A.F.R.

HIGH COURT OF ORISSA : CUTTACK

W.P.(C) No.29177 of 2021

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

Bombay Intelligence Security (India) Ltd. .... Petitioner.

Versus.

Union of India & others .... Opp.parties

For Petitioner : Mr. D.P.Nanda, Sr. Advocate
Miss. Sarita Moharana, Advocate

For Opp.parties : Mr. P.K.Parhi, ASGI
Mr. B.S. Rayaguru, CGC
(for Opp.Party nos.1 to 4)

Mr. Goutam Mukherjee, Sr. Advocate
Mr. Aviral Dhirendra, Advocate
Mr. Anupam Dash, Advocate
Ms. Supriya Patra, Advocate
(for Opp. Party no.5)

PRESENT

THE HON'BLE SHRI JUSTICE JASWANT SINGH
A N D
THE HON'BLE SHRI JUSTICE M.S.SAHOO

Date of hearing : 02.08.2022 : Date of judgment: 26.08.2022

BY THE BENCH : The petitioner, a company registered under the Companies Act, namely Bombay Intelligence Security (India) Ltd challenges the decision of the tendering authority/the opposite party no.2-All India Institute of Medical Science (Hereinafter, AIIMS for short), Bhubaneswar in qualifying the bid of opposite party no.5 : Quess Corporation Ltd. and awarding the contract to opposite party no.5 for providing manpower on job outsourcing basis at AIIMS Bhubaneswar for a period of two years from the date of award of contract and further extendable.

2. In the writ petition the following prayers have been made :

> *(a) The acceptance of the tender bid of the opposite party no.5 and award of contract under Annexure-13 should be declared illegal, arbitrary, unreasonable and be quashed.*
>
> *(b) The bid of the petitioner should be accepted since the petitioner has complied all criteria of the tender notice dated 10.02.2021 and quoted equal rate similar to opposite party no.5.*
>
> *(c) The process adopted by the opposite party nos.3 & 4 in evaluation and finalization of the public tender should be declared illegal, arbitrary, mala fide and violative of the article 14 of the constitution of India.*

3. The opposite party no.2-All India Institute of Medical Science Bhubaneswar is a statutory body and it is agreed by the petitioner as well as the opposite parties that the said authority is a "State" as defined under Article 12 of the Constitution of India.

4. The facts as they have emerged are that after the E-tender notice dated 30.12.2020 (Annexure-2) inviting tender from intending bidders, a corrigendum dated 10.02.2021 (Annexure-4 to the writ petition) was issued. In the said corrigendum, Clauses-11, 19 & 20 of Technical Bid (Eligibility Criteria) have proved to be the bone of contention between the parties and, therefore, are quoted herein for convenience of reference :

> *"**Clause-11** (i) Valid Labour License copies issued in favour of the Firm by Labour Commission, GOI of respective areas exclusively for manpower deployment (Health care, Technical, Administrative, Engineering and similar Services) where manpower have been provided by the firm during last 05(Five) FYs (2015-16), 2016-17, 2017-18, 2018-19, 2019-20).*
> *(ii) Undertaking to be submitted by the bidder (who is not operating in Bhubaneswar) that they will obtain and submit valid labour*

license from the local authority for area of work at Bhubaneswar within 30 (Thirty) days from the date of award of work/contract."

*"**Clause-19-**Experience in providing Manpower Services {(Health Care, Technical, Administrative, Engineering and Similar Services (Excluding security, Watchman & Housekeeping Services)} as per Annexure-III. This shall cover the details of works of similar nature, approximate magnitude and duration carried out and/or on hand as on 31.03.2020 for last 5 years along with copy of work orders/certificates issued by concerned authority from Central Government/State Govt./PSU/Autonomous bodies/reputed private organization where the job was carried out.*

***Clause-20**- Bidders must have completed a single work order for minimum value of Rs.5.00 crore (Rupees five crore only) towards Manpower service {for Health care, Technical, Administrative, Engineering and similar Services (Excluding security, watchman & Housekeeping service)} in any year during last 5 years. (Please enclose copy of necessary completion certificate.)".*

The notice inviting the tender requires the bidders to enclose the copies of completion certificate towards satisfaction of the eligibility criteria as quoted here above, provided in Clauses-19 and 20. The completion certificate has to be of the work done towards manpower during the last five years excluding *Security, Watchman, Housekeeping Service*.

Referring to clauses quoted above, it is sought to be submitted that the opposite party no.5's bid should have been disqualified being not in consonance with Clauses-19 & 20 above as the opposite party no.5 in the *completion certificate* produced for evaluation of it's bid has not excluded "*Security, Watchman & Housekeeping Services*".

5. The tender is in two parts as specified in the E-tender No.11031 dated 30th December,2020 as quoted herein:

“TENDER EVALUATION
***Tenders evaluation will be done in two** stages:*
a. Technical bid (Eligibility Criteria).
b. Financial bid.

***Terms of Two Bid System**:*

The e-tender online shall be submitted in 2(Two) parts:
*(i) **Technical Bid:** Online Submission of all required documents.*
*(ii) **Financial Bid:** Financial bid shall be submitted online. The Financial Bid of bidders, who qualify at Technical Bid Evaluation, will be opened thereafter.”*

The tender was to be awarded to the L1 bidder as provided in *Clause-11* of the “General Terms and Conditions” that is quoted herein:

“… … Firstly, agency who have quoted lowest service charge not below 2.08% in finance part shall be awarded as L1 bidder. Secondly, if two or more agencies have quoted same service charge then the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of the manpower services for last 05(five) years of the bidder as depicted in the Audited Financial Statement/IT Returns during the year 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20. Accordingly bidders have to enclose self-attested copies of IT Returns and Audited Financial statements along with their Technical bid.”

Clause-4 of the *Financial Bid* further clarifies the method of selection of L1 bidder as quoted herein :

“4. The Lowest Bidder (L-1) shall be determined on the basis of service charges quoted by the bidders. The service charge should be more than 2.08% (TDS-IT) @ 2% primary education cess @ 2% of TDS-IT & Higher education cess @ 2% of TDS-IT)of the consolidated wage and maximum two digits after decimal points is to be taken for evaluation. It should not be mentioned in the fraction. It should not be mentioned in the fraction. The service charge is also to be at percentage common to all categories. Firstly, agency who has quoted lowest service charge (More than 2.08%) in finance part shall be awarded as L-1 bidder. Secondly, if two or more agencies have quoted same percentage of lower service charge, than the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of manpower

> *services (excluding security, watchman and housekeeping services) for last five (05) years of the bidder as depicted in the column A of the Annexure-IV. Accordingly, bidders have to enclose self-attested copies of IT Returns and Audited Financial Statements along with their technical bid. Clearly showing the turnover for manpower service (excluding security, watchman & housekeeping service). In case the value of such services are not segregated clearly, the bid will be rejected."*
>
> *(emphasis supplied)*

6. Out of ten bidders, nine bidders including the petitioner and the opposite party no.5 were declared qualified in the technical bid. On 06.09.2021 the price bids were opened and it was found that out of nine qualified bidders, six bidders quoted equal rate of service charges, i.e., 2.09 percent (%) of total remuneration payable for the outsourcing job. The tender committee selected opposite party no.5 as lowest bidder on the ground that the opposite party no.5 showed to have highest turnover and the petitioner was found to be the second lowest bidder.

7. The petitioner on 19.07.2021(Annexure-6) issued request letter for re-valuation of the tender document on certain grounds pertaining to technical evaluation of bids.

On 27.07.2021 (Annexure-7) the authority replied to the petitioner giving clarification in the form of parawise reply to the issues raised petitioner's letter dated 19.07.2021, i.e., pertaining to nature of service to be provided by bidders, Trade licenses of the bidders turnover of bidders and lastly regarding the bidders having office at Bhubaneswar.

Thereafter, the petitioner on 03.08.2021 (Annexure-8) made a further request to the authority for reconsideration of all the evaluated technical bids tendered by all the participants and not to proceed further in finalizing the tender. The tendering authority responded to the letter dated 03.08.2021 giving detailed reply and went on to finalise the tender and awarded the contract in favour of opposite party no.5 by issuing "Notification of Award" dated 06.09.2021 (Annexure-13).

8. The challenge to the acceptance of the (Technical Bid) tender of opposite party no.5 is on the ground that the completion certificate submitted by the opposite party no.5 as part of his bid document includes "*housekeeping, sanitation service, cleaning etc*.," therefore is contrary to the mandatory condition of Technical Bid (Eligibility Criteria).

It is alleged by the petitioner that action of the opposite party nos.2 to 4, qualifying the bid of opposite party no.5 and accepting the same is a result of favouritism shown to the opposite party no.5, therefore, rendering the process of decision making bad in law, and hence award of the contract is liable to be set aside.

9. It is submitted by the petitioner that the work completion certificate, furnished by opposite party no.5 in the form of performance statement, is not in accordance with Clauses-19 and 20 of the Technical Bid (Eligibility Criteria) as the said clauses provide that *housekeeping service* is to be excluded while giving completion certificate whereas the opposite party no.5 had included *housekeeping service* to show the financial turnover.

It is averred by the petitioner that in contrast to the approach of opposite party no.5 tenderer, the petitioner has complied with the conditions contained in Clauses-19 and 20 and has excluded the financial turnover of housekeeping, *"sanitation service,, cleaning etcs."* in the work completion certificate.

10. This Court after hearing the learned counsel for the petitioner and the learned Additional Government advocate on 01.10.2021 issued notice and in the interim it was directed that there shall be stay of operation of the work order dated 06.09.2021 (Annexure-13) by which the opposite party no.5 was awarded the tender and the work order was issued. Since the tender is for the provision of manpower service for a large Hospital like, AIIMS, the petitioner who was earlier engaged by the opposite party no.2 was allowed by the employer to extend the contract up to 31.10.2021 and the said contract has been extended during the pendency of the present writ petition, thereby the petitioner is continuing. Interim order passed by this Court in I.A.No.13499 of 2021 dated 01.10.2021 has been extended by the subsequent orders of this Court.

11. As far as the pleadings are concerned, in response to the writ petition counter has been filed by opposite party no.5 dated 08.12.2021. The tendering authority opposite party nos. 1 to 4 have filed their counter dated 16.02.2022. Thereafter additional affidavit on behalf of opposite party nos.1 to 4 has been filed. Rejoinder dated 16.05.2022 in response to the counter filed by opposite party nos.1 to 4 dated 16.02.2022 has been filed. Additional affidavit dated 05.08.2022, has been filed by the opposite parties-1 to 4, which are on record.

12. On 21.06.2022 a Division Bench while hearing the matter considered the contention in respect of ineligibility of opposite party no.5 as advanced by the petitioner and noted by it's order that the turnover component qua

"*Housekeeping, Sanitation Service*" was severable and by excluding the same, opposite party no.5 was not only eligible but has much more turnover than the petitioner. For ready reference the said order dated 21.06.2022 is reproduced herein :

> *"3. Referring to the e-tender documents, Mr. B.Routray, learned Senior Advocate for the petitioner argued vehemently stating inter alia that the bidders must have completed a single work order of minimum value of Rs.5.00 crore (rupees Five Crore only) towards Manpower service {(Human Resources (health care, Technical Administrative, Engineering and other Services)} in a year during last 05 (five) years for which necessary completion certificate should be furnished by the bidder. Thereafter a corrigendum was issued on 10.02.2021 under 2 Annexure-4, wherein at Clause-20, it has been indicated as follows:-*
>
> > *"Bidders must have completed a single work order for minimum value of Rs.5.00 crore (rupees Five Crore only) towards Manpower service {(for Health care, Technical, Administrative, Engineering and other Services (excluding security, watchman & House keeping Service)} in any year during last 05 (five) years."*
>
> *3.1 Learned counsel for the petitioner further contended that since tender condition stipulates exclusion of security, watchman & House keeping Service and for that the minimum value of 5 crore will be computed towards Manpower service {(for Health care, Technical, Administrative, Engineering and other Services in any year during last 05 (five) years, the opposite party no.5 does not satisfy this requirement. He also brings to the notice of this Court the certificate issued by the Kasturba Hospital at page 130 and referring to Clause-9, i.e. description of the services provided by the firm, which reads as follows:-*
>
> > *"Integrated Facility Management services including Housekeeping & Sanitation, Cleaning, Façade Cleaning, Horticulture, Pest control, Paramedics & Disinfection, Garbage Management, Canopy cleaning, Mechanized cleaning of High rise building Glass and Steel structure etc., Bio waste management, Hygiene, Patient care, Repair and Maintenance (includes preservative maintenance of Electrical equipment, Civil, Air-Conditioning equipment's and repairs thereof, Engineering services including repairs and maintenance of lifts, Mechanical, Plumbing & Sewage, Medical Gas system and Laundry services etc.*

3.2 <u>It is further contended that since the housing keeping and sanitation, cleaning, Façade Cleaning, Horticulture, Pest control, Paramedics & Disinfection, Garbage Management, Canopy cleaning, Mechanized cleaning etc. have been included, therefore, the opposite party no.5 does not satisfy the requirement as per the terms and 3 conditions of the tender documents</u>.

4. Mr. G. Mukherjee, learned Senior Advocate appearing for the opposite party no.5 <u>brings to the notice of this Court the very same document, where at Clause-12, the break up of the amount has been made and House Keeping & Sanitation has also been excluded and the amount was indicated. If that will be excluded, it also comes to 12.00 crores. In the subsequent document at page-131 issued by the very same hospital, it comes to 15 crores. Thereby even excluding security, watchman & House keeping Service as has been mentioned above, the opposite party no.5 satisfies the minimum value of 5.00 crores in any year of the last 5 years. Thereby the opposite party no.5 is eligible to participate in the tender."</u>

(emphasis supplied)

13. Mr. D.P. Nanda, learned Senior Advocate, instructed by Miss. Sarita Maharana, learned counsel for the petitioner; Mr. P.K. Parhi, learned Assistant Solicitor General of India (ASGI) along with Mr. B.S.Rayaguru, learned Central Government Counsel (CGC) for opposite party no.1 & Mr. Goutam Mukherjee, Senior Advocate instructed by Mr Aviral Dhirendra and Mr. Anupam Dash, learned counsel for O.P. No.5 made their submissions on behalf of the respective parties and the learned counsel were heard at length. The parties have filed their list of dates and notes of submission which form part of the record.

14. In view of the contention of the petitioner that acceptance of the Technical Bid of the petitioner is contrary to clause-11 of the "General Terms and Conditions" issued by the tendering authority along with the notice dated 30.12.2022 (Annexure-2) inviting tender, the said "*Clause-11*" is quoted herein:

"11. After evaluation, the work shall be awarded to L1 bidder after complying with all Acts/provisions stated/referred to for adherence in the tender. The service charge to be quoted should be more than 2.08% (TDS-IT@2%, Primary education cess-@0.02% of TDS-IT- & Higher education cess- @ 0.02% of TDS-IT) of the consolidated wage and maximum two digits after decimal points is to be taken for evaluation. The service charge is also to be at Percentage common to all categories. The Bidder has to comply all the provisions of the labour laws and all other applicable rules/regulation/laws."

It is found that since all the nine technically qualified bidders quoted service charge @ 2.09%, the lowest bidder has been decided as per the clause: "*if two or more agencies have quoted same service charge then the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of the manpower services for last 05(five) years of the bidder as depicted in the Audited Financial Statement/IT Returns during the year 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20."*

15. The contention of the petitioner that the opposite party no.5 has not complied with Clauses-19 and 20 of the Technical Bid (Eligibility Criteria) quoted (supra) and that the tendering authority have not followed the said clauses-19 and 20, has been specifically answered by the tendering authorities in their counter affidavit filed by opposite party nos.1 to 4 dated 16.02.2022 which is as follows (in paragraph-20) :

"The Tender Committee evaluated the documents submitted by the participating bidders including the petitioner and the opposite party no.5(Quess Corporation Ltd.), as per the requirements of the Technical Bid (Eligibility Criteria) and found 9 (nine) nos. of bids as technically qualified in the Technical Bid, including both the petitioner-company and the opposite party no.5. Further, the opposite party no.5 submitted list of posts deployed by it at Kasturba Hospital along with the performance report, as per requirement of Clause-19 of the Technical bid (Eligibility Criteria) and also submitted documents regarding competition of single work order for minimum 5.00 crore (in any year between 2015-16 to

2019-20) of Kasurba Hospital, as per the requirements of Clause-20 of the Technical bid (Eligibility Criteria).

The documents as has been submitted by the opposite party no.5 in Technical Bid, clearly reflects that the opposite party no.5 has ***provided Manpower service, i.e., health care, technical, administrative, engineering and similar services], apart from security, watchman & Housekeeping service, to Kasturba Hospital, Manipal*** *and has got outstanding performance report, as per requirement of Clause-19 of the Technical bid (Eligibility Criteria). Further the documents submitted by opposite party no.5 in the Technical bid, it is mentioned that it has completed single work order for minimum* ***5.00 Crore (i.e., 1468.36 lakhs, in the financial year 2018-2019, in other Outsource Manpower),*** *in Kasturba Hospital, Manipal, which does not include the value of services for Housekeeping and Sanitation. Thus, the documents clearly established the Technical bid eligibility Criteria, in favour of opposite party no.5 (Quess Corporation), as per requirements of Clause-19 and Clause-20."*

16. To fortify their pleadings, the tender evaluating authorities/employer have annexed the work completion certificate submitted by opposite party no.5 enclosed to their counter marked as Annexures-A/2 and B/2. It has been further pleaded by opposite party nos.1 to 4 (Paragraphs-18, internal pages-11, 12 & 13 of the counter) as reproduced herein :

"Thus, as per Condition (4) of the Financial Bid, if two or more agencies have quoted same percentage of lowest service charge, then the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05 (five) years of the bidder as depicted in the Column "A" of Annexure-IV). ***The Opp.Party No.5 (Quess Corporation) submitted Turnover Certificate duly certified by Chartered Accountants showing value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05(Five) years of the bidder as per Column "A" of Annexure-IV). The Turnover certificate submitted by opposite party no.5 reveals the value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05 (Five) years, as 18,027.19 crores."***

> *" … … **In the instant case, as six bidders quoted same percentage of lowest service charge i.e., 2.09, hence the lowest bidder (L-1) is determined basing upon the highest value of cumulative gross turnover arising out of manpower service (Excluding Security, watchman & Housekeeping Service) for last 05 (Five) years of the bidders, as per Condition (4) of the Financial bid.***
>
> *As the value of cumulative gross turnover of Opposite Party No.5 for last 05 (Five) years from manpower service (Excluding Security, watchman & Housekeeping Service) (Quess Corporation) **was the highest i.e. 18027.19 Crores and hence the Tender Committee declared Opposite Party No.5 as L-1, as per the terms and conditions stipulated at the Financial Bid of the Tender Document.** The Tender committee has not committed any irregularity or illegality in evaluation of both Technical bid and financial bid of the bid documents submitted by participating bidders, in the Tender Process. The Opposite Party no.5 is declared as L-1 (Lowest bidder) in the Tender Process validly and rightly, as per terms and conditions of Tender Notice."*

The turnover certificate of opposite party no.5 has been annexed marked as Annexure-C/2 to the counter of opposite party nos.1 to 4.

17. The rejoinder filed by the petitioner to the counter of opposite party nos.1 to 4 breaks no further ground, the averments being inter alia repetitions of the averments made in the writ petition.

18. The opposite party no.5, the successful bidder, in its counter dated 8.12.2021 has raised preliminary objection regarding maintainability of the writ petition contending that it is the prerogative of the tendering authority to evaluate the tender and it is also in the realm of policy of the public authority (Opposite party nos.2 to 4) and, therefore, the writ petition is not maintainable.

18.1 Apart from the raising preliminary objection on ground of maintainability, it has been specifically averred by opposite party no.5 in their counter that the evaluation of tender has been done within four corners of the bid conditions in accordance with the tender documents as envisaged under Caluse-4 (quoted at above) of the financial bid which provides the manner of selecting L-1.

It has been further averred by opposite party no.5 that on opening of the financial bid on 6.9.2021 in presence of all the bidders including the petitioner, it was found that all the bidders have quoted service charge in excess of 2.08 and at the relevant para-17 of counter it has been thus stated :

> *" … … Since, all the nine financial bidders quoted service charge in excess of 2.08% and six financial bidders quoted the same service charge. However, the opposite party no.5 was declared as a lowest (L-1) bidder as per Clause-4 of the Financial Bid because the annual cumulative turnover of the opposite party no.5 for the last financial year was highest among the six financial bidders who quoted the same price for service charge."*

18.2 Regarding the cumulative turnover of opposite party no.5 as compared to the petitioner, it has been specifically averred by the opposite party no.5 *"… cumulative turnover of the opposite party no.5 for the Financial Years 2015-16 to 2019-20 is INR 18027,19,00,000 (Eighteen Thousand Twenty Seven Crore Nineteen Lakh Only) whereas the cumulative turnover of the petitioner for the Financial Years 2015-16 to 2019-20 is INR 1065,61,92,592 (One Thousand Sixty Five Crores Sixty One lakh Ninety Two Thousand Five Hundred Ninety Two Only … …"* and therefore the opposite party no.5 has to be declared as L1 as per the conditions of tender.

19. The comparative assessment of annual turnover of bidders by the authorities (opposite party nos.1 to 4) filed before this Court, is reproduced herein for reference :

Comparison statement as per Turn over								
Sl No	**Firm Name**		**FY Year**					
			2015-16	**2016-17**	**2017-18**	**2018-19**	**2019-20**	**Cumulative Turnover(Rs.)**
1	**M/S BIS(Petitioner)**	Total Annual turn over out of Manpower service(Rs.)	1,92,50,00,034.00	1,99,92,17,401.00	2,25,92,57,661.00	2,22,03,51,432.00	2,25,23,66,064.00	**10,65,61,92,592.00**
		Total Annual turn over other than manpower service(Rs.)	3,37,50,00,221.00	4,14,60,32,231.00	4,87,61,13,585.00	4,81,66,17,967.00	4,65,84,17,910.00	**21,87,21,81,914.00**
		Total Turnover(Rs.)	**5,30,00,00,255.00**	**6,14,52,49,632.00**	**7,13,53,71,246.00**	**7,03,69,69,399.00**	**6,91,07,83,974.00**	**32,52,83,74,506.00**
2	GA Digital	Total Annual turn over out of Manpower service(Rs.)	132.95 Crores	125.86 Crores	145.66 Crores	209.72 Crores	272.06 Crores	**886.25 Crores**
		Total Annual turn over other than manpower service(Rs.)	0	0	0	0	0	**0**
		Total Turnover(Rs.)	**132.95 Crores**	**125.86 Crores**	**145.66 Crores**	**209.72 Crores**	**272.06 Crores**	**886.25 Crores**
3	Kapston Facilities	Total Annual turn over out of Manpower service(Rs.)	70,27,38,022.00	90,63,08,004.00	1,11,02,84,164.00	1,47,23,03,769.00	2,13,39,27,316.00	**6,32,55,61,275.00**
		Total Annual turn over other than manpower service(Rs.)	Nil	Nil	Nil	Nil	Nil	**Nil**
		Total Turnover(Rs.)	**70,27,38,022.00**	**90,63,08,004.00**	**1,11,02,84,164.00**	**1,47,23,03,769.00**	**2,13,39,27,316.00**	**6,32,55,61,275.00**
4	Source Dotcom	Total Annual turn over out of Manpower service(Rs.)	28,55,61,322.00	22,87,55,312.00	21,67,35,517.00	24,43,23,420.00	25,54,67,879.00	**1,02,64,69,146.80**
		Total Annual turn over other than manpower service(Rs.)	10,87,11,199.00	8,77,67,060.00	8,73,93,064.00	11,18,23,975.00	7,84,68,914.00	**9,48,32,842.40**
		Total Turnover(Rs.)	**39,42,72,521.00**	**31,65,22,372.00**	**30,41,28,581.00**	**35,61,47,395.00**	**33,39,36,793.00**	**1,43,78,58,227.00**
5	**Quess Crop (Opp. Party No. 5**	Total Annual turn over out of Manpower service(Rs.)	2,419.46 Crores	2787.19 Crores	2799.56 Crores	3,725.77 Crores	6,295.21 Crores	**18,027.19 Crores**
		Total Annual turn over other than manpower service(Rs.)	498.72 Crores	655.74 Crores	1611.27 Crores	1969.02 Crores	1445.02 Crores	**6179.77 Crores**
		Total Turnover(Rs.)	**2,918.18 Crores**	**3,442.93 Crores**	**4,410.83 Crores**	**5,694.79 Crores**	**7,740.23 Crores**	**24,206.96 Crores**
6	Oriental Security	Total Annual turn over out of Manpower service(Rs.)	24.1041 Crores	26.3919 Crores	36.6068 Crores	41.9868 Crores	40.2968 Crores	**169.3864 Croress**
		Total Annual turn over other than manpower service(Rs.)	0.1445 Crores	0.1059 Crores	0.1394 Crores	0.1741 Crores	0.2918 Crores	**0.8557 Crores**
		Total Turnover(Rs.)	**24.2486 Crores**	**26.4978 Crores**	**36.7462 Crores**	**42.1609 Crores**	**40.5886 Crores**	**170.2421 Crores**

The above comparative analysis goes to show that the cumulative annual turnover of petitioner "*excluding security, watchman, housekeeping service*" is Rs.2187.21 crores, whereas that of the opposite party no.5 is Rs.6179.77 crores.

20. Before we proceed to deal with the rival contentions we would deem it appropriate to take note of the pronouncements laying down the propositions of law regarding scope of judicial review of the process of evaluation of tender by State/instrumentality of State.

Learned counsel for the petitioner has placed reliance on the decision rendered by the Hon'ble Supreme Court reported in ***(2017) 4 SCC 269: Reliance Telecom Ltd. V. Union of India*** to contend that the judicial review cannot be denied so far as exercise of power of government/public bodies to enter into the contract is concerned, so as to prevent arbitrariness or favoritism.

21. The opposite party nos.1 to 4 have relied on the decisions rendered by the Hon'ble Supreme Court in ***TATA Cellular v. Union of India: (1994) 6 SCC 651*** paragraphs-70, 74 and 75; ***Jagdish Mandal v. State of Orissa and others : (2007) 14 SCC 517*** and ***Montecarlo Ltd. V. National Thermal Power Corporation Ltd. : (2016) 15 SCC 272***. Referring to *Tata Cellular* (supra), it is contended by opposite party nos.1 to 4 that on clear scrutiny of the materials available on record, it can be concluded that in the tender process the authority has adhered to the principles established by law and the entire tender process was free from arbitrariness, malafides & favoritism as well as is in consonance with the public policy.

22. The learned counsel for opposite party no.5 seeks support from the decisions of Hon'ble Supreme Court in ***TATA Cellular*** (supra), ***Jagdish Mandal*** *(supra)* and further on ***Tamil Nadu Generation & Distribution Corporation Limited (TANGEDCO) Rep. by its Chairman and Managing Director and another v. CSEPDI- TRISHE Consortium, Rep. by its Managing Directors and another): (2017) 4 SCC 318***; ***N.G. Projects Limited v. Vinod Kumar Jain & others: 2022 SCC Online SC 336*** and ***Jasoda Roadlines and Ors v. Orissa State Warehousing Corporation and Ors: 2020(III) ILR-CUT-587,*** to show the scope of judicial review of a process of selection of bidder/finalization of tender by the Government/instrumentality of the Government.

It is submitted by the learned Senior Counsel for opposite party no.5 that the Courts cannot really enter into the realm of evaluation of tender by the authority, in exercise of power of judicial review, when the evaluation is neither ex-facie erroneous nor can be perceived as flawed nor perverse or absurd.

It is further contended that the Court cannot adopt the approach of an appellate forum or authority and extend the principle of judicial review to the area of evaluation of tender unless some manifest error in the method adopted is shown to the Court.

23. Apart from the above decisions cited at the bar, it would be apt to refer to certain other judicial pronouncements those are regarded as *Locus Classicus* on the scope of judicial review of administrative action.

In ***Chief Constable of the North Wales Police v. Evans: 1982(1) WLR 1155; (1982)3 All E R 141 (HL):*** *pp 1160H-1161A, 1173F 1174F-G of*

WLR, it was held by the House of Lords "*judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made*". "*.....judicial review is concerned, not with the decision, but with the decision-making process*"

Lord Hailsham in his separate yet concurring opinion observed (pp.1160E-H -1161-A of WLR):

> *"The first observation I wish to make is by way of criticism of some remarks of Lord Denning M.R. which seem to me capable of an erroneous construction of Rules of the Supreme Court: the rules which governed civil procedure in the Supreme Court of Judicature of England and Wales from its formation in 1883 until 1999. The purpose of the remedy by way of judicial review under R.S.C., Ord. 53. This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.*
>
> *(emphasis supplied)*
>
> *Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning M.R. (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on*

the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.

(Emphasis supplied)

Lord Brightman in his opinion (which was agreed to by the majority) observed as follows :

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

(pp.1173-F of WLR)
(Emphasis Supplied)

There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that " Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable." If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

(pp. 11874-F, G of WLR)

(Emphasis supplied)

24. Again, the House of Lords in ***Council of Civil Service Unions (C.C.S.U.) v. Minister for Civil Service, [1984] 3 All E.R.935, H.L.(E); [1984] 3 W.L.R. 1174; Civil Services [1985] A.C 374,*** considering the scope of judicial review of administrative action have held (opinion of Lord Diplock, *pp:1196-B-C-D-E-F-G of WLR*) as follows :

" … … Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the

development has come about, <u>one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality"</u> and the <u>third "procedural impropriety"</u>. That is not to say that further development <u>on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality"</u> which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

<u>By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it</u>. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

<u>By "irrationality</u>" I mean <u>what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.</u> To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "<u>procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision</u>. This is because <u>susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred,</u>

even where such failure does not involve any denial of natural justice. …”

(Emphasis supplied)

25. Apart from the broad principles to be adopted by the superior courts for Judicial Review of administrative action, as laid down in ***Chief Constable of the North Wales Police*** *(supra),* the development of the principle of *proportionality* as a further ground of judicial review is to be noted. **(*R. v. Secretary of State for the Home Department, ex Brind, (1991)1 AC 696; (1991)2 WLR 588 (HL)*)**: (Opinion of Lord Lowry: *pp 609C, D, H-610 A, B of W.L.R).*

> *“The applicants have relied on the doctrine of proportionality. That is, in one sense of the word, a deeply rooted and well understood idea in English law. In a claim for damages for personal injuries suffered by a workman allegedly through his employer’s negligent system of work the court has to weigh the risk of an accident, the likely severity of the consequences, the expense and difficulty of taking precautions and the resources of the employer with a view to deciding whether the employer failed to take reasonable care for the safety of the workman. In another field, as counsel once contended in Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd. [1988] 1 W.L.R. 990, 1001, proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be “unreasonable” in the Wednesbury sense.*
>
> *xxx xxx xxx*
>
> *2. The judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the right answer where the question is put in a Wednesbury form. The same applies if the judges’ decision is appealed. 3. Stability and relative certainty would be jeopardized if the new doctrine held sway, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application both at first instance and on appeal. 4. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, not to speak of the prolongation of uncertainty for all concerned with the decisions in*

> *question, and the taking up of court time which could otherwise be devoted to other matters. The losers in this respect will be members of the public, for whom the courts provide a service. … …"*

Having considered the conspectus of the decisions as discussed above, in our considered view, the efforts of this Court has to be to adopt the test, i.e. to "*consider whether something has gone wrong of the nature and degree which requires its intervention".*

26. Similarly, the Hon'ble Supreme Court in ***TATA Cellular (supra)*** *(at paragraphs-77 & 80 of SCC)* considering the scope of judicial review of the process of evaluation of tender by State/instrumentality of State have laid down the following :

> *"**77.** The duty of the court is to confine itself to the question of legality. Its concern should be :*
>
> 1. *Whether a decision-making authority exceeded its powers?*
> 2. *Committed an error of law,*
> 3. *committed a breach of the rules of natural justice,*
> 4. *reached a decision which no reasonable tribunal would have reached or,*
> 5. *abused its powers.*
>
> *Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:*
>
> *(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
>
> *(ii) Irrationality, namely, Wednesday unreasonableness.*
>
> *(iii) Procedural impropriety.*

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

*“**80.** At this stage, The Supreme Court Practice, 1993, Vol.1, pp. 849850, may be quoted :*

"4. Wednesbury principle.- A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. per Lord Greene, M.R.)"

27. It has also to be noted that there was pre-bid conference amongst the tenderer and the intending bidders on 12.01.2021 and subsequent opportunity was given to the tenderers including the petitioner to make representation seeking clarification. These inbuilt mechanisms included in the tender process also add to the sanctity of the tender process making it more in tune with the *principles of natural justice* as well as making the process more transparent.

28. When the matter was taken up on 08.07.2022 the learned Senior Counsel for the petitioner submitted that the petitioner would prefer not to raise the contention that the opposite party no.5’s bid was technically disqualified. However, since the said issue has been pleaded it is answered by this Court.

In view of the aforesaid discussions, it has to be held that the petitioner has not been able to demonstrate that the opposite party no.5

has not complied with the conditions provided in Clauses 19 & 20 of the Technical Bid (Eligibility Criteria) as quoted *supra*.

The comparative evaluation shows total annual turnover of the opposite party no.5 other than manpower service is Rs.6179.77 crores whereas the said annual turnover other than manpower service of the petitioner is Rs.2187.21 crores (Rs.21,87,21,81,914.00), thereby, indicating that both having quoted 2.09% as rate of service charge the opposite party no.5 having higher cumulative turnover for the last five years becomes L1.

29. The pleadings of the petitioner and assertions based thereon have been duly evaluated. In the legal and factual premise, the petitioner's contention that the O.P. NO.5 did not satisfy the conditions as contained in clauses 11, 19 & 20 Technical Bid (Eligibility Criteria) and that the evaluation of the bid of O.Ps.1 to 4 was contrary to the said clauses-11, 19 & 20 as well as clause-4 of Financial Bid, fails scrutiny of this Court.

We find that substantial and pertinent reasons have been ascribed by the tender evaluating authority in qualifying the bid and awarding the tender to the O.P. No.5 which is upheld. The dictum in ***Reliance Telecom Ltd.*** *(supra)* is of no avail to the petitioner.

30. Now coming to the other allegations of the petitioner that is: the process of evaluation of tender, is vitiated by arbitrariness, is unreasonable and therefore, is liable to be interfered with, has to be rejected, inasmuch as, this Court from the materials available on record, comes to a finding that the evaluation of tender was done by following due process as advertised, giving equal opportunity of consideration to all the participating bidders as per the Clause-4 of the Financial Bid read with Clauses-11, 19 and 20 of the Financial Bid (Eligibility Criteria).

31. Before parting with the case, considering that by interim order dated 01.10.2021 this Court directed stay of operation of the work order dated 06.09.2021 (Annexure-13) issued in favour of O.P. No.5 that was to commence w.e.f. 01.10.2021 and taking into consideration the principle ***actus curae neminem gravabit*** i.e, act of Court should harm none, it is further directed that the work order dated 6.9.2021 (Annexure-13) issued by the O.Ps.1 to 4, in favour of O.P. No.5 shall be implemented forthwith by the parties keeping intact the paragraph-4 of the work order i.e., the duration of the contract shall be initially for a period of 02(two) years from the date of award of contract and further extendable for another 01(One) year on mutually agreeable terms of conditions.

32. The writ petition is dismissed, however, opposite party nos.1 to 4 shall be bound by the aforesaid directions. There shall be no order as to costs.

....	....
Jaswant Singh,J.	***M.S.Sahoo,J.***

Orissa High Court, Cuttack
The 26th August,2022/dutta/Gs