

(2001) 10 MP CK 0027

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1949 of 2001

Reddy Brothers and Company

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 29-10-2001

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2002) 1 MPHT 472

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : Jugalkishore Gilda, for the Appellant; R.S. Jha, Dy. A.G. and Kishore Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.—Invoking the extra-ordinary jurisdiction of this Court the petitioner, a registered partnership firm, has prayed for issue of writ of certiorari for quash-ment of the decision of the respondent Nos. 2 and 3 by which they have disqualified the petitioner and awarded the tendered work in favour of respondent No. 4 by holding the same to be arbitrary and malafide and grant such other reliefs as may be deemed fit and proper in the facts and circumstances of the case.

2. The facts as have been uncurtained are that the petitioner is a registered partnership firm and engaged in the business of contractorship for last nine years and has made a reputation by undertaking various works under various departments of Government of Maharashtra. The respondent No. 3, the Superintending Engineer, Masonry Dam Circle, Deolond, Shahdol, issued a notice inviting tenders (Form B Item Rate Tender) for the balance drilling and curtain grouting and drainage holes in drainage gallery from R.D. 455.065 m to R.D. 830.90 m. of Bansagar Masonry Dam. The total amount of contract is Rs. 95.72 lacs. A copy of Notice Inviting Tender (in short "NIT") has been brought on record as Annexure-I.

3. According to the writ petitioner the tender was to be received in three envelopes system. As the petitioner was eligible and fulfilled all the requirements it was issued the pre-qualification documents alongwith the tender document. For the purpose of satisfying the conditions of pre-qualifications, the petitioner has submitted a certificate from the Project Officer, Executive Engineer, Soil & Water Management Pilot Project, Nagpur for the work of "Tertiary grouting through inspection gallery of Masonry Dam at Totladoh Project". The petitioner to show that it was qualified and had the experience of doing the work for which the tender was floated by the respondent authorities submitted the said certificate. In the said certificate due to typing error committed by the concerned clerk in the Office of Project Officer, Soil & Water Management Pilot Project, Nagpur the quantities of drilling and grouting to the shown under Columns 7 and 8 along serial No. 4 were shown under Columns 7 & 8 along serial No. 1. The representative of the petitioner had taken a corrected copy of the certificate issued by the Project Officer, Soil & Water Management Pilot Project, Nagpur and requested the respondent No. 2 to accept the corrected copy of the certificate. The said respondent rejected the request of the petitioner. The corrected certificate has been brought on record as Annexure-III. It is put forth that respondent No. 2 having on its own asked for a clarification regarding the certificate issued by the Project Officer, Soil & Water Management Pilot Project, Nagpur ought to have taken corrected certificate on record and should have given full opportunity to the petitioner to show that there was no false statement in the said certificate instead of disqualifying the petitioner. It is also put forth that the petitioner made a representation to the respondent authorities and pointed out the factual position and requested that the corrected certificate be taken on record. Thereafter, the petitioner had been in contact telephonically with the respondent authorities and also requested them to consider its prayer. It is submitted that the petitioner made a representation to the Chief Secretary, Government of Madhya Pradesh seeking his intervention. It is further submitted that when the petitioner contacted the respondent No. 2 the said respondent informed the petitioner that it was disqualified for proving false and incorrect information alongwith pre-qualified documents. Feeling dissatisfied and aggrieved by the arbitrary and mala fide action of respondent No. 2 the petitioner submitted a representation to the Secretary, Bansagar Control Board, Rewa.

4. It is urged that the action of the respondent authorities in disqualifying the petitioner without affording an opportunity of hearing is totally arbitrary and mala fide and is hit by equality clause enshrined under Article 14 of the Constitution of India. It is also put forth that the petitioner had brought this fact to the notice of higher authorities of the State Government but a sphinx like silence was maintained which exposit total indifference of the authorities concerned. It is also submitted that the petitioner came to know that the respondent authorities accepted the tender of respondent Nos. 4 and 5 though they have made a bid of 85% above the CoT while the bid made by the petitioner was 55% above the CoT. It is averred that the aforesaid action has been taken

because of the embedded bias of the authorities against the petitioner and the attitudinal difference towards respondent No. 4, It has also been put forth that the respondent No. 5 was a front put up by the respondent No. 4 in order to circumvent the tender conditions. It has been stated that tender conditions required that there should be atleast two bidders for the project or else the tender has to be recalled to avoid such situation. According to the information available to the petitioner the bid submitted by the respondent No. 5 was on a Xerox letter-head but the same was accepted. It is urged that the bid of respondent No. 4 has been accepted though the same was 30% higher than the petitioner. With the aforesaid pleadings the reliefs have been sought for as has been indicated hereinabove.

5. A return has been filed by the respondent Nos. 1 to 3 contending, inter alia, that the entire petition is based on the misconceived notion and deliberate suppression of facts. It is put forth that the offers were opened on 3-3-2001 and pre-qualification assessment was made and finalised on 27-3-2001 and the petitioner was found eligible on the basis of the statements and documents filed. The petitioner did not have the necessary requisite eligibility and work experience. According to the said respondents, the work in question is of extreme specialised and technical nature and therefore, adherence to the work experience requirement is a condition precedent and no compromise or relaxation in regard to that is permissible. It is also set forth that so called corrected statement was filed on 28-3-2001 after the decision in regard to the pre-qualification but even then the corrected statement and work experience shown therein is apparently an act of after thought. It is submitted that the tender documents in three different places columns/forms were provided to describe the eligibility and work experience in detail and at every place the work allegedly corrected in the statement filed on 28-3-2001 is conspicuously missing which shows that the petitioner, in fact, did not possess the said work experience. An incorrect statement has been filed realising the fact that in absence of desired work experience the bid will not at all be considered. It is also set forth that the petitioner has made an effort by filing so called corrected statement to over come its eligibility criteria and lack of experience. According to the said respondents corrected certificate submitted by the petitioner was contradictory to the information submitted by it vide pages 12 & 14 of the pre-qualification application format and pages 1 to 3 (of extra pages with pre-qualification format), and hence, was not acceptable. This aspect was explained to the petitioner but this fact has been deliberately suppressed by it. It is also disputed that the petitioner was ever contacted on telephone and asked for any clarification. It is also put forth that respondent No. 2 had never asked the petitioner to submit any clarification or to submit any new or corrected certificate either telephonically or through any letter. In view of the specific provision enshrined in Paragraph 1.06 of pre-qualification document, the respondent No. 2 cannot accept such clarification or corrected certificate, once the tenders had been submitted on 3-3-2001. In addition to this it has been stated that even

though the revised certificate"submitted by the petitioner was examined. The corrections made in the corrected certificate are not attested. The details of work shown executed in corrected certificate do not tally with the work shown in Annexures R-1 to R-3. It is also putforth that in whatever way the petitioner shifts the work done figures in its certificate it does not get the requisite pre-qualification as it had not done the requisite quantity of 5000 M drilling through drainage gallery, and therefore, it was rightly disqualified. It is putforth that the Chief Engineer on 27-3-2001 decided the pre-qualification and the representation of the petitioner was received on 29-3-2001. It was examined by the Chief Engineer and he concluded that no change is required in the decision of disqualifying the petitioner. However, he appended the representation with the agenda note for those work for the consideration of tender sub-committee. It has been putforth that petitioner has not brought this fact to the notice of this Court. It was explained to the petitioner that his corrected certificate was not matching with the information submitted by it and on this ground alone i.e., suppression of fact the petition may be rejected. It is highlighted that out of seven tenders received, two tenders, respondent Nos. 4 and 5, were pre-qualified since the documents and certificates submitted by them with the tender on 3-3-2001 were fulfilling all the prescribed parameters and other five tenderers including the petitioner were disqualified as they had not met the prescribed requirement of pre-qualification. It is also setforth that these two tenderers were informed on 27-3-2001 that they had been pre-qualified and price bid envelope "C" for their tender would be opened on 30-3-2001 and they should remain present on 30-3-2001 and the price bid of respondent No. 4 was found to be the lowest. The bids of other tenderers were not opened.

6. The further stand of the respondent Nos. 1 to 3 is that the work of drilling and grouting through the drainage gallery of Bansagar Project is a very specialised work and proper execution of work is related with the performance and safety of dam and hence, it can only be awarded to the firm having requisite expertise. As the bids of disqualified firms cannot be compared with the qualified firm, the petitioner has no legal right and there is no question of breach of trust. Allegation of showing favour to respondent No. 2 has been categorically denied. Assertion to the effect that there was mistake of concerned clerk in the documents furnished by the petitioner has been commented upon to indicate that the petitioner was aware of the same but it wanted to create unwanted pressure of this kind by misguided information. It is also submitted that the allegation that respondent No. 5 was the front put up is incorrect inasmuch as there were seven tenderers in the fray. It is also setforth that the tender documents do not show that there should be atleast two bidders for the work of the tender else tender will be recalled. It is also putforth that there is no ban on accepting bids on photostat copies of letter head.

7. In the return it has also been highlighted that Bansagar Project is a joint project of three states, namely, Madhya Pradesh, Uttar Pradesh and Bihar. It is constructed as per the agreement between these states. The construction

activities and major decision (which are above power of Chief Engineer) are taken by Executive/Tender Sub-Committee of Bansagar Control Board. It is also stated that the balance work of drilling and grouting is pending since 1992 and several times the tenders were called but work could not be executed due to litigation or some other reasons. It is also set forth that in the June, 2000 dam has been completed upto the crest and reservoir is filled and, therefore, upstream of the dam is about 150 ft. water height above the level of drainage gallery. From the drainage gallery 150 ft. deep holes were drilled below the level of the gallery and grouted, These grouting develops an impervious curtain diaphragm which prevents the seepage from the foundation of dam. It is also set forth that 100% tightness is not possible even after above grouting same water seeps through the grouted curtain or from below and develops uplift pressure. Drainage holes are drilled in downstream of grouted curtain and the present tender is for the balance work of above work which is important for safety and performance of the dam and hence the specialised and expert hand is essential.

8. A rejoinder affidavit has been filed by the petitioner to the return filed on behalf of the respondent Nos. 1 to 3 (though it has been described as counter to the return on behalf of respondents 1 to 3) wherein it has been stated that the certificate submitted by the petitioner on 28-3-2001 clearly shows that the petitioner had the necessary qualification and experience to do the tender work. It is also put forth that neither the petitioner nor its staff noticed the typographical mistake committed by the clerk working in the Executive Engineer's Office and submitted the pre-qualification documents and after realising the same the petitioner sent corrected certificate with covering letter from the said Executive Engineer. The corrected certificate shows that the petitioner has the necessary experience of drilling and grouting in a Masonry Dam and hence the petitioner ought to have been considered for pre-qualification by the respondent authorities. Emphasis is laid to highlight that the corrected certificate is valid and it was sent accompanied by a covering letter of the competent authority of office of the Executive Engineer Officer. It is also put forth that had the respondent authorities considered the corrected certificate it would have been plain as noon day that the corrected certificate would have shown that the petitioner-firm had done 6820 RM of drilling and grouting. It is also put forth that without drilling it is not possible to grout. Hence, the contention of respondent authorities that the petitioner has not done 5000 M of drilling holds no water and, therefore, the disqualification meted to the petitioner is absolutely erroneous. It is also put forth that the Chief Engineer who had examined the corrected certificate submitted by the petitioner ought to have given a hearing to the representative of the petitioner before disqualifying him. It is also put forth that the petitioner has the requisite experience and his price bid should have been opened by the authorities concerned and they should not have arbitrarily accepted the bid of respondent No. 4. An opinion given by the Consulting Engineer and Structural Designer has been brought on record as Annexure-I to

the rejoinder affidavit to show that the petitioner has skill in drilling and grouting in drainage gallery and inspection gallery.

9. A counter affidavit has been filed by the respondent No. 4, the beneficiary. It is putforth therein that the petitioner has not filed the complete NIT so as to enable this Court to go through the conditions of NIT. Complete NIT has been brought on record as Annexure R-4/1. Under Part-2 of NIT it was stipulated that the tender will be received in the Office of Superintending Engineer or Chief Engineer or Engineer-in-Chief up to 15.00 hours on 3-3-2001 from category S-3 to S-5 contractors registered in the office of the Engineer-in-chief, Water Resources Department, Bhopal and firms of repute who have successfully executed similar works of equal magnitude provided they get themselves registered prior to execution of agreement. It is also setforth that as a matter of fact, the NIT was issued for as many as 7 groups out of which the petitioner has submitted tender for Group No. 7 of the work i.e. Balance Drilling and Curtain Grouting and Drainage holes in Drainage Gallery from reduced depth 455.065 mtrs. to reduced depth 830.90 mtrs. of Ban Sagar Dam (Group No. 7). It was also putforth that before receipt of last date for submission of tenders i.e., 3-3-2001 an amendment to the NIT was issued vide S.Es. letter No. 566/9, dated 27-2-2001. A copy of said corrigendum has been brought on record as Annexure R-4/2. It was specifically mentioned that drilling of 5000 RM shall be in drainage gallery of Masonry Dam. The words "tunnel or similar structures" which were there in the NIT were thus deleted making it quite clear that for that pre-qualification purpose, only drilling in drainage gallery of Masonry Dam would be considered and drilling in any other similar structure like tunnel, inspection gallery etc., could not be considered. It is also highlighted that pre-qualification documents in which all the details about pre-qualification requirement is mentioned by the Government of Madhya Pradesh has also not been submitted by the petitioner deliberately. A reference has been made to pre-qualification documents to show that the petitioner should have ensured submission of complete information in the prescribed format alongwith pre-qualification document. It is also submitted that the pre-qualification applications will be evaluated based on the information and certificates furnished at the time of submission of pre-qualification application. It is also urged that all the documents were to be filed in three envelopes A, B and C on 3-3-2001 but the same was not done by the petitioner. It is also putforth that the consideration of the tender documents was to commence on 8-3-2001 at 15.00 hrs.

10. According to respondent No. 4 as per the amendment issued to the notice inviting tender as Annexures R-4/2 and R-4/3, the tenderer was required to submit his certificate of proof that he had successfully executed 5000 mtrs. of drilling through the drainage gallery and 100 mtrs. grouting. The petitioner submitted a certificate to the effect that he has done the work of requisite quantity of redrilling, but redrilling is quite different from drilling. It is also putforth that drilling is altogether a different process where machinery and other logistics are different. In drilling one has to make drill hole using percussive rigs

and other equipments whereas in redrilling it is done in the same redrill holes when drill hole is clogged or obstructed due to falling of loose material or obstruction by using water and air washing of the obstructed holes. Hence, redrilling is a process performed to clear the drilled holes. It is stated in the affidavit that even schedule of rates of USR of Water Resources Department of Government of Madhya Pradesh there is a separate item for drilling and re-drilling i.e., Item No. 2209 and Item No. 2212 respectively of USR. It is also putforth that the rates of these items are different. In essence, the stand of the respondent No. 4 in this regard is that as per the pre-qualification document 5000 M of drilling through drainage gallery is required to be done to pre-qualify and redrilling cannot be equated with drilling. It is also putforth that certificate of the petitioner shows the quantity of tertiary grouting through inspection gallery at Totladoh dam as 360 mtrs. and this gallery has been done in inspection gallery. It is highlighted that inspection gallery is quite different from drainage gallery. The work of drilling and grouting is required to be done through drainage gallery whereas the petitioner has done this small quantity of drilling work through inspection gallery and, therefore, specific requirement as per NIT was not fulfilled by the petitioner and it is also not covered by the certificate produced by him. It is also setforth that the petitioner obtained the corrected certificate on 22-3-2001 whereas pre-qualification documents were to be submitted on 3-3-2001 and therefore, the same could not have been considered. Emphasis has also been laid on the fact that the revised certificate was obtained by the petitioner after opening of the tender, hence, this cannot be considered as that would vitiate the basic concept of dealing with the tenders. There is immense criticism with regard to making of representation after opening of the tender. It is also putforth that every tenderer has to qualify himself/itself on the basis of tender documents submitted by the dead-line prescribed and not thereafter. It is also putforth that the tender of the answering respondent has not been accepted but it is still under consideration.

11. A rejoinder affidavit has been filed to the return submitted by respondent No. 4 (though it has been described as counter to the return of respondent No. 4) pleading, inter alia, that the petitioner had submitted his tender for Groups 6 & 7 of the work i.e., Balance Drilling and Curtain Grouting and Drainage holes in Drainage Gallery from R.D. 161.18 m to R.D. 455.065 m of Bansagar Dam as well as for balance work from R.D. 455.065 m to 830.90 m of Bansagar Dam. Due to oversight the petitioner had not mentioned in the memo of petition that it had also made a bid for balance work from R.D. 161.18 m to R.D. 455.065 m of Bansagar Dam. It is also putforth that as per respondent No. 4 the respondent authorities specifically demanded from the bidders that they must have done 5000 RM of drilling in drainage gallery of Masonry Dam and not drilling in any other similar structure like tunnel, inspection gallery is totally incorrect. It is also mentioned that the drilling work in drainage gallery requires the same machinery that is required for drilling work in inspection gallery. In fact, drainage gallery and inspection gallery are part of any Masonry Dam. It is noteworthy to mention

here that respondent No. 4 has annexed a corrigendum dated 27-2-2001 to the original NIT to show that respondent No. 3 had issued the copy of said corrigendum to the respondent No. 4 but the petitioner had not received any such copy of letter dated 27-2-2001 notifying the deletion of condition mentioned in physical criteria mentioned in the pre-qualification document. It is also stated that there was no necessity for the respondent authorities to delete said words at a late stage when admittedly the pre-qualification documents were to be opened on 3-3-2001. The said condition has been deleted to favour the respondent No. 4 and same was against the petitioner and other bidders who have been disqualified from pre-qualification. The respondent-authorities should have intimated to each and every bidder but apparently they did not do that. The rules of game have been changed at such a late stage only counter benefit on respondent No. 4, and hence, the decision of respondent authorities in disqualifying the petitioner is liable to be quashed. Criticism has been advanced with regard to the stand taken by respondent No. 4 that the petitioner was not pre-qualified on the basis of the documents filed by it. It is also putforth that after the petitioner came to know about the mistake committed by the concerned clerk a corrected certificate was brought and same was filed. It is also putforth that of respondent authorities have not properly evaluated the certificate submitted by the petitioner and arbitrarily and malafidely disqualified the petitioner without affording an opportunity of hearing before taking any decision. It is also setforth that like the respondent No. 4 the respondent authorities have also wrongly understood the experience certificate submitted by the petitioner. It has been highlighted that in order to carry out drilling work in an inspection gallery same type of drilling machinery that is required for carrying out drilling work in drainage gallery and even the procedure required for carrying out drilling and grouting in inspection gallery is necessary. Various other facts have been enumerated to show that the petitioner was pre-qualified.

12. An additional return has been filed on behalf of the respondent Nos. 1 to 3 contending, inter alia, that the NIT calling for the tenders for the balance drilling and curtain grouting and drainage holes in the drainage gallery of the Ban Sagar Masonry Dam was invited by the answering respondents and as per the qualification for submitting pre-qualification tenders, the tenderers should have had drilling experience of at least 5000 running mtrs. (RM) and grouting experience of atleast 100 metric tone (MT) in drainage gallery of Masonry Dam/tunnel or similar structure. About 7 persons including the respondent No. 4 purchased the tender document from the answering respondents prior to 27-2-2001. On 27-2-2001 the answering respondents took a decision to amend the pre-qualification requirement by deleting the word "tunnel or similar structure" from column of qualification and accordingly, all the seven persons who had purchased the tender document prior to 27-2-2001 were issued letters informing them about the correction and deletion. As far as petitioner is concerned it purchased the tender document on 28-2-2001 i.e., subsequent to the correction made in the qualification column and, therefore, the correction in

the qualification column were already incorporated in the tender document purchased by the petitioner in accordance with the decision to delete the words "tunnel or similar structure" on 27-2-2001. This fact is abundantly clear from the pre-qualification application submitted by the petitioner. Copy of such application has been brought on record as Annexure R-8. In Para 4.3 under the heading physical criteria it is clearly shown that the words "tunnel or similar structure" have been scored through and, therefore, there was no need to issue corrigendum informing the petitioner in respect of such deletion of words.

13. In the additional return it has been highlighted that the petitioner was fully aware of the fact that the qualification required for submitting tender was successful completion of the drilling work to the extent of 5000 RM grouting work to the extent of 100 MT in drainage gallery of Masonry Dam in one year of the last five years. Alongwith the pre-qualification tender which was filed by the petitioner on 3-3-2001 and as per the conditions contained therein the petitioner filed a certificate certifying his experience and giving details of the work done by it. Though the same has also been filed alongwith the petition the answering respondents filed another copy of the said certificate as Annexure R-9. It is also putforth that on a perusal of the said document it is clearly perceptible that the petitioner did not have the experience of drilling to the extent of 5000 RM or grouting to the extent of 100 MT in the drainage gallery in the Masonry Dam. It is also setforth that in Item Nos. 1 and 2 in the said certificate there is mention of redrilling of the holes in the foundation gallery which is totally a different work from drill and grouting. Redrilling is undertaken only for the purpose of clearing and cleaning holes in the drainage gallery and it has nothing to do with the the drilling and curtain grouting. The item mentioned at serial Nos. 3 and 4 mention about tertiary grouting which is not at par with the drilling and curtain grouting work. Tertiary grouting is an exercise which is undertaken only in those cases where existing curtain grouting is adequate to control the seepage and, therefore, it is obviously the work which is undertaken where drilling and grouting has already been completed. Item No. 5 in the said certificate relates to drilling and grouting but does not give any other details regarding the extent or the amount. It is also putforth that certificate filed by the petitioner alongwith the pre-qualification document did not give correct and required information and, therefore, the petitioner submitted corrected certificate on 28-3-2001 the copy of which has been brought on record as Annexure R-10. It is also putforth in the said certificate the only correction made by the petitioner is that the figure 6820 shown in column drilling 75 to 50 MM Dia in RM against the item No, I has been shifted and shown against the item No. 4. It is also setforth that even if the corrected certificate is taken into consideration the petitioner does not fulfil the qualification as prescribed for three reasons, namely, (i) the work which the petitioner has done is though of tertiary grouting whereas the tender requirements are the work of drilling and curtain grouting; (ii) the work of tertiary grouting has been done by the petitioner in the inspection gallery whereas the qualification required for tender are drilling and curtain grouting

work in drainage gallery; and (iii) the work of 6820 RM shown against the item No. 4 has been said to have been executed vide agreement No. B-I/45/ DL/95/96 in column 3 and by the details of the agreement and work thereunder the petitioner has filed document copies of which have already been filed by the answering respondents as "Annexures R-2/1 and R-2/7 specified details of the agreement in question are Annexure R-2/4 and in the said document in Columns 4 and 5 the petitioner has itself mentioned tertiary grouting work only to the extent of 360 RM whereas in the corrected certificate it has mentioned 6820 RM which clearly indicates the fact that the petitioner has not submitted the correct information before the authorities and also clearly establishes the fact that the petitioner does not possess the requisite qualification for participating in the tender proceedings. It is also set forth that keeping in view the aforesaid facts the Chief Engineer in Annexure R-6 has clearly stated that the petitioner firm does not fulfil the requirement of physical target and, therefore, he cannot be pre-qualified in the pre-qualification bid.

14. I have heard Mr. J.K. Gilda, learned counsel alongwith Mr. S.M. Puranik and Miss Anuradha Pandit for the petitioner, Mr. R.S. Jha, learned Dy. Advocate General for the respondents 1 to 3 and Mr. Kishore Shrivastava, learned counsel for the respondent No. 4.

15. Mr. Gilda has contended that the rejection of offer submitted by the petitioner by the respondents 1 to 3 on the ground that he had not submitted the requisite certificate is unsustainable inasmuch as the petitioner had submitted the same after coming to know about defect which is clerical in nature. It is his further submission that the respondents 1 to 3 modified the Notice Inviting Tender after tender was issued and that amount to changing the rules of the game which is impermissible. The learned counsel further propounded that the deletion was made to adjust the offer of the respondent No. 4 and the same vitiates the entire action as arbitrary and malafide. It is put forth by him that the reasons ascribed for rejecting at the stage of the pre-qualification is absolutely unjust, improper and unwarranted inasmuch as even under the amended requirement the petitioner qualifies but the authorities have failed to appreciate the same in proper perspective. The learned counsel, to buttress his submissions has placed reliance on the decision rendered in the case of Laxmikant and others Vs. Satyawar and others, and M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and on an unreported judgment of the High Court of Bombay delivered in Konark Infrastructure Pvt. Ltd. v. Commissioner, Ulhasnagar and Ors., (W.P. No. 1663/2000).

16. Combating the aforesaid submissions Mr. R.S. Jha, learned Dy. Advocate General appearing for the respondents 1 to 3 has submitted that as per the Notice Inviting Tender, the petitioner was required to submit the necessary certificate alongwith the Tender Form and any kind of correction was not allowable thereof and moreso, after tenders were opened. The learned counsel

has canvassed that the petitioner has taken a plea that there was a telephonic communication to it to rectify the mistake which is not factually correct and hence, the aforesaid stand of the petitioner is unacceptable. Mr. Jha has also urged that the amendment to Notice Inviting Tender took place on 27-2-2001 and the petitioner purchased the amended Tender Form on 28-2-2001 and, therefore, there is no necessity to inform him about the changed criteria and in any case it would not tantamount to changing the rules of the game. The learned counsel, pyramiding the aforesaid submission, argued that all the tenderers who purchased the tender form were informed about the change but the petitioner purchased the changed tender form and hence, the grievance of the petitioner is not worth ventilating on the score that there has been a metamorphosis with regard to the rules of the game. It is urged with vehemence by Mr. Jha that even assuming that there had been no deletion of the conditions then also the petitioner does not qualify at the pre-qualification stage. It is put forth by him that the stand of the petitioner that he has qualified because of the work done by him is untenable inasmuch as the work done by the petitioner is quite different than the work is sought to be done by the respondents 1 to 3. It is highlighted by the learned counsel that there is a gulf of difference between two categories of work and experts have made the distinction and, therefore, this Court should not enter into that arena same being in the technical sphere.

17. It is submitted by Mr. Kishore Shrivastava, learned counsel for the respondent No. 4 that as the petitioner had not complied with the tender conditions by the date fixed and supplied the documents after the opening of the tender can not advance his grievance on the ground that his bid on pre-qualification should have been accepted and he should have been treated qualified for technical bid and financial bid. The learned counsel vehemently urged that the petitioner is not qualified and in fact, documents filed by the petitioner would go a long way to show that there has been suppression of facts and misconception with regard to the nature of work.

18. To appreciate the rival submissions raised at the Bar, I have carefully perused the pleadings of the parties. Three questions emerge for consideration:

(a) whether the respondents 1 to 3 changed the rules of the game by amending the Notice Inviting Tender and by that the petitioner gets a right to challenge the same before this Court ?

(b) Whether non-submission of the requisite documents by the petitioner disqualifies him to be considered for the purpose of pre-qualification ? and

(c) Whether the petitioner is qualified by the submission of the rectified certificate furnished to him by the competent authority, the Executive Engineer ?

Before I proceed to advert to the questions posed I think it apposite to refer to the decisions cited by Mr. Gilda, learned counsel for the petitioner. The learned counsel has placed reliance on the decision rendered in the case of Laxmikant (supra). He has drawn the attention of this Court to Paragraph 5 of the decision,

The said paragraph reads as under:--

"The learned counsel appearing for the respondent urged that in view of the statutory provision of Rule 4 (3) it was not open to the Trust to prescribe the conditions of auction referred to above. The respondent having participated in the said public auction on the basis of those conditions which were in the nature of supplementary provisions for holding the auction could not be questioned by the respondent. The High Court, was not justified in quashing the resolution dated 27-2-1981 of the Trust, to reinstate the plot in question in favour of the appellants on conditions mentioned in the said resolution. That decision had been taken by the Board of Trustees which power was neither challenged nor could have been challenged. As such no right had accrued to the respondent which could have been enforced by the High Court in the writ jurisdiction. Accordingly, the appeal is allowed. The impugned judgment of the High Court is set aside. In the facts and circumstances of the case, there shall be no orders as to costs."

The learned counsel has also placed heavy reliance on the decision rendered in the case of Monarch Private Limited (supra). In the aforesaid case their Lordships addressed to the sanctity of the tender process and in Paragraphs 10 and 11 held as under :--

"10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the Courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process, should be treated alike. We may sum up the legal positions thus :

(i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between the persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the Courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is malafide."

19. The learned counsel has also drawn the attention of this Court to Paragraph 14 to highlight that the Apex Court has given stamp of approval to the decision rendered by the High Court as the High Court set aside the award of contract in view of the fact that it has not fulfilled the conditions relating to the Clause 6 (a) of the tender notice but the same was deleted subsequently to the last date of the acceptance of the tender. Their Lordships further expressed as under :--

"..... The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered."

20. It is apposite to state here that aforesaid case arose out of the decision rendered by the High Court of Bombay in the case of Konark Infrastructures (supra). The learned counsel for the petitioner has submitted that as the view taken by the Bombay High Court has been approved by the Supreme Court the decision rendered by the Bombay High Court should be looked in detail. In essence the submission of the learned counsel for the petitioner is that the action of the respondents 1 to 3 does not show fairness as rules of the game have been changed in the middle.

21. Now I shall advert to the obtaining factual matrix. The core question that arises for consideration is whether the instant case is one where the rules of the game have been so changed that as it affected the petitioner ? Mr. Gikla has urged with vehemence that in the notice inviting tender the conditions which were initially mentioned read as under:--

"In drainage Gallery of Masonry Dam/Tunnel or similar structures".

It is not disputed at the Bar that the second part of the physical criteria was later on deleted. It is put forth by him that had the same not been deleted the petitioner would have definitely been qualified because of the work done by him. This submission has been canvassed in addition to the contention that the petitioner is also qualified even if first aspect is taken into consideration. It is noteworthy to state here that initially in Notice Inviting Tender there was mention of two aspects of work and the second one was changed and every tenderer was noticed. The stand of the respondent Nos. 1 to 3 is that seven tenderers were in the fray and all of them were informed with regard to the change. It is worthwhile to mention here none of those tenderers has approached this Court. The stand of the respondents that the petitioner purchased the tender form after the deletion had taken place. The document which was supplied to the petitioner has been brought on record as Annexure R-8. On a perusal thereof it is plain as noon day the second part of the physical criteria has been deleted. Thus, by the time the petitioner purchased the tender form the conditions incorporated in physical criteria had already been modified and the petitioner purchased the modified tender form. In view of this stand, the heart of the matter is that whether the petitioner should be allowed to contend that there has been change with regard to rule of the game and by such change a breach has been committed. It is not a case where the petitioner had purchased the tender form earlier and taken pain to submit the tender and before opening or acceptance of

the tender form the conditions were changed. It is worth while to state that as far as the petitioner is concerned he purchased the tender form after the condition was modified. I may hasten to add here that this Court had directed the learned counsel for the respondent Nos. 1 to 3 to produce the relevant file so that this Court could appreciate the factual scenario in proper perspective and accordingly, Mr. Jha had produced the file. On a perusal of the file it transpires that tender form which was filled up by the petitioner did not have words "Tunnel or similar structures" and the said deletion has been signed by the Superintending Engineer, Masonry Dam Circle, Deolond, District Shahdol. On a perusal of the same it transpires that the petitioner purchased the tender form after 28-2-2001. In view of the aforesaid, it can unhesitatingly be concluded that the petitioner can not assail the change in the tender conditions on the ground that there has been change of rules of the game in the mid way because by the time he purchased the tender form the conditions had already been changed. This is not a case where the tenderer was not aware about the tender conditions and, therefore, there has been no change in the rules of the game.

22. Now I shall advert to the second contention submitted by the learned counsel for the petitioner that after receipt of the telegram he had rectified the certificate which was given by the competent authority and hence, the case of the petitioner should have been considered. The stand of the respondent Nos. 1 to 3 is that certificate submitted by the petitioner was not correct and by such certificate he could not be included in the consideration zone and after coming to know about it he submitted a corrected certificate. It is vehemently urged by Mr. Jha as the petitioner had not submitted the corrected certificate his tender form was incomplete and hence, he can not claim as a matter of right for consideration. It is also putforth by him that stand taken by the petitioner that it had received a telegram from the authority is not factually correct. It is also noteworthy to state here that the petitioner had not produced any telegram sent by the Executive Engineer. Quite apart from the above such a rectification cannot be permitted to be allowed as that would affect the tender process and hence, on this ground also I am of the considered opinion that the tender form of the petitioner could not have been considered.

23. The last plank of the submission of the learned counsel for the petitioner is that he was entitled to be considered for the next step as he had rectified the mistake. It is putforth by Mr. Gilda that if the respondent Nos. 1 to 3 would have taken into consideration the offer of the petitioner for the purpose of envelope "B" they would have saved 30% of the cost. Controverting the aforesaid submission it is putforth by Mr. Jha that, apart from the fact that the petitioner was not entitled to rectify the certificate in question, the certificate, even if it is accepted, the petitioner docs not satisfy the pre-qualification criteria. The learned counsel has submitted that the experience shown by the petitioner does not meet the requirement of respondent Nos. 1 and 2 as there is a gulf of difference in drainage gallery in Masonry Dam and the work done by the petitioner. The learned counsel has drawn the attention of this Court to tender form which

prescribes physical criteria wherein the drilling of 5000 RM and grouting of 100 MT are mentioned. Mr. Jha has submitted that the petitioner has done a different kind of work like redrilling holes through foundation gallery and that can not be made a qualification for the work in question. The learned counsel for the petitioner has drawn the attention of this Court to the experts opinion brought on record by it. As the matter in the technical realm, this Court is not in a position to comment upon the type of the work. On a perusal of the stand taken by the respondents it transpires that they have made a distinction between the two categories of work and the distinction is in the sphere of technicality and if they have found the petitioner ineligible for this kind of special work which requires a different kind of expertise, I am of the considered view that the opinion of the respondents 1 to 3 on that score is final and this Court can not sit in appeal over the same.

24. In view of my preceding analysis, the writ petition, being sans merit, stands dismissed without any order as to costs.