

**ORISSA HIGH COURT: CUTTACK**

**W.P.(C) No. 34915 OF 2021**

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

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**AFR**

Baldev Panda

.....

Petitioner

-Versus-

Odisha Water Supply &  
Sewerage Board and others

.....

Opp. Parties

For petitioner : M/s P.C. Nayak,  
S.K. Rout and R.K. Rout  
Advocates

For opp. parties : Mr. S.N. Das, Advocate.  
[O.P. Nos. 1 to 3]

M/s Biswajit Nayak,  
S. Samantray and A.K. Patra,  
Advocates.  
[O.P.No.4]

P R E S E N T:

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

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**Date of hearing : 19.10.2022 :: Date of judgment: 28.10.2022**

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**DR. B.R. SARANGI, J.** The petitioner, by means of this writ petition, seeks to quash the decision making process adopted by the authorities of Odisha Water Supply and Sewerage Board in qualifying the bid of opposite party no.4 under Annexure-1 and consequential issuance of letter of acceptance dated 18.10.2021 in its favour under Annexure-1/A, by declaring the process of selection as illegal, arbitrary and violative of Article-14 of the Constitution of India, and to issue direction to the opposite parties to accept the bid of the petitioner as he has complied with all the eligibility criteria as per the Detailed Tender Call Notice (DTCN) under Annexure-2.

2. The factual matrix of the case, in a nutshell, is that the petitioner is a Special Class Contractor registered under the PWD Contractors' Registration Rules, 1967 and has gained experience by executing various works under the Government and its Undertakings. Orissa Water Supply and Sewerage Board (hereinafter referred to 'OWSSB') is a nodal agency under the Government of Odisha. It was established in the year 1991 as a statutory

body as per the provisions of the Orissa Water Supply and Sewerage Board Act, 1991. Opposite party no.3-Chief Engineer, Septage, OWSSB, Bhubaneswar, on behalf of opposite party no.1-OWSSB, on 25.08.2021, invited lump sum bids through e-procurement from 'A' Class or Special Class Contractors registered with the Odisha State Government and Contractors of equivalent grade/class registered with Central Government/ any other State Government/ Military Engineering Services (MES)/ Railways for the work "Construction, Testing, Commissioning & Trial Run of Septage Treatment Facility (20 KLD) capacity each at Burla Town and Hirakud Town of Sambalpur District, Odisha (Balance Work)", vide Bid Reference No. 06/CESEPTAGE/ 2021-22 dated 25.08.2021, with an estimated cost of Rs.514.23 lakh. The cost of tender paper was fixed as Rs.10,000/-. The period of completion of construction was six months whereas Trial Run, O & M was one month. The period of availability of tenders on online was from 10.00 Hrs. of 02.09.2021 to 17.00 Hrs. of 17.09.2021, the last date and

time seeking clarification was 17.00 Hrs. of 09.09.2021, the last date and time of bidding online was 17.00 Hrs. of 17.09.2021 and the date and time of opening of technical bid was 11.30 Hrs. of 18.09.2021.

2.1 In response to the notice inviting tender, referred to above, all total six bidders, including the petitioner and opposite party no.4, participated. The petitioner, complying with all the criteria of the tender notice, submitted his bid on 13.09.2021, which was duly acknowledged by the authority. Out of six bidders, three bidders were qualified in the technical bid, which was opened on the schedule date and time, i.e., 11.30 Hrs. of 18.09.2021. They are (1) the petitioner-Baladev Panda, (2) M/s Sai Vaishnavi Enterprises and (3) opposite party no.4-M/s Shreerose Wealth Ventures Limited. Opposite party no.4 had uploaded the work experience certificates of one Ruchika Social Service Organization and Odisha State Volunteers and Social Worker Association, which are not Govt./Public Sector Unit/Undertaking/Enterprises in India, as per Clause-6 of the DTCN.

Schedule-D of the tender call notice specifically stipulated that the certificate of work experience must be furnished by the employer not below the rank of Executive Engineer, whereas opposite party no.4 had submitted the work experience certificate without being certified by any employer and still then opposite party no.4 was qualified. Qualifying of technical bid of opposite party no.4 was objected to by the petitioner, vide letter dated 07.10.2021, specifically stating therein that the documents submitted by opposite party no.4 were not in consonance with Clause-6 of the DTCN issued by the OWSSB. But the tender evaluation committee on the very same day took the following decision on the objection filed by the petitioner:-

*“After examining the allegation of the petitioner, followed by re-examination of the tender documents of M/s Shreeroose Wealth Ventures Ltd. clarifications are issued, such as, “the experience certificates for two works issued by Orissa State Volunteers and Social Workers Association and Ruchika Social Service Organization for construction of SeTPs at Angul and Choudwar respectively were Government Projects implemented in the two municipalities of Odisha under project Nirmal. The said projects were monitored by a Project*

*Steering Committee of H&UD Department vide notification no.9171 dated 24.03.2015. Hence the tender committee had no scope to reject the aforesaid experience certificate and so the same were considered and accepted by the committee as requisite experience certificate.”*

It was further clarified that no bidder would be permitted by the tender inviting committee to submit any further documents voluntarily. Aggrieved by the consideration made by the tender committee in its decision making process allowing opposite party no.4 to participate in the bid, the petitioner has approached this Court by filing the present writ petition.

3. Mr. P.C. Nayak, learned counsel appearing for the petitioner contended that the object of Clause-6 of the DTCN is that the bidder must have participated in public tender, selected and executed the similar nature of civil construction work, but in the case at hand opposite party no.4 had produced the certificates of private organizations and, as such, opposite parties no.1 to 3 are not the work-in-charge of the said work and, thereby, in the decision making process, while accepting the bid of opposite party

no.4, no transparency in the evaluation of bids was maintained. It is further contended that the tender committee has no jurisdiction to relax the tender conditions for a particular bidder and allow it to participate in the bidding process. It is further contended that the government notification dated 24.03.2015, on which reliance was placed, has not been referred to in the tender conditions and, as such, the same speaks about implementation of the government project. Furthermore, had the said notification formed part of the tender conditions, it would have facilitated other bidders to participate in the process of tender. But its subsequent consideration with a view to qualifying the bid of opposite party no.4 cannot sustain in the eye of law. It is further contended that as per Sub-clause 2(B)1.(a) of Section-2(C) of Data Sheet the name of the employer indicated therein has to be provided, but the certificate furnished by opposite party no.4 having not been issued by such employer, the same should not have been taken into consideration by the tender evaluation committee.

To substantiate his contentions, learned counsel for the petitioner relied upon the judgments of the apex Court in the cases of **National High Speed Rail Corporation Ltd. v. Montecarlo Limited**, (2022) 6 SCC 404; **Vice Chairman and Managing Director, City and Industrial Development Corporation of Management Ltd. v. Shishir Realty Pvt. Ltd.**, AIR OnLine 2021 SC 1106; **Vidarbha Irrigation Development Corporation v. M/s Anoj Kumar Agarwala**, AIR 2019 SC (Supp) 950; **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium) and others**, (2016) 8 SCC 622 and order of this Court in the case of **Santoshi Infotech Computer Centre v. State of Odisha and others**, W.P.(C) No. 17613 of 2020 disposed of on 22.01.2021.

4. Mr. S.N. Das, learned counsel appearing for opposite parties no.1 to 3, while admitting the fact of issuance of tender call notice by the opposite party-authorities and participation thereof by the petitioner as well as opposite party no.4, contended that the experience certificates submitted by opposite party no.4 in its bid

fulfilled the requirement, inasmuch as it uploaded the work experience certificates issued by one Ruchika Social Service Organization and Odisha State Volunteers and Social Worker Association, and thereby satisfied the requirement of Clause-6 of the DTCN. It is further contended that the two completion certificates, which were furnished by opposite party no.4, are relating to the projects of similar nature executed by it, out of which one project got commissioned in Chowdwar Municipality and another got commissioned in Angul Municipality, which are also Public Sector Units run by the State. It is also contended that the opposite party-Board does not dispute the fact that completion certificates furnished by opposite party no.4 were not directly issued by the Municipalities but the same were furnished by the Agency, which was entrusted with the implementation of the said projects. Since the certificates furnished by opposite party no.4 clearly matched the eligibility criteria and both the projects executed by opposite party no.4 for Chowdwar and Angul Municipalities were successfully completed, the

same were taken into consideration as per the tripartite agreements executed between the Housing and Urban Development Department, M/s Practical Action and Chowdwar Municipality signed on 04.01.2017. M/s Practical Action was entrusted with construction of Feacal Sludge Treatment Plant at Chowdwar Municipality. M/s Practical Action selected M/s Ruchika Social Service Organization and in turn opposite party no.4 was selected by M/s Ruchika Social Service Organization for construction of the project work on 10.01.2020. Similarly, in Angul Municipality, the agreement was executed on 28.05.2020. Therefore, the projects which are completed by opposite party no.4 are executed and commissioned for Government/Public Sector Unit/ Undertakings/ Enterprises in India. Thereby, it satisfies the condition stipulated in Clause-6 of the DTCN. In Section-2(B) of Instructions to Bidders, A.General, under Clause1(a) the 'employer' has been defined, whereas 'eligibility criteria' has been prescribed under Clause-5. Clause-5.2 prescribes that a bidder shall be 'A' Class or 'Special

Class' Contractors registered with the Odisha State Government and Contractors of equivalent grade/class registered with Central Government/any other State Government/MES/Railways. Clause-6 of the DTCN provides that the Firms/Companies/Registered Contractors should have executed civil construction works valuing not less than Rs.154.27 lakh (30% of the estimated cost) in any one year during the last five years (2016-17 to 2020-21). Thus, it is contended that the words "should have" used in Clause-6 are not mandatory whereas the word "shall" used in Clause-5.2 is mandatory. Thereby, Clause-6 of the DTCN is not an essential condition and, as such, discretion lies with the authority to construe the requirements of Clause-6 without putting any mandate thereon. It is further contended that by accepting the two certificates issued by the private organization, the opposite party-authorities have not committed any error and decision making process cannot be faulted with so as to warrant interference of this Court.

In support of his contentions, learned counsel appearing for opposite parties no.1 to 3 relied upon the judgments of the apex Court in the cases of **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.**, (2006) 11 SCC 548; **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited**, (2016) 16 SCC 818; and **Galaxy Transport Agencies, Contractors, Traders, Transport and Suppliers v. New J.K. Roadways, Fleet Owners and Transport Contractors**, 2020 SCC OnLine SC 1035.

5. Mr. A.K. Patra, learned counsel appearing for opposite party no.4, while admitting the experience certificates issued by the Orissa State Volunteers and Social Workers Association and Ruchika Social Service Organization for construction of SeTPs at Angul and Chowdwar Municipalities, contended that since the works had been executed for the local authorities under the project 'Nirmal', which was monitored by the Project Steering Committee constituted under the notification issued by the Housing and Urban Development

Department on 24.03.2015, acceptance of such certificates cannot defeat the purpose of consideration for participation pursuant to the tender call notice under Annexure-2. It is further contended that Clause-30.2(ii), Clause-31 and Clause-20.2 of the DTCN clearly empower the tender floating authority to seek any clarification from any bidder, if the bid is found to be not completed as per the terms and conditions of the tender, and, as such, the opposite party-Board has got discretion to accept the additional document from a bidder after opening of technical bid. It is further contended that if the State or its instrumentality acted reasonably, fairly and in public interest in awarding the contract, interference of this Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. As such, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by the State or public authorities, as in the present case, there is no illegality committed by the

tender evaluation committee in accepting the certificates produced by opposite party no.4.

To substantiate his contentions, learned counsel for opposite party no.4 has relied upon the judgments of the apex Court in the cases of **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.**, (2006) 11 SCC 548, **Michigan Rubber (India) Ltd. v. State of Karnataka**, (2012) 8 SCC 216; and **Reliance Telecom Limited v. Union of India**, (2017) 4 SCC 269.

6. This Court heard Mr. P.C. Nayak, learned counsel appearing for the petitioner; Mr. S.N. Das, learned counsel appearing for opposite parties no.1 to 3; and Mr. A.K. Patra, learned counsel appearing for opposite party no.4 by virtual mode and perused the records. 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, in view of the urgency, as the petitioner is

enjoining the interim order passed by this Court on 12.11.2021 in I.A. No.16231 of 2021.

7. On the basis of the factual matrix, as delineated above, and the arguments advanced by learned counsel appearing for the respective parties, the sole question falls for consideration before this Court is-

*Whether the two experience certificates produced by opposite party no.4 issued by Orissa State Volunteers and Social Workers Association and Ruchika Social Service Organization with regard to construction of SeTPs at Angul and Chowdwar Municipalities under the project 'Nirmal' satisfied the requirement of Clause-6 of the DTCN or not.*

8. For just and proper adjudication of the case, the relevant clauses of the DTCN are extracted hereunder:-

**“Clause-6:-** *The firms/ Companies/ Registered Contractors should have executed Civil Construction Work(s) valuing not less than Rs. **154.27 Lakh** (30% of the estimate cost ) in any one year during the last 5 (five) years (2016-17 to 2020-21). The constructed works should have been executed in Govt. /Public Sector Unit/Undertaking /Enterprise in India. The executed similar nature of civil construction work(s) should include at least one 10 KLD above capacity SeTP either completed*

or the core components of SeTP have been successfully commissioned in any Govt. or Public Sector Unit/Undertaking /Enterprise in India. The document regarding completion of SeTP / commissioning of core components of SeTP to be furnished by Agency duly certified by the Employer. The work experience during the financial year 2021-22 shall also be considered. The experience certificate(s) and document(s) should have been issued/signed from /by appropriate authority i.e., not below the rank of Executive Engineer/equivalent. Weightage @10% per year shall be given on the value of the work(s) executed in the preceding years as mentioned in Clause 8 below.”

**“Section – 2(A)**  
**DETAILS OF THE DOCUMENTS TO BE**  
**FURNISHED**  
**FOR ONLINE BIDDING**

(a) Scanned copies of the following documents to be up-loaded in appropriate place in PDF format in the website **www.tendersodisha.gov.in**

xxx

xxx

xxx

viii. Work experience certificate from the authority not below the rank of Executive Engineer/Equivalent.”

**“SECTION -2(B)**  
**INSTRUCTIONS TO BIDDERS**  
**A. GENERAL**

**1. Definitions:**

(a) “Employer” means the **ORISSA WATER SUPPLY & SEWERAGE BOARD (OWSSB)** an undertaking of the Government of Odisha represented by the **Member Secretary, OWSSB, Odisha, Bhubaneswar** or his authorized representative with whom the selected Contractor signs the contract for the services.”

xxx

xxx

xxx

**“5. Eligibility:-**

xxx

xxx

xxx

**5.2** A Bidder shall be **‘A’ Class or ‘Special’ Class** Contractors registered with the Odisha State Government and Contractors of equivalent grade/class registered with Central Government/any other State Government/MES/Railways.”

**“SECTION -2(C)**  
**DATA SHEET**

| <b>Ref.<br/>Cl. No.</b> | <b>Description</b>                                                                                                                                                                                                                                       |
|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                         | Name of the Work: <b>“Construction, Testing, Commissioning &amp; Trial Run of Septage Treatment Facility (20KLD) capacity each at Burla Town and Hirakud Town of Sambalpur District, Odisha (Balance works).”</b>                                        |
| xxx                     | xxx                                                                                                                                                                                                                                                      |
| 2(B) 1.(a)              | Name of the Employer : CE, Septage ,OWSSB, Bhubaneswar/MS, OWSSB, Bhubaneswar/ Commissioner, Sambalpur Municipal Corporation /Any Other Office or Officer or Establishment Declared /Authorised by Housing & Urban Development Deptt., Govt. of Odisha.” |
| xxx                     | xxx                                                                                                                                                                                                                                                      |

9. In view of Clause-6 of the DTCN, as quoted above, opposite party no.4 to make its bid eligible had uploaded the work experience certificates issued by one Orissa State Volunteers and Social Workers Association

and Ruchika Social Service Organization, which are not Government/Public Sector Unit/Understanding/Enterprise in India. But those certificates have been entertained by the tender evaluation committee towards work experience of performing similar nature of work to satisfy the condition stipulated in the tender documents. As per Schedule-D of the tender notice, which provides that the work experience certificate must be issued by the employer not below the rank of Executive Engineer, but the work experience certificates furnished by opposite party no.4, which are placed on record in the counter affidavit filed by opposite parties no.1 to 3 as Annexure-A/1 series, were issued by the Executive Director of Orissa State Volunteers and Social Workers Association on 24.06.2019 and the Director (Procurement & Quality Control), Ruchika Social Service Organization on 11.02.2021 and, as such, the name of the employer has been indicated as Orissa State Volunteers and Social Workers Association and Ruchika Social Service Organization. The date of starting of work, as per the

agreement, pursuant to certificate dated 24.06.2019, has been indicated as 24.08.2019 and in respect of certificate dated 11.02.2021, the same has been mentioned as 10.01.2020. If Schedule-D prescribes that the work experience certificates must be issued by the employer not below the rank of Executive Engineer, both the certificates referred to in Annexure-A/1 series do not satisfy such requirement.

10. It may be noted that with regard to above the petitioner had raised objection in its letter dated 07.10.2021 under Annexure-5. Under clause-(b) thereof it was specifically pleaded as under:-

*“b) The Documents submitted by M/s Shree Rose wealth ventures Ltd. is not Consonance with the OWSSB DTCN clause no.6 As per the clause the bidder must be Constructed work or executed in Govt. /Public Sector unit/ Under taking / Enterprise in India. But in fact the case of M/s Shree Rose Wealth ventures Ltd. has submitted the documents of Orissa State Volunteers and Social Workers Association for construction of SeTP at Angul & Ruchika Social service Organization for construction of SeTP at Choudwar. The same are violating the above said clause.”*

But in the proceeding of tender evaluation committee meeting, the objection of the petitioner dated 07.10.2021 was taken into consideration and the committee found as follows:-

*“After examining the aforesaid allegations of Sri Panda followed by re-examination of the tender documents of M/s Shreerose Wealth Ventures Ltd. the following clarifications are issued:*

*The experience certificate(s) for two works issued by Orissa State Volunteers and Social Workers Association and Ruchika Social Service Organization for construction of SeTPs at Anugul and Choudwar, respectively were Govt. projects implemented in the two municipalities of Odisha under Project Nirmal, The said projects were monitored by a Project Steering Committee of H& UD Department vide notification No. 9170 dt. 24.03.2015. Hence, the tender committee had no scope to reject the aforesaid experience certificates. So the same was considered and accepted by the committee as requisite experience certificate. It is also clarified that no bidder was permitted by the tender Inviting authority to submit any further document voluntarily.*

*With the above clarification it is concluded that the allegations raised by Sri Baldev Panda in his letter stated above is neither true nor sustainable. So his complaint is considered and rejected.”*

11. The reason, which has been assigned, does not satisfy the requirement of Clause-6 of the DTCN, rather it admits the position that the construction of SeTPs by Angul and Chowdwar Municipalities were government projects implemented by two Municipalities under the project 'Nirmal' and the said projects were monitored by the Project Steering Committee, as per notification dated 24.03.2015 of the Housing and Urban Development Department. But the notification no.9170 dated 24.03.2015 does not form part of the DTCN. Had the notification formed part of the DTCN, other similarly situated bidders could have participated in the process of bidding. Keeping in view such notification and making opposite party no.4 eligible, by considering the certificates issued by two private agencies, opposite party no.2 has committed gross error in the decision making process. Thereby, acceptance of bid of opposite party no.4, being contrary to the conditions stipulated in Clause-6 of the DTCN, cannot be sustained in the eye of law.

12. The notification dated 24.03.2015, which has been annexed as Annexure-7 to the writ petition, was issued by the Government of Odisha in Housing and Urban Development Department. It speaks for constitution of Project Steering Committee with a view to improving urban sanitation system in two towns, i.e., Angul and Dhenkanal Municipalities, a sponsored sanitation programme by Bill and Melinda Gates Foundation and Arghyam Foundation called "Project Nirmal". The programme was to be implemented by Practical Action, Bhubaneswar and Centre for Policy Research, New Delhi. As such, the notification does not indicate with regard to acceptance of certificates issued by any private organization. Therefore, if any private organization undertakes the work and issues certificates, the same cannot satisfy the requirement of Clause-6 of the DTCN. Clause-6 of the DTCN is a key eligible criteria, i.e., similar nature of work which is an essential condition and it must be read with Schedule-D, which clearly provides that the experience certificate, certification of employer not

below the rank of Executive Engineer/equivalent is to be furnished in support of the work experience. But on perusal of the certificates, which have been annexed as Annexure-A/1 series to the counter affidavit filed by opposite parties no.1 to 3, it would be seen that opposite party no.4 neither submitted the experience certificates in terms of Clause-6 nor as per Schedule-D. Therefore, relying on the notification issued on 24.03.2015, the tendering authority cannot validate the certificates issued by the private organizations in favour of opposite party no.4, especially after the cut-off date, by relaxing the condition for a particular bidder contrary to the terms and conditions of the tender, which is not permissible in a public tender.

13. The proceeding of tender evaluation committee dated 01.10.2021, which has been annexed as Annexure-1 to the writ petition, so far as opposite party no.4 is concerned, while considering its technical bid, following observations were made:-

***“C. M/s Shreerose Wealth Venture Ltd.:***

*The bidder submitted completion certificates from (a) M/s Orissa State Volunteers and Social Workers Association for construction of SeTP in Angul and from (b) M/s Ruhcika Social Service Organization for construction of SeTP in Choudwar. The Financial Year wise payments received were not mentioned in the documents. Further clarification were sought vide this office letter no. 1180 dt. 23.09.2021 for submission of work experience in support of 10 KLD or above capacity SeTP either completed or the core components of SeTP successfully commissioned in any Govt. or Public Sector Unit/Undertaking /Enterprise in India as per clause 6 of Section-1 of DTCN. The bidder submitted a new work experience which did not contain any financial information. From the available documents, work executed in FY 2018-19 was calculated to be rs.198.58 lakhs.”*

The aforementioned observation clearly indicates that the authority, while admitting the factum of production of certificates of two private organizations, clearly mentioned that the financial year-wise payments received were not mentioned in the documents and therefore clarification were sought, vide letter dated 23.09.2021, as per Clause-6 of Section-1 of the DTCN. It has been further stated that the bidder submitted a new work experience which did not contain any financial information and that the work executed in the financial year 2018-19 was calculated to

be Rs.198.58 lakhs. From the above observations, it is made clear that the so called private experience certificates issued by two private organizations should not have been considered, as the same are not provided by the employer not below the rank of Executive Engineer or equivalent. The requirement of Clause-6 of the DTCN is that the experience certificates and documents should have been issued/signed from/by appropriate authority, i.e., not below the rank of Executive Engineer or equivalent. Therefore, the certificates, which are made available on record, do not indicate that the same are issued/singed from/by appropriate authority, i.e., not below the rank of Executive Engineer or equivalent.

14. In **Words and Phrases, Permanent Edn.** Vol. 15 at p. 157, the word 'equivalent' has been defined to mean equal in value, area, volume, force, meaning, or the like, synonym; alike, identical.

15. In **Websters Third new International Dictionary**, it is provided that as an adjective, 'equivalent'

means: 1. Equal in force or amount ..... equal in area or volume but not admitting of super position (a square to a triangle) 2a: like in signification or import... 3a: equal in value :COMPENSATIVE’.

16. In **New Webster’s Dictionary**, the word ‘equivalent’ has been defined to mean, equal in value, measure, force, effect, or significance, corresponding in position or function.

17. In **Chambers 21<sup>st</sup> Century Dictionary**, the word ‘equivalent’ has been defined to mean (as an adjective) equal in value, amount, function, meaning etc. (equivalent to) having the same or a similar effect as.

18. In **Black’s Law Dictionary**, the word ‘equivalent’ as an adjective defined as ‘equal in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance; alike, identical.

19. The above various dictionary meanings of the word ‘equivalent’ had been taken into consideration in

***Godrej & Boyce Mfg. Co. Ltd. v. State of Maharashtra,***

(2009) 5 SCC 24. If the above meaning is taken into consideration and applied to the present case, it would be evident that the certificates, which have are annexed as Annexure-A/1 series to the counter affidavit filed by the opposite parties no.1 to 3, are neither signed by the Executive Engineer nor by any equivalent person so as to consider the same by the tendering authority.

20. Much argument was advanced by Mr. S.N. Das, learned counsel appearing for opposite parties no.1 to 3 that Clause-6 of the DTCN requires that the Firms/Companies/Registered Contractors should have executed civil construction works valuing not less than Rs.154.27 lakh (30% of the estimated cost) in any one year during the last five years (2016-17 to 2020-21) and that the constructed works should have been executed in Govt./Public Sector Unit/Undertaking/Enterprise in India. Thus, it is contended that the words “should have” used in Clause-6 are mandatory in nature and, as such, to justify the same, he has placed reliance on Clause-5.2

of eligibility criteria, as provided under Section 2(B) of the Instructions to Bidder, A. General, which provides that a bidder shall be 'A' Class or 'Special Class' Contractor, and contended that such use of the word "shall" in the said clause, is mandatory.

21. In **Babu Ram v. State of U.P.**, 1995 (2) SCC 689, the apex Court held that the use of the word 'shall' in a statute, though generally taken in a mandatory strict or liberal construction should be used as a tool in the process of ascertaining legislative intent when it is in doubt.

22. In **Mohan Singh v. International Airport Authority of India**, (1996) 10 JT 311: (1996) 8 Scale 251, the apex Court held that the word 'shall' though *prima facie* gives impression of being mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that

would flow from the construction thereof one way or the other.

23. In ***Salem Advocate bar Assn. v. union of India***, (2005) 6 SCC 344, the apex Court held that use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory.

24. In ***Done Investments (P.) Ltd. v. Gujarat Industrial Investment Corpn.***, (2006) 2 SCC 619, the apex Court held that ordinarily a procedural provision would not be mandatory even if the word 'shall' is employed therein unless a prejudice is caused. Therefore, the use of word "shall" though prima facie means mandatory and even if in this case for eligibility criteria contained in Clause-5.2 of the DTCN the use of the word "shall" may be mandatory, but use of the words "should have" in Clause-6 of the DTCN has to be construed as "must have".

25. In ***State of M.P. v. Laxmishankar Mishra***, AIR 1979 SC 979, while interpreting the words “should have worked on the post for a minimum period of seven years” appearing in Rule-3(b) of the Rules framed under M.P. Local Authorities School Teachers (Absorption in Government Service) Act, 1963, the apex Court held that on a pure grammatical construction of the expression it would indisputably appear that the person claiming to be absorbed must have worked on the post of Headmaster/Principal of a High/Higher Secondary School for a minimum period of 7 years. Emphasis is on the experience gained by working on the post of Head Master/Principal. A person in-charge of the post also works and discharges the duties and functions of the post of which he has taken charge. Even an officiating incumbent of the post does discharge the functions and duties of the post. Therefore, though the provisions contained “should have worked on the post for minimum period of seven years”, but while interpreting the same, the apex Court held that here the word “should have” should be construed as “must have”

worked on a post of Headmaster/Principal of a High/Higher Secondary School for a minimum period of 7 years.

Therefore, by applying the above principle to the present case, if the words “should have” used in Clause-6 are treated as “must have”, then in that case the case of the petitioner is well justified, because opposite party no.4 does not satisfy the requirement of Clause-6 having not got the experience certificates and documents issued/signed from/by appropriate authority, i.e., not below the rank of Executive Engineer/equivalent.

26. Reliance was placed by learned counsel for opposite parties no.1 to 3 and 4 on the decision of the apex Court in the case of **B.S.N. Joshi** (supra), wherein the apex Court held that unless there is illegality committed by the authority, the Court should normally slow in interfering with the matter. This proposition of law is well founded and there is no dispute with regard to the same. But considering the facts of the present case, as

discussed above, since gross illegality has been committed in the decision making process by selecting opposite party no.4, the Court has jurisdiction to interfere with the same.

27. In **Afcons Infrastructure Limited** (supra), referring to the judgment of the apex Court in the cases of **Dwarkadas Marfatia and Sons v. Port of Bombay**, (1989) 3 SCC 293; **Tata Cellular v. Union of India**, (1994) 6 SCC 651, the apex Court held that the constitutional courts are concerned with the decision making process. A decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not substitute its view for that of the administrative authority.

28. In **Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers** (supra), the apex Court held that unless arbitrariness or *mala fide* on the

part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a Writ Court.

Applying the above principles to the present case, it appears that the petitioner alleged arbitrariness on the part of the tendering authority, particularly when it comes to technical evaluation and, as such, since the decision making process is under challenge, this Court has jurisdiction to interfere with the same. Thereby, the said judgment cited by learned counsel for opposite parties no.1 to 3 may not have any application to the present context.

29. In ***National High Speed Rail Corporation*** (supra), the apex Court formulated two questions, so as to cause interference under Article 226 of the Constitution of India, in paragraph-29 of the judgment, which is extracted hereunder:-

*“29. Thus, from the aforesaid decisions, it can be seen that a court before interfering in a contract matter in exercise*

*of powers of Judicial review should pose to itself the following questions:*

*(i) Whether the process adopted or decision made by the authority is mala fide or intended to favor someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? And*

*(ii) Whether the public interest is affected?*

*If the answers to the above questions are in the negative, then there should be no interference under Article 226.”*

Applying the above two conditions to the present case, since the process adopted or decision made by the authority is arbitrary or irrational, the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached. Thereby, this Court can interfere with the same and decide the matter.

30. In ***Vice Chairman and Managing Director, City and Industrial Development Corporation of***

**Maharashtra Ltd.** (supra), in paragraphs-67 and 68 of the judgment, the apex Court held as follows:-

*“67. Before we state the conclusions, this Court would like to reiterate certain well-established tenets of law pertaining to Government contracts. When we speak of Government contracts, constitutional factors are also in play. Governmental bodies being public authorities are expected to uphold fairness, equality and rule of law even while dealing with contractual matters. It is a settled principle that right to equality under Article 14 abhors arbitrariness. Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process. A transparent bidding process is much favoured by this Court to ensure that constitutional requirements are satisfied.*

*68. Fairness and the good faith standard ingrained in the contracts entered into by public authorities’ mandates such public authorities to conduct themselves in a non-arbitrary manner during the performance of their contractual obligations.”*

31. In **Vidarbha Irrigation Development Corporation** (supra), in paragraphs-15 and 18 of the judgment, the apex Court held as follows:-

*“15) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous –*

*they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.*

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*18) We may record that Mr. Basant very fairly submitted before us that he will match the amount of Rs. 39.15 crores that was the bid of Respondent No. 2 before us. We record this statement and order, therefore, that the work now be performed by the Respondent No. 1 at this bid amount. The judgment of the High Court, insofar as para 8 is concerned, is set aside.”*

32. In **Central Coalfields Limited** (supra), the apex Court held that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is *mala fide* or is intended to favour someone. Similarly, the decision should not be interfered with

unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before the Supreme Court.

33. In **Santoshi Infotech Computer Centre** (supra), this Court in paragraph-25 of the said order, held as under:-

*“25) There is no denial of the above facts by the Opposite Parties 1 to 3. If needed the Finance Department Circular was being acted upon, there was no reason to accept the above bids. There is merit in the contention of Mr. Mishra that the Circular of the Finance Department dated 22<sup>nd</sup> May, 2018 cannot be relied upon to reject the Petitioner’s price bid unless it was mentioned in the tender document itself, in which case the Petitioner and other bidders may have been put on notice that they could not quote below a certain minimum amount.”*

34. Therefore, taking into consideration the judgments of the apex Court as well as this Court, as mentioned above, since the opposite party-authorities have come to a conclusion for awarding the contract in favour of opposite party no.4 taking into account the two certificates obtained from the private agencies, the same is contrary to the Clause-6 of the DTCN. Thereby, the decision making process is perverse, arbitrary and contrary to the provisions of law. More so, the notification dated 24.03.2015 under Annexure-7 relied upon by the opposite party-authorities justifying their action, having not formed part of the DTCN, the same should not have been taken into consideration.

35. In the above view of the matter, this Court is of the considered view that the Letter of Acceptance issued in favour of opposite party no.4 on 18.10.2021 under Annexure-1/A, cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed. Since the petitioner is the 2<sup>nd</sup> successful bidder, he shall be called upon to match the bid of opposite party no.4 and if

he is so agreed, then necessary steps should be taken in accordance with law for execution of the agreement to undertake the work, in view of the judgment of the apex Court in the case of **Vidarbha Irrigation Development Corporation** (supra).

36. In the result, the writ petition is allowed. However, there shall be no order as to costs.

**G. SATAPATHY, J.** I agree.

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**DR. B.R. SARANGI,**  
**JUDGE**

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**G. SATAPATHY,**  
**JUDGE**

**Orissa High Court, Cuttack**  
**The 28<sup>th</sup> October, 2022, Ashok/GDS**