

(2020) 11 GAU CK 0009

In the Gauhati High Court

Case No : Writ Petition (C) No. 2286, 2308, 2369 Of 2020

M/S. Matlebuddin Ahmed

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 10-11-2020

Acts Referred:

Indian Penal Code, 1860 — Section 406, 420, 467, 468, 471
Code Of Civil Procedure, 1908 — Order 6 Rule 5
Constitution Of India, 1950 — Article 226

Citation : (2020) 11 GAU CK 0009

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : D. Saikia, B. Gogoi, B.D. Konwar, J. Singh, R. Kalita, B.D. Goswami, B. Islam

Final Decision : Partly Allowed

Judgement

1) Heard Mr. D. Saikia, learned senior counsel, assisted by Mr. B. Gogoi, learned counsel for the petitioner. Also heard Mr. B.D. Konwar, learned senior counsel, assisted by Mr. J. Singh, learned counsel for the respondent nos. 2 and 3, Mr. R. Kalita, learned counsel for respondent no.4 and Mr. B.D. Goswami appearing with Mr. B. Islam, learned counsel for respondent no.6. No one appears on call for the respondent nos. 1 and 5, despite due service of notice.

2) At the outset, it is mentioned herein that the matter has been heard in the "admission" stage at the instance of the learned senior counsel for the petitioner, respondents no.2 and 3 and such prayer not being objected to by the learned counsel for the respondent no.6.

3) This series of three writ petitions is the second round of litigation before this Court. The petitioner herein is registered as a Class-I(A) contractor with the Assam Public Works Department. The National Highways Authority of India (NHAI for short) had floated three following tenders, which are the subject matter of challenge in this set of three writ petitions, viz., (1) NIT bearing number

07/2019-2020 (O&M) for the work of "Maintenance of Guwahati Bypass from Ch. Km. 146.172 to Km. 163.895 of NH-37 in the State of Assam for the year 2019-2020 (SH: De-siltation of drains, culverts, cleaning of main carriageway, cleaning of medians, buffer zones, pot hole repair, etc.)", which is the subject matter of W.P. (C) 2286/2020; (2) NIT bearing number PIU/GHY/03/2019-20 (O&M) for the work of "Maintenance and safety of road section from Ch. Km. 1093.000 to Km. 1119.814 of NH-31 in Assam under package EW-II (AS-04)", which is the subject matter of W.P.(C) 2308/2020; and

(3) NIT bearing number PIU/GHY/04/2019-20 (O&M) for the work of "Maintenance and safety of road section from Ch. Km. 1065.000 to Km. 1093.000 of NH-31 in Assam under package EW-II(AS-04)", which is the subject matter of W.P.(C) 2369/2020.

4) The case of the petitioner is that he had participated in the e-bidding process in respect of all the three NITs. By filing these three writ petitions, the petitioner has, amongst others, assailed (i) the tender process; (ii) tender clause no. 4.4A(b); (iii) office order dated 23.04.2020, holding the bid of the petitioner to be not responsive; (iv) office order dated 29.04.2020, holding the bid submitted by the petitioner to be not responsive and declaring the date for opening of financial bid on 01.05.2020; (v) letter of acceptance dated 05.05.2020; and speaking order dated 22.05.2020. In W.P.(C) 2286/2020, in addition to other reliefs, the petitioner has also prayed for a direction to the tendering authority to accept the experience certificate dated 05.05.2020 and 06.05.2020 submitted by the petitioner.

5) Based on the submissions made by the learned senior counsel for the petitioner and the respondents no.2 and 3 and the learned counsel representing respondent nos. 4 and 6, amongst others, the broad grounds on which the petitioner seeks relief are as follows:-

a. The rejection of bid submitted by the petitioner by holding it to be not responsive was arbitrary and to favour the respondent no.4.

b. The clause nos. 4.4A(b) of Instruction to Bidders as amended vide Corrigendum-I dated 04.03.2020 was not mandatory as on a previous occasion the said condition was relaxed by the respondent nos. 2 and 3 by awarding similar works contract to the petitioner.

c. The amendment to the said clause no. 4.4A(b) of Instruction to Bidders was designed to oust competition and to favour the respondent no.4, as such, arbitrary and not in public interest.

d. It is projected that 4 and 6 lane highways were recently introduced in the State, as such, a large number of contractors do not have experience in such work, but they have similar experience in maintaining high value two lane highways. Therefore, by amending clause 4.4A(b) vide Corrigendum-I, level playing field was withdrawn to favour respondent no.4.

e. It is projected that in similar tenders floated in the year 2018 and 2019, clause 4.4A(b) of Instruction to Bidders was relaxed and contractors having experience in 2 lane highway maintenance including the petitioner were awarded the contract, which was successfully completed by the petitioner. Hence, it is projected that the said clause was not mandatory. Hence, it is projected that the corrigendum-I was arbitrary and whimsical.

f. That while passing the speaking order dated 22.05.2020, the Regional Officer, NHA (respondent no.3) failed to consider and/or refer to the Deed of Agreement dated 16.10.2017, which was subsequently produced before the respondent no.3 on the strength of orders passed by this Court in W.P.(C) 2157/2020, W.P.(C) 2168/2020 and W.P.(C) 2174/2020, which according to the learned senior counsel for the petitioner, clearly demonstrated that the petitioner had the past experience as an approved sub-contractor, as contained in clause 4.4A(b) of the Instructions to Bidder. Hence, the speaking order dated 22.05.2020 was vitiated for non consideration of relevant document.

g. The respondent nos. 2 and 3 held the bid submitted by respondent no.5 as responsive by office order dated 23.04.2020 subject to condition that work completion certificate be submitted. Accordingly, it is projected that if bid submitted without requisite document was held to be responsive, the respondent nos. 2 and 3 ought to have applied same principle to all and they ought to have held the bid submitted by the petitioner to be responsive, subject to by permitting the petitioner to producing deficit documents. It is also submitted that respondent no.5 had submitted turnover certificate for the financial year 2015-16, 2016-17 and 2017-18, which was in violation of clause 4.2(f) of Instructions to Bidder.

h. It is projected that in order to save the tender process, the bid submitted by respondent no.5 was held to be responsive, otherwise there would have been a sole valid tender, which would have called for re-tendering. Hence, it is projected that the tender of respondent no.5 was held to be responsive for collateral purpose to favour the respondent no.4.

i. It is urged that the respondent no.4 had submitted forged, fabricated and manufactured document with his bid, being the Chartered Accountant's certificate of turnover. Referring to Annexure-V and V-1 of the writ petition it is submitted that the Chartered Accountant's certificate dated 14.10.2019 did not contain the Unique Document Identification Number (UDIN) for short, which was made mandatory by the Institute of Chartered Accountants of India. Assailing the said certificate it is submitted that the document contained membership number of respondent no.6 as 311841. However, the said registration number was not of respondent no.6, but was of one Sourabh Jain of Kolkata, who was not having Certificate of Practice. Accordingly, it is submitted that in terms of clause 4.7(i) of Instructions to Bidders, the bid of respondent no.4, accompanied with forged document ought to have been rejected outright.

j. It is projected that upon verification, it is revealed that the respondent no.4 had submitted his bid forged documents relating to equipment rental agreement. In this regard, reliance is placed on declaration made by owner of two tippers bearing registration number AS-01-EC-4032 and AS-01-GC-6661, whose owners have expressed no knowledge about rental agreement of their equipment and that they did not execute the agreements. Similarly, vehicle bearing registration number AS-01-CC-3256 was shown as a tipper, which has turned out to be a pick-up van as per document downloaded from web-portal of Parivahan Sewa of Govt. of India, Ministry of Road Transport and Highways. It is submitted that despite such disclosure, the respondent nos.2 and 3 are doing their best to delay the enquiry to favour respondent no.4.

k. It is projected that the respondents no.2 and 3 have favoured respondent no.4 by accepting 2 (two) experience certificates dated 13.03.2020, which did not contain signature of authority equivalent to Chief Engineer, as Project Director of NHAI, who had issued those certificates is not equivalent to rank of Chief Engineer.

l. It is also submitted that the affidavit- in- opposition on behalf of respondent nos. 2 and 3 was filed by Dipak Das, who thought was the Accounts Officer, had misrepresented that he was the respondent no.3, i.e. Regional Officer, NHAI. Accordingly, it is submitted that the affidavit- in- opposition ought to be discarded as not acceptable, being vitiated by non production of authorization to swear and file affidavit on behalf of the respondent nos. 2 and 3 as well as on account of misrepresentation by the deponent.

m. The speaking order dated 22.05.2020 is assailed by stating that although the petitioner had produced agreement dated 16.05.2017 to show that he was a nominated and approved sub-contractor, who had completed 100% of the contract work, the said work was not at all referred to in the speaking order dated 22.05.2020.

n. It is projected that the work experience certificate submitted by the respondent no.4 did not contain endorsement by an authority equivalent to the Chief Engineer, but was signed by Project Director of NHAI, which is equivalent to an Executive Engineer in A.P.W.D.

6) From the pleading of the parties, the undisputed facts which emerge are that the petitioner had participated in these three tender process and that his bids were held to be non- responsive, as such, the aggrieved petitioner had assailed such action of the respondents no.2 and 3 by filing three writ petitions. By consent order dated 14.05.2020 in W.P.(C) No. 2157/2020, order dated 18.05.2020 in W.P.(C) 2168/2020, and order dated 18.05.2020 in W.P.(C) No. 2174/2020, this Court had directed the NHAI authorities to consider the representation made by the petitioner on 04.05.2020 with direction to also consider any further documents that the petitioner would like to rely on, further directing that the Regional Officer, NHAI (respondent no.3) would give

opportunity of hearing to the petitioner and the respondent no.4 on or before 20.05.2020 and to pass a reasoned order within a period of 5 (five) days thereafter. Accordingly, after conducting oral argument and upon examination of representations and documents, up-held the three letters of acceptance dated 05.05.2020 issued in favour of the respondent no.4 by holding that the same did not require any interference.

7) The grounds of challenge as narrated in paragraphs 5(a) to 5(e) above are taken up together. In this regard, the learned senior counsel for the petitioner has made elaborate submissions as regards his financial capability and previous work experience to project that his tender was wrongly held to be non-responsive. It was submitted that in a previous occasion, similar tender was floated and although the contractors who had past experience in similar works for 4 and 6 lane highways were eligible to bid, but the respondents no.2 and 3 had accepted the bid submitted by the petitioner although he had experience of 2 lane highway similar works. Accordingly, it was submitted that although bidders having past experience in 2/4/6 lane highways were initially eligible to bid, but in the present case, by issuing Corrigendum-1 dated 04.03.2020, previous experience in 2 (two) lane was excluded, which according to the petitioner, is to oust the petitioner from competition and to favour the respondent no.4. In this regard, the Court is inclined to accept the submissions made by the learned senior counsel for the respondent nos. 2 and 3 that if in past indulgence was given to the petitioner to do similar maintenance work even without holding experience in maintaining 4 and 6 lane highways, would not create a binding precedent for the respondent nos.2 and 3 to hold the bid of the petitioner to be technically responsive.

8) Moreover, it is the admitted case of the petitioner that in past he was permitted to participate in tender and was also awarded similar contract work without 4 and 6 lane highway experience. The said statement indicates that the intention of the respondent nos. 2 and 3 was to get the maintenance of highways done by contractors having past experience in 4/6 lane highways, but it was relaxed in past for the petitioner. In light of such factual background, there exists no ground for the Court to hold that there was some motive in issuing Corrigendum-1 dated 04.03.2020 or that it was designed to favour the respondent no.4 and to oust the petitioner from competition. Moreover, having participated in the bidding process with Corrigendum-1 on record, it is not open for the petitioner to turn around and assail the said Corrigendum-1, which had the effect of revising and/or amending Clause 4.4A(b) of Instructions to Bidders.

9) Moreover, the Court is of the considered opinion that under the unique facts of the present case in hand, it would not be proper on part of the Court to examine whether clause 4.4A(b) was an essential term of contract or not. In this regard, it would be apt to refer to the case of Central Coalfields Ltd. Vs. SLL-SML (Joint Venture), (2016) 8 SCC 622, wherein the Supreme Court of India has observed, inter-alia, that whether a term of the NIT is essential or not is a decision taken

by the employer which should be respected and that even if the term is essential, the employer has the inherent authority to deviate from it provided deviation is made applicable to all bidders and potential bidders as held in Ramanna Dayaram Shetty, further observing that if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. Therefore, it appears that only to a limited extent, the High Court can examine the lawfulness of the decision, but the Court should be loath in examining soundness of the decision, otherwise the Court would be taking over the function of tender issuing authority, which it cannot.

10) That as regards ground for challenge as narrated in paragraph 5(f) above, that while passing the speaking order dated 22.05.2020, the Regional Officer, NHAI (respondent no.3) failed to consider and/or refer to the Deed of Agreement dated 16.10.2017. It is true that the said document was not considered by the respondent no.3 while passing the speaking order. However, it appears that those documents cannot be accepted as a proof that the petitioner had the requisite experience in handling maintenance work for 4/6 lane National Highway. Hence, in the considered opinion of the Court, the speaking order dated 22.05.2020 cannot be said to be vitiated for non consideration of agreement dated 16.10.2017.

11) As regards grounds of challenge as narrated in paragraph 5(g) and 5(h) above, it is seen that in this set of three writ petitions, the petitioner has not prayed for any relief as regards action of the respondent nos.2 and 3 in declaring the bid of respondent no.5 to be responsive. The challenge is limited to rejection of technical bid submitted by the petitioner and award of contract work to the respondent no.4. Hence, as the respondent no.5 was not awarded with the contract work in reference, the said grounds of challenge appear to be merely academic. Moreover, in the considered opinion of the Court, the petitioner is not found to have suffered any prejudice as this Court by (i) order dated 14.05.2020 in W.P.(C) 2157/2020, (ii) order dated 18.05.2020 in W.P.(C) 2168/2020, and (iii) order dated 18.05.2020 in W.P.(C) 2174/2020, had directed the respondent no.3 to consider any additional document that may be relied upon by the petitioner.

12) As regards grounds of challenge as narrated in paragraph 5(i) above, it has been projected by the petitioner that the respondent no.4 had relied on forged and fraudulently manufactured Chartered Accountant's certificate dated 14.10.2019 regarding financial turnover, purportedly issued by respondent no.6. However, the respondent no.6 had filed an affidavit- in- opposition on 12.08.2020, inter-alia, disowning the alleged certificate to have been manufactured behind his back, further stating that the said certificate did not contain a "Unique Document Identification Number", which created a doubt as to genuineness of the certificate. In paragraph 5 thereof, the respondent no.6 has specifically stated that (a) the letter head in the certificate does not belong to him; (b) the address given in the letter-head is not that of his firm; (c) the signature and seal in the certificate do not belong to him; (d) the Membership

Number appearing in the certificate does not belong to him and he is also not aware as to who has been issued with the said Membership number; (e) he did not issue any financial turnover certificate and/ or any other certificate to the respondent no. 4 on 14.10.2019, the date on which the purported certificate is shown to have been issued; and (f) the financial turnover figures shown in the purported certificate dated 14.10.2019 do not match with the figures for the respective financial years mentioned in the certificate issued by him to the respondent no. 4 on the basis of Income Tax records for the period of 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19. By filing rejoinder affidavit on 17.08.2020, the respondent no.3 has taken a stand that in view of what has been disclosed by respondent no.6 in his affidavit- in- opposition, the respondent no.3 had issued a show cause notice dated 14.08.2020 to the respondent no.4 as to why no penal action should be taken against him as per clause 35 of the Instruction to Bidders. It is also stated that on 17.08.2020, an FIR has been lodged before the Dispur P.S. against the petitioner. In this regard, the learned senior counsel for the respondent nos.2 and 3 has emphatically submitted that as civil consequences arise in case action is taken under clause 35 of the Instruction to Bidders, the show cause and inquiry is inevitable, and that he has instructions to submit that if the respondent no.4 is found guilty, appropriate steps would be taken by the respondents no.2 and 3. In this regard, the stand of the respondent no.4 in his short rejoinder affidavit against the affidavit- in- opposition filed by the respondent no.6 is that he has denied the expression that the financial turnover certificate dated 14.10.2019 is his handiwork and the same was made behind the back of the respondent no.6. The lodging of FIR, registered as Dispur P.S. Case No. 1767/2020 under section 420/406/468/471 IPC and issuance of show cause notice by the respondent nos. 2 and 3 is specifically admitted by the respondent no.4, but with a stand that disclosure of defence at this stage may cause prejudice to him in (i) the trial of criminal case against him, and (ii) in the departmental show-cause proceeding. Thus, the inevitable conclusion of the Court is that the respondent nos. 2, 3 and 4 have not specifically denied that the Chartered Accountant's Certificate dated 14.10.2019 of financial turnover purportedly by respondent no.6 was fraudulent. Under the spirit of the provisions of Order VI Rule 5 CPC, evasive denial and/or non- denial of allegations amounts to admission. Hence, without prejudice to the departmental show cause proceeding and criminal case against the respondent no.4, for the purpose of deciding these set of three writ petitions, this Court has no hesitation to hold that the conduct of the respondents no.2 and 3 to (i) lodge an FIR based on disclosures made by the respondent no.6, and (ii) issuance of show cause notice to the respondent no.4 would constitute a prima facie proof that the said respondents no.2 and 3 have also formed an ex facie opinion that the Chartered Accountant's certificate dated 14.10.2019 was forged and fraudulent, and submitted with the intent of cheating. Accordingly, unless contrary is proved in course of trial, for the purpose of deciding the present challenge, the award of contract by the respondent nos.2 and 3 to the respondent no.4 in respect of three notice inviting tenders prima facie is found to

be vitiated by fraud, which has been brought to light by the petitioner after award of the contract work to the respondent no.4.

13) In respect of grounds of challenge as narrated in paragraph 5(j) above, the learned senior counsel for the petitioner by referring to the documents annexed to the writ petition, has successfully demonstrated that in his bid submitted by the respondent no.4, one vehicle bearing registration no. AS-01-EC-4032 was projected to be tippers of Bulbul Lasker, which as per registration document appears to be owned by a different person. It has also been successfully demonstrated that vehicle shown as Tipper bearing registration no. AS-01-CC-3256 was actually a pick-up van. Allegation to that effect is not denied either by the respondent nos. 2 and 3 or by the respondent no.4. Therefore, the petitioner has been able to successfully demonstrate that bid submitted by the respondent no.4 is prima facie vitiated by incorrect particulars. Accordingly, as fraud vitiates everything, without prejudice to the respondent no.4 in the departmental show cause and FIR lodged by respondent nos. 2 and 3 against the respondent no.4 or criminal trial, if any, arising therefrom, the Court is constrained to hold that the bid submitted by the respondent no.4 is vitiated by incorrect particulars. In this regard, the Court is inclined to reject the submission made by the learned senior counsel for the respondents no.2 and 3 that till date the quality of work has not suffered due to lack of vehicles because of that be so, there was no reason for the NHAI to provide clause 4.7.(i) and clause 35 in Instructions to Bidders relating to corrupt or fraudulent practices and moreover, there was no need for the respondent nos. 2 and 3 to lodge any FIR containing allegations relating to ingredients of section 420/406/ 467/471 of the Indian Penal Code. The lodgment of FIR by respondent nos. 2 and 3 is found to negate the submissions made by the learned senior counsel for the respondent nos.2 and 3.

14) In respect of grounds for challenge, as narrated in paragraph 5(k) above, by relying on the experience certificates dated 05.05.2020 and 06.05.2020, the learned senior counsel for the petitioner has submitted that the Executive Engineer, PWD, Rangia NH Division had certified that the petitioner had past experience in improvement work of roads and junctions of upto four lane specifications, and road widening works of roads of upto four lane specifications. It is submitted that the Regional Officer, NHAI had heard the petitioner and respondent no.4 before passing the impugned speaking order dated 22.05.2020. However, it is submitted that before mechanically discarding the said two experience certificates by holding that they are not valid work experience documents and that certificates dated 05.05.2020 and 06.05.2020 were related to NH-15 under Rangia NH Division, which was not 4 or 6 lane highway, the Executive Engineer concerned was not heard and no clarification was sought from the said authority, as such, it is submitted that the certificates dated 05.05.2020 and 06.05.2020 were summarily rejected without rhyme or reason and in a fanciful manner at the whims and caprice of the authorities. In this regard, it is seen that as per Corrigendum-1 dated 04.03.2020, clause 4.4A(b)

was mandated to read as follows - "The similar work constitutes experience in operation and maintenance/ construction of 4/6 laned highway for O&M contracts." Thus past experience in respect of similar works in 2 lane highway was deleted. On a perusal of the experience certificate dated 05.05.2020, the relevant contents thereof is that - "A part of the above work was improvement of road junctions by way of widening upto four lane specification ..." Moreover, the relevant contents of experience certificate dated 06.05.2020 is that - "... the amount involved in the improvement of road by way of widening up to four lane specification ..." In light of the herein before quoted contents of the two past experience certificates, the Court is inclined to accept the submissions made by the learned senior counsel for the respondent nos. 2 and 3 that there is a vast difference in two lane highway constructed as per four lane specification and an actual 4 lane highway and that merely because the Assam P.W.D. has built a highway with four lane specification, such construction would not make a particular stretch of road to be called a four lane highway. Therefore, the Court is constrained to hold that the rejection of certificates dated 05.05.2020 and 06.05.2020 by the impugned speaking order dated 22.05.2020 cannot be faulted with.

15) With regard to the grounds of challenge as narrated in paragraph 5(I) above, it is true that the affidavit- in- opposition on behalf of respondent nos. 2 and 3 was filed by one Dipak Das, who has categorically stated on oath that he was the Accounts Officer of respondent no.2, which is also evident from the rubber stamp affixed at the foot of the affidavit. However, he has made a categorical statement in paragraph 1 of affidavit- in-opposition sworn by him that "I am the respondent no.3 ...". Thus, there is no escape that the said deponent had misrepresented in the affidavit filed on behalf of respondent nos. 2 and 3 that he was the respondent no.3, i.e. Regional Officer, NHAI. It is also true that the deponent filing the said affidavit- in- opposition on behalf of the respondent nos. 2 and 3 have not produced any letter of authorization or power of attorney to swear and file affidavit on behalf of the respondent nos. 2 and 3. Nonetheless, it is seen that the respondent nos. 2 and 3 have not been put to notice on this account and, as such, they had no occasion to take steps in this regard. Hence, notwithstanding that the learned senior counsel for the petitioner has rightly raised the issue, but under the facts of the case, specially that the respondent nos. 2 and 3 have not been put to notice of such defect, the Court is not inclined to discard the affidavit-in- opposition filed by respondent nos. 2 and 3 at this stage.

16) As regards grounds of challenge as narrated in paragraph 5(m) above, the learned senior counsel for the petitioner had questioned the speaking order dated 22.05.2020 on the ground that although the petitioner had produced agreement dated 16.05.2017 to show that he was a nominated and approved sub-contractor, who had completed 100% of the contract work, the said work was not at all referred to in the speaking order dated 22.05.2020. This plea otherwise appears to be attractive. However, there is nothing on record to show

that the said agreement dated 16.05.2017 or any other document not considered in the speaking order dated 22.05.2020 related to work experience relating to 4 and/or 6 lane highways, as such, even if the said document had been considered, the same does not help to establish the claim of the petitioner to have his bid declared "responsive". Thus, the Court is constrained to hold that the challenge made by the petitioner on this ground fails.

17) As regards ground of challenge as narrated in paragraph 5(n) above, the learned senior counsel for the petitioner had also assailed the bid submitted by the respondent no.4 on the ground that the work experience certificate submitted by the respondent no.4 did not contain endorsement by an authority equivalent to the Chief Engineer, but was signed by Project Director of NHAI, which is equivalent to an Executive Engineer in A.P.W.D. In this regard, it is seen that in paragraph 35 of their affidavit-in-opposition filed on 17.08.2020, the respondents no.2 to 4 have taken a stand that " ... the contention made in paragraph 25 of the writ petition that counter signature of the Chief Engineer was not required in regard to his experience certificates dated 05.05.2020 and 06.05.2020 is wholly fallacious and unsustainable. The order of this Hon'ble Court nowhere states that the said documents of the petitioner need not conform to the requirements of clause 4.2(c) of the ITB. ..." However, in paragraph 38 of the said affidavit-in- opposition, it has been stated that "... respondent no.4 is an existing contractor of the NHAI and the experience certificates submitted by him are in respect of works of NHAI and as such the requirement of counter-signature of Chief Engineer did not arise." The Court is conscious of the observations made by the Supreme Court of India in the case of Jagdish Mandal v. State of Orissa (2007) 14 SCC 517, that if the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. However, it is apparent that when clause 4.2(c) of Instructions to Bidders does not exonerate contractors working with NHAI from producing certificate from an authority other than the rank of Chief Engineer, as such, there has been an aberration of said clause 4.2(c) in the matter of accepting experience certificate of respondent no.4, which otherwise amounts to an admission by the respondent nos. 2 and 3 that the petitioner and the respondent no.4 were not treated equally. Hence, arbitrariness on part of the respondent nos.2 and 3 ex facie appears on the face of the records. Hence, the Court is inclined to accept the contention of the learned senior counsel for the petitioner that if the respondents no.2 and 3 had relaxed clause 4.2(c) of Instructions to Bidder, such relaxation ought to have been made applicable to all because there might be an instance that one otherwise eligible bidder did not know about such relaxation, and did not participate in the bidding process due to lack of certificate from the Chief Engineer or his equivalent. Thus, as the respondent nos.2 and 3 has accepted work certificate issued in favour of the respondent no.4 by an authority not equivalent to the Chief Engineer, the acceptance of bid submitted by respondent no.4 is vitiated by clause 4.2(c) of

Instructions to Bidder.

18) It was also submitted by the learned senior counsel for the petitioner that in this case, the rate quoted by the petitioner was about Rs.1.50 Crore lower than the rate quoted by the respondent no.4. Accordingly, by referring to the order dated 14.10.2020, passed by this Court in I.A.(Civil) 1557/2020 in W.P.(C) 2812/2020, it is submitted that this was a fit case for the price bid of the petitioner be directed to be opened. In this regard, it is seen that the petitioner has not been able to satisfy the Court that his bid was "responsive" and that the rejection of his technical bid was vitiated by any error apparent. Moreover, this Court had granted an opportunity of hearing to the petitioner and the Regional Officer of the respondents no.2 and 3 had up-held the letters of acceptance dated 05.05.2020. This Court by the order passed in I.A.(Civil) 1527/2020, merely refused to modify the interim order of stay, and did not issue a direction upon the tendering authority to open the price bid of the unsuccessful bidder, as such, the said order does not come to the aid of the petitioner.

19) The learned senior counsel for the petitioner has placed reliance on the case of Assam Tea Employees Provident Fund Organization & Ors. vs Asomi Industries Private Ltd. & Ors. in I.A.(Civil) No. 1557/2020 in W.P.(C) 2812/2020, decided by this Court on 14.10.2020. Per contra, the learned senior counsel for the respondents no.2 and 3 has placed reliance on the following cases, viz., (i) Pathan Mohammed Soleman Rehmat Khan Vs. State of Gujarat, (2014) 4 SCC 156; (ii) Arun Kumar Agarwal Vs. Union of India, (2013) 7 SCC 1; (iii) Air India Ltd. Vs. Cochin International Airport Ltd. & Ors., (2002) 2 SCC 617; (iv) Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors., (1979) 4 SCC 665; (v) Heinz India Pvt. Ltd Vs. State of U.P. & Ors., (2012) 5 SCC 443; (vi) Maa Binda Express Carrier & Anr. Vs. North East Frontier Railway & Ors., (1988) 4 SCC 452; (vii) Kissan Sarkari Chini Mills Ltd. Vs. Vardan Linkers & Ors., (2008) 12 SCC 500; (viii) Meerut Development Authority Vs. Association of Management Studies & Anr., (2009) 6 SCC 171; and (ix) Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors., (2012) 8 SCC 216.

20) In this regard, reference may be made to the decision rendered by the Supreme Court of India in the case of Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. & ors., (1997) 1 SCC 738, wherein it has been opined that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. The petitioner has been able to successfully make out a case where on facts the present case is distinguishable from the facts of the cases cited by the learned senior counsel for the respondent nos. 2 and 3 and, as such, this order need not be burdened with discussions on the cases so cited.

21) In light of the above observations by the Supreme Court of India, in the

present case in hand, it is found that after award of the contract, it has come to light that not only the respondent no.4 has provided fabricated document relating to vehicles to be used in the contract, which turned out to be of different owner and different vehicle as already referred herein before and moreover, the respondents no.2 and 3 having satisfied itself that the Charter Accountant's turnover certificate was questionable, has lodged an FIR against the respondent no.4 and they had also issued show cause notice to the respondent no.4. Therefore, without prejudice to the respondent no.4 in the departmental proceeding and criminal trial, for the purpose of deciding this matter, it is held that but for the forged and fabricated Charter Accountant's turnover certificates dated 05.05.2019 and 06.05.2019, there is a strong possibility that the tender or bid submitted by the respondent no.4 would have also been non-responsive. In light of the said position, we are unable to find merit in the submissions made by the learned senior counsel for the respondent nos. 2 and 3 that if the contract work of the respondent no.4 is terminated abruptly, public interest would suffer because the agencies of the State cannot permit a person who has got the contract work awarded to him by exercising fraud, fabrication of documents and forgery of documents to continue to continue with his awarded work. The Court also cannot support the submissions that it may take 4-5 months to award a fresh contract, if the present contract work is terminated forthwith, because the Court cannot put its seal of approval to the proposition that despite getting the contract by practicing deceit and fraud, such a person be allowed to reap the benefit of such deceit and fraud as such a proposition would encourage perpetrators of fraud to make profit out of such practice.

22) It is reiterated at the cost of repetition that by issuing show cause notice to the respondent no.4, the respondent nos. 2 and 3 is deemed to have prima facie satisfied that the three contract works awarded to the respondent no.4 was on the basis of allegedly tainted documents as discussed herein before. The respondents no.2 and 3 have not taken a specific stand that before the last date of submission of tender they had notified all concerned that the (i) Chartered Accountant's turnover certificate, and (ii) details of vehicle for deployment in the project were both non-essential tender conditions and that it was permissible for the prospective bidder to show other person's vehicle in tender and use some other vehicle for carrying out the work. Both these acts by the respondent no.4 of purportedly submitting forged and fabricated (i) Chartered Accountant's turnover certificate, and (ii) details of vehicle for deployment in the project, is found to have vitiated the tender submitted by the said respondent no.4. Thus, the cases cited by the learned counsel for the respondent nos. 2 and 3 are not found to help the said respondents in any manner because but for the alleged tainted documents, the respondent no.4 would not have qualified for the award of the said contract works.

23) Under such circumstances as discussed above, the Court is of the considered opinion that the principle of judicial review cannot be denied to the petitioner in so far as exercise of contractual powers of respondent nos. 2 and 3 are

concerned. The power available with the Constitutional Courts to issue prerogative writs under Article 226 of the Constitution of India is intended to be used to prevent arbitrariness and is required to be exercised in the larger public interest. Public interest is found to be tilting heavily against the respondent nos.2, 3 and 4 as it has been brought to the notice of the court that by allowing the respondent no.4 to continue with his three contract works, which are the subject matter of these three writ petitions, the respondent nos. 2 and 3 have exercised their power for collateral purpose by not promptly disposing of the action as envisaged by clause 35 of Instructions to Bidder because but for the forged Chartered Accountant's Certificate and Rental Agreements, the bid submitted by the respondent no.4 would have been rendered non-responsive as provided in clause 4.4B(a)(iii), and clause 4.4(b)(i) read with clause 4.4(d) of Instructions to Bidder. Therefore, the Court has no hesitation to set aside and quash the three contract work orders issued pursuant to viz., (1) NIT bearing number 07/2019-2020 (O&M) for the work of "Maintenance of Guwahati Bypass from Ch. Km. 146.172 to Km. 163.895 of NH-37 in the State of Assam for the year 2019-2020 (SH: De-siltation of drains, culverts, cleaning of main carriageway, cleaning of medians, buffer zones, pot hole repair, etc.)", which is the subject matter of W.P.(C) 2286/2020; (2) NIT bearing number PIU/GHY/03/2019-20 (O&M) for the work of "Maintenance and safety of road section from Ch. Km. 1093.000 to Km. 1119.814 of NH-31 in Assam under package EW-II (AS-04)", which is the subject matter of W.P.(C) 2308/2020; and (3) NIT bearing number PIU/GHY/04/2019-20 (O&M) for the work of "Maintenance and safety of road section from Ch. Km. 1065.000 to Km. 1093.000 of NH-31 in Assam under package EW-II(AS-04)", which is the subject matter of W.P.(C) 2369/2020.

24) Before parting with the records, it is clarified that the observations made in this order is merely to decide the present three lis, and the said observations are not intended to be treated as a finding on merit touching in any manner upon the criminal case filed against the respondent no.4 or in respect of departmental action purportedly initiated against the respondent no.4, which shall be decided in its own merit without being influenced by this order.

25) The tender process had already been culminated with issuance of letter of acceptance dated 05.05.2019 in favour of respondent no.4, as such, the prayer (i) made in the writ petition has been rendered infructuous. In light of the discussions above, the Court is not inclined to tinker with the tender clause 4.4A(b) of Instructions to Bidders, as such, the petitioner is not found entitled to relief in terms of prayer (ii) of the writ petition. In light of the discussions above, the challenge made to the rejection of technical bid of the petitioner as "non-responsive" fails and, as such, the petitioner is not found entitled to reliefs in terms of prayer nos. (iii), (iv), (vii), (viii) and (ix). However, the tender/ bid submitted by the respondent no.4 is found to have been vitiated as indicated herein before, as such, the prayer (v) made in the writ petition stands allowed and resultantly, the three letters of acceptance dated 05.05.2020, bearing nos.

NHAI/RO/GHY/2017/ TENDER(VOL-VI)/ 926/19953, NHAI/RO/GHY/2017/ TENDER(VOL-VI)/19957, and NHAI/RO/GHY/2017/TENDER(VOL-VI)/19956 issued by the respondent no.3 in favour of the respondent no.4 are hereby set aside and quashed. As a consequence thereof, with regard to prayer (vi), the speaking order dated 22.05.2020 stands partly interfered with in so far as it relates to upholding of letter of acceptance dated 05.05.2020 by the respondent no.3 by setting aside the said part only.

26) The three writ petitions stands partly allowed to the extent as indicated above, leaving the parties to bear their own cost.