

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.28101 of 2011

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

OrissaJob.Com,
represented through its Proprietor,
Ashok Kumar Jena,
S/o. Late Kulamani Jena,
2nd Floor, 357, Ashraya Complex,
Rasulgarh, Bhubaneswar,
Dist: Khurda

... Petitioner

-Versus-

State of Orissa & Others

... Opp.Parties

For Petitioner : Mr. R.K. Rath, Sr. Advocate
M/s M.K.Das, P.K.Nanda,
P.Rath, D.Sahoo & A.S. Paul

For Opp. Parties : Mr. B.K. Nayak
Addl. Government Advocate
(For OPs 1 & 2)
Mr. S.K.Sanganeria,
P.C.Patnaik, P.Nayak &
A.Sanganeria
(For O.P. 3)

P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA
AND**

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment :23.12.2011

B.N. Mahapatra, J. In this writ petition, the petitioner challenges the decision of opposite party No.2-State Project Director, Orissa Poverty Reduction

Mission (for short, "OPRM") taken on 29.06.2011 under Annexure-7 selecting opposite party No.3-Sumeet Security Service as successful bidder on the ground that the said decision is illegal, arbitrary and unreasonable. Further prayer of the petitioner is to prohibit the said Project Director from entering into agreement with opposite party No.3-Sumeet Security Service and direct the Project Director to declare the petitioner as successful bidder.

2. Petitioner's case in a nutshell is that it is a Human Resources (HR) Consultancy Firm, represented through its Proprietor. It is an empanelled Consultant for supply of human resources to a Project called 'Targeted Rural Initiatives for Poverty Termination and Infrastructure' (for short, "TRIPTI"). The Project Director of OPRM invited proposals on 21.05.2011 to provide consultancy services with regard to supply of human resources at State, District and Block Project Management Units of TRIPTI Project on Outsourcing Basis to the empanelled firms. TRIPTI Project under OPRM is established, managed and administered by the Government Authorities under Panchayati Raj Department, Government of Orissa. Pursuant to the letter of invitation dated 21.05.2011 (Annexure-1) issued by the Project Director, the petitioner as an empanelled Consultant, took part in the pre-bid meeting conducted by the Project Director for the purpose of selection of HR Agency for Outsourcing Manpower to TRIPTI Project for the year 2011-12 along with other five empanelled Consultants

including opposite party No.3-Sumeet Security Service, represented through its Proprietor Sri Prasanna Kumar Sahoo. Pursuant to the invitation of bids and pre-bid meeting by the Project Director, the petitioner submitted its bid proposal both technical and financial on 13.06.2011, which is before the stipulated period as per the norms provided by the TRIPTI Mission. After receipt of the tender proposals and complete verification of the technical bids from three bidders, the Project Director short listed the petitioner and opposite party No.3-Sumeet Security Service. Finally, the Project Director, being the Chairperson of the Procurement Committee, illegally accepted the bid of Sumeet Security Service. Hence, the present writ petition.

3. Mr. R.K. Rath, learned Senior Advocate appearing on behalf of the petitioner submitted that the Project Director illegally accepted the bid of opposite party no.3, which is in clear contravention of the terms of reference mentioned in the Request for Proposal (Annexure-2). The Project Director invited bids in a series of predefined formats both in technical and financial bids. In case of technical bids format starts from TECH-1 to TECH-8 and in case of financial bids the format starts from FIN-1 to FIN-6. In the Request for Proposal (RFP) a condition was stipulated that any proposal submitted, which is not as per the format given by the Project Director, shall be treated as non-responsive. Opposite party no.3-Sumeet Security Service submitted its bid with wrong type of technical proposals by changing the standard

formats given by the Project Director. Opposite party No.3 has quoted the facts and figures in Form TECH-7 and Form TECH-8, which are staffing schedule and work schedule respectively. Therefore, acceptance of the proposals submitted by opposite party No.3-Sumeet Security Service is completely unreasonable and quite illegal for which the selection is liable to be set aside.

4. It is further submitted that opposite Party No.3 has also submitted the Form FIN-2 and FIN-3 of the financial bid that has no resemblance with the standard formats given by the Project Director. Opposite party No.3 has quoted the facts and figures in Form FIN-2 which is the summery of costs and has also quoted the facts and figures in Form FIN-3, which is the breakdown of costs by activity. These are not as per the formats given by the Project Director. Moreover, opposite party No.3 has quoted the facts and figures in Form FIN-3 in four different segments as per his own choice against one page prescribed format by the Project Director. Form FIN-3 submitted by opposite party No.3 is not in accordance with the stipulations made by the Project Director. As per instruction No.2 of Form FIN-3 “names of activities (phase) should be the same as, or correspond to the ones indicated in the second column of Form TECH-8”. This Form FIN-3 is not in accordance with the activities indicated in the second column of Form TECH-8. Therefore, acceptance of the proposals submitted by

opposite party no.3 is completely unreasonable and illegal for which the selection is liable to be set aside.

5. It was further argued that calculation of service tax in Form FIN-5 of the financial proposal submitted by opposite party no.3 is completely wrong and invalid. Service tax is to be calculated on the total billing value that includes Salary, ESI, EPF contribution, Agency charges and other statutory contributions if any. Whereas opposite party No.3 has calculated the Service Tax on the salary value only excluding ESI & EPF contribution, Agency Charges/Service Charges of the Agency/Consultant and suppressed the actual tax liability in order to become L1. The bidder opposite party No.3 has quoted Rs.50/- only as Service Charges which is clearly unsustainable and impracticable, as because, the Project Director would suppose to deduct TDS @ 2% of the Gross Bill amount (i.e. 2% of Rs.8989/- in case of Section Officer), which is approximately Rs.180/- per manpower/month basis, almost more than 3 times of the amount of Service Charge quoted by opposite party No.3. This implies that opposite party No.3 has adopted unjustifiable calculation and quoted the impracticable price to become successful bidder, which is prohibited by some other State and Central Government Organizations in India. This would prompt the service provider to go for illegal labour practices and the same would also promote acceptance of illegal gratification at the time of recruitment.

6. As per Section 6.1 of TOR, the Consultant should have been present at the time of negotiation. This guiding principle has not been followed at the time of negotiation and none of the consultants as mentioned in Form TECH-5 of the technical bid submitted by opposite party No.3 were present. The contract has been awarded to opposite party No.3 without adhering to the requirement of Clause 6.1 and Clause 6.4 of RFP which vitiates the entire tender process. Therefore, acceptance of proposals of opposite party No.3 is proved to be *mala fide* and the same is unsustainable in the eye of law for which the same should be quashed.

7. The status of opposite party No.3-firm has not been clarified in the tender proposal. In some of the documents like certificate from Registrar of Firms, Form-C and certificate issued from Labour Department indicate that opposite party No.3 is a partnership firm and in some certificates like certificates issued from Commercial Taxes Department and Audit Report given by the Auditors, it is mentioned that opposite party No.3 is a proprietorship firm. However, along with bid document, the experience of a dissolved partnership firm has been submitted by opposite party No.3 and the same was taken into consideration by opposite party no.2 for which the entire decision making process is vitiated. Opposite party No.3 has committed error in submitting the labour licence issued in its name as a partner of the partnership firm along with bid document filed in his individual capacity.

8. Mr. B.K. Nayak, learned Additional Government Advocate submitted that TRIPTI is an International Development Association, World Bank assisted livelihood project. It is being implemented by the OPRM which is a Society formed under the Panchayati Raj Department, Government of Orissa, since 31st March, 2009 and is also a registered Society under the Societies Registration Act, 1860. It has a governing body, chaired by the Chief Secretary of Orissa and an Executive Committee, chaired by the Secretary, Panchayati Raj Department. Representatives from various departments are members of both the bodies. The OPRM consists of a State Project Management, Unit-10, District Project Management Units and 38 Block Facilitation Team. The objectives of TRIPTI is to enhance the socio-economic status of the poor especially women and disadvantageous groups in selected districts. The project emphasizes on strengthening and creation of organization of the poor Self Help Groups (SHGs) and Federations at Panchayat, Block and District Levels. For effective implementation of the project, quality manpower is an essential requirement. As per the Government decision, 48 posts of Accountant for 10 Districts and 38 Block Level Data Entry Operators, Section Officer, P.A. to Director at State Level are to be filled up through process of outsourcing. Total posts to be filled up were 56. The process of selection of an agency, which will provide manpower on outsourcing basis, has been made as per World Bank Procurement Guidelines. Basing on the World Bank Guidelines and the Finance

Department's guidelines, TRIPTI published Expression of Interest (EOI) for selection of agency on 01.08.2010 and 02.08.2010. The cut-off date for submission of EOI was fixed to 17.08.2010. Accordingly, 13 nos. of EOIs were received. They were opened on 24.08.2010. Subsequently, Procurement Committee evaluated all the EOIs as per approved criteria on 09.09.2010. The method of selection is Least Cost Method. In this Method, Request For Proposal (RFP) is sent to top 6 short-listed agencies/Consultants. Both technical and financial bids are invited through RFP. Technical bids are evaluated first. Financial bids of those agencies/Consultants are only opened who qualify the minimum technical score specified in the RFP. The lowest bidder is the responsive bidder with whom contract is signed. In this method, cost being the basis of selection no financial negotiation is allowed. Accordingly, following the above process, RFPs were sent to 6 agencies including the petitioner and opposite party no.3. RFPs from 3 firms were received within the stipulated time. Technical evaluation was made by the Committee on 16.06.2011 out of which two agencies qualified technically, i.e., the petitioner and opposite party no.3. On 17.06.2011, the Procurement Committee recommended for getting no objection from the World Bank before opening of financial proposals. Accordingly, technical evaluation report was sent to the World Bank on 18.06.2011 and no objection from the World Bank was received on 27.06.2011.

9. The financial proposals were opened before the representatives of the petitioner and opposite party No.3 on 29.06.2011. The petitioner had quoted Rs.1,37,49,172/- including service tax and opposite party no.3 had quoted Rs.1,24,20,387/- including service tax. Since opposite party No.3 had quoted the lowest, he became the responsive bidder. Clearance was received from the World Bank on draft contract agreement on 21.07.2011. After getting approval from the Secretary, Panchayati Raj Department, who is the Chairman of Executive Committee, contract was signed on 02.08.2011. It is further submitted that the writ petition is not maintainable as the same is a contractual matter and involves serious disputed questions of fact which cannot be decided in a writ petition filed under Articles 226 and 227 of the Constitution. After considering the case of the petitioner as well as opposite party No.3 in all respects, decision was taken to award the contract in favour of opposite party no.3. The agreement with opposite party No.3 has already been signed and executed, and the opposite party no.3 has also started execution of the said contract. Therefore, the writ petition has become infructuous and as such liable to be rejected. It is not correct to say that the petitioner is an empanelled Consultant for supply of HR on outsourcing basis and opposite party no.3 is not an empanelled Firm but there were only two short-listed firms.

10. The bid of opposite party No.3 has been accepted following the World Bank procurement procedure. The information required by the project

was available in the descriptive form submitted by opposite party No.3 and the proposal was evaluated by the project. The information required in FIN-2 has been provided by opposite party No.3 in the format but it has added separate columns to the original format. The total amount is same. FIN-3 submitted by opposite party no.3 is as per format except detailed description of group activities on the top of the format, which does not have an impact on the price bidding. The detail description of the group activities has been verified with 2nd column of TECH-8 by the Project Director.

11. If opposite party No.3 has wrongly calculated service tax, the firm will be responsible to the indirect tax authority. Each organization has its own statutory dues to be paid to the Government exchequer as applicable. It is submitted that the TDS from salary components of financial bid, which is a major component, will be deducted by opposite party No.3 and it is a matter of concern of opposite party No.3.

12. The World Bank format of standard bidding document does not contain micro level calculation. The Project Director has followed the formats prescribed by the World Bank and guidelines prescribed by the Finance Department, Government of Orissa while floating the tender. Presence of professional staff at the time of negotiation is not mandatory. The process of evaluation of proposals shall be confidential until publication of award of contract. The information relating to evaluation of proposal and recommendation concerning award shall not be disclosed to the Consultants,

who submitted proposals. Referring to Section 8(1)(d) of the RTI Act, 2005, Mr. Nayak submitted that the information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party unless the competent authority is satisfied that larger interest warrants disclosure of such information the same cannot be supplied. Opposite party No.2 in EOI had invited eligible agencies/Consultants for providing services on outsourcing of manpower for TRIPTI project. It was nowhere mentioned that the same will be proprietorship/partnership firm. Rejection of the proposal on this ground would have been illegal. The project has carried out the tender process following all due procedures and no illegal favouritism has been shown or done. Concluding his argument, Mr. Nayak prayed for dismissal of the writ petition.

13. Mr. S.K. Sangneria, learned counsel appearing for opposite party no.3-Sumeet Security Service submitted that opposite party no.3 earlier was a partnership firm constituted on 08.10.1998 which dissolved on 28.08.2001. The said opposite party No.3 was once again constituted partnership firm on 28.11.2008 and opposite party no.3 had 75% share in the partnership firm. The said firm was continuing with its partnership business in respect of providing Security Service and in course of continuation of partnership business since the other partner could not be able to invest only 10% in the partnership business and opposite party no.3 having invested 90% capital in the partnership business, the said partnership

between opposite party No.3 and other partner came to an end by dissolution of the partnership on 11.01.2010. After dissolution of the partnership business, opposite party No.3 is continuing with the business in the name of Sumeet Security Service under the status of proprietorship business and opposite party No.3 became a proprietorship concern. As opposite party No.3 was/is in business of providing security service through outsourcing manpower since 1998 and the proprietorship firm came into existence after 10.01.2010 having experience in the similar nature of business, opposite party no.3 furnished experience certificate accordingly.

14. Opposite party No.3 after finalization of their technical bid and financial bid part of the tender, entered into agreement with the Project Director on 02.08.2011 and the same has been filed by opposite party Nos.1 and 2 in their counter affidavit. Opposite party No.3 after entering into the agreement with opposite party Nos.1 and 2 on 02.08.2011, has already spent Rs.2,92,163/- till 26.10.2011 and subsequent thereto has also spent about Rs.1,12,000/-. The petitioner having knowledge of execution of the contract agreement by opposite party No.3 with opposite party Nos.1 and 2 on 02.08.2011 and since opposite party No.3 have started operation of the contract, the writ petition is not maintainable. Moreover, factual disputes are involved in the present writ petition and such factual dispute in respect of contract under the Indian Contract Act

cannot be challenged nor can be adjudicated in the present writ petition under Articles 226 and 227 of the Constitution. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Brihan Mumbai Electric Supply & Ors. Vs. Laqshya Media Pvt. Ltd. & Ors*, (2010) 1 SCC 620; and the judgment of this Court in *North Brook Jute Company Ltd. Vs. The Additional Principal, Chief Conservator of Forests (K.L.), Orissa & Ors.*, 2006 (Supp-I) OLR 777, Mr. Sangneria submitted that the writ petition should be dismissed.

15. On the rival contentions advanced by the parties, the following questions fall for consideration by this Court

- (i) Whether the writ Court has jurisdiction to interfere with the contractual matters?
- (ii) Whether experience of erstwhile partnership firm can be the experience of opposite party No.3, who was a partner in the erstwhile firm?
- (iii) Whether the labour licence granted in the name of a partner of an erstwhile partnership firm in the capacity of partner of said firm can be utilized by opposite party No.3, who submitted its bid in his individual capacity after dissolution of said firm?
- (iv) Whether the bid is liable to be rejected for non-production of bid document and/or production of wrong bid document?

- (v) Whether non-fulfillment of conditions stipulated in Clauses 6.1 and 6.4 of RFP (Annexure-2) vitiates the decision making process?
- (vi) Whether there is any error in the decision making process and in the facts and circumstances of the case, opposite party No.2-Project Director is not justified in awarding the contract to opposite party No.3-Sumeet Security Service?
- (vii) What order?

16. Question No.(i) is with regard to maintainability of the writ petition involving contractual matters. In the instant case, petitioners' specific case is that the decision making process is vitiated as it is arbitrary, discriminatory and *mala fide*. According to Mr.Rath, opposite party No.3 has not fulfilled the necessary criteria to qualify in the technical bid.

17. Needless to say that the terms of invitation to tender cannot be opened to judicial scrutiny because the invitation to tender is in the realm of contract. The Government must have freedom of contract. A fair play in joints is a necessary concomitant for an administrative function in an administrative sphere or quasi administrative sphere. At the same time, law is well settled that judicial review covers contractual matters involving

Government and Court can interfere only if a policy decision is found to be arbitrary, discriminatory or *mala fide*.

18. At this juncture, it will be beneficial to refer to some of the decisions of the Hon'ble Supreme Court on this point.

19. In the case of ***Commissioner of Income Tax, Bombay & Ors., vs. Mahindra & Mahindra Ltd. & Ors., AIR 1984 SC 1182***, the Hon'ble Supreme Court in paragraph 11 of the said judgment has held as under:

“By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from *Barium Chemicals case*¹ on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. This Court in one of its later decisions in *Shalini Soni v. Union of India*² has observed thus: “It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote”. Suffice it to say that the following passage appearing at pp. 285-86 in Prof. de Smith's treatise *Judicial Review of Administrative Action* (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus:

“The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to

which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. *It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts.* These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidity contained within each category.”

20. In the ***State of U.P. & Ors. vs. Renusagar Power Co. & Ors.***, AIR 1988 SC 1737, it was held that exercise of administrative power will be set aside if there is a manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary.

21. In ***Sterling Computers Ltd. vs. M/s. M & N Publications Ltd. & Ors.***, AIR 1996 SC 51, the Hon’ble Supreme Court observed as follows:

“While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision making process”

22. The Hon'ble Supreme Court in the case of ***M/s. Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others***, AIR 2000 SC 2272, held as under:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

- (i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;
- (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated;
- (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

23. In ***Indian Railway Construction Co. Ltd. vs. Ajay Kumar***, (2003) 4 SCC 579, the Supreme Court held as follows:

“It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary..... If a power (whether legislative or administrative) is exercised on the basis of

facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.”

24. The Hon’ble Supreme Court in the case of ***Directorate of Education & Ors. vs. Educomp Datamatics Ltd. & Ors.***, (2004) 4 SCC

19 observed as follows:

“It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.”

25. In ***State of N.C.T. of Delhi & Anr. vs. Sanjeev alias Bitto***,

AIR 2005 SC 2080, the Hon’ble Supreme Court in paragraph 16 held as

follows:

“16..... One can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground is ‘illegality’ the second ‘irrationality’ and the third ‘procedural impropriety’ ”

26. The Hon'ble Supreme Court in the case of ***Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corporation Ltd. and others, (2007) 8 SCC 1***, held as under:

“38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This “legal certainty” is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of “level playing field”.

39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*⁵ the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, *however, such difference of opinion must be based on specified norms*. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a

norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above “certainty” is an important aspect of the rule of law. In *Reliance Airport Developers*—the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.”

27. The specific allegation of the petitioner is that the contract has been awarded illegally and arbitrarily without adhering to the terms and conditions of the tender call notice with *mala fide* intention of favouring opposite party No.3. Therefore, we are of the view that the present writ petition is maintainable.

28. As question Nos.(ii), (iii) and (iv) are inter-linked they are dealt with together. In the instant case, it is not in dispute that opposite party No.3 has submitted its tender paper as proprietor of M/s Sumeet Security Service. According to Mr.Rath, opposite party No.3 in his technical bid has furnished the experience certificate of the partnership firm for which points have been awarded to him towards his past experience and he was found qualified in the technical bid.

29. Undisputedly, partnership firm was dissolved on 11, January, 2010 and since then opposite party No.3 is carrying on business in his individual capacity as proprietor of Sumeet Agency, but opposite party No.3 in his tender paper submitted particulars of past experience of the erstwhile firm and the same was taken into account by opposite party No.2

while considering the technical bids. As per tender documents, Consultant's experience is required and opposite party No.3 furnished the particulars of past experience of the firm. The experience particulars furnished by opposite party No.3 are available at page 190 to 202 of the writ petition out of which experience particulars at pages 190, 195 and 199 relate to the period when the partnership was in existence. From the proceedings of the Procurement Committee for finalization of technical evaluation for hiring of HR Agency for outsourcing of manpower for TRIPTI Project held on 17.06.2011, it reveals that out of the three agencies who submitted RFPs, two agencies, namely, petitioner-firm and opposite party No.3 secured more than 80 points out of 100 and therefore they were declared to have met the minimum qualifying point as 80 set out in the RFP. According to the said proceeding, opposite party No.3 secured 85.63 points and the petitioner secured 83.88 points. A copy of the said proceeding is available at page 310 of the writ petition. In paragraph 21 of the counter affidavit filed by the State, it is stated that on the objection raised by the petitioner on the legal status of opposite party No.3 relating to documents submitted by him it is clarified that opposite party No.2 in EOI has invited agencies for providing services for outsourcing of manpower for TRIPTI project and it was nowhere mentioned that the same will be proprietorship/partnership firm. Rejection of the proposal on this ground would have been illegal. This submission of opposite party-State authorities

certainly does not meet the allegation raised by the petitioner in paragraph 13 of the writ petition. It is not the case of the petitioner that whether a partnership or proprietorship firm is eligible to submit tender paper. Petitioner's specific case is that while the opposite party No.3 submitted his tender paper in his individual capacity, he ought not to have submitted the experience of the dissolved firm for consideration of his technical bid. In its counter, opposite party No.3 has not specifically denied such assertion of the petitioner. However, in the written notes of submission, opposite party No.3 stated that opposite party No.2 has taken into consideration his individual past experience. Such stand of the opposite party No.3 does not get support from counter filed by opposite party Nos.1 and 2, the State authorities. Hence, the same is not accepted.

Since the Procurement Committee has awarded 85.63 points to opposite party No.3 taking into consideration the experience of the dissolved partnership firm, wherein the opposite party No.3 was a partner, the decision making process is vitiated on this ground. Needless to say that partnership firm is an independent legal entity distinct from its partners. The Delhi High Court in the case of ***M/s. New Horizons Ltd. & Anr. V. Union of India & Ors.***, AIR 1994 Delhi 126, held that a Company is an independent person distinct from its members. First petitioner is certainly carrying on its business independently of that of its shareholders. It is one thing to say that shareholders of the Company have vast experience in the

publication of telephone directories with yellow pages and it is entirely another thing if the Company itself has that experience. Experience of the shareholders cannot be the experience of the Company.

The other stand of opposite party No.3 that he held the major share in the partnership firm will not alter the position and hence rejected.

30. In view of the above, opposite party No.2 is not justified in taking into account the experience of the partnership firm to award points to opposite party No.3 and declaring him qualified in technical bid.

31. Another irregularity pointed out by Mr.Rath is that though opposite party No.3 has submitted the tender in his individual capacity, he has furnished the labour licence granted in his name as partner of M/s Sumeet Security Service on 14.10.2009 when the partnership was in existence. Thus, opposite party No.3 has no labour licence in his individual name. At page 253 of the writ petition, the copy of the labour licence is available which reveals that labour licence No.K-1672/09 dated 14.10.2009 has been granted to one Prasanna Kumar Sahoo, (Partner), M/s Sumeet Security Service, Plot No.1056/7, Satabadi Nagar, Baramunda, Bhubaneswar under Section 12(1) of the Contract Labour (Regulation and Abolition) Act, 1970. The said licence was valid up to 30.10.2010 for C.V.Raman College of Engineering, Janla, Bhubaneswar. Since the partnership was dissolved on 11.01.2010 as per Annexure-B/3 to the counter of opposite party No.3, the labour licence issued in the year 2009

cannot be utilized by opposite party No.3, who submitted its tender in his individual capacity after dissolution of the partnership firm.

32. In this context, this Court in ***Subas Chandra Panda Vs. Superintending Engineer, Rural Works, Koraput & Ors.***, AIR 2004 Orissa 124 held that for non-production and non-filing of the bid documents by the participants rejection of bid was valid. Therefore, on this ground the decision of opposite party No.2 is not sustainable in law.

33. Question No.(v) is as to whether non-fulfillment of conditions stipulated in Clause 6.1 and Clause 6.4 of RFP (Annexure-2) vitiates the decision making process. The contention of Mr.Rath is that as per Clause 6.1, the inviting Consultants will, as a prerequisite for attendance at the negotiations, confirm availability of all of professional staff. Failure to such requirement would attract negotiation with next ranking Consultant. Petitioner's case is that no professional staff was present along with opposite party No.3; therefore, he should have been called for negotiation of contract. In its counter affidavit at paragraph 18, opposite parties 1 and 2 have stated that Clause 6.1 and Clause 6.4 of RFP are not mandatory. Opposite party No.3 in his counter affidavit has not specifically denied the averments made in paragraph 10 of the writ petition to this effect. At this juncture, it is necessary to know what is contemplated under Clause 6.1 and Clause 6.4 of RFP, which are extracted below:-

"6. Negotiations 6.1 Negotiations will be held at the date and address indicated in the Data Sheet. The invited

Consultant will, as a pre-requisite for attendance at the negotiations, confirm availability of all Professional staff. Failure in satisfying such requirements may result in the Client proceeding to negotiate with the next-ranked Consultant. Representatives conducting negotiations on behalf of the Consultant must have written authority to negotiate and conclude a Contract.

**Availability of
Professional
staff/experts**

xx

xx

xx

6.4 Having selected the Consultant on the basis of, among other things, an evaluation of proposed Professional staff, the Client expects to negotiate a Contract on the basis of the Professional staff named in the Proposal. Before contract negotiations, the Client will require assurances that the Professional staff will be actually available. The Client will not consider substitutions during contract negotiations unless both parties agree that undue delay in the selection process makes such substitution unavoidable or for reasons such as death or medical incapacity. If this is not the case and if it is established that Professional staff were offered in the proposal without confirming their availability, the Consultant may be disqualified. Any proposed substitute shall have equivalent or better qualifications and experience than the original candidate and be submitted by the Consultant within the period of time specified in the letter of invitation to negotiate.”

34. In view of the specific provisions contained in above clauses, it is difficult to accept the contention of the State that the requirement of the said provisions is not mandatory. This being the conditions of RFP, it is necessary that the said conditions are to be satisfied. The tender inviting authority has not stipulated such condition aimlessly or insensibly. Putting such a contention has a definite purpose. Therefore, a participant who does

not satisfy this condition cannot be declared as a successful bidder as the said contention is certainly a condition of eligibility.

35. From the proceeding of the meeting for discussion on clarification of final proposal of opposite party No.3-Sumeet Security Service held on 11.07.2011(available at page 330 of the writ petition) does not reveal that in the negotiation, opposite party No.3 has confirmed the availability of all professional staff. In that event, the petitioner should have been called for negotiation, which has not been done by opposite party No.2 in the present case.

36. At this juncture, it is necessary to refer to the judgment of the Hon'ble Supreme Court in the case of ***Ramana Dayaram Shetty v. International Airport Authority of India***, AIR 1979 SC 1628, wherein the Hon'ble Supreme Court at paragraphs 20, 21 and 22 held as under:-

20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

21. This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in *E. P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348 : (AIR 1974 SC 555) and *Maneka Gandhi v. Union of India*, (1978) 1

SCC 248 : (AIR 1978 SC 597) that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C. J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* (AIR 1975 SC 266) (supra) where the learned Chief Justice pointed out that '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 black-listing -A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling - It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the

goods.' It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.

22. It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of kendu leaves by the Government of Orissa in *Rasbihari Panda v. State of Orissa*, (1969) 3 SCR 374 : (AIR 1969 SC 1081). The trade of kendu leaves in the State of Orissa was regulated by the Orissa Kendu Leaves (Control of Trade) Act, 1961 and this Act created a monopoly in favour of the State so far as purchase of kendu leaves from growers and pluckers was concerned. Section 10 of the Act authorised the Government to sell or otherwise dispose of kendu leaves purchased in such manner as the Government might direct. The Government first evolved a scheme under which it offered to renew the licences of those traders who in its view had worked satisfactorily in the previous year and had regularly paid the amounts due from them. The scheme was challenged and realising that it might be struck down, the Government withdrew the scheme and instead, decided to invite tenders for advance purchases of kendu leaves but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. This method of sale of kendu leaves was also challenged by filing a writ petition on the ground inter alia that it was violative of Articles 14 and 19 (1) (g) and this challenge, though negatived by the High Court, was upheld by this Court in appeal. The Court pointed out that the original scheme of offering to enter into contracts with the old licencees and to renew their terms was open to grave

objection, since it sought arbitrarily to exclude many persons interested in the trade and the new scheme under which the Government restricted the invitation to make offers to those traders who had carried out their contracts in the previous year without default and to the satisfaction of the Government was also objectionable, since the right to make tenders for the purchase of kendu leaves being restricted to a limited class of persons, it effectively shut out all other persons carrying on trade in kendu leaves and also the new entrants into that business and hence it was *ex facie* discriminatory and imposed unreasonable restrictions upon the right of persons other than the existing contractors to carry on business. Both the schemes evolved by the Government were thus held to be violative of Articles 14 and 19 (1) (g) because they 'gave rise to a monopoly in the trade in kendu leaves to certain traders and singled out other traders for discriminatory treatment'. The argument that existing contractors who had carried out their obligations in the previous year regularly and to the satisfaction of the Government formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by the sale, namely, effective execution of the monopoly in the public interest, was also negated and it was pointed out that : "exclusion of all persons interested in the trade, who were not in the previous year licencees, is *ex facie* arbitrary : it had no direct relation to the object of preventing exploitation of pluckers and growers of kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State." The Court referred to the offer made by a well known manufacturer of bid is for purchase of the entire crop of kendu leaves for a sum of Rs. 3 crores which was turned down by the Government and expressed its surprise that no explanation was attempted to be given on behalf of the State as to why such an offer, from which the State stood to gain more than Rs. 1 crore, was rejected by the Government. It will be seen from this judgment that restricting the invitation to submit tenders to a limited class of persons was held to be violative of the equality clause, because the classification did not bear any just and

reasonable relation to the object sought to be achieved, namely, selling of kendu leaves in the interest of the general public. The standard or norm laid down by the Government for entering into contracts of sale of kendu leaves with third parties was discriminatory and could not stand the scrutiny of Article 14 and hence the scheme was held to be invalid. The Court rejected the contention of the Government that by reason of Section 10 it was entitled to dispose of kendu leaves in such manner as it thought fit and there was no limitation upon its power to enter into contracts for sale of kendu leaves with such persons it liked. The Court held that the Government was, in the exercise of its power to enter into contracts for sale of kendu leaves, subject to the constitutional limitation of Article 14 and it could not act arbitrarily in selecting persons with whom to enter into contracts and discriminate against others similarly situate. The Court criticised the Government for not giving any explanation as to why an offer for a large amount was not accepted, the clearest implication being that the Government must act in the public interest; it cannot act arbitrarily and without reason and if it does so, its action would be liable to be invalidated. This decision wholly supports the view we are taking in regard to the applicability of the rule against arbitrariness in State action.”

37. The Hon’ble Supreme Court in ***Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India & Ors***, (2006) 10 SCC 1, held that in the ultimate, the question would be whether in the process of selection, the Government had adopted a transparent and fair process. While balancing several claims a rational approach is necessary and that is to be formed in line with the scope of judicial interference

38. In view of the above factual and legal positions, the decision of the Hon’ble Supreme Court in *Brihan Mumbai Electric Supply (supra)* and

judgment of this Court in *North Brook Jute Company Ltd. (supra)* relied upon by learned counsel appearing for opposite party No.3, have no application to the case at hand.

39. Question No.(vi) is as to whether opposite party No.2, the Project Director, is justified in awarding contract to opposite party No.3-Sumeet Security Service. In view of our answers to question Nos. (ii), (iii) and (iv), the Project Director is not justified in awarding contract to opposite party No.3-Sumeet Security Service.

40. In the result, we set aside the selection of opposite party No.3 as successful bidder and direct opposite party No.2-Project Director to award the work in favour of the petitioner provided he matches with the price quoted by opposite party No.3 and makes firm commitment by way of furnishing an undertaking to that effect. This condition is stipulated by us keeping in view the interest of the State. If the petitioner fails to match with the price quoted by opposite party No.3, there shall be fresh tender.

41. The writ petition is allowed accordingly.

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B.N. Mahapatra,J

V. Gopala Gowda, C.J. I agree.

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Chief Justice

