

GAHC010020102024



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

Case No. : WA/36/2024

SANJAY KR SINGH
S/O LATE BALRAM SINGH, R/O CHIRWAPATTY ROAD, TINSUKIA, P.O.-
TINSUKIA, ASSAM-786125

VERSUS

PURBANCHAL BUILDTECH PVT LTD AND 6 ORS
A REGISTERED PRIVATE LIMITED COMPANY HAVING ITS REGISTERED
OFFICE AT HOUSE NO. 2, SEWALI PATH, FA AHMED NAGAR, SIX MILE,
GUWAHATI-781022, KAMRUP (M), ASSAM TO BE REPRESENTED BY ONE
OF ITS AUTHORIZED DIRECTOR VIZ. MD MATLEBUDDIN AHMED

2:MD MATLEBUDDIN AHMED
S/O GIAS UDDIN AHMED
DIRECTOR
PURBANCHAL BUILDTECH PRIVATE LIMITED
A REGISTERED PRIVATE LIMITED COMPANY HAVING ITS REGISTERED
OFFICE AT HOUSE NO. 2
SEWALI PATH
FA AHMED NAGAR
SIX MILE
GUWAHATI-781022
KAMRUP (M), ASSAM

3:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
PWD (NH WORKS)
ASSAM, DISPUR
GUWAHATI-781006

4:THE CHIEF ENGINEER
PWD (NH WORKS)

ASSAM
CHANDMARI
GUWAHATI-781003
ASSAM

5:THE CHIEF ENGINEER
PWD (BORDER ROADS)
ASSAM
CHANDMARI
GUWAHATI-781003
ASSAM

6:THE TECHNICAL BID EVALUATION COMMITTEE
REPRESENTED BY ITS CHAIRMAN
CHIEF ENGINEER
PWD (NH WORKS)
ASSAM
GUWAHATI-781003
ASSAM

7:BIRMIWAL AND ASSOCIATES
CHARTERED ACCOUNTANTS
HEAD OFFICE 404 COMMERCE HOUSE
AT ROAD
ATHGAON
GUWAHATI-781001
KAMRUP (M)
ASSA

Advocate for the Petitioner : MR. B D KONWAR SR. ADV., MR J SINGH,MR H AGARWAL,MR. R SALOI

Advocate for the Respondent : SC, PWD,

Linked Case : WA/49/2024

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECRETARY TO THE
GOVERNMENT OF ASSAM
PWD (NH WORKS)
DISPUR
GUWAHATI- 781006.

2: THE CHIEF ENGINEER
PWD (NH WORKS)

ASSAM,CHANDMARI
GUWAHATI- 781003
ASSAM.

3: THE CHIEF ENGINEER
PWD (BORDER ROADS)
ASSAM,CHANDMARI
GUWAHATI- 781003
ASSAM.

4: THE TECHNICAL BID EVALUATION COMMITTEE
REPRESENTED BY ITS CHAIRMAN
CHIEF ENGINEER
PWD (NH WORKS), ASSAM
GUWAHATI- 781003, ASSAM.

VERSUS

PURBANCHAL BUILDTECH PVT. LTD. AND 3 ORS.
A REGISTERED PRIVATE LIMITED COMPANY
HAVING ITS REGISTERED OFFICE AT HOUSE NO. 2
SEWALI PATH
F.A. AHMED NAGAR
SIX MILE
GUWAHATI- 781022
KAMRUP (METRO), ASSAM
TO BE REPRESENTED BY ONE OF ITS AUTHORISED DIRECTOR VIZ. MD
MATLEBUDDIN AHMED.

2:MD. MATLEBUDDIN AHMED
S/O GIAS UDDIN AHMED
DIRECTOR
PURBANCHAL BUILDTECH PVT LTD.
A REGISTERED PRIVATE LIMITED COMPANY
HAVING ITS REGISTERED OFFICE AT HOUSE NO. 2
SEWALI PATH
SIXMILE, GUWAHATI- 781022
KAMRUP(M), ASSAM.

3:SANJAY KUMAR SINGH
S/O LATE BALRAM SINGH
R/O CHIRWAPATTY ROAD
P.O.- TINSUKIA
DIST.- TINSUKIA, ASSAM- 786125.

4:BIRMIWAL AND ASSOCIATES
CHARTERED ACCOUNTANTS
HEAD OFFICE- 404 COMMERCE HOUSE

A.T. ROAD
ATHGAON
GUWAHATI- 781001
KAMRUP(M)
ASSAM.

- For the Appellant(s) : Mr. B.D. Konwar, Senior Advocate Assisted by Mr. H. Agarwal, Advocate for the appellant in WA No.36/2024.
- : Mr. D. Nath, Senior Govt. Advocate, Assam for the appellants in WA No.49/2024.
- For the Respondent(s) : Mr. K.N. Choudhury, Sr. Advocate Assisted by Mr. R.M. Deka, Advocate for respondents in both the writ appeals.
- : Mr. D. Nath , Senior Government Advocate for respondent Nos.3 to 6 in WA No.36/2024.
- : Mr. B.D. Konwar, Senior Advocate assisted by Mr. H. Agarwal, Advocate for the respondent No.3 in WA No.49/2024.

Date of Hearing : 25.06.2024 & 25.07.2024.

Date of Judgment : 02.08.2024

- BEFORE -

**HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE SUMAN SHYAM**

JUDGMENT & ORDER

(CAV)

(Vijay Bishnoi, CJ)

1. Heard Mr. B. D. Konwar, learned senior counsel appearing for the appellant in WA No. 36/2024 and for the respondent No. 3 in WA No. 49/2024; Mr. D. Nath, learned Senior Government Advocate, Assam appearing for the appellants in WA No. 49/2024 and respondent Nos. 3 to 6 in WA No. 36/2024. Also heard Mr. K.N.

Choudhury, learned Senior Counsel, appearing for the respondents.

2. These writ appeals are filed by the appellants being aggrieved by the judgment and order dated 21.05.2024 passed by the learned Single Judge in WP(C) No. 3958/2023, whereby the writ petition filed on behalf of the respondent No. 1 (in short "company") has been allowed and the decision making process of the Bid Evaluation Committee leading to the rejection of the bid of the company has been set aside with the further direction to consider the financial bid filed by it and to allot the work in question to L-1 bidder in accordance with law.

Since both these appeals have been filed against the same impugned judgment and order, both these appeals have been heard together and are being disposed of by this common judgment and order.

3. The brief facts of the case are that the PWD (NH), Assam, had floated a Notice Inviting Tender (NIT) on 11.04.2023 inviting bids from the interested bidders for the work "*Periodic Renewal of Makum-Rupai Bypass from Km. 0.000 to Km 23.482 (L=23.482 Km) under ARP for 2022-23 under EPC Mode under Dibrugarh NH Division in the State of Assam. (Job No. TA/15/2022-23/266) Package No. PWD-NH(R)/DIB/2023-24/EPC/01*". In response to the said NIT, the company, the appellant in WA No. 36/2024 and four other bidders submitted their technical and financial bids.

4. Prior to the evaluation of the technical bids of the above referred bidders, the appellant in WA No. 36/2024 filed a complaint against the company and other, namely, M/s M.K. Hatibaruah & Co., alleging that both of them had not disclosed about their ongoing works and, as such they had violated the conditions mentioned in Clause No. 2.6.2 of the Request For Proposal (RFP) (Bid Document). The Technical Bid Evaluation Committee in its meeting held on 14.06.2023 evaluated the technical bids submitted by the bidders and declared the technical bid of 4 number of bidders, namely, M/s Tapan Dutta, Kaushal Sharma, M/s M.K. Hatibaruah and the company as non-responsive bids, however, declared the bids submitted by N.K. Agarwalla and Sanjay

Kumar Singh, the appellant in WA No. 36/2024, as responsive. In respect of the technical bid of the company, it is mentioned in the minutes of the meeting of the Technical Bid Evaluation Committee that the bid submitted by the company was declared as non-responsive because there was deliberate misrepresentation of facts by the company in violation of Clause 2.6.2 of the Request for Proposal (RFP) (Bid document).

5. Being aggrieved with the same, the company preferred the above referred writ petition contending that the company is a registered private limited company consisting of three Directors, namely, Md. Matlebuddin Ahmed, Babul Deka and Bhaskar Goswami, and after inception of the company on 02.06.2022, it was registered by the Chief Engineer, PWD (NH), Assam, as a Class-1(A) category contractor under PWD (NH) for the year 2020-2023. It was further contended in the writ petition that the registration of Md. Matlebuddin Ahmed as contractor was cancelled by the Chief Engineer, PWD (NH), Assam vide office order dated 21.07.2022 as per application submitted by him and, consequently, all works under PWD (NH), Assam, allotted to Md. Matlebuddin Ahmed were transferred in the name of the company.

6. It was also contended that thereafter the company got registered as a Class-1 (A) category contractor for the year 2022-2025 under PWD (Roads), Assam vide Registration Certificate dated 11.11.2022. However, no order of transferring of pending works in PWD (Roads) in the name of its director Md. Matlebuddin Ahmed was issued by the Chief Engineer PWD (Roads) Assam and, consequently, all the pending/existing works allotted to the proprietorship firm of Md. Matlebuddin Ahmed before incorporation and registration of the company remained outside the purview of the company and the said pending/existing works/commitments were being carried out by Md. Matlebuddin Ahmed in his individual risk and capacity and the company had nothing to do with the said works.

7. In the writ petition, it was the specific assertion of the company that the Tender Evaluation Committee, while declaring the technical bid of the appellant as non-responsive, relied upon some works pending with the PWD (Roads), existing in the name of Md. Matlebuddin Ahmed. However, the said works pending in the name of Md. Matlebuddin Ahmed in PWD (Roads) had never been transferred in the name of the company at any point of time, unlike the pending works in the PWD (NH), existing in the name of Md. Matlebuddin Ahmed had been transferred in the name of the company and, in such circumstances, the existing/pending works in the PWD (Roads), Assam, in the name of Md. Matlebuddin Ahmed had not been mentioned in the tender documents submitted by the company.

8. It was further contended that in spite of the said facts, the Technical Bid Evaluation Committee had declared the technical bid of the company as non-responsive on the ground that it had not disclosed the pending/existing works of its Director Md. Matlebuddin Ahmed. It was also contended that before declaring the technical bid of the company, the Technical Bid Evaluation Committee had not sought any clarification from the company.

9. In the writ petition, the company also raised the question about eligibility of the respondent No. 5, Sanjay Kumar Singh (appellant in WA No. 36/2024) contending that the respondent No. 5 had used only one and the same Unique Document Identification Number (UDIN) for multiple certificates generated on the same day, though each such certificate should have contained separate UDIN number. However, the learned Single Judge has not dealt with the said contention of the writ petitioners and, therefore, we need not deliberate upon the said aspect of the matter.

10. On the aforesaid premise, the company assailed the decision of the Technical Bid Evaluation Committee of declaring the bid of the company as non-responsive and prayed for setting aside the said decision with consequential reliefs, such as, to consider the financial bid submitted by it.

11. The claim of the company has been contested by the appellants, Sanjay Kumar Singh (WA No. 36/2024) and the State of Assam and others (WA No. 49/2024), who were arrayed as respondents in the writ petition, contending that as per the terms and conditions of the contract, the company was required to disclose all the ongoing commitments including the pending/existing works in the name of its Director Md. Matlebuddin Ahmed. It has been contended that while providing the details of "eligible projects" in the bid, the company had relied upon a work undertaken and concluded by its Director Md. Matlebuddin Ahmed and, therefore, as per Clause 2.2.1 of the Bid Document, the company was required to disclose all the ongoing commitments in the name of its Director Matlebuddin Ahmed for the purpose of demonstrating its bid capacity. It is further contended that by not disclosing the ongoing commitments, particularly, the works pending in PWD (Border Roads) in the name of its Director Md. Matlebuddin Ahmed, the company violated the condition No. 2.6.2 of the Bid Document, which speaks about misrepresentation on the part of a bidder.

12. With the said assertions, the appellants have defended the action of the Technical Bid Evaluation Committee of declaring the technical bid submitted by the company as non-responsive. In support of their contentions, the appellants have placed reliance on the Memorandum of Association of the company and the affidavit filed by its Director Md. Matlebuddin Ahmed, dated 15.07.2022, submitted with the Bid Documents. The appellant Sanjay Kumar Singh has also explained the matter regarding generation of multiple certificates with one UDIN number. Apart from that, the appellants have also contended that the company had not disclosed one of the works awarded to it by the PWD (Roads) in March, 2023 while submitting its bid in response to the NIT, though the said work had been awarded to it prior to the last date of submission of the bid, which means that the said work was pending when the bid was submitted by the company.

13. With regard to the contention of the appellants to the effect that though one work had been awarded in the name of the company by the PWD (Roads) on

10.03.2023 but the same was not disclosed by the company in the bid documents, the learned Single Judge has rejected the said contention on the ground that the Technical Bid Evaluation Committee did not declare the bid of the company as non-responsive on the ground that the respondent company had not disclosed about the work awarded to it on 10.03.2023, but on the allegation of non-disclosure of certain commitments, which were existing/pending in the name Md. Matlebuddin Ahmed, one of the Directors of the company.

14. The learned Single Judge has come to the conclusion that the three works, which the Technical Bid Evaluation Committee had taken into consideration, had been awarded by the PWD (Roads) to Md. Matlebuddin Ahmed, i.e. one of the Directors of the company, prior to incorporation of the company and the works so allotted to Md. Matlebuddin Ahmed had not been transferred to the company till the date of submission of the bid by the company.

15. Regarding the contention of the appellants herein that the company had not disclosed about the work allotted to it on 10.03.2023, the learned Single Judge has opined that the said contention cannot be taken into consideration in view of the law laid down by the Hon'ble Supreme Court in ***Commissioner of Police, Bombay vs. Gordhandas Bhanji***, reported in ***AIR 1952 SC 16*** and ***Mohinder Singh Gill vs. Chief Election Commissioner***, reported in ***AIR 1978 SC 851***, wherein it is held that when an authority takes a decision, the same cannot be construed in the light of the explanations subsequently given and the same is required to be construed objectively in the context of the language used.

We are perfectly in agreement with the said observations of the learned Single Judge, because the decision of the Technical Bid Evaluation Committee speaks about non-disclosure of all the pending/existing works awarded by the PWD (Border Roads) in the name of Md. Matlebuddin Ahmed, one of the Directors of the company and not about any other work awarded in the name of the company, and pending.

16. Negating the contentions raised on behalf of the respondents in the writ petition to the effect that it was obligatory on the part of the company to disclose in the bid documents about all the pending/existing works in the name of its Director, the learned Single Judge has concluded that it is trite law that a company is a separate juristic person with its own legal entity and the bidder for the work in question is a company. It is further observed by the learned Single Judge that the Director of a company is a separate legal entity and the works pending/existing in the name of the Director, which have not been specifically transferred in the name of the company, are not required to be disclosed and, as such, the decision of the Technical Bid Evaluation Committee in declaring the bid of the company as non-responsive on the allegation of misrepresentation is unreasonable.

17. So far as the contention of the respondents in the writ petition to the effect that when certain works in the name of Md. Matlebuddin Ahmed, one of the Directors of the company, had been disclosed by the company as a part of its credentials, the other three works awarded in the name of Md. Matlebuddin Ahmed should also have been disclosed, is concerned, the learned Single Judge has negated the said contention while concluding that the works which had been awarded in the name of its Director, Md. Matlebuddin Ahmed and had been disclosed by the petitioner No. 1 company in its bid documents, had already been officially transferred in the name of the company, whereas those three works in question continued to remain in the name of Md. Matlebuddin Ahmed and had not been officially transferred to the company.

18. The learned Single Judge has also concluded that the bid capacity of the respondent company is Rs. 55.65 Crore whereas the required bid capacity for the work in question is Rs. 19.29 Crore and, as such, it would not affect the required bid capacity.

19. The learned Single Judge has further observed that the financial bid of the respondent company is significantly less than that of the private respondent No. 5

(appellant in WA No. 36/2024) and, therefore, element of public interest is also involved and this aspect, which is also relevant, cannot be overlooked.

20. Assailing the order impugned, the learned counsel appearing for the appellants have vehemently submitted that the learned Single Judge has erred in observing that the company had no obligation to disclose the three ongoing/pending/existing works in the name of its Director while submitting its bid in response to the NIT. It is contended that when some ongoing/pending/existing works in the name of its Director, Md. Matlebuddin Ahmed have been relied upon by the respondent company while providing details of "eligible projects", it cannot be said that all the works pending in the name of its Director, Md. Matlebuddin Ahmed, are not required to be disclosed to demonstrate the bid capacity of the respondent company. Learned counsel for the appellants have submitted that the learned Single Judge has ignored the relevant clause of the Memorandum of Association of the company, according to which all the credentials technical, financial, experimental, managerial and whatsoever of its Director Md. Matlebuddin Ahmed have to be counted for the company for the purpose of fresh bids and contracts under Assam PWD (Roads), Assam PWD (Building), Assam PWD (NH Works), National Highway Authority of India, etc. in which Md. Matlebuddin Ahmed has worked in earlier years.

21. Inviting our attention towards the affidavit dated 15.07.2022 filed by Md. Matlebuddin Ahmed, one of the Directors of the company, submitted with the bid documents, it is contended by the learned counsel for the appellants that in the said affidavit Md. Matlebuddin Ahmed has made a declaration that all its existing assets and liabilities will stand transferred to the company. Learned counsel for the appellants has also relied upon a certificate issued by the concerned Chartered Accountant in conformity with the affidavit of Md. Matlebuddin Ahmed, Director of the company.

22. It is also contended by the learned counsel for the appellants that the learned Single Judge has erred in observing that the works which existed in the name Md.

Matlebuddin Ahmed, Director of the company, and were relied upon by the company as part of its credentials, had been officially transferred in the name of the company. However, the work in the name of Md. Matlebuddin Ahmed, which had been relied upon by the company while providing details of "eligibility projects", had never been transferred to the company at any point of time, because the said work had been completed in March, 2021 itself, whereas the company was incorporated only in the year 2022.

23. Learned counsel for the appellants have also argued that the learned Single Judge has erred in taking into consideration the fact that the financial bid of the company was significantly less than that of the respondent No. 5 and coming to the conclusion that this aspect is relevant and cannot be overlooked. It is contended that the Hon'ble Supreme Court has categorically held that price need not always be the sole criterion for awarding contract and, therefore, the learned Single Judge has erred in allowing the writ petition and, in such circumstances, the impugned judgement cannot be sustained and the same is liable to be dismissed.

24. Learned counsel for the appellants have further argued that the Hon'ble Supreme Court in various pronouncements has categorically held that the High Court, while exercising powers under Article 226 of the Constitution, should refrain from interfering in the matters of grant of tender unless a case of arbitrariness, *mala fide* or bias is made out. It is also submitted that in the present case the respondent Nos. 1 and 2 have failed to demonstrate that there is arbitrariness, *mala fide* or bias in the action of the State.

In support of the above contention, learned counsel for the appellants have placed reliance on the decisions rendered by the Hon'ble Supreme Court in the following cases:

1. **N.G. Projects Ltd. Vs. Vinod Kumar Jain & Ors.**, reported in (2002) 6 SCC 127;

2. **National High Speed Rail Corporation Vs. Montecarlo Limited & Anr.**, reported in (2022) 6 SCC 401;
 3. **Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors.**, reported in 2023 SCC OnLine SC 671;
 4. **Agmatel India Private Limited Vs. Resoursys Telecom & Ors.**, reported in (2022) 5 SCC 362;
 5. **Jagdish Mandal Vs. State of Orissa**, reported in (2007) 14 SCC 517;
 6. **Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited & Anr.**, reported in (2016) 16 SCC 818;
 7. **Central Coalfields Limited Vs. SLL-SML (Joint Venture Consortium)**, reported in (2016) 8 SCC 622;
 8. **G.J. Fernandez Vs. State of Karnataka**, reported in (1990) 2 SCC 488;
 9. **Uflex Limited Vs. Government of Tamil Nadu & Ors.**, reported in (2022) 1 SCC 165;
 10. **Galaxy Transport Agencies, Contractors, Traders, Transports & Suppliers Vs. New J.K. Roadways, Fleet Owners & Transport Contractors**, reported in (2021) 16 SCC 808.
 11. **Silpi Constructions Contractors Vs. Union of India & Anr.**, reported in (2020) 16 SCC 489;
 12. **Bharat Coking Coal Ltd. Vs. AMR Dev Prabha**, reported in (2020) 16 SCC 759;
 13. **Montecarlo Ltd. Vs. NTPC Ltd.**, reported in (2016) 15 SCC 272;
 14. **Tata Cellular Vs. Union of India**, reported in (1994) 6 SCC 651.
25. Per contra, learned counsel appearing for the company has submitted that there is no illegality in the impugned judgment passed by the learned Single Judge and the learned Single Judge has rightly noticed that the three works, which had been taken into consideration by the Technical Bid Evaluation Committee while declaring the bid submitted by the company as non-responsive, were in the name of Md.

Matlebuddin Ahmed in his individual capacity and the said works had not been transferred to the respondent company by the concerned authority.

26. It is further argued that the learned Single Judge has also rightly come to the conclusion that Md. Matlebuddin Ahmed, one of the Directors of the company, is a separate legal entity and, therefore, certain works pending/existing in the name of the said Director cannot be termed as the pending/existing works of the company.

27. It is contended that non-disclosure of the three works, existing in the name of Md. Matlebuddin Ahmed, cannot be termed as fatal and the conclusion arrived at by the learned Single Judge in setting aside the decision of the Technical Bid Evaluation Committee of declaring the bid of the company as non-responsive is not liable to be interfered with.

28. Learned counsel has further argued that it is an admitted position that the price quoted by the company in its financial bid is significantly less than that of the appellant Sanjay Kumar Singh and, in such circumstances, the said aspect is relevant and cannot be overlooked.

29. Learned counsel for the company has further argued that though the Technical Bid Evaluation Committee has not declared the technical bid submitted by the respondent company as non-responsive on the ground that it had not disclosed a work awarded to it in March, 2023, the appellants have attempted to justify the action of the Technical Bid Evaluation Committee contending that all the works pending/existing in the name of the respondent company had not been disclosed, however, the learned Single Judge has rightly negated the said contention on the ground that the appellants cannot justify their action by supplementing reasons which have not been reflected in the order under challenge before the writ Court.

30. Learned counsel for the company has therefore argued that there is no illegality in the impugned judgment and the same is not liable to be interfered with. In support of his above contentions, the learned counsel for the company has placed reliance on

the decisions rendered by the Hon'ble Supreme Court in the following cases:

- (i) ***New Horizons Limited vs. Union of India, reported in (1995) 1 SCC 478.***
- (ii) ***Tata Cellular vs. Union of India, reported in (1995) 1 SCC 478.***
- (iii) ***Mohindhr Singh Gill vs. Chief Election Commissioner, reported in (1978) 1 SCC 405.***
- (iv) ***Commissioner of Police vs. Gobardhan Bhanji, reported in AIR 1952 SC 16.***
- (v) ***S. R. Venkataraman vs. Union of India, reported in (1979) 2 SCC 491. 25.***

31. We have considered the submissions advanced by the learned counsel for the parties and also perused the material available on record.

32. As observed earlier, the company had taken a specific stand before the writ court that it was not obligatory upon the company to disclose those works existing/pending in the name of its Director Md. Matlebuddin Ahmed which had not been transferred in the name of the company, as had been done by the Chief Engineer, PWD (NH) in respect of some other works pending/existing in the name of Md. Matlebuddin Ahmed.

33. At the same time, the company has tried to justify its reliance on a work assigned to its Director, Md. Matlebuddin Ahmed, in the details of "eligible projects", stating that the company was incorporated on 02.06.2022 with no past experience and, therefore, the experience of completed works assigned to its Director Md. Matlebuddin Ahmed was relied upon by the company while submitting its bid and the said course is permissible in law.

34. Having taken into consideration the above fact situation, we are of the view that the company cannot blow hot and cold at the same time. If the company had placed reliance on the past experience of its Director to demonstrate its capacity to

execute the work for which the NIT was issued, the company was also obliged to disclose all the existing commitments of its said Director to demonstrate its capability to execute the work satisfactorily.

35. It is interesting to note that the company, despite taking the specific stand that it had no obligation to disclose the works which were pending/existing in the name of one of its Director Md. Matlebuddin Ahmed, because those works were being executed by him in his individual capacity, in order to demonstrate its capacity to execute the work for which the NIT was issued, the company has relied on two works mentioned at Sl. Nos. 1 and 2 in Annexure-VI, Appendix (IA), which existed in the name of its Director Md. Matlebuddin Ahmed and executed by him. This fact is evident from the following averments made on behalf of the respondents in an affidavit filed in reply to the affidavit-in-opposition filed by the respondent Nos. 1, 2 and 4 in the writ petition:

“.... It is stated that in respect of two numbers of works i.e., (a) Construction of new bridge over river Kuthori (Br. No.352/1) on NH-715 (Old NH-37) under EPC mode under Nagaon NH Division, Nagaon in the State of Assam. (Job No. 1 BR. 352/1/AS/2021-22/222), and (b) Construction of new bridge over river Kumati (br. No.397/1) including sub way bridge and approaches on NH-52 (Now NH No.15) under Nagaon NH Division, Nagaon in the State of Assam the respondent No.2 are still making payment to the petitioner No.2. It is stated that although the payments of bills in respect of aforesaid two numbers of works have been made in favour of the petitioner No.2, however, the petitioners in the good faith have shown aforesaid two numbers of works as ‘ongoing project’ in the bid submitted by the petitioner No.1 Company.”

36. Apart from that, while submitting its bid, the company had furnished a copy of its Memorandum of Association along with its bid documents and had also enclosed a copy of the notarised affidavit sworn by its Director Md. Matlebuddin Ahmed, which are available on record. In the said Memorandum of Association as well as the affidavit of Md. Matlebuddin Ahmed, it is clearly mentioned that consequent upon formation of the company, all the credentials, technical, financial, experimental, managerial and whatsoever of its Director Md. Matlebuddin Ahmed shall be counted in the credit of the company. Moreover, in the said notarised affidavit, Md. Matlebuddin Ahmed, the

Director of the company has further mentioned that "*all my existing assets and liabilities along with loans, working capital limit, equipment, finance, vehicle loan or any other will be transferred to newly incorporated company....*"

37. Another fact relevant to our view is that while giving details of works to demonstrate its bid capacity under the Head "Bid Capacity" (Clause 2.2.2.1), the company had provided certain information mentioned at Annexure-VI, Appendix (IA) with a declaration that none of the ongoing works mentioned in the Statement, which had been awarded to Md. Matlebuddin Ahmed, the Director of the company, had been left. The aforesaid declaration is reproduced hereunder:

"The statement showing the value of all existing commitments, anticipated value of work to be completed in the period of construction of the project for which bid is invited and ongoing works as well as the stipulated period of completion remaining for each of the works mentioned above is verified from the certificate issued that has been countersigned by the Client or its Engineer-in-charge not below the rank of Executive Engineer or equivalent in respect of EPC Projects or Concessionaire/Authorised Signatory of SPV in respect of BOT projects. No awarded/ongoing works has been left in the aforesaid statement which has been awarded to M/s Md Matlebuddin Ahmed, Director of Purbanchal Buildtech Pvt Ltd. individually/ and other member M/s..... and M/s.....as on bid due date of this RFP."

38. From the above, it is evident that though a declaration was given by the respondent company that no ongoing/awarded work had been left, which had been awarded to its Director Md. Matlebuddin Ahmed in his individual capacity, the company did not disclose all the ongoing/pending works awarded to its said Director.

39. Learned counsel for the appellants have rightly submitted that the learned Single Judge has erred in negating their contention that the work which had been relied upon by the company as a part of its credentials, had been officially transferred in its name. In our view, the said finding is factually incorrect because in the details of "eligible projects", the company relied on a work assigned and completed by its Director Md. Matlebuddin Ahmed way back on 31.03.2021, whereas the company itself was incorporated on 02.06.2022.

40. In the above facts and circumstances of the case, we are of the considered opinion that the Technical Bid Evaluation Committee did not commit any illegality in declaring the bid submitted by the company as non-responsive on the ground that the company had not disclosed all of its existing/ongoing works and this amounted to deliberate misrepresentation of facts, rendering the company liable to be disqualified as per Clause 2.6.2 of the RFP (Bid document).

41. It is settled by various pronouncements of the Hon'ble Supreme Court that the High Court, while exercising powers under Article 226 of the Constitution of India, should refrain itself from interfering in the matters of grant of contract until and unless a case of arbitrariness, *mala fide* or bias is made out. In the case of **N.G. Projects Ltd. Vs. Vinod Kumar Jain & Ors.**, reported in **(2002) 6 SCC 127**, the Hon'ble Supreme Court has even held to the extent that even if a case of arbitrariness or *mala fide* is made out, still the Court should refrain from interfering in the matters of grant of tender but instead relegate the parties to seek damages for the wrongful exclusion. The relevant portion of the aforesaid judgment is reproduced hereunder:

“23. If the Court finds that there is total arbitrariness or that the tender has been granted in a *mala fide* manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.”

42. In the present case, the Technical Bid Evaluation Committee came to the conclusion that as per the conditions mentioned in the bid documents, the company was required to disclose all the ongoing works, be it in the name of one of its Directors. We are of the view that even if the said interpretation of the Technical Bid Evaluation Committee is not acceptable, then also that by itself it would not be a reason for interfering with the interpretation.

43. In **Agmate India Private Limited Vs. Resoursys Telecom & Ors.**, reported in **(2022) 5 SCC 362**, the Hon'ble Supreme Court has laid down a relevant principle in relation to interpretation of tender document. The relevant portion of **Agmate India Private Limited** (supra) is reproduced hereunder:

“24. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject-matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the three-Judge Bench decision of this Court in Galaxy Transport Agencies [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] wherein, among others, the said decision in Afcons Infrastructure [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment.

25. This Court referred to various decisions on the subject and stated the legal principles as follows : (Galaxy Transport Agencies case [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035], SCC paras 14-20)

“14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818], this Court held : (SCC p. 825, para 15)

‘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.’

15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha [Bharat Coking Coal Ltd. v. AMR Dev Prabha, (2020) 16 SCC 759], under the heading “Deference to authority's interpretation”, this Court stated

: (SCC p. 776, paras 50-52)

'50. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent 1 seeks to only enforce terms of NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

51. In the present facts, it is clear that BCCL and C1-India have laid recourse to clauses of NIT, whether it be to justify condonation of delay of Respondent 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818]

52. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.'

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489], this Court held as follows : (SCC pp. 501-02, para 20)

'20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.'

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the NIT For this reason, the Division Bench's conclusion

[*New JK Roadways v. State (UT of J&K)*, 2020 SCC OnLine J&K 733] that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the appellant before us. **Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court.** Thus, in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517], this Court noted : (SCC pp. 531-32, para 22)

'22. 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. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.'

19. Similarly, in *Montecarlo Ltd. v. NTPC Ltd.* [Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272], this Court stated as follows : (SCC p. 288, para 26)

'26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. **But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible.** The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.'

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own."

(italicised matter emphasised in the original; emphasis in bold italics supplied)

26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.” **(Emphasis supplied)**

44. The other judgments, on which the learned counsel for the appellants have placed reliance, also pronounce that in the matters of grant of tender the Court should not interfere in a routine matter. In the case of *The Silppi Constructions Contractors Vs. Union of India & Anr. Etc. Etc.*, reported in (2020) 16 SCC 489, the Hon'ble Supreme Court, after taking note of the earlier decisions rendered in Tata Cellular Vs. Union of India, (1994) 6 SCC 651; Raunaq International Ltd. Vs. I.V.R. Construction Ltd., (1999) 1 SCC 492; Air India Limited Vs. Cochin International Airport Ltd., (2000) 2 SCC 617; Karnataka SIIDC Ltd. Vs. Cavalet India Ltd., (2005) 4 SCC 456; Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138; B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd., (2006) 11 SCC 548; Jagdish Mondal Vs. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. Vs. State of Karnataka, (2012) 8 SCC 216; Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818; Montecarlo Vs. NTPC Ltd, AIR 2016 SC 4946; Municipal Corporation, Ujjain Vs. BVG India Ltd., (2018) 5 SCC 462; and Caretel Infotech Limited Vs. Hindustan Petroleum Corporation Limited, 2019 (6) SCALE 70, has held in paragraphs 19 and 20 as under:

“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of

judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. *The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity."*

45. The learned Single Judge, while interfering with the decision of the Technical Bid Evaluation Committee, has observed that the financial bid of the company is significantly less than that of the appellant Sanjay Kumar Singh and, therefore, element of public interest is also involved and this aspect is also relevant and cannot be overlooked. In this regard, it is apposite to refer to the judgment rendered by the Hon'ble Supreme Court in the case of **Raunaq International Ltd. Vs. I.V.R.**

Construction Ltd., (1999) 1 SCC 492, wherein the Hon'ble Supreme Court, while considering the aspect of the price quoted in the bid in the matter of awarding contract, has held as under:

“16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.”

Later, the Hon'ble Supreme Court in **Air India Limited** (supra) has again reiterated that price need not always be the sole criteria for awarding contract.

46. So far as the judgments rendered by the Hon'ble Supreme Court in the cases of **Gordhandas Bhanji**, (supra) and **Mohinder Singh Gill** (supra), on which the learned counsel for the company has placed reliance, are concerned, the Hon'ble Supreme Court in the said judgments has laid down that an authority cannot justify its action by furnishing supplementary reasons. However, since we have already clarified that we are in agreement with the view taken by the learned Single Judge that for justifying their decision the appellants cannot rely on a fact which had not been considered by the action taking authority while taking such decision, no further deliberation is required on this aspect.

47. The decision rendered by the Hon'ble Supreme Court in the case of **New Horizons Limited** (supra), on which the counsel for the company has placed reliance, is also of no help to the company because the bid submitted by the company had not been declared as non-responsive by the Technical Bid Evaluation Committee by not taking into consideration the experience gained by one of its Directors.

48. So far as the judgment rendered by the Hon'ble Supreme Court in **Tata Cellular** (supra) is concerned, there is no quarrel that the decision of a decision making authority in contractual matters is always subject to judicial review, but such judicial review is limited and open only in those cases where arbitrariness, *mala fide* or bias in the action of the decision making authority is apparent, and the same is the law at present.

49. In view of the above discussions, we are of the view that the impugned judgment passed by the learned Single Judge cannot be sustained and the same is, therefore, set aside. Resultantly, the writ petition filed on behalf of the company stands dismissed.

50. These writ appeals stand disposed of with the above observations.

No order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant