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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 % **Date of Decision: 31.01.2022**

+ W.P.(C) 5426/2021 & CM APPL. 16829/2021
 M/S SANJAY AGRAWAL THROUGH ITS PARTNER
 SIDDHARTH AGRAWAL Petitioner
 Through: Ms. Kiran Suri, Sr. Adv. with Mr.
 Hitendra Nath Rath, Adv.

versus

NATIONAL PROJECTS CONSTRUCTION CORPORATION
 (NPCC) LTD THROUGH: CHAIRMAN-CUM-MANAGING
 DIRECTOR Respondents
 Through: Mr. Paritosh Budhiraja and Ms.
 Surabhi Maheshwari Advs. for R-1 and R-2
 Mr. Parijat Kishore, Adv. for R-3.

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+ W.P.(C) 5785/2021 & CM APPL. 18139/2021
 M/S SANJAY AGRAWAL THROUGH ITS PARTNER
 SIDDHARTH AGRAWAL Petitioner
 Through: Ms. Kiran Suri, Sr. Adv. with Mr.
 Hitendra Nath Rath, Adv.

versus

NATIONAL PROJECTS CONSTRUCTION CORPORATION
 (NPCC) LTD THROUGH: CHAIRMAN-CUM-MANAGING
 DIRECTOR Respondents
 Through: Mr. Paritosh Budhiraja and Ms.
 Surabhi Maheshwari Advs. for R-1 and R-2
 Mr. Parijat Kishore, Adv. for R-3



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+ W.P.(C) 6468/2021 & CM APPL. 20345/2021
 M/S SANJAY AGRAWAL Petitioner
 Through: Ms. Kiran Suri, Sr. Adv. with Mr.
 Hitendra Nath Rath, Adv.

versus

NATIONAL PROJECTS CONSTRUCTION COMPANY
 LIMITED & ORS. Respondents
 Through: Mr. Paritosh Budhiraja and Ms.
 Surabhi Maheshwari Advs. for R-1 and R-2
 Mr. Parijat Kishore, Adv. for R-3

CORAM:

HON'BLE MR JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. The three writ petitions have a common thread and overlapping factual matrix as well as legal issues. In addition, the parties to the three writ petitions are also the same, and hence, all 3 writ petitions have been taken up together and are being disposed of by this common judgment.
2. The petitioner is a registered partnership firm engaged in the business of construction of road, buildings, bridges and other infrastructure projects across the country. The respondent No.1 is a PSU of the Government of India, involved in execution of various works of Central Departments and its PSUs. Respondent No. 2 is the officer of respondent No. 1 and the tender inviting authority.



3. With this common background, we now reproduce the factual matrix of the individual Petitions.

W.P.(C) 5426/2021

4. This writ petition has been filed seeking the following substantial prayers:
 - a. *“Issue a writ in the nature of Mandamus, or any other appropriate WRIT, order or direction, thereby, holding the disqualification of the Petitioner as illegal and arbitrary; and direct the Respondents No.1 and 2 to open the Financial Bid of the Petitioner pursuant to NIT No. NPCC/PROJECTS/EMRS-JH/21/-22/046 (3rd call) dated 23.03.2021 for the execution of the work of "Construction of Eklavya Model Residential Schools (EMRS) at Torpa & Murhu (Dist. Khunti) Jharkhand" ;*
 - b. *Issue a writ in the nature of Mandamus, or any other appropriate WRIT, order or direction, thereby holding the qualification of the Respondent No.3 in the technical evaluation as illegal and arbitrary pursuant to NIT No. NPCC/PROJECTS/EMRS-JH/21/-22/046 (3rd call) dated 23.03.2021 for the execution of the work of “Construction of Eklavya Model Residential Schools (EMRS) at Torpa & Murhu (Dist. Khunti) Jharkhand”; and*
5. Respondent No. 1 vide NIT No. NPCC /PROJECTS/EMRS-JH/21-22/046 dated 23.03.2021 invited bids for execution of work, namely, *“Construction of Eklavya Model Residential School (EMRS) at Torpa & Murhu (District Khunti) Jharkhand.”* The estimated cost of work was Rs. 38.13 Crores. As per Clause 2.14 of 'The Pre-qualification and Instructions to Bidders', the bidders were required to visit the site and certify the said visit by the concerned Zonal Manager. The failure to provide certificate may disqualify the bidder from the tender process.



6. It is pertinent to mention that this was the third tender call notice floated by the Tendering authority for the same project. Before this, the respondent Nos.1 & 2 had floated 2 tenders for the same project. The Petitioner did not participate in the first tender, and for reasons best known to the respondent, the first tender was cancelled. The second tender No. NPCC/PROJECTS/EMRS-JH/21-22/040 was issued on 12.03.2021, wherein the Petitioner had submitted the Site-Visit report dated 15.03.2021 as required under Clause-2.14(e) of the Notice Inviting Tender. The said Tender process was subsequently recalled vide letter dated 23.03.2021, for insufficiency of the number of bidders. The Respondent No.2 immediately, on the same date, called for fresh bids under the present tender.
7. Subsequent to the floating of the third tender, the petitioners filed its bid on 28.04.2021, and deposited the earnest money of Rs. 48,13,000/-. The petitioner submitted the certificate dated 15.03.2021 in compliance of Clause 2.14(e). Only two bidders had participated in the tender, namely, the petitioner and the respondent No. 3. The respondent No. 1 uploaded the comparative statement of the technical evaluation on 31.03.2021, wherein the petitioner's bid had been disqualified on the ground of '*submission of previous site visit*'. The comparative table produced by the respondents reads as under:

S.No. Qualifying Criteria		Name of Agencies		
			1 of 2	2 of 2
			M/s Sanjay Agrawal	M/s Seethal Construction
1.	...			
2.	...			
3.	...			



...				
...				
<u>25</u>	<u>Site Visit Report</u>		<u>Submitted (previous report)</u>	<u>Submitted</u>
<u>26</u>	<u>Observation</u>		<u>Disqualified</u>	<u>Qualified</u>

(Emphasis added)

8. As per the comparative statement, the petitioner scored 89 marks and the respondent No. 3 scored only 70 marks. Aggrieved by its disqualification, the petitioner filed W.P.(C) 5426/2021.
9. The matter came up before us on 21.05.2021. We issued notice and directed respondent Nos.1 and 2 to file their counter affidavits and directed it to maintain status quo in the matter.
10. It is the submission of the learned Counsel for Petitioner that the said Clause is not an essential Clause of the terms of the tender. We will examine the detailed submission of the petitioner in this regard a little later.
11. The petitioner further argued that respondent No.3, the only other technically qualified bidder, is not qualified in view of Clause 4. As per Clause 4 of the '*Pre-Qualification Criteria*;' the bidder is required to have either un-utilized credit facility of 10% (minimum) of Estimated cost put to tender issued on or after the date of publication of the NIT, duly certified by Bank, or, in the alternative, the bidder must have Solvency Certificate for an amount equal to 40% of the estimated cost duly certified by the banker. Such certificate shall be uploaded with the bid. The said Clause is reproduced as under:-

"4. Credit Facility: Agency shall have Un-utilized credit facility of 10 (minimum) of Estimated cost put to tender



issued on or after the date of publication of this NIT duly certified by Bank.

OR

Solvency Certificate: *Tenderer must have solvency for an amount equal to 40% of the estimated cost duly certified by the banker and to be unloaded while submitting the tender on website. Solvency certificate upto 6(six) months before the date of publication of tender will be acceptable"*

12. According to the petitioner, the respondent No. 3 had submitted a 'Certificate of Credit Facility' dated 08.03.2021 from the Union bank. Upon perusal of the said Certificate, it was found that the respondent did not have un-utilized Credit facility of 10% of the estimated cost put to tender. As per the said Certificate, the Respondent had un-utilized non-fund based credit facility of Rs.3,69,55,000/- and the available balance in the fund based credit facility at Rs.3,40,871. Hence, even if the credit facility in the non-fund based amount is taken into consideration, the un-utilized credit facility comes to Rs.3,72,95,871/- (Rs.3,69,55,000 + Rs.3,40,871), which is much less than the required 10% of the estimated cost put to tender (i.e. Rs. 3.81 crores in case of un-utilised Credit Facility certificate). Moreover, the Certificate of Credit Facility should have been issued on or after the date of publication of NIT (i.e. on or after 12.03.2021), but the certificate was issued to M/s. Seethal Construction- the respondent No. 3, on 08.03.2021.
13. The respondent Nos. 1 and 2 have filed their short-affidavit, wherein they have stated that Clause 2.14(e) was an essential condition, as any bid submitted without knowledge of actual site condition may lead to



variation in estimated costs, and bidders may not be able to consider the cost impact of local site condition in their bids such as tree cuttings, low level land, hard rock area, marshy land, unavailability of approach road etc., due to which the bidders might submit lower quote and after award of work, the agency may not be able to perform, and may stop the work, due to which the work would get delayed. Hence clause 2.14 is essential, since the same effects – in a substantial way, the performance of the contract. Consequently, if any bidder does not submit the site visit Certificate as per Clause No. 2.14(e) and Proforma-XIII along with the bid, then it is not considered as a responsive bid.

14. The respondent No. 1, in its counter-affidavit, has further stated that the site visit Certificate submitted by one Shri Ram Krishna Singh (some places referred to as Shri Ram Krishna Sinha) stated to be the Project Coordinator of the Petitioner Firm, in the Jharkhand Zonal office at Ranchi (being the certificate dated 15.03.2021, in compliance of clause 2.14(e)) of the NIT) was found to be forged. On 05.04.2021, an affidavit dated 17.03.2021 executed by the aforesaid Shri Ram Krishna Singh was received by hand in Jharkhand Zonal office of respondent No. 1, wherein it was stated by Shri Ram Krishna Singh on affidavit that he has not made the site visit in respect of the tender of construction and development of Eklavya Model Residential School at Torpa & Murhu. Counsel for the Respondent No. 1 has submitted that the collusion alleged by the Petitioner between the officials of the Respondent No.1 Corporation with any party is false and misconceived. He submitted that petitioner has been disqualified for the fraudulent act committed by the Petitioner, for which the Petitioner was



also recommended to be blacklisted and, hence, action of respondent no.1 is justified.

15. In the rejoinder, the contention of the petitioner is that there is arbitrariness, bias, and favouritism shown by respondent No. 1 in disqualifying the petitioner, so as to remove any competition for respondent No.3. The petitioner further submits that the site visit certificate filed in pursuance to clause 2.14 (e) and Performa- XIII was certified/ countersigned by the Zonal Manager of respondent No.1, and whence the zonal officer certified the site visit, the requirement of clause 2.14 stands complied, and the presumption must be drawn in favour of the petitioner.

W.P.(C) 5785/2021

16. As regards W.P.(C) 5785/2021, the petition has been filed by the petitioner, seeking following substantial prayers:

- a. *“Issue a writ in the nature of Mandamus, or any other appropriate WRIT, order or direction, thereby, holding the disqualification of the Petitioner as illegal and arbitrary; and direct the Respondents No. 1 and 2 to open the Financial Bid of the Petitioner pursuant to NIT No. NPCCPROJECTS/EMRS-JH/21/-22/039 (2nd call) dated 12.03.2011 for the execution of the work of "Construction of Eklavya Model Residential Schools (EMRS) at Albert Ekka (Dist:Gumla) Jharkhand":*
- b. *Issue a writ in the nature of Mandamus. or any other appropriate WRIT, order or direction, thereby holding the qualification of the Respondent No.3 and 4 in the technical evaluation as illegal and arbitrary pursuant to NIT No. NPCC/PROJECTS/EMRS-JH/21/-22/039 (2nd call) dated 12.03.2021 for the execution of the work of “Construction of Eklavya Model Residential Schools*



(EMRS) at Albert Ekka (Dist:Gumla) Jharkhand"; and

17. In this writ petition, the petitioner has sought a declaration that the petitioner is technically qualified, and seeks consequential opening of the financial bid for the work '*Construction of Eklavya Model Residential Schools (EMRF) at Albert Ekka, District Gumla, Jharkhand*), vide tender enquiry bearing No. NPCC/PROJECTS/EMRS-JH/21-22/039 dated 12.03.2021(2nd call).
18. The Respondent No.1 vide NPCC/PROJECTS/EMRSJH/ 21-22/039 dated 12.03.2021 had invited bids for the execution of the work namely "*Construction of Eklavya Model Residential Schools at Albert Ekka (Dist-Gumla) Jharkhand.*" The estimated cost of the work was Rs. 18.74 crores. Clause 2.14 was identical in the two tenders in question, and so were Clauses 10 '*the qualification and instructions to bidder*, and Clause 11: *Pre-Qualification criteria*
19. The petitioner had deposited the earnest money deposit of Rs.28,74,000/-. Due to the various restrictions imposed on the movement of Personnel due to the resurgence of COVID-19 infection, the Petitioner had vide certificate dated 15.03.2021 authorized the Respondent No.5, Ram Krishna Singh, to prepare the certificate as per Clause-2.14(e). The said Respondent, thereafter, prepared the said certificate and affixed his signature upon the same; as well as got the said certificate countersigned by the Authorized officer of the Respondent No.1. The petitioner also submitted the certificate dated 15.03.2021– in compliance of Clause - 2.14(e) of the tender document.
20. The Respondent No.1 uploaded the comparative statement dated 17.04.2021 of Technical Evaluation, wherein the Petitioner's bid had



been disqualified stating "Site Visit report not genuine submitted" as the reason of qualification. The comparative table produced by the respondents reads as under:

S.No. Qualifying Criteria		Name of Agencies			
			1 of 3	2 of 3	3 of 3
			M/s Sanjay Agrawal	Arvind Kalyani Infrastructure Pvt.	M/s Sanjay Kumar Upadhaya
1,	Tender Cost of Rs. 59,000/-		Submitted	Submitted	Submitted
2.	EMD Rs. 28.74 lacs		Submitted	Submitted	Submitted
3.	Pvt. Ltd./ Partnership/Proprietorship		Partnership Firm	Pvt. Ltd. Company	Partnership Firm
4.			..	..	..
...					
...					
...					
...					
<u>25.</u>	<u>Site Visit Report</u>		<u>Site Visit report not genuine(S submitted)</u>	<u>Submitted</u>	<u>Submitted</u>
<u>26</u>	<u>Observations</u>		<u>Disqualified(Fraud Has been done to get the site visit report)</u>	<u>Qualified</u>	<u>Qualified</u>

(Emphasis added)



21. It is pertinent to state here that, in the subsequent column, the tender evaluating authorities stated that "*Fraud has been done to get the site visit report*"; but no details of any such fraud – which had been attributed to the Petitioner, had been shared with the Petitioner.
22. Upon the opening of the bid, the Petitioner had found that only three bidders had participated, the respondent Nos. 3 & 4 being the other bidders. The respondents Nos. 1 & 2 had gone ahead and opened the financial bids of the other bidders, and were proceeding ahead with awarding the said tender, when this petition was preferred.
23. When the matter came before us on 03.06.2021, we enquired from counsel for the respondent as to what is the stand of the respondent vis-a-vis their own representative, Mr. Amit Sharma (the officer of the respondent Nos. 1 and 2), who had counter signed the document, certifying the site visit of Sh. Ram Krishna Sinha, and whether any action is being taken against Amit Sharma for allegedly issuing a false certificate which bears his signature, along with that of Sh. Ram Krishna Sinha. This court then proceeded to issue notice and directed respondent Nos.1 and 2 to file their counter affidavits specifically dealing with the aforesaid aspects. We also stayed the award of the tender to any third party.
24. The Petitioner submitted that Respondent No.3 had submitted a certificate dated 05.03.2021 by HDFC bank purportedly, in compliance of Clause-4 of *the Pre-qualification Criteria*. The said certificate dated 05.03.2021, however, did not come within the purview of Clause 4, as the said clause necessitates that the bidder must have un-utilized credit facility of 10% (minimum) of estimated cost put to tender, on or after



the date of publication of this NIT duly certified by Bank. The NIT having been published on 12.03.2021; the certificate dated 05.03.2021 cannot be considered. Moreover, from the said certificate it is evident that the respondent No.3 does not possess the un-utilized credit facility, and the bank shall be able to provide the same to execute the work during the contract period. Such assurance by the Bank is beyond the tender condition, as the tender condition has made it essential that the bidder must possess more than 10% of the estimated cost, as un-utilized credit facility. Similarly, the respondent No.4 has submitted a certificate dated 06.03.2021, which is also prior to the date of Publication of the present Bid. Hence, the said bidders were not entitled to be qualified and their financial bids should not have been opened. But irrespective of such violation, the respondent Nos.1 & 2 have gone ahead and opened the financial bids of the other bidders and are proceeding ahead with awarding the said tender.

25. It is further submitted that, in the present case, the financial bid has been opened and respondent No. 3 has made a price bid of Rs. 17,65,13,937.22/- , which is 5.82 % lower than the estimated cost of the project. Respondent No. 4 has made a price bid of Rs. 18,36,73,453.56/-, being 2% lower than the estimated cost of the project. The petitioner had quoted a price, which was Rs. 8,99,625/- less than that of respondent No. 3.
26. The respondent Nos.1 & 2 have filed a short affidavit, wherein the stand taken is that one affidavit dated 17.03.2021 executed by Shri Ram Krishna Singh was received in Jharkhand Zonal Office of the Respondent No.1 Corporation on 05.04.2021, wherein it was stated by



Sh. Ram Krishna Singh that he has not done the site visit in respect of the tender of Construction and Development of Eklavya Model Residential School at Albert Ekka, Distt. Gumla, Jharkhand, and that Sh. Sanjay Agarwal, the Partner of M/s Sanjay Agarwal, has forged his signatures.

27. As regards our query raised on 03.06.2021– with regard to the action taken by the respondents against their own officer for allegedly issuing the false certificate, it was submitted by the respondent that the site visit certificate issued to the petitioner was issued by the Zonal Manager under the impression of site being visited by authorized representative of the petitioner i.e. Shri Ram Krishna Singh (Respondent No.5). However, the said site visit certificate was signed by the Zonal Manager, Ranchi Zone, and not by Mr. Amit Sharma as has been contended by the petitioner during the hearing on 03.06.2021.
28. Thus the respondent has contended that the petitioner was disqualified and was blacklisted from further tendering in NPCC for two years, due to fraudulent act as per clause 18 of NIT & Clause 2.13.1(a) of the *Pre-qualification & Instructions to Bidders* in NIT, which is reproduced as under:

"18. Fraudulent Act: The Contractor shall submit all genuine documents w.r.t. its credential such as work experience, Bank Guarantee and other documents to NPCC to qualify in the Tender. The Contractor agree that the contractor shall not indulge in any fraudulent activity and in any points of time including after being successful bidder, if any fraudulent act shall have been committed by the Contractor then NPCC shall have full rights to forfeit the EMD, Security Deposit, Performance Bank Guarantee, whatsoever without any notice to the Contractor. "



29. Clause 2.13.1 (a) of Pre-qualification & Instruction to Bidders is also reproduced hereunder:

"2.13.1 Additional Requirement: Even though the bidders meet the above qualifying criteria, they are liable to be disqualified if they have:

(a) Made misleading or false representation in the forms, statements and attachments in proof of the qualification requirements; "

W.P.(C) 6468/2021:

30. In W.P.(C) 6468/2021, the petitioner's substantive prayers read as under:

- a. "Issue a writ in the nature of Mandamus, or any other appropriate WRIT, order or direction, thereby, declaring the debarment/blacklisting vide letter dated 18.05.2021 as illegal, arbitrary and unreasonable; and to consequently quash the said debarment/blacklisting order.*
- b. Issue a writ in the nature of Mandamus, or any other appropriate WRIT, order or direction, thereby quashing the said order of debarment.*
- c. ..."*

31. In the present writ petition, the petitioner has challenged the debarment/blacklisting order dated 18.05.2021 issued by the respondent no.1, whereby the petitioner has been blacklisted for a period of two years from participating in any tender floated by the respondent no.1. The said decision of debarment/blacklisting has been taken by the respondent no.1 due to the alleged fraudulent act of the petitioner in violation of clause 18 of NIT & Clause 2.13.1(a) of *the Pre-qualification & Instructions to Bidders* in NIT. The decision to blacklist the petitioner came at the heels of it being disqualified from



the tender process under NIT bearing NPCC/PROJECTS/EMRS-JH/21-22/039 issued on 12.03.2021, on the ground that the site report prepared and submitted by it was obtained under a fraud.

32. The petitioner submits that the order of debarment/blacklisting dated 18.05.2021 is illegal, arbitrary and unreasonable, and the same is in violation of principles of natural justice. The case of the petitioner is that before taking any penal action, it was mandatory for the respondents to follow the principles of natural justice and give a show cause notice, call for a reply and, thereafter take the decision. The letter dated 18.05.2021, blacklisting the petitioner reads as under:

*“National Projects Construction Corporation Limited
(A Government of India Enterprise)
(Ministry of Jal Shakti)*

SPEED POST

Ref. No. NPCC/Projects/2021/185

Dated:18.05.2021

*M/s Sanjay Agrawal,
35-36, First Floor, Millenium Plaza,
G.E. Road, Raipur(C.G.)*

Sub: Affidavit by the Ram Krishna Singh received by NPCC-Debarment from participating in Tenders of NPCC Ltd. For period of 2 years.

Ref: (i) An Affidavit received by NPCC.

Dear Sir.

In reference to the above, An Affidavit received from Ram Krishna Singh during the evaluation of bid. The case was informed to the Higher Management of NPCC and as per clause



no. 18 of PRE-QUALIFICATION AND INSTRUCTIONS TO BIDDERS (Fraudulent Act) of NIT, the Management has decided to debar/Black List your agency from participating in Tender of NPCC Ltd for period of 2 years i.e. from date of issuing of this letter.

This is issued with approval of Competent Authority.

Thanking you,

Yours faithfully,

Sr. Manager(Projects)

Cc:

1)OSD to CMD, NPCC Ltd, Gurgaon

2)HOD(Projects)

3)All Zonal Managers, NPCC Ltd.”

33. When the matter came before us on 16.07.2021, we, while issuing notice to the respondents, also stayed the operation of the communication dated 18.05.2021 blacklisting the petitioner for a period of two years.
34. The respondent has filed a short-affidavit and has taken identical stand as taken in the previous two petitions, namely, that the petitioner was blacklisted after it was found that it had forged the site certificate and that there was no collusion between the respondents and any other bidder. In the rejoinder, the petitioner has submitted that the petitioner was neither aware of the affidavit dated 17.03.2021, nor was the said affidavit shared with the petitioner. The petitioner has further submitted that no intimation with regard to blacklisting/debarment was ever



intimated to the petitioner. The petitioner submits that subsequent to it being intimated of the role of respondent No.4 i.e., Ram Krishna Singh on 04.05.2021, it also got registered FIR dated 06.05.2021, in the local Police Station against Ram Krishna Singh, thereby alleging fraud/cheating and criminal breach of trust.

Submissions:-

35. Ms. Suri, learned Senior Counsel, appearing for the petitioner in all 3 cases, has submitted as under:

- I. The petitioner's representative Ram Krishna Singh had visited the site and satisfied itself as to the condition of the site. The petitioner stands by the said certificate, and has not backed out from, or disowned the said certificate;
- II. Any bidder dropping its bid, automatically confirms to have visited the site as per clause 2.14(d), and hence the submission of site visit report is otiose, irrelevant and a non-essential condition. Moreover, as per clause 10 of "*the qualification and instruction to bidders*"; the bidder is deemed to have visited the site and then dropped the tender, thereby doing away with the essentiality of '*site visit report*'.
- III. The other bidders do not qualify in view of clause 4 the '*Pre-Qualification Criteria*.'
- IV. The petitioner had visited the site (through its officer, Mr. Ram Krishna) and thereafter prepared the site visit report dated 15.03.2021. The said site visit report was also received and signed by the Zonal Manager, and the said certificate was uploaded along



with its bid.

- V. Ground of fraud and forging of signature is an afterthought, and was never intimated to the petitioner
 - VI. Shri Ram Krishna Singh after completion of such site visit and obtainment of the report, *malafidely* and in connivance with the respondents has executed the fake affidavit to harass and deter the petitioner from being awarded the works under tenders.
 - VII. No opportunity was provided to the petitioner to show cause before blacklisting for the period of two years.
36. Mr. Budhiraja, learned Counsel appearing for respondent Nos.1 and 2 submits that:
- I. As per the conditions of the NIT, the failure to provide certificate as per Clause 2.14 of '*the qualification and instruction to bidders*', leads to disqualification of the bidder from the tender process, as the same is an essential condition.
 - II. On the basis of the affidavit furnished by Sh. Ram Krishna Singh in the Zonal office at Ranchi of the respondent Corporation, the tender committee members of the respondent No. 1 Corporation disqualified and blacklisted the petitioner.
37. Mr. Parijat Kishore, counsel for respondent no.3, the only technically qualified bidder in **W.P.(C) 5426/2021**, has also filed a counter affidavit. He submits that forgery has been committed by the petitioner and suppression of material facts has rendered itself dis-entitled for any relief under the extra-ordinary writ jurisdiction. He also submitted that



as per Clause 77.0, Courts in Gurugram have the exclusive jurisdiction with respect to any dispute arising out of the Agreement.

38. Before proceeding to consider the rival submissions, it will be relevant to reproduce the relevant clauses hereunder.

39. Clause 2.14 reads as under:

“2.14 Site Visit:

a. The bidder is advised to visit and examine the Site of Works and its surroundings and obtain for itself on its own responsibility and cost all information that may be necessary for preparing the bid and entering into a contract for construction of the Works.

b. The bidder and any of its personnel or agents will be granted permission by the Employer/Owner to enter upon its premises and lands for the purpose of such visit, but only upon the express condition that the bidder, its personnel, and agents will release and

c. Indemnify the Employer/Owner and its personnel and agents from and against all liability in respect thereof, and will be responsible for death or personal injury, loss of or damage to property, and any other loss, damage, costs, and expenses incurred as a result of the inspection. .

d. Before submitting a Bid, the Bidder shall be deemed to have satisfied himself by actual inspection of the site and locality of the works, that all conditions liable to be encountered during the execution of the works are taken into account and that the rates entered in the Price Bid document are adequate and all-inclusive for the completion of work to the entire satisfaction of the Employer/Owner.

e. Agency should visit the site as actual and certify the same by concerned Zonal Manager (Address above). Certificate for the same has to be uploaded in the NIT. Failure of the same may disqualify the bid.”



40. Clause 10 of “*the qualification and instructions to bidder*” reads as under:

"10. The tender shall be deemed to have gone through the various conditions and clauses of the tender and visited the site before quoting their rates, once they make an offer for this work. No claim shall be entertained on this account."

41. Clause 11 of the “*Pre-Qualification criteria*” reads as under:

"11. NPCC is free to get documents verified and agency shall have no objection to it. In case if it is found at any stage that agency has made any false information will be disqualified & blacklisted. "

Common analysis:

I. On issuance of Site certificate:

42. The first and foremost question that arises for our consideration is whether the certificate required under Clause 2.14(e) has to be obtained only subsequent to the issuance of tender, or the site visit conducted pursuant to the second tender— which was cancelled, soon whereafter the third tender i.e. the tender in question was issued, would amount to substantial compliance.
43. Clause 2.14 reproduced by us above when read as a whole, clearly shows the purpose of prescribing the site visit was that the bidder should have seen the site, and should have all the relevant information necessary for preparing the bid. Clause 2.14(e) is a deeming provision, with the objective of fastening the bidder with having all information/knowledge of the site condition before preparing and submitting the bid.



44. A bare perusal of the tender conditions clearly shows that the prospective bidder is “advised” to visit the site. To fasten the consequences of making a bid, the obligation cast on the bidder/tenderer is to visit the site, and obtain the certification by the Zonal Manager of the respondent. There is no requirement that the certificate has necessarily to be obtained after the publication of the tender, and one issued pursuant to the second tender, but before the third tender notice publication, would not be a valid certificate for the purpose of the third tender. Since the cancellation of the second tender and issuance of the third tender took place simultaneously; site has remained the same, and; there is no difference of time between cancellation of the second tender and issuance of the third tender, there is no basis for the respondents to claim that the site visit certificate vis-a-vis the second tender could not be utilized by the petitioner, if the same was, otherwise valid and actionable.
45. The purpose behind the certificate, as stated in the counter-affidavit of the respondent, is for the bidder to get the knowledge of the actual site condition so as to enable the bidder to consider the cost impact of local site condition in their bids, such as tree cuttings, low level land, hard rock area, Marshy land, unavailability of approach road etc. By doing so, the bidder will be armed with knowledge of the site condition and perform its work better, avoiding any delays and cost overrun. Since there is no time lost between the issuance of third tender and cancellation of the second tender, we do not see any reason why the site visit certificate obtained vis-a-vis the second tender will fail to fulfil the condition. It is a well settled rule of administrative law that an



executive authority must be rigorously held to the standards by which it professes its actions to be judged, and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. The Supreme Court in ***Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.***, (1979) 3 SCC 489, applying this rule held that:

*“Now, there can be no doubt that what paragraph (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered 2nd class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1st respondent and since the 4th respondents did not satisfy this standard or norm, it was not competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in *Viteralli v. Seton*(1) where the learned Judge said:*

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

46. As is clear from the above, the terms of the tender have to be



scrupulously followed, and there is no scope for adding or deleting any words. Since preparation of a tender is a complex exercise, each and every word must be given its true meaning and nothing more or less should be read into the terms of the tender.

47. Thus, we are of the clear view that Clause 2.14 does not require a fresh certificate to be submitted of a date after the publication of the tender, and the certificate dated 15.03.2021 was liable to be examined, subject of course, to the certificate being genuine.

II. On whether fraud has been done to obtain the site visit report.

48. It will be relevant to reproduce the affidavits of Shri Ram Krishna Singh dated 17.03.2021, rescinding his Site Visit Certificate filed by the respondent Nos. 1 & 2 in W.P.(C) 5426/2021 and in W.P.(C) 5785/2021:

In W.P.(C) 5426/2021:

“

03508

*Notary Public Ranchi
Affidavit*

I, Ram Krishna Singh Son of Late Ram Chandla Singh resident of C/o S.K. Tiwari Sunday Market P.O & P.S. Dist. Ranchi, Jharkhand do hereby solemnly affirm and declare as follows:

- 1. That I have been living on aforesaid place.*
- 2. That Sanjay Agarwal Partner of M/s Sanjay Agarwal, 35 36, First floor Millennium Plaza G.E. Rd Raipur Chattisgarh has been done my Signature on my behalf in tender of construction and Development Eklavya Model Residential School at Torpa and Murhu Dist. Khunti Jharkhand which is fauls on dated 15.3.2021*



3. *That I have not done visit in said area.*
4. *That I can take legal action against him (Sanjay Agarwal) for said action.*
5. *That my said statements are true and correct if any found wrong then I shall be responsible for the same.*

Sworn and signed at Ranchi on dt. 17.3.2021

The Deponent who has been identified by Sri.....

Adv. Ranchi

Deponent

Sign

Identified by Adv. Ranchi”

(Emphasis added)

In W.P.(C) 5785/2021:

“

29390

Affidavit

I, Ram Krishna Singh Son of Late Chhabila Singh resident of C/o S.K. Tiwari Sunday Market patu P.O & P.S. Ratu Dist. Ranchi Jharkhand do hereby solemnly affirm and declare as follows:

- 1. That I have been living on aforesaid place.*
- 2. That Sanjay Agarwal Partner of M/s Sanjay Agarwal, 35 36, First floor Milenium Plaza G.E. Rd. Raipur Chattisgarh has been done my signature on my behalf in tender of construction and Development Eklavya Model Residential School at Albert Ekka Dist. Gumla Jharkhand which is faults on dated 15.3.2021.*
- 3. That I have not done visit in said area.*
- 4. That I can take legal action against him (Sanjay Agarwal) for said action.*
- 5. That my said statements are true and correct if any found wrong I shall be responsible for the same.*



Sworn and signed at Ranchi on dt 17.3.2021
The Deponent who has been identified by Sri.==

Adv. Ranchi

Deponent
Sign
Identified by Adv. Ranchi”

(Emphasis added)

49. The certificate required under Clause 2.14(e) had to be as per the proforma XIII Annexed with the tender. The format which was required to be submitted along with the tender is as under:

“

PROFORMA- XIII
FORMAT FOR UNDERSTANDING THE PROJECT SITE
 (on Bidder Letter Head)

I/we hereby certify that I/we have examined & inspected the site & its surrounding satisfactorily, where the project is to be executed as per the scope of works. I/ We are well aware about the location and conditions etc.

I/ We hereby submit our BID considering above all facts gathered during site visit and each & every aspect has been considered in the Quoted cost of the project as per BOQ.

1. Name of Bidder Representative with Designation visited the site:-.....
2. Name of Bidder/Firm:-
3. Tender to be participated by Bidder:-
4. Name of site visited with dates:-
 - a) _____ on _____
 - b) _____ on _____

Please add on as required
(Name with designation)



Representative of the Agency/Firm

Countersigned

*Representative of National Projects Construction Corporation
Limited*

*Note: Technical Bids without Proof of Site Visit will be
summarily rejected.*

Sign & Seal of Tender”

50. The last part of proforma XIII, requires the certificate to be countersigned by the representative of NPCC. The site visit certificate submitted by petitioner in W.P.(C) 5785/2021 reads as under:

*“M/s Sanjay Agrawal
Engineers & Consultants
‘A-5’ Class Contractor*

PROFORMA-XIII

FORMAT FOR UNDERSTANDING THE PROJECT SITE

I/we hereby certify that I/we have examined & inspected the site & its surrounding satisfactory, where the project is to be executed as per the scope of works. I/we are well aware about the Location and conditions etc.

I/ we hereby submit our BID considering above all facts gathered during site visit and each & every aspect has been considered in the Quoted cost of the project as per BOQ.

- 1. Name of Bidder Representative with Designation who visited the site – Ram Krishna Singh Project Co-ordinator*
- 2. Name of Bidder/Firm – M/s. Sanjay Agrawal*
- 3. Tender to be participated by Bidder- Construction & Development of Eklavya Model Residential School At Albert*



Ekka Dist. Gumla, Jharkhand.

4. Name of The Site Visited with Dates

a) Albert Ekka on 15.03.2021

*Ram Krishna Sinha
Project Co-ordinator
Authorized Representative
M/s Sanjay Agrawal*

*Countersigned
Representative of NPCC Ltd.”*

51. Similar Proforma XIII was also filed in WP (C) 5426/2021 which was also countersigned by the representative of NPCC.
52. A perusal of the site visit certificate submitted by the petitioner with its tender bid clearly shows that the said certificate was, in fact, countersigned by the representative of NPCC. There is no mention in the counter-affidavit of the respondent as to who had countersigned the site visit certificate for and on behalf of NPCC, and what action has been taken against the said person, if the site visit certificate was false. There is only a cursory mention in the counter-affidavit that the respondent is in the process of conducting an investigation. The very fact that the site visit certificate dated 15.03.2021 is countersigned by the representative of NPCC, lends credence to the presumption that the said certificate would have been generated after Shri Ram Krishna visited the site, and thus should be considered as genuine, as it is countersigned by representative of NPCC. It seems that the said employee/ representative of the petitioner Shri Ram Krishna Singh has fallen apart from the petitioner, and to spite the petitioner and cause business loss to it, he has issued the said affidavits.



53. Another important factor which catches our attention is that the petitioner has been kept in dark about the affidavits of Shri Ram Krishna. The petitioner submitted certificate dated 15.03.2021 signed by Shri Ram Krishna Singh, duly certified by the representative of NPCC. The affidavit dated 17.03.2021 of Shri Ram Krishna Singh—disowning his site visit and signatures on the site visit certificate, is stated to have been submitted in the regional office of respondent at Jharkhand, and the respondent has blindly relied upon the said affidavit without confronting the petitioner with the same. The said Shri Ram Krishna Singh seems to have been believed – when he gave the two affidavits, without trying to find out under what circumstances he is withdrawing from the site visit certificates. The least that was required of the respondent corporation, was that it informs the petitioner of the same, enclosing the affidavits dated 17.03.2021 of Shri Ram Krishna Singh, and to seek an explanation from the petitioner in this regard. The entire action of respondent Nos. 1 and 2 is premised on the assumption that the affidavit of Shri Ram Krishna Singh is gospel truth, without there being any effort made on the part of the respondent, to either ask the petitioner for their explanation, or ask the representative of the NPCC as to why and how they have certified the site visit on 15.03.2021. The counter affidavit of the respondent is totally silent in this regard
54. Thus, we are of the view that the action of the respondent in disqualifying the petitioner in W.P.(C) 5426/2021 and in W.P.(C) 5785/2021 for construction of ***Eklavya Model Residential School at Torpa and Murhu, Dist. Khunti, Jharkhand and Eklavya Model***



Residential School at Albert Ekka, Dist. Gumla, Jharkhand respectively, does not meet the test of judicial scrutiny and is tainted by *arbitrariness*.

III. On Debarment/blacklisting:

55. As regards W.P.(C) 6468/2021, the respondent's conduct of debarring/black listing the petitioner, without following the principles of natural justice, again does not meet the test of judicial scrutiny. As has been stated above, a reasonable chance of hearing was denied to the petitioner prior to the order of blacklisting and debarment. Before taking of any penal action, it is quintessential and mandatory that a reasonable chance of hearing is provided to the party and the discussion is arrived at after consideration of the case of the affected party. The discussion should reflect due application of mind to all relevant and germane aspects and should be a reasoned discussion.
56. In *Kulja Industries Ltd. v. Western Telecom Project BSNL*, (2014) 14 SCC 731, the Supreme court has laid down that the decision of blacklisting by the Authority is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. The Supreme Court has observed:

“17.... The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a



proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Dwarkadas Marfatia and Sons v. Port of Bombay [(1989) 3 SCC 293] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution.”

(emphasis supplied)

57. In the case of **Gorkha Security Services v. Govt. (NCT of Delhi)**, (2014) 9 SCC 105, the Hon'ble Supreme Court has held as under:-

“16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.



17. Way back in the year 1975, this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75)

“12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.



20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.” (emphasis supplied)

58. The sum and substance of the above pronouncements is that the order of debarment/blacklisting falls within the power of Judicial Review of the Writ court. The order of black listing has to cross the hurdle of meeting with principles of natural justice, doctrine of proportionality, reasonableness, and fairness. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contracts. Such action can only be taken once the principles of Natural Justice have been followed in their true letter and spirit and intent. Thus, before taking such a harsh decision, the person concerned should be given an opportunity to represent his case before he is put on the blacklist. Issuance of show cause notice must not be mere formality, rather the same should specifically mention the grounds on which the department necessitates the action, and also the proposed action, so that the person aggrieved may explain the circumstances in his defence properly.
59. Since no prior notice was given by the respondent Nos.1 and 2 before passing such debarment/blacklisting notice, and the petitioner did not get an opportunity to explain as to circumstances around the affidavits of Shri Ram Krishna Singh, we are of the opinion that the action of



respondent in issuing the impugned communication black listing the petitioner for two years is in violation of the principles of natural justice. i.e., without affording any opportunity to the petitioner to explain the allegations levelled against it. Thus, in the view of the above, we hold that the non-issuance of show cause notice is fatal to the impugned order dated 18.05.2021.

60. Consequently, all the 3 writ petitions are, allowed. Since we are allowing the writ petition we need not go into the disqualifications of the other eligible bidders, as the petitioner claims to be the lowest bidder. We, however, reserve the right of the petitioner to raise the said issues at a later stage, if the need arises.
61. The respondents shall consider the bids of the petitioner in respect of the two tenders aforesaid responsive, and shall proceed according to law. The petitioner shall not be considered to be blacklisted. We, however, leave it open to the respondents to consider the issue of blacklisting afresh in accordance with law, and while affording a fair and reasonable opportunity to deal with the same. Parties are left to bear their respective cost.

JASMEET SINGH, J

VIPIN SANGHI, J

JANUARY 31, 2022