ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 10119 OF 2022

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

M/s Kamala Agencies ..... Petitioner

-Versus-

State of Odisha and others ..... Opp. Parties

For Petitioner : Mr. Pitambar Acharya, Sr. Advocate along with M/s S. Rath and S.S. Tripathy, Advocates.

For Opp. Parties : Mr. Ashok Kumar Parija, Advocate General along with Mr. P.P. Mohanty, Additional Government Advocate.

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MISS JUSTICE SAVITRI RATHO

Date of hearing 02.05.2022:: Date of judgment: 12.05.2022

DR. B.R. SARANGI, J. The petitioner, which is a proprietorship firm and registered dealer, whole-seller, supplier and distributor of veterinary drugs/medicines, chemicals, veterinary instruments and equipments, has filed this writ petition seeking to quash the decision taken by opposite parties no. 2 and 3 in the meeting of the tender committee under Annexure-4 dated 28.03.2022 and to declare the provisions of clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid document, bearing reference No. 01/2021-22/DAHVS/ Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media dated 29.12.2021 as *void ab initio*. The petitioner further seeks direction to the opposite parties to consider the financial bids of the eligible bidders fulfilling the pre-qualification criteria of un-amended clause 5.2 and to reject the bids of ineligible bidders, which were otherwise ineligible before amendment of clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid documents.

2. The factual matrix of the case, in brief, is that opposite party no.2 floated an e-tender call notice on 29.12.2021 under Annexure-2, inviting eligible bidders for "*supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22*" vide Bid

Reference No. 01/2021-22/DAHVS/ Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media. The schedule of dates mentioned in the said notice were later on amended vide Corrigendum-II dated 25.01.2022 and some of the deadlines were relaxed. The petitioner duly participated in the tender process and submitted its bid within the stipulated time. Clause 5.2 of the tender document prescribed the pre-qualification criteria to participate in the tender process. As per such clause, only the distributors, who have experience in supplying the quoted items, as mentioned in the schedule of requirement, to any Govt. organization/Govt. /Pvt. Hospitals / Other Agencies in India are eligible to submit bid for the tender. Clause 6.13 of the bid document contains the provisions regarding grounds for rejection of the bids. It has been specifically mentioned therein that those bidders, who will not fulfill the requirement of clause 5.2, will be disqualified from participating in the tender process. After opening of the technical bids on 15.02.2022, opposite parties No.2 and 3 called a meeting of the tender committee on 28.03.2022 under the chairmanship of Director, AH&VS and decided to alter the pre-qualification criteria, as contained in clause 5.2 of the bid document, and waive off the requirement of filing the Performance Statement in the Format-T9. Much after the opening of the technical bid, in order to accommodate more number of responsive bidders, as there were limited business opportunities during COVID-19 pandemic, the tender committee decided for alternation of pre-qualification criteria prescribed under clause 5.2. As per the requirement of clause 5.2, the bidders were to submit copies of the purchase orders placed by purchasers for any two financial year during 2017-18, 2018-19, 2019-20 and 2020-21. Due to such decision of the tender committee in waving off the requirement of filing of the Performance Statement in Format-T9, an attempt was made to accommodate some non-serious and ineligible bidders, which were otherwise ineligible as per the provisions of the unamended clause 5.2. Alteration of the provisions of the bid documents, after opening of the technical bid, also runs contrary to clause 6.17 of the bid document, which prescribes the procedure for making amendment in the bid document. The petitioner, having come out successful and eligible in technical bid by fulfilling the stringent pre-qualification criteria as mentioned in clause 5.2 of the bid document, was grossly prejudiced because of participation of ineligible bidders in the financial bid, which were otherwise ineligible as per the provisions of the unamended clause 5.2, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid document. Being aggrieved by such action of the authorities, the petitioner has approached this Court by filing the present writ petition.

3. Mr. Pitambar Acharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner, vehemently contended that once an advertisement was issued inviting bids with certain terms and conditions, and on that basis the bidders were participated, after opening of the technical bid, the clauses of the such tender document should not have been relaxed. As such, the relaxation of such clauses, after opening of the technical bid, amounts to arbitrary

and unreasonable exercise of power by the authorities, which amounts to violation of Articles 14 and 19 (1)(g) of the Constitution of India and runs contrary to the principle prescribed under Article 299 of the Constitution of India.

3.1 It is further contended that since the bids were invited under pre-amended provisions of clause 5.2, if any amendment is made to the said clause that too after opening of the technical bid, that itself violates clause 6.17 of the bid document, and by this process the authorities have acted against the established principle in awarding government contract, that "*rules of the game cannot be changed mid-way*".

3.2 His further contention is that the alternation of pre-qualification criteria was made much after the opening of the technical bid, in order to accommodate more number of responsive bidders, as there were limited business opportunities during COVID-19 pandemic, but that decision should have been taken before the notification was issued. However, after opening of the technical bid, the decision taken for change of the conditions of the bid, cannot sustain in the eye of law. More particularly, pursuant to pre-amended provisions of clause 5.2, many of the participants had already submitted their bids and their bids were under scrutiny and, as such, some of the bidders were qualified in the technical bid. Thereby, after technical bid was opened, the incorporation of new clauses under clause 5.2 should not have been made in the midst of the tender process. Thereby, the action of the authorities is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***Tata Cellular v. Union of India***, (1994) 6 SCC 651; ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517; and ***Vidarbha Irrigation Development Corporation and others v. Anoj Kumar Agarwala and others***, (2020) 17 SCC 577.

4. Mr. Ashok Kumar Parija, learned Advocate General appearing along with Mr. P.P. Patnaik, learned

Additional Government Advocate for the State-opposite parties, vehemently contended that notice was issued on 29.12.2021 inviting online bids through e-tender portal of Government of Odisha from the eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22". Said notice was issued for procurement of 221 items, including 121 items in instruments & equipments category and 79 items in chemicals & reagents category. The technical bid was opened through online mode on 15.02.2022 at 11.30 A.M. The preliminary verification of all the technical bids was carried out by the members of the duly constituted Tender Committee taking into consideration different parameters like acknowledgement copy of bid document cost of Rs.5600/- submitted through online mode, bid security declaration, annual average turnover statement by Chartered Accountant for any three consecutive financial years during 2017-18, 2018-19, 2019-2020 and 2020-21, i.e. Rs.4.00 crore in case of manufacture/importer and Rs.2.00 crore in case of authorized distributor, details of items quoted with their specifications, details of bidder & service center, declaration in form affidavit in Form T5 before Executive Magistrate/ Notary Public, Manufacture's authorization form in a letter head- in case the bidder is the manufacturer (OEM), manufacture's authorization form in a letter head of the manufacturer- in case the bidder is the authorized importer/distributor of OEM along with other tender terms and conditions. After opening of technical bid, it was found that 11 number of bidders had participated pursuant to the notice inviting bid dated 29.12.2021, out of which bids of 2 number of bidders were rejected for non-fulfillment of the conditions laid down in the bid document. Therefore, total 9 number of bidders, including the petitioner, were selected and qualified for opening of financial bid.

4.1 It is further contended that the authorities observed, that 09 bidders, which were qualified during the technical bid evaluation and were eligible for financial bid evaluation, were actually qualified for 41 items out of 221 items enlisted in the bid document. In this circumstance, the purpose of inviting tender for supply of essential veterinary items was not fulfilled. Therefore, it was felt necessary to convene an urgent tender committee meeting, prior to opening of the financial bid, in order to ensure more responsive bidders in the tender process and to get the items at competitive price. Accordingly, the meeting was held on 28.03.2022 under the Chairmanship of Director, AH&VS, Odisha Cuttack. As there was limited business opportunity during COVID-19, it was decided in the meeting to relax some of the clauses of the bid, more specifically clauses 5.2.5, 5.2.5.2 and 5.2.6.3 of the bid in order to validate more number of responsive bidders.

4.2 The further submission of learned Advocate General is that the opposite parties have taken liberal stand by relaxing clauses of the bid document keeping larger public interest in mind and meant for benefit of all the bidders without any bias and prejudice. It was also emphatically submitted that the petitioner is in no way affected adversely by such relaxation. According to him, during the technical evaluation, the petitioner was qualifying for 26 items, whereas, it was observed that the petitioner was qualifying for 160 items, after relaxation of the clauses of the bid, thereby, getting maximum advantages amongst the bidders.

4.3 The further stand of learned Advocate General is that, the petitioner kept silent and did not make any objection to the proceeding dated 28.03.2022, when it was uploaded in the website on 08.04.2022. The petitioner started complaining only after the evaluation of financial bid, which was carried on 12.04.2022. Thereby, raising of objection on financial bid is not *bona fide*, rather colored by ulterior motive. As such, it is contended that the writ petition is liable to dismissed on the ground of principle of *estoppel.*

4.4 It is further contended that knowing fully well the decision taken by the tender committee on 28.03.2022, with regard to change of clause 5.2 which was uploaded on 08.04.2022, the petitioner remained silent, but he raised objection after the financial bid was opened on 12.04.2022 by filing the present writ petition on 20.04.2022. Thereby, the action of the petitioner cannot be considered above board. Having participated in the process of selection without any objection, after opening of the financial bid, challenging the amendment to clause 5.2 enabling more bidders to participate in the tender process, cannot sustain in the eye of law. Thereby, the writ petition is liable to be dismissed.

4.5 A further stand is taken that the petitioner has not impleaded the bidders who had participated in the process of tender, particularly when the tender process is going on and it has not been concluded, because of the interim order passed by this Court. As a consequence thereof, the writ petition is also liable to be dismissed on the ground of *non-joinder* of proper parties.

5. This Court heard Mr. Pitambar Acharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner; and Mr. Ashok Kumar Parija, learned Advocate General appearing along with Mr. P.P. Mohanty, learned Additional Government Advocate for the State-opposite parties by

hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission, as it is an urgent tender matter involving supply of medicines and other related items to various veterinary hospitals of the State.

6. The facts, which are undisputed, are that the Director of Animal Husbandry & Veterinary Services, Odisha-opposite party no.2 floated an e-tender call notice on 29.12.2021 under Annexure-2 inviting eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22" vide Bid Reference No. 01/2021-22/DAHVS/ Veterinary Instruments/ Equipments/ Chemicals/ Reagents/ Media, for online bid through e-tender portal. As per the bid document, the schedule of dates for different steps to be taken were provided as follows:-

Sl. No.	***Particulars***	***Date and time***
1.	*Date & time of release*	*29/12/2021, 3.00 PM*

	of bid		
2.	*Date & time of submission of queries by E-Mail id-aodahvs@gmail.com*	*03/01/2022, up to 12.30 PM*	
3	*Date & time of Pre-bid meeting*	*05/01/2022, 3.00 PM (through online : meeting link will be shared in the website.*	
4	*Date & time of Online bid submission*	*Start Date & Time*	*End Date & Time*
		06/01/2022, 11.00 AM	*27/01/2022, 5.00 PM*
5.	*Date & time for submission of Tender Documents*	*Start Date & Time*	*End Date & Time*
		10/01/2022, 11.00 AM	*02/02/2022, 3.00 PM*
6.	*Date & time of online Technical bid opening*	*03/02/2022, 11:30 AM*	
7.	*Date of demonstration of Equipment (if required by the Tender Inviting Authority for some equipments)*	*To be informed to those bidders whose bids are found to be technically responsive based on documents furnished in technical bid.*	
8.	*Date of opening of Financial bid*	*To be informed to the qualified bidders.*	

7. The tender document in clause 5.2 deals with pre-qualification of bidders. The relevant part of clause 5.2 of the bid document, for an effective adjudication of the lis between the parties, is quoted hereunder:-

> "5.2.5 *Product must be BIS/CE/USFDA/IEC etc. (valid BIS/CE/US FDA/IEC certificate etc.) certified.*
>
> ***The bidder should have experience in supplying quoted items (as mentioned in schedule of requirement)*** *(execute directly by manufacturer/ importer or through distributor) of the equipment(s) mentioned in the schedule of requirement to any Govt. organization/Govt./Pvt. Hospitals and other Agencies in India and purchase order copies in support of that in any 2 financial years during 2017-18,2018-19,2019-20,2020-21 (As per Format T9-Items Wise)*

5.2.5.2 Must have any two years of experience in manufacturing /importing of similar items during 2017-18,2018-19,2019-20,2020-21.

5.2.6.3. ***The bidder should have experience in supplying quoted items (as mentioned in schedule of requirement****) to any Govt. organization/Govt. /Pvt. Hospitals / Other Agencies in India and purchase order copies in support of that in any 2 financial years during 2017-18, 2018-19, 2019-20, 2020-2021 (Format T9- Item wise.)"*

8. Clause 6.13 of the bid document deals with rejection of bids and clause 6.13.1 thereof prescribes as follows:-

> *"6.13.1 The bids shall be rejected in case the bidder fails to meet the pre-qualification criteria as specified in Clause 5.2 of Section-V."*

9. Clause 6.17 of the bid document deals with amendment of Bid Documents and clause 6.17.1 thereof prescribes as follows:-

> *"6.17.1 At any time prior to the deadline for submission of Bid, the Tender Inviting Authority may, for any reason, modify the bid document by amendment and publish it in e-tender portal & website of DAH&VS, Odisha."*

Termination of contract is provided under Clause 6.51 of the tender document.

10. The opposite parties issued Corrigendum-II on 25.01.2022, by re-scheduling the date and time, which reads as follows:-

<table>
<tr><th>Sl. No.</th><th>Particulars</th><th colspan="2">Date and time</th></tr>
<tr><td>1.</td><td>Date & time of release of bid</td><td colspan="2">29/12/2021, 3 PM</td></tr>
<tr><td>2.</td><td>Date & time of submission of queries by E-Mail id-aodahvs@gmail.com</td><td colspan="2">03/01/2022, up to 12.30 PM</td></tr>
<tr><td>3</td><td>Date & time of Pre-bid meeting</td><td colspan="2">05/02/2022, 3 pm (through online</td></tr>
<tr><td rowspan="2">4</td><td rowspan="2">Date & time of Online bid submission</td><td>Start Date & Time</td><td>End Date & Time</td></tr>
<tr><td>06/01/2022, 11 AM</td><td>09/02/2022, 5.00 PM</td></tr>
<tr><td rowspan="2">5.</td><td rowspan="2">Date & time for submission of Tender Documents, Tender Document Fee of tender Document</td><td>Start Date & Time</td><td>End Date & Time</td></tr>
<tr><td>10/01/2022, 11 AM</td><td>14/02/2022, 5.00 PM</td></tr>
<tr><td>6.</td><td>Date & time of online Technical bid opening</td><td colspan="2">15/02/2022, 11:30 AM</td></tr>
<tr><td>7.</td><td>Date of demonstration of Equipment (if required by the Tender Inviting Authority for some equipments)</td><td colspan="2"></td></tr>
<tr><td>8.</td><td>Date of opening of Financial bid</td><td colspan="2">To be informed to the qualified bidders.</td></tr>
</table>

11. Pursuant to the aforementioned re-scheduling of time and conditions stipulated in the tender documents, 11 number of bidders participated in the tender. Out of them, 02 number of bidders became ineligible and 09 number of bidders, including the

petitioner, became successful in the technical bid. As such, on perusal of clauses 5.2.6 and 5.2.6.3, it appears that only the distributors, who have experience in supplying the quoted items, as mentioned in schedule of requirement, were eligible to submit the bid for the tender. After the technical bid was opened on 15.02.2022, through online mode, opposite parties No.2 and 3 called for a meeting of the tender committee on 28.03.2022 under the Chairmanship of Director, AH&VS, Odisha Cuttack, who decided to alter the pre-qualification criteria as contained in the clause 5.2 of the bid documents and waived off the requirement of filing the Performance Statement in the Format-T9. Clause 3 (b) of the Brief Notes of the meeting held on 28.03.2022 reads as follows:-

> *(b) Clause No. 5.2.5, 5.2.5.2 & 5.2.6.3:- "Performance Statement in Format-T9 supported with the copies of Purchase orders placed by purchasers for any 2 financial years during 2017-18, 2018-19, 2019-20 and 2020-21" was ignored to validate more numbers of responsive bidders. The committee considered this case due to limited business opportunities during COVID-19 pandemic situation."*

12. On perusal of the above clause, it would be seen that there was an alternation of pre-qualification criteria, after the technical bid was opened on 15.02.2022, in order to accommodate more number of responsive bidders, since there was limited business opportunity during COVID-19 pandemic. But, as it reveals from the pre-amended clause 5.2, the bidders were required to submit copies of purchase orders placed by purchasers for any 2 financial years during 2017-18, 2018-19, 2019-20 and 2020-21. According to the petitioner, waiving off the requirement of filing of the performance statement in Format-T9 is nothing but an attempt to accommodate some non-serious and ineligible bidders, which were otherwise ineligible as per the provisions of the un-amended clause 5.2. Even if such amendment was undertaken on the basis of the decision of the tender committee dated 28.03.2022, the petitioner did not raise any objection before the authority concerned at the relevant point of time and on the basis of such amended provision of clause 5.2, steps were taken accordingly. The decision of the committee dated

28.03.2022 was uploaded in the website on 08.04.2022. Even though such amendment to clause 5.2 had been brought to the notice of the petitioner on 08.04.2022, no protest was raised by him. Not that that, on 12.04.2022, when evaluation of financial bid was carried out, the petitioner did not also raise any objection. He filed this writ petition only on 20.04.2022, challenging the action of the opposite parties.

13. Mr. Pitambar Acharya, learned Senior Advocate, vehemently contended that the amendment to clause 5.2 had never been brought to the notice of the petitioner. This contention cannot be accepted, in view of the fact that it is an e-tender process and everything was done through online basis. To be more specific, the decision of the tender committee dated 28.03.2022 was uploaded on 08.04.2022, but the petitioner did not raise any objection to the same. Rather, he participated in the process of financial bid held on 12.04.2022. Having participated in the process of financial bid, without any objection with regard amendment made to clause 5.2,

subsequently, he cannot turn around and say that the amendment to clause 5.2 is arbitrary, unreasonable and contrary to the provisions of law. Thereby, he is *estopped* to challenge such action by filing writ petition on 20.04.2022 before this Court.

14. In ***Black's Law Dictionary, 7th Edn***. at page 570, '*estoppel*' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

15. In ***B.L. Sreedhar v. K.M. Munireddy***, (2013) 2 SCC 355 (365), it has been held by the apex Court that '*estoppel*' is based on the maxim *allegans contrarir non est audiendus* (a party is not to be heard contrary) and is the spicy of presumption *juries et de jure* (absolute, or conclusive or irrebuttable presumption).

16. In the case of ***H.R. Basavaraj v. Canara Bank,*** (2010) 12 SCC 458, the apex Court while dealing with the general word, '*estoppel*' stated that '*estoppel* is a principle applicable when one person induces another or

intentionally causes the other person to believe something to be true and to act upon such belief as to change his/ her position. In such a case, the former shall be estopped from going back on the word given. The principle of *estoppel* is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

17. Similar view has also been taken by this Court in the case of ***M/s. Balasore Alloys Ltd. & Anr. Vs. State of Odisha & Ors***, 2019 (I) ILR-CUT-214.

18. In view of the aforesaid fact and law, it is made clear that a party is not to be heard contrary, meaning thereby the estoppel is a principle when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/ her position. In such a case, the former shall be estopped from going back on the word given. Needless to mention here that the petitioner was all along silent, when there was amendment to clause 5.2, and participated in the financial bid evaluation held on

12.04.2022, even coming to know the fact of amendment of the provision as per the decision of the tender committee dated 28.03.2022, which was uploaded in the website on 08.04.2022. Therefore, he cannot subsequently turn around and assail the same by way of writ petition, after having participated in the process of tender.

19. In ***Om Prakash Sukla v. Akhilesh Kumar Sukla,*** AIR 1986 SC 1043, the apex Court was pleased to hold that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in the examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

20. In ***Madan Lal and others v. State of Jammu and Kashmir and others,*** AIR 1995 SC 1088, the apex Court held that if a candidate takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of

interview was unfair or Selection Committee was not properly constituted.

21. Similarly, in ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others,*** (2011) 1 SCC 150, in paragraphs, 25 to 28, the apex Court held as follows:

> *"**25.** In this connection, we may refer to the decision of the Supreme Court in G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus: (SCC p. 591)*
>
> *"15. … He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee."*
>
> ***26.** In P.S. Gopinathan v. State of Kerala [(2008) 7 SCC 70 : (2008) 2 SCC (L&S) 225] this Court relying on the above principle held thus: (SCC p. 84, para 44)*
>
> *"44. … Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at*

all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] ….”

27. *In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] in SCC at para 18 it was held that: (SCC p. 107)*

“18. … It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.”

28. *Besides, in K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345] in SCC paras 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel.”*

22. Though some of the cases cited above relate to service matter, but the principle laid down therein by the apex Court is applicable to the present context. Therefore, by applying the said well settled principle of the apex Court to the present context, it can be construed that the

petitioner, having been participated in the process of tender, should not have turned around and challenged the decision of the tender committee by filing this writ petition. As such, the writ petition at the instance of the petitioner is not maintainable.

23. Reliance was placed by the learned Senior Counsel appearing for the petitioner on ***Tata Cellular*** (supra) wherein the apex Court categorically held that it shall always be the endeavour of the Government to prevent arbitrariness or favoritism. There is no doubt about such principle laid down by the apex Court. The ratio decided in the said case is of little help to the petitioner, as because in the case at hand the materials available on record reveal that the decision of the tender committee has been taken in the greater interest of the public and the petitioner is in no way affected adversely by such relaxation.

24. Similarly, in the case of ***Jagdish Mandal*** (supra), the apex Court held as follows:-

> *"……….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."*

25. This Court is conscious of the position of law laid down by the apex Court, as mentioned above, but the conduct of the petitioner is also to be considered in the light of the law laid down by the apex Court in various judgments. The petitioner should have immediately approached the authority, when the amendment with regard to clause-5.2 was placed on website on 08.04.2022, and could have protested the same, when he participated in the financial bid evaluation proceeding on 12.04.2022. Therefore, having participated in the process of tender without any objection, the petitioner is now

precluded from challenging such amendment by filing the present writ petition.

26. In ***Vidarbha Irrigation Development Corporation*** (supra), the apex Court held that the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition, which had to be strictly complied with, was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.

27. On perusal of the writ petition, it is evident that the petitioner has not impleaded other bidders as parties to the writ petition.

In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & another***, (2016) 16 SCC 818, the apex Court, at paragraph-18 thereof, has held as follows:-

> *"18. Before we conclude, it is necessary to point out that the High Court was of opinion that the eligible bidders were not entitled to be either impleaded in the petition filed in the High Court by the ineligible bidder GYT-TPL JV or were not entitled to be heard. With respect, this is not the appropriate view to take in matters such as the present. There are several reasons for this, one of them being that there could be occasions (as in the present appeals) where an eligible bidder could bring to the notice of the owner or employer of the project that the ineligible bidder was ineligible for additional reasons or reasons that were not within the contemplation of the owner or employer of the project. It was brought to our notice by Afcons Infrastructure in these appeals that GYT-TPL JV did not have any experience in the construction of a viaduct by the segmental construction method and that the translations of documents in Mandarin language filed in the High Court were not true English translations. Submissions made by learned counsel for Afcons Infrastructure in this regard are important and would have had a bearing on the decision in the writ petition filed in the High Court but since Afcons Infrastructure was not a party in the High Court, it could not agitate these issues in the writ petition but did so in the review petition which was not entertained. It is to avoid such a situation that it would be more appropriate for the constitutional Courts to insist on all eligible bidders being made parties to the proceedings filed by an unsuccessful or ineligible bidder."*

In view of the law laid down by the apex Court, as mentioned above, when the petitioner has not impleaded all the bidders as parties to this case, the writ petition is also not maintainable, as the same suffers from *non-joinder* of parties.

28. Mr. Pitambar Acharya, learned Senior Advocate appearing for the petitioner vehemently contended that amendment to clause-5.2 after opening of technical bid cannot sustain, being violative of the established principle in awarding government contract that "rules of the game cannot be changed mid-way".

29. This question no more remains *res integra*. In ***Secretary, A.P. Public Service Commission v. B. Swapna and others***, 2005 (2) Supreme 615, the Andhra Pradesh Public Service Commission had initially advertised for recruitment to eight posts of Asst. Public Relation Officers. Subsequently, seven more vacancies were advertised. Therefore, the recruitment was made for fifteen vacancies. The selection was finalized on 02.07.1996. During the currency of the waiting list, the competent authority again notified 14 more vacancies on 14.4.1997 to be filled up by the candidates from the

waiting list. In that case, the apex Court held that there were two principles in service laws, which were indisputable. Firstly, there could not have been appointment beyond the advertised number and secondly, the norms of selection could not have been altered after the selection process had started. In paragraph-16 of the said judgment, the apex Court held as follows:-

> *"The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No.1 it was unamended rule, which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only."*

30. Similar question had come up for consideration before this Court in ***Mrs. Madhumita Das v. State of Orissa,*** 100 (2005) CLT 465, wherein the question before this Court was not that the modalities

fixed by the Committee/Full Court were illegal, but the question was that once norms were published in the advertisement for notice of all, whether it could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum to the advertisement in question. In the said case, the Court opined that once an advertisement was issued to fill up a post in any office under the State, it is the duty of the recruiting authority to give necessary information to all in a precise and clear manner, and relying upon the judgment in ***Secretary, A.P. Public Service Commission*** (supra), the Court came to a conclusion, which reads as follows:-

> *"Once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law."*

31. In ***M/s. Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation***, AIR 2000 SC 2272, the apex Court held that if the term of

a tender is deleted after the players entered into the arena, it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions, fresh process of tender was the only alternative permissible.

32. In ***West Bengal Electricity Board v. Patel Engineering Co. Ltd***, AIR 2001 SC 682, the apex Court held that tenders were invited only from the bidders who have satisfied in pre-qualification and the instructions to the bidders issued by the employer required the bidder to fill in rates and prices for all items of the works described in the bill of quantities both in figures and words and as such errors been confined to a case of either recording in U.S Dollar equivalent to the unit rates already noted in Indian Rupee or vice versa, the mistakes could have been corrected. More so, if a mistake has been committed may, be unilateral or mutual, but it is always unintentional. If it is intentional, it ceases to be a mistake.

33. In ***Central Coalfields Ltd v. SLL-SML (Joint Venture Consortium)***, AIR 2016 SC 3814, the apex Court

held that rejection of bid not accompanied by bank guarantee in format prescribed in bid documents treating it as non-responsive in view of the General Terms and Conditions governing bidding process, is not arbitrary, unreasonable or perverse. Therefore, it is not open to judicial review.

34. In ***Ramana Dayaram Shetty v. The International Airport Authority of India***, AIR 1979 SC 1628, the apex Court, while considering the terms of contract, the interpretation, deed and construction, held that on a proper construction what the notice required was that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years' experience of running a IInd hotel or restaurant. The test of eligibility laid down was an objective test and not a subjective one. Therefore, the

tender cannot be accepted of a person, who does not fulfill the requisite qualification.

35. Therefore, in view of the law laid down by the apex Court, as discussed above, this Court, adhering to the view taken by the apex Court and applying the same to the present context, makes it clear that the petitioner had never raised any objection to the amendment to clause 5.2, even though the same was placed in the website on 08.04.2022 and, more so, while participating in the process of tender, that is to say in the financial bid evaluation, he had also raised no objection. As a matter of fact, by such amendment no prejudice has also been caused to the petitioner, in view of the fact that 09 successful bidders were actually qualified for 41 items out of 221 items enlisted in the bid document and, thereby, the purpose of inviting the tender for supply of essential veterinary items was not fulfilled, as a consequence thereof, the tender committee, prior to opening of the financial bid took a decision to amend clause 5.2 to ensure more number of responsive bidders in the tender

process and to get the items at competitive price, which the petitioner knows very well when the matter was placed in the website on 08.04.2022, and in such process, during the technical bid evaluation though the petitioner had qualified for 26 items, after clauses of the bid were relaxed it was observed that the petitioner qualified for 160 items and, thereby, got maximum advantages amongst the bidders. Therefore, the petitioner is in no way adversely affected by such relaxation.

36. Considering from the other angle, it appears that e-tender notice was issued inviting bid documents from eligible bidders for "supply of Veterinary Instruments, Equipments, Chemicals, Reagents & Media etc. for the year 2021-22". In course of hearing, this Court made a query with regard to "for the year 2021-22". In reply, learned Advocate General, appearing for the State-opposite parties, contended that since the tender process was started on 29.12.2021 and it is still continuing, the mention of "for the year 2021-22", has no meaning. But fact remains, the year 2021-22 should have

been clarified as to if the same stands for a "calendar year"; or "financial year"; or "assessment year"; or a year as applicable for the tender process. In absence of any such specific meaning attached to "for the year 2021-22", if normal presumption would be drawn, that the said period relates to a financial year, then it starts from 01.04.2021 and ends on 31.03.2022. Since the tender process is continuing beyond this period, the tender call notice cannot sustain in the eye of law. If the year is assumed to be a calendar year, which remains from 1st of January to 31st of December, the said period has also been over. Therefore, in normal parlance, wherever the word "year" or the word "month" is used, it is to be understood that the year of the month is to be reckoned according to British calendar.

37. In the above context, it is worthwhile to mention, in Section 3 of the Converts' Marriage Dissolution Act (21 of 1866), the "year" has to respectively mean "month" according to the British calendar. As per Section 3 (66) of General Clauses Act (10 of 1897), the

"year" means, a year reckoned according to British calendar. As per Section 3 (n) of the Coffee Act (7 of 1942), "year" means the period of twelve months beginning with the first day of July and ending with thirtieth day of June next following. According to Section 2 (13) of the Electricity (Supply) Act (54 of 1948), the "year", in relation to the Board or a Generating Company, means, the year commencing on the 1st day of April. As per Section 2 (i) of the Chartered Accounts Act (38 of 1949), "year" means, the period commencing on the 1st day of April of any year and ending on the 31st day of March of the succeeding year. As per Section 2 (k) of the Central Sales Tax Act (74 of 1956), "year" in relation to a dealer, means the year applicable in relation to him under the general sales tax law of the appropriate State, and where there is no such year applicable the financial year. As per Section 2 (g) of the Sugar (Regulation of Production) Act (55 of 1961), "year" means, the year beginning on the first day of November and ending on the thirty-first day of October in the following year. Similarly, as per Section 2 (f) of Food Corporation Act (37 of 1964), year means the financial year.

38. Therefore, looking at the meaning of the year as defined under different provisions of law, this Court is of the considered view that, if the period of 2021-22 is already over, and the tender process, which was started at the end of the year, is still continuing, it can be safely construed that to favour some persons such an attempt has been made by the State functionaries. Meaning thereby, if it relates to a financial year, the process of tender should have been started before the month of March, 2021 and it should have been completed by end of March, 2021. But tender being invited in the month of December, 2021 for the year 2021-22 and till end of April, 2022 the process has not been concluded, that speaks volume on the action taken by the State functionaries, for which the government should be careful in future. Furthermore, in one hand, argument has been advanced, that the tender was invited for supply of essential commodities which cannot wait and should be supplied

with all promptitude, but, on the other hand, delay has been caused at the level of the State authorities in inviting the tender. Therefore, it clearly indicates that it has been done to favour somebody, who is supplying the essential commodities, so that the continuity of supply should be made by such person. Thereby, this Court is of the considered view that the Government should be very careful while inviting tender for a particular year, may be financial year or may be British calendar year, and the tender process should have been started before the start or at the very beginning of the year itself, instead of waiting till the end of the year. Therefore, we hope and trust that Government should adhere to the principle, in letter and spirit.

39. Be that as it may, keeping in view the fact that the tender in question was invited for supply of essential commodities, since amendment to clause-5.2 was made keeping larger public interest in mind and the same was meant for benefit of all the bidders, including the petitioner, and that such decision of tender committee

amending clause-5.2 was not objected to by the petitioner either when it was published in the website or when it participated during the process of evaluation of financial bid, this Court is of the considered view that the writ petition at the behest of the petitioner does not warrant interference of this Court in exercise of jurisdiction under Article 226 of the Constitution of India.

40. In view of the foregoing discussions, this Court does not find any merit in this writ petition, which is accordingly dismissed. No order as to costs.

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DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J. I agree.

....
SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 12th May, 2022, Arun/GDS