

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

ITANAGAR PERMANENT BENCH(NAHARLAGUN)

1. WP(c)621(AP)2018

1. M/s N. T. Agency
Head Office : Pagatara, Jollang, PO/Police
Station : Naharlagun, registered Office : B
Sector, Prem Nagar, Naharlagun, Papum
Pare District, Arunachal Pradesh.
Email ID : ntagencynlq@gmail.com
Phone No. : 0360-2248212.

2. Mr. Nich Rika
S/o Lt. Nich Jill, a resident of Sito village,
PO/PS : Yazali, Lower Subansiri District.

..... *Petitioners*

-Vs-

1. The State of Arunachal Pradesh, represented by the Chief Secretary, Government of Arunachal Pradesh, Itanagar.
2. The Secretary, PWD, Government of Arunachal Pradesh, Itanagar.
3. The Chief Engineer, PWD (Central Zone – A), Government of Arunachal Pradesh, Itanagar.
4. The Superintending Engineer, Yachuli Circle, PWD, Government of Arunachal Pradesh, Camp : Naharlagun.
5. The Executive Engineer, Yazali Division, PWD, Government of Arunachal Pradesh.
6. M/s Tama Fabrication, represented by its proprietor, with its registered office at A Sector, Naharlagun, PO/Police Station : Naharlagun, Papum Pare District, Arunachal Pradesh.

By Advocates:

For the petitioners: Mr. Indranil Choudhry, Sr. Adv.
Mr. Marto Kato
Mr. Bido Sora
Mr. B. Lingu
Mr. N. Sora
Mr. P. Ete
Mr. T. Noshi
Mr. T. Epa
Mr. M. Tanga
Mr. R. Karga
Mr. A. Timung
Mr. J. Rome

For the respondents: Mr. Subu Tapin, Sr. Govt.
Advocate

Mr. V. Lakshminarayana, Sr. Adv.
Mr. Ashwin Kumar
Mr. P. K. Tiwari, Sr. Adv.
Mr. D. Kamduk
Mr. K. Eshi

:::BEFORE:::

HON'BLE MR. JUSTICE NANI TAGIA

Date of hearing : 15.05.2019

Date of Judgment : 12.06.2019

JUDGMENT & ORDER(CAV)

Heard Mr. Indranil Choudhury, learned senior counsel appearing on behalf of the petitioners. Also heard Mr. Subu Tapin, learned Senior Government Advocate, appearing on behalf of the respondents No. 1 to 5; and Mr. V. Lakshminarayana, learned senior counsel, assisted by Mr. Ashwin Kumar, learned counsel, appearing on behalf of private respondent No. 6.

2. This writ petition has been filed challenging the legality and validity of the order, dated 01.11.2018, issued by the Executive Engineer, Yazali PWD Division, under Memo. No. YZD/W-2018-19/282-89 whereby the petitioner and the Respondent No. 6 have been held to be approved by the competent

authority as technically qualified in respect of the work i.e. **"C/o road from Yoglu to Yapap Geko(Phase-II, 17KM), Pistana circle, Lower Subansiri District, under CRF"** and further provided in the said order that the financial bids of the technically qualified bidders will be opened in the Conference Hall of the Donyi Polo Hotel Ashok at Itanagar, on 05.11.2018, at 1100 hours and also the impugned order, dated 21.11.2018, issued by the Chief Engineer(CZ-A), Public Works Department, Government of Arunachal Pradesh, Government of Arunachal Pradesh, Itanagar, under Memo. No. CEAP(CZ-A)/WTC-56/CRF/Tender/2018-19/2880-81 whereby the approval for acceptance of the tender for the work, referred to above, amounting to Rs. 27,69,14,883.58/- in favour of the private respondent No. 6, have been conveyed to the Superintending Engineer, Yachuli Circle, PWD, Arunachal Pradesh.

3. The facts leading to the filing of the present writ petition, may be stated, in brief, as under:

The Executive Engineer, Yazali PWD Division, had issued the Notice Inviting Tender(NIT), dated 12.09.2018, inviting bids through online item rate bid to 2(two) bids system wherein at serial No. 1, it was provided as follows:

"1. NIT NO. YZD/NIT/2018-19/01 Name of Work – C/o Road from Yoglu to Yapap Geko/Phase-II:17KM), Pistana Circle, Lower Subansiri District, Arunachal Pradesh, under CRF. Estimated cost Rs. 28,43,32,448.00. Earnest Money Rs. 5686648.00 for Non-APST Contractor @ Rs. 2843324.00 for APST Contractor. Period of completion 24 months."

4. In the said Notice Inviting Tender(NIT), it was provided that the bid forms and other details can be obtained from the departmental website i.e. <https://pwdar.etenders.in> from 1100 hours of 12.09.2018 to 1200 hours of 26.09.2018. According to the bid documents, the technical bids was supposed to be opened on 26.09.2018, which, however, was postponed to 03.10.2018, by a corrigendum, dated 28.09.2018, issued by the Executive Engineer, Yazali PWD Division, and accordingly, the technical bids were opened on 03.10.2018 which was approved on the same date, 03.10.2018, wherein it was found that

the technical bids of the petitioner as well as the private respondent No. 6 have been found to be technically qualified as it would be evident from the impugned letter, dated 01.11.2018, issued by the said Executive Engineer, Yazali PWD Division. By the letter, dated 01.11.2018, it was further provided that the financial bid would be opened on 05.11.2018, which, however, got postponed to 08.11.2018, vide corrigendum, dated 03.11.2018, issued by the Executive Engineer, Yazali PWD Division, and accordingly, as fixed, the Financial Bids was opened on 08.11.2018.

In the meantime, the writ petitioner, vide representation, dated 20.11.2018, written to the Executive Engineer, Yazali PWD Division, with a copy of the same, endorsed to the Chief Engineer, Public Works Department, Government of Arunachal Pradesh, as well as Superintending Engineer, Yachuli Circle, with a prayer for rejection of the bid of the private respondent No. 6 on the ground that the said Respondent No. 6 had above 3(three) nos. of works at his hands as awarded by the various Departments of the Government of Arunachal Pradesh, which are enumerated hereunder:

- "1. C/o Steel Suspension Bridge over River Pare(75.00 mtr. Span) at Balapu to connect PMGSY road under RIDF under Sagalee, PWD Division(Copy of Letter of Award, Commencement of Work and latest QPR is attached herewith as ANNEXURE-2 for your ready reference).**
- 2. C/o Road from Parsiparlo Circle to HQ to Damin Block HQ.(Stage-II) Package No. AR/14/02/007 under Department of RWD , Government of Arunachal Pradesh. (Copy of proceed to work attached herewith as ANNEXURE-3).**
- 3. C/o Integrated Development of New Adventure Tourism in Arunachal Pradesh under North East Circuit of Swadesh Darshan(SH: Development of Ecopark-Cultural village at New Sagalee) Package No. TOU/EW-SD/2016/15 under Department of Tourism, Government of Arunachal Pradesh(Copy of commencement of work and letter of acceptance is enclosed as ANNEXURE-4).**
- 4. Besides above mentioned work, M/s Tama Fabrication has been recently awarded the work for c/o of Steel Suspension Bridge over river Pare(75.00 mtr. Span) to connect Rigo village from Nimte for which works are in full swing(Copy of reference letter and latest progress report is attached herewith as Annexure-6) for your ready reference please. Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development & Promotional) Act, 2015(Copy attached as ANNEXURE-5)."**

5. The aforesaid representation, dated 20.11.2018, written by the writ petitioner, was received by the Offices of the Chief Engineer(CZ-A), Public Works Department, Government of Arunachal Pradesh, and Superintending Engineer, Yachuli Circle, respectively, on 20.11.2018, and the office of the Executive Engineer, Yazali PWD Division, on 22.11.2018, and accordingly, it is the case of the petitioner that in view of the Respondent No. 6 having above 3(three) works at the time of submission of the bid, the respondent authorities could not have approved the tender work, in question, in favour of the private respondent No. 6 vide the impugned order, dated 21.11.2018, which would be in violation of the Rule 4(ii)(e) of the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development & Promotional) Rules, 2015, hereinafter referred to as the 'Rule of 2015', and as the impugned approval order, dated 21.11.2018, have been issued in violation of the Rules framed, the impugned order, dated 21.11.2018, is liable to be set aside and quashed.

6. The State Respondents have filed 2(two) separate counter affidavits. One being filed by the Respondents No. 4 & 5, namely, Superintending Engineer, Yachuli Circle, and the Executive Engineer, Yazali PWD Division, and the other being filed by the Respondents No. 1 & 2, namely, the Chief Secretary, Government of Arunachal Pradesh, and the Secretary, Public Works Department, Government of Arunachal Pradesh.

7. In the counter affidavit filed by the Respondents No. 4 & 5, a stand has been taken in paragraphs No. 7 & 8 that the works, having estimated cost of above Rs. 10 crores, the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development & Promotional) Act, 2015, hereinafter referred to as the 'Act of 2015', has no application and accordingly, as the Act and the Rules does not apply to a project with above Rs. 10 crores, the representation submitted by the writ petitioner was ignored as the said Act and the Rules of 2015 had no application to such a project with an estimated cost of above Rs. 10 crores. Therefore, the approval made

in favour of the respondent No. 6 in respect of the tender work, does not suffer from any illegalities. It is also stated in paragraph No. 8 that the clause for applicability of the Act of 2015 and the Rules framed thereunder, has not been laid down in the terms and conditions of the Standard Bidding Document ('SBD', for short) for the said project since it is irrelevant for the instant case.

8. In paragraph No. 5 of the said counter affidavit, it has been stated that the writ petitioner had quoted an amount of Rs. 23,97,77,553.50 which was 15.67% below the justified estimated cost put to tender whereas the Respondent No. 6 had quoted a sum of Rs. 27,61,14,883.58/- which was 2.61% below the justified estimated cost put to tender and as per Clause 20.4.32 of the CPWD Manual of 2014, it is clearly mentioned that the amount beyond the permissible limit of 5% of the justified rate, should be rejected.

9. In the counter affidavit filed by the Respondents No. 1 & 2, the authorities, in paragraph No. 8, had taken a stand that there is no violation of any provisions laid down under the Act of 2015 and the Rules framed thereunder. It is the further stand of the respondents No. 1 & 2 that the credentials of the private respondent No. 6 having been established as the most eligible for the package in question, with respect to the specific provision of the Rules of 2015 as under Rule 2(ii) and also Rules 4(i) as well as Rule 4(ii)(e), have been satisfied by the said Respondent No. 6 and it further says that the statements submitted or uploaded by the Respondent No. 6 in Form-D in compliance of the requirement of the Notice Inviting Tender(NIT), have also been taken into account.

10. In paragraph No. 9 of the said counter affidavit filed by the Respondents No. 1 & 2, it is further stated that the petitioner's representation was not admissible as per the rule and hence, rejected, in exercise of the authority vested under Clause 18 of the approved Notice Inviting Tender(NIT). After having taken a stand to the effect that the Respondent No. 6 had duly complied and fulfilled the requirement of the Act of 2015 and the Rules

framed thereunder, a curious stand have been further taken in paragraph No. 11 of the said counter affidavit wherein it has been stated that the Rules of 2015, in the instant case, is not relevant since the corresponding amount of the project is above Rs. 10 crores.

11. It is also the further stand of Respondents No. 1 & 2 in paragraph No. 10 of the said counter affidavit, that none of the 4(four) projects as highlighted by the writ petitioner falls within the jurisdiction of the Lower Subansiri District and the Act of 2015 being the Act for the district based entrepreneurs, the projects that fell outside the said district, has no relevancy in evaluating the bid.

12. The Respondent No. 6, by filing his counter affidavit, has also taken the identical stand which the State Respondents have already taken in this matter through their respective counter affidavits, to the effect that the Act of 2015 and the Rules framed thereunder, are not applicable to the project, the cost of which is above Rs. 10 crores.

13. The Respondent No. 6, apart from taking the stand that the Act of 2015 and the Rules framed thereunder, would not be applicable to a work whose estimated cost is above Rs. 10 crores, has raised a preliminary objection with regard to the maintainability of the writ petition on various grounds, as under:

- (i) That the writ petition has been filed by a general power of attorney holder who had no personal knowledge and the SBD has not prescribed the 3(three) works as alleged in the writ petition.
- (ii) That vide O.M. dated 18.11.2016 that the State Government has enhanced the maximum limits of 5(five) contracts/packages of road construction works by a Firm and as the work of *c/o road from Parsiparlo circle to HQ(Stage-II) Package No. AR/14/02/007* falls under the PMGSY, it could not be taken as

ongoing projects under the Act of 2015 and the Rules framed thereunder, and also the said Act of 2015 and the Rules framed thereunder, would not apply to a project which estimated cost is above Rs. 10 crores and as the writ petitioner has not challenged the letter of intent, dated 13.12.2018 and the agreement, dated 13.12.2018, which actually, according to the learned senior counsel for the Respondent No. 6, is dated 14.12.2018, have not been put to challenge by the writ petitioner, as such, the writ petition is not maintainable.

- (iii) That the work, in question, is a public project, and hence, the same cannot be halted by this Court.
- (iv) That as the Act of 2015 and the Rules framed thereunder, being not applicable to the project whose estimated cost is above Rs. 10 crores, which, in turn, invites global tender and bidders from national and international Firms, having innumerable works, in hand, to participate in the bidding process, as such, the writ petition is not maintainable.
- (v) That the petitioner's Firm, without any agitation, had participated in the technical bid, as an unsuccessful bidder, has no *locus standi* to approach this Court under Article 226 of the Constitution of India, and as such, it is not maintainable.
- (vi) That, as the work has already been awarded and it had already commenced, the writ petition has, therefore, become infructuous.

14. Mr. Choudhury, learned senior counsel, representing the petitioner, by referring to Section 2(b), 3(1) of the Act of 2015 *read with* the Schedule of the said Act as well as Rules 3, 4(1), 4(ii)(e) of the Rules of 2015, would contend that these provisions are the statutory provisions enacted by the legislature of the State of Arunachal Pradesh and therefore, the respondent authorities are duty bound to mandatorily apply and comply with the provisions referred to above. In violation thereof, it would vitiate the technical

qualification of the private Respondent No. 6. It is the requirement under Rule 4(ii)(e) that the intending bidders must not have 3(three) works, in hand, in any of the Departments of the State Government at a time. In the instant case, the writ petitioner, by referring to representation/complaint, dated 20.11.2018, having apprised the respondent authorities about the 4(four) nos. of works that the Respondent No. 6 had with the State Government, the respondent authorities ought to have rejected the technical bid of the Respondent No. 6.

15. Mr. Choudhury, learned senior counsel, further submits that as would be evident from Annexure-3 appended to the counter affidavit filed by the Respondents No. 1 & 2, the Respondent No. 6 has now at least 5(five) nos. of works, in hand, and therefore, the respondent authorities ought to have summarily rejected the technical bid of the Respondent No. 6. The respondent authorities, in the present case, have completely failed to make any inquiries as regards the number of works that the Respondent No. 6 had, despite, their own admission in the affidavit, in question, and, therefore, the impugned order of approval dated 21.11.2018 issued in favour of the Respondent No. 6, is highly illegal for non-compliance of the Act of 2015 and the Rules framed thereunder.

16. Mr. Choudhury, learned senior counsel, further submits that the Act of 2015 and the Rules framed thereunder, would apply with all its rigors even to the project whose estimated cost is above Rs. 10 crores in the absence of any specific express exclusion in the Act of 2015 and the Rules framed thereunder, making it inapplicable to such projects.

17. Mr. Tapin, learned Senior Government Advocate, on the other hand, submits that the object of the Act of 2015 and the Rules framed thereunder, is to provide an incentive to the district based entrepreneurs and professionals as defined under clause 2(b) of the Act of 2015 and since the contractors referred to under serial No. 6 of the Schedule, appended to in the said Act,

does not make any reference to the district based entrepreneurs rather all the Class-I registered contractors eligible for national and international competitive bidding having been referred to in the said Schedule, the Act of 2015 and the Rules framed thereunder, would not be applicable in respect of the project whose estimated cost is above Rs. 10 crores. Learned Senior Government Advocate further submitted that even if the Act of 2015 and the Rules framed thereunder, is assumed to be applicable to a project whose estimated cost is above Rs. 10 crores, all the conditions laid down under clause 4(ii) would only be applicable to the district based entrepreneurs as defined under clause 4(ii)(b) of the Rules of 2015. He also submitted that clause 4(ii)(a) to (g) are having the same force of application. Clause 4(ii)(a) speaks about the registration of district based entrepreneurs under the Arunachal Pradesh Contractors Enlistment Rules, 2008, which is one of the pre-conditions to take participation in the tender in the State of Arunachal Pradesh issued by the State Government. Clause 6 of the Schedule talks about the contractors who can participate in the tender estimated at the cost of above Rs. 10 crores. The contractors herein, are the contractors who are Class-I registered contractors and are eligible for national and international competitive bidding and since clause 6 is kept open to all the contractors irrespective as to whether the contractor is registered under the Arunachal Pradesh PWD or any other authority but clause 4(ii)(a) talks about the compulsory enlistment of the contractors under the 2008 Rules, therefore, clause 6 of the schedule and clause 4(ii)(a) are directly contrary to each other, which cannot dwell together and if 4(ii)(a) cannot dwell together with clause 6 of the Schedule, then clause 4(ii)(e) also cannot dwell together with clause 6 of the Schedule. He further submits that the contractors referred under clause 6 of the Schedule, have not been included within the purview of the Act of 2015, therefore, the question of exclusion by providing a particular provision, would not arise.

18. Mr. V. Lakshminarayana, learned senior counsel representing the Respondent No. 6, at the very outset, submitted that the writ petition having

been filed by the general power of attorney holder who had no personal knowledge of the 'e' tendering system, this writ petition would not be maintainable inasmuch as the affidavit of this petition has been sworn by an incompetent person. The writ petition would not be maintainable for yet another reason that the proceedings dated 31.10.2018 by the Technical Evaluation Committee, is not put to challenge and what is challenged, in fact, is only the communication, dated 01.11.2018, by which the writ petitioner and the private Respondent No. 6 have been stated to have technically qualified thereby fixing 05.11.2018 as the date for opening of the financial bids. He also submits that the petitioner having been disqualified in the financial bid, the writ petition is, therefore, not maintainable and as such, no relief can be granted. That apart, since the contract has already been awarded as well as work has also commenced and the agreement, dated 14.12.2018 has not been challenged including the letter of intent, dated 13.12.2018, the instant writ petition is not maintainable. He further submits that since the project is of public importance and also, it is an ongoing project, this Court, therefore, cannot interfere with the award of the contract at this stage.

19. Advancing the arguments on the merit of the writ petition, the learned senior counsel representing the Respondent No. 6, has argued that the employer or the authority is the best judge of the terms and conditions put under the NIT. The Court cannot add or subtract any of the norms or terms and conditions prescribed by the employer or the authority and the constitutional Court must respect the understanding of the authority though the understanding of the authority is not agreeable to the constitutional Court. Evaluation of the tender document must be limited to the terms and conditions incorporated in the SBD and the decision making process must relate to only the terms and conditions set-out in the SBD. The constitutional Court cannot examine the trivial matters including the violation of the terms and conditions of the document outside the SBD. All bidders in a global tender should be national bidders and the Class-I registered contractors must be treated alike. No via media procedure outside the terms and conditions of the

tender document, can be entertained. The judicial review is limited to arbitrariness, unfairness, biasness, and illegality only in respect of an evaluation of a tender process based on the terms and conditions of the tender document. A tender condition contains a mandatory and directory condition. Even the essential conditions can be deviated or relaxed by an employer provided such a deviation or relaxation is made applicable to all. With regard to the application of the Act of 2015 and the Rules framed thereunder, the learned senior counsel has submitted that in respect of a project with an estimated cost of above Rs. 10 crores, section 3(1) of the Act of 2015 limits the application of the Act in terms of the Schedule to such a project, the same is not applicable. The application of the Act of 2015 and the Rules framed thereunder, is restricted to the entries made under serial nos. 1 to 5 of the Act of 2015 and the Rules framed thereunder, wherein the word "domicile" has been mentioned and the entry under serial no. 6 which makes a mention of Class-I contractor as well as contractors eligible for national and international bidding, and the word 'domicile' having not been mentioned under serial No. 6 of the Schedule, the scope and extent of the application of the Act of 2015 and the Rules framed thereunder, is not applicable to a project whose estimated cost is above Rs. 10 crores.

20. According to Mr. Lakshminarayana, learned senior counsel, the word '*or*' are employed by the legislature immediately after the word '*upto*' followed by such amount only refers to the amount mentioned in serial Nos. 1 to 5 and not under serial no. 6. The word '*upto*' followed by the word '*or*' involving such amount would be referable to a previous entry and '*upto*' refers to entries under serial Nos. 1 to 5 and not entry under serial No. 6. Therefore, the legislature excludes the entry under serial No. 6 from the application of the Act of 2015. If the employer has understood the Act of 2015 and the Rules framed thereunder, but has not applied and followed only the CPWD Forms 6 and 8 of the tender documents which is the SBD, this Court cannot substitute the understanding of the employer and the awarding of the work, and, therefore, cannot be interfered with by this Court. If the Act of 2015 is

held to be applicable in the present case then 2(two) different classes of bidders would be created, which is not permissible under the law when the works under the contract is indigenous and the contract work under the serial No. 6 of the schedule is a global contract.

21. Mr. Lakshminarayana, learned senior counsel, further contended that Rule 4(ii)(e) cannot be invoked by an unsuccessful bidder. Rule 4(ii)(e) provides the restriction to get the work done in a speedy manner in public interest and the condition of the work would not include the mandatory conditions of a tender document and 4(ii)(e) should be treated as directory in character. In fact, Rule 4(ii)(e) is not a mandatory condition and it is only a directory condition since it is not set-out in the CPWD Form 6 of the SBD. Advancing the argument with respect to the scope of judicial review in exercise of the powers under Article 226 of the Constitution of India, in the matters pertaining to a tender, it is submitted by the learned senior counsel for the respondent No. 4 that the Court shall restrain in disturbing the public works already awarded to a party and the Court should be very loathe or exercise a restraint in exercising the extraordinary power at the instance of unsuccessful bidder who has got commercial interest and upset the ongoing projects.

22. In support of his submissions, Mr. Lakshminarayana, appearing on behalf of the respondent No. 6, has placed reliance on the following decisions for the proposition that have been indicated against each of the decisions cited hereinbelow:

A. JUDICIAL REVIEW

1. Caretare Vs. HPCL Ltd., Civil Appeal No. 3588/2019, Para 36 & 37.

“The window of judicial review in terms of Article 226 has increased, this in turn affects the efficiency of the commercial activities of the public sector.”

2. Suresh Kumar Wadhwa Vs. State of M. P., 2017(16)SCC 757, Para 35 and 26.

Courts have no power to amend the Contract or add words to the tender document. The object of providing the terms of NIT is made known to the public.

3. Montecarlo Ltd. Vs. NTPC Ltd., (2016) 15 SCC 272 Para 19,21,25 & 26.

Terms and condition of the SBD, Author is the best person And is not open for judicial review.

4. Global Energy ltd. Vs. Adani Exports Ltd 2005(4) SCC 435, Para 8 to 10.

No judicial review on terms and conditions of the contract.

5. Municipal Corpn., Ujjain V. BVG India Ltd. 2018(5)SCC 462, Para 37

Courts must as far as possible avoid a construction of a document which is unworkable.

6. Central Coalfields Ltd. V SLL-SML(Joint Venture Consortium), 2016(8)SCC 622, Para 48, 49.

Decision of the employer must be respected by the Courts and Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders.

7. CRRC Corpn. Ltd. V. Metro Link Express for Gandhinagar & Ahmedabad(Mega) Co. Ltd. (2017) 8 SCC 282, Para 29, 30, 31 and 32.

Courts cannot take-over the decision making function of the employer and make a distinction between essential and nonessential contrary to the decision of the employer re-writing the arrangement.

8. Maa Binda Express Carrier Case (2014) 3 SCC 760, Para 9 to 11.

Greater latitude should be given to an employer in formulation of a condition of a tender document.

9. Afcons Infrastructure Ltd.,(2016)16 SCC 818 Para 14 and 15.

Words used in the Tender documents cannot be ignored or treated as redundant or superfluous, they must be given meaning and their necessary significances.

10. Consortium of Titagarh Firema Adler S.P.A. Case(2017) 7 SCC 486, Para 30

Courts will not interfere if it is a procedural aberration.(II) if the decision is taken manifestly in consonance with the language of the tender documents to flout the tender. Court should follow the principle restraint.

11. Michigan Rubber(India) Ltd. Case, 2012(8) SCC 216, Para 23.

Principle of Judicial restraint applicable, when the State or Authority follows the reasonable procedure.

12. Jadish Mandal Case, (2007) 14 SCC 517, Paragraph No. 22

Dispute between two persons, civil suits for damages

Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction.

13. (2012) 6 SCC 17, Para 22

Disputes between the two tenderers, court should see presence of public interest as laid down in Raunaq International Ltd. case.

14. Air India case, 2000 (2) SCC 617, Para 7

Court should exercise its discretionary power under 226 with great care and not merely to make out a legal point.

15. Arunachal Trade and Commercial Case 2010(3)BC 307, Para 18

If the successful bidder had in fact substantially complied with the purport and object in which essential conditions are laid down. No judicial review.

B. FINANCIAL BID NO JUDICIAL REVIEW

16. T.N. Generation and Distribution Corpn. Ltd. 2017 (4) SCC 318, Paragraph No. 36, 37, 38

Financial bid no judicial review.

17. Shobikaa Impex (P) Ltd. v. central Medical Services Society 2016 (16) SCC 233, para 19 to 23.

Fixation of value, it is for the authority including adherence of essential conditions.

C. FAIR AND EQUAL OPPORTUNITY FOR ALL THE PARTICIPANTS AND HIGH REVENUE

18. Nagar Nigam v. Al Faheem Meat Exports(P.) Ltd, (2006) 13 SCC 382, paragraph No. 18 and 21.

Fair opportunity to all those who are eligible

19. Nova Ads v. Metropolitan Transport Corpn., (2015) 13 SCC 257, paragraph No. 56 and 57

"All eligible competitors And giving a fair opportunity to them and also generating maximum revenue".

20. Ram & Shyam Co. v. State of Haryana, (1985) 3 SCC 267, Para 12

The State is required to secure the best market price available in the market economy so that larger revenue coming into the coffers of the state Administration would serve public purpose.

21. Rishi Kiran Logistics (P) Ltd.V Case (2015) 13 SCC 233, Para 24 to 38

Object of the tender is to higher revenue to the State is upheld.

22. Dutta Associates case, (1997)1 SCC 53, Para 4 & 8

The conditions and procedure shall be notified and when viability not there in the document. It cannot be made applicable.

23. Monarch Infrastructure case, 2000 (5) SCC 287, Para 10

"Eligibility to all"

D. ESSENTIAL, MANDATORY AND SUBSIDIARY CONDITIONS

24. B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548 , PARAGRAPH NO. 23, 66,67

"The terms contained in the noticed inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard – and–fast rule can be laid down therefor. We would, a little later, noticed the underlying intention of the employer in prescribing the so-called essential conditions".

25. Sterling Computers Ltd v. M & N Publications Ltd., (1993) 1 SCC 445, para25.

"Departure can be made from the condition of tender document."

26. Union of India v.Dinesh Engineering Corpn.,(2001) 8 SCC 491, Para15

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for the purposed of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by the justice Holmes.

27. 2016 (8) SCC 446, Para 14

Essential conditions and ancillary or subsidiary conditions. Deviation to all is permitted.

28. Podder Steel Corporations case, 1991(3) SCC 273 , Para 6,7 & 8.

Essential conditions of eligibility and the other conditions which are merely ancillary or subsidiary. Literal compliance of all terms of the tender notice not insisted upon.

29. Narayani's case Gauhati High Court W.P NO. 976/2017, D.D on 09.08.2017

"It is for the Government to decide whether conditions are directory or mandatory."

- a) Including criteria to prescribe.
- b) Criteria for evaluation.

E. ON-GOING PROJECTS SHOULD BE CONTINUED AND CANNOT BE STAYED

30. Sterling Computers Ltd .v. M & N Publication Ltd.,(1993) 1 SCC 445, Para 32 .

"It is a matter of common experience that whenever applications relating to awarding of contracts are entertained for judicial review of the administrative

action, such applications remain pending for months and in some cases for years. Because of the interim orders passed in such applications, the very execution of the contracts, are kept in abeyance. The cost of different projects keep on escalating with passage of time apart from the fact that the completion of the project itself is deferred.”

31. (2012)6 SCC , Para 33

On-going projects should be continued in public interest.

32. NHAI v. Gwalior-Jhansi Expressway Ltd., 2018(8) SCC 243, PARA 24,

Investment huge money no interference.

33. 2017 (5) SCC 387, PARA31, Chhattisgarh State Industrial Development Corpn. Ltd.

Work is in progress no interference.

34. Raunaq International Ltd. cases. 1991 (1) SCC 492, 27

Projects cannot be stopped.

F. TERMS AND CONDITIONS OF THE TENDER

35. Global Energy case, 2005 (4) SCC 435 , PARA9&10

Court cannot whittle down the terms of the tender document unless they are wholly arbitrary and discriminatory or actuated by malice.

36. Meerut Development Authority, 2009 (6) SCC 171, Para 26 &27

Court cannot insist a new term in the tender document,

37. Reliance Energy Ltd .v. 2007 (8) SCC 1 , Para38 AND 39

In the tender document legal certainty of terms and conditions and the norms must be specified. In the present case CPWD norms have been strictly specified.

38. JSW Infrastructure Ltd .v. Kakinada Seaports Ltd., 2017 (4) SCC 170, Para8, 9 AND 10

Perverse understanding of the terms and conditions of the tender notification is not demonstrated by the petitioners.

39. S.S. & Circle Officer .v Orissa Mining Corpn. Ltd. 2008 SCC 772, PARA 45

The terms of the tender document should not be interpreted has highly pedantic and legalistic manner but should be read and understood what it is .

40. Shri Binya Ronya Vs. The State of Arunachal Pradesh ,W.P NO. 153/2017 , PARA10 & 11 D.D on 09/04/2017.

Para 45 "Salutary" meaning – producing good effects. And concluded contract can not be re-opened.

41. Suresh Kumar Wadhwa case, 2017 (16) SCC 757, Para26,27 & 35

The object of publishing all material terms are threefold. No person can add or amend the terms of contract.

42. Rinchin Dondup Vs. State of Arunachal Pradesh, (2017)5 GLT 474, 12 ,18 to 21.

Conditions not prescribed in the SBD, Court cannot make it applicable.

43. Ramana Dayaram Shetty v. International Airport Authority of India AIR 1979 SC 1628, Paragraph No.-7,20,35.

"Adding conditions other than NIT, not permissible."

"Imposition of restriction are not permitted."

"No relief was granted. Since, on-going project."

G. REASONS NEED NOT BE GIVEN IN TENDER MATTER SINCE TENDERING IS THROUGH E-PORTAL

44. Ramchandra Murarilal Bhattad v . 2007 (2) SCC 588 , PARA55

"Since the procedure of tender is strictly in terms of tender document , reasons not required ."

"Authority exercising power to deal with contractual matters , not required to assign reasons \".

H. HARMONIOUS CONSTRUCTIONS

45. Krishan Kumar v. State of Rajasthan,1991 (4) SCC 258 , PARA 11

"One provisions should not be interpreted to defeat the other provisions. It should be harmoniously construed."

46. Govt. of T.N case, 2001 (1) SCC 742 , PARA 8

"Latter section of the same statute prevail over other section."

I. CLASSIFICATION WITHIN A CLASS NOT PERMITTED

47. Rashbihar case, 1969 (1) SCC 414, at para 18

"The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved."

48. Ashoka Smokeless Coal India (P)Ltd. v. Union of India, (2007) 2 SCC 640 , AT 161

"Class subjected to differential treatment , without any rational classification, vires Article 14 of the Constitution of India."

49. NHAI v. Gwalior – Jhansi Expressway Ltd., (2008) 8 SCC 243.

"Two classes of bidders prohibited \".

J. MAINTAINABILITY OF THE PETITIONS

50. Gas Co. (Proprietary) Ltd v. State of W.B.AIR 1962 SC 1044 , PARA 2 & 5

"There is no legal right to be enforceable and the writ is not maintainable at the instance of a person who has no legal right \".

"Personal or individual right not damaged, cannot file a writ petition."

51. State Bank of Travancore v. Kingston computers (I) (P) Ltd. (2011) 11 SCC 524, Paragraph No. 8 to 14

"Is neither any valid Board resolution nor any valid authorization on behalf of the company, writ not maintainable, by third person."

52. S.L Kapoor v. Jagmohan, AIR 1981 SC 136, PARA 17

Futile writs cannot be issued by the constitutional courts.

53. Raunag International Ltd . v. I.V.R, Construction Ltd.(1991) 1 SCC 492

"A person who does not fulfill the qualification cannot approach under article 226 and 227 of the constitution of India."

54. M/S Jumke Store vs. The Govt. of Arunachal Pradesh , W.P No. 62/ 2016, Paragraph No.-6,11,14,15,22,23, & 24

" If bid is rejected no relief can be granted "

"Conditions not having any substantive bearing on the work."

55. Chattisgarh state Industrial Development Corpn. Ltd. v. Amar Infrastructure Ltd., 2017 (5) SCC 387, PARA31,35,& 37

" No interference by an disqualified person".

56. 2016(S)GLT 230, Paragraph No. 10, 13, 14, 15.

"Disqualified person cannot interfere and no interference after substantial work is done

57. M/s Jasti Sow Entrepreneur's case, W.P. No.151/2016, D.D. on 29/04/2016

"A person is not entitled to press the provisions of Act, if he disqualified"

"If no other person is eligible, contract can be awarded."

58. T. Gangkak Vs. State of Arunachal Pradesh, W.P. No. 693/2018, Para 16

"Substantial work is completed."

"Huge cost is imposed".

"Time consumes for next process of tender."

"Delay in completion of projects."

K. INTERPRETATION OF THE WORD "UP-TO"

59. Sunil Kumar Rana V. State of Haryana, (2003) 2 SCC 628, Para 8

Legislative intent thus to compute the period of one year from the "commencement of this Act," meaning thereby Haryana Act 3 of 1994 is equally explicit and clear. There is, therefore, no rhyme or reason or justification in the claim on behalf of the appellant that the one year-year period has to be calculated from the date of coming into force of Haryana Act 15 of 1994, which merely substituted the word "after" by the word "upto". The result of substitution, as we could see, was to read the provision as amended by the word, ordered to be substituted.

60. Zile Singh v. State of Haryana, (2004) 8 SCC 1, Para 24 & 25.

L. INTERPRETATION OF THE WORD 'SUCH.

61. Ombalika Das v. Hulsan Shaw, (2002) 4 SCC 539, Para-8 & 9.

"of a kind previously or about to be mentioned or implied; of the same quality as something just mentioned (used to avoid the repetition of one word twice in a sentence); of a degree or quantity stated or implicit; the same as something just mention (used to avoid repetition of one word twice in a sentence); that part of something just stated or about to be stated."

62. Rajasthan v. Kishan Sing, (1992) 3 SCC 696, Para-5

"Superfluous expression not it is synonymous with the word -- 'All'. The word 'such' as an adjective is used for something that has been stated earlier or which is to be specified or exemplified in the portion which is to be follow. The word 'such' means of the kind, the like kind or the same kind. The word 'such' means of the kind, the like kind or the same kind. The word 'such is used avoid repetition of the expression already indicted, described or specified or to donate the context which is about to be indicated, suggested or exemplified. In the context of Section 22 of the Act it is not possible to construe the expression 'to perform such functions."

63. Puranlal Lakhanpa Vs. Union of India (UOI), AIR 1958 SC 163, Paragraph No. 24, 32 & 34.

The present argument of the learned Solicitor-General on the basis that one of the possible construction of the words "such detention" is detention for a period longer than three months. That being so, and the word "such" meaning in the ordinary English language, of the kind already described, even if two kinds of detention, namely, preventive detention simpliciter and detention for other reasons, have been earlier mentioned, the kind mentioned nearest to the word "such" must be the kind intended by it. Therefore again the words "such detention" must be taken as referring to detention for a period longer than three months. Indeed clause (4) and the other clauses have nothing to do with other kind of detention than preventive detention. The word "such" cannot therefore seek to make a distinction from a thing occurring in a wholly separate provision of the article, namely, clauses (1) and (2). That being so, I am unable to agree that the words "such detention" refer to preventive detention simpliciter."

64. Central Bank of India v. Ravindra, (2002) 1 SCC 367, Para-42 & 43.

"Webster's Dictionary and Thesaurus, meaning of 'such' is given as "of a kind previously or about to be mentioned or implied; of the same quality as something just mentioned (used to avoid the repetition of one word twice in a sentence); of a degree or quantity stated or implicit: the same as something just mentioned (used to avoid repetition of one word twice in a sentence); that part of something just stated or about to be stated". Thus, generally to a noun is indicative of the draftsman's intention that he is assigning the same meaning or characteristic to the noun as has been previously indicated or that he is referring to something which has been said before."

65. S.R Bommai V. Union of India, (1994) 3 SCC 1 Para- 173 & 174

"The history of the law, and you may gather from the instrument itself the object of the legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing of law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same.

You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances,

While it has been held that it is duty of the Courts to interpret a statute as they find it without reference to whether its provisions are expedient or unexpedient, it has also been recognised that where a statute is ambiguous and subject to more than one interpretation, the expediency of one construction or the other is properly considered. Indeed, where the arguments are nicely balance, expediency my tip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the

law. The mere fact that the statute leads to unwise results is not sufficient to justify the court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of the statute. By the same token, an omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the courts to interpret a statute as they find it without reference to whether its provision are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill-conceived."

The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly be not given effect to in opposition to the plain language of the sections of the Act.

66. Ram Phal Kundu v. Kamal Sharma, (2004) 2 SCC 759 Para-13.

67. Corpn. of India Ltd. V. Commr. of Labour, (2008) 7 SCC 680, Para-16

"When the words of the statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, courts are bound to give effect to that meaning irrespective of consequences

'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

68. Sankar Ram & Co. V. Kasi Naicker, (2003) 11 SCC 699, Para-7

"The courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be achieved by it.

It is a well-settle rule of interpretation that no part of statute shall be constructed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer..... The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it."

M. INTERPRETATION OF THE WORD "OR".

69. Union of India V. Rabinder Singh, (2012) 12 SCC 787, Para-25.

"We accept the submission of Shri Tripathi that the two parts of Section 52(f) are disjunctive, which can also be seen from the fact that there is a comma and the conjunction "or" between the two parts of this clause (f) viz. (i) does any other thing with intent to defraud, and (ii) to cause wrongful gain to one person or wrongful loss to another person. If the legislature wanted both these parts to be read together, it would have used the conjunction "and"."

70. Union of India v. Ind-Swif Laboratories Ltd.,(2011) 4 SCC 635, Para 17.

"The issue is as to whether the aforesaid word "or" appearing in Rule 14, twice, could be read as "and" by way of reading it down as has been one by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "or" in between the expressions "taken" or "utilised wrongly" or has been

erroneously refunded as the word "and". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interests."

71. Hyderabad Asbestos Cement products v. union of India, (2000) 1 SCC 426, Para 8.

"Use of a "or" and the availability of one of the two alternatives would suffice."

72. Inayat Alikhan v. State of U.P., (1971) 2 SCC 311, Para-5.

"If the aforesaid provision is read as a whole we find no reason to read the word "or" in between the expressions "taken" or "utilised wrongly" or "has been erroneously refunded" as the word "and". On the happening of any of the three aforesaid circumstances such credit become recoverable along with interest."

73. Kamta Prasad Aggarwal v. Executive Officer, (1974) 4 SC 440, Para 11.

The word "or" is used in disjunctive sense

74. AIR 1965 SC 1457

"Positive conditions separated by or are read in the alternative negative conditions connected by or are constructed as cumulative and "or" is read as "nor" or 'and'."

75. Firoj Farukee V. State of W.B, 1973 (3) SCC 903, Para-6.

"It is urged that the use of the word "or" in the order shows that the detaining authority was not definite regarding the ground of detention. Similar argument was advanced before us in the case of Ananta Mukhi alias Ananta Hari v. State of West Bengal and was rejected. It has been held by us that the use of the word "or" in the detention order would not introduce an infirmity as might justify the quashing of that order."

23. Mr. Choudhury, learned senior counsel, in respect of the argument put-forth by the Respondent No. 6 that the writ petitioner has not put to challenge the award dated 13.12.2018 as well as the agreement, dated 14.12.2018 and the writ petition would not be maintainable, in reply, submitted that the so-called agreement, dated 14.12.2018, is only an integrity agreement and not the formal agreement as defined in clause(1) of the conditions of the contract *read with* the clause 10 of the conditions of the contract so the question of challenging the integrity agreement, dated 14.12.2018, which is not a formal agreement, in terms of the terms and conditions of the SBD, does not arise and as such, there was no necessity in challenging the agreement, dated 14.12.2018.

24. With regard to the arguments advanced by the learned senior counsel for the Respondent No. 6 that the letter of intent, dated 13.12.2018, has not been challenged by the writ petitioner and therefore, the writ petition would

not be maintainable, Mr. Choudhury, learned counsel for the petitioner, in reply, submitted that the writ petition was filed on 10.12.2018 wherein the impugned order, dated 01.11.2018 by which order, the Respondent No. 6 was held to be technically qualified and also the impugned recommendation, dated 21.11.2018 which are the basis for issuing the letter of intent, having been put to challenge, separate challenge to the said letter of intent, which is only the offshoot of the decision taken in pursuance of the impugned orders, dated 01.11.2018 and 21.11.2018, therefore, is not necessary.

25. With regard to the argument made by the Respondent No. 6 that the condition of requiring the contractors to submit the list of works, as required under the law i.e. Clause 4(ii)(e) having not been prescribed under the NIT, the said condition cannot be insisted upon, Mr. Choudhury, in reply, submitted that the requirement of submitting all the details of the works in hand with the contractor has been provided in clause 19 of the Notice Inviting Tender(NIT). And in Page 137 of the SBD, there is a Form prescribed to that effect along with a declaration to be made by the contractor and therefore, he submitted that the argument that the requirement of submitting the pending works in hand, has not been prescribed under the SBD, therefore, the same cannot be insisted upon in terms of Rule 4(ii)(e), is not correct.

26. With regard to the arguments made by the Respondent No. 6 and the State Respondents with regard to the applicability of the 'Act' and the 'Rules' to a project whose estimated cost is above Rs. 10 crores, Mr. Choudhury, in reply, submitted that had it been the intention of the employer that the Act of 2015 and the Rules framed thereunder, would not be applicable in the case of a project whose estimated cost is above Rs. 10 crores, the employer would not have incorporated the clause 19 read with Form D at page 137 of the SBD, requiring the contractors to submit their pending works in hand to the NIT authority.

27. Mr. Choudhury, learned senior counsel, in reply to the arguments advanced by the learned counsels for the respondents that the Act of 2015 and the Rules framed thereunder, must not apply to a project above Rs. 10 crores, submitted that, on reading of Section 2(b), 3(1) *along with* the Schedule to the Act of 2015, as well as Rules 2, 3 & 4 of the Rules of 2015, does not find any express exclusion with regard to the non-applicability of the Act and the Rules in respect of the project which is above Rs. 10 crores and in the absence of any express specific exclusion in the provision of the Act of 2015 and the Rules framed thereunder, the said Act as well as the Rules, cannot be held to be inapplicable to the projects above Rs. 10 crores.

28. Mr. Choudhury, learned senior counsel, further submitted that the words "***or involving such amount in the schedule thereto***" as has been provided in Section 3(1) of the Act, makes the Act and the Rules applicable even with regard to the projects above Rs. 10 crores as included under serial No. 6 of the Schedule. Similarly, the words "***shall be mandatorily applied to all works***" as provided under Rule 3 of the Rules of 2015, makes it expressly applicable to all the works that has been provided in the said Schedule irrespective of the value.

29. With regard to the arguments advanced by the learned senior counsel for the Respondent No. 6, to the extent that even assuming that the Act and the Rules of 2015 apply in the present case, the requirement of fulfilling the conditions laid down as provided under Rule 3(e) is not a mandatory condition but only a directory condition and it can be waived or deviated by the respondent authorities, Mr. Choudhury, learned senior counsel for the petitioner, submitted that the Act of 2015 and the Rules framed thereunder, does not contain any power of relaxation of any of the conditions that have been prescribed under the said Act and Rules of 2015.

30. Rival submissions advanced at the Bar have received due consideration of this Court.

31. The primary question which have been asked to decide by this Court in the present writ petition is the applicability of the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development & Promotional) Act, 2015, and the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development & Promotional) Rules, 2015, in the case of the project whose estimated cost is above Rs. 10 crores. For the purpose of deciding the applicability of the above-noted Act and the Rules of 2015 to the project whose estimated cost is above Rs. 10 crores, some of the relevant provisions of the Act and the Rules, may be noted, hereinbelow:

The Act of 2015 was enacted by the legislature to provide an incentive to ensure greater participation by district based entrepreneurs and professionals as a part of government policy thereby facilitating decentralization of developmental activities with greater participation of people from nook and corners of the State of Arunachal Pradesh to build a society of people with uniform social and economical status in the State.

Section 2(b) of the Act of 2015 and section 3(1) alongwith the schedule provided in the Act of 2015, which are relevant for the purpose, are quoted hereinelow:

"2(b) "District Based Entrepreneurs and Professionals means and includes any person who is involved in activity of execution of Development and welfare project of the Government and includes Architect, Engineers, Contractors, Doctors, etc., but does not include any government official. The person must be local having Arunachal Pradesh domiciled certificate and is a permanent resident of the District."

"3(1) The State Government shall, in its development and welfare oriented projects in a district give preference to the district based entrepreneurs and professionals to secure equitable distribution of state developmental work among different categories of entrepreneurs in project works up to or involving such amount as prescribed in the Schedule thereto."

SCHEDULE

| Sl. No. | Cost of Works | Eligibility |
|----------------|---|---|
| 1 | 2 | 3 |
| 1. | <i>Upto Rs. 50.00 lakhs</i> | <i>All registered contractors in Class V and IV categories domiciled within the territorial jurisdiction of Community Block.</i> |
| 2. | <i>Above Rs. 50.00 lakhs and upto Rs. 1.00 crore</i> | <i>All registered contractors in Class IV and III categories domiciled within the territorial jurisdiction of Assembly Constituency.</i> |
| 3. | <i>Above Rs. 1.00 crore and upto Rs. 3.00 crore</i> | <i>All registered contractors in Class III categories domiciled within the territorial jurisdiction of Assembly Constituency.</i> |
| 4. | <i>Above Rs. 3.00 crore and upto Rs. 5.00 crore</i> | <i>All registered contractors in Class I categories domiciled within the territorial jurisdiction of the District.</i> |
| 5. | <i>Above Rs. 10.00 crore</i> | <i>All registered contractors in Class I and contractors eligible for National and International competitive bidding.</i> |

Section 2(b) has defined the district based entrepreneurs to mean and include any person who is involved in activity of execution of developmental and welfare project of the Government and included therein, Architect, Engineers, Contractors, Doctors, etc., but not including any government official and further provided the person must be local having Arunachal Pradesh domiciled certificate and a permanent resident of the district.

Section 3(1) mandates the State Government to give preference to the district based entrepreneurs and professionals to secure equitable distribution of State developmental works amongst different categories of entrepreneurs in project works upto or involving such amount as prescribed in the schedule thereto.

32. The schedule provides that for the cost of works *upto* Rs. 50 lakhs, preference be given to the registered contractors in Class V & IV categories domiciled within the territorial jurisdiction of community block; *above* Rs. 50 lakhs and upto Rs. 1 crore, preference be given to the registered contractors in class IV & III categories domiciled within the territorial jurisdiction of the

assembly constituency; *above* Rs. 1 crore and upto Rs. 3 crores, preference be given to all registered contractors in class III category domiciled within the territorial jurisdiction of the assembly constituency; *above* Rs. 3 crores and upto Rs. 5 crore, preference be given to all registered contractors in Class-II category domiciled within the territorial jurisdiction of the assembly constituency; *above* Rs. 5 crores and upto Rs. 10 crores, preference be given to all registered contractors in class I category domiciled within the territorial jurisdiction of the district; and *above* Rs. 10 crores, preference be given to all registered contractors in class I category and contractors eligible for national and international competitive bidding.

33. From the conjoint reading of Section 2(b) of the Act and Section 3(1) read along with the schedule thereto, it is noticed that the value of the work have been categorized into 6 groups; the registered contractors have been categorized into Class I to V and the domiciliary of the contractors have been categorized into community block, assembly constituency and the district. However, no domiciliary qualifications have been prescribed in respect of the works above Rs. 10 crores. However, nothing is discernible from the above provisions that the Act of 2015 would be excluded from its applicability in respect of the works above Rs. 10 crores. Section 3(1) which provides that the State Government shall in its development and welfare oriented projects in a district, gives preference to the district based entrepreneurs and professionals to secure equitable distribution of State's development work among different categories of entrepreneurs in project works upto or involving such amount as prescribed in the schedule, hereto, does not in any manner whatsoever, indicates that the Act of 2015 would be inapplicable to the works above Rs. 10 crores. Rather, the use of the words "**..... project works up to or involving such amount as prescribed in the Schedule hereto**" in Section 3(1) *read with* the Schedule thereto, would indicate that the Act of 2015 would be applicable for the projects/works upto Rs. 10 crores as well as above Rs. 10 crores.

34. Similarly, in order to give effect to the Act of 2015, the Rules of 2015 have been framed by the Government in exercise of the powers conferred by section 5 of the Act of 2015.

Rules 3 and 4 of the Rules of 2015, which are relevant for the purpose of adjudication of this case, are quoted hereinafter:

"3. Applicability of the Rules : These Rules shall be mandatorily applied to all works undertaken by various agencies, Departments under the Government of Arunachal Pradesh including works and Development Departments such as Public Works Department(PWD), Rural Works Department(RWD), Water Resource Department(WRD), Public Health Department and Housing Department (PHED), Hydro Power Department(HPD), Urban Development and Housing Department (UD & HD), Department of Power(Elect.), Forest Department, Agriculture, Horticulture, Animal Husbandry and Veterinary and Dairying, Rural Development Department, etc.

4. Methods and Procedures of selection of District Based Entrepreneurs : (i) As per the provisions of section 3, the following schedules shall be followed by all agencies and Government Department in the selection of contractor for the execution of works within the State after an NIT has been called.

SCHEDULE

| Sl. No. | Cost of Works | Eligibility |
|----------------|--|--|
| 1 | 2 | 3 |
| 1. | Upto Rs. 50.00 lakhs | All registered contractors in Class V and IV categories domiciled within the territorial jurisdiction of Community Block. |
| 2. | Above Rs. 50.00 lakhs and upto Rs. 1.00 crore | All registered contractors in Class IV and III categories domiciled within the territorial jurisdiction of Assembly Constituency. |
| 3. | Above Rs. 1.00 crore and upto Rs. 3.00 crore | All registered contractors in Class III categories domiciled within the territorial jurisdiction of Assembly Constituency. |
| 4. | Above Rs. 3.00 crore and upto Rs. 5.00 crore | All registered contractors in Class I categories domiciled within the territorial jurisdiction of the District. |
| 5. | Above Rs. 10.00 crore | All registered contractors in Class I and contractors eligible for National and International competitive bidding. |

(ii) The Contractors/Entrepreneurs before participating in the tenders must satisfy the following conditions:

(a) The District Based Entrepreneurs and Professionals must be duly registered under the Arunachal Pradesh Contractors Enlistment

- Rules, 2008, in the appropriate class of category and that the Registration is must be valid on the date of participation of tender, a copy of which must be submitted to the tendering authority.*
- (b) If the District based Entrepreneurs and Professionals have their firm already got registered as contractors under Arunachal Pradesh Contractors Enlistment Rules, 2008, have the address different from their domiciled territorial jurisdiction, they shall be allowed to participate in the tender on production of proof of permanent resident certificate in support of their claim.*
 - (c) The contractors who has been awarded the work by call of tender shall not sub-let his work, failing which the authority shall be competent to rescind the contract and take suitable course of action.*
 - (d) The categories – IV and V contractors shall be exempted from requirement for producing proof of completion of works similar type in last five years to qualify for participation in a tender.*
 - (e) In the larger interest of the public and for equitable distribution of developmental works amongst eligible contractors and also to ensure effective management and quality of works, a contractor shall be allowed to have only 3(three) works in hand in any of departments under Government of Arunachal Pradesh at a time instead of existing 2(two) Nos. of any tender work under the State Government and for which, he shall make a declaration to be executed in an Affidavit that he is not engaged in more than two any tender works under the State Government. He shall also, for participation in any tender be required to submit completion certificate issued by the Engineer-in-charge, duly counter signed by the concerned Superintending Engineer and Chief Engineers.*
 - (f) In the event of inadequate response to a tender invited at block level/Assembly Constituency level, the eligible contractor of adjacent block/Assembly Constituency within the district shall be eligible to participate in the subsequent call of that tender.*
 - (g) In the event of inadequate response to a tender invited at District level tender for an amount of Rs. 5 crore to Rs. 10 crore, all eligible indigenous of Arunachali contractor domiciled and registered under Arunachal Pradesh Contractors Enlistment Rules, 2008, shall be eligible to participate in the subsequent call of that tender and if the cost of works is above 10 crore, all the registered contractors in Class I and contractors shall be eligible to participate.”*

35. Rule 3 of the Rules of 2015 quoted hereinabove, provides that the Rules shall be mandatorily applied to all works undertaken by various agencies and departments under the Government of Arunachal Pradesh including works and development departments such as Public Works Department(PWD), Rural Works Department(RWD), Water Resource Department(WRD), Public Health Department and Housing Department (PHED), Hydro Power Department (HPD), Urban Development and Housing Department (UD & HD), Department of Power(Elect.), Forest Department, Agriculture, Horticulture, Animal Husbandry and Veterinary and Dairying, Rural Development Department, etc..

36. Rule 4(i) provides that as per the provisions of Section 3, the following Schedule shall be followed by all agencies and government departments in the selection of contractors for the execution of works within the State after an Notice Inviting Tender(NIT) had been called; and the Schedule classifies the value of works and the class of contractors and the domiciliary in the same manner as have been classified in the Schedule provided in the Act.

37. Thus, Rule 3 and Rule 4(i) of the Rules mandates the departments and various agencies under the Government of Arunachal Pradesh to mandatorily apply and follow the Rules while making a selection of district based entrepreneurs.

38. Rule 4(i) having provided the same classification or values of works/ classes of contractors and the territorial domiciliary of the contractors, there is no indication that the Rules of 2015 would not be applicable to works, the value of which is above Rs. 10 crores.

39. The use of the words **"..... shall be mandatorily applied to all works undertaken by various agencies, departments under the Government of Arunachal Pradesh...."** in Rule 3 of the Rules and the use of the words **".... As per the provisions of Section 3, the following Schedules shall be followed by all agencies and government departments in the selection of contractor for the execution of works within the State after the Notice Inviting Tender (NIT) has been called....."** in Rule 4(i) of the Rules, makes it clear as regards the applicability of the Act and Rules to the works that have been classified in the Schedule provided under the Act as well as the Rules. The Schedule provided under the Act and the Rules having not excluded the application of the Act and the Rules, there is no reason to hold that the Act and the Rules shall not apply to a project, the cost of which is above Rs. 10 crores. Therefore, on a conjoint reading of Section 2(b) and 3(1) *read with* the Schedule of the Act and Rules 3 & 4 of the Rules of 2015, I am of the considered view that the Act and the Rules of 2015 would be applicable to the works/projects, the value of which is above Rs. 10 crores. Once, the Act and

the Rules of 2015 have been held to be applicable to the projects/works, the value of which is above Rs. 10 crores, there is no reason why the condition prescribed under Rule 4(ii)(e) would not be followed and insisted upon in selection of the district based entrepreneurs. Rule 4(ii)(e) which have been quoted hereinbefore, provides that the contractors shall be allowed to have only 3(three) works in hand, in any of the departments under the Government of Arunachal Pradesh at a time for which the contractor is required to make a declaration to be executed in an affidavit that he is not engaged in more than 2(two) tender works under the State Government.

40. Admittedly, the respondent No. 6 while submitting the bid, did not file any declaration in the form of an affidavit that he is not engaged in more than 2(two) tender works under the State Government. On the other hand, the petitioner vide representation, dated 20.11.2018, written to the Executive Engineer, Yazali PWD Division, with a copy of the same, endorsed to the Chief Engineer, Public Works Department, Government of Arunachal Pradesh, as well as Superintending Engineer, PWD Yachuli Circle, that the respondent No. 6 has more than 3(three) works at his hand, with various departments of the Government of Arunachal Pradesh, by describing each of the works in the said representation, pending execution by the respondent No. 6. The respondent authorities, however, without considering the representation, dated 20.11.2018, submitted by the petitioner, or, without making an endeavour to find out the correctness of the facts stated therein, had gone ahead to approve the bid of respondent No. 6 vide impugned order, dated 21.11.2018, issued by the Chief Engineer(CZ-A), Public Works Department, Government of Arunachal Pradesh, Government of Arunachal Pradesh, Itanagar, under Memo. No. CEAP(CZ-A)/WTC-56/ CRF/Tender/2018-19/2880-81

41. The fact that the respondent No. 6 had at least 4(four) works in hand, as described by the writ petitioner in his representation, dated 20.11.2018, written to the Executive Engineer, Yazali PWD Division, with a copy of the same, endorsed to the Chief Engineer, Public Works Department, Government

of Arunachal Pradesh, as well as Superintending Engineer, Yachuli Circle, have neither been denied by the State respondents nor by the respondent No. 6. The decision of the respondent authorities in approving the bid of the respondent No. 6 on the face of a complaint, dated 20.11.2018, that the respondent No. 6 has at least 4(four) works in his hand, is in clear infraction of the mandate of Rule 4(ii)(e) of the Rules.

42. As an alternate to the argument on non-applicability of the Act and the Rules, *per se*, an argument has been advanced by the learned senior counsel for the respondent No. 6, that even if the 'Act' and the 'Rules' are held to be applicable in the instant case, the applicability of the 'Act' and the 'Rules', having not been specified in the Notice Inviting Tender(NIT) or the SBD, the same cannot be applied for the reason that the Courts have no power to amend the contracts or to add words to the tender documents, and the Courts cannot read restrictions and conditions if it is not prescribed by the tender document while evaluating the tenders as have been laid-down in the case of ***Suresh Kr. Wadhwa –vs- State of M.P. & ors.***, reported in **(2017) 16 SCC 757**, and other series of decisions, cited above, needs mention only to be rejected for the reason that in the present case, the Court is in no way adding/altering/reading any restrictions and conditions not prescribed by the tender documents; what the Court has noticed in the present case is the infraction of the mandate and the law enacted by the legislature while arriving at the impugned decision to approve the bid of the private Respondent No. 6.

43. The mandate of the legislature; in the view of this Court, ought to have been followed in arriving at a decision to approve the bid of the respondent No. 6, notwithstanding the fact that the same have not been mentioned in the Notice Inviting Tender(NIT) or the SBD. The law enacted by the legislature on the subject, would have to be followed by the authorities, even though it is not mentioned in the NIT or the SBD.

44. All the decisions relied on by the learned senior counsel for the respondent No. 6 pertains to the scope of judicial review with regard to the terms and conditions of the Notice Inviting Tender(NIT) and/or the SBD. None of the decisions cited by the respondent No. 6 pertains to the scope of judicial review with regard to the violation of the mandate of the Act and the Rules.

45. Arguments have also been advanced by the respondent No. 6 that there can be no judicial review on financial bid; right of the parties are limited to receiving fair and equal opportunity; on-going projects should be continued and cannot be stayed, etc. Once, it has been held that the impugned approval of the bid of respondent No. 6 has been made in gross violation of the Act and the Rules, the arguments put-forth, as above, by the respondent No. 6, would be of little significance for the reason that no decision making process of the authorities would remain non-vitiated if the decision is arrived at in violation of the law enacted by the legislature.

46. For the reasons and discussions made hereinabove, in the considered view of this Court, the impugned order, dated 01.11.2018, issued by the Executive Engineer, Yazali PWD Division, under Memo. No. YZD/W-2018-19/282-89, as well as the impugned order, dated 21.11.2018, issued by the Chief Engineer(CZ-A), Public Works Department, Government of Arunachal Pradesh, Government of Arunachal Pradesh, Itanagar, under Memo. No. CEAP (CZ-A)/WTC-56/CRF/Tender/2018-19/2880-81, cannot be sustained in law. Accordingly, the impugned orders, dated 01.11.2018 and 21.11.2018, are hereby set aside and quashed.

47. In view of the above, the instant writ petition stands allowed and stands disposed of accordingly.

48. There shall be no order as to costs.

JUDGE

Bhaskar