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**(2022) 03 MAN CK 0010**

**In the Manipur High Court**

**Case No :** Writ Appeal No. 66 Of 2021, Miscellaneous Case (Writ Appeal) No. 119 Of 2021

M/s. Devendra Construction Company — APPELLANT

Vs

State Of Manipur & Ors — RESPONDENT

**Date of Decision :** 10-03-2022

**Acts Referred:**
Constitution Of India, 1950 — Article 14, 226

**Citation :** (2022) 03 MAN CK 0010

**Hon'ble Judges :** Sanjay Kumar, CJ;MV Muralidaran, J

**Bench :** Division Bench

**Advocate :** Om Prakash Mehta, R.K. Kulajit, Prateek Gattali, Phalgun Buch, N. Kumarjit, H.S. Paonam, S. Gunabanta

**Final Decision :** Allowed

## Judgement

Sanjay Kumar, CJ

(Through Video Conferencing)

(CAV)

[1] The Department of Drinking Water and Sanitation, Ministry of Jal Shakti, Government of India, launched the 'Jal Jeevan Mission' to provide functional water-tap connections to every household in the country by the year 2024. In turn, the State of Manipur undertook the Manipur Water Supply Project at a projected cost of Rs. 3064.58 Crore with the aid and assistance of the New Development Bank (NDB), a bank established by the BRICS nations at Shanghai, China. The State of Manipur aims at establishing an Integrated Water Supply Project for Imphal Planning Area Phase-3 and supply of drinking water to 25 towns and to 1731 habitations in the rural areas of Manipur.

As recommended by the NDB and in order to attract international competitive bidding, the project was divided into 14 procurement packages. One such

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procurement package is the Manipur Water Supply Project [SH: Providing Drinking Water Supply to other Towns (13 nos.) – Works Package: OTP P-VI (W)]. Invitation for bids for this package was issued by the Public Health Engineering Department (PHED), Government of Manipur, under NIT No.CE/PHE/3-94/NDB(W)/P-VI/2020/4013 dated 27.02.2021. The NIT discloses that the approximate value of the work was Rs. 168.36 Crore and the period for completion was projected as two and a half years after the date of issue of the work order. The NIT also provided that the bids for the work were to be submitted in a two-bid system, viz., a technical bid and a financial bid, on a turn-key basis by reputed firms/contractors incorporated in any of the member countries of the NDB.

[2] M/s. Devendra Construction Company, Jodhpur, the appellant partnership firm, and M/s. Keystone Infra Private Ltd., Hyderabad, the third respondent company, along with four other concerns, participated in the tender process in relation to this package. However, the appellant firm's tender was rejected at the threshold vide e-mail dated 24.09.2021. It was stated therein that its technical bid had been rejected during the technical evaluation by the duly constituted Committee for the reason - 'technically not qualified'. Aggrieved thereby, the appellant firm approached this Court by way of W.P(C) No.672 of 2021. Its prayer therein was to direct the authorities of the PHED, Government of Manipur, to provide reasons for rejection of its technical bid vide e-mail dated 24.09.2021; to provide it reasonable time to file a reply; to direct the said authorities to pass a speaking order after considering the reply and the representation filed by it, in case the decision to reject its bid still continued to hold the field; to direct the said authorities to open its financial bid in case they withdrew the e-mail dated 24.09.2021 and to allot the work to it in case its bid was the lowest amongst all the bidders; to grant liberty to it to challenge the speaking order passed by the authorities within ten working days from its communication, in case the decision to reject its bid continued and to direct the authorities not to finalize the bid till then; and to award costs. The appellant firm also sought interim relief by staying the finalization of the bid till disposal of the writ petition. An interim order to that effect was granted on 05.10.2021.

[3] However, by Judgment and Order dated 29.10.2021, a learned Judge of this Court dismissed the writ petition and vacated the interim order. On the very same day, viz., 29.10.2021, the authorities of the PHED issued a work order in favour of the third respondent company, which was declared the successful bidder. Aggrieved by the dismissal of the writ petition, the appellant firm filed this appeal on 15.11.2021. When the appeal was taken up for hearing on admission on 16.11.2021, the learned Advocate General, Manipur, informed the Court that the work order had already been issued to the successful bidder. On 17.11.2021, the learned Advocate General furnished details, stating that Work Order dated 29.10.2021 had been issued to M/s Keystone Infra Private Ltd., Hyderabad. Thereupon, the appellant firm filed MC(WA) No.110 of 2021 seeking to implead the successful bidder. The application was ordered on 29.11.2021

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after notice was served upon the said bidder but leave was granted to it to raise objections as to such impleadment in the event of any prejudice.

[4] The Contract Agreement between the PHED, Government of Manipur, and the third respondent company was executed on 03.11.2021, i.e., before the filing of this appeal. However, this Court passed an order in this appeal on 21.12.2021, noting that the photocopies of the original record that had been produced, pursuant to a direction to produce the original record, revealed that four out of the six bidders for the subject package of work were excluded on an identical ground but further verification revealed that the said ground was equally applicable to the third respondent company also. This Court therefore opined that further examination was required in the context of the bonafides of the State authorities in eliminating the competition at the threshold, thereby restricting consideration to the financial bids of only two out of the six bidders, and as to whether such an exercise was in public interest. This Court accordingly directed that the award of the work to the third respondent company would be subject to further orders in this appeal.

[5] The appellant firm also filed MC(WA) No.119 of 2021. Therein, it asserted that the PHED authorities had proceeded to issue the work order in hot haste on the very day that the judgment was pronounced in the writ petition and stated that this Court would have ample power to take note of events subsequent to the original proceedings in order to do complete justice between the parties and also to avoid unnecessary litigation and expenditure. According to it, the rules of procedure needed to be moulded so as to promote substantial justice. Having said so, the appellant firm sought leave, by way of abundant caution, to add additional prayers in the appeal to the effect that the work order dated 29.10.2021 issued to the third respondent company be quashed along with the e-mail dated 24.09.2021 issued to the appellant firm and to direct the PHED authorities to open the financial bid of the appellant firm and award it the contract, if its bid was found to be the lowest amongst the bidders.

[6] By way of Affidavit-in-opposition dated 27.11.2021 filed by the Joint Secretary (PHED), Government of Manipur, the authorities sought to justify the issuance of the work order in such a hurry. She stated therein that the work in question was a highly time-bound project which was important for the people of the State. She further stated that the Ministry of Jal Shakti, in its review meeting held on 04.10.2021, requested the State authorities to ensure award of the work without further delay. She pointed out that the work orders for the other packages under the NDB project were issued on 15.10.2021 but, the subject package was kept on hold owing to the pendency of the writ petition. That was stated to be the reason why the work order was issued as soon as the judgment was pronounced therein.

[7] Heard Mr.Om Prakash Mehta, learned counsel, assisted by Mr.R.K.Kulajit, Mr.Prateek Gattali and Mr.Phalgun Buch, learned counsel, for the appellant firm; Mr. N.Kumarjit Singh, learned Advocate General, Manipur, for the State

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authorities; and Mr.H.S.Paonam, learned senior counsel, assisted by Mr.S.Gunabanta, learned counsel, for the third respondent company.

[8] At the outset, the learned Advocate General and Mr. H.S.Paonam, learned senior counsel, argued the preliminary issue as to the scope of this writ appeal. Their specific contention is that it is not open to the appellant firm to enlarge the scope of the proceedings at the appeal stage as it is a settled proposition of law that an appeal is only a continuation of the proceeding from which it arises. They would therefore contend that the appellant firm cannot seek amendment of its prayer at the appellate stage and challenge the work order issued to the third respondent company after dismissal of the writ petition.

[9] Reference may be made to case law on the point. In Kedarnath Aggarwal (dead) and another vs. Dhanraji Devi (dead) by LRs and another [(2004) 8 SCC 76], relying on the earlier judgment in Pasupuleti Venkateswarlu vs. Motor & General Traders [(1975) 1 SCC 770], the Supreme Court observed that the basic rule is that rights of parties should be determined as on the date of institution of the suit or proceedings, but the same does not mean that events happening after institution of a suit/proceeding cannot be considered at all and it would be within the power and duty of the Court to consider changed circumstances. It was further held that a Court of law may take into account subsequent events, inter alia, in the following circumstances: 1) the relief claimed originally has, by reason of subsequent change of circumstances, become inappropriate; or 2) it is necessary to take notice of subsequent events in order to shorten litigation; or 3) it is necessary to do so in order to do complete justice between the parties. On similar lines, in M/s. Bay Berry Apartments (P) Ltd and another vs. Shobha and others [(2006) 13 SCC 737], the Supreme Court observed that if the cause of action arose during the pendency of the suit and if, having regard to the facts and circumstances of the case, the suit keeping in view the subsequent event cannot be dismissed, then such subsequent events must also be considered. It was further observed that an appeal is in continuation of the suit and the appellate Court may take into consideration subsequent events with a view to mould the relief. Similar were the observations of the Supreme Court in Rajesh D. Darbar and others vs. Narasingrao Krishnaji Kulkarni and others [(2003) 7 SCC 219], wherein it was observed that Courts can take notice of subsequent events and mould the relief, subject to the rider that this can be done only in exceptional circumstances, i.e., where the nature of the relief, as originally sought, has become obsolete or un-serviceable or a new form of relief would be more efficacious on account of subsequent developments and events during the appellate stage. Much earlier, in Rameshwar and others vs. Jot Ram and another [(1976) 1 SCC 194], the Supreme Court had observed that the bearing of subsequent events on the right of action, on the nature of the relief and on its impotence to create or destroy substantive rights would have to be spelt out. It was held that where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief would be more efficacious on account of developments subsequent to the suit or even during the appellate

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stage, it is but fair that the relief is moulded, varied or reshaped in the light of the updated facts.

On the other hand, in Jagdish Prasad Shivhare vs. Municipal Corporation, Gwalior, and others [(1999) SCC Online MP 143 = 1999 (2) MPLJ 247], a Division Bench of the Madhya Pradesh High Court observed that a decision in a case under Article 226 cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. However, the Bench further observed that though a plea is not specifically raised, but yet if it is covered by the issue by implication and the parties know that the said plea is involved, the mere fact that the plea was not expressly taken in the pleading would not necessarily disentitle the party relying upon it, if it is satisfactorily proved.

In Bachhaj Nahar vs. Nilima Mandal and another [(2008) 17 SCC 491], the Supreme Court held that the High Court's decision was not sound. The High Court had opined that when a plaintiff sets forth facts and makes a prayer for a particular relief in a suit, it amounts to mere suggestion as to what the relief should be and that it is for the Court, as a matter of law, to decide upon the relief that should be granted. According to the Supreme Court, such an observation may be appropriate with reference to a writ proceeding and may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed, but the said observation is misconceived if it is meant to hold that a Civil Court may grant any relief it deems fit, ignoring the prayer. This judgment demonstrates that the power of the High Court in relation to writ proceedings under Article 226 would be wider in scope than the power of the Court while dealing with conventional civil litigation.

[10] Though Mr.H.S.Paonam, learned senior counsel, would contend that most of the decisions referred to supra arose out of civil proceedings and the same cannot be extended to writ proceedings, it may be noted that the power and discretion of the Court under Article 226 of the Constitution would be much wider than that exercised by the Court in civil proceedings, which would be fettered by the rules of procedure and more particularly, the CPC. Notably, one of the prayers of the appellant firm in the writ petition was that its financial bid should be opened and it should be awarded the contract, if found to be the lowest bidder. Given this prayer, the action of the authorities in awarding the work to the third respondent company on the very day that the writ petition was dismissed, in the opinion of this Court, would not preclude the appellant firm from challenging such award in this appeal and reiterating its prayer that its bid be considered and the work be awarded to it, if found to be the lowest. In any event, it is not open to the PHED authorities to present a fait accompli to this Court and nullify the vested right of appeal available to the appellant firm. As pointed out by the Supreme Court, once the award of the subject work is put in issue and an opportunity of hearing is afforded to all the parties concerned, no prejudice would be caused to anyone. Therefore, this Court finds no grounds to

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relegate the appellant firm to a fresh case by treating the award of the work as a new cause of action which, in fact, it is not. The plea of the appellant firm in MC(WA) No.119 of 2021 to amend its prayer is accordingly accepted, though it is not necessary to do so as this Court has the power to mould the relief, taking note of the subsequent award of the work to the third respondent company.

[11] Coming to the merits of the matter, the PHED authorities produced photocopies of some of the records and the original record in part. Perusal of the records reflects the following relevant facts.

The first e-tender for Package VI, along with the other packages, was floated in December, 2019. However, by letter dated 23.02.2021, the Administrative Department decided to call for fresh bids for all the packages, including the subject package. The second e-tender was accordingly floated on 27.02.2021 in relation to this package of work and the others. However, opening of the technical bids was postponed 16 (sixteen) times between the dates 19.03.2021 to 10.09.2021. By way of Corrigendum dated 28.08.2021, the Chief Engineer, PHED, intimated that the technical bids for Package VI would positively be opened on 10.09.2021 and requested the bidders to upload their annual reports for the last three consecutive years, viz., 2017-18, 2018-19 and 2019-20, in their technical bids. A Tender Opening Committee (Technical Evaluation Committee) was constituted with the following officers: The Chief Engineer, PHED; the Joint Secretary (Finance) Government of Manipur; the Additional Chief Engineer, PHED; the Superintending Engineer (Urban-Circle), PHED; the Superintending Engineer, Planning and Monitoring Circle, PHED; and the Contract & Procurement Specialist, WAPCOS Ltd. The Executive Engineers of the Water Supply Maintenance Division No.2; the Imphal West PHE Division; and the Thoubal PHE Division, assisted the Committee.

[12] The technical bids were opened on 10.09.2021 for the subject package and 6(six) bidders were found to have submitted their bids, viz., 1) M/s Badrirai & Company, Dibrugarh, Assam; 2) Keystone Infra Pvt. Ltd., Hyderabad; 3) Rean Water Tech Pvt. Ltd., Kolkata; 4) Lahoty Buildcon. Ltd., Jaipur; 5) Velko Infratek Projects Pvt. Ltd., Andhra Pradesh; and 6) Devendra Construction Company, Jodhpur.

As regards the annual reports for three financial years, it was found that none of the bidders, except M/s. Keystone Infra Private Ltd., Hyderabad, had submitted separate annual reports and upon enquiry, the Committee was informed that private companies which are not publicly listed were not mandated to have annual reports and it was also informed that the bidders had assumed that the financial reports submitted by them were the required annual reports. Annual reports were accordingly called for once again from all the bidders on 10.09.2021.

[13] On 20.09.2021, upon final evaluation of the documents submitted by the bidders, the Tender Opening Committee (Technical Evaluation Committee) observed as under: -

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Sl. No.

Name of Firm/bidder

Requirement as per NIT

Technical Evaluation Summary

1.

M/s Badrirai & Company

Submitted as per NIT

2.

Keystone Infra Pvt. Ltd.

Submitted as per NIT

3.

Devendra Construction Company

Audited Financial Statements for the last three financial years along with Turnover Certificate issued by the Chartered Accountant or equivalent of the respective country in the format as mentioned in Appendix-4

· Annual Turnover submitted but signed by bidder instead of CA.

· CA certificate submitted separately in another format without specifying Water Supply turnover

4.

Rean Water Tech Pvt. Ltd.

Audited Financial Statements for the last three financial years along with Turnover Certificate issued by Chartered Accountant or equivalent of the respective country in the format as mentioned in Appendix-4

· Annual Turnover submitted but signed by bidder instead of CA.

· CA certificate submitted separately in another format without specifying Water Supply turnover

5.

Lahoty Buildcon Ltd.

1) The Bidder should fulfil the following experience criteria:

i) Basic and detailed engineering including procurement, construction of minimum one Conventional Water Treatment Plant with capacity of 5.00 MLD or higher in PHED or similar organization in the member countries of NDB during the last 5 years (from FY2015-16 to FY2019-20)

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2) Audited Financial Statements for the last three financial years along with Turnover Certificate issued by Chartered Accountant or equivalent of the respective country in the format as mentioned in Appendix-4

· WTP capacity 1.4 MLD (61 KLPH) < 5 MLD

· Annual Turnover submitted but signed by bidder instead of CA.

· CA certificate submitted separately in another format without specifying Water Supply turnover.

6.

Velko Infratek Projects Pvt. Ltd.

1) Audited Financial Statements for the last three financial years along with Turnover Certificate issued by Chartered Accountant or equivalent of the respective country in the format as mentioned in Appendix-4.

2) Work order copies to be provided duly certified not below the rank of Executive Engineer or equivalent in Government Department of the respective country along with the format given in Appendix-6.

· Power of attorney not submitted.

· Annual turnover certificate submitted in another format.

· Non-blacklist certificate & Bid securing declaration not notarized.

· Submitted work experience in the name of another firm.

· Most of the uploaded documents unreadable.

[14] The financial bids of the two technically qualified bidders were downloaded and opened on 25.09.2021 and it was found that M/s. Badrirai & Company had quoted Rs. 200.58 Crore, which was +19.14% above the estimated cost of Rs. 168.36 Crore. M/s. Keystone Infra Private Ltd. was found to have quoted Rs. 191.79 Crore, which was +13.90% above the estimated cost. Rate negotiation was stated to have been done with M/s. Keystone Infra Private Ltd., which reduced its bid to Rs. 191.09 Crore, which worked out to +13.50 % over the estimated cost. The matter was then placed before the Higher Tender Committee, comprising the Chief Secretary (Finance), Government of Manipur; the Secretary, (PHE), Government of Manipur; the Chief Engineer (PHED); and the Joint Secretary (Finance), Government of Manipur. Notably, the Chief Engineer, PHED, was in both committees. On 11.10.2021, the Higher Tender Committee deliberated on the Note submitted by the PHED and recommended award of the subject package of work to the L-1 bidder, viz., M/s. Keystone Infra Private Ltd., Hyderabad, at the negotiated rate of Rs. 191.09 Crore.

[15] In effect, the common ground for rejection of the technical bids of four out of the six bidders, including the appellant firm, was that the annual turnover

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documents submitted by them were either signed by the bidder, instead of the Chartered Accountant, or were in a different format; and the Chartered Accountant Certificates submitted separately were also in another format, without specifying water supply turnover. The issue with regard to the Chartered Accountant's Certificate was, however, not mentioned in relation to one of the disqualified bidders, viz., M/s. Velko Infratek Projects Pvt. Ltd.

[16] Reference in this regard may now be made to Section III of the Tender Document titled, 'Evaluation and Qualification Criteria'. Clause A.1 therein, titled 'Technical Criteria', states that bidders should upload the mentioned authenticated documents enclosed in the Technical Terms and non-compliance with the same shall be considered as non-responsive and shall be liable for rejection outright. It further states that the bidder should have the following eligibility criteria and submit the necessary documents with the tender.

One of the criteria in the table underneath, at Clause 3, reads as follows: -

3.

Average Construction Turnover: The bidder should submit the audited financial statements for the last 3 (three) financial years from FY2017-18 to FY2019-20 to demonstrate the current soundness of the bidders' financial position showing a minimum average turnover of not less than Rs.67.34 Crore from execution of water supply and other civil engineering works.

Audited Financial Statements for the last three financial years along with Turnover Certificate issued by Chartered Accountant or equivalent of the respective country in the format as mentioned in Appendix-4.

Appendix – 4 in the Tender Document reads as under:

APPENDIX-4

AVERAGE TURNOVER CERTIFICATE FOR LAST 3

FINANCIAL YEARS

Bidder's Name______________________________

Date___________________________________________

NIT No. & Date____________________________________

Certified that, the Turnover of M/s __________________________ from execution of Water Supply and other Civil Engineering works during the previous three (03) financial years is as below.

Financial Year

Amount (INR crores)

2017-18

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2018-19

2019-20

Average

INR____ crores

INR (Figure in words)

This certificate is given on the basis of copy of audited financial reports for profit/ loss account and balance sheet.

Sd/-

(Chartered Accountant)

Place:

“Seal:”

[17] It is an admitted fact that the appellant firm did not submit Appendix-4 signed by its Chartered Accountant. On the other hand, one of its partners signed it on its behalf. However, on the left side, the words ‘Chartered Accountant’ were mentioned within brackets and it was stated as follows: ’Certificate attached’. A Chartered Accountant’s Certificate was separately appended to the appellant firm’s Annexure-4. The Appendix-4 and the Chartered Accountant’s Certificate submitted by the appellant firm read thus: -

“ Subject to JODHPUR Jurisdiction

M/s DEVENDRA CONSTRUCTION COMPANY

An ISO 9001:2005, 14001:2005, 45001:2018 Certified Company.

DESIGNING,ENGINEERING, PROCUREMENT, CONSTRUCTION & MANAGEMENT.

APPENDIX- 4

AVERAGE TURNOVER CERTIFICATE FOR LAST 3 FINANCIAL YEARS

Bidder’s Name: - DEVENDRA CONSTRUCTION CO.

Date: - 23/03/2021

NIT No. & Date: - CE/PHE/3-94/NDB(W)/P-VI/2020/4013, Dated: 27.02.2021

Certified that, the Turnover of M/s Devendra Construction Co. from execution of Water Supply and other Civil Engineering works during the previous three (03) financial years is as below: -

Financial Year

Amount (INR crores)

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2017-18

2018-19

2019-20

Average

INR____ crores

INR (Figure in words)

This certificate is given on the basis of copy of audited financial reports for profit/ loss account and balance sheet.

Sd/-

(Chartered Accountant)

Place:

“Seal:”

“M/s R.P.Mundra & Co.

Chartered Accountant.

Out Side Siwanchi Gate,

Jodhpur.

TO WHOM IT MAY CONCERN

On the basis of the records produced before us it is certified that annual construction turnover from the contract business for last three years of M/s DEVENDRA CONSTRUCTION CO., 41-B, Umaid Bhawan Road, Near Suncity Art Emporium, Jodhpur are as follows: -

PERIOD

GROSS TURNOVER

ANNUAL CONSTRUCTION TURNOVER

NET WORTH

01.04.2017 TO 31.03.2018

1,37,77,60,345.94

1,19,61,97,958.88

56,52,87,362.58

01.04.2018 TO 31.03.2019

98,03,60,230.00

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98,03,60,230.00

60,50,40,454.42

01.04.2019 TO 31.03.2020

98,00,35,859.00

98,00,35,859.00

65,38,25,850.76

It is further certified that average construction turnover of last three years of M/s Devendra Construction Co., Jodhpur is of Rs.10521.98 Lakhs.

It is also certified that the new worth of M/s Devendra Construction Co., Jodhpur as per the Balance Sheet for the year ended 31.03.2020 is of Rs.6538.25 Lakhs.

FOR M/s R.P.MUNDRA & CO.

Sd/- with Seal

(AMIT MUNDRA)

PARTNER

M.No.403453
For M/s Devendra Construction Co.,

Place : Jodhpur

Sd/-

Date : 18.02.2021

Udin : 21403453AAAACS9855

Partner"

[18] It may be noted that the figure mentioned against each financial year in the appellant firm's Appendix-4 tallies with the figure mentioned as the annual construction turnover against that financial year in the Chartered Accountant's Certificate. Further, the said Appendix-4 is worded in the very same language prescribed in the format, which includes the words 'certified that the turnover of M/s. Devendra Construction Company from execution of Water Supply and other Civil Engineering works'. However, the Chartered Accountant's Certificate merely refers to it as 'construction turnover from contract business' and does not mention the words 'water supply and civil engineering works'. No doubt, when a tender document categorically states that the bidders should submit eligibility documents in a prescribed format, it is incumbent upon them to do so. However, the very purpose of floating a tender is to enable the State to get the most competitive price so that the public exchequer is not put to loss. That being the objective, some amount of laxity in strict compliance would ordinarily be enabled

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under the tender document itself. In the case on hand as well, that is so. Clause D 2 in Section II of the Tender Document, titled 'Instructions to Bidders', deals with clarification of bids and provides as follows: -

"D 2. CLARIFICATION OF BIDS

D2.1 To assist in the examination, evaluation, and comparison of the bids, and qualification of the Bidders, the Employer may, at its discretion, ask any Bidder for a clarification of its bid, given a reasonable time for a response. Any clarification submitted by a Bidder that is not in response to a request by the Employer shall not be considered. The Employer's request for clarification and the response shall be in writing. No change, including any voluntary increase or decrease, in the prices or substance of the bid shall be sought, offered, or permitted.

D2.2 If a Bidder does not provide clarifications of its bid by the date and time set in the Employer's request for clarification, its bid may be rejected."

[19] It may be noted that, after the rejection of its bid under e-mail dated 24.09.2021, the appellant firm addressed reply e-mail dated 24.09.2021 requesting that the reasons for its rejection during the technical evaluation be furnished to it. However, by letter dated 25.09.2021, the Superintending Engineer (Planning & Monitoring Circle), PHED, informed the appellant firm that any query raised after technical evaluation would be entertained only after the finalization of the tender. This communication is stated to be sourced in the 'Confidentiality' clause at D1.1 of Section II of the Tender Document. This clause states that information relating to the evaluation of bids and recommendation of contract award shall not be disclosed to bidders or any other persons not officially concerned with the bidding process until the contract award is communicated to all bidders. This clause obviously has no application at a point of time when the bid is still under evaluation and would apply only after a decision is taken as to award of the work and pending communication of the same to all the bidders. Reliance on this clause was, therefore, wholly misplaced. The outright rejection of the appellant firm's request for the reasons as to why its tender had been rejected was thus not in keeping with the norms.

[20] In this regard, it may also be noted that Clause C.1 of Section III of the Tender Document, referred to supra, deals with the 'Bid Opening Committee'. Clause C.1.2 speaks of the 'right of the bidder to question the rejection at the techno-commercial stage' and provides that a tenderer shall have the right to be heard in case he feels that a proper procurement process is not being followed and/or his techno-commercial bid has been rejected wrongly. The tenderer is to be permitted to send his representation in writing and on receipt of the same, it may be decided whether to withhold opening of the financial bids and the bidder may be expeditiously replied. Therefore, the authorities failed to ask for a clarification under Clause D2.1 of Section II of the Tender Document and also failed to give an opportunity to the appellant firm under Clause C.1.2 of Section

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III of the Tender Document.

[21] It would also be relevant to take note of Clauses 5.4.4. and 5.4.5 of the Manual for Procurement of Works, 2019. These clauses read as under: -

"5.4.4 Minor Infirmity/ Irregularity/ Non-conformity

During the preliminary examination, some minor infirmity and/ or irregularity and/ or non-conformity may also be found in some tenders. Such minor issues could be a missing pages/ attachment or illegibility in a submitted document; non-submission of requisite number of copies of a document. There have been also cases where the bidder submitted the amendment Bank Guarantee, but omitted to submit the main portion of Bid Document. The court ruled that this is a minor irregularity. Such minor issues may be waived provided they do not constitute any material deviation (please refer to Para 5.5.1 (iv) below) and financial impact and, also, do not prejudice or affect the ranking order of the tenderers. Wherever necessary, observations on such 'minor' issues (as mentioned above) may be conveyed to the tenderer by registered letter/ speed post, and so on, asking him to respond by a specified date also mentioning therein that, if the tenderer does not conform Procuring Entity's view or respond by that specified date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further.

5.4.5 Clarification of Bids/ Shortfall Documents

During evaluation and comparison of bids, the Procuring Entity may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered/ speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further. No change in prices or substance of the bid including specifications, shall be sought, offered or permitted. No post-bid clarification at the initiative of the bidder shall be entertained. The shortfall information/documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, GSTN number has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a contract without its completion/performance certificate, the certificate can be asked for and considered. However, no new contract should be asked for so as to qualify the bidder."

For reasons best known to them, the PHED authorities did not choose to take recourse to the procedure prescribed under these provisions so as to widen the

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zone of consideration in the interest of the State.

[22] The reason for the rejection was finally furnished to the appellant firm in the affidavit-in-opposition dated 10.10.2021 filed in the writ petition by the Joint Secretary (PHED), Government of Manipur. In para 7.2 therein, she stated that the firm was rejected on the ground that it did not submit the Turnover Certificate issued by the Chartered Accountant in the format as mentioned in Appendix-4, wherein it is clearly mentioned that the turnover should be from the execution of water supply and civil engineering works, but in the Turnover Certificate submitted by the firm, the turnover from water supply is not specified as mandated by the Tender Document. In para 2.6 of the affidavit also, she stated that there is no mention of the turnover from execution of water supply and other civil engineering works and, therefore, the firm had failed to submit the Turnover Certificate in the format as mentioned in Appendix-4 and, hence, the bid of the firm was rejected for violation and non-fulfilment of the technical criteria provided in Section III of the Tender Document.

[23] As already noted supra, reliance by the PHED authorities on the confidentiality clause in D1.1 was misplaced and it was only Clause D2.1 which stood attracted at a time when the technical bids were still under evaluation and process. Further, though the PHED authorities had reserved the right to reject a non-responsive bid outright if it was not in compliance with the technical terms, it may be noted that the bid of the appellant firm was not rejected at the outset on 10.09.2021 despite the fact that Appendix-4 submitted by it was not signed by its Chartered Accountant, as prescribed in the Tender Document. On the other hand, the authorities deemed it appropriate to address letter dated 10.09.2021 to the appellant firm asking it to submit its annual reports. The records reflect that this letter was addressed after opening of the technical bids and during the process of their evaluation. Therefore, it is clear that the authorities did not choose to exercise their right to reject the appellant firm's bid outright. Having entertained the said bid, despite the lapse of the appellant firm in so far as Appendix-4 is concerned and having called for annual reports from it under letter dated 10.09.2021, their failure to afford it an opportunity to make good the said lapse appears to be rather hidebound and hyper-technical.

[24] Be it noted that the Appendix-4 of the third respondent company was identical to that of the appellant firm in terms of the language therein and the only difference was that it was signed by the Chartered Accountant. Significantly, the Turnover Certificate appended thereto was from a different Chartered Accountant and it did not indicate that the turnovers of the third respondent company for the six financial years from 2014-15 to 2019-20, covered thereunder, were from water supply and civil engineering works. The figures mentioned as against the financial years, 2017-18, 2018-19 and 2019-20, in the Appendix-4, however, tallied with the figures mentioned in the said Certificate. Significantly, this situation was identical to the situation of the appellant firm but for the fact that its Appendix-4 was not signed by its Chartered Accountant.

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[25] It may also be noted that Appendix-6, pertaining to 'General Construction Experience', was to be submitted by the bidders in proof of their having experience in relation to procurement and construction of conventional water treatment plants; construction of water supply infrastructure; and laying, jointing, testing and commissioning of pipes of 50 mm and above for a minimum length of 80 kilometres in a single project during the last 5 years (from FY 2015-16 to FY 2019-20). Appendix-6 submitted by the appellant firm clearly brought out the fact that it had executed works in relation to rural water supply schemes: 1). RGLC RD 111.0 (Indolai Nadi- Peelwa-Sadari-Jambheshwar Nagar; 2). Package KLC-02 of "Water Supply Project for Kolayat Tehsil based on Kolayat Lift Canal"; and 3). RWSS RGLC RD 177.5 Tinwari-Mathaniya-Osian- Baori-Bhopalgarh Package-IV. Further, Appendix-8, titled 'Current Contract Commitment/Work in Progress' filed by the appellant firm indicated that it was involved in various water supply works. As many as, 9 (nine) such contracts relating to water supply systems at Jodhpur, Saiwai Madhapur, Gangapur, Gurdaspur and Amritsar were detailed therein. Apart from this, the audited balance sheets and profit & loss accounts of the appellant firm for the three financial years in question were also available with the authorities and the same indicated, under Form No.3CD, that its business included construction and maintenance of roads, rail, bridges, tunnel, ports, harbours, runways, etc. That apart, the figures mentioned in the appellant firm's Appendix-4 and in its Chartered Accountant's Certificate were borne out by these financial statements and there was no discrepancy or difference therein.

[26] In effect, the documents already available with the PHED authorities were sufficient in themselves to bear out and confirm the eligibility of the appellant firm and it was the failure of the said authorities in taking note of the same and in adamantly insisting upon adherence with the Appendix-4 format that resulted in the exclusion of the appellant firm from consideration. This point of distinction was not taken note of by the learned Judge, in the judgment under appeal, while comparing the present case with that of M/s. Nezone Pipes & Structures {W.P(C) No.427 of 2021, decided on 16.08.2021; and WA No. 39 of 2021, decided on 11.10.2021}. In that case, Appendix-4 was to indicate the turnover of not less than Rs. 40 Crore for the product under consideration but M/s. Nezone Pipes & Structures failed to submit Appendix-4 in that format. Significantly, the financial statements for the last three financial years submitted by it also did not give the breakup of the turnover so that the minimum turnover in relation to the product under consideration could be ascertained therefrom. It was in these circumstances that this Court held in the writ petition and, thereafter, in the appeal, that no point would have been served by allowing an opportunity to M/s. Nezone Pipes & Structures to clarify the issue, as the documents placed on record did not suffice and no new documents could have been filed by it to make out its eligibility in terms of the turnover during the previous three financial years for the product under consideration. The case on hand stands on a different footing as the documents filed by the appellant firm were sufficient to

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demonstrate that its turnover for the last three financial years was from civil engineering and water supply works and such turnover was more than sufficient to meet the eligibility norm. However, a rather pedantic approach was adopted by the PHED authorities in excluding bidders at the preliminary stage itself, by insisting upon a narrow-minded adherence to the prescribed format.

As already pointed out supra, Appendix-4 and the Chartered Accountant’s Turnover Certificate submitted by the third respondent company were practically identical but the only difference was that it’s Appendix-4 had been signed by the Chartered Accountant. As is the case with the appellant firm, the Certificate of the third respondent company’s Chartered Accountant also did not indicate that its turnover was from civil engineering and water supply works. In effect, there was no difference whatsoever in so far as the substance and contents of these documents were concerned and the only point of distinction was that, in the case of the third respondent company, its Appendix-4 had been signed by its Chartered Accountant but Appendix-4 was not signed by the Chartered Accountant in the case of the appellant firm. This minor defect, in the opinion of this Court, could have been permitted to be rectified as the clarification clause D2.1 was worded wide enough to permit it. All the more so, as Appendix-6, Appendix-8 and the financial statements submitted by the appellant firm clearly indicated that its turnover was from civil engineering and water supply works.

[27] Significantly, in Food Corporation of India vs. M/s. Kamdhenu Cattle Feed Industries [(1993) 1 SCC 71], the Supreme Court had observed that in the contractual sphere, as in all other State actions, the State has to conform to Article 14 of the Constitution, of which non-arbitrariness is a significant facet. Noting that there is no unfettered discretion in public law and a public authority possesses power only to use it for public good, the Supreme Court held that this would impose a duty to act fairly and to adopt a procedure which shows fair play in action. Per the Supreme Court, due observance of this obligation as a part of good administration would raise a reasonable or legitimate expectation in every citizen to be treated fairly in its interaction with the State and its instrumentalities.

Earlier, in Tata Cellular vs. Union of India [(1994) 6 SCC 651], the Supreme Court had observed that the principles of judicial review would apply to exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism but there are inherent limitations in the exercise of that power. It was pointed out that the Government, being the guardian of the finances of the State, was expected to protect the financial interest of the State and the right to refuse a tender is always available to it but the principles laid down under Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. It was further pointed out that there can be no question of infringement of Article 14, if the Government tries to get the best person or the best quotation and the right to choose cannot be considered to be an arbitrary power. The Supreme Court pointed out that the duty of the Court is to confine itself to the

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question of legality and its concern should be whether a decision-making authority: 1) 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. In effect, the grounds on which an administrative action would be subjected to control by judicial review can be classified as 1) Illegality: this means the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it 2) Irrationality, namely: Wednesbury unreasonableness; and 3) Procedural impropriety.

Again, in Reliance Airport Developers (P) Ltd. vs. Airports Authority of India and others [(2006) 10 SCC 1], the Supreme Court pointed out that discretion would undoubtedly mean judicial discretion and not whim, caprice or fancy. Elaborating further, the Supreme Court noted that the word 'discretion' literally means and denotes an uncontrolled power of disposal, yet in law, the meaning given to this word appears to be the power to decide within the limits allowed by positive rules of law as to punishment, remedies or costs. This, according to the Supreme Court, would mean that even if a person has a discretion to do something, the said discretion has to be exercised within the limits allowed by positive rules of law and the legal meaning of the word 'discretion' would, therefore, unmistakably avoid untrammeled and uncontrolled choice and more positively, points out at there being a positive control of some judicial principles. Discretion, per the Supreme Court, is the discernment of what is right and proper and denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences and not to do according to the will and private affections of persons.

More recently, in Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and another [(2016) 16 SCC 818], the Supreme Court pointed out that interference with the decision-making process in accepting or rejecting a tender is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision.

In the light of the legal principles adumbrated by the above case law, the narrow and hidebound approach adopted by the PHED authorities, ignoring the more liberal terms and conditions set out in the Tender Document, resulting in cutting down the competition at the threshold, ultimately leaving only two out of the six bidders in the fray, cannot be countenanced.

[28] The additional affidavit dated 23.02.2022 filed by the Deputy Secretary (PHED), Government of Manipur, discloses that after the opening of the financial bids for all the packages, it was found that the lowest bidders for all the six

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packages had quoted rates over and above the estimated cost put to tender but as delay in the execution of the works would seriously affect the target of the NDB project, the Chief Engineer, PHED, sought approval from the Government to undertake rate negotiations with the respective L-1 bidders, as provided under Clause 5.6.6 of the Manual for Procurement of Works, 2019. Approval was granted by the Government on 04.10.2021 and pursuant thereto, the third respondent company was asked to lower its rate, vide letter dated 04.10.2021. By its response dated 05.10.2021, the third respondent company offered a discount of Rs. 70 Lakh over the quoted price and reduced its bid to Rs. 191,09,46,000. According to the Deputy Secretary, the instructions dated 18.11.1998 of the Central Vigilance Commission with regard to avoidance of post-tender negotiations would not apply to projects funded by the World Bank and other international funding agencies.

[29] However, para 3.4 of the judgment under appeal discloses that the learned Judge was informed that the lowest bid of the successful bidder, M/s. Keystone Infra (P) Ltd., was Rs. 191.79 Crore and the appellant firm had stated then that its bid was still competitive and if it was rejected it would cause loss to the public exchequer, frustrating the entire object of the online bidding process. Mr. Om Prakash Mehta, learned counsel, would point out that even after the post-tender negotiations with the third respondent company, its bid has only been reduced by Rs. 70 Lakh and would assert that the bid of the appellant firm would cause greater savings to the State and, in turn, the public exchequer.

[30] It may be noted that the work order was issued in favour of the third respondent company on the very same day that the writ petition came to be dismissed. The reason for this haste was stated to be the urgency to proceed with the work so as to complete it by March, 2022. However, the record speaks against this claim by the PHED authorities. It may be noted that opening of the technical bids was postponed no less than 16 (sixteen) times. That apart, the Tender Document itself indicated that the time frame for completion of the work was 2½ years after the issuance of the work order. The affidavit filed in this appeal by the PHED authorities on 27.11.2021 stated to the effect that the Government of Manipur is targeting completion of the Jal Jeevan Mission by the year 2021-22 and delay in the execution of the work would hamper the completion of the mission and this was stated to be the reason why the work order was issued on the same day as the dismissal of the writ petition. Contradicting this stand, the work order issued on 29.10.2021 to the third respondent company affirmed that the time allowed for completion of the work is 2½ years after the date of issue of the work order. Therefore, the so-called urgency cited before this Court to justify the speed with which the work order was issued appears to be rather suspect, if not completely fictitious.

[31] It may be noted that the very purpose of undertaking the exercise of floating a public tender by a State instrumentality, such as the PHED, is to secure the best possible price for the execution of the work, which would entail savings

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not only for the State Government but also for the public exchequer, the ultimate beneficiary. This being the objective of the exercise, the authorities must necessarily be mindful of how they go about curtailing the zone of consideration of eligible bidders so that competitive prices can be procured to determine the most economic and qualified bidder who can be awarded the work. Eliminating bidders at the threshold on hyper-technical grounds so as to reduce the zone of consideration to just two bidders, as in the case on hand, would be counter-productive to the very objective of public/open bidding. The endeavour of the authorities should have been to determine eligibility of all the bidders on the strength of the complete documents submitted by them and not by insisting upon fastidious adherence to the format of a single document, excluding from consideration all other documents which had relevance to the determination of such eligibility. As already pointed out supra, three out of the six bidders were eliminated only on the ground that their Chartered Accountant's Certificates did not specify the Water Supply turnover and one bidder was excluded on the ground that its annual Turnover Certificate was submitted in another format. This hyper-technical approach resulted in only two financial bids surviving for consideration and both bids were found to be above the estimated cost projected in the Tender Document. Even negotiations with the lowest tenderer, the third respondent company, resulted in savings of just Rs. 70 Lakh and it is the claim of the appellant firm that its financial bid is still competitive compared to the same and would result in far greater savings for the State and the public exchequer.

This Court is informed that the third respondent company has already commenced the work but that, by itself, is not sufficient to accept the obtaining situation on equitable considerations and permit the third respondent company to complete the work at unnecessary extra cost to the State and the public exchequer. More so, when this Court has made award of the work in its favour subject to further orders in this appeal. Reliance on Brihan Mumbai Electric Supply and Transport Undertaking and another vs. Laqshya Media Private Limited and others [(2010) 1 SCC 620] is therefore of no avail to the third respondent company as the bidders in that case had completed 1/3rd and 40% respectively of the works allotted to them. Given the time span of 2½ years for completion of the subject work, the third respondent company would not have executed such an extent as on date.

[32] On the above analysis, the rejection of the appellant firm's tender and also the Work Order dated 29.10.2021 issued to the third respondent company, along with the subsequent Contract Agreement dated 03.11.2021, are set aside. The PHED authorities shall reconsider the entire eligibility issue of the bidders by allowing them to furnish clarifications, if necessary, so that the Committee concerned can ascertain, on the basis of the available documents, as to whether or not they are eligible in terms of the tender conditions and if found to be so, proceed to open their financial bids. Thereupon, the PHED authorities may consider the lowest qualified bidder and proceed to award the work to it in accordance with due procedure after holding further rate negotiation, if

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necessary.

The quantum of work done by the third respondent company shall be jointly ascertained and payment shall be made to it for the work executed, in terms of its financial bid. The financial bid of the lowest bidder, if accepted, shall be construed to be for the balance work and the work order/contract agreement shall be moulded accordingly. The entire exercise shall be completed within one month from the date a copy of this order is made available.

MC(WA) No.119 of 2021 is allowed.

The appeal is allowed to the extent indicated above.

In the circumstances, there shall be no order as to costs.

The records, original as well as photocopies, shall be handed over to an authorized Government Advocate by the Registrar (Judicial) of this Court under acknowledgement.

A copy of this order shall be supplied online or through WhatsApp to the learned counsel for the parties.

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