

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH
(NAHARLAGUN)

1. W.P (C) No.248 (AP)/2019

M/S B. B. Enterprises, Indira Gandhi Park, near Central Power House, Itanagar, represented by its proprietor Sri Bengia Bado, Son of Sri Bengia Takia, aged about 42 years, resident of I.G. park, near Central Power House, Itanagar, Pin:781111, Papum Pare District, Arunachal Pradesh.

...PETITIONER

-versus-

1. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
2. The Secretary Cum Chief Executive Officer, ARRDA, RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Financial Bid Evaluation Committee, Department of RWD, Government of Arunachal Pradesh, Itanagar represented by the Chairman.
4. The Executive Engineer, DPIU-II, RWD, Chayang Tajo, East Kameng, Seppa, Arunachal Pradesh.
5. Ms. Buru Enterprises, Yara Tabang Complex, ESS-Sector, Itanagar, Papumpare, Pin-791111, Arunachal Pradesh.
6. M/S SPN Constructions, Papu Nallah, P.O. & P.S.-Naharlagun, Pin-791110, Arunachal Pradesh

... RESPONDENTS

2. W.P (C) No.198 (AP)/2019

M/S Yuma Enterprises, represented by its proprietor, Shri Tarh Nachung, resident of P-Sector, Nirjuli, PO/PS Nirjuli, District Papum-Pare, Arunachal Pradesh.

...PETITIONER

-versus-

1. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
2. The Chief Executive Officer, ARRDA (Arunachal Rural Road Development Agency), RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Chairman, Tender Evaluation Board Committee, Department of RWD, Government of Arunachal Pradesh, Itanagar.
4. The Superintendent Engineer, Rural Works Circle, Itanagar, Arunachal Pradesh.
5. The Executive Engineer, DPIU, RWD, Laaying Yangte, Sangram, Kurung-Kumey District, Arunachal Pradesh.
6. The Union of India, represented by the Director General, National Rural Roads Development Agency.
7. M/S B.B. Enterprises, Indira Gandhi Park, near Central Power House, Itanagar, Papum-pare District, Arunachal Pradesh.

...RESPONDENTS

8. M/S Vivek Enterprises, G Sector Itanagar, Papumpare District, Arunachal Pradesh.

...PROFORMA RESPONDENTS

3. W.P (C) No.201 (AP)/2019

M/S B. B. Enterprises, Indira Gandhi Park, near Central Power House, Itanagar, represented by its proprietor Sri Bengia Bado, Son of Sri Bengia Takia, aged about 42 years, resident of I.G. park, near Central Power House, Itanagar, Pin:791111, Papum Pare District, Arunachal Pradesh.

...**PETITIONER**

-versus-

1. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
2. The Secretary Cum Chief Executive Officer, ARRDA, RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Financial Bid Evaluation Committee, Department of RWD, Government of Arunachal Pradesh, Itanagar represented by the Chairman.
4. The Executive Engineer, DPIU-II, RWD, Chayang Tajo, East Kameng, Seppa, Arunachal Pradesh.
5. Ms. Buru Enterprises, Yara Tabang Complex, ESS-Sector, Itanagar, Papumpare, Pin-791111, Arunachal Pradesh.
6. M/S SPN Constructions, Papu Nallah, P.O. & P.S.-Naharlagun, Pin-791110, Arunachal Pradesh.

... **RESPONDENTS**

4. W.P (C) No.221 (AP)/2019

M/S Kenge Construction Co., ESS-Sector, Itanagar, P.O/P.S.-Itanagar, Papumpare District, PIN:791111 Arunachal Pradesh represented by Shri Ha Tatu, Proprietor, S/o Lt. Ha Tama, resident of Papu Nallah, Naharlagun, P.O/P.S.-Naharlagun, Papum Pare District, PIN:791110, Arunachal Pradesh.

...PETITIONER

-versus-

1. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
2. The Secretary-cum-Chief Executive Officer, ARRDA (Arunachal Rural Road Development Agency), RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Chief Engineer, Rural Works Circle, Itanagar, Papumpare District, Government of Arunachal Pradesh.
4. The Superintendent Engineer, Rural Works Circle, Itanagar, Papumpare District, Arunachal Pradesh.
5. The Executive Engineer, DPIU-II, RWD, Laaying Yangte, District Kurung-Kumey, Arunachal Pradesh.
6. The Financial Bid Evaluation Committee, Department of RWD, Government of Arunachal Pradesh, Itanagar represented by the Chairman.
7. M/S PRL Projects & Infrastructure Ltd, Puja House, 34/1 Vikas Apartment, East Panjabi Bagh, New Delhi, 110026.

...RESPONDENTS

5. WP (C) 222 (AP) 2019

M/S Samco Construction Company, registered office at 'E' sector, Opposite IDBI Bank, Itanagar, District Papumpare, Arunachal Pradesh, represented herein by its proprietor Shri Tage Sambyo, S/o Late Tage Tailyang, R/o 'ESS' sector, Itanagar, P.O/P.S Itanagar, District Papumpare, Arunachal Pradesh,.

...PETITIONER

-versus-

1. The State of Arunachal Pradesh through the Secretary Rural Work Department cum CEO Arunachal Rural Road Development Agency, Government of Arunachal Pradesh.
2. The Chief Engineer, Arunachal Pradesh Rural Road Development Agency, Government of Arunachal Pradesh, Itanagar.
3. The Superintendent Engineer, Rural Work Circle, Itanagar, Papumpare District, Arunachal Pradesh.
4. The Executive Engineer/DPIU, Sagalee Division Rural Work Department (RWD), Papumpare District, Arunachal Pradesh.
5. M/S N.T. Agency, Prem Nagar, Naharlagun, P.O/P.S Naharlagun, Papumpare District, Arunachal Pradesh.

...RESPONDENTS

6. W.P (C) No.224 (AP)/2019

M/S Mesnia Enterprises, A Sole proprietorship concern, represented by its proprietor, Shri James Techhi Tara, aged about 42 years, Son of Lt. Techhi Bapi Tara, Resident of E-Sector, Nirjuli, PO & PS-Nirjuli, District Papum Pare, PIN-791109, Arunachal Pradesh.

...PETITIONER

-versus-

1. The Union of India, represented by its Secretary, Ministry of Rural Development, Government of India, New Delhi.
2. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Arunachal Rural Roads Development Agency, Rural Works Department, represented by its CEO, District-Itanagar, Arunachal Pradesh.

4. The Executive Engineer/DPIU, Rural Works Department, Sagalee, District-Papumpare, Arunachal Pradesh.
5. The Technical Bid Evaluation Committee (Package No. AR/07/04/010), represented by its Chairman, RWD, Government of Arunachal Pradesh, Itanagar.
6. The Financial Bid Evaluation Committee (Package No. AR/07/04/010), represented by its Chairman, RWD, Government of Arunachal Pradesh, Itanagar.
7. M/S Capital Enterprises, represented by its sole proprietor, Naharlagun, District-Papumpare, Arunachal Pradesh.

...RESPONDENTS

7. W.P (C) No.227 (AP)/2019

M/S Tama Fabrication Works, Represented by its Proprietor, Shri Techhi Tama, aged about 45 yrs, S/o Techhi Rak, resident of A-Sector, P.O. & P.S. Naharlagun, District-Papumpare, Arunachal Pradesh.

...PETITIONER

-versus-

1. The Union of India, represented by its Secretary, Ministry of Rural Development, Government of India, New Delhi.
2. The State of Arunachal Pradesh, represented by the Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.
3. The Arunachal Rural Roads Development Agency, Rural Works Department, represented by its CEO, District-Itanagar, Arunachal Pradesh.
4. The Executive Engineer/DPIU, Rural Works Department, Sagalee, Papumpare District, Government of Arunachal Pradesh.

5. The Technical Bid Evaluation Committee (Package No. AR/07/04/010), represented by its Chairman, RWD, Government of Arunachal Pradesh, Itanagar.
6. The Financial Bid Evaluation Committee (Package No. AR/07/04/010), represented by its Chairman, RWD, Government of Arunachal Pradesh, Itanagar.
7. M/S Capital Enterprises, represented by its sole proprietor, Naharlagun, District-Papumpare, Arunachal Pradesh.

...RESPONDENTS

Advocates for the petitioners: Shri K. N. Chowdhury, Sr. Counsel,
Shri R. M. Deka [WP(C)248(AP)2019 & WP(C)209(AP)2019].
Shri S. Biswakarma [WP(C)221(AP)2019].
Shri K. Tama [WP(C)222(AP)2019].
Shri B. Kausik, [WP(C)227(AP)2019].
Shri P. Taffo, [WP(C)198(AP)2019].
Shri A. Sharma, [WP(C)224(AP)2019]

Advocates for the respondents: Shri M.K. Choudhury, Sr. counsel
Shri R. Saikia, for the private respondent [WP(C)248(AP)2019 & WP(C)201(AP)2019].
Shri D. Mazumdar, Sr. Counsel for the respondent No. 7 [WP(C)227(AP)2019] and WP(C)224(AP)2019].
Mr. K. Ete, learned Sr. Addl. Advocate General for the State of Arunachal Pradesh.
Shri G. Tarak, learned Standing counsel, Rural Works Department, Government of Arunachal Pradesh.
Shri P. J. Saikia, for the respondent No. 7 [WP(C)221(AP)2019].
Shri D. Panging, for the respondent No. 7 in WP(C) 198/2019.

:::BEFORE:::
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : 13.08.2019 & 14.08.2019

Date of Judgment & Order : 11.09.2019

JUDGMENT AND ORDER(CAV)

As the principal ground of challenge is the same, all these writ petitions were heard together and being disposed of by this common judgment and order.

2. These writ petitions have been filed by unsuccessful bidders who had submitted their bids in connection with Notices Inviting Tender. The said NITs involve a number of works and the writ petitions have been filed for different works which would be indicated later. Each work in the NIT indicated an estimated cost based upon which the bids were submitted. It is not in dispute that the petitioners in all the writ petitions as well as the private respondents were found to be technically responsive and accordingly, the financial bids were opened. It is the case of the petitioners that on opening of such financial bids, their bids for the respective works were found to be the lowest. However, the authorities resorted to the concept of a justified rate and after working out the same, the bids of the private respondents were found nearest to the justified rate and accordingly, declared as L1, followed by allotment of the work. The case of the petitioners, broadly is that the concept of justified rate was not indicated before the tender process had started and even if it is assumed that there was some indication, the same was absolutely not transparent, whereby, the authorities were vested with unbridled discretion, leading to grave injustice in selecting the private respondents to the prejudice of the petitioners. It is the further case of the petitioners that, even assuming that the authorities had the power to work out a justified rate, the process was not scrupulously followed and therefore, the entire exercise stands vitiated.

3. Apart from the aforesaid principal ground, in two of the writ petitions, an additional ground has been taken regarding purchase of the bid document by submitting Demand Draft by a third party not connected with the private respondents as well as the fixed deposit certificate purchased by a third party for the Earnest Money Deposit(EMD). It is the case of the petitioners that the Demand Draft for the Bid document as well as Earnest Money Deposit being in the name of a third party, the bid of the private respondent itself is defective and therefore, the financial bid of the said private respondent ought not to have been considered.

4. I have heard Shri K. N. Chowdhury, learned Senior Counsel for the petitioner, assisted respectively by Shri R. M. Deka, learned counsel in WP(C)248(AP)2019 & WP(C)209(AP)2019; Shri S. Biswakarma, learned counsel in WP(C)221(AP)2019; Shri K. Tama, learned counsel in WP(C)222(AP)2019; and Shri B. Kausik, learned counsel in WP(C)227(AP)2019. I have also heard Shri P. Taffo, learned counsel for the petitioner in WP(C)198(AP)2019 as well as Shri A. Sharma, learned counsel for the petitioner in WP(C)224(AP)2019.

I have also heard Shri K. Ete, learned Senior Additional Advocate General for the State of Arunachal Pradesh, assisted by Shri G. Tarak, learned Standing Counsel, Rural Works Department, Government of Arunachal Pradesh; Shri M. K. Choudhury, learned Sr. counsel for the private respondent No. 5, assisted by Shri R. Saikia, learned counsel in WP(C)248(AP)2019 & WP(C)201(AP)2019; Shri D. Mazumdar, learned Senior Counsel for the respondent No. 7 in WP(C)227(AP)2019 & WP(C)224(AP)2019; Shri P. J. Saikia, learned counsel appearing for the respondent No. 7 in WP(C)221(AP)2019; and Shri D. Panging, learned counsel for the respondent No. 7 in WP(C) 198(AP)/2019.

5. Shri K. N. Choudhury, learned Senior Counsel leading the argument on behalf of the petitioners in the cases mentioned above submits that the basic requirement of maintaining transparency and fairness in a contract, which is essential exercise for distribution of State

largesse has been totally done away with in the instant cases. There cannot be any concept of 'justified rate' after declaration of estimated costs. He clarifies that in the first writ petition i.e. WP(C)201(AP)2019, pertaining to package No. AR/14/07/015 for construction of road from Palo to Machane Village (Full Stage), since due to inadvertence the appendix to the Instructions to the Bidders (ITB) was overlooked, it was contended that there was no communication, whatsoever, regarding resorting to the concept of justified rate. He, however, fairly submits that after the affidavit-in-opposition was filed by the respondent authorities, the concerned Section of the ITB pertaining to justified rate was noted leading to filing of the second writ petition by the same petitioner being WP(C)248(AP)2019. The learned senior counsel submits that though ideally the first writ petition should have been withdrawn by taking leave to file the second writ petition, due to such default, the petitioner should not be non-suited, moreso when a case on merits have been able to be made out by the petitioner.

6. On the merits of the case, the learned senior counsel submits that no doubt the appendix to the NIT pertaining to Clause 26.3 mentions about an Office Memorandum dated 17.01.2019, whereby, a Committee was to be constituted to work out a justified rate in accordance with Clause 20.4.3 of the CPWD Manual, there is gross inconsistency in following the procedure laid down. The learned senior counsel submits that the requirement of introducing the concept of a justified rate was totally absent inasmuch as Clause 26.3 of the ITB itself contains a mechanism to examine as to whether a bid offered by a prospective bidder was viable or not. The said Clause envisages that if the bid of a successful bidder is found to be grossly unbalanced, opportunity may be given to him to explain the item wise rate quoted by him and also to increase the amount of performance grantee. It is submitted that as per the existing Rules, bids within 5% of the estimated value were to be considered without any question; those in between 5% to 10% may be considered by citing reasons; however, those beyond 10% were liable to be considered.

7. Referring to the affidavit-in-opposition, the learned senior counsel for the petitioner has submitted that in terms of the Office Memorandum dated 17.01.2019, a Committee was constituted vide notification dated 23.01.2019, consisting of 4(four) members who were specifically named. However, by referring to the work-sheet of the said Committee, wherein, the signatures of the member appear, it becomes apparent that it is not submitted with the Committee constituted.

8. Summing up his arguments as regards the aforesaid two writ petitions, the submissions of the senior counsel can be culled down as follows:

(i). There is no concept of justified rate in the present process and the same has been introduced as an afterthought to cause prejudice to the petitioners.

(ii). Though justified rate may be opted in a given case, in the instant case, the manner and mechanism laid down for applying the justified rate have been grossly violated. Clause 26.3 of the ITB was not followed.

(iii). Rules of the game cannot be changed midway.

(iv). The Office memorandum dated 17.01.2019 should have been mentioned in the NIT itself and not as an appendix to the ITB.

9. In support of his submission, Shri K. N. Choudhury, learned Sr. counsel has relied upon the below mentioned decisions:

(i). *K. K. Enterprise Vs. Union of India [WP(C) 1874/2018]*.

(ii). *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. & Ors.* reported in (1997) 1 SCC 53.

(iii). *Educomp Solutions Ltd. & Ors. Vs. State of Assam & Ors.* reported in 2006 (2) GLT 775.

(iv). *Sargous Tours and Travels & Anr. Vs. Union of India & Ors.* reported in 2003 (3) GLT 202.

(iv). *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. & Ors.* reported in (2001) 2 SCC 451.

(v). *New Horizons Ltd. & Anr. Vs. Union of India & Ors.* reported in (1955) 1 SCC 478.

(vi). *Harminder Singh Arora Vs. Union of India & Ors.* reported in AIR 1986 SC 1527.

10. Drawing the attention of this Court to the affidavit-in-opposition filed by the Department, it has been argued that the plea of the Department that as per Clause 28.1 of the ITB there is no requirement to disclose reasons is not acceptable under the law and therefore fallacious. It is argued that the defence is wholly inadequate and the State is unable to defend its actions thereby, inviting interference by this Court.

11. Coming to the facts of WP(C)222(AP)2019 (M/S Samco Construction Company Vs. State of Arunachal Pradesh & Ors.), pertaining to package No. AR/07/04/026 for construction of road from BRTF road Sagalee Pakke Kessang, 1300 km point to Khyate Village (via Tabio and Jarjee) (Full Stage), it is clarified that though after working out the so called justified rate, respondent No. 5 whose bid was found to be within (-)5%, the said respondent No. 5 had surrendered, there was contemplation to allot work to one M/S T. K & Sons Enterprises. However, since the allotment was yet to be done, M/S T.K. & Sons Enterprises has not been made a party respondent as no vested right has been accrued upon the said party. Referring to the provisions of CPWD Manual, namely, Clause 20.4.3.1, though it is prevailing market rate it should be taken by the employer while working out the bids, in the instant case, the same was not done. As a result thereto, the entire exercise of allotting the contract to a third person by ignoring the bid of the petitioner is wholly unjustified.

12. Coming to the facts of the WP(C) 227 (AP)/2019, (M/S Tama Fabrication Works Vs. Union of India & Ors.), pertaining to maintenance of a patch of road measuring from 5 km point of Sagalee-Karoi road to Dev (Full Construction) apart from the aforesaid grounds of introduction

of concept of justified rates, additionally it has been argued that the bid of the respondent No. 7, who is the beneficiary of the process is defective, amongst others, on two grounds. Referring to the application submitted by the respondent No. 7, forwarding the Demand Draft of the amount of Bid Security being Demand Draft No. 001862 along with the said instrument, it is apparent that Demand Draft was purchased from a third party, namely, M/S N.T. Agency and there is no reference to the respondent No. 7. Similarly, the case while procuring fixed deposit for the purpose of Earnest Money Deposit (EMD) being No. 834892228. Referring to the fixed deposit receipt, it has been urged that the name of the third party, namely M/S N.T. Agency, appears. The consequent argument is that the bid security and EMD have been submitted which is the name of the third party, there is nothing to bind the contractor in case of default and the very purpose of such requirement becomes nugatory.

13. In support of the aforesaid submissions, the learned counsel has referred to the Clauses 8.2, 16.1, 16.3, 32.3(d), 32.5 and 32.7(a) of the ITB. The aforesaid clauses are quoted herein below for ready reference.

"8.2. The bid document is available online on the website <http://www.pmgstenders.gov.in>. The bid document can be downloaded free of cost, however, the bidder is required to submit capital Demand Draft towards cost of bid document in favour of the name given in the Bid Data Sheet.

16.1. The bidder shall furnish, as part of the Bid, Bid Security, in the amount specified in the Appendix to ITB.

16.3. Any bid not accompanied by an acceptable Bid Security, unless exempted in terms given in the Appendix to ITB and not secured as indicated in Sub-Clause 16.4, 16.1 and 16.2, shall be rejected by the Employer as non-responsive.

32.3(d). The Bidder(S)/contractor(s) will, when presenting his bid, disclose any and all payments he has made, is committed to or intends to make to agents, brokers or any other intermediaries in connection Standard Bidding Document for PMGSY.

32.5. The Bidder(S)/contractor(s) will not, directly or through any other person or firm indulge in fraudulent practice, which means a willful misrepresentation or omission of facts or submission of fake/forged documents in order to induce public official to act in reliance thereof, with the purpose of obtaining unjust advantage by or causing damage to justified interest of others and/ or to influence the procurement process to the detriment of the government interests. And, this includes collusive practice amongst Bidders (prior to or after bid submission) designed to

establish bid process at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition.

32.7(a). If the Bidder(S)/Contractor(S), either before award or during execution of contract has committed a transgression through a violation of Clauses 32.1 to 32.6 above all in any other form, such as to put his reliability or credibility in question, the Employer after giving proper opportunity to the Bidder(S)/Contractor(S) shall have powers to disqualify the Bidder(S)/Contractor(S) from the tender process or terminate the contract, if already executed or exclude the Bidder(S)/Contractor(S) from future contract award processes."

The contention is that the ITB mandates that it is the bidder who is to submit the Security Deposit as well as EMD in his own name.

14. Referring the reply affidavit filed on 09.08.2019, more specifically the communication dated 08.08.2019, it is contended that vide the said communication, the bids with similar defects were rejected and therefore, in any circumstances, the bid of the respondent No. 7 could not have been held to be technically responsive. Drawing the attention of this Court to the Clause 27 of the ITB, it is submitted that overall power is vested on the authorities to declare the bid to be non-responsive.

15. The facts of the WP(C) 224 (AP)/2019 (M/S Mesnia Enterprises Vs. Union of India & Ors.), pertaining to construction and maintenance of road of 5 km from Sagalee-Karoi to Deb (Full Stage), are somehow similar to the earlier case namely WP(C) 227 (AP)/2019. Shri Angshuman Sarma, learned counsel for the petitioner, while reiterating the arguments made in the earlier case submits that the very purpose of the EMD is to demonstrate the earnestness of the bidder *qua* the intention to complete the work. Such intention would be put to serious doubt when the EMD in question is deposited by a third party. It may be mentioned in this case also that the Security Deposit as well as EMD were purchased in the name of M/S N. T. Agency which is not connected with the respondent No. 7.

Shri Sharma, learned counsel, relies upon the following decisions to fortify his arguments:

- (i) *Shree Hanuman Cotton Mills & Ors. Vs. Tata Air-Craft Ltd.* reported in (1969) 3 SCC 522.

- (ii) *Global Energy Ltd. & Anr. Vs. M/S Adnani Exports Ltd. & Ors.* reported in (2005) 4 SCC 435
- (iii) *Chaitanya Kumar Vs. State of Karnataka & Ors.*, reported in (1986) 2 SCC 594

In all these cases, interference was of the ground of use of other person's documents and forms which were not prescribed.

16. The facts of the WP(C) 198 (AP)/2019 (M/S Yuma Enterprises Vs. State of Arunachal Pradesh & Ors.), pertaining to package No. AR/14/03/009, construction of road from BRTF (Koloriang-Tabumna) road to Fua (Full Stage) falls within the category of the first case wherein the introduction of the concept of the justified rates is the principal of subject matter of challenge. Appearing on behalf of the petitioner, Shri Pritam Taffo, the learned counsel, submits that the schedule of rates having already existed and estimate cost having notified, there was no requirement to introduce the concept of justified rates, that too in a manner which is not at all transparent. Shri Taffo by assailing the allotment of work to the private respondent submits that the concept of the justified rates was introduced to suit the private respondent. In this case, an amended writ petition was also filed.

17. The decision which are the subject matter of challenge were defended by Shri K. Ete, learned Senior Additional Advocate General, Arunachal Pradesh. Terming the arguments and the grounds taken in the writ petitions as frivolous and imaginary, Shri Ete has submitted that the dispute is nothing but a business rivalry between the different contractors. The learned counsel has at the outset made it clear that the State was not favouring any particular party and the decision taken were strictly in accordance with law and purely in the interest of public service. The learned Senior Additional Advocate General submits that at present 260 numbers of similar projects under PMGSY are going on smoothly and it is only in the present cases where challenge have been sought to be made for private business rivalry. It is further submitted that the work sites are in the remote district of Kurung Kumey nearing China border and

the intention of the State is to ensure timely completion of the work without compromising the quality. It is further submitted that no *mala fide* have been alleged in any of the cases and it is natural that it is only one party which can be regarded as L1 which is an essential part of a competitive bid.

18. Resisting the principal ground of challenge, namely, introduction of a concept of the justified rates which is the pleaded case only in WP(C) 201 (AP)/2019, it has been categorically denied that the bidders were unaware of any such justified rates. Further, the same petitioner had filed the subsequent writ petition, being WP(C) 248 (AP)/2019, after receiving copy of the affidavit-in-opposition filed in WP(C)221(AP)/2019, whereby, a different prayer has been made. Therefore, it is not the case of the petitioner's that they were not aware of working out of justified rate. Referring to the Clause 31.1.19, the learned Senior Additional Advocate General has submitted that the works in question involved item wise rates. Further, Appendix 26.3 is an essential part of the ITB which clearly speaks of the Office Memorandum (OM) dated 17.01.2019 which was an existing document. The said OM dated 17.01.2019 specifically states that the justified rate would be worked out as per the CPWD Manual Clause 20.4.3 and therefore, no illegality can be attributed in the process. Supporting the need of such justified rate, the learned Senior Additional Advocate General has submitted that though the rate submitted by the bidders is an important and relevant factor, past experience shows that extremely low rates have led to abandonment of the projects which seriously affect the interest of public. The said experience coupled with the fact that the work in question pertains to areas which are far-flung and remote nearing the China border, apart from the rate, the timely completion by maintaining quality are equally relevant and important factors.

19. As regards non-adhering to the norms laid down by the OM dated 17.01.2019 read with 23.01.2019 by which a Committee was constituted, Shri Ete, submits that there is no such pleadings in any of the writ

petitions and therefore, the said ground cannot be taken up at the time of arguments. The learned Senior Additional Advocate General, however, fairly submits that certain statements have been made in this aspect in the affidavit, if these are treated to be pleadings, the said argument is fallacious and the records would demonstrate the said fallacy. The learned State Counsel submits that committee envisaged vide the OM dated 23.01.2019 contains certain members. For ready reference, the relevant part of the said Office Memorandum is quoted herein below:

*"GOVERNMENT OF ARUNACHAL PRADESH
ARUNACHAL RURAL ROAD DEVELOPMENT AGENCY
RURAL WORKS DEPARTMENT
'C' SECTOR: ITANAGAR-791111.*

No. RWD/PMGSY/557/2/2018-19 Dated Itanagar the 23^d January, 2019

OFFICE MEMORANDUM

The Standing Committee is hereby constituted with the following officers to workout justification of Workable Rate of each PMGSY road works under Ph-XII (Batch-I & II).

- | | | |
|----|---------------------------------|--------------------------|
| 1. | <i>D. Nyodu, CE (PMGSY)</i> | <i>:Chairman</i> |
| 2. | <i>N. Rigia, SE (PMGSY)</i> | <i>:Member Secretary</i> |
| 3. | <i>S.E. of concerned Circle</i> | <i>: Member</i> |
| 4. | <i>PIU Concern</i> | <i>: Member</i> |

The committee should submit the report for each project to the 'Financial Bid Evaluation Committee' well in time before Bid Opening.

*Sd/- Kapa Kholie, IAS
Chief Executive Officer, ARRDA, RWD
Govt. of Arunachal Pradesh,
Itanagar."*

20. Referring to the records produced in these cases, it is submitted that there is no deviation in the Committee as prescribed in the aforesaid notification as the members assigned by the designating persons, namely, the Chief Engineer (Chairman), Superintendent Engineer (same person holding two posts) and the Executive Engineer (PIU), are present. The only signature which may be termed to be a deviation of the notification dated 23.01.2019 is that of the Assistant Surveyor of Works. However, it is submitted that the said officer is the overall in-charge of the works and as such, had assisted the Committee. Since he was fully aware of the

works in question, his presence, rather than vitiating the process would lend credence to the exercise of the undertaking to work out the justified rate. Coming to the petitioners' point taken in the WP(C) 227 (AP)/2019, the learned State Counsel by referring to the Clause 27.1(i) submits that the expression used is "lowest evaluated bid price". Clause 9 stipulates clarification of bidding documents which gives a right to the bidders to seek any clarification and there is also a provision for pre-bid meeting for additional clarification. Though Clause 8.2 pertains to cost of the bid document to be paid in the form of Demand Draft, it has not specified that the said Demand Draft has to be generated from bidders account or in the name of bidder. In absence of any such Clause, the argument made on behalf of the petitioners is wholly unsustainable. Referring to the Clause 16.2 relating to the Bid Security, the ITB does not require the same to be deposited from the bidders account and the emphasize is more on the amount. It is submitted that a bare look in the FD submitted for the bid security (EMD) would reveal that the same is pledged in the name of A.R.D.A. i.e. the employer and therefore, even if the third party wants to withdraw the bid, the same is not possible. The arguments of the learned Senior Additional Advocate General, Arunachal Pradesh can be summarized in the following manner:

- a) There was no change, whatsoever, made in the process of opening of the tender;
- b) The concept of justified rates was notified in the ITB itself by way of Appendix whereby Office Memorandum dated 17.01.2019 was made in terms reference to the Clause 20.4.3 of the CPWD Manual;
- c) Neither the Office Memorandum dated 17.01.2019 or Clause 20.4.3 of the CPWD Manual are subject matter of challenge;
- d) All the parties participating in the tender process were fully aware of the concept of working out of the justified rate;

- e) There is no any allegation of *mala fide* in the working out of justified rates so as to suit any particular bidder;
- f) The justified rates arrived at by the duly constituted Committee has not been questioned;
- g) Presence of the Assistant Surveyor of Works in the Committee will not vitiate the finding as the said officer was fully conversant with the works in question, rather his presence has added to the credence of the findings;
- h) The justified rates are arrived by the Expert Committee and in absence of palpable irregularity or irrationality, finding of such Expert Committee would be outside purview of judicial scrutiny;
- i) Bare perusal of the justified rates demonstrate that the same are reasonable and based upon the prevailing market rates;
- j) In case of any confusion regarding interpretation of any Clause of the ITB, the one given by the owner should normally be accepted. These submissions are in connection with Clause 26.3 of the ITB which according to the learned State counsel talks about the successful bidder *qua* the justified rate; and
- k) The works in question are of immense public importance with the sites at remote Kurung Kumey District nearing China border and the works having been started, no interference may be made in the interest of public; and
- l) The present disputes are purely *inter-se* disputes between rival contractors and in fact the petitioner in WP(C) 201/2019 and WP(C) 248/2019 is also the beneficiary in the works concerning WP(C) 198/2019, pertaining to package No. AR/14/03/009, construction of road from BRTF

(Koloriang-Tabumna) road to Fua (Full Stage) and therefore, it cannot be said that there was any partiality or bias in the tender process.

21. In support of his submissions, the learned Senior Additional Advocate General, Arunachal Pradesh, has relied upon the following decisions:

- (i). *S. Raghumani Singh Vs. Chief Engineer-PWD & Ors.*, reported in 1999 (1) GLT 334 .
- (ii). *AIR India Vs. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617.
- (iii). *Jagdish Mandal Vs. State of Orissa & Ors.*, reported in (2007) 14 SCC 517.
- (iv). *M/S Michigan Rubber (India) Ltd. Vs. State of Karnataka & Ors.*, reported in (2012) 8 SCC 216 .
- (v). *Municipal Corporation of Ujjain Vs. B.V.G. India Ltd.*, reported in (2018) 5 SCC 462.
- (vi). *Meerut Development Authority Vs. AMS*, reported in (2009) 6 SCC 171.
- (vii). *Union of India Vs. Chajju Ram*, reported in (2003) 5 SCC 568.

22. Let us discuss the case laws cited on behalf of the State.

23. In the case of *S. Raghumoni Singh Vs. Chief Engineer-PWD & Ors.*, reported in 1999 (1) GLT 334, the working out of justified rate and the methodology *vis-à-vis* the CPWD Manual has been discussed.

24. In the case of *Air India Ltd. Vs. Cochin International Airport*, reported in (2000) 2 SCC 617, it has been laid down that the price need not be the sole criteria for acceptance of a bid. An overwhelming public interest is to be given preference and mere making out of legal point is not sufficient for interference with such process.

25. In *Jagdish Mandal Vs. State of Orissa & Ors.*, reported in (2007) 14 SCC 511, the Hon'ble Supreme Court in categorical terms has held that if the decision is taken *bona fide* and in the interest of public, the Court will be reluctant to exercised the powers of judicial review even if there is some procedural aberration or error of assessment or prejudice to the tenderer. The power of judicial review cannot be invoked to protect private interest over public interest to decide contractual disputes. The case of *Michigan Rubber(I) Ltd Vs. State of Karnataka & Ors.*, reported in (2012) 8 SCC 216, has been cited to bring home the contention that conditions of tender are not liable to be interfered with unless those appear to be palpably irrational or unanswerable.

26. In the case of *Municipal Corporation Ujjain Vs. BVG India Ltd.*, reported in (2018) 5 SCC 462, the Hon'ble Supreme Court has laid down that it would not be open to independently evaluate technical and financial bids by a writ court taking the role of an Appellate Court for coming to its conclusion unless it is clearly establish that there is presence of *mala fide*, intention to favour a particular party or bias. Decisions are not be interfered with which has been taken in the public interest.

27. The case of *Meerut Development Authority Vs. Association of Management Studies & Anr.*, reported in (2009) 6 SCC 171, it has been cited that a competitive bidder can only enforce its right to equality and fair treatment. The case of *Union of India Vs. Chajju Ram*, reported in (2003) 5 SCC 568, has been cited to fortify the submission made that the concept to *stare decisis* has to be applied keeping in mind a decision is an authority for what it decides and not for what can logically can be deduced therefrom. The said citation has been pressed in service as facts of the case of *Dutta Associates Pvt. Ltd. Vs. Indo Merchatiles Pvt. Ltd. & Ors.*, reported in (1997) 1 SCC 53, are distinguishable on facts which have been elaborately discussed above. The learned State Counsel has also relied upon the case laws reported in (2016) 8 SCC 466 (*M/S Bakshi Security and Personnel Services Pvt. Ltd. Vs. Devkishan Computed Pvt. Ltd. & Ors.*); (2016) 8 SCC 622 (*Central Coalfields Ltd. Vs. SLL-SML (Joint*

venture Consortium) & Ors); (2016) 15 SCC 272 (Monte Carlo Limited Vs. National Thermal Power Corporation Limited); and (1999) 2 SCC 492 (Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors.).

28. Shri M. K. Choudhury, learned Senior Counsel appearing for the private respondent No. 5 in WP(C)201(AP)2019 and WP(C)248(AP)2019 seriously raises the issue of maintainability of the writ petitions. He submits that the said respondent No. 5 who is the successful bidder in the tender process was allotted work in accordance with law and by adhering to the principles of fairness and transparency. The learned Senior Counsel submits that initially the same petitioner M/S B. B. Enterprises had instituted WP(C)201(AP)2019 on the ground that without any communication, whatsoever, in the ITB, the concept of justified rates were introduced midway by changing the rules of the game. It is submitted that the first petition appears to be structured on the law laid down by the Hon'ble Apex Court in the case of *Dutta Associates (Supra)*. The basic pleaded case of the petitioner was that in absence of any provision in the NIT, the concept of justified rate could not have been introduced and by resorting to the same, the petitioner who was otherwise the L-1 has suffered prejudice. The learned Sr. counsel submits that after exchange of affidavit-in-opposition, when it was pointed out that the concept of justified rate was not an afterthought but very much a part of the ITB, the second writ petition WP(C)248(AP)2019 was filed. Giving a different colour to the second writ petition, the prayers in the respective writ petitions have been made mutually exclusive. The contention advanced is that without taking leave of the Court and without withdrawing the first writ petition, the second writ petition could not have been filed and is hit by the principle of Order-II Rule-2 of the CPC. It is further, submitted that it is not a case that in the second writ petition, any subsequent action has been challenged. Referring to the dates, it is submitted that the second writ petition was filed on 15.07.2019 which is much after 08.07.2019, on which date, notice to proceed with the work was already issued to the respondent No. 5. The learned Sr. counsel for the respondent No. 5 submits that though under Section 141 of the CPC,

the Code, as such, is not applicable in a writ proceeding, the spirit of the Code would definitely apply as the same is based on the concept of justice, equity and good conscience.

29. Reiterating and endorsing the submission of the learned Sr. Addl. Advocate General, Arunachal Pradesh, the learned Sr. counsel for the respondent No. 5 submits that appendix to the ITB in specific terms stipulates that allotment of the work would depend upon the justified rate which is to be worked out on the basis of the Office Memorandum dated 17.01.2019 which on the other hand, relies upon Clause 20.4.3 of the CPWD Manual. The learned Sr. counsel submits that though the entire case of the petitioners appears to be structured on the principles laid down by the Hon'ble Apex Court in the case of *Dutta Associates (supra)*, a bare perusal of the said judgment would reveal that the facts are wholly distinguishable. Whereas, in the case of *Dutta Associates (supra)*, a new concept of "viability range" was introduced which was not indicated in the NIT or the tender documents, in the instant case, the ITB, more specifically appendix thereto, in clear terms lays down the working out of justified rate which is directly connected with the quality of the work in question. It is further submitted that neither the Appendix nor the Office Memorandum dated 17.01.2019, read with the relevant provisions of the CPWD Manual, are subject matters of challenge.

30. It is argued that the case of *K.K. Enterprises (Supra)* is clearly distinguishable. In the said case, there was a stipulation in the General Conditions of Contract (GCC) which says that in case of revision of writs, corrigendum is required to be published. The learned Sr. counsel further relies upon *1999(1) GLT 334 "Saikhon Raghumoni Singh"* and an unreported case namely, *M/S T.L. Constructions (WP(C)377(AP)2015)*.

31. As regards the allegation regarding the composition of the Committee, the learned Sr. counsel relies upon the submissions made on behalf of the State and has reiterated that mere presence of the Assistant

Surveyor of Works, who is conversant with the facts, would not vitiate the proceedings.

32. It is further argued that in the entire writ petition, there is no allegation of any *mala fide* exercise of powers for achieving collateral purpose. By relying upon the case of *Raunaq International Ltd. Vs. I.V.R. Construction Ltd.* reported in (1999) 1 SCC 492, *Tata Cellular Vs. Union of India* reported in (1994) 6 SCC 651 and *Siemens Public Communication Network Ltd. & Anr. Vs. Union of India & Ors.* reported in (2008) 16 SCC 215, it is submitted that it is the employer who is the best judge with regard to the methodology by which the work is to be done and the Court would not substitute such decision which is taken in the interest of public.

33. It is submitted that the work has already been started and has progressed significantly. Since there is no allegation of any *mala fide*, this Court should not act as an Appellate authority and interfere with the views of the employer.

34. Shri D. Mazumdar, learned Sr. counsel appears for the respondent No. 7 in WP(C)227(AP)2019 and WP(C)224(AP)2019 and has submitted that the writ petitions are wholly without any merits and liable to be dismissed. Fully endorsing the arguments advanced by the learned counsels for the other respondents, he submits that the principal argument of 'so-called' introduction of concept of 'justified rate' is fallacious. The appendix to the ITB having in clear terms mentioning working out of a justified rate as per an Office Memorandum, it would not lie on the mouth of the petitioners to base their cases on mere speculation. Meeting the argument regarding purchase of the tender documents by a Demand Draft by one M/S N. T. Agency as well as the Earnest Money Deposit also in the name of M/S N. T. Agency, the learned counsel has submitted that the relevant Clause 22.6 of the ITB only gives a competitive bidder 5(five) days to raise any objection, however, in the instant case, no such objections were raised within the said period of 5(five) days and therefore, objections, made thereafter, would carry no

meaning. As regards the EMD, as per provisions of the ITB, the originals instrument has been submitted before the authority and a perusal of the same reveals that the same contains the name of the owner of the work, namely, A.R.D.A. and therefore, there cannot arise any question of any risk being involved by allotment of such work.

35. Shri Mazumdar, learned Senior Counsel, further submits that the so called objection regarding bid submitted by the respondent No. 7 are afterthought and cannot be taken into consideration by this Court inasmuch as the respondent authorities in its wisdom did not find any fault with the bid in exercise of the powers vested by Clause 16.3 of the ITB. It is submitted that the Earnest Money Deposited was furnished in full compliance of the tender document. In any case, the objections taken are hyper technical in nature and not liable for any consideration vis-à-vis substantial rights of the parties.

36. By referring to the affidavit-in-opposition of the Department filed on 03.08.2019, more specifically, the notification dated 11.05.2017 annexed thereto, it is submitted that justified rates were to be worked out on the last date of submission of bids and therefore, it cannot be said that the rate is pre-determined one to suit a particular bidder.

37. Referring to Clause 8.3 of the ITB, it is submitted that a bidder is supposed to know all the conditions and in view of such expressed provision of the Contract, the writ petitioner is *estopped* from feigning ignorance of the concept of justified rate. With regard to the interpretation of Clause 26.3, it is submitted that the interpretation of various Clauses of a tender document given by the employer should be given precedence as the employer is the author of such provisions. The said argument is advanced to endorse the views expressed by the State that "Rate" as envisaged in Clause 26.3 refers to justified rate. With regard to the case law cited by the petitioners, the learned Sr. counsel submits that all the case laws are distinguishable on facts and a careful reading of the same would rather reveal that law laid down in the same

are in support of the case of the respondent. In support of his submissions, Shri Mazumdar, learned Senior Counsel, relies upon the following decisions:

- (1) *(2016)15 SCC 272, (Montecarlo Limited Vs NTPC Ltd)*
- (2) *(2000) 2 SCC 617, (Air India Ltd. Vs. Cochin International Airport)*
- (3) *(1997) 1 SCC 53, (Dutta Associates Pvt. Ltd Vs. Indo Merchantiles Pvt. Ltd. & Ors)*
- (4) *(1991) 3 SCC 273, (Poddar Steel Corporation Vs. Ganesh Engineering Works)*
- (5) *(2014) 3 SCC 760, (Maa Binda Express Carrier Vs. North-East Frontier Railway)*
- (6) *(1991) 1 SCC 492, (Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors.)*

38. Shri P. J. Saikia, learned counsel appearing for the respondent No. 7 in WP(C)221(AP)2019, endorses the submissions made by the learned counsel for the State respondents as well as private respondents. Additionally, he pointed out that in the Table of Contents in the ITB, more specifically, Section 2 thereof, Appendix to the ITB is specifically mentioned. In view of such expressed mentioning of the Appendix, which in turn refers to the OM dated 17.01.2019, the concept of justified rate was very much within the knowledge of all the bidders. The learned counsel submits that the principal ground in this case, namely, non-mentioning of working out of justified rate and procedure of such working out being not transparent are wholly without any basis. It is submitted that the OM dated 17.01.2019 makes a specific reference to Clause 20.04.3 of the CPWD Manual which is a standard document. As regards the procedure to work out such justified rate *qua* the constitution of the committee as per OM dated 23.01.2019 is not the pleaded case in the writ petitions and are only passing remarks in the affidavit-in-reply filed in WP(C)201(AP)2019, WP(C)222(AP)2019 and WP(C)224(AP)2019.

39. Shri Saikia, learned counsel, further refers to Clause 22.5 of the ITB read with Clause 22.6, which stipulates 5(five) days for lodging of complaint after the justified rate is worked out, which, in the instant case, was not done. The bids were opened on 03.07.2019 and the compliant was lodged on 15.07.2019, which itself was barred as per agreed terms of the ITB. Further, the said complaint was not with regard to justified rate. Shri Saikia has relied upon a decision of the Apex Court reported in *(2007) 11 SCC 704 (State of Assam & Anr. Vs. Abhnandan Trading (P) Ltd & Ors.)*.

40. Shri D. Panging, learned counsel for the respondent No. 7 in WP(C) 198 (AP)/2019, however, submits that since his client is a petitioner challenging the same methodology in different tender, which are the subject matter of WP(C) 221(AP)/2019 & WP(C) 248 (AP)/2019, his client has instructed him not to advance any argument for defence.

41. The rival contentions of the learned counsels for the respective parties have been duly considered. The records have been produced by the learned State counsel, which have been carefully examined.

42. To answer the dispute amongst the parties, it would be beneficial to refer certain essential conditions of the ITB and Office Memorandum which would be relevant in the present cases:

Clause 26.3 of the ITB reads as follows:

"26.3 If the Bid of the successful Bidder is seriously unbalanced in relation to the Engineer's estimate of the cost of work to be performed under the contract, the Employer may require the Bidder to produce detailed price analysis for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices. After evaluation of the price analysis, the Employer may require that the amount of the Performance Security set forth in Clause 30 of ITB be increased at the expense of the successful Bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful Bidder under the Contract. The amount of the increased Performance Security shall be decided at the sole discretion of the Employer, which shall be final, binding and conclusive on the bidder."

Appendix regarding Clause 26.3 reads as follows:

"(26.3) Accepting authority does not bind itself to accept the lowest bid unless the bid price found to be within the rational variation of justified rate as notified vide OM no. SRWD-45/2012 dated 17.01.2019."

The OM dated 17.01.2019 reads as follows:

**"GOVERNMENT OF ARUNACHAL PRADESH
SECRETARIAT :: RURAL WORKS DEPARTMENT
ITANAGAR
ANNEXURE-C**

No. SRWD – 45/PMGSY/2012

Dated Itanagar The 17th Jan'2019

OFFICE MEMORANDUM

The para 2 of OM issued vide No. SRWD-45/2012 dated 5th June' 2018, is hereby replaced as follows:

"In view of the trend of quoting abnormal low bid price by the bidders in PMGSY road works, it has been felt necessary to check the practice, so as to deliver quality work which is an important parameter under the programme and to safe guard the interest o the public, it is notified that, henceforth the lowest bid price of bidder within the rational variation over the justified rate shall only be accepted as per the provision of CPWD manual vide Clause 20.4.3."

This issues with the approval of the competent authority.

Sd/-

Kapa Kholie, IAS

Secretary (RWD)

Government of Arunachal Pradesh

Itanagar

Memo No. SRWD-45/2012

Dated Itanagar, the 17th Jan 2019."

The other relevant Clauses of the ITB have been already been extracted above.

43. WP(C)201(AP)2019 was instituted on the premises that the concept of justified rate was absolutely alien and could not have been resorted to in the tender process which had caused immense prejudice to the petitioner and also made the entire process opaque. However, on filing of the affidavit-in-opposition, when it was pointed out that justified rate was in accordance with an OM dated 17.01.2019, which is specifically mentioned in the Appendix to the ITB, the second writ petition, namely,

WP(C)248(AP)2019, was filed in which resorting to justified rate was challenged as being violative of the principles relating to distribution of State largesse, non-following of Clause 26.3 of the ITB and violation of the procedure laid down to work out such justified rate. Though a strong objection was raised by Shri M. K. Choudhury, learned Sr. counsel appearing for the private respondent, that ideally the initial writ petition should have been withdrawn with leave to file the second writ petition in conformity with the spirit of Order 23 Rule 1 of the CPC *read with* Order-2 Rule-2, this Court is of the opinion that in exercise of the extra-ordinary powers conferred by Article 226 of the Constitution of India, the petitioner should not be non-suited on this technical objection and rather propose to adjudicate the case on its merits.

44. Let us therefore deal with the contentions of the writ petitioners on merit. Though the sheet anchor of the submission is that an alien concept of “justified rate” was introduced, the said submission cannot be countenanced in view of the Appendix to the ITB, wherein, in clear terms, reference to the O.M. dated 17.01.2019 has been made which has been quoted above. As per the aforesaid O.M., the lowest bid price of the bidder within the rational variation of the “justified rate” shall be accepted and such acceptance was as per provision of Clause-20.4.3 of the CPWD Manual. **The underlying objective of the said notification is reflected in the O.M. itself which is to deliver quality work and to safeguard the interest of the public in view of the trend to quote abnormal low price by bidders in PMGSY road works.** Further, neither the O.M. dated 17.01.2019 nor Clause-20.4.3 of the CPWD Manual are the subject matter of challenge and no *mala fide*, whatsoever, has been alleged for introduction of the said concept while publishing NIT for the work in question.

45. In view of such finding of this Court that the concept of “justified rate” was not introduced after the standard process started, the corollary argument that rules of the game were changed midway falls through.

46. The further argument of the petitioners was that the mandate of Clause 26.3 which is itself a mechanism to prevent quoting of abnormally low rates by a particular bidder, this Court is of the opinion that "Rate" which is mentioned in the aforesaid Clause has to be meant as "justified rate", an interpretation which has been put forward on behalf of the State. Since the tender document is authored by the State Department, the interpretation given by the State has to be accepted, moreso, when the said interpretation appears to be a reasonable one.

47. Let us now deal with the submission of alleged violation in the process of working out the "justified rate". It has been argued that the Committee constituted vide the O.M. dated 23.01.2019 to work out the "justified rate" does not match with the signatories of the members appearing in the work-sheets to come to the "justified rate". A careful examination of the worksheet would reveal that the signatories of the Chief Engineer, Superintendent Engineer and the PIU, who is the ex-Officio Executive Engineer, are present along with that of the Assistant Surveyor of works. The only signatory who is not envisaged by the said notification is that of the Assistant Surveyor of Works. The learned Senior Additional Advocate General has explained that the Assistant Surveyor of Works was having the ground knowledge of the work in question and had only assisted the Committee and his presence would not vitiate the proceeding inasmuch as the principal object of working out a "justified rate" as per the O.M. dated 17.01.2019 has been duly fulfilled. This Court is inclined to accept the aforesaid submission made on behalf of the State on two counts. Firstly, the "justified rate" which has been worked out is that of a Committee having specialised knowledge and the findings arrived and this Court cannot sit on appeal over the findings arrived at by such Committee. Secondly, in absence of allegation of *mala fide* or lack of transparency in the decision making process, any interference by this Court in that regard would be wholly unwarranted.

48. This Court is also required to deal with the submissions made in two writ petitions regarding submission of Security Deposit and EMD in

the name of a third party. It appears to this Court that such challenge apart from being time barred is also untenable in law. Clause 22.5 read with Clause 22.6 of the ITB specified a particular time to lodge any complaint by a competitive bidder and in the instant case, the complaint was lodged much thereafter. In any case, it is within the domain of the employer to decide such complaint and this Court will not interfere on this ground. This Court is further of the view that there is no provision whatsoever in the ITB prohibiting such deposit by a third party. Even on merits, this Court is of the opinion that the argument that there is a risk involved by accepting such deposit in the name of a third party cannot be countenanced inasmuch as the instrument clearly contains the name of the employer/agency in favour of whom the instrument is submitted. In the opinion of this Court, no hindrance would arise in meeting the objectives by furnishing of the said instruments (Demand Drafts and Fixed Deposits).

49. The petitioners have mainly relied upon the case of *Dutta Associates (supra)*. However, a careful reading of the same would reveal that the concept of viable rate which was the subject matter of dispute in the said case was evolved after the tender process has started and therefore the same was interfered with by the Court. In fact there is a clear finding in the said case that the Tender Notice / ITB should contain the procedure of evaluation, which in fact has been done in case in hand.

50. The case of *Educomp (supra)*, cited by the petitioners, is distinguishable on facts inasmuch as the interference by the High Court was on the ground of new criteria which were adopted for evaluating the bids. In the case of *Sargous Tour (supra)*, interference by the High Court was because of lack of transparency in the tender process which is not the case in the present writ petitions.

51. At this stage, it has to be kept in mind that the process in question was a competitive bidding process and bids submitted by the respective bidders were not to be disclosed before opening of the bids and no

advantage, whatsoever, could be availed by any of the bidders and they were at par. The case laws cited on the submission of Security Deposit and EMD in the name of third parties by the petitioners are clearly distinguishable inasmuch as in those cases, the submission was done in a totally different format which did not meet the objective of such deposit. The case of *K.K. Enterprise (supra)* is distinguishable on facts inasmuch as in the said case, there was a stipulation in the GCC that in case of revision, corrigendum is required. However, in the instant case, there was no question of any revision and the "justified rate" was worked out as notified vide the O.M. dated 17.01.2019 which has been mentioned above. This Court is also aware of the fact that no *mala fide* has been alleged and the objectives underlined in the Office Memorandum dated 17.01.2019 appeared to be in the interest of public service.

52. The Hon'ble Supreme Court in a recent decision pertaining to allotment of works vide tender in its judgment rendered on 09.04.2019 in *Civil Appeal No. 3588 of 2019 (Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Limited & Ors.)*, after referring to the earlier case laws, has laid down as follows:

"32. We may notice another important aspect also, i.e., reluctance of respondent No.1 to accept the allegations of respondent No.3. If respondent No.1 itself had doubts on the certificate, that would have been another matter. This is not so as is apparent from the affidavit filed by respondent No.1. In any case, at best, this aspect ought to have been left to the wisdom of respondent No.1, rather than the Court embarking on the course of action it followed, as if it was sitting in appeal over a decision of respondent No.1. We may add that if respondent No.1 itself has any doubts on these certificates, nothing prevented, nor still prevents respondent No.1 from looking into this aspect.

36. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and

balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector.

37. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.³, this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice."

On the point of interpretation of a particular Clause of the Contract, it has been held as follows:

"38. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of respondent No.1 must prevail. Respondent No.1 itself, appreciative of the wording of clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own interpretation of the contract to be thrust on respondent No.1, or ask the Court to compel respondent No.1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the Constitutional

Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

53. This Court is of the considered opinion that the works in question are of immense public importance and has also considered the submission of the State Counsel that 260 project of similar nature involving "justified rates" are in progress, and it is only in respect of these cases, challenge has been raised by rival competitors. The overwhelming public interest has to over-ride the private interest of the petitioners and in absence of any palpable illegality or established *mala fide*, this Court would not interfere in matters involving public interest.

54. In view of the aforesaid facts and circumstances, this Court is of the considered view that the challenge made in the writ petitions are not sustainable in law and therefore the same are dismissed. Consequently, interim orders, if any, operating in any of the writ petitions stand vacated. No order as to cost.

JUDGE

Victoria/Jumbi/SDS/Lipak