ORISSA HIGH COURT: CUTTACK

W.P(C) NO. 15395 OF 2022

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

AFR Sarat Kumar Samal ..... Petitioner

-Versus-

State of Odisha & Ors. ..... Opp. Parties

For Petitioner : M/s. P.C. Nayak and S. Padhi, Advocates

For Opp. Parties : Mr. P.P. Mohanty, Addl. Govt. Advocate [O.Ps.No.1-5]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE G. SATAPATHY

Date of Hearing: 23.09.2022 :: Date of Judgment : 28.09.2022

DR. B.R. SARANGI,J. The Petitioner, who is a Special Class Contractor registered under the P.W.D. Contractors Registration Rules, 1967, has filed this writ petition seeking to quash the letter dated 13.06.2022 under

Annexure-4, whereby a communication has been made by opposite party no.4 to opposite party no.5 that the bid of the petitioner submitted for the work "Improvement to Road and C.D. works under PMGSY" for the Package No.OR-02-488/PMGSY-III (B-III) in the district of Balasore has been rejected by opposite party no.3, as per recommendation made in Bid Evaluation Committee Meeting held on 10.06.2022, and direction has been issued to go for rebidding of the said package, and to issue direction to the opposite parties to accept the petitioner's bid for the aforesaid work in terms of recommendation of opposite party no.5, vide letter dated 03.06.2022 under Annexure-3, within a stipulated period.

2. The epitome of facts leading to filing of this writ petition are that opposite party no.4-Chief Engineer, PMGSY in the office of the Engineer-in-Chief, Rural Works, Odisha, Bhubaneswar, invited public tender notice no.1056 dated 11.04.2022 for various packages of works, including the package no.OR-02-488-PMGSY-III(B-III), in the district of Balasore for the work

"Improvement to Road and CD works under Pradhan Mantri Gram Sadak Yojana", in respect of which the petitioner, having requisite eligibility criteria, submitted his bid along with other bidders. The technical bids were opened on 25.05.2022 and the tender evaluation committee, out of four bidders, qualified the petitioner and one Prafulla Kumar Mohapatra-opposite party no.6. Thereafter, the price bids of technically qualified bidders were opened on 03.06.2022, whereafter the petitioner, having quoted 7.50% excess over the estimated value of the work, was declared as 1st lowest bidder. As the petitioner, for having complied with all criteria, was found L-1, opposite party no.5, vide letter dated 03.06.2022, recommended his name to opposite party no.4 for approval. Instead of according approval, opposite party no.4, vide letter dated 13.06.2022, intimated opposite party no.5 that the bid of the petitioner has been rejected by opposite party no.3-CEO, Orissa State Rural Road Agency (OSRRA), as per recommendation of Bid Evaluation Committee in the meeting held on 10.06.2022, and accordingly requested to go for immediate rebidding for the package no. OR-02-488-PMGSY-III(B-III) observing all formalities. Hence, this writ petition.

3. Mr. P.C. Nayak, learned counsel appearing for the petitioner contended that since the tender of the petitioner was found responsive both in technical and price evaluation and recommended for approval, the same should not have been rejected arbitrarily without any valid reason and without giving any opportunity of hearing to the petitioner. Thereby, it is contended that such action of the authorities is violative of Article 14 of the Constitution of India. It is also contended that the bid submitted by the petitioner, having been qualified in the technical evaluation and declared as the first lowest bidder after opening of the price bid, and recommended for approval without any adverse remarks against him, the direction for rebidding of the very same package of work cannot be sustained in the eye of law. It is further contended that in the same batch of tender even after tendering process is over, the authority has granted deviation of 4.69% over the estimated cost of the tender.

Since the petitioner has quoted 7.50% excess over the estimated cost of the tender, the authorities should have approved the bid of the petitioner by giving equal and fair treatment to all the bidders. It is further contended that the present tender estimate was based on SOR 2014 and the petitioner quoted 7.50% excess basing on the market rate as there is abnormal increase in materials in addition to labour charges. If the authorities retendered the package no.OR-02-488-PMGSY-III(B-III), it would be estimated on the basis of SOR 2022 and the present cost of the work would be minimum 20% excess. Therefore, without assigning any reason and without affording any opportunity of hearing to the petitioner and also without specifying violation of any tender clause rejecting his bid, issuance of direction for rebidding of the aforesaid work cannot be sustained in the eye of law and the same should be quashed.

In support of his contentions, learned counsel for the petitioner has relied upon the judgments of the apex Court in ***Adani Gas Limited v. Petroleum and Natural Gas Regulatory Board***, (2020) 4 SCC 529,

Mihan India Ltd. v. GMR Airports Ltd., ***etc.*** AIR 2022 SC 2745, ***Sampad Samal v. State of Odisha***, AIR 2017 Ori 33 and of this Court in ***D.K. Engineering & Construction v. State of Odisha***, 2016 SCC OnLine Ori 405.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties, while admitting the notice inviting tender and participation of the petitioner in the said tender process and found to be L-1 and recommended for approval after becoming successful bidder for having quoted 7.5% excess of the estimated cost, contended that the bid evaluation committee meeting of OSRRA, which was held on 10.06.2022 under the chairmanship of opposite party no.3 for finalization of PMGSY-III tenders including the present tender, after due deliberation and discussion, unanimously decided to cancel the tender for the package no. OR-02-488-PMGSY-III(B-III) due to high tender premium and directed opposite party no.5 to proceed with the fresh tender. It is contended that such decision has been taken, in view of Clause-28.1 of SBD

for PMGSY, which states that the authority reserves the right to accept or reject any bid and to cancel the bidding process and reject all bids, at any time prior to award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidders of the grounds for the employers' action. It is further contended that Clause-5.6.3 of "Manual for Procurement of Work 2019, Ministry of Finance Department of Expenditure" prescribes that "in every recommendation of TC, award of contract, it must be declared that the rates recommended are reasonable and the comparison may be made with similar contracts awarded elsewhere. Since the petitioner quoted 7.50% excess of the estimated cost, the tender evaluation committee did not accept the same and rejected the bid of the petitioner and issued direction for rebidding. Therefore, the authorities have not committed any illegality or irregularity in passing the said order. It is further contended that the authorities, while deciding the tender, have considered the modality not to approve the bid with high tender premium, which is uniform for all bidders. Thereby, the contentions raised by learned counsel for the petitioner cannot be sustained in the eye of law and accordingly, prays for dismissal of the writ petition.

5. This Court heard Mr. P.C. Nayak, learned counsel appearing for the petitioner and Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of at the stage of admission.

6. On the basis of the factual matrix, as discussed above, the admitted fact is that the petitioner participated in the tender process and was qualified both in the technical and financial evaluation. After he was found L-1 bidder, having quoted 7.50% excess of the estimated cost, opposite party no.5-Chief Construction Engineer, Rural Works Circle, Balasore, vide letter dated 03.06.2022, recommended to opposite party no.4-Chief

Engineer, PMGSY for approval of the bid of the petitioner. But just after seven days of such recommendation, opposite party no.4 intimated to opposite party no.5, vide letter dated 13.06.2022, that the tender of the petitioner has been rejected by C.E.O, OSRRA, as per recommendation of Bid Evaluation Committee in the meeting held on 10.06.2022, and requested opposite party no.5 to go for immediate rebidding for the package observing all formalities, and returned the tender documents and papers for acknowledgement without assigning any reason as to violation of which clause of the tender document the bid of the petitioner has been cancelled.

7. For just and proper adjudication of the case, relevant clauses of Section-2-Instructions to Bidders (ITB)-A. General of Odisha State Rural Roads Agency Standard Bidding Document for PMGSY for Construction and Maintenance, are extracted below:

> "***Clause-13. Bid Prices***
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> *13.1. The Contract shall be for the whole Works, as described in Clause 1.1. of ITB,*

based on the priced Bill of Quantities submitted by the Bidder online.

13.2. The Bidder shall make online entries to fill the Percentage Rate or Item Rates in Bill of Quantities as specified in the Appendix to ITB; only the same option is allowed to all the Bidders. The Bidder is not required to quote his rate for Routine Maintenance. The rates to be paid for routine maintenance by the Employer are indicated in the Bill of Quantities.

Percentage Rate Method requires the bidder to quote a percentage above/below/at par of the schedule of rates specified in the Appendix to ITB.

Item Rate Method requires the bidder to quote rates and prices for all items of the Works described in the Bill of Quantities. The items for which no rate or price is entered by the Bidder will not be paid for by the Employer when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities.

Clause-22. Bid Opening

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22.7. The Employer shall inform the bidders, who have qualified during evaluation of Part I of bids, of the date, time of online opening of Part II of the bid, if the specified date of opening of financial bid is changed. In the event of the specified date being declared a holiday for the Employers, the bids will be opened at the appointed time and location on the next working day.

22.8. Part II of bids of only those bidders will be opened online, who have qualified in Part I of the bid. The bidders' names, the Bid prices, the total amount of each bid, and such other details as the Employer may consider appropriate will be noticed online by the Employer at the time of bid opening.

Clause-25. Examination of Bids and Determination of Responsiveness.

25.1. During the detailed evaluation of "Part-I of Bids", the Employer will determine whether each Bid(a) meets the eligibility criteria defined in Clauses 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities; and (d) is substantially responsive to the requirements of the bidding documents. During the detailed evaluation of the "Part-II of Bids", the responsiveness of the bids will be further determined with respect to the remaining bid conditions, i.e., priced bill of quantities, technical specifications and drawings.

25.2. A substantially responsive "Financial Bid" is one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservations is one (a) which affects in any substantial way the scope, quality, or performance of the Works; (b) which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.

Clause-26. Evaluation and Comparison of Bids.

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26.3. If the Bid of the successful Bidder is seriously unbalanced in relation to the Engineer's estimate of the cost of work to be performed under the contract, the Employer may require the Bidder to produce detailed price analysis for any or all items of the Bill *of Quantities, to demonstrate the internal consistency of those prices. After evaluation of the price analysis, the Employer may require that amount of the Performance Security set forth in Clause 30 of ITB be increased at the expense of the successful Bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful Bidder under the Contract. The amount of the increased Performance Security shall be decided at the sole discretion of the Employer, which shall be final, binding and conclusive on the bidder.*

Clause-27. Award Criteria

27.1. Subject to Clause 30 of ITB, the Employer will award the Contract to the Bidder whose Bid has been determined:

(i) to be substantially responsive to the bidding documents and who has offered the lowest evaluated Bid price, provided that such Bidder has been determined to be (a) eligible in accordance with the provisions of Clause 3 of ITB, and (b) qualified in accordance with the provisions of Clause 4 of ITB; and

(ii) to be within the available bid capacity adjusted to account for his bid price which is evaluated the lowest in any of the packages opened earlier than the one under consideration.

Clause-28. Employer's Right to Accept any Bid and to Reject any or all Bids.

28.1. Notwithstanding Clause 27 above, the Employer reserves the right to accept or reject any Bid, and to cancel the bidding process and reject all bids, at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder *or bidders or any obligation to inform the affected Bidder or bidders of the grounds for the Employer's action.*

Clause-32. Corrupt or Fraudulent Practices"

On perusal of the aforementioned Clauses, which contained in Chapter-A to Chapter-F of Section-2, Instructions o Bidders (ITB) of Standard Bidding Document for PMGSY, it appears that it classifies the entire terms and conditions.

8. It transpires from the bid documents that there is no description with regard to "high tender premium" nor has it been clarified nor provided in any of the documents required to be followed for such tender. Rather, the tender conditions stipulated under sub-clause-26.3 of Clause-26 and Clause-32 restrict for less bidding and sub-clause 13.2 provides for quoting excess/less of tender value and the petitioner bid was substantially responsive as per clause-25.2 of the tender notice. As such, the petitioner is coming under Clause-27(1)-Award Criteria, as his bid was substantially responsive and, as such, there is no restriction or

condition to quote reasonable tender price, nevertheless the authorities have accepted the excess price of same tender notice of another project by approving bid on 4.69% excess than the estimated cost, vide Annexure-5 dated 13.06.2022 in respect of Nilagiri Engineering Co-operative Society, Contractor being L-1 for the work "Improvement to Road and C.D. works under PMGSY for the Package No.OR-02-502 in the district of Balasore". If on one hand the authorities have approved 4.69% excess price of the estimated cost and accepted the same, there is no valid justifiable reason not to accept the bid of the petitioner, who has quoted 7.50% excess of the estimated cost. Thereby, even though 'high tender premium' has been accepted in one case, non-acceptance of the same in the case of the petitioner violates Article-14 of the Constitution of India. As regards the reason for rejection, it has been indicated in Annexure-4 dated 13.06.2022 that the tender of the petitioner has been rejected by CEO, OSRRA, as per recommendation of Bid Evaluation Committee in its meeting held on 10.06.2022. But in the counter affidavit filed by the opposite parties no.1 to 5, reliance has been placed on the proceedings of the Bid Evaluation Committee Meeting, OSRRA held on 10.06.2022 under the Chairmanship of C.E.O., OSRRA-opposite party no.3, so far as petitioner's Package No.OR-02-488/PMGSY-III is concerned, the following decision has been taken:

> *"8. OR-02-488/PMGSY-III*
> *In package No. OR-02-488/PMGSY-III, the L1 bidder is Sri Sarat Kumar Samal at the quoted rate 7.50% excess over the construction cost put to tender. The Committee after due deliberation and discussion unanimously decided to cancel the package No. OR-02-488 due to high tender premium and directed C.C.E., R.W. Circle, Balasore to proceed with retender".*

The only reason has been assigned in the proceeding, as mentioned above, that after due deliberation and discussion unanimously a decision was taken to cancel the package No. OR-02-488/PMGSY-III due to 'high tender premium' and direction was issued to C.C.E., R.W. Circle, Balasore to proceed with retender. But what constitute the meaning of 'high tender premium' has not been explained either in the tender documents or anywhere in the records of the case, but by using such nomenclature, the bid submitted by the petitioner has been rejected.

9. Further, on perusal of the tender documents, it is seen that Clause-28 deals with only employer's right to accept any bid or to reject any or all bids and the said clause starts with a non-obstante clause by using the words 'notwithstanding Clause-27', the employer reserves right to accept or reject any bid and to cancel the bidding process and reject all bids, at any time prior to the award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employer's action.

10. In ***Union of India v. G.M. Kokil***, 1984(Supp) SCC 196 : AIR 1984 SC 1022, the apex Court held that a clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of

the section in case of conflict an overriding effect over the provision or Act mentioned in the *non obstante* clause.

11. In ***T.R. Thandur v. Union of India***, AIR 1996 SC 1643, the apex court held that non obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non obstante clause or to override it in specified circumstances.

12. In ***Central Bank of India v. State of Kerala***, (2009) 4 SCC 94, the apex Court held that while interpreting a *non obstante* clause, the Court is required to find out the extent to which the Legislature intended to give it an overriding effect.

13. In ***P. Virudhachalam v. Management of Lotus Mills***, AIR 1998 SC 554 : 1998 (I) SCC 650, the apex Court held that the expression 'notwithstanding anything in any other law' occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears.

14. In ***Satyanarayan Sharma v. State of Rajasthan***, AIR 2001 SC 2856 : (2001) 8 SCC 607, the apex Court held that the expression 'notwithstanding anything contained in the Act' may be construed to take away the effect or any provision of the Act in which the section occurs but it cannot take away the effect of any other law. For example 'notwithstanding anything contained in section 482 Cr.P.C., 1973 cannot take away the effect of section 19 of the PC Act, 1988 which prevents grant of stay.

15. Applying the above principles to the present context, merely because Clause-28 stipulates that notwithstanding Clause-27, which deals with Award Criteria, the employer reserves the right to accept any bid or to reject any or all bids, that does not mean while the power under Clause-28.1 shall be exercised, the same shall be at the caprice and whims of the authority, rather, the same shall be inconsonance with the Clauses of the tender documents. As such, this question remains no more *res integra,* in view of the ratio decided by the

apex Court in ***Mihan India Ltd***. (supra), paragraph-43 whereof reads as follows:

> "*Bare perusal of the above stated case-law in light of the facts of the instant case makes it clear that merely having the power of rejection of bids does not entitle authorities to exercise the said power arbitrarily. While discussing the applicability of Clauses 2.16.1, 3.3.1 and 3.3.5, it is made clear that in pre-bid procedure prior to acceptance, the bidding process may be annulled otherwise after issuance of LoA, the annulment cannot be done. The authorities further acted arbitrarily relying upon the GoM's letter dated 16.03.2020 in reference to PMIC's meeting dated 14.10.2019 in which re-tendering was directed. Re-tendering was not possible without ignoring the bid already accepted. Therefore, the order of annulment has been directed applying Clause 2.16.1 arbitrarily".*

16. Even if direction was given for retendering of the bid, in the very same judgment, the apex Court held that the same is completely an arbitrary exercise of power, and contrary to the provisions of RFP and violative of Article 14 of the Constitution of India. In paragraphs-47 and 49 of the aforesaid judgment, the apex Court held as follows:

> *"47. Analysing the facts of this case in the light of the judgments in Dinesh Engineering (Supra) and Shishir Realty (Supra), after issuing the LoA in terms of Clause 3.3.5 of RFP and declaring GAL as concessionaire as per Clause 3.3.6, issuing letter of annulment of bidding process on the basis of the meeting of PMIC on 14.10.2019, which directed for re-tendering of*

the bid, is completely an arbitrary exercise of power, contrary to the provisions of RFP and violative of Article 14 of the Constitution of India.

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49. In the facts of the present case and the findings so recorded hereinabove, it is clear that the authorities have acted arbitrarily in violation of Article 14 of the Constitution of India. In such a situation, the public law remedy has rightly been availed, invoking the jurisdiction of the High Court under Article 226 of the Constitution of India".

17. Similar question had come up for consideration before the Division Bench of this Court in ***Sampad Samal*** (supra), wherein one of us (Dr. B.R. Sarangi, J.) was one of the Members. In paragraph-9 of the said judgment, this Court held as follows:

"Further, resorting to clause 10 of the terms and condition of tender papers, whereby right to reject is reserved by the authority concerned without assigning any reason, can be justified only when there is proper and adequate ground for passing an order of cancellation and not in an arbitrary manner, as has been done in the present case".

18. In the judgment of a Division Bench of this Court rendered in ***D.K. Engineering & Construction*** (supra), of which one of us (Dr. B.R. Sarangi, J.) is the author, at paragraphs-19 and 20 it was held as follows:

> *"19. Applying the above principles to the present context, it appears that the authority having found, after opening of both technical and financial bids, the petitioner being the lowest bidder, subsequently could not have called for a report without giving notice and, as such, on the basis of the report furnished by the Executive Engineer (R&B), Kalahandi, the tender committee could not have taken a decision to disqualify the petitioner as per the ITB Clause 3.4(b) as well as Clause-108(b) and (d) of DTCN for past poor performance and inordinate delay in completion of previous works entrusted to it. Such action of the authority amounts to arbitrary and unreasonable exercise of power and violates Article 14 of the Constitution of India.*
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> *20. In view of the aforesaid facts and circumstances, since the action of the authority is arbitrary and unreasonable and violates Article 14 of the Constitution of India, this Court hereby quashes the proceedings of the tender committee meeting held on 15.02.2016 vide Annexure-F to the counter affidavit, by which the petitioner has been declared disqualified as per ITB Clause 3.4(b) as well as Clause-108(b) and (d) of DTCN for past records of poor performance and inordinate delay in execution of previous works entrusted to it as per the report of the Executive Engineer (R&B), Kalahandi and also quashes the decision to call for the second lowest bidder to reduce his rate at par with the rate quoted by the first lowest bidder, as stipulated in Clause-29.2".*

19. In view of aforesaid discussions, this Court is of the considered view that the impugned order/letter dated 13.06.2022 under Annexure-4 issued by Chief Engineer, PMGSY to the Chief Construction Engineer, R.W. Circle, Balasore rejecting the bid of the petitioner,

as per the recommendation made by the Bid Evaluation Committee in its meeting held on 10.06.2022, and requesting to go for immediate rebidding of the Package No.OR-02-488/PMGSY-III(B-III) is arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

20. Coming to the Manual for Procurement of Works, 2019 issued by Government of India Ministry of Finance, Department of Expenditure, which is annexed as Annexure-C/5 to the counter affidavit and on which reliance has been placed by the State-opposite parties, it is of worthy to note that the said Manual has not been referred to in the tender notice nor the committee has relied on or referred to the same for cancellation of the tender of the petitioner. As a matter of fact, the circular stipulates that abnormally low price cannot be accepted and nowhere stipulates that the bid quoting 7.50% excess of the cost of tender will be rejected. More so, in the counter affidavit, the complete Manual for Procurement of Works 2019 has not been annexed, but

the same has been annexed by the petitioner to the rejoinder affidavit.

21. For just and proper adjudication of the case, Clauses-5.6.3 and 5.6.6 of the Manual for Procurement of Works, 2019 are extracted below:

> *"5.6.3. In every recommendation of the TC for award of contract, it must be declared that the rates recommended are reasonable. The comparison may be made with the similar contracts awarded elsewhere. The Last Purchase Price (LPP) may be updated taking into consideration inflation during the interim period and geographical conditions etc.*
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> *Xxx xxx xxx*
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> *5.6.6.* ***Negotiations***
> *(i) Normally, there should be no negotiation. Negotiations should be a rare exception rather than the rule and may be resorted to only in exceptional circumstances. If it is decided to hold negotiations for reduction of prices, they should be held only with the lowest acceptable bidder L1, who is techno-commercially responsive for the supply of a bulk quantity and on whom the contract would have been placed but for the decision to negotiate. In no case, including where a cartel/pool rates are suspected, should negotiations be extended to those who had either not tendered originally or whose tender was rejected because of unresponsiveness of bid, unsatisfactory credentials, inadequacy of capacity or unworkable rates".*

22. In view of Clause-5.6.3, wherein it has been specifically mentioned that in every recommendation of the TC for award of contract, it must be declared that

the rates recommended are reasonable. The comparison may be made with the similar contracts awarded elsewhere. If that condition is taken into consideration, the self-same tender document in respect of Package No.OR-02-502, the bid has been accepted being 4.69% excess of the estimated cost. Therefore, there is no reason why the petitioner's bid quoting 7.50% excess of estimated cost is to be rejected. Thereby, the step so taken is in gross violation of Clause-5.6.3 of the Manual for Procurement of Works, 2019.

23. Similarly, another alternative has been prescribed under Clause-5.6.6, as mentioned above, which clearly reveals that normally there should be no negotiation. Negotiation should be a rare exception rather than the rule and may be resorted to only in exceptional circumstances. If it is decided to hold negotiations for reduction of prices, they should be held only with the lowest acceptable bidder L1. Therefore, if for any chance, opposite parties have thought that the petitioner has given 7.50% excess of the estimated cost and admittedly he is L1 bidder and, as such, his bid was

recommended for approval and the opposite parties wanted for reduction of price, though invoking Clause-5.6.6, the petitioner should have been called upon for negotiation, because for the self-same tender, the price of 4.69% excess of the estimated cost in respect of Package No.OR-02-502 has been accepted. Without calling for negotiation merely on the basis of recommendation of the Bid Evaluation Committee in its meeting held on 10.06.2022, the tender submitted by the petitioner has been rejected and direction has been issued to go for retendering, which is not only arbitrary and unreasonable exercise of power but also discriminatory.

24. Reverting back to the decision taken by the Bid Evaluation Committee that due to 'high tender premium' direction was issued to C.C.E, R.W. Circle, Balasore to proceed with retendering. But the expression 'high tender premium' has neither been explained nor defined nor mentioned in any of the provisions of the Standard Bidding Document for PMGSY or the Manual for Procurement of Works, 2019. In absence of any

meaning of the expression 'high tender premium', disqualification of the petitioner would constitute an infraction of Article 14 of the Constitution of India.

25. In ***Adani Gas Ltd***. (supra), the apex Court held that to disqualify a bidder on the basis of a criterion which was not notified and of which bidders had no knowledge would be arbitrary and would constitute an infraction of Article 14 of the Constitution of India. It is further held with regard to power of the Court to deal with such contractual matters. It is well settled that judicial review cannot be denied even in contractual matter to prevail arbitrariness. Even though Clause-5.6.6 provides for negotiation, such opportunity was not given to the petitioner, rather the recommendation of the bid of the petitioner has been rejected without assigning any reasons thereon.

26. In ***Food Corporation of India v. Kamdhenu Cattle Feed Industries***, AIR 1993 SC 1601, the Apex Court held as follows:

> *"In contractual sphere as in all other State actions, the State and all its instrumentalities*

> *have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'."*

27. In ***Master Marine Service (P) Ltd. v. Metcafe & Hodgkinson (P) Ltd***, (2005) 6 SCC 138, the apex Court held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review.

28. In view of the aforesaid law laid down by the apex Court, it can be well deduced that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The right to refuse the lowest and any other tenderer is always available to the Government, but the principles laid down under Article 14 of the Constitution have to be kept in view while refusing to accept the tender.

29. Taking into consideration the factual matrix vis-à-vis principles decided in the aforesaid judgments, this Court is of the considered view that the authorities, having found the petitioner, after opening of technical and financial bids, as the lowest bidder and recommended for approval, the Bid Evaluation Committee should not have taken a decision to reject the bid of the petitioner and such action of the authorities amounts to arbitrary and unreasonable exercise of power and violates Article 14 of the Constitution of India.

30. In the above view of the matter, this Court quashes the proceedings of the Bid Evaluation Committee dated 10.06.2022, so far as it relates to Package No. OR-02-488/PMGSY-III(B-III) mentioned at Sl. No.8 of the proceedings, which is annexed as Annexure-A/5 to the counter affidavit filed by the State-opposite parties, by which the bid of the petitioner has been rejected. Consequentially, the order/letter dated 13.06.2022 under Annexure-4 issued by the Chief

Engineer, PMGSY to the Chief Construction Engineer, RW Circle, Balasore for immediate rebidding of the Package No. OR-02-488/PMGSY-III(B-III) is quashed. Thereby, this Court directs the authorities to take steps for approval of the petitioner's bid on the basis of the recommendation made on 03.06.2022 under Annexure-3 or go for negotiation with the petitioner, being the L-1 bidder as per Clause-5.6.6 of the Manual for Procurement of Works, 2019, as expeditiously as possible preferably within a period of four weeks from the date of communication of this judgment.

31. The writ petition is thus allowed**.** However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

G. SATAPATHY, J. I agree.

(G. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 28th September, 2022, Alok