

HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+ WRIT PETITION No.3202 OF 2017

04.07.2017

#Between:

M/s Sri Vishnu Srirama Constructions
Rep. by its Managing Partner V.Rajagopal Reddy, ...Petitioner

AND

1. The Andhra Pradesh Education & Welfare
Infrastructure Development Corporation,
Rep. by its Managing Director,
and three others ... Respondents

!Counsel for the petitioner : M/s P.Gangarmi Reddy,

Counsel for the respondents : Advocate General for A.P. for
Sri G.Seena Kumar,
Sri N.Bharat Babu

<Gist :
>Head Note:

? Cases referred:

- ¹ (2012) 10 SCC 1
- ² (2005) 4 SCC 649
- ³ 2005 (1) SC 235
- ⁴ 1981 AIR 487
- ⁵ (2017) 4 SCC 243
- ⁶ (1982) 2 SCC 365
- ⁷ (1996) 4 SCC 208
- ⁸ (1971) 3 SCC 153
- ⁹ (1972) 2 SCC 36
- ¹⁰ (1969) 3 SCC 146
- ¹¹ (1982) 2 SCC 365
- ¹² (2009) 6 SCC 171
- ¹³ (1990) 3 SCC 280
- ¹⁴ (2008) 10 SCC 696
- ¹⁵ (1978) 1 SCC 405
- ¹⁶ (2005) 2 ALT 786
- ¹⁷ 2015 (9) SCC 433=AIR 2015 SC 3405
- ¹⁸ (2002) 1 SCC 216
- ¹⁹ (2003) 7 SCC 410
- ²⁰ (1969) 3 SCC 769
- ²¹ (2004) 3 SCC 553
- ²² (1970) 1 SCC 582
- ²³ (1998) 8 SCC 1
- ²⁴ (2005) 6 SCC 657
- ²⁵ (1991) 3 SCC 91
- ²⁶ (2006) 10 SCC 236

- ²⁷ AIR 1952 SC 12
- ²⁸ AIR 1955 SC 233
- ²⁹ 2013 (7) SCC 25
- ³⁰ 2013 (10) SCC 83
- ³¹ (2017) 5 SCC 387
- ³² (2012) 6 SCC 464
- ³³ (2017) 3 ALD 486
- ³⁴ (1975) 1 SCC 70
- ³⁵ AIR 1994 SC 1277
- ³⁶ (2012) 11 SCC 257
- ³⁷ (2006) 11 SCC 548
- ³⁸ (1978) 3 SCC 36
- ³⁹ (1977) 3 SCC 457
- ⁴⁰ (1974) 4 SCC 3
- ⁴¹ (1978) 1 SCC 248
- ⁴² (1979) 3 SCC 489
- ⁴³ (1989) 3 SCC 751
- ⁴⁴ (1990) 3 SCC 752
- ⁴⁵ [1977] 3 SCR 249
- ⁴⁶ 1977 (2) SCC 256
- ⁴⁷ (2014) 9 SCC 105
- ⁴⁸ (1975) 1 SCC 70
- ⁴⁹ (1989) 1 SCC 229
- ⁵⁰ (2012) 11 SCC 257
- ⁵¹ (2008) 9 SCC 31
- ⁵² (2015) 1 ALT 720
- ⁵³ (2014) 1 ALT 299
- ⁵⁴ (2004) 3 SCC 553
- ⁵⁵ 2004) 7 SCC 698
- ⁵⁶ AIR 2004 SC 3894
- ⁵⁷ (2001) 3 SCC 537
- ⁵⁸ (1941) 1 KB 675
- ⁵⁹ (1991) 4 SCC 139
- ⁶⁰ (2000) 5 SCC 488
- ⁶¹ (2003) 2 SCC 111
- ⁶² (2004) 8 SCC 270
- ⁶³ JT 2005 (1) SC 303
- ⁶⁴ (2005) 1 SCALE 385



HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

W.P.M.P.No. 17767 of 2017

in/and

WRIT PETITION No.3202 OF 2017

ORDER:

The petitioner-firm-M/s Sri Vishnu Sri Rama Constructions rep. by its Managing Partner (for short, 'petitioner-firm') is a registered Contractor. The 1st respondent is the Andhra Pradesh Education & Welfare Infrastructure Development Corporation (for short, 'APEWIDC'). On behalf of the 1st respondent supra, its Superintendent Engineer (4th respondent) invited tenders for construction of A.P.Social Welfare Residential School at B.Mattam of Kadapa District vide NIT No.295/ SE/ APEWIDC/ KDP/ AE/ 2016-17,dt.05.11.2016. The petitioner-firm and two others submitted tenders and the 4th respondent opened the technical bid on 12.12.2016 and found all the three bidders are qualified and on the same day, having opened the price bid, submitted same to the 3rd respondent-the Chief Engineer and Chairman, APEWIDC(R.1) who has to refer the same to Tender Committee (2nd respondent) represented by its Principal Secretary, Social Welfare Department, Govt. of Andhra Pradesh, for the cost of the work is more than 2Crores and however the Tender Committee rejected the tender of the petitioner-firm and disqualified it by forfeited the EMD of 1% and also suspending from participating in tenders up to 31.03.2017 on the ground that the petitioner-firm failed to furnish two ongoing works in the Statement-IV of tender schedule. It is the grievance of the petitioner-firm therefrom in seeking the relief more particularly in the nature of relief of writ of mandamus

declaring the rejection of the bid of the petitioner-firm and disqualifying and suspending from participation in the tenders of APEWIDC upto 31.03.2017 and forfeiting the EMD as per communication by the 1st respondent by memo,dt.23.01.2017 and letter of intimation of the same to the 4th respondent pursuant thereto, dt. 24.01.2017 as illegal, arbitrary and unsustainable with a consequential direction to accept the bid of the petitioner-firm and to award the work in its favour and to pass such other order/ s.

2. The averments further in support of the writ petition prayer are that the petitioner-firm fulfilled the qualification prescribed under clause-14 of the tender notice with bid capacity as per Formula(2AN-B) and furnished particulars in the formats enclosed supported by documents and in the Statement-IV of the formats of the existing commitments i.e. works on hand and works for which bids are submitted to be mentioned is to be evaluated bid capacity of the bidder, that the petitioner-firm has the bid capacity of 35.06crores as per the information furnished in Statement-IV which is more than the tender value of Rs.15,69,38,030/- and the Tender Committee, having opened the price bid of the petitioner-firm and others and found the petitioner-firm is the lowest quoted bid of 5.39%less than the other bidders. The petitioner-firm in the Statement-IV furnished details of 15 ongoing works and three works of which tenders submitted and however by oversight, it has not mentioned two ongoing works of Rs.4,04,63,454/- (Rs.3,22,61,439/-+Rs.82,02, 015/-) and pursuant to the notice issued by the 3rd respondent dt.04.01.2017 the petitioner-

firm furnished the details of the two works not mentioned in the Statement-IV and from its adding available bid capacity of Rs.31,01,74,164/- is more than the tender value and fulfilled the criteria and the 3rd respondent pursuant to which even recommended to the Tender Committee, which concluded that the non-mentioning of the two ongoing works in the Statement-IV amounts to furnishing of false/ fraudulent certificates with tender which is a disqualification and disqualified, though the petitioner-firm is found to be L-1 in price bid. It is also the contention that even as per the conditions of tender notice after opening of the technical bid and price bid, the tender opening authority opened the price bid and sent to 3rd respondent for evaluation and submission to the Tender Committee, which called for certain details from the 3rd respondent, on which the 3rd respondent issued notice to the petitioner-firm and obtained value of other two ongoing works which were not mentioned in the statement-IV. On furnishing the value of other two ongoing works, the available bid capacity of the petitioner-firm is more than tender value, the 3rd respondent has recommended to the Tender Committee to consider the bid of the petitioner-firm. Even as per the conditions of tender notice, after opening the technical bid and price bid, the tender opening authority or the evaluating authority can call the bidder for clarification of the statements and once the petitioner-firm clarified on the Statement-IV by furnishing other two ongoing works originally not mentioned, it shows that the petitioner-firm has no intention to mislead the Tender Committee. There is even nothing of false statement or fabricated document furnished that too even if those

two works included by the petitioner-firm with bid capacity that was also taken into consideration by the 3rd respondent, the decision of the Tender Committee in disqualifying the petitioner-firm under sole ground for the furnishing of incomplete information which has actually no effect on the bid capacity of the petitioner-firm is thereby arbitrary. It is also the contention that it is not only the disqualification of the petitioner-firm but also suspended from tendering works in the APEWIDC and that too, without issuing notice and opportunity, suspended for tendering works besides forfeiting 1% EMD by violation of the principles of natural justice, hence the order of disqualification, suspending from participation and forfeiting of 1% EMD is contrary to law, illegal and arbitrary and thereby to set aside the same and order of interim suspension of the proceedings and consequently direct the 2nd respondent to accept the bid and award the work and pass such other orders.

3. The learned Standing Counsel for the respondents represented by the Managing Director of 1st respondent Corporation filed counter affidavit on behalf of the respondents by denying the writ petition averments and with the contentions impugning the maintainability of the writ petition and justifying the action and disentitlement to any reliefs, that the Social Welfare Department of Govt. of Andhra Pradesh accorded administrative sanction for the construction of 5 A.P. Social Welfare Residential Schools on permanent basis under Rural Infrastructure Development vide G.O.Ms. No.22, Social Welfare (RS2), Department, dt.20.02.2016 and the residential

School at B Mattam, Kadapa district is one among the 5. The Secretary of the Society requested the 1st respondent to instruct the Chief Engineer of respondent Corporation to call for tenders for construction of residential schools that shall be completed within 12 months vide letter dated 24.10.2016 of 4th respondent. Consequently the 4th respondent invited tenders with an ECV of Rs.15,69,38,030/- dt.05.11.2016 through e-procurement, whereunder 5 tenders were received and the petitioner-firm is one of such bidders. As per the technical bid evaluation, 3 bidders were qualified including the petitioner-firm from technical bids opened on 30.11.2016 and the price bids opened on 09.12.2016. The 4th respondent evaluated the tenders received to the subject work and recommended the petitioner-firm as qualified and the matter placed before the Tender Committee(2nd respondent) which met on 04.01.2017 and while the matter is under process, certain firms have participated in the tenders to the subject work, represented to the 3rd respondent stating that NIC conditions were not followed while declaring the successful tenderer who have not qualified saying without verification of NIT conditions the officers opened the tenders and declared the petitioner-firm as if successful tenderer and thereby the tenders for work has to be cancelled and re-tenders to be called for by following the procedure. It is pursuant to the said representation received by the 3rd respondent, the 3rd respondent referred to the 4th respondent for a detailed report by memo dated 17.12.2016 and the matter placed before the 2nd respondent for consideration with the information received on 04.01.2017, there the 2nd respondent-Tender

Committee directed the R.1-Corporation to verify the complaint with concerned executive agency/bidder and to place before the Committee on 11.01.2017, thereafter the 3rd respondent issued letters to all bidders L.1 to L.3 which include the petitioner-firm on 04.01.2017 requesting to attend office of the Corporation with concerned documents in person on 06.01.2017 and they attended the 3rd respondent but not submitted/ disclosed about the particulars with regard to works on hand. It is therefrom on verification of the complaint with concerned Department, the 4th respondent submitted in his report that the petitioner-firm has not shown the works on hand in Statement-IV of the tender conditions and the allegation made by L.2-firm in this regard is genuine and correct vide letter, dt. 06.12.2017 and the matter when placed before the Tender Committee-R.2 on 11.01.2017, the Committee, after examining the work-wise details observed that all the three bidders furnished incomplete information by suppressing works on hand in Statement-IV of the tender document in their bids and the bidder should submit the works invariably as specified in the tender schedule with necessary conditions failing which tender can be treated as incomplete and liable to be summarily rejected. Thus Tender Committee in its meeting held on 11.01.2017, after due examination, decided all the 3 bidders L.1(Petitioner-firm) to L.3 treated disqualified and forfeited the EMD and suspended them from tendering the works in the APEWIDC upto 31.03.2017 and directed the R.1-Corporation to recall the tenders for the work through short tenders. Keeping in view of the Tender Committee minutes, the 1st respondent-Corporation issued

orders directing the 4th respondent to take further action in terms of the decision of the Tender Committee, dt.23.01.2017 and in turn R.4 intimated to the petitioner-firm and the other two bidders and requested the bank authorities concerned to release the bank guarantee submitted by them to the Corporation account by letter, dt. 24.01.2017. It is the further contention in the counter affidavit that to qualify for consideration of award of the contract, the tenderer should fulfill the qualification information listed at page-237 of the bid document, signed by the petitioner-firm, wherein point No.17 referred to statement of existing commitments in ongoing Government works along with supporting experience certificates as in Statement-IV, the petitioner-firm furnished incomplete information by suppressing certain work details on hand which is very clear that it willfully breached the tender conditions and is liable for disqualification in terms of self-declaration given by the petitioner-firm automatically. The petitioner-firm and the other two bidders have not declared the complete list of works on hand and thereby once failed to abide by the tender conditions even they quoted bid price the lowest, not entitled to be considered. It is thereby disqualified the petitioner-firm, forfeiting the EMD and suspending to participate in tendering the works up to 31.03.2017 not only the petitioner-firm and other two bidders also and the contrary averments are untrue and unsustainable as it is from the complaint received against the petitioner-firm and on verification and finding the suppression of the material, the action is taken by rejection of the tenders among other bonafides since the petitioner-firm concealed

the facts and submitted incomplete information and thereby not fulfilled the tender conditions and suffered disqualification therefrom and the action is since genuine and proper and no way arbitrary and illegal and no way questionable. It is also the further averment that the tender conditions can be classified into two categories one is essential conditions on eligibility and the other is mere ancillary and subsidiary and in case of non-compliance of essential conditions of eligibility, it is an automatic disqualification of the tenderer that too the tender essential conditions clause-11 says all details should be noted in the columns 1 to 8 of the statements which are mandatory and once the essential conditions are not fulfilled by suppression of information, the tender is liable to be rejected from the disqualification apart from action, hence the writ petition is liable to be dismissed. It is also the submission in the counter affidavit that there is no violation of principles of natural justice in view of the above factual matrix and the contrary averments are untrue and the tender was issued fixing time bound schedule to complete the residential school construction within 12 months as any delay in completion of the project will cause harm to the students community for lack of accommodation and further it is only to complete the process, the respondents are forced to call for short tender notice to complete the work in the larger interest of the student community and because of the interim orders on 31.01.2017 restraining the respondents in finalization of the short tender notice, dt.30.07.2017, the further progress could not be made and the interim order is liable to be vacated, otherwise it will cause loss to the state exchequer also

besides effecting career of the students and seeking to vacate the interim order and dismiss the writ petition.

4. Pursuant to the above, heard the learned counsel for the petitioner-firm and also the learned Standing Counsel for the respondents and perused the material on record.

5. Coming to answer several contentions:

(i). So far as e-tenders or short tenders concerned, auction by calling tenders is only one of the modes and not even the only mode nor it is a constitutional mandate. In this regard, the Constitution Bench of the Apex Court (5JB) in *Natural Resources Allocation*, in *Re, Special Reference No. 1 of 2012*¹ observed at para-199 that:.

“The policy of allocation of natural resources for public good can be defined by the legislature, as has been discussed in the foregoing paragraphs. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. In the aforesaid view of the matter, there can be no doubt about the conclusion recorded in the “main opinion” that auction which is just one of the several price recovery mechanisms, cannot be held to be the only constitutionally recognized method for alienation of natural resources. That should not be understood to mean, that it can never be a valid method for disposal of natural resources (refer to paragraphs 186 to 188 of my instant opinion).”

“In para 186, the earlier expression in Common cause supra was referred and relied. At para 188 observed that auction is not a constitutional mandate, in the nature of an absolute principle which has to be applied in all situations. The policy for allocation of natural resources may also be determined by the executive.”

(ii). So far as maintainability of the writ petition against the respondents concerned, the 1st respondent corporation is once an authority and otherwise any other authority within the meaning of State under Article 12 of the Constitution of India, the writ petition is maintainable if otherwise to entertain. Once the 1st respondent is

¹ (2012) 10 SCC 1

within the meaning of Article 12 of the Constitution, it is bound to follow the doctrine of fairness and good faith in their activities including in the process of tenders and finalization, needless to say equally there cannot be any monopoly status even to tenderers. In this regard, the Constitution Bench of the Apex Court (5JB) in *Zee Telefilms Ltd. Vs. Union of India*² (in WP No.(civil) 541 of 2004-SLP No.(civil) 20186 of 2004, dt.02/02/2005), held that- A monopoly status need not always be created by a law within the meaning of clauses 2 to 6 of Article 19 of the Constitution of India. The Board in view of enormity of powers is bound to follow "the doctrine of fairness and good faith in all its activities"-[See *Board of Control for Cricket, India & Anr. Vs. Netaji Cricket Club*³].

It is because the object of Part III of our Constitution is to curtail abuse of power and if by reason of the Board's activities, fairness in action is expected. The decisions rendered in different jurisdictions clearly suggest that a body like the Board would come within the purview of the expression "Other Authorities" contained in Article 12 of the Constitution of India. For that conclusion, the Apex Court referred its earlier expression of the Constitution Bench(6JB) in *Ajay Hasia Etc vs. Khalid Mujib Sehravardi*⁴, that vividly answered the description of "Authority and Other Authorities" contained in Article 12 of the Constitution of India that if the Society is an instrumentality or the agency of the State and the Central Governments, it is an "authority" and, therefore, the "State" within the meaning of Article 12 and it must follow that it is subject to the constitutional obligation under Article 14. The expression "other authorities", in Article 12 must be given an interpretation where

² (2005) 4 SCC 649

³ 2005 (1) SC 235

⁴ 1981 AIR 487

constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form.

(iii). So far as the right of tenderers against rejection of tender to impugn concerned, the Apex Court in one of the very recent expressions, in Haryana Urban Development Authority and others Vs. Orchid Infrastructure Developers Pvt. Ltd.⁵, by referring to the earlier expressions held from paras-27 to 32 that:

“27. This Court in the case of State of Uttar Pradesh v. Vijay Bahadur Singh⁶ has laid down that there is no obligation to accept the highest bid. The Government is entitled even to change its policy from time to time according to the demands of the time. It was observed thus:

"3. It appears to us that the High Court had clearly misdirected itself. The Conditions of Auction made it perfectly clear that the Government was under no obligation to accept the highest bid and that no rights accrued to the bidder merely because his bid happened to be the highest. Under Condition 10 it was expressly provided that the acceptance of bid at the time of auction was entirely provisional and was subject to ratification by the competent authority, namely, the State Government. Therefore, the Government had the right, for good and sufficient reason, we may say, not to accept the highest bid but even to prefer a tenderer other than the highest bidder.

The High Court was clearly in error in holding that the Government could not refuse to accept the highest bid except on the ground of inadequacy of the bid. Condition 10 does not so restrict the power of the Government not to accept the bid. There is no reason why the power vested in the Government to refuse to accept the highest bid should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. In fact, to give an antithetic illustration, the very enormity of a bid may make it suspect.

It may lead the Government to realise that no bona fide bidder could possibly offer such a bid if he meant to do honest business. Again the Government may change or refuse its policy from time to time and we see no reason why change of policy by the Government, subsequent to the auction but before its confirmation, may not be a sufficient justification for the refusal to accept the highest bid. It cannot be disputed that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest.

⁵ (2017) 4 SCC 243

⁶ (1982) 2 SCC 365

If the Government has the power to accept or not to accept the highest bid and if the Government has also the power to change its policy from time to time, it must follow that a change or revision of policy subsequent to the provisional acceptance of the bid but before its final acceptance is a sound enough reason for the Government's refusal to accept the highest bid at an auction..."

28. In *Laxmikant & Ors. v. Satyawar*⁷, this Court has laid down that in the absence of completed contract when the public auction had not culminated to its logical end before confirmation of the bid, no right accrued to the highest bidder. This Court has laid down as under:

"4. Apart from that the High Court overlooked the conditions of auction which had been notified and on basis of which the aforesaid public auction was held. Condition No. 3 clearly said that after the auction of the plot was over, the highest bidder had to remit 1/10 of the amount of the highest bid and the balance of the premium amount was to be remitted to the trust office within thirty days "from the date of the letter informing confirmation of the auction bid in the name of the person concerned". Admittedly, no such confirmation letter was issued to the respondent. Conditions Nos. 5, 6 and 7 are relevant:

"5. The acceptance of the highest bid shall depend on the Board of Trustees.

6. The Trust shall reserve to itself the right to reject the highest or any bid.

7. The person making the highest bid shall have no right to take back his bid. The decision of the Chairman of the Board of Trustees regarding acceptance or rejection of the bid shall be binding on the said person. Before taking the decision as above and informing the same to the individual concerned, if the said individual takes back his bid, the entire amount remitted as deposit towards the amount of bid shall be forfeited by the Trust." From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him.

The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the cases of *Trilochan Mishra v. State of Orissa*⁸, *State of Orissa v. Harinarayan Jaiswal*⁹, *Union of India v. Bhim Sen Walaiti Ram*¹⁰ and *State of U.P. v. Vijay Bahadur Singh*¹¹.

It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held. In the present case no right had accrued to the respondent either on the basis of the statutory provision under Rule

⁷ (1996) 4 SCC 208

⁸ (1971) 3 SCC 153

⁹ (1972) 2 SCC 36

¹⁰ (1969) 3 SCC 146

¹¹ (1982) 2 SCC 365

4(3) or under the conditions of the sale which had been notified before the public auction was held."

29. In *Meerut Development Authority v. Association of Management Studies*¹², this Court has laid down that a bidder has no right in the matter of bid except of fair treatment in the matter and cannot insist for further negotiation. The Authority has a right to reject the highest bid. This Court has laid down thus:

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

x x x x x

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

30. Reliance has been placed on behalf of the respondent on a decision of this Court in *M/s. Star Enterprises v. City and Industrial Development Corporation of Maharashtra Ltd.*¹³ The relied upon portion is extracted hereunder:

"10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers.

That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so."

No doubt about it that there have to be some reasons for rejection of the bid which are adequately present in the instant case as discussed hereinabove. The decision is of no help to espouse the cause of the plaintiff.

¹² (2009) 6 SCC 171

¹³ (1990) 3 SCC 280

31. Reliance has also been placed on a decision of this Court in *Kalu Ram Ahuja v. Delhi Development Authority*¹⁴ in which this Court has laid down that the highest bid was rejected without assigning any reason and there was no record showing that the decision was based on rational and tangible reasons and was in public interest. In the instant case we are satisfied from the order that the reports were considered and what were the reports, has been made clear in the reply filed by the respondents which has not been controverted. In the instant case merely the bid being above the reserve price, was not a safe criteria to accept the same.

32. In *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi*¹⁵, this Court has laid down that when a statutory functionary makes an order, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. This Court has held thus:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji AIR 1952 SC 16*: "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do."

Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

There is no dispute from the aforesaid proposition. However, in the instant case reasons have been mentioned in the rejection order and the nature of reports has also been sufficiently explained. Thus the rejection of seven different bids in the auction reflects that there was due application of mind by the concerned authority and rejection could not be said to be illegal, arbitrary or sans of reason.

6. Thus, the petitioner-firm merely because it is the L.1 among L.1 to L.3 as lowest cannot have any unfettered right before its finalization by acceptance or rejection of the bid as in the meantime it is only a conditional one at best and not a contract at all to enforce muchless to impugn by invoking writ jurisdiction in this regard, irrespective of the law is fairly settled including from the larger Bench expression of the Apex Court in *Bhamidipati Annapoorna Bhavani Vs.*

¹⁴ (2008) 10 SCC 696

¹⁵ (1978) 1 SCC 405

Land Acquisition Officer, Yeleru Reserve Project¹⁶ that there are no limitations on the discretionary power of the High Court under Article 226 of the Constitution of India, however, such power be exercised along recognized lines and not arbitrarily but judiciously and availability of alternative and efficacious or statutory remedy itself is not a bar in entertaining a writ petition in the given facts and circumstances.

7. In this Court, coming to the expression of the Apex Court in *State of Kerala & Others Vs. M.K. Jose*¹⁷, it is in relation to the facts on termination of a contract awarded to the respondent and forfeiting the security deposit of the petitioners before the Supreme Court, pursuant to the contract terms. There the work covered by the agreement entered dated 18.12.2010 to complete within 12 months as per the terms stipulated that could not be completed, even time is extended till 30.06.2012 and again till 31.03.2013 and despite notice and instructions failed to complete and thereby the petitioner-Government represented by Executive Engineer issued direction dated 14.02.2013 to stop the work also for deviations in the work and revised estimate sought to be done not sanctioned and pursuant to which the writ petition was maintained and the High Court disposed of by directing the Principal Secretary to take a decision on the proposal of revised estimate and the respondent-contractor later filed contempt petition against the Principal Secretary that was no doubt dropped and he later filed another writ petition where High Court

¹⁶ (2005) 2 ALT 786

¹⁷ 2015 (9) SCC 433=AIR 2015 SC 3405

directed the Principal Secretary, PWD to consider and pass appropriate orders on his representation made earlier. Therefrom the Apex Court observed that the facts supra show the attitude of the respondent contractor in filing representations and writ petitions not only two in 2012, but also 3 more in 2013 in obtaining orders and directions and in the scenario the contract was eventually terminated by PWD department of Kerala. That termination was ultimately assailed in writ petition No.22541 of 2013 for mandamus with a direction to take steps for measurement of work completed and learned Single Judge of Kerala High Court directed so and when assailed in writ appeal, the appellate Court on 17.12.2013 passed an order saying more than 50% of work remains to be completed from Ex.P15 order and the contractor's affidavit dated 15.03.2013 in one of the earlier writ petitions show as if 70% work completed and the submission as if 90% work completed are not correct. The Counsel for the Contractor then sought for appointment of an advocate commissioner to substantiate the contentions of 90% of the work completed and eventually the Division Bench appointed 2 advocates as commissioners to submit joint report and with direction to provide necessary assistance to the Commissioner by permitting them the power to call for record from any Office. The commissioners submitted their report. The Bench on the basis of final report held that the order of termination is erroneous from the competent authority opined more than 50% work remained to be done as a factual defect, since commissioners report shows otherwise, in quashing said order of termination with a direction to the

Superintending Engineer, PWD to consider and dispose of the matter afresh by affording opportunity to the contractor. Then the issue arisen before the Apex Court where in the factual scenario it is observed that this kind of orders in a contract matter by the High Court under Article 226 of Constitution of India are ill-conceived by converting the controversy into disturbing labyrinth, but encourage frivolous litigation. The High Court should not have been appointed an advocate commissioner for what precisely was the quantum of work done and whether there had been a breach by the contractor are required to be gone into by the appropriate legal forum for writ. Court ordinarily should not entertain a matter of breach of contract involving disputed questions of fact. The case on hand indicates the same as also held by one of the 2 Judge Bench expression of the Apex Court in State of Bihar Vs. Jain Plastics and Chemicals Limited¹⁸ that where disputed question of law involved and to adjudicate the same there is an alternative and efficacious remedy open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction. Though existence of alternative remedy does not affect the jurisdiction to issue writ under Article 226 of Constitution of India, but for seriously disputed questions or rival claims of the parties with regard to breach of contract raised are to be investigated and determined in the form of alternative efficacious remedy. The Apex Court referred other expressions including National Highways Authority of India Vs. Ganga Enterprises¹⁹, where

¹⁸ (2002) 1 SCC 216

¹⁹ (2003) 7 SCC 410

on the forfeiture of security deposit is without authority and questioned the breach of contract impugned in holding the dispute in the case purely involve terms of offer in the contract from the alternative remedies available effectively writ jurisdiction is not an appropriate remedy to adjudicate such contractual dispute, though there are cases where writ court was enforcing statutory right or duty. The other decision referred is *Gunwant Kaur Vs. Municipal Committee, Bhatinda*²⁰, that even on disputed facts exercise of writ jurisdiction is, it is true, discretionary but must be exercised on sound judicial principles. It also referred the other expression of the Apex Court in *ABL International Limited Vs. Export Credit Guarantee Corporation of India Limited*²¹, which refers to *Gunwant Kaur supra* and other earlier expression in *Century Spg. And Mfg. Co. Ltd. Vs. Ulhasnagar Municipal Council*²² that merely because one of the parties raised a dispute in regard to the facts of the case, the Court entertained writ petition under Article 226 is not always bound to relegate the parties to a suit or other remedy as held in *Gunwant Kaur supra* in a writ petition that if the facts require even oral evidence to be taken, in an appropriate case writ court has jurisdiction to entertain writ petition involving disputed questions of fact for there is no absolute bar for entertaining writ petition even if same arises out of contractual obligation and/or involves some disputed questions of facts. The other expression of the Apex Court

²⁰ (1969) 3 SCC 769

²¹ (2004) 3 SCC 553

²² (1970) 1 SCC 582

in Whirlpool Corporation Vs. Registrar of Trade Marks²³ says the plenary right of the High Court to issue a prerogative writ will not ordinarily be exercised to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable or for other valid and legitimate reasons, where the Court thinks it necessary to exercise the said jurisdiction including for any violation of Article 14 of the Constitution of India. It is by referring to observe in Para 18, more particularly, from ABL International supra among others held that each case depends upon own facts and public interest as held in Binny Limited Vs. Sadasivan²⁴ and G.B. Mahajan Vs. Jalgaon Municipal Council²⁵ and Noble Resources Limited Vs. State of Orissa and Another²⁶, where a public law element is involved judicial review is permissible by entertaining writ petition. It is having referred the law on the scope of Article 226 ultimately on the facts held that in the factual scenario several writ petitions filed by the Contractor tantamounts to abuse of process for which the High Court should not have been exercised the restraint by setting aside the order of the High Court and allowed the Civil Appeal of the State by upholding the termination of the contract.

8. In fact from perusal of the above expressions which referred several earlier expressions on the principle of law, it is crystal clear that even availability of efficacious alternative remedy itself is not a bar apart from even disputed questions of fact involved and further, in a case where a public law element is involved, judicial review is

²³ (1998) 8 SCC 1

²⁴ (2005) 6 SCC 657

²⁵ (1991) 3 SCC 91

²⁶ (2006) 10 SCC 236

also permissible in entertaining writ petition against impugned action of the authorities concerned. Thus, the decision relied has no help to say either availability of alternative remedy is a bar or disputed questions of fact involved is a bar in deciding as to whether the impugned order of the collector (CS) in suspending the Form-B license is arbitrary and unsustainable or not.

9. In fact referring to ABL International supra and others expressions right from the expression of the Apex Court in State of Orissa Vs. Madangopal Rungta²⁷, writ petition is maintainable. Apart from it, the larger bench of this Court in Bhamidipati Annaporrna Bhavani supra, referring to several expressions of the Apex Court including Whirlpool supra, ABL International supra among other held that there are no limits to exercise discretionary power under Article 226 of Constitution of India though such power to be exercised in recognized lines not arbitrarily, but judiciously and availability of alternative and efficacious remedy is not a bar in entertaining a writ petition, but for to decide depending upon facts and circumstances of each case and disputed questions of fact involved also not a bar to entertain a writ petition.

10. The constitution Bench of the Apex Court in Hari Vishnu Kamath Vs. Ahmad Ishaque²⁸ held on the scope of Article 226 of Constitution of India which confers on High Courts the power to issue appropriate writs to any person or authority within its territorial jurisdiction in terms of absolute and unequivocal and if the High

²⁷ AIR 1952 SC 12

²⁸ AIR 1955 SC 233

Courts are to recognize or admit any limitation on this power that must be founded on some provision in the Constitution itself and not otherwise. In *State of Madhya Pradesh Vs. Sanjay Nagayach*²⁹, the Apex Court held that alternative remedy of statutory appeal no way a bar when the action of the statutory authority is questioned as arbitrary and in violation of any provision of law or Rules. In *Sri Siddeshwara Cooperative Bank Limited Vs. Ikbali*³⁰, the Apex Court held that availability of efficacious alternative remedy is not an absolute bar, but for, self-restraint.

11. Even what the latest expression of the Apex Court in case of *Government Contract and Tenders, in Chhattisgarh State Industrial Development Corp. Ltd. Vs. Amar Infrastructure Ltd.*³¹ was observed that the tender floated in respect of up-gradation of infrastructure within the stipulation period and two bidders found qualified and opined by the evaluation committee of they fulfilled the requisite qualification and resolved unanimously to open financial bids of them where found M/s. Rayapur was ranked as L.1 when compared to M/s. Archons as L.2 and bid of Rayapur was accepted and work order was issued and M/s. Amar was disqualified for not found the requisite criteria as per the tender conditions and Amar complained saying Archons also not fulfilled the conditions for not having hot mix plant to consider as L.2 tender of technical bid and in saying there was manipulation at the instance of the Corporation in technical evaluation and thereby fresh bids have to be called for and not to

²⁹ 2013 (7) SCC 25

³⁰ 2013 (10) SCC 83

³¹ (2017) 5 SCC 387

allow the bid finalized of Rayapur. The Apex Court observed that the issue involved of improper finalization of technical bid of one of the two tenderers of whom one has no qualification is the impugment and in the public interest which is one of the considerations, in a fight between rival tenderers particularly to cater their business interests in seeking re-tendering, the Court has to loath to make interference under Articles 226 or 32 of the Constitution, irrespective of otherwise maintainability of writ. It is also observed that in the absence of malafide or arbitrariness to favour, no interference was warranted to interfere with the work under progress taken up by the other bidder. It is observed in this regard at para-32 that

“32. This Court in *Tejas Constructions and Infrastructure Pvt. Ltd. vs. Municipal Council, Sendhwa*³² has laid down that when the work is 60 per cent complete, Court should be slow to interfere as re-tendering would delay the project. In the absence of malafide or arbitrariness which is not made out in the instant case as 50 per cent of the work had been completed when the order was passed by the High Court, hence, no interference was warranted in the present case”.

12. From this now coming to the facts of the case on hand, the petitioner-firm is one of the three tenderers since all rejected, so far petitioner-firm concerned mainly the rejection of the tender is for suppression of the factum of two works in progress. Even as per the writ petition affidavit averments, it is not its case of it has no knowledge of the same or it is not concerned with the works or those belong to somebody but for saying while admitting in Statement-IV, it did not disclose as complained and found of two ongoing works for a

³² (2012) 6 SCC 464

sum of Rs.4,04,63,454/-, the version is by oversight. It is highly absurd to believe the same is outcome of oversight and the same cannot be a ground thereby for rejection. Its other contention of even taken the two ongoing works value, it is eligible otherwise is not a ground to consider and the other contention of the said condition in tender is onerous also not tenable as the free hand has to be given to the tendering authority in setting terms of tender and the judicial interference is minimal but for showing malafide and arbitrary and actuated by bias as held referring to several expressions of the Apex Court by this Court another Bench in Radha Konduri Vs. State of A.P.³³. Thus, the rejection is supported by reasons and well within the discretion and requires no interference by this writ Court. Further, coming to the subsequent short tender process adopted in view of the urgency of the works to complete the school building for the larger public interest of the student community which must be within a span of 12 months to complete from the process started in October/ November, 2016 and the writ petition filed is on 30.01.2017, the short tenders finalized and work not entrusted to the highest bidder therein from the interim direction to that effect of this Court, dt.31.01.2017 not in dispute and said highest bidder of short tender bid is not before the Court as co-respondent for not to pass any adverse order against as observed in Chhattisgarh State Industrial Development Corp. Ltd. Supra that in the absence of malafide or arbitrariness to favour the bidder of the short tender bid process, no interference is warranted of the work to be taken up by the other

³³ (2017) 3 ALD 486

non-party bidder, no doubt, there for non-interference 50% of the work was completed and here the bid is not even finalized and the finalization itself is subject to result of the present writ petition. Further, on 20.04.2017 petition in W.P.M.P.No.17767 of 2017 was filed by M/s.Sri Krishnarjuna Constructions Firm represented by its Managing Partner to come on record as R.5 saying the Department after e-tender notification process finalized by rejection of the three tenderers, issued short tender notice inviting e-procurement in respect of same work covered by the original tender notification, dt. 05.11.2016 wherein the proposed party as R.5 among two others by name K.M.V.Projects Ltd. And Chabra Associates submitted tenders and the bids were opened and because of the interim direction by this Court in this Writ Petition of not to finalize the e-procurement short tenders, same is stalled and as the firm is also interested in this lis to come on record as R.5 being adversely effected otherwise by virtue of the writ petition, sought for impleadment. This Court not chosen to consider the impleadment by extending the area of the lis particularly to decide any dispute inter se also between respondents and with the proposed party and the petitioner-firm otherwise, that too, the proposed R.5 as non-party bidder that to be finalized is subject to result if any shall not have any unfettered right of accrual of the bid only its favour for acceptance, that too, for there is no as on date any concluded contract much less further commencement of work but for only in the process of application and not even finalized.

13. No doubt, the lis covered by the reliefs in the writ is not the only issue involved of rejecting the lowest tender of the petitioner-

firm for suppression of the factum of two ongoing works of it(firm). It is because the petitioner-firm also impugns the suspending it from tendering till 31.03.2017 which period no doubt already expired by now and against forfeiting of 1%EMD amount.

14. So far as the right of tenderer against suspending him from tendering till 31.03.2017 (which is nothing but not permitting though calling by the petitioner-firm as a blacklisting for a span) which period no doubt already expired by now but for to say that indirectly prevented the petitioner-firm to participate in the short tender process taken up subsequently and against forfeiting of 1% EMD amount concerned, on the concept of blacklisting the Apex Court in *M/s Kulja Industries Limited Vs. Chief Gen. Manager W.T. Proj. BSNL*, in CA No.8944 of 2013 (SLP(C)No.20716 of 2011) held on 04.10.2013 particularly at paras 17 to 19 that:

17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because 'blacklisting' simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power

and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of West Bengal³⁴ where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity.

18. Subsequent decisions of this Court in M/s Southern Painters vs. Fertilizers & Chemicals Travancore Ltd.³⁵; Patel Engineering Ltd. Union of India³⁶; B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.³⁷; Joseph Vilangandan vs. The Executive Engineer, (PWD) Ernakulam³⁸ among others have followed the ratio of that decision and applied the principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer *res integra*. The decisions of this Court in Radha Krishna Agarwal vs. State of Bihar³⁹; E.P. Royappa v. State of Tamil Nadu⁴⁰; Maneka Gandhi v. Union of India⁴¹; Ajay Hasia supra; R.D. Shetty vs. International Airport Authority of India⁴² and Dwarkadas Marfatia and sons vs. Board of Trustees of the Port of Bombay⁴³ have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a Writ Court exercising powers under Article 226 or Article 32 of the Constitution. It is also well settled that even though the right of the writ petitioner-firm is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and

³⁴ (1975) 1 SCC 70

³⁵ AIR 1994 SC 1277

³⁶ (2012) 11 SCC 257

³⁷ (2006) 11 SCC 548

³⁸ (1978) 3 SCC 36

³⁹ (1977) 3 SCC 457

⁴⁰ (1974) 4 SCC 3

⁴¹ (1978) 1 SCC 248

⁴² (1979) 3 SCC 489

⁴³ (1989) 3 SCC 751

proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in *M/s Mahabir Auto Stores vs. Indian Oil Corporation Ltd.*⁴⁴ should, in our view, suffice:

“11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radha Krishna Agarwal v. State of Bihar*⁴⁵..... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable..... It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.”

⁴⁴ (1990) 3 SCC 752

⁴⁵ [1977] 3 SCR 249

Thus, it is the power of the authorities concerned if at all to blacklist a tenderer or a contractor by passing an order supporting by reasons after enquiry and by affording opportunity to show cause by mentioning clearly in the show cause notice the proposed action, so as to meet though personal hearing is not a mandatory one thereafter before taking action, as a part of meeting the principle of natural justice unless it is specifically excluded by mentioning in the terms of giving of show cause notice and opportunity to explain for taking action; though rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights but for the aim is to secure justice and to prevent miscarriage of justice.

In Chairman, Board of Mining Examination v. Ramjee⁴⁶, the Apex Court held that

“Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt –that is the conscience of the matter.... We cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept of reasonable opportunity.”

Further in this regard, the Apex Court in Gorkha Security Services Vs. Govt. (NCT of Delhi)⁴⁷ held before blacklisting a tenderer/ contractor from the necessity of serving show cause notice as a requisite of the Principles of Natural Justice that way back in the year 1975, this court in the case of M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal⁴⁸, 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

⁴⁶ 1977 (2) SCC 256

⁴⁷ (2014) 9 SCC 105

⁴⁸ (1975) 1 SCC 70

person. This is clear from the reading of Para Nos. 12 and 20 of the said judgment. Necessitating this requirement, the court observed thus:

“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”.

18. Again, in *Raghunath Thakur v. State of Bihar*⁴⁹ the aforesaid principle was reiterated in the following manner:

“4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically

⁴⁹ (1989) 1 SCC 229

of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons there for. We, however, make it quite clear that we are not expressing any opinion on the correctness of otherwise of the allegations made against the appellant. The appeal is thus disposed of."

19. Recently, in the case of Patel Engineering Ltd. v. Union of India⁵⁰ speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner:

"13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Ltd. supra as under:

"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."

14. The nature of the authority of the State to blacklist the persons was considered by this Court ----- Though nobody has any right to compel the State to enter into a contract, everybody has a

⁵⁰ (2012) 11 SCC 257

right to be treated equally when the State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. -----

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 and 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 Engineering (supra).

21.....

22.To put it otherwise, we are of the opinion that in order to fulfill the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/ action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

we may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

23 to 28.....

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.

30) We are conscious of the following words of wisdom expressed by this Court through the pen of Justice Krishna Iyer in case of Chairman, Board of Mining Examination *supra* in paras-1, 13 & 14:

“1. If the jurisprudence of remedies were understood and applied from the perspective of social efficaciousness, the problem raised in this appeal would not have ended the erroneous way it did in the High Court. Judges must never forget that every law has a social purpose and engineering process without appreciating which justice to the law cannot be done.

13.Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt –that is the conscience of the matter.

14..... We cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept of reasonable opportunity.”

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.

The prejudice argument.

32. It was sought to be argued-----For this proposition he referred to the judgment of this Court in *Haryana Financial Corporation and Anr. v. Kailash Chandra Ahuja*⁵¹ (paras-21, 31, 36 & 44).

“21. From the ratio laid down in *B. Karunakar*¹ it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such

⁵¹ (2008) 9 SCC 31

inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not [pic] ipso facto result in the proceedings being declared null and void and the order of punishment *nonest and ineffective*. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

31. At the same time, however, effect of violation of the rule of *audi alteram partem* has to be considered.....

36. The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non- observance had prejudicially affected the applicant.

44. From the aforesaid decisions, it is clear thatwhether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

33) When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned ASG. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show cause notice has not caused any prejudice to the appellant. Moreover, had the action of black listing being specifically proposed in the show cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show cause notice has not caused any prejudice to the appellant.

This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.

34) For the aforesaid reasons, we are of the view that the impugned judgment of the High Court does not decide the issue in correct prospective. 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”.

15. The decision of another Bench of this Court in *Techno Industries Vs. IOCL, Hyderabad*⁵², is even reiteration of the principle laid down in the expressions supra of the Apex Court and that were followed by this Court earlier in *A.Ramalingeshwar Reddy Vs. VC & MD of APSCS Ltd.*⁵³ and *ABL International Limited Vs. ECGCOI Ltd.*⁵⁴ on the concept of blacklisting and maintainability of the writ petition.

16. No doubt, as submitted by the learned Standing Counsel for respondents, each case depends on its own facts and in the case on hand, the respondents deliberately suppressed the information of two ongoing works which is mandatory, that disentitled to participate including for future participation in suspending the participation for the limited period and thereby the short tender process in vogue

⁵² (2015)1 ALT 720

⁵³ (2014) 1 ALT 299

⁵⁴ (2004) 3 SCC 553

cannot be interdicted and there are no violation of principles of natural justice in the case on hand in the factual scenario and the principles laid down in the expressions have no application to say any violation of principles of natural justice in non-giving of any show cause notice inviting reply and its consideration before passing the order as the very order is from the suppression of the material facts. For that the learned counsel submits that a decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. It is also a trite law that a point not raised before a Court would not be an authority on the said question. It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used. He relied in this regard, the expressions in Punjab National Bank vs. R.L. Vaid and Others⁵⁵; State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others⁵⁶ and A-One Granites v. State of U.P. and Others⁵⁷ and of the Court of Appeal in Lancaster Motor Co. (London)

⁵⁵ (2004) 7 SCC 698

⁵⁶ AIR 2004 SC 3894

⁵⁷ (2001) 3 SCC 537

Ltd. v. Bremth Ltd.⁵⁸; also State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another⁵⁹; Arnit Das Vs. State of Bihar⁶⁰ (Para 20); Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd.⁶¹; Cement Corporation of India Ltd. Vs. Purya and Others⁶²; Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate⁶³ and para-42 of Kalyan Chandra Sarkar vs. Rajesh Ranjan @Pappu Yadav⁶⁴.

17. In fact, so far as rejection of the tender of the petitioner-firm is concerned, that no way requires interference as concluded supra, so also if at all for forfeiture of 1% of EMD if governed by the terms of the tender document. However, for blacklisting of a civil death from what the expressions supra that requires opportunity of reply by meeting from show cause notice of the reason to take recourse for blacklisting, that is lacking in the case, though it is not a blacklisting practically for ever but for suspending to participate for future tenders in the works of the corporation, it is practically blacklisting for a tenure though it is a short tenure and that also requires the principles of natural justice to observe by show cause notice and inviting reply for responding to the prospective action before passing the order.

18. Having regard to the above and in the result, the Writ Petition is allowed in part as follows:-

⁵⁸ (1941) 1 KB 675

⁵⁹ (1991) 4 SCC 139

⁶⁰ (2000) 5 SCC 488

⁶¹ (2003) 2 SCC 111

⁶² (2004) 8 SCC 270

⁶³ JT 2005 (1) SC 303

⁶⁴ (2005) 1 SCALE 385

i). It is from the fact that before taking action for suspending the participation of the petitioner-firm for future tendering till 31.03.2017, leave about forfeiting of 1% of EMD as per the tender conditions if at all, for there is no show cause notice muchless to suspend his participation for the reason of the suppression of two ongoing works of him worth more than 4 crores in the form-IV Statement, same is no doubt deliberate as observed supra and even therefrom to meet the principles of natural justice and fair play, said action of suspending the participation of the petitioner-firm for future tendering till 31.03.2017, is set aside with a direction to the respondents to issue show cause notice fixing time of at least 4 days from date of its service/receipt for reply of petitioner-firm and to pass appropriate orders after considering reply given if any within the stipulated time.

ii). Needless to say the consequence of which is as if petitioner-firm participation is not suspended.

iii). As a corollary the petitioner-firm is to be permitted in the short tender process to apply by fixing time so to apply before its finalization with existing applicants/tenderers, unless orders passed in the meantime of expiry of time to apply to be fixed, if at all blacklisted to reject any such fresh application even in the finalization process of the short tenders.

iv). It is needless to say including any decision as to forfeiture of any amount out of EMD to arrive and enforce therefrom.

v). The W.P.M.P.No.17767 of 2017 is dismissed.

vi). There is no order as to costs.

Dr. B. SIVA SANKARA RAO, J

Dt.04.07.2017

Note: L.R.copy to be marked.
b/o vvr

Note: Issue copy immediately.
b/o vvr.

