

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 15733 OF 2022

AND

W.P.(C) NO. 15735 OF 2022

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

AFR

In W.P.(C) No. 15733 of 2022

Prakash Kumar Mohanty Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : M/s. S.K. Dalai, S. Mohapatra
and P. Dash, Advocates.

For Opp. Parties : Mr. P.P. Mohanty,
Addl. Government Advocate.

In W.P.(C) No. 15735 of 2022

Prakash Kumar Mohanty Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : M/s. S.K. Dalai, S. Mohapatra
and P. Dash, Advocates.

For Opp. Parties : Mr. P.P. Mohanty,
Addl. Government Advocate.

P R E S E N T:

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

Date of hearing & judgment: 08.09.2022

DR. B.R. SARANGI, J. In both the above noted writ petitions, Prakash Kumar Mohanty, who is a registered “Special Class Contractor” according to the revised classification prescribed under Rule-3 of the PWD Contractor Registration Rules, 1967, is the Petitioner. By means of W.P.(C) No. 15733 of 2022, he seeks to quash Annexure-2 series dated 22.05.2022, whereby his technical bid in respect of Package No. OR-15-480 has been rejected; and by way of W.P.(C) No. 15735 of 2022 he seeks to quash Annexure-2 series dated 22.05.2022, whereby his technical bid in respect of Package No. OR-15-482 has been rejected. In both the writ petitions, he also seeks for direction to the State-Opposite Parties to consider his case along with others by accepting his technical bids and by opening his financial bids in respect of the packages, as noted above. Since both the writ petitions involve common issue and reliefs sought therein are similar and technical bids of the Petitioner in respect of both the packages have been

rejected on the selfsame ground, they are heard together and are disposed of by this common judgment.

2. As the facts of both the cases are akin to each other, for a just and proper adjudication, the factual matrix of W.P.(C) No. 15733 of 2022 has been referred to.

2.1 The Government of Odisha in the office of the Chief Construction Engineer, Rural Works Circle, Bhawanipatna took a decision to undertake construction of roads & bridges under Pradhan Mantri Gram Sadak Yojana (PMGSY) including their maintenance for five years on National Competitive Bidding through e-Procurement Notice for PMGSY-III, Batch-III (2021-22) in Packages. Accordingly, the Chief Construction Engineer, Rural Works Circle, Bhawanipatna on behalf of the Odisha State Rural Road Agency (OSRRA), vide Bid Identification No.BPI/Online-01/2022-23 No.662 dated 11.04.2002, invited the percentage rate bids from the eligible and approved contractors registered with PWD/CPWD/MES/ Railways. The last date for receipt of bids was 10.05.2022 up to 5 P.M. The tender documents consisted of eight

Sections, of which, Section 4 prescribed the General Conditions of the Contract and Section 2 specified the Instructions to Bidders (ITB) and Appendix thereto.

2.2 In pursuance of the above tender notice, the Petitioner participated in the bidding process for the following works in the District of Kalahandi under Bhawanipatna Division:-

Package No.	Name of work	Total cost
OR-15-480	MRL11-NH201 to Karlaguda via Thuapadar	347.44
OR-15-482	MRL08-NH201 to Dhippadar	190.02
OR-15-491	MRL08-NH201 to Mukundpur vis Baijalpur	465.5

Three numbers of bidders, including the Petitioner, had participated in the bid. The tender was evaluated by the Tender Evaluating Committee. The Petitioner was however, disqualified on the ground that the lease deed was not furnished as per the requirement under Clause 4.2 (d) of the General Conditions of ITB. The Petitioner had also failed to supply the key machinery envisaged under Clause 4.4 B(b)(i) of the ITB. On 22.05.2022, the result of the

technical bid was published vide a notice, where the Petitioner was declared as disqualified, whereas other two bidders were declared as qualified.

2.3 As per Clause-(vi) of Part-II Special Conditions of the Contract under Section-4 Conditions of Contract, the Petitioner submitted a grievance petition before the Chief Engineer, PMGSY Rural Works, within 5 working days of the date of publication of the result of technical bid for final decision by the Tender Grievance Redressal Committee on the result declared on 22.05.2022. The Petitioner in the said grievance petition had contended that he had obtained two paver finishers, which was the requirement under additional equipment for roads having BM/BC/SDBC/PMC machinery under SI 15 of the Clause 4.4.(B)(b)(i) on lease from one Rajesh Thakur and had submitted the documents evidencing it through the e-procurement process for both the bids, namely, OR-15-480 (W.P.(C) No. 15733 of 2022) and OR-15-482 (W.P.(C) No. 15735 of 2022). The Petitioner had also submitted an invoice bearing no. ZL1018001252 evidencing the

ownership of the basic equipment, as envisaged under the aforesaid Clause. But the same was not considered in respect of both the bids, i.e., OR-15-480 and OR-15-482.

2.4 Pursuant to the grievance petition under Annexure-3 series, the Chief Engineer PMGSY called for a detailed report from the Chief Construction Engineer, RW Circle, Bhawanipatna. The Chief Engineer PMGSY, vide letter No. 967 dated 31.05.2022, further informed the Chief Construction Engineer, Bhawanipatna that the Petitioner has his own paver and the authority, if so desires, may consider the request of the agency. After receipt of the letter from the Chief Engineer PMGSY, the Chief Construction Engineer, who is the Tender Inviting Authority, opined that the Petitioner may be treated as qualified bidder, as he has his own paver finisher. Accordingly, the grievance of the Petitioner was referred to the Tender Redressal Committee and the Committee, which was presided over by the Chairman, Opposite Party No.6 herein, after perusing the petition and after due deliberation and discussion, concluded to defer the matter

for the time being with an opinion that the letters submitted by the Chief Construction Engineer are ambiguous and inadequate. Further, the Committee sought for clarification as to whether the lease deed was uploaded or not by the bidder and the specific reason for disqualification along with the details should be furnished within three days to the office of Chief Engineer for necessary redressal in the next meeting, but no action was taken. Therefore, the Petitioner had approached this Court by filing W.P.(C) No. 15506 of 2022 and W.P.(C) No. 15504 of 2022, which were withdrawn on 23.06.2022 with a liberty to file better applications. Hence, these writ petitions.

3. Mr. S.K. Dalai, learned counsel for the Petitioner vehemently contended that all the relevant documents were uploaded in the e-portal and as such, the Petitioner had complied substantially with the eligibility clause 4.2 (d) which prescribes the qualification of bidders under Section 2 of ITB. But the said qualification clause has to be read with certain other ancillary clauses for interpretation of

main clause. Appendix-1 of the Clause 4.4 B states about key equipments which is again sub-divided into basic equipment and additional equipments for certain types of roads. The Petitioner had complied with the same by furnishing the documents of ownership and arrangement made thereto for all the basic and additional equipments as well. But technical evaluation was made in an arbitrary manner and consequentially the bid of the Petitioner was rejected. In other words, the Technical Evaluation Committee, while making evaluation, had not taken into consideration Clause-25 of Section 2 of the ITB, which states that the detailed evaluation of each bid will be done considering the three parameters, such as, it must meet the eligibility criteria, must be properly signed and would be substantially responsive to the requirements of bidding documents. The bid of the Petitioner, even though had satisfied all the three parameters, was abruptly ignored and declared non-responsive for the financial bid. Thereby, the action of the State-Authorities in rejecting the technical bid of the Petitioner cannot sustain in the eye of law.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-Opposite Parties, while disputing the contentions raised by the learned counsel for the Petitioner, contended that the Chief Construction Engineer, Rural Works Circle, Bhawanipatna-Opposite Party No.4, on 11.04.2022, invited the percentage rate bids, in electronic tendering system, for construction of roads and bridges under Pradhan Mantri Gram Sadak Yojana including their maintenance for the period of five years from the eligible and approved contractors registered with State PWD/CPWD/MES/ Railways etc. Pursuant thereto, the Petitioner participated in the process of bid. The present case relates to construction of road from MRL-11-NH-201 to Karlaguda, Via-Thuapadar, for which the paver machines are required to make such road. While uploading the bid, the Petitioner had only uploaded the invoices of such paver machines, which were not owned by him. As the Petitioner had not uploaded any lease agreement to that extent, the technical bid of the Petitioner was rejected taking into consideration Clauses-3(d) and 4.4 B(b)(i) of the DTCN (Detailed Tender

Call Notice). It is further contended that though the Petitioner had uploaded the invoice of Lessor, but lease agreement was not uploaded by him. The Petitioner claimed that he is the owner of two paver finishers, which is under scrutiny of Tender Redressal Committee at C.E., PMGSY, Bhubaneswar. Therefore, justified the rejection of the technical bid of the Petitioner stating inter alia that the Petitioner had not uploaded any evidence either in support of the ownership of the paver machine or any lease agreement with regard to such paver machine. Therefore, rejection of technical bid of the Petitioner is well justified, which does not warrant interference by this Court at this stage.

5. This Court heard Mr. S.K. Dalai, learned Counsel appearing for the Petitioner and Mr. P.P. Mohanty, learned Additional Government Advocate appearing 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.

6. Before delving into the legality and propriety of rejection of the technical bid of the petitioner, it is pertinent to refer to the relevant clauses of the DTCN.

6.1 Section-2 of the Standard Bidding Document deals with Instruction to Bidders (ITB). Under A. General, Clause-1 envisages the Scope of Bid, Clause-2 provides the Source of Funds, Clause-3 stipulates with regard to Eligible Bidders, Clause-4 prescribes Qualification of the Bidders. Clause-4.2(d), being relevant for the purpose of the case, is extracted hereunder:-

“4.2 (d) evidence of ownership of major items of construction equipment named in Clause 4.4 B (b)(i) of ITB or evidence or arrangement of possessing them on hire/lease/buying as defined therein.”

Clause-4.4 B(b)(i), being essential for just decision of the case, is quoted as under:-

“4.4B(b). Each bidder must demonstrate:

(i) availability for construction work, either owned, or on lease or on hire, of the key equipment stated in the Appendix to ITB including equipment required for establishing field laboratory to perform mandatory tests, and those stated in the Appendix to ITB.”

Appendix to ITB Clause-4.4.B(b)(i) states as follows:-

“(4.4. B)(b)(i). The key equipment for road works and field testing laboratory.

a. Key equipments for Road Works are: As per Sl. 15 (a) of Contract Data to General Conditions of the Contract.”

6.2 Contract Data to General Conditions of Contract of the Standard Bidding Document, at Clause-15 prescribes that the key equipment/machinery for construction of works shall be as follows:-

“A. For road works

Sl. No.	Name of Equipment/ Machinery	Minimum Required Quantity		
		For single road in a package	For Two roads in a package	For Three roads or more than three roads in a package
i. Basic equipments for all roads				
1.	Vibratory Roller	1 No.	1 No	2 Nos
2.	Tandem Roller	1 No.	1 No	2 Nos
3.	Water Tanker	1 No.	2 Nos	3 Nos
4.	Concrete Mixure	1 No.	2 Nos	3 Nos
5.	Needle Vibrator	2 Nos.	4 Nos	6 Nos
6.	Plate Vibrator	1 No.	1 No	2 Nos
7.	Static Road Roller (8 to 10 Tonnes)	2 Nos.	2 Nos	3 Nos
8.	Bitumen Mechnaical Sprayer	1 No.	1 No	2 Nos
9.	Air Compressor	1 No.	1 No	2 Nos
10.	Tipper/Tipper hyva	2 Nos.	4 Nos	6 Nos
11.	Tractor	1 No.	2 Nos	3 Nos
12.	Concrete Saw Cutting Machine	1 No.	1 No	2 Nos
ii Additional equipment for roads having BM/BC/SDBC/PMC				
13.	Hot Spot Mix Plant double drum type Or Hot mix Plant (30 to 40 TPH or more)	1 No		

14.	Paver Finisher	1 No.
iii Additional equipment for roads having WMM		
15.	Batch Mix Plant	1 No.
16.	Grader	1 No.
iv. Additional equipment for roads having 2 coats of Surface Dressing		
17.	Mechanical chips spreader	1 No..”

6.3 The notice dated 22.05.2022 where result of Technical Bid Evaluation, PMGSY-III, Batch-III (2021-22) for responded packages (except single bid) invited vide this Office Bid Identification No. BPT/Online-01/2022-23, at Sl. No.3 states as follows:-

Sl. No.	Package No.	No. of Bidder Participated	Name of the Bidder	Qualified/ Disqualified	Reasons of Disqualification.
1	2	3	4	5	6

xxx		xxx		xxx	
3	OR-15-480	3 Nos	1.	Akshaya Kumar Panda	Qualified
			2.	Prakash Kumar Mohanty	Disqualified
			3.	RBS Construction	Qualified
					Inadequate machineries as per Clause No. 4.2 (d) of DTCN

6.4 The check list for evaluation of Technical Bids of PMGSY Works Identification No. BPT/Online-01/2022-23, at Clause No.12 under the heading Additional equipment

for roads having BM/BC/SDBC/PMC it has been indicated as follows:-

	Required as per DTCN		Furnished/ Uploaded in Technical Bid			
Sl. No	Name of Equipment/ Machinery	Quantity For single road in a package	Owned/Lease			Document furnished or not with page no. (Ownership/ Lease/Hire agreement/ Despatch Invoice)
			Owned	Hired/ Lease	Total	

Xxx

xxx

xxx

14.	Paver Finisher	1 No.	-	-	-	P-73
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“lease deed not furnished” is written in handwriting as against Sl. No.14.

7. In view of the materials available on record, as mentioned above, the Petitioner’s technical bid, so far as Package No. OR-15-480 is concerned, was rejected on the ground of inadequate machineries as per Clause-4.2(d) of the DTCN, which speaks about evidence of ownership of major items of construction equipment named in Clause 4.4 B (b)(i) of ITB or evidence of arrangement of possessing them on hire/lease/buying as defined therein. Clause 4.4 B(b)(i), as quoted above, required each bidder must demonstrate availability for construction work, either

owned, or on lease or on hire, of the key equipment stated in the Appendix to ITB including equipment required for establishing field laboratory to perform mandatory tests, and those stated in the Appendix to ITB. The Appendix to ITB under (a) specifies key equipments for Road Works are: as per Sl. 15 (a) of Contract Data to General Conditions of the Contract. If that would be taken into consideration, it only speaks for road works the Petitioner has to provide the key equipments/machinery. So far as basic equipments for all roads are concerned, the same have been prescribed under Sl. Nos. 1 to 12 of clause (i) and so far as additional equipments for roads having BM/BC/SDBC/PMC are concerned, the same have been provided at Sl. Nos. 13 and 14 under clause (ii).

8. As per data of machinery possessed either owned or leased/hired under Clause-12 at Sl. No. 14, though the Petitioner had furnished the data with regard paver finisher, but he was disqualified on the ground of non-furnishing of lease deed. But fact remains, the Petitioner is the owner of the paver finisher and produced

the invoice bearing no.ZL1018001252, which is placed on record. Therefore, when technical bid of the Petitioner was rejected, he made a grievance by way of filing representation to the Chief Engineer, PMGSY, Rural Works Orissa, Bhubaneswar stating inter alia that he had enclosed the invoice, which was uploaded in the e-procurement site, but the same was not taken note of by the Technical Evaluation Committee. In response to such grievance petition, the Chief Engineer, PMGSY communicated to the Chief Construction Engineer, vide letter dated 25.05.2022, calling upon him to provide certain information for redressal of the grievance prior to finalization of the tender. In response to the same, the Chief Construction Engineer, Rural Works Circle, Bhawanipatna, communicated to the Chief Engineer, PMGSY vide letter dated 31.05.2022 to the following effect.

*"To
The Chief Engineer, PMGSY
Rural Works, Odisha
Bhubaneswar.*

Sub: Tender for the PMGSY Package No.OR-15-480 and OR-15-482.

Ref:- Your good office letter No. 16473 dated 25.05.2022.

Sir,

In inviting a kind reference to the aforesaid subject, it is to state that as per scrutiny of bid document, Prakash Kumar Mohanty has submitted the Invoice of Paver Finisher of Sri Rajesh Thakur. Also he has own Paver Finisher which is shown in Grievance Petition.

If authority desires the request of agency may be considered for qualification in Technical Evaluation at this level.

Encl: As above

*1) Invoices of Paver Finisher owned by Rajesh Thakur
At Page - 90,91 of technical Bid.”*

This clearly indicates that the Chief Construction Engineer, Rural Works Circle, Bhawanipatna, who is the tender inviting authority, has categorically admitted that the Petitioner had submitted the invoice of paver finisher of Sri Rajesh Thakur and that he has own paver finisher which is shown in his grievance petition. Therefore, he suggested that if the Authority desires the request of agency may be considered for qualification in technical evaluation at this level.

9. The Chief Construction Engineer, Rural Works Circle, Bhawanipatna also communicated another letter on 02.06.2022 to the Chief Engineer, PMGSY contending therein that the Petitioner participated in PMGSY tender

may be considered as qualified bidder, as he has owned paver finisher produced along with grievance petition, for want of which he has been disqualified in technical evaluation. Therefore, the tender inviting authority is conscious about the fact that the Petitioner is in possession of a paver finisher, document of which was produced along with the bid document and also in the grievance petition submitted before the competent authority. Thereby, suggestion was given to consider his document for technical evaluation. However, the Chief Engineer, PMGSY communicated, vide letter dated 07.06.2022, to the Chief Construction Engineer, i.e., the tender inviting authority with regard to the decision taken in the Tender Grievance Redressal Committee meeting held on 02.06.2022 and also directed to communicate the decision of the committee to the Petitioner individually basing on his grievance. Accordingly, in the Tender Grievance Redressal Committee Meeting held on 02.06.2022 at 5.00 P.M. in the Conference Hall of Office of E.I.C., Rural Works, Bhubaneswar, a decision was taken

on the grievance petition of the Petitioner to the following effect:-

“On scrutiny it is found that in the same notice the C.C.E. has qualified the petitioner in another package No.OR-15-491 and published the result on dtd.30.05.2022.

The Committee after due deliberation and discussion opined that the letters submitted by C.C.E. are ambiguous and the details provided is inadequate. The Committee thus deferred the decision on this grievance and directed C.C.E., R.W. Circle, Bhawanipatna to clarify whether lease deed has been uploaded or not by the bidder and the specific reason for disqualification along with all the details within 3 days to the office of Chief Engineer, PMGSY for necessary Redressal in the next meeting.”

A perusal of the aforementioned decision would go to show that the Committee had deferred the decision on the grievance made by the Petitioner and directed the Chief Construction Engineer, R.W. Circle, Bhawanipatna, to clarify whether lease deed had been uploaded or not by the bidder and the specific reason for disqualification along with all the details within 3 days to the office of the Chief Engineer, PMGSY for necessary redressal in the next meeting. Meaning thereby, without taking any final decision, the authorities have tried to proceed with the bid with two qualified bidders.

10. At that stage, the Petitioner had approached this Court by filing the present writ petition. While entertaining the writ petition, to protect the interest of the Petitioner, this Court, on 27.06.2022, passed the following order:

“This matter is taken up through hybrid mode.

2. Heard Mr. S.K. Dalai, learned counsel for the Petitioner and Mr. P.P. Mohanty, learned Additional Government Advocate.

3. The Petitioner has filed this Writ Petition seeking to quash the order dated 22.05.2022 under Annexure-2 series, by which his technical bid in respect of package no.OR-15- 480 has been rejected, and to direct the Opposite Parties to allow and consider his technical bid by opening the financial bid of the Petitioner along with others.

4. Mr. S.K. Dalai, learned counsel for the Petitioner contended that Odisha State Rural Roads Agency issued standard bidding document for construction & maintenance under Pradhan Mantri Gram Sadak Yojana (PMGSY) for the year 2021-22 in respect of 65 Packages in the district of Kalahandi & Nuapada. The technical bid of the Petitioner was disqualified in respect of Package No.OR-15-480 due to inadequate machineries as per Clause -4.2(d) of DTCN. Clause-4.2(d) of the DTCN states that evidence of ownership of major items of construction equipment named in Clause4.4B (b)(i) of ITB or evidence of arrangement of possessing them on hire/lease/buying as defined therein. Clause-4.4 B (b)(i) states that each bidder must demonstrate availability for construction work, either owned, or on lease or on hire, of the key equipment stated in the Apendix to ITB including equipment required for establishing field laboratory to perform mandatory tests, and those stated in the Apendix to ITB. Clause 4.4.B (b)(i) of the Apendix to ITB states that the key equipment for road works and field testing laboratory (a) Key equipments for Road Works are: as per SI.15(a) of Contract Data to General conditions of

the Contract. On perusal of Clause-15 would go to show that the key equipment/machinery for construction of works shall be (A) (i) basic equipments for all roads (ii) additional equipment for roads having BM/BC/SDBC/PMC and one item under the said category. But it is contended that when notice was published under Annexure-2 series dated 22.05.2022, in the check list against clause-14- paver finisher, it is stated that lease deed not furnished. It is contended that the Petitioner has got paver finisher as he is the owner and furnished the invoice to the authority concerned. Therefore, the question of producing any lease deed for the said purpose does not arise. It is contended that the Petitioner has intimated to the higher authority by submitting the invoice of paver finisher including all the documents to consider him as qualified bidder. On consideration of the same, the higher authority intimated the same to the Tender Grievance Redressal Committee for consideration, but without considering the same, the committee reiterated the same thing and opined that the decision of the Chief Construction Engineer, Rural Works Circle, Sunabeda is upheld and accordingly, rejected the grievance of the Petitioner on 02.06.2022. It is contended that if the Petitioner is the owner and produced the invoices of paver finisher, the authority has not applied his mind and passed the order declaring the Petitioner disqualified. Therefore, the decision taken on 02.06.2022 rejecting the grievance of the Petitioner cannot sustain in the eye of law.

5. Issue notice to the opposite parties.

6. Six extra copies of the Writ Petition be served within three days on Mr. P.P. Mohanty, learned Additional Government Advocate, as he appears for Opposite Parties no.1 to 6 to enable him to obtain instructions or file counter affidavit.

7. Requisites for issuance of notice to Opposite Parties no.7 & 8 by speed post shall be filed within three days. Office shall send notice to the said Opposite Parties fixing a short returnable date.

8. As an interim measure, it is directed that no further action shall be taken pursuant to Annexure-1 series in respect of Package No.OR-15-480 till 06.07.2022.”

11. In the counter affidavit filed by the Opposite Parties No. 1 to 6, at paragraphs-7 and 14, the following stand has been taken:-

“7.In the present case, the petitioner while uploading his bid, he has only uploaded the invoices of such paver machines, which was not owned by him. Further the petitioner has not uploaded any lease agreement to that extent. Hence the technical bid of the petitioner was rejected taking into consideration of Clause-3(d) and 4.4 B(b)(i) of the DTCN.

xxx xxx xxx

14. That in reply to the averments made in paragraphs-16 and 20 of the writ petition, it is respectfully submitted that the additional equipment mentioned in SI.No.15(A) in contract data to G.C.C. is according to the nature of work to be executed as well as mandatory for bidder to fulfil the requirement. This should not be considered lightly for qualification criteria. The additional equipment listed in machinery as mentioned above cannot be interpreted ancillary as clause but it should be noticed as if main clause. It is disputed and denied that the petitioner has submitted the invoices and list of all the major equipments including paver machine through online.

All other averments/allegations made in these paragraphs are hereby disputed and denied.”

12. In view of the reasons, which have been assigned in the counter affidavit filed by the Opposite Parties No. 1 to 6, the rejection of the technical bid submitted by the Petitioner cannot have any justification, when he himself possessed the paver finisher and in evidence of which he had produced the invoice, the

question of production of the lease deed for such document is not required. More so, when the competent authority, while considering the grievance of the Petitioner called upon the tender inviting authority to produce the report, it has been specifically admitted by the tender inviting authority that the Petitioner, who participated in PMGSY tender, may be considered as a qualified bidder, as he has owned a paver finisher and in support of the same he had produced invoice along with the grievance petition, for want of which, he has been disqualified in technical evaluation. Therefore, there is no valid and justified reason in rejecting the technical bid submitted by the Petitioner on a flimsy ground of non-production of the lease deed. If the Petitioner himself possessed the paver finisher machine, as required under the Standard Bidding Document, and had uploaded the invoices and also enclosed such documents along with grievance petition filed before the competent authority and considering the same the grievance redressal authority instructed the tender issuing authority to furnish detailed report, basing upon which the tendering issuing authority considered that the Petitioner had his own paver

finisher, in that case, rejection of the technical bid due to non-production of lease deed does not arise. As such, the rejection of such technical bid of the Petitioner cannot sustain in the eye of law.

13. In ***Tata Cellular v. Union of India, (1994) 6 SCC 651***, the apex Court held that it shall always be the endeavor of the Government to prevent arbitrariness or favoritism. At Paragraphs 70, 71 and 81(2), the apex Court observed as follows:-

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and

the need to remedy any unfairness. Such an unfairness is set right by judicial review.

81 (2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Bernet London Borough Council, ex p Johnson the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.”

At the same time, the Principle of Judicial Review has been summarized in Paragrpah-94 of the said Judgment, which reads as follows:-

“94. The principles deducible from the above are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in

an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

At Paragraphs-151 and 154 of the said Judgment, the apex Court also observed as follows:-

“151. In the above two cases, we are obliged to interfere on the ground of arbitrariness and violation of the principle of natural justice confining ourselves to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision-making process.

154. In view of the foregoing, we thus reach the conclusion that Bharati Cellular could not claim the experience of Talkland. This conclusion has come to be arrived at on the basis of the parameters we have set out in relation to the scope of judicial review. We may reiterate that it is not our intention to substitute our opinion to that of the experts. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly this Court would interfere.”

14. The sum and substance of the Principle laid down by the apex Court in the aforementioned case is that in exercise of power under Judicial Review, the Court

cannot substitute its opinion to that of experts and also cannot sit as a Court of Appeal, but will review the manner in which the decision is made and also held the Government must have freedom of contract. The decision must not only be tested by the application of “*Wednesbury Principle of Reasonableness*” but must be free from arbitrariness not affected by bias or actuated by *mala fides*. Consequently, where the selection or rejection is arbitrary, then certainly the Court would interfere. Therefore, with the touchstone of Article 14, 19 (1)(g) and 21 of the Constitution of India, if the scrutiny of fact and law will be taken into consideration and if the Court comes to a conclusion that there is arbitrary, unreasonable exercise of power tainted with *mala fide* and bias, in that case, the Court has got the power to interfere with the same.

15. In ***Radha Krishna Agarwal v. State of Bihar***,

AIR 1977 SC 1496, the apex Court held as follows:-

“In case any right conferred on the citizens which is sought to be interfered, such action is subject to article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State

action of this type of entering or not entering into contracts, article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the right of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non- discrimination in the type of the transactions and nature of the dealing.”

16. Similar view has also been taken by the apex Court in ***Mahabir Auto Stores v. Indian Oil Corporation Ltd.***, AIR 1990 SC 1031, ***Priya Gupta v State of Chhattisgarh***, AIR 2012 SC 2413, ***Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority***, (2013) 10 SCC 95, ***Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj. BSNL***, AIR 2014 SC 9, ***Powai Panchsheel Co-operative Housing Society v. M.H.A.D.A.***, (2019) 2 SCC 294.

17. In ***In re: Special Reference No.1 of 2012***, (2012) 10 SCC 1: AIR 2013 SC (Civ) 209: 2012 AIR SCW 6194, the apex Court observed as follows:

“It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under article 226 or article 32 of the Constitution.

18. Similarly, in ***S.G.Jaisinghani v. Union of India***, AIR 1967 SC 1427, the Constitution Bench of the apex Court observed as under :-

“In the context it is important to emphasise that absence or arbitrary power is the first essence of the rule of law, upon which our whole Constitutional System is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within the clearly defined limits. Rule of law, from this point of view, means that the decision should be made by the application of known principles and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.”

19. In ***Ramana Dayarama Shetty v. International Airports Authority of India***, AIR 1979 SC 1628, the apex court observed that every action of the executive Government must be informed by reasons and should be free from arbitrariness. That is the very essence

of rule of law and its bare minimum requirement. Thus, the decision taken in an arbitrary manner contradicts the principle of legitimate expectation and the plea of legitimate expectation relates to **procedural fairness** in decision making and forms part of the rule of non-arbitrariness as denial of administrative fairness is Constitutional anathema.

20. In view of the aforementioned principle laid down by the apex Court, there is no iota of doubt that if there is no reasonable exercise of power by the Authority and more so, if the arbitrary and unreasonable exercise of power based on bias and *mala fide*, the Court has every jurisdiction to interfere with the same in exercise of Power under Article 226 of the Constitution of India.

21. In view of the facts and law, as discussed above, there is no iota of doubt that the rejection of the technical bids of the Petitioner vide Annexure-2 series to both the writ petitions cannot sustain in the eye of law and, as such, the technical bids of the Petitioner are to be considered by the authority, keeping in view the letter

dated 31.05.2022 under Annexure-5 and letter dated 02.06.2022 under Annexure-6, issued by the Chief Construction Engineer, Rural Works Circle, Bhawanipatna, the tender inviting authority addressed to the grievance redressal authority, i.e. Chief Engineer, PMGSY, Rural Works, Orissa, Bhubaneswar. Thus, while quashing Annexure-2 series to both the writ petitions, this Court directs the Tender Evaluation Committee to take into consideration the technical bids of the Petitioner, in respect of both the above noted packages, for evaluation in accordance with law keeping in mind the letter dated 31.05.2022 and letter dated 02.06.2022 under Annexures-5 and 6 respectively.

22. In the result, both the writ petitions are allowed.
There shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

G. SATAPATHY, J. I agree.

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G. SATAPATHY,
JUDGE

Orissa High Court, Cuttack
The 8th September, 2022, Arun/GDS