

IN THE HIGH COURT OF MANIPUR
AT IMPHAL
WP(C) No. 477 of 2024

1. **M/S Bhartia Infra Project Ltd.** having its head office at 201 Royal Arcade, Dr. B. Baruah Road, Ulubari, P.O. & P.S. Ulubari, Guwahati-781007.
2. M/S GKC Projects Limited (Joint Venture) having its office at Sy. No. 9 (P). CII-Green Building Lane, HITEC City, Kondapur, Hyderabad – 500084, Telangana, India respectively.

The petitioner Nos. 1 and 2 are represented by the authorised Signatory namely Shri Ningombam Ibochouba Singh, aged about 52 years, S.O. Late N. Nabakumar Singh of Chingamakha Phura Makhong, P.O. & P.S. Singjamei, Imphal West District, Manipur – 795008.

... Petitioners

-Versus-

1. The Union of India through the Secretary, Ministry of Road Transport & Highways, Transport Bhawan, 1, Parliament Street, New Delhi – 110001.
2. The State of Manipur represented by the Commissioner (Works), Govt. of Manipur, Old Secretariat Complex, Babupara, Imphal West, Manipur – 795001.
3. The Project Director-cum-Chief Engineer, Externally Aided Projects (EAP), Public Works Department (PWD), Manipur having its office at PWD Complex, Khuyathong, P.O. & P.S. Imphal, Imphal West District, Manipur.

... Official Respondents

With

WP(C) No. 521 of 2024

1. M/S Bhartia Infra Project Ltd. Represented by its Director Mr. Ramawatar Bhartia having office at 201, Royal Arcade, Dr. B. Baruah Road Ulubari, Guwahati – 781007, Assam.
2. M/S GKC – BIPL (JV) represented by Mr. Ramawatar Bhartia Authoritised Signatory having office at 201, Royal Arcade, Dr. B. Baruah Road, Ulubari, Guwahati – 781007, Assam.

The petitioner Nos. 1 and 2 are represented by the authorised Signatory namely Shri Ningombam Ibochouba Singh, aged about 54 years, S/o N. Nabakumar Singh of Chingamakha Phura Makhong, P.O. & P.S. Singjamei, Imphal West District, Manipur – 795008.

... Petitioners

-Versus-

1. The Union of India through the Secretary, Ministry of Road Transport & Highways, Transport Bhawan, 1, Parliament Street, New Delhi – 110001.
2. The State of Manipur represented by the Secretary/ Commissioner (Works), Govt. of Manipur, Old Secretariat Complex, Babupara, Imphal West, Manipur – 795001.
3. The Project Director-cum-Chief Engineer, Programme Implementation Unit (PIU) Externally Aided Projects (EAP), Public Works Department (PWD), Manipur having its office at PWD Complex, Khuyathong, P.O. & P.S. Imphal, Imphal West District, Manipur.
4. AMRIL-IRCON Jont Venture, Saikrupa, D. No. 8-3-833, Plot: 37 & 38, Phase-1, Kamalpuri Colony, Hyderabad, Telangana-500073.

... Respondents

B E F O R E

HON'BLE MR. JUSTICE AHANTHEM BIMOL SINGH

For the petitioners :: Mr. H.S. Paonam, Sr. Advocate asstd. by
Mr. Yumnam Shushruta, Advocate
For the respondents :: Mr. S. Vijayanand Sharma, Sr. Panel
Counsel;
Mr. M. Devananda, Addl. AG asstd. by Ms.
Naorem Jyotsana, Advocate.
Date of hearing :: **07-08-2024**
Date of judgment :: **28-08-2024**

J U D G M E N T

[1] Heard Mr. H.S. Paonam, learned senior counsel assisted by Mr. Yumnan Sushruta, learned counsel appearing for the petitioners; Mr. S. Vijayanand Sharma, learned senior panel counsel appearing for the respondents No. 1 and Mr. M. Devananda, learned Additional AG assisted by Ms. Naorem Jyotsana, learned counsel appearing for the respondents No. 2 and 3. None appeared for the respondent No. 4, despite service of notice.

The present two writ petitions have been filed primarily challenging the rejection of the Technical Bids submitted by the petitioners in connection with the NIT dated 15-03-2024 in respect of a contract work for construction of Rigid Pavement and Lined Drain of Selected Roads under Highway South Division - Package - 4 (total road length of 111.182 km.) coupled with the prayer for directing the respondents No. 2 and 3 to open the Financial Bids submitted by the petitioners in connection with the said contract work. As the two writ petitions filed by the same petitioners

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raises common question of facts and law, the same were heard jointly and being disposed of by this common judgment.

[2] There is no dispute with regard to the facts of the present two writ petitions. The Project Director-cum-Chief Engineer, EAP, PWD, Manipur, respondent No. 3 herein, issued a Notice Inviting Tender (NIT) dated 15-03-2024 inviting e-tender bids from interested and eligible tenderers in connection with the following contract works:-

IOCT No. / Package No.	Package Name	Completion Time (Months)	Tender Security (INR)
MN/PWED/EAP/MURDAMIP/PRO C-W/2024/01 MUR-CW-01	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal West Division – Package 1: Total Road Length – 172.858 km.	Execution = 36 Post construction Mandatory Maintenance = 60	17.80 crore using the instruments specified in Instructions to Tenderers 19.3 (Tender Data Sheet)
MN/PWD/EAP/MURDAMIP/PROC -W/2024/02 MUR-CW-02	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal West Division – Package 1: Total Road Length – 172.858 km.	Execution = 36 Post construction Mandatory maintenance = 60	13.85 crore Using the instruments specified in Instructions to Tenderers 19.3 (Tender Data Sheet)
MN/PWD/EAP/MURDAMIP/PROC -W/2024/03 MUR-CW-03	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal East Division (ED-2) – Package 3: Total Road Length – 122.209 km.	Execution = 36 Post construction Mandatory maintenance = 60	12.20 crore Using the instruments specified in Instructions to Tenderers 19.3 (Tender Data Sheet)
MN/PWD/EAP/MURDAMIP/PROC -W/2024/04 MUR-CW-04	Construction of Rigid Pavement and Lined Drain of Selected Roads under Highway South Division – Package 4: Total Road Length – 111.182 km.	Execution = 36 Post construction Mandatory maintenance = 60	11.10 crore Using the instruments specified in Instructions to Tenderers 19.3 (Tender Data Sheet)

[3] The tender document consist of three parts. Part 1 relates to tendering procedure consisting of six Sections, i.e., Section I to VI,

Part 2 relates to works' requirements consisting of one Section, i.e., Section VII and Part 3 relates to conditions of contract and contract forms consisting of three sections, i.e., Sections VIII to X. Section I relates to instructions to tenderers and under Clause 11 of Section I, it is, inter alia, provided as under:-

"11.1. The Tender shall comprise two Parts, namely Technical Part and the Financial Part. These two Parts shall be submitted simultaneously in two separate sealed envelopes (two- envelope tendering process). One envelope shall contain only information relating to the Technical Bid and the other only information relating to the Financial Part. These two envelopes shall be enclosed in a separate sealed outer envelope marked "ORIGINAL TENDER."

[4] Under Clause 16 and 17 of Section I, it is provided as under:

"16.1. The tenderer shall furnish a technical proposal in the Technical Part of the Tender including the statement of work methods, equipment, personnel, schedules and any other information as stipulated in Section IV, Tender Forms, in sufficient detail to demonstrate the adequacy of the tenderer's proposal to meet the works' requirements and the completion time."

"17.1 To establish Tenderer's eligibility in accordance with ITT 4. Tenderers shall complete the Letter of Tender – Technical Part, included in Section IV, Tender Forms."

"17.2 In accordance with Section III, Evaluation and Qualification Criteria, to establish its qualifications to perform the Contract, the Tenderer shall provide the information requested in the corresponding information sheets included in Section IV, Tender Forms."

"17.3 If provisions for development of domestic industry (such as a margin of domestic preference) apply as specified in accordance with ITT 38.1, domestic Tenderers, individually or in joint ventures, applying for eligibility for domestic preference shall supply all information required to satisfy the criteria for eligibility specified in accordance with ITT 38.1."

[5] Under Clause 27 and 30 of Section I, it is, inter alia, provided as under:-

“27.1 To assist in the examination, evaluation and comparison of the Tenders, and qualification of the Tenderers, the Employer may, at its discretion, ask any Tenderer for a clarification of its Tender, allowing a reasonable time for response. Any clarification submitted by a Tenderer 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 Tender shall be sought, offered or permitted, except to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the Tenders, in accordance with ITT 36.”

“30.1 In evaluating the Technical Parts of each Tender, the Employer shall use the criteria and methodologies listed in this ITT and Section III, Evaluation and Qualification Criteria. No other evaluation criteria or methodologies shall be permitted.”

[6] Under Clause 31 and 32 of Section I, it is provided as under:-

“31.1 The Employer's determination of a Tender's responsiveness is to be based on the contents of the Tender itself, as defined in ITT 11.”

“31.2 A substantially responsive Tender is one that meets the requirements of the Tender Document without material deviation, reservation or omission. A material deviation, reservation or omission is one that:

(a) if accepted, would:

(i) affect in any substantial way the scope, quality or performance of the Works specified in the Contract; or

(ii) limit in any substantial way, inconsistent with the Tender Document, the Employer's rights or the Tenderer's obligations under the proposed Contract, or

(b) if rectified, would unfairly affect the competitive position of other Tenderers presenting substantially responsive Tenders.

“31.3 The Employer shall examine the technical aspects of the Tender submitted in accordance with ITT 16, in particular, to confirm that all requirements of Section VII, Works' Requirements have been met without any material deviation, reservation or omission.”

“31.4 If a Tender is not substantially responsive to the requirements of the Tender Document, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission.”

“32.1 The Employer shall determine to its satisfaction whether the eligible Tenderers that have submitted substantially responsive Tender -

Technical Parts meet the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.”

“32.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT 17. The determination shall not take into consideration the qualifications of other firms such as the Tenderer's subsidiaries, parent entities, affiliates, subcontractors (other than Specialized Subcontractors if permitted in ITT 33.3) or any other firm(s) different from the Tenderer.”

“32.3 If a Tenderer does not meet the qualifying criteria specified in Section III, Evaluation and Qualification Criteria, its Tender shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission.”

“32.4 Only Tenders that are both substantially responsive to the Tender Document and meet all Qualification Criteria shall have their envelopes marked "FINANCIAL PART™ opened at the second public opening.”

[7] Section III of Part 1 relates to Evaluation and Qualification Criteria and Clause 3 of Section III deals with Qualification Criteria. Under Clause 3.2 of Section III, it is provided as under:-

Historical Contract Non-Performance

Eligibility and Qualification Criteria			Compliance Requirements				Documentation
No	Subject	Requirement	Single Entity	Joint Venture (existing or intended)			Submission Requirements
				All Members Combined	Each Member	One Member	
3.2	History of Nonperforming Contracts	Nonperformance of a contract did not occur as a result of contractor default since January 1, 2019	Must meet requirement	Must meet requirement	Must meet requirement	N/A	Form CON-2

1. Nonperformance as decided by the Employer, shall include all contracts where (a) non-performance was not challenged by the contractor, including through referral to the dispute resolution mechanism under the respective contract, (b) contracts that were so challenged but where the dispute resolution mechanism/ court of Law has not overturned /stayed the decision of the Employer* and (c) contracts that were so challenged but fully settled against the contractor. Nonperformance shall not include contracts where decision of the Employer* was overruled by the dispute resolution mechanism. Nonperformance must be based on all information on fully settled disputes or litigation, i.e., dispute or litigation that has been resolved in accordance with the dispute resolution mechanism under the respective contract and where all appeal instances available to the Tenderer have been exhausted.

* Refers to the competent authority who had awarded/ terminated the Contract.

2. This requirement also applies to contracts executed by the Tenderer as JV member.
3. The Tenderer shall provide accurate information on the related Tender Form about any litigation or arbitration resulting from contracts completed or ongoing under its execution

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over the last five years. A consistent history of awards against the Tenderer or any member of a joint venture may result in failure of the Tender.

[8] In response to the aforesaid NIT, the petitioners submitted their bid for Package No. MUR-CW-04 for construction of Rigid Pavement and Lined Drain of Selected Roads under Highway South Division-Package-4 (total road length of 111.182 km.) The Technical Bids submitted by the tenderers, including the present petitioners, in connection with the four contract works notified in the aforesaid NIT, were opened on 24-05-2024 in the office of the respondent No. 3. The information submitted by the petitioners in connection with their historical contract non-performance, pending litigation and litigation history in Form CON - 2 as required under clause 3.2 of Section-III of Part-1 of the bidding documents are as under:-

Non performed Contracts in accordance with Section III, Evaluation and Qualification Criteria			
Year	Non-performed portion of contract	Contact Identification	Total Contract Amount (INR)
2022	Amount – Rs. 53,50,76,967.79 Percentage – 35%	Contract Identification – CON/J-1/2612 dated 12.03.2020 Name of Employer – Chief Engineer/ CON-VII Address of Employer = N.F. Railway, Maligaon, Guwahati-11 Reasons(s) for nonperformance – There was total ban on quarrying/ borrowing of Earth in the State of Manipur due to which earthwork was hampered badly.	Rs. 150,66,92,915.20
2014	Amount – Rs. 2,94,10,109.00 Percentage – 18%	Contract Identification – CON/BVU-NLP/1267 dated 10.07.2009 Name of Employer – General Manager/ CON/ N.F Railway Address of Employer – Maligaon, Guwahati-11 Reasons(s) for nonperformance – Unilateral Closure of CA by Department	Rs. 15,87,07,142.00
2014	Amount – Rs. 1,99,57,089.00 Percentage – 10%	Contract Identification – CON/BVU-NLP/1272 dated 15.09.2009 Name of Employer – General Manager/CON/ N.F Railway Address of Employer – Maligaon, Guwahati-11 Reason(s) for nonperformance – Unilateral Closure of CA by Department	Rs. 18,16,94,706.00

[9] On coming to know about the information submitted by the petitioners in connection with their historical contract non-performance, the respondent No. 3 wrote a letter dated 28-05-2024 to the Deputy Chief Engineer, CON-4, North East Frontier Railway (Construction), Imphal, requesting the latter to provide an update on the status of the historical contract non-performance of the petitioners. In response to the said letter, the Deputy Chief Engineer, CON-4, NF Railway, Imphal, wrote a letter dated 12-06-2024 furnishing the following information:-

“1. Bhartiya Infra Project Ltd.:

- The contract agreement No-.CON/J-1/2612 dated 12.03.2020 with M/s Bhartiya Infra Project Ltd. was terminated vide letter No. W/60/CON/J-1/EMB/2019/RT-1/2612 dated 26.09.2022. Despite the termination of the aforementioned contract, M/s Bhartiya Infra Project Ltd. has several other ongoing contracts with the railway which are under progress as per schedule.*
- A legal case concerning this termination is currently ongoing, and the court has not given any ruling in this regard.”*

[10] The Technical Bids submitted by the petitioners were evaluated by the duly constituted Bid Evaluation Committee and the Committee recommended that the Technical Bids/ tenders submitted by the petitioners were substantially non-responsive to the technical requirements specified in Section III: Evaluation and Qualification Criteria of the tender document. Thereafter, the said Evaluation Report was submitted to the investment bank by the respondent No. 3 under a letter dated 12-07-2024 for obtaining No-objection and approval for opening Financial Part of the tender for the technically responsive tenderers. The operative portion of the said report are reproduced hereunder for ready reference.

“3.1.6. Historical Contract Non-Performance**(1) GKC-BIPL JV**

The Lead Member of the joint venture has submitted a completed Form CON-2, asserting that no instances of contract non-performance have occurred since January 1, 2019, as specified in Section III, Evaluation and Qualification Criteria, Sub-Factor 3.2.1. However, the JV partner, BIPL, has submitted a completed Form CON-2 listing a project that experienced non-performance, as detailed below:

Year	Non-Performed portion of Contract	Contract Identification	Total Contract Amount
2022	Amount – Rs. 53,50,76,967.79 Percentage – 35%	Contract Identification – CON/J-1/2612 dated 12.03.2020 Name of Employer – Chief Engineer/ CON-VII Address of Employer – N.F. Railway, Maligaon, Guwahati – 11 Reason(s) for nonperformance – There was total ban on quarrying/ borrowing of Earth in the State of Manipur due to which earth work was hampered badly	Rs. 150,66,92,915.20

This office vide its letter No.22/PD/PIU/MUR/PROC-CW/2024/8726 dated 28/05/2024 had requested the Deputy Chief Engineer, CON-4, North East Frontier Railway (Construction). Imphal to confirm any declaration as Non-Performer of all the Tenderers who submitted the tender for all 4 (four) contract packages of the Project during the last 5 (five) years since 1st Jan 2019. It was also requested to provide an update on the status of termination of the work - "Earthwork, Construction of Major or Minor Bridges and Protection works between Ch 115.930 to 124.660 in connection with Jiribam-Tupul-Imphal new BG Railway Line Project". This project was originally awarded to Bhartia Infra Projects Limited under North East Frontier Railway's Agreement no. CON/J-1/2612 dated 12.03.2020. It was subsequently terminated as per North East Frontier Railway's letter no. W/60/CON/J-I/EMP/2019/08/RT-1/2612 dated 26.09.2022, and as of the latest available information on 17.11.2023, the termination remains in effect. Further it was also requested to furnish details whether the Hon'ble Court has given any ruling regarding the challenge made by the Contractor in the court of law. The Northeast Frontier Railway, in its letter W/60/CON/J-I/EMB/2019/RT-1/2612/0522 dated 12.06.2024, informed that a legal case concerning the termination of the above-mentioned contract is ongoing, and the court has not given any ruling in this regard."

In accordance with Section III, Evaluation and Qualification Criteria, under the History of Nonperforming Contracts:- "Nonperformance, as

decided by the Employer, shall include all contracts that were so challenged but where the dispute resolution mechanism/court of law has not overturned/stayed the decision of the Employer".

Though BIPL had challenged its employer (the authority who awarded/terminated the contract) in court against the termination of the contract due to nonperformance, the court has not overturned/stayed the decision of the Employer, hence it will be considered as Non-Performing Contracts. Therefore, the JV Member BIPL doesn't meet the requirement under this criterion.

Since all members combined must meet the requirement under Section III, Evaluation and Qualification Criteria, under the History of Nonperforming Contracts, the Tenderer GKC-BIPL JV does not meet the requirement under this criterion.

"5. Conclusion and Recommendations:

The evaluation has been carried out against the requirements of the Tender Documents for the completed tenders offered by GKC-BIPL JV and AMRIL-IRCON Joint Venture. Observation based on the documents made available by the Tenderer are summarized below

(i) GKC-BIPL JV

The Tenderer meets the aggregate requirements regarding Completeness of the tender.

The Tenderer satisfies the requirements under Clause 3.3: Financial Situation and Performance, Clause 3.4: Experience (including General Experience and Specific Construction Experience), and the Declaration of Environmental, Social, Health, and Safety (ESHS) as outlined in Section 3: Qualification Criteria. However, the Tenderer fails to meet the requirements under Historical Contract Non-Performance. Specifically, the JV Partner, Bhartia Infra Projects Limited (BIPL), has a record of contract non-performance. Although BIPL challenged the employer (the authority who awarded or terminated the contract) in court, the court has not overturned or stayed the employer's decision.

Therefore, the Evaluation Committee concludes that the Technical Tender submitted by the GKC-BIPL JV is substantially non-responsive to the Technical requirements specified in Section III: Evaluation and Qualification Criteria of the Tender Document."

[11] The status about the rejection of the Technical Bids submitted by the petitioners on ground of non-responsiveness was updated on the

Website and the petitioners having been aggrieved filed the present writ petitions for redressing their grievances.

[12] Mr. H.S. Paonam, learned senior counsel appearing for the petitioners submitted that the Ministry of Road Transport and Highways (S&R Zone), Government of India, issued a Circular dated 06-10-2021 laying down the Standard Operating Procedure to debar/ penalise/ declare the Contractor/ Concessionaire as non-performer in National Highways and other Centrally Sponsored Road Projects. In para. 5 of the said Circular, it is provided that before deciding the Contractor/ Concessionaire as non-performer or debarring/ penalising it, the concerned authority shall issue a notice to the Contractor/ Concessionaire by giving 15 days' time to furnish its return reply and allowed personal hearing, if so desired by the Contractor/ Concessionaire, before the competent authority or any person designated for the purpose and that such a notice shall not be issued without approval of an Officer below the rank of Chief Engineer/ CGM/ ED. In case of projects where public safety is endangered by the behaviour/ conduct/ action of the Consultant/ Contractor/ Concessionaire, the authority may temporarily suspend the concerned Contractor/ Concessionaire from participating in ongoing future bidding upto one month period during which the regular process of debarment shall be concluded.

[13] The learned senior counsel submitted that declaring a Contractor non-performer/ debarring/ blacklisting being a serious adverse action against the Contractor, the accepted norm in this regard is providing a show cause and giving an opportunity of being heard is a precondition requirement. It has been submitted that in the present case, there has never been an instance where the petitioners have been subjected to such procedures as mentioned above leave alone issuance of a letter or order declaring the petitioners as non-performers. The learned senior counsel further submitted that without ascertaining such obligated formality and without any material and by just relying on the correct information provided by the petitioners as regards their having a history of termination of contract on 26-09-2022 along with the portion of the non-performed work, the authorities arrived at a conclusion that the petitioners are non-performers and rejected the Technical Bids submitted by them. According to the senior counsel, such action of the authorities is highly misconceived/ arbitrary and without any legal basis and as such, it would be just and proper to direct the authorities to evaluate the Technical Bids submitted by the petitioners and to allow them to compete with other qualified bidders in the Financial Bids so that the most suitable bidder can be identified and award the contract.

[14] The learned senior counsel forcefully submitted that the petitioners have never been declared as a non-performer and that this factum is supported by the letter of the Deputy Chief Engineer, CON-4,

[14]

NF Railway, Imphal, dated 17-07-2024 addressed to the Project Director, EAP, Public Works Department, Manipur (respondent No. 3) wherein it has been specifically certified that the agency, M/S Bhartia Infra Project Limited is not declared "Non-performer" by the Railway.

[15] It has further been submitted that as the petitioners were not declared as non-performer, the Railway Authority and other authorities in other States allowed the petitioners to participate in many tender process after 26-09-2022 on which date, the earlier contract work executed by the petitioners was terminated by the Railway Authority and having been found successful, the petitioners have been awarded Letter of Acceptance of high value contracts and as such, the rejection of the Technical Bids submitted by the petitioners only on the basis of the information furnished by the petitioners relating to historical contract non-performance is not warranted and such action of the authorities are highly arbitrary and have been done in colourable exercise of power.

[16] The last point submitted by the learned senior counsel appearing for the petitioners is that before taking a decision to reject the Technical Bids submitted by the petitioners, the authorities did not issue any notice or show cause to the petitioners or gave an opportunity of being heard and that the decision to reject the Technical Bids of the petitioners have been taken in complete violation of the principle of natural justice and on this count alone, the decision for rejecting the

Technical Bids is liable to be quash and set aside. In support of his contention, the learned senior counsel cited the following case laws:

1. **“Prakash Ratan Sinha Vs. State of Bihar & ors.”** reported in **(2009) 14 SCC 690** wherein it has been held as under:-

- “12. The argument of the learned counsel for the appellant, basically is that, the administrative decision taken by the respondents is unfair, unreasonable and in breach of the principles of natural justice. The administrative decision taken by the respondents is within the realm of public law and therefore, the decision ought to have been taken in a fair and reasonable manner. This was more necessary because the action cancelling the promotion of the appellant had civil consequences in the sense that it not only puts an end to the right of the appellant and also his further career prospects. Therefore, the respondents are under an obligation to take all decisions in a fair and lawful manner by adhering to the rules of natural justice.”
- “13. The law in this regard has been settled by several decisions of this Court. The principle that emerge from the decisions of this Court is that, if there is a power to decide and decide detrimentally to the prejudice of a person, duty to act judicially is implicit in exercise of such a power and that the rule of natural justice operates in areas not covered by any law validly made.”
- “14. Corollary principles emanating from these cases are as to what particular rule of natural justice should apply to a given case must depend to an extent on the facts and circumstances of that case and that it is only where there is nothing in the statute to actually prohibit the giving of an opportunity of being heard and on the other hand, the nature of the statutory duty imposed on the decision maker itself implies an obligation to hear before deciding. These cases have also observed, whenever an action of public body results in civil consequences for the person against whom the action is directed, the duty to act fairly can be presumed and in such a case, the administrative authority must give a proper opportunity of hearing to the affected person.”

2. **“Gorkha Security Services Vs. Government (NCT of Delhi) & ors.”** reported in **(2014) 9 SCC 105** wherein it has been held as under:-

- “16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought

to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

"17. Way back in the year 1975, this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B.4, highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75)

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

"20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given an opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned

order on this ground. Such a contention was specifically repelled in Patel Engg."

"29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice."

"31. When it comes to the action of blacklisting which is termed as "civil death" it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT."

"34. For the aforesaid reasons, we are of the view that the impugned judgment of the High Court does not decide the issue in the correct perspective. The impugned Order dated 11-9-2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs."

[17] Mr. M. Devananda, learned Addl. AG appearing for the respondents No. 2 and 3 submitted that by a letter dated 26-09-2022 of the Chief Engineer/CON-VII, NF Railway, Maligaon addressed to the petitioner No. 1, the contract work of "Earthwork, construction of Major of minor bridges and protection works between Ch. 115930 to 124660 in connection with the construction of Jiribam-Tupul-Imphal new BG Railway Line project" awarded to the petitioner No. 1 was rescinded on the ground of non-performance and the petitioner No.1 was penalized by debarring it from participating in the tender for executing the balance

work and by forfeiting the security deposit and encashing the Performance Guarantee.

It has been submitted that while submitting the Technical Bids, the petitioners voluntarily declared their earlier historical contract non-performance in the Form CON-2 submitted by them as required under Clause 3.2 of Section III of Part 1 of the bidding documents and one of such non-performance occurred in the year 2022.

[18] It has also been submitted that under Clause 3.2 of Section III, one of the eligibility and qualification criteria to be fulfilled by a bidder is that non-performance of a contract did not occurred as a result of Contractor default since January, 1, 2019 and that under Clause 32.3 of Section I, it is provided that if a tenderer does not meet the qualifying criteria specified in Section III, its tender shall be rejected by the employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission.

Mr. M. Devananda, learned Addl. AG submitted that as the petitioners have voluntarily declared that they have a history of contract non-performance in 2022, the Bid Evaluation Committee recommended that the Technical Bids/ tenders submitted by the petitioners was substantially non-responsive to the technical requirements specified in Section III and on the basis of such recommendation, the Technical Bids submitted by the petitioners were rejected as non-responsive.

[19] The learned Addl. AG submitted that the tender bidding documents lay down in detail the procedure to be followed for each stage of the bidding process, such as, issuance of invitation for bids, issuance of notices, corrigendum, opening of bids, evaluation of bids, approval of bids, etc., with detailed instructions to bidders that is obligatory for each bidder to follow including the requirements to be fulfilled while bidding. It has also been submitted that the employer diligently followed and complied with the laid down procedure, all the approved instruction to tenderers and the guidelines laid down in the bidding documents. It has further been submitted that the Technical Evaluation of all the bids for all the packages including that of the petitioners were carried out as per the procedure laid down in the tender bidding documents and in complete compliance of the guidelines of the bank of procurement for works. According to the learned Additional AG, the authorities have acted fairly and strictly in conformity with the laid down norms and procedure while evaluating the Technical Bids submitted by the tenderers and there is no question of arbitrariness or mala fide action on the part of the authorities. The learned senior counsel, accordingly, submitted that there is no merit in the present writ petitions and the same deserves to be rejected outright.

[20] I have heard at length and considered the rival submissions advanced by the learned counsel appearing for the parties. I have also carefully examined all the materials available on record including the

connected Government file produced by the learned Additional AG. The only issue that needs to be considered and decided in the present two writ petitions is whether the petitioners, more particularly the petitioner No. 1 is a non-performing contractor or not.

It is an admitted position of fact that by a letter dated 26-09-2022 of the Chief Engineer, CON-VII, NF Railway, Maligaon addressed to the petitioner No. 1, the contract work in connection with "Earthwork, construction of Major of minor bridges and protection works between Ch. 115930 to 124660 in connection with the construction of Jiribam-Tupul-Imphal new BG Railway Line Project" awarded to the petitioner No. 1 was rescinded on ground of non-performance and the petitioner No. 1 was penalised by debarring it from participation in the tender for executing the balance work and by forfeiting the security deposit and encashing the Performance Guarantee. On examination of the said letter, it can be clearly seen that the said termination order was issued after giving two prior notices to the petitioner No. 1 and by following the procedure laid down in Clause 62 of the Standard General Conditions of contract and the petitioners have admitted such factual position. It is also an admitted position of fact that the said termination order still stands without any interference from any court or competent authority. In the present case, the petitioners have also voluntarily disclosed about their historical contract non-performances in Form CON-2 as required under Clause 3.2 of Section III of Part 1 of the bidding

documents. In fact, the petitioners have never denied the fact that the petitioner No. 1 has a history of non-performance including one in 2022.

Taking into consideration such admitted factual positions, this court is of the considered view that the petitioners, more particularly the petitioner No. 1 has a history of non-performance and this court did not find any merit and substance in the submission advanced by the learned senior counsel appearing for the petitioners that the petitioners have never been declared as non-performers.

[21] In the present case, the petitioners voluntarily disclosed the information about their historical contract non-performance including one of 2022 in the Form CON-2 submitted by them along with their bidding documents. On coming to know about such historical non-performance of the petitioners, the respondent No. 3 wrote a letter to the authorities of the Railway to confirm about the veracity of the disclosure made by the petitioners and only after obtaining confirmation from the concerned authorities of the Railway, the Technical Bids of the petitioners were evaluated by the Bid Evaluation Committee and after careful and detail consideration, the Bid Evaluation Committee recommended that the Technical Bids/ tenders submitted by the petitioners was substantially non-responsive to the technical requirements specified in Section III of Part 1. On the basis of such recommendation, the Technical Bids submitted by the petitioners were rejected as non-responsive. Taking into consideration such undisputed factual positions, this court is of the

considered view that there is no question of arbitrariness or mala fide or colourable exercise of power on the part of the authorities in rejecting the Technical Bids submitted by the petitioners and this court did not find any ground or reason for interfering with such decisions.

[22] It has been submitted on behalf of the petitioners that the Deputy Chief Engineer, CON-4, Imphal NF Railway has specifically certified in his letter dated 17-07-2024 that the petitioner No. 1 was not declared as non-performer by the Railway and that the respondent No. 3 did not take into consideration the said letter while rejecting the Technical Bids of the petitioners. This court did not find any merit and substance in the said submission for the following two reasons:-

Firstly, the said letter dated 17-07-2024 was issued only after the evaluation of the Technical Bids of the petitioners by the Bid Evaluation Committee had been completed and the evaluation report had been submitted by the respondent No. 3 to the investment bank on 12-07-2024 for conveying No-Objection and approval for opening of the Financial Bids. As such, there was no question of ignoring or not considering the said letter at the time of evaluation of the Technical Bids of the petitioners.

Secondly, under Clause 32.3 of Section I of the bidding documents, it is provided that if a tenderer does not meet the qualifying criteria specified in Section III, Evaluation and Qualification Criteria,

its tender shall be rejected by the employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission. In view of the said provisions, the information or declaration made by the petitioners about their historical contract non-performance in Form CON-2 cannot be corrected and the Technical Bids of the petitioners cannot be subsequently made responsive.

[23] In the case of “**Jagdish Mandal Vs. State of Orissa & ors.**” reported in **(2007) 14 SCC 517**, the Hon’ble Apex Court in para. 22 of the judgment held as under:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. 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. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

[24]

- (i) *Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

- (ii) *Whether public interest is affected.*

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

[24] In the case of **"N.G. Projects Ltd. Vs. Vinod Kumar Jain & ors."** reported in **(2022) 6 SCC 127**, the Hon'ble Apex Court in para. 22 and 23 of the judgment held as under:-

"22. *The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.*

"23. *In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision making process is after complying with the procedure contemplated by*

the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

[25] In the case of **“Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & ors.”** reported in **2023 SCC Online SC 671**, the Hon’ble Apex Court in para. 48 and 52 to 54 held as under:-

- “48. *This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489)*”
- “52. *Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or*

contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in Association of Registration Plates v. Union of India, reported in (2005) 1 SCC 679.”

“53. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.”

“54. As observed by this Court in Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.”

[26] I have carefully perused the judgments cited on behalf of the petitioners and this court is of the considered view that the ratio laid down in the said judgments are not applicable in the facts and circumstances

[27]

of the present case and accordingly, the said judgments are of no help to the case of the petitioners.

[27] In view of the facts and circumstances of the present cases and for the reasons and findings given hereinabove and the ratio laid down by the Hon'ble Apex Court in the case of **Jagdish Mandal (supra)**, **N.G. Projects Ltd. (supra)** and **Tata Motors Limited (supra)**, this court did not find any ground or reason for interfering with the decision taken by the authorities for rejecting the Technical Bids submitted by the petitioners. Accordingly, the present writ petitions are hereby dismissed and the interim order passed earlier stands vacated. There will be no order as to cost.

JUDGE

FR / NFR

Devananda