We shall be liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if we received (if you serve upon us) a written claim or demand under this guarantee on or before 08.03.2021.

Yours faithfully

Chief Manager"

(Emphasis supplied)

23. It is pertinent to mention here that in the body of the bid security (Bank

Guarantee) submitted by P-1, name of the beneficiary is shown as "Executive Engineer, Road Construction Department, Road Division, Garhwa, Jharkhand" which is not in terms of Addendum to Clause 16.1, but it should be in favour of "Executive Engineer, Road Division, Garhwa". However, it also needs to be pointed out that the same amount of Rs. 1,34,00,000/- has been mentioned in figures and in words therein. However, in respect of the validity period of the Bank Guarantee, the notwithstanding Clause inserted at the bottom indicates that it shall be valid up to 08.03.2020 and the beneficiary's rights as well as the banks' liability under this guarantee shall stand extinguished, unless a written claim or demand is made under this guarantee on or before 08.03.2021. This notwithstanding clause relating to the validity period of bid security is not in conformity with the format prescribed and the bid document, whereunder the Employer have reserved its right to get the bank guarantee extended and notice for such extension to the bank have been waived. It appears that the bank guarantee submitted by the other successful bidder M/s Agarwal Global Infratech Pvt. Ltd. (appellant herein) also suffered from the same discrepancy. Relevant part of the bank guarantee submitted by M/s Agarwal Global Infratech Pvt. Ltd. is quoted hereunder:

"This Guarantee will remain in force up to and including the date 28/02/2020, 174 days after deadline for submission of Bids as such deadline is stated in the instructions to Bidders or as it may be extended by the Employer, notice of which extension (s) to the Bank is hereby waived. Any demand in respect of this guarantee should reach the Bank not later than the above date.

Notwithstanding anything contained hereinabove:

1. Our liability under this bank guarantee shall not exceed Rs. 1,33,58,000/- (Rupees One Crore Thirty Three Lakhs Fifty Eight Thousand Only).
2. This bank guarantee shall be valid up to 28.02.2020; (being the date of expiry of the guarantee) and
3. We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only and only if you serve upon us a written claim or demand at YES Bank Limited, Ground And First Floor Golcha Chambers, Civil Lines, Sant Kabir Chowk, Near Holy Heart School Raipur-492001 (C.G) on or before 28.02.2021." (Underline supplied)

24. Though other successful bidders were not impleaded as party Respondents in the writ petition, but it was brought to the Court's notice on behalf of P-1 that the bank guarantee submitted by M/s N.G Projects Ltd also suffered from same infirmity. It appears that the technical bid of other bidders who had presented the bank guarantee in the name of "Executive Engineer, Road Construction Department, Road Division, Garhwa" instead of Executive Engineer, Road Division, Garhwa was also accepted, though they were in deviation of the terms of the SBD and its Addendum, quoted above.

25. It is evident from the aforesaid discussions that the bank guarantee submitted by the writ petitioner was not in the proper prescribed format and not in conformity with Clause 7 of the NIT read together with Clause 16 of SBD and Addendum to Clause 16.1. However, at the same time, the bank guarantee submitted by the appellant M/s Agarwal Global Infratech Pvt. Ltd was also not in conformity with the prescribed format as regards the extension of validity period at the discretion of the Employer and the waiver of right to notice to the bank by the Employer in view of notwithstanding clause introduced in the bank guarantee. It was the specific case of the State Respondents in para-14 of its counter affidavit that the bank guarantee had to be as per the prescribed format. There has been deviation in the name of the addressee in the bank guarantee submitted by other bidders, as taken note of by the learned single Judge. As such, in evaluation of the technical bid as respects the bid security under Clause 7 read with clause 16.1 and its Addendum thereto, the Tender Evaluation Committee did not appear to adopt uniform yardsticks.

26. On the part of the appellant, it has been urged that in a tender of such highly technical nature, the role in evaluation of the tender should be best left to the technical experts. In support thereof, learned senior counsel for the appellant M/s Agarwal has relied upon the following decisions: W.B. State Electricity Board versus Patel Engineering Co. Ltd. And others [(2001) 2 SCC 451]; Glodyne Technoserve Limited Versus State of Madhya Pradesh and Others [(2011) 5 SCC 103]; Bakshi Security and Personnel Services Private Limited versus Devkishan Computed Private Limited and others [(2016) 8 SCC 446]. He has also placed reliance upon the decision of the Apex Court in the case of Galaxy Transport Agencies Contractors, Traders, Transports and Suppliers Versus New J.K. Roadways, Fleet Owners and Transport Contractors and Others [2020 SCC Online SC 1035] which lays down that interpretation of the tender conditions should not be second guessed by the courts in place of the authority framing the tender document, unless it is mala fide. However, it is also a settled principle of law laid down in the case of Ramana Dayaram Shetty versus International Airport Authority of India and others [(1979) 3 SCC 489] and consistently followed thereafter such as in the case of Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and another [(2016) 16 SCC 818], that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. Para-10 of the judgment rendered in the case of Ramana Dayaram Shetty (Supra) is extracted hereunder:

"10. It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice

Frankfurter in *Viteralli v. Saton* where the learned Judge said:

An Executive Agency must be rigorously held to the standards by which it professes its action to be judged

Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

..... Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege." (Emphasis supplied)

27. This dictum laid down as back as in the year 1979 acknowledging the fact that the Government in a welfare state is a regulator and dispenser of special services and provider of a large number of benefits including jobs, contracts, licences, quotas, mineral rights, etc. and discretion of the Government in matter of grant of such largesse cannot be held to be unlimited. The exercise of discretion should not be arbitrary or at its sweet will. In a recent decision of the Apex Court in the case of *Central Coalfields Limited and another versus SLL-SML (Joint Venture Consortium) and others* [(2016) 8 SCC 622 following the decision of *Jagdish Mandal versus State of Orissa and others* [(2007) 14 SCC 517, it was reiterated that ordinarily, soundness of the decisions taken by the Employer ought not to be questioned, but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision is such that no responsible authority acting reasonably and in accordance with relevant law, could have reached. Whether a term of NIT is essential or not, is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it, provided the deviation is made applicable to all bidders and potential bidders, as held in *Ramana Dayaram Sheety* (supra). However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. [See: para-47 and 48 of *Central Coalfields Limited (Supra)*]. The Apex Court in the facts of the said case found that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, it was also observed that there is no inflexibility in this regard that the employer could deviate from the bid document but only within the parameter mentioned above.

28. As per the stand of the Respondent State at para-14 of their counter affidavit in the writ petition, the bank guarantee had to be submitted as per the prescribed format. Format has been laid down under Section 8 of the Bid

Document under the head 'Security' and 'Other Forms'. There is no pleading on behalf of the State that some deviation in the format of bid security document was permissible.

29. Having regard to the discussions made hereinabove, the view taken by the learned single Judge cannot be said to be erroneous in the eye of law in the light of scope and powers of judicial review for interference in contractual matters. This Court sitting in appeal is not supposed to substitute its own views if the findings of the learned single Judge do not suffer from perversity. It is profitable to rely upon the observation made by the Apex Court in the case of *B. Venkatamuni versus C.J. Ayodhya Ram Singh and others* [(2006) 13 SCC 449, para-11 & 12] as also observed in the case of *Management of Narendra & Company Private Limited versus Workmen of Narendra & Company* [(2016) 3 SCC 340, para-5], relevant part of which is quoted hereunder:

"5.Be that as it may, in an intra-court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely because another view or a better view is possible, there should be no interference with or disturbance of the order passed by the Single Bench, unless both sides agree for a fairer approach on relief."

30. On the part of the appellant State, learned Advocate General has cited following decisions to assail the findings of the learned single Judge.

i. *Montecarlo Limited versus National Thermal Power Corporation Limited*: [(2016) 15 SCC 272]:

ii. *Sterling Computers Limited versus M/s M&N Publications Limited and others*: [(1993) 1 SCC 445]

iii. *Jagdish Mandal versus State of Orissa and others*: [(2007) 14 SCC 517]

iv. *Master Marine Services (P) Ltd. Versus Metcalfe & Hodgkinson (P) Ltd. And another*: [(2005) 6 SCC 138]:

v. *Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and another*: [(2016) 16 SCC 818]

A perusal of the judgment cited by the learned Advocate General shows that the line of decisions cited in the case of *Montecarlo Limited* (supra) enunciate the principle of law that in a contract of commercial nature, the courts should refrain from exercising the powers of judicial review even if there is a procedural aberration or error in assessment or prejudice to a tenderer leaving it to the employer of the project having authored the tender documents to understand and appreciate its requirements and interpret its document, unless there is mala fide or perversity in the understanding or appreciation in the application of the terms of the tender conditions. In the case of *Municipal Corporation, Ujjain and Another versus BVG India Limited and Others* [(2018) 5 SCC 462], the Apex

Court has expressed that exercise of discretionary power under Article 226 of Constitution of India should be made with great caution and only in furtherance of public interest and not merely on the making out of a legal point. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere. Similar is the opinion expressed by the Apex Court in *Master Marine Services (P) Ltd. Versus Metcalfe & Hodgkinson (P) Ltd.* And another [(2005) 6 SCC 138] where it has been held that the court exercising judicial review does not sit as a court of appeal, but merely reviews the manner in which the decision is made. The court does not have the expertise to correct the administrative decision and substitute its own decision without the necessary expertise which itself may be fallible. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by *mala fides*. Quashing of decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. In the case of *Tajas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa* and another [(2012) 6 SCC 464], Apex Court has observed that in the absence of any *mala fides* or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders, no interference is required, particularly when the allotment of work in favour of the Respondent No. 2 therein did not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant Company. The Apex Court observed that interference with the ongoing work is therefore not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible. Learned Advocate General has also relied upon the case of *Silppi Constructions Contractors versus Union of India and Another* [(2020) 16 SCC 489] where the Hon'ble Court has summarized the principles of judicial review in the matter of interpretation of tender documents vis-à-vis power of the competent authority. The Apex Court has referred to the earlier decisions and the case of *Tata Cellular versus Union of India* [(1994) 6 SCC 651] and the recent decision in the case of *Caretel Infotech Limited Versus Hindustan Petroleum Corporation Limited and Others* [(2019) 14 SCC 81], wherein the Hon'ble court had observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done. The principles have been summarized at paragraph-19 and 20 of the judgment in *Silppi Constructions Contractors* (Supra). It has been held that the court should normally be loathe to interfere in contractual matters unless a clear cut case of arbitrariness or *mala fides* or bias or irrationality is made out. The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts

involving technical issues, the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give fair play in the joints to the Government and public sector undertakings in matters of contract and it should not interfere where such interference may cause unnecessary loss to the public exchequer. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

31. The principles of law enunciated in the decisions relied upon by the appellant State and also other parties when applied to the facts of the present case do support the conclusion arrived at by the learned single Judge in interfering with the decision of the Tender Evaluation Committee as regards the case of P-1 on grounds of arbitrariness.

32. It is necessary to advert to the case of P-2 whose technical bid was rejected on the ground that the litigation history submitted by the Joint Venture applicant was not in conformity with clause 2.7.1(a) (ii), quoted above. Clause 2.6.8 which deals with the litigation history of the individual members of the joint venture has also been quoted above. P-2, a joint venture M/s Ramiya-HS (JV), the bidder submitted information of litigation history in the following manner through its power of attorney holder "No litigation history of either JV member". Learned single Judge while dealing with the case of P-2 held that the State Respondent had arbitrarily rejected the technical bid of P-2, though litigation history was to be submitted by the applicant i.e. the bidder. The Employer i.e. State had taken a view that in terms of clause 2.7.1(a)

(ii) read with clause 2.6.8, individual members of joint venture must each satisfy the requirement as regards the litigation history. Appellants have contended that the learned single Judge should not have stepped into shoes of the employer in the matter of construction of the terms of the NIT and second guessed its requirement to come to a finding that the action was arbitrary and illegal.

33. Learned counsel for the Respondent joint venture M/s Ramiya-HS (JV) (P-2) has contended that Clause 2.7.1 is the ground of rejection and the same could not have been supplemented by the Respondent State by way of a counter affidavit by placing reliance upon Clause 2.6.8 of SBD in the light of the principle laid down in the case of Mohinder Singh Gill and Another versus The Chief Election Commissioner, New Delhi and Others [(1978) 1 SCC 405] reiterated in the case of United Air Travel Services through its Proprietor A.D.M. Anwar Khan Versus Union of India through Secretary (Ministry of External Affairs) [(2018) 8 SCC 141]. It is true that construction of terms of the NIT is best left to the employer i.e. author of the tender document especially when the tender is of

highly complex technical specification. But that does not mean that these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring specific skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints. [See: Montecarlo Limited versus National Thermal Power Corporation Limited [(2016) 15 SCC 272, para 26].

34. On consideration of the rival pleas concerning the rejection of the Technical Bid of P-2 in the light of the materials placed on record, it appears that the learned single Judge ought not to have embarked upon the construction of terms of the NIT specifically concerning the provision relating to litigation history under Clause 2.7.1(a) (ii) in the light of the principles enunciated in the decisions cited above. It would amount to stepping into the shoes of the employer and second guessing the requirement of the terms of the NIT in application to this subject. The contention of the P-2 / Respondent M/s Ramiya-HS (JV) that clause 2.6.8 was not specifically referred in the order of rejection, does not appeal to the reasoning since clause 2.7.1

(ii) specifically refers to clause 2.6.8 which, in turns, refers to the litigation history of individual members of the joint venture. Clause 2.7.1(a) (ii) provides that individual members must each satisfy the requirement of para 2.6.7 and 2.6.8. However, nothing turns upon the interference in the finding of the learned single Judge, so far as P-2 is concerned, in view of the opinion derived hereinabove as regards the findings of the learned single Judge on disqualification of P-1 in the technical bid, since the bid security offered by the writ petitioner (P-1) and the Respondent / appellant herein M/s Agarwal Global Infratech Pvt. Ltd both were not found to be conforming to the specific terms of the NIT leading to cancellation of tender itself. Therefore, opinion of this court as respects the findings of the learned single Judge in the case of P-2 shall not change the final outcome of these appeals.

Since the evaluation of the technical bids and the decision of the Tender Committee have been held to be vitiated on the grounds of arbitrariness for the reasons indicated hereinabove, award of tender in favour of the private Respondent M/s Agarwal Global Infratech Pvt. Ltd / appellant herein had to consequentially fail.

Learned single Judge while directing the Respondent State to issue fresh tender for award of W-1 work, has relied upon legal maxim "sublato fundamento cadit

opus", relying upon the decision in the case of TRF Limited versus Energo Engineering Projects Limited [(2017) 8 SCC 377]. It has arrived at an opinion that once the infrastructure has collapsed, the super structure is bound to collapse. Learned single Judge has quashed the consequential action of the State Respondent in award of the tender in favour of the private Respondent M/s Agarwal Global Infratech Pvt. Ltd / appellant herein as permissible under "any other relief" prayed for by the writ petitioner in order to do complete justice in exercise of discretionary powers under Article 226 of Constitution of India relying upon the case of Satya Narain Singh versus District Engineer, PWD Ballia and another [1962 Supp. (3) SCR 105] and also in the case of B.C. Chaturvedi versus Union of India and others [(1995) 6 SCC 749] as also in the case of Shangrila Food Products Ltd And Another versus Life Insurance Corporation of India and Another [(1996) 5 SCC 54]. Since the award of work in favour of the private Respondent M/s Agarwal Global Infratech Pvt. Ltd / appellant herein was found to be flawed on grounds of arbitrariness in matters of qualification in technical bid, the consequential action to award the work in its favour could not have been upheld since it would amount to allowing the appellant M/s Agarwal Global Infratech Pvt. Ltd to enjoy the fruits of a wrong decision. The course adopted by the learned single Judge to direct the Respondent State to call for a fresh tender for award of the work in such circumstances, does not call for any interference.

35. Having analyzed the reasonings rendered by the learned single Judge in the conspicuous facts of the case, it cannot be said that the decision of the Tender Evaluation Committee in evaluating the bid security document of the petitioner no. 1 and that of the successful tenderer M/s Agarwal Global Infratech Pvt. Ltd. / appellant herein do not suffer from arbitrariness. If the writ petitioner's (P-1) bid security suffered from significant discrepancy while tested in the light of clause 7 of the NIT read with clause 16.1 and Addendum to the ITB, the Bank Guarantee submitted by the appellant also was in deviation to the prescribed format. Learned single Judge has also found deviation from the applicable terms of the NIT and SBD pertaining to the bid security in respect of Bank Guarantee submitted by other successful tenderers in the technical evaluation bid. It therefore appears that uniform standard as professed by the Employer were not applied to the case of the individual tenderer while evaluating the technical bid. As such, the selection of one and rejection of another during technical evaluation was neither in consonance with the specific terms of the NIT and SBD read with the Addendum, nor was on uniform yardstick.

36. As an upshot of the aforesaid discussions and for the reasons recorded hereinabove, these appeals are dismissed.