

**IN THE HIGH COURT OF JUDICATURE AT PATNA
(FROM RESIDENTIAL OFFICE VIA VIDEO APPLICATION)
Civil Writ Jurisdiction Case No.6237 of 2020**

M/s Cobra Industrial Security Forces (I) Ltd. A company duly registered under the provision of the companies Act, 1956 having its registered office at Tiwary Mansion, Kamla Nagar, near Akash Trading Kokar P.S. Sadar, District Ranchi, Jharkhand and one of its Local Office At Samvedan, Ravikar Lane, Gujral Path, Keshari Nagar, P.S.- Shastrinagar, Patna. Through its Director Sunil Kumar Tiwary, Aged about 49 Yrs., Male, Son of Late Capt. S.N. Tiwary, P.S.- Sadar, Ranchi, Jharkhand.

... .. Petitioner/s

Versus

1. The State of Bihar through the Director, Department of Education, Government of Bihar, Vikas Bhavan, Bailey Road, Patna.
2. Bihar School Examination Board Main Building, Sinha Library Road, Patna, through its Chairman.
3. The Chairman Bihar School Examination Board, Main Building, Sinha Library Road, Patna.
4. The Secretary Bihar School Examination Board, Main Building, Sinha Library Road, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Sanjay Singh, Adv. Mr.Nirbhay Prashant, Adv.
For the BSEB	:	Mr.Lalit Kishore, Sr.Adv. Mr. Gyan Shankar, Adv.
For the State	:	Mr. Iqbal Asif Niazi, AC to GP-5
For the Intervenor	:	Mr. Raju Giri, Adv.

**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT
Date : 20-10-2020**

Petitioner in the present case has moved this court for the reliefs mentioned in paragraph 1 of the writ application which reads as under:

“a. For quashing the entire tender process with respect to the notice Inviting Tender No.PR-115/2020 and the Notice Inviting Tender No.PR-116/2020 (Annexure-6 Series) floated by the



Respondent No.2 i.e. Bihar School Examination Board, on 29.04.2020, inviting tender for “providing Security Services to Bihar School Examination Board, Patna” and for “providing Housekeeping Services to Bihar School Examination Board, Patna”, respectively as both the tenders has been floated by the Respondent no.2 without cancelling the earlier tenders notice No.PR490/2019 (Annexure-1), which was floated in the month of December 2019 for similar work i.e. “for Providing Housekeeping, security personnel and potable water supply with modern equipment and best quality manpower for building and campus at the office of Bihar State Examination Board (hereinafter referred as “BSEB”) and 10 regional office of BSEB, wherein the petitioner was declared as L1, but in spite of several request made by the petitioner, the agreement was not executed nor the tender process was cancelled nor any action was taken by the respondent no.2.

Further, even without cancelling the aforesaid Tender notice No. PR 490/2019 (Annexure-1), again similar tenders being Tender No. PR-104/2020 (Annexure-4) for providing Housekeeping Services and Tender No.105/2020 (Annexure-5) for providing Security Services were floated by the Respondent BSEB on 16.03.2020 in which the petitioner also participated, but without cancelling the same, the Respondent BSEB once again on 29.04.2020 issued fresh Tenders i.e. Notice Inviting Tender No.PR-115/2020 and the Notice Inviting Tender No.PR-116/2020 (Annexure-6 series) and thereafter in a quite illegal, arbitrary and malafide manner cancelled the aforesaid Tender Notice No.PR 490/2019 (Annexure-1) issued in the month of December, 2019, Tender No.PR-104/2020 (Annexure-4) and Tender No.105/2020 (Annexure-5) floated on 19.03.2020 were cancelled on 29.05.2020 (Annexure-7 series) i.e. after floating of tender dated 29.04.2020.

b. For a direction upon the concerned Respondent to immediately quash the intimation given by the respondent no.2 through e-mail on 29.05.2020 (Annexure-7 series) whereby and where under it was informed that the Tender Notice No.PR 490/2019



(Annexure-1) issued in the month of December, 2019 Tender No. PR-104/2020 (Annexure-4) and Tender No.105/2020 (Annexure-5) floated on 16.03.2020 has been cancelled, even without giving any opportunity of hearing to the petitioner.

c. For any other relief/reliefs for which the petitioner may be deemed fit and proper by this Hon'ble Court under the facts and circumstances of this case.”

Case of the petitioner

2. It is the case of the petitioner that being one of the premier security agency engaged in providing security service and other allied services to various organizations of the central government, state government, public sector undertakings and private organizations in various States of the country, it is also engaged in providing security services to the respondent Bihar School Examination Board (hereinafter referred to as the “BSEB”). The petitioner was able to get the tender for security services floated by the BSEB in the year 2017, it was for a period of three years and as the said period was going to expire the BSEB floated a similar e-tender on 21.12.2019.

3. The e-tender bearing no. PR-490/2019 (Annexure ‘1’) was floated inviting tender for providing house keeping, security personnel and portable water supply with modern equipment and best quality manpower for the building and in nine regional offices of the BSEB situated at Patna, Gaya, Bhagalpur, Muzaffarpur, Purnea, Kosi, Saran, Darbhanga and



Munger.

4. It is not in dispute that petitioner and two other tenderers qualified at the technical bid stage and thereafter their financial bids were opened. The petitioner claims that he was the lowest bidder (L1) but the BSEB did not declare the petitioner as the lowest bidder instead M/s Sarvesh Security Services Private Limited was declared L1. The petitioner had protested against the said decision of the BSEB as it was the contention of the petitioner that said M/s Sarvesh Security Services Pvt. Ltd. had quoted 2% as security service charge for the work mentioned at serial no. 2 i.e. F2 of Annexure '1' whereas the mandatory requirement as per the tender inviting notice was to quote more than 2.0%. It is not in dispute that for the work of carrying out the housekeeping services at specified working place the said Sarvesh service security pvt. Ltd. had quoted the lowest amount of Rs. 2,49,000/- as against the quote of this petitioner at Rs. 2,80,000/- per month and for the portable water supply services the said company had quoted rate of 25 per unit water jar/bottle of 20 liters.

5. Petitioner alleged that in terms of clause 14(III) of the tender (Annexure '1') the petitioner had quoted more than 2% i.e. 2.01% therefore the petitioner had complied with the



condition of tender and there was no reason as to why he was not declared L1. The grievance of the petitioner as contained in it's letter dated 17.01.2020 (Annexure '2') and the letter dated 24.01.2020 (Annexure '3') to look into the matter and declare the petitioner as L1 and allow the work to this petitioner remained unattended. The petitioner claims that on many occasion the respondents gave oral assurance to the petitioner that they will execute agreement with the petitioner.

6. It is then alleged that suddenly and to utter surprise of the petitioner the BSEB floated new tenders for similar works but separately on 16.03.2020 being Tender No. PR-104/2020 for providing housekeeping services and Tender No. 105/2020 for providing security services. Annexure '4' and '5' of the writ application are the photocopies of the two tenders dated 16.03.2020 which contains the terms and conditions thereof.

7. The last date for submission of tender no. 104/20 and 105/20 was 30.03.2020 and it is stated in paragraph '1' itself that the petitioner had also participated in the said tender but at this stage the grievance of the petitioner is that the tenders (Annexure '4' and '5') were issued on 16.03.2020 without cancelling the earlier tender no. 490/2019 (Annexure '1').

8. It is further stated that due to the complete



lockdown declared by the Government of India in order to combat the pandemic of Covid-19 the BSEB did not proceed with Tender No. 104/20, 105/20 and and 106/20, rather floated fresh tenders being Tender Notice No. PR-114/2020, PR-115/2020 and PR 116/2020 (Annexure '6' series) for the work of security services and Tender No. 116/2020 (Annexure 6/A) for housekeeping services. The Annexure '6' and '6/A' respectively with which this petitioner is concerned were placed for online sale from 29.04.2020 to 13.05.2020 (during lockdown 2) and the last date for submission of tender was 13.05.2020 upto 14:00 hours. Thereafter by a corrigendum dated 13.05.2020 (Annexure '7') the date for submission of bid and opening of technical bid were extended by one week i.e. till 20.05.2020.

9. The case of the petitioner is that this was a lockdown period and there was a total lockdown in the area in which the office of the petitioner is situated at Patna. It is stated that since the office of the petitioner is situated in the containment zone, the petitioner could not open it's office and requested the respondent to postpone the entire tender exercise till the lockdown is over. With the writ application, however, there is no reference of any email or any other communication and document in this regard.



10. The grievance of the petitioner is that the respondent authorities particularly respondent no. 3 has acted in a quite arbitrary and malafide manner, opened the financial bid of some of the bidders on 27.05.2020 and proceeded to finalize the tender process without cancelling the tender no. PR-490/2019 (Annexure '1'), Tender No. 104/2020 (Annexure '4') and Tender No. 105/2020 (Annexure '5').

11. It is, thus submitted that the tender notice as contained in Annexure '6' and '6/A' has been issued during Pandemic period and because of this haste shown by the respondents the very competition among the tenderers against the petitioner has been curtailed which is against public interest. Petitioner claims that firstly there was no reason to cancel the tenders (Annexure- 4 and 5) and there was no communication in this regard and secondly even if Annexure-4 and 5 were cancelled there was no 'public interest' involved in issuing fresh tenders (Annexure-6 series) on 29.04.2020 and then proceeding with the same despite the interim order dated 30.04.2020 passed by Hon'ble Full Bench of this Court in CWJC No.5633/2020 which has been extended from time to time. Had the petitioner been allowed to participate in the fresh tenders (hereinafter Annexure '6' and '6/A' or Annexure-6 series) after duly



cancelling the earlier tenders, the BSEB could have saved huge amount.

12. Mr. Sanjay Singh, learned counsel representing the petitioner has in the course of argument submitted that the petitioner was informed about cancellation of the earlier tender only vide communication dated 29.05.2020 as contained in Annexure '9' to the writ application which shows that prior to this communication the petitioner had no information with regard to cancellation of tender no. 490/2019, 104/2020 and 105/2020. It is submitted that by doing so the respondents have not acted fairly and the petitioner has not been given the level playing field to participate in the tenders. He has submitted that the whole action on the part of respondents were actuated with malafide intention to oust the petitioner and right from Tender No.PR-490/19 (Annexure-1) the respondents had shown their malafide intent. Learned counsel has submitted that the scope of judicial review in Tender Matters are well settled in the case of **ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553** and **Ramchandra Murarilal Bhattad & Ors. Vs. State of Maharashtra & Ors. (2007) 2 SCC 588** (Paragraph 49, 57 and 59).



Submission of 'BSEB'

13. On the other hand, Mr. Lalit Kishore, learned Senior Counsel representing the 'BSEB' submits that so far as Tender No. PR-490/2019 (Annexure '1') is concerned, the said tender was a composite tender for house keeping, security services as well as supply of portable water. A dispute arose with respect to the quote of security services charge and due to a mistake committed in the tender notice itself, the tenderers were asked to quote service charge for more than 2.00% whereas it should have been in the form that the bidders must not quote less than 2.00% which is the minimum service charge. The technical evaluation committee had accepted the rate of 2.00% service charge provided by M/s Sarvesh Security Services Pvt. Ltd. but the petitioner raised an issue out of that, therefore after proper consideration and upon looking to the objection raised by the petitioner the chairman of the 'BSEB' directed to cancel the Tender and invite fresh short Tender Notice for selection of agency separately for the three items. In view of the said direction of the Chairman the Tender Notice No. 490/2019 was cancelled and the same was notified vide Annexure 'B' to the counter affidavit on 10.02.2020 itself.

14. Learned Senior Counsel has after verification and



upon instruction from the respondent 'BSEB' confirms this court that the decision as contained in Annexure 'B' was put on the website of the BSEB on 10.02.2020 itself. It is also submitted that the petitioner never raised any objection and no challenge was made to the said cancellation of Tender which was duly notified on the website and the fact that the petitioner participated in the subsequent Tender no. 104/2020 (Annexure-4) and 105/2020 (Annexure-5) floated on 15.03.2020 further confirms that the petitioner was fully aware of the cancellation of earlier tender and he had accepted the floating of fresh tenders as contained in Annexure '4' and '5' respectively, thus, according to learned Senior Counsel firstly the petitioner had not acquired any right in respect of the first tender as there was no communication to the petitioner that his tender was declared L1 and secondly by participating in the subsequent tenders the petitioner had waived his right, if any, knowingly and with no unambiguous term, to raise any objection against the cancellation of first tender. Learned senior counsel has relied upon the judgment of Hon'ble Supreme Court in the case of **Jharkhand Vs.State of Jharkhand and others Vs. CWE-Soma Consortium reported in (2016) 14 SCC 172** (Paragraph 13, 14 & 15) to submit that the respondents had no obligation to



award the tender even to the lowest tenderer and they were well within their right to cancel the tender.

15. It is the submission of learned Senior Counsel for the 'BSEB' that the tenders as contained in Annexures '4' and '5' were proposed to be opened on 30.03.2020 but due to outbreak of Covid-19 and the lockdown imposed by the Home Ministry, Government of India from 25th March, 2020 to 14th April, 2020 the first corrigendum for opening of the aforesaid tenders was published on 28.03.2020 whereby the next date of opening of the tenders was fixed for 20.04.2020. It is then submitted that due to announcement of second lockdown from 15th April, 2020 to 3rd May, 2020 the aforesaid date of opening of tenders were postponed till further order. It is then stated in paragraph 17 of the counter affidavit that as the second lockdown was announced till 3rd May, 2020 it was directed to cancel all the aforesaid tenders and invite fresh tenders.

16. The date of such decision and direction by which all the tenders (Annexure '4' and '5' respectively) were cancelled is, however, not indicated in the counter affidavit and copy of such decision has not been brought on the record.

17. It is further stated that the three tenders bearing no. PR-114/2020, PR-115/2020 and PR-116/2020 were



published for portable water supply, for security services and for housekeeping services respectively and all the three tenders were to be opened on 13.05.2020. By issuing a corrigendum the date of opening of tenders was extended from 13.05.2020 to 20.05.2020. It is then submitted that the tenders were opened and so far as Tender No. PR-114/2020 is concerned, there was only a single bidder therefore the said Tender could not be finalized in want of competitive bid. Tender no. 115/2020 for security services was finalized on the basis of comparative statement of financial bid and on the basis of highest average annual turnover in favour of M/s Rakshak Securities Pvt. Ltd., T-5, Plot no. 12, Manish Plaza-III, Sector 10, Dwarka, New Delhi and the said successful tenderer has been recommended for awarding the work. The Tender no. 116/2020 for housekeeping has been finalized in favour of M/s Sarvesh Security Services Pvt. Ltd. who has been recommended for award of work.

18. As regards the contention of the petitioner that the tenders as contained in Annexure '6' and '6/A' were floated during the lockdown period when the petitioner was unable to open his office at Patna which was situated in a containment Zone, it is the stand of the respondent 'BSEB' that tender is not



published for any person in particular. It is published for general and in case someone is not in a position to submit a tender it cannot be termed illegal, arbitrary and malafide. It is submitted that it cannot be said to be a violation of fundamental right of a person if he is not in a position to perform an activity due to certain preventive order of the Government.

19. The respondent 'BSEB' has brought on record a fact that the petitioner was unable to participate in the tender (Annexure '6' and '6/A') because the organization of the petitioner was blacklisted by Bihar Rajya Beej Nigam Limited Patna for next three years and it was debarred to participate in any tender of Bihar Rajya Beej Nigam Limited vide order no. BN/STHA/VIVIDH-10/2019-767 dated 13.04.2020, a copy of which has been brought on the record as Annexure 'F'.

Rejoinder of the petitioner

20. By submitting a rejoinder to the counter affidavit petitioner has disputed the document as contained in Annexure 'B' to the counter affidavit and has submitted that it is a fabricated document as it neither contains any reference number nor any office order has been mentioned therein. Learned counsel for the petitioner has submitted that Annexure 'B' has been fabricated only after filing of the present writ application



for which a thorough investigation is required and this court may take judicial notice of the same. Learned counsel submits that if Annexure 'B' was notified earlier then there was no reason for issuing another notification/communication on 29.05.2020 after finalizing the tenders. According to learned counsel for the petitioner the floating of fresh tenders without cancelling the earlier one is not permissible. As regards the order of blacklisting passed by the Beej Nigam learned counsel submits that the same was challenged by the petitioner before this Hon'ble Court in CWJC No. 5636/2020 which has been heard and allowed by a learned coordinate Bench of this Court on 13.07.2020.

21. I.A. No. 1/2020 has also been filed on behalf of M/s Rakshak Securities Pvt. Ltd. in whose favour the security services work has been recommended by the 'BSEB'. It is the submission of the Intervenor that the petitioner company was blacklisted for three years by the Beej Nigam but this fact has not been mentioned in the writ application, and therefore, the petitioner has suppressed vital information from this court which has made the petitioner disentitled for the reliefs prayed in the writ application. Intervenor has further informed this court that on being called upon to deposit the performance



security by the Secretary of the 'BSEB', the petitioner company has submitted a bank guarantee of Rs.10 lacs as performance security and has requested the 'BESB' to execute the agreement.

Consideration

22. Having heard learned counsel for the parties and on perusal of the records, this court finds that the first grievance of the petitioner is that it was in fact L1 tenderer in the first tender (Annexure '1') but M/s Sarvesh Security Services Pvt. Ltd. was wrongly declared L1. In this regard, on the basis of the materials available on the record, this Court finds that at this stage this argument is not open to the petitioner inasmuch as the decision to cancel the tender (Annexure '1') was taken vide Annexure 'B' to the counter affidavit on 10.02.2020 and this Court has been confirmed on repeated query that the said decision was uploaded on the website of the 'BSEB' on 10.02.2020 itself.

23. Although the petitioner has contended that Annexure 'B' is a fabricated document and it has been manufactured after filing of the writ application, the fact that the petitioner has participated in the subsequent tenders bearing no. PR-104/2020 and 105/2020 floated on 15.03.2020/16.03.2020 without raising any protest would go against the petitioner and



the Court will come to a conclusion that even if by any stretch of imagination the petitioner had an opportunity to raise an objection against floating of the subsequent tenders without cancelling PR-490/2019 (Annexure '1') the petitioner was aware of the said right to raise objection but then the same was not raised and that right was waived. The petitioner chose to participate in the subsequent tenders. This is coupled with the admitted position that the petitioner was never communicated that he has been declared L1 in the first tender. In the case of Jharkhand Vs.State of Jharkhand and others Vs. CWE- Soma Consortium (supra) their Lordships of the Hon'ble Supreme Court discussed these aspects in paragraph 13, 14 and 15. The relevant part of these paragraphs are being reproduced hereunder:-

“13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide *Laxmikant v. Satyawar* [*Laxmikant v. Satyawar*, (1996) 4 SCC 208] , *Rajasthan Housing Board v. G.S. Investments* [*Rajasthan Housing Board v. G.S. Investments*, (2007) 1 SCC 477] and *U.P. Avas Evam Vikash Parishad v. Om Prakash Sharma* [*U.P. Avas Evam Vikas*



Parishad v. Om Prakash Sharma, (2013) 5 SCC 182 : (2013) 2 SCC (Civ) 737]).

14. The appellant State was well within its rights to reject the bid without assigning any reason thereof.....

15. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India.....”

24. For all these reasons the first argument raised on behalf of the petitioner would fail.

25. The next submission of learned counsel for the petitioner is that during pandemic period when the office of the petitioner was closed being situated in a containment zone at Patna, the respondent BSEB proceeded to float fresh tenders as contained in Annexure- ‘6’ and ‘6/A’ respectively without cancelling the tender nos.104 of 2020 and 105 of 2020 (Annexure-4 and 5 respectively).

26. In this regard so far as the pleadings available on the record in form of counter affidavit of the ‘BSEB’ is concerned, in paragraph ‘16’ it is stated that due to outbreak of covid-19 lockdown by way of corrigendum opening of the tenders no.104/2020, 105/2020 and 106/2020 was fixed for 20th April, 2020 but due to announcement of second lockdown from 15.04.2020 to 03.05.2020 the aforesaid date of opening of



tenders were postponed till further order. In paragraph '17' of the counter affidavit it is stated that as the second lockdown was announced on 03.05.2020 it was directed to cancel all the aforesaid tenders and invite fresh tenders. The order by which the cancellation of previous tenders were done has not been brought on record, though no specific reason is required to be provided by the 'BSEB' for taking such decision towards cancellation of tenders, in fact the reasons as it appears from the pleadings were that second lockdown was announced till 03.05.2020 so all the tenders were cancelled. Assuming for a moment that this is a valid reason, the logic and reasoning behind cancellation of previous tenders would be held reasonable one considering the impact of lockdown during the pandemic period between 15.04.2020 to 03.05.2020 and due to announcement of lockdown but in the same stroke of pen if it is stated in paragraph '17' that it was directed to cancel all the aforesaid tenders and at the same time invite fresh tenders, the reasoning behind issuing two opposite directions are not appealing to this Court. The Court would therefore go into this issue to find out whether the decision was a malafide decision as has been pleaded on behalf of the petitioner? Whether it satisfies the test of "Wednesbury unreasonableness."?



Scope of Judicial Review

27. In the case of **ABL International Ltd. & Anr vs Export Credit Guarantee Corporation of India Ltd and ors.** reported in **(2004)3 SCC 553**, the Hon'ble Apex Court while reaffirming its earlier views in the case of **K.N. Guruswamy Vs. State of Mysore (1955) 1 SCR 305** held in paragraphs 8, 9, 10, 11, 12, 13 and 14 as under :-

“8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

9. In our opinion this question is no more res integra and is settled by a large number of judicial pronouncements of this Court. In K.N. Guruswamy v. The State of Mysore (1955) 1 SCR 305 this Court held:

"The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else.... .

10. It is clear from the above observations of this Court in the said case though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy v. The State of Mysore and Ors. was followed subsequently by this Court in the case of D.F.O, v. Ram Sanahi Singh (1973) 3



SCC 864 wherein this Court held:

"By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy's case (supra), there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power." (Emphasis supplied)

11. In the case of Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd. (1983) 3 SCC 379 this Court following an earlier judgment in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 held:

The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporation Act falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226.

12. The learned counsel appearing for the first respondent however submitted that this Court has taken a different view in the case of LIC of India v. Escorts Ltd. (1986) 1 SCC 264 wherein this Court held:

"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public



law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder." (Emphasis supplied).

13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of Life Insurance Corporation of India (Supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be



available. The learned counsel then relied on another judgment of this Court in the case of State of U.P. v. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22 wherein this Court held:

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.

14. This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract that in that case because of an arbitration clause in the contract, the court refused to invoke the remedy under Article 226 of the Constitution. We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration unless of course both the parties to the dispute agree on another mode of dispute resolution. Since that is not the case in the instant appeal, the observations of this Court in the said case of Bridge & Roof



Co. (1996) 6 SCC 22 is of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable.”

28. In the case of **Verigamto Naveen Vs. Government of A.P. and others (2001) 8 SCC 344** the question which arose before the Hon’ble Apex Court was as to whether the relief sought for and granted by the High Court arises purely in the contractual field and, therefore, the High Court ought not to have exercised its power under Article 226 of the Constitution. While considering the said question their Lordships held in paragraph ‘21’ as under :-

“21. On the question that the relief as sought for and granted by the High Court arises purely in the contractual field and, therefore, the High Court ought not to have exercised its power under Article 226 of the Constitution placed very heavy reliance on the decision of the Andhra Pradesh High Court in *Y.S. Raja Reddy v. A.P. Mining Corpn. Ltd.* [(1988) 2 An LT 722] and the decisions of this Court in *Har Shankar v. Dy. Excise & Taxation Commr.* [(1975) 1 SCC 737], *Radhakrishna Agarwal v. State of Bihar* [(1977) 3 SCC 457 : AIR 1977 SC 1496], *Ramlal & Sons v. State of Rajasthan* [(1976) 1 SCC 112 : AIR 1976 SC 54], *Shiv Shankar Dal Mills v. State of Haryana* [(1980) 2 SCC 437 : AIR 1980 SC 1037], *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489 : AIR 1979 SC 1628] and *Basheshar Nath v. CIT* [AIR 1959 SC 149]. Though there is one set of cases rendered by this Court of the type arising in *Radhakrishna Agarwal case* [(1977) 3 SCC 457 : AIR 1977 SC 1496] much water has flown in the stream of judicial review in contractual field (emphasis supplied). In cases where the decision-making authority exceeded its statutory power or committed breach of rules or



principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in *Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] , *Mahabir Auto Stores v. Indian Oil Corpn.* [(1990) 3 SCC 752] and *Shrilekha Vidyarthi (Kumari) v. State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742 : AIR 1991 SC 537] Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field. Therefore, we do not think it would be appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected.”

29. In *Rishi Kiran Logistics v. Board of Trustees of Kandla Port and Ors.* (2015) 13 SCC 233, this Court held that a writ petition under Article 226, being a public law remedy, a “public law element” should be present on facts. In this connection paragraph 37 and 38 of the said judgment are reproduced hereinbelow.

“37.The questions before the Supreme Court in *Kisan Sahkari Chini Mills Ltd. case* [(2008) 12



SCC 500] were: (i) Whether the High Court was right in concluding/assuming that there was a valid contract? and (ii) Whether the High Court was justified in quashing the order of the Secretary (Sugar)? This Court answered the aforesaid questions in the negative and set aside the judgment of the High Court holding that:

“Ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. He would be entitled to the relief of specific performance, if the contract was capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a writ petition under Article 226 of the Constitution, is not available to seek damages for breach of contract or specific performance of contract. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked.”

38. It thus stands crystallised that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element.”

30. Similar view has been expressed by the Hon’ble Apex Court in *Joshi Technologies International Inc. v. Union of India and Ors.* (2015) 7 SCC 728 (paragraph 69.1).

31. The aforesaid decisions of the Hon’ble Apex Court have been taken note of while examining the grievance of the petitioner in the present writ application where in fact the petitioner is alleging violation of fair play in action by the



‘BSEB’ which is covered within the meaning of ‘Any other Authority’ under Article 12 of the Constitution of India. This Court while examining the grievance of the petitioner must be very careful to weigh conflicting public interests, and should intervene only when there is an overwhelming public interest in entertaining the writ petition. This proposition has been laid down by the Hon’ble Apex Court in the case of **Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors. (1999) 1 SCC 492 (paragraphs 11 to 13, 24 and 25)**. These principles have been reiterated in the case of **Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517 (paragraph 22)**. The Hon’ble Apex Court had an occasion to consider a challenge to award of a tender in the case of **Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 (Paragraph 23 and 24)**. Judgment in the case of **Tata Cellular v. Union of India (1994) 6 SCC 651 (paragraphs 70 and 71)** and **Rajasthan State Housing Board and Anr. v. G.S. Investments and Anr. (2007) 1 SCC 477 (paragraph 10)**.

32. Learned counsel for the petitioner has submitted that in the present case the petitioner had participated in the tenders (Annexure-4 and 5) and was looking for participation in the bid process but on the one hand the tenders in which the



petitioner had participated were cancelled citing the lockdown 2 announcement from 15.04.2020 to 03.05.2020 and this was done till further order but the respondent 'BSEB' proceeded to issue a fresh tender during the same lockdown 2 period as it would appear from Annexure-6 series that those were floated on 29.04.2020. The reasoning and rationale behind cancellation of earlier tenders and then issuance of fresh tenders are self-contradictory and smacks foul play in action. Learned counsel has pleaded that this action of the 'BSEB' has resulted in depriving the petitioner from getting considered for tenders (Annexures '4' and '5') and at the same time ousting the petitioner from participation in the fresh tenders (Annexure '6' series).

33. In the first blush the submission of petitioner attracts this Court, therefore, the contention of the petitioner is required to be examined, keeping in mind the backdrop of the intervening circumstances i.e. blacklisting of petitioner vide order dated 13.04.2020 (Annexure-F to the counter affidavit of BSEB). It is the stand of the BSEB that because of this blacklisting the petitioner did not participate in the tender as it was under order of debarment (paragraph 36 of the counter affidavit).



Blacklisting of the petitioner

34. It is an admitted fact that the petitioner was blacklisted on 13.04.2020 before start of lockdown-2 with effect from 15.04.2020 but unfortunately and to the dismay of this Court this fact has not been mentioned in the writ petition. The Court came to know this aspect of the matter from the counter affidavit of the 'BSEB' but again some more facts which have a bearing upon this matter have been traced by this Court from the website of the High Court. This Court finds that the petitioner had challenged the order of blacklisting vide CWJC No.5636/2020. The said writ application was filed during the lockdown period on 30.04.2020. The case was heard by a learned coordinate Bench of this Court on 04.05.2020 on the point of interim relief. The learned coordinate Bench considered the submissions of the parties and while granting time to the respondents to file their respective counter affidavits passed in interim order in the following terms:-

“In view of the peculiar circumstances prevailing on account of lock-down due to COVID-19 pandemic, I deem it fit and proper to direct that the operation of the impugned order dated 13.04.2020, as far as blacklisting of the petitioner firm is concerned, shall remain restricted to the State of Bihar till the next date of hearing. It is further directed that in case the Bihar Rajya Beej Nigam Limited has not encashed the bank guarantee/EMD, though stated to have been forfeited, the same shall not be en-



cashed till the next date of hearing, however, the writ petitioner shall be obliged to keep the bank guarantee in question, alive....”

35. This Court reiterates that the petitioner completely concealed this fact and in the counter affidavit also those specific details are not there but then it is a matter of record and the same is available on the website of the High Court.

36. It is, therefore, crystal clear that on 04.05.2020, the petitioner was unable to get a complete stay of the impugned order, rather the learned coordinate Bench made it clear that the impugned order shall remain restricted to the State of Bihar.

37. In the whole writ petition there is no statement that the petitioner was not aware of floating of the fresh tenders (Annexure-6 series). The statement made in paragraph ‘22’ of the writ petition shows that the petitioner had requested the ‘BSEB’ to postpone the tenders. Though, there is no documentary proof attached with the writ petition to support this statement, one thing is clear to this Court that the petitioner having been blacklisted on 13.04.2020 itself knew very well that it was not eligible to participate in the tenders (Annexure-6 series). The tender date was in fact postponed till 20.05.2020 but having failed to get complete stay on the order of blacklisting the petitioner was unable to participate in the tender.

38. The aforementioned intervening fact i.e. the



blacklisting aspect would take away the very sanctity of the submission made on behalf of the petitioner that because of its office being situated in containment zone at Patna it was unable to participate in the tenders (Annexure-6 series).

39. The fact that the petitioner was able to challenge the order of blacklisting immediately by filing writ petition on 30.04.2020 through same learned advocate and actively pursued his remedy before this Court shows that there was no hindrance to the petitioner in challenging the fresh tenders floated on 29.04.2020 if he was aggrieved by that. As stated above it is not the case of the petitioner that it was not aware of the fresh tenders. This Court can easily, therefore find as to what were going on with the petitioner during that period. The petitioner was in touch with its lawyer(s) and was aware of the legal position that unless it gets rid of the order of blacklisting it would not be possible for him to participate in the tenders, there was no ground available to the petitioner to challenge the fresh tenders. It is only when the fresh tenders were finalized after opening of the financial bids on 27.05.2020 and the recommendations were already made by the tenders committee in favour of the successful bidders, the petitioner filed the present writ petition on 18.06.2020. In the writ petition it was



completely concealed/suppressed that the petitioner was blacklisted on 13.04.2020 and that in fact stay order was operating against the petitioner in respect of the State of Bihar as on the date of filing of the writ application.

40. A plea has been raised that the petitioner could not participate in tenders (Annexure-6 series) because it's office was situated in containment zone at Patna. It is a matter of record that the Registered office of the petitioner is at Ranchi. The Registered office is the principal place of business where all records are kept. The plea of the petitioner for not participating in fresh tenders is thus not a bonafide plea.

41. It has rightly been submitted before this Court that it amounts to suppression of vital information from the Hon'ble Court which has a bearing upon the writ application. The observations of the Hon'ble Supreme Court in the case of **Prestige Lights Ltd. vs. State Bank of India (2007) 8 SCC 449** (paragraph 33) on which reliance has been placed on behalf of the intervenor is quoted hereunder for a ready reference:-

“33. It is thus clear that though the appellant Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a court of law is also a court of equity. It is, therefore, of utmost necessity that when a party approaches a High



Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the writ court may refuse to entertain the petition and dismiss it without entering into merits of the matter.”

Plea of Malafide

42. Despite the aforesaid fact situation, the petitioner has pleaded ‘malafide’ therefore, this Court would now deal with the same. In the case of **Sate of Bihar & Anr. vs. P.P. Sharma, IAS and another** reported in **1992 Suppl. 1 SC 222** their Lordships of the Hon’ble Apex Court dealt with the plea of malafide.

43. Again in the case of **Prabodh Sagar Vs. Punjab State Electricity Board and Ors.** reported in **(2000) 5 SCC 630**; **HMT Ltd. vs. Mudappa** **(2007) 9 SCC 768** and **State of A.P.& Ors. vs. Goverdhanlal Pitti** **(2003) 4 SCC 739** their Lordships of the Hon’ble Apex Court dealt with the concept of ‘legal malice’ or ‘malice in law’ and recently in the case of **Rajneesh Khajuria Vs. Wockhardt Ltd. & Anr.** reported in **AIR 2020 SC 629** while referring to the aforementioned judgments the Hon’ble Supreme Court considered the plea of malafide in paragraph 16, 17 and 18 which are being reproduced hereinbelow:-



“16. The act of transfer can be unfair labour practice if the transfer is actuated by mala fide. The allegations of mala fides have two facets — one malice in law and the other being malice in fact. The challenge to the transfer is based upon malice in fact as it is an action taken by the employer on account of two officers present in Conference. In a judgment in *State of Bihar v. P.P. Sharma* [*State of Bihar v. P.P. Sharma*, 1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192] , this Court held that mala fide means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The plea of mala fides involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power. As far as second aspect is concerned, there is a power of transfer vested in the employer in terms of letter of appointment. Even in terms of the provisions of the Act, the transfer by itself cannot be said to be an act of unfair labour practice unless it is actuated by mala fides. Therefore, to sustain a plea of mala fides, there has to be an element of personal bias or an oblique motive. This Court held as under:

“50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fides involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements



and conditions of a valid exercise of administrative power.

51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.

59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. Malice in law is not established from the omission to consider some documents said to be relevant to the accused. Equally reporting the commission of a crime to the Station House Officer, cannot be held to be a colourable exercise of power with bad faith or fraud on power. It may be honest and bona fide exercise of power. There are no grounds made out or shown to us that the first information report was not lodged in good faith. *State of Haryana v. Bhajan Lal* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] is an authority for the proposition that existence of deep seated political vendetta is not a ground to quash the FIR. Therein despite the attempt by the respondent to prove by affidavit evidence corroborated by documents of the mala fides and even on facts as alleged no offence was committed, this Court declined to go into those allegations and relegated the dispute for investigation. Unhesitatingly, I hold that the findings of the High Court [*Prem Prakash Sharma v. State of Bihar*, 1990 SCC OnLine Pat 105 : (1990) 2 PLJR 404 (2)] that FIR



gets vitiated by the mala fides of the Administrator and the charge-sheets are the results of the mala fides of the informant or investigator, to say the least, is fantastic and obvious gross error of law.”

17. In another judgment in *Prabodh Sagar v. Punjab SEB* [*Prabodh Sagar v. Punjab SEB*, (2000) 5 SCC 630 : 2000 SCC (L&S) 731] , it was held by this Court that the mere use of the expression “mala fide” would not by itself make the petition entertainable. The Court held as under:

“13. ... Incidentally, be it noted that the expression “mala fide” is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner has become more of a liability than an asset and in the event of there being such a situation vis-à-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (*sic* compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is none. Mere user of the words “mala fide” by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion i.e. exactly what the High Court has done and that is the reason why the narration has been noted in this



judgment in extenso. ...”

18. In a judgment in *HMT Ltd. v. Mudappa* [*HMT Ltd. v. Mudappa*, (2007) 9 SCC 768], quoting from earlier judgment of this Court in *State of A.P. v. Goverdhanlal Pitti* [*State of A.P. v. Goverdhanlal Pitti*, (2003) 4 SCC 739], it was held that “legal malice” or “malice in law” means “something done without lawful excuse”. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. The Court held as under:

“24. The Court also explained the concept of legal mala fides. By referring to *Words and Phrases Legally Defined*, 3rd Edn., London Butterworths, 1989 the Court stated: (*Goverdhanlal case* [*State of A.P. v. Goverdhanlal Pitti*, (2003) 4 SCC 739]

‘12. The legal meaning of malice is “ill will or spite towards a party and any indirect or improper motive in taking an action”. This is sometimes described as “malice in fact”. “Legal malice” or “malice in law” means “something done without lawful excuse”. In other words, “it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others.””

It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill will or spite on the part of the State. It could only be malice in law i.e. legal mala fides. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide.”

44. In the present facts, it is not in dispute that the



tenders (Annexure-4 and 5) were to remain open till 30.03.2020 but before that complete lockdown was declared on 23.03.2020, as a result thereof, a corrigendum was issued on 28.03.2020 extending the date of submission of bid up to 20.04.2020 but when the on-going lockdown-2 was going on the BSEB thought it just and proper to cancel the tenders (Annexure-4 and 5). Although, no date of cancellation is mentioned in the counter affidavit, this Court finds that in the present case the fact that no date or no document showing cancellation being on record is not relevant and significant. The floating of fresh tenders on 29.04.2020 itself was enough to understand that earlier tenders process have been cancelled. The petitioner had also come to know about the tenders floated on 29.04.2020 is an admitted fact. It is not the case of the petitioner that tenders were floated on 29.04.2020 knowingly and deliberately to get the petitioner out of competition on account of its blacklisting and rightly not taken because any such plea could have only been misconceived. Thus, in the opinion of this Court, the plea of 'malafide' is not proved from the pleadings on the record. No inference of malafide may be drawn by this Court in the present case.

Reasonableness in decision making

45. This Court would, however, record that the



‘BSEB’ had no reason to act in haste during lockdown-2 particularly so when the tenders (Annexure-4 and 5) were not being acted upon during extended period up to 20.04.2020.

46. The ‘BSEB’ could have waited for few more weeks, nonetheless this action of the ‘BSEB’ in going for fresh tenders cannot be held suffering from principle of “wednesbury unreasonableness”. At this stage petitioner is unable to demonstrate that in a hurry through fresh tenders either the competition was curtailed or that ‘BSEB’ has awarded the contract on a highly inflated and exaggerated price and/or that award has been given to a favoured one. With the counter affidavit of ‘BSEB’ proceeding of tender committee in respect of the security services only has been brought on record as Annexure ‘D’. This Court is, therefore, not going into that matter. It is always open to the competent authority or agency to look into financial aspects if occasion so arises.

47. The petitioner having been blacklisted on 13.04.2020, in view of the order dated 04.05.2020 passed in CWJC No.5636/2020 wherein the effect of the order of blacklisting was restricted to the territory of the State of Bihar, knew it very well that it would not be possible for the petitioner to participate in the fresh tenders, thus no plea of prejudice may



be raised that too keeping in mind that in contractual matters the plea of prejudice to an individual cannot be entertained unless it is shown to the Court that such prejudice has been caused by changing the level playing field or that it is case of malafide or that the action of the State or its instrumentalities was such that it was intended to favour someone.

Making out of a legal point not enough

48. It is well settled that this Court sitting in its writ jurisdiction under Article 226 of the Constitution of India need not interfere with the decision of the State only on making out a legal point. In the case of **Larsen and Toubro Ltd. Vs. SJVN Thermal (P) Ltd.** reported in **2019 (3) BLJ 636**, this very Court had occasion to trace the case laws on the subject. Paragraph 83, 84, 85 and 86 from the said judgment are quoted hereunder for a ready reference:-

“83. In the case of Air India Ltd. Vs. Cochin International Airport Ltd. And Others reported in (2000) 2 SCC 617 while relying upon the judgment in the case of Tata Cellular (supra) and **M/s Raunaq International Ltd.** (supra), the Hon’ble Supreme Court was considering the challenge to the judgment of the Hon’ble Division Bench of Kerala High Court arising out of a dispute raised by Cambatta Aviation Ltd. against the action of Cochin International Airport Ltd. (in short ‘CIAL’) in the matter of award of contract for ground-handling



services at the new Cochin Airport at Nedumbassery to AIR India Ltd. The learned single Judge had dismissed the writ application finding no arbitrariness or illegality in the award of contract but the Hon'ble Division Bench held that the action was violative of the principles of natural justice, arbitrary and illegal. The allegation was that 'CIAL' had not acted fairly and impartially as it had carried on negotiations with Air India behind the back of Cambatta and no opportunity was given to Cambatta to give a better offer. In the said case in paragraph '7' their Lordships held as under:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in [Ramana Dayaram Shetty v. International Airport Authority of India](#) (1979) 3 SCC 489, [Fertilizer Corporation Kamgar Union \(Regd.\) v. Union of India](#) (1981) 1 SCC 568 ; [CCCE v. Dunlop India Ltd.](#) (1985) 1 SCC 260; 1985 SCC (Tax) 75, [Tata Cellular v. Union of India](#) (1994) 6 SCC 651; [Ramniklal N. Bhutta v. State of Maharashtra](#) (1997) 1 SCC 134, and [Raunag International Ltd. v. I.V.R. Construction Ltd.](#) ((1999) 1 SCC 492. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to



arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. 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 power 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 (emphasis supplied). 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 intervene.”



84. In the case of Michigan Rubber (India) Ltd. Vs. State of Karnataka and others reported in (2012) 8 SCC 216, the Hon'ble Supreme Court once again considered the nature and scope of judicial review under Article 226 of the Constitution of India. In the said case the pre-qualification criteria incorporated in the tender floated by Karnataka State Road Transport Corporation was sought to be challenged by filing a writ application, the said criteria was withdrawn by the Corporation and thereafter a modified pre-qualification criteria was issued vide subsequent tender. Being aggrieved by the new pre-qualification criteria the appellant preferred a writ petition before the Hon'ble High Court which was dismissed by the learned Single Judge and when the matter went to the Hon'ble Division Bench of the High Court, the Division Bench also dismissed the same. In the Special Leave to Appeal before the Hon'ble Supreme Court it was submitted that the pre-qualification criteria as specified in Conditions 2(a) and 2(b) [amended conditions 4(a) and 4(b)] of the tender in question is unreasonable, arbitrary, discriminatory and opposed to public interest in general and these conditions were incorporated to exclude the appellant Company and other similarly situated companies from the tender process on wholly extraneous grounds. The appellant Company also contended that it was successfully selected in previous three contracts and had supplied their products to the Corporation without any complaint at any point of time.



85. After referring to the aforementioned judgments in the case of **Tata Cellular** (supra) and **M/s Raunaq International Ltd.** (supra), their Lordships referred the judgment of the Hon'ble Supreme Court in the case of **Union of India Vs. International Trading Company reported in (2003) 5 SCC 437**. Paragraph 13 of the judgment in the case of **Michigan Rubber (India) Ltd.** (supra) reads as under:-

13.[In Union of India & Anr. vs. International Trading Co. & Anr. \(2003\)](#)

[5 SCC 437](#), this Court, in similar circumstances, held as under: (SCC pp.445 and 447, paras 15-16 and 22-23)

“15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of [Article 14](#) is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of [Article 14](#) and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of [Article 14](#) is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any



ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary

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22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the



restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.”

86. Learned senior counsel for the petitioner as well as learned senior counsel for the respondents have relied upon these judgments by reading certain paragraphs in their own manner. While it is the



contention of Mr. Ranjit Kumar, learned senior counsel for the petitioner that if the State or its instrumentalities acted unfairly and unreasonably, the action of the State are amenable to the judicial review, learned senior counsel for the respondents submit that it is only when the arbitrariness in the decision making process is hit by the wednesbury principle of unreasonableness or perversity that the court should interfere with the decision of the State. The attention of this Court has been drawn towards the observations of the Hon'ble Supreme Court in the case of **Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517 (para 22)** wherein their Lordships have recorded inter-alia as under:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 :

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 black-listing 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.”

49. The tests laid down in the judicial pronouncements of Hon’ble Supreme Court take this Court to conclude that no interference is required in the facts of this case with the tender process undertaken by the ‘BSEB’ on 29.04.2020 (Annexure-6 series). This Court finds no reason to issue a writ to the respondents. This application, therefore, fails.

50. Since this Court has found that in the writ application the petitioner has completely concealed a very vital and material fact that the petitioner was blacklisted on 13.04.2020, against which a writ application being CWJC



No.5633/2020 was filed on 30.04.2020, there was also an interim order dated 04.05.2020 passed by a learned coordinate Bench of this Court which was operating on the date of filing of the present writ application, this Court hereby imposes a cost of Rs.25,000/- against the petitioner. Let the cost amount be deposited with the Patna High Court Legal Aid Committee within a period of four weeks from today and receipt thereof be filed failing which the office shall bring it to the notice of this Court.

51. This writ application and I.A. No.01/2020 stand disposed of.

(Rajeev Ranjan Prasad, J)

arvind/-

AFR/NAFR	AFR
CAV DATE	15.10.2020
Uploading Date	20.10.2020
Transmission Date	

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.

