



AFR IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.5790 of 2024 & W.P.(C) No. 5535 of 2024

In Both Writ Applications

***M/s. Nanda Infra Construction Pvt. Ltd.,
represented by its Managing Director, Dilip
Kumar Nanda, S/o- Anukul Nanda, aged
about 56 years, At/College Road, P.O. South
Balanda, Dist- Anugul***

....

Petitioner

-versus-

***1. State of Orissa, represented by the
Secretary, Works Department, Secretariat,
AT- Bhubaneswar, Dist- Khurda***

***2. Engineer-in-Chief (Civil), Odisha,
Nirman Soudha, Kesharinagar, Unit-V,
AT/PO- Bhubaneswar-751001, Dist- Khurda***

***3. Chief Engineer (DPI & ROADS),
Odisha, Nirman Soudha, Kesharinagar, Unit-
V, AT/PO- Bhubaneswar- 751001, Dist-
Khurda***

***4. Executive Engineer (Civil), Office of
the Engineer-in-Chief (Civil), Odisha,
Nirman Soudha, Kesharinagar, Unit-V,
AT/PO- Bhubaneswar- 751001, Dist- Khurda***

***5. Financial Advisor-cum-Special
Secretary to Govt., Works Department,
Odisha, Nirman Soudha, Kesharinagar, Unit-
V, AT/PO- Bhubaneswar- 751001, Dist-
Khurda.***

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Opposite Parties



For the Petitioner : Mr. K.B. Panda, Advocate and Mr Shounak Kumar Panda

For Opposite Parties : Mr. Pitambar Acharya, Advocate General with Ms. A. Dash Additional Standing Counsel

CORAM:

HON'BLE THE CHIEF JUSTICE

HON' BLE MS JUSTICE SAVITRI RATHO

HON'BLE MR JUSTICE SIBO SANKAR MISHRA

JUDGMENT

15.01.2025

Savitri Ratho, J. For an authoritative pronouncement, the following questions had been referred to larger Bench on 18.11.2024 by a Division Bench of this Court in these two writ applications:

*“i.) Whether the observations made by the Supreme Court in paragraph-8 of the decision in **Mohinder Singh Gill vs The Chief Election Officer: AIR 1978 SC 851** has application to test the correctness of a purely administrative order by an authority, which is State within the meaning of Article-12 of the Constitution of India, cancelling a tender process before acceptance of the bid of a tenderer?”*



ii.) *Whether there is any requirement of giving an opportunity of hearing or prior notice to the highest / lowest bidder, before cancellation of tender notice keeping in mind the settled legal position that such bidder does not acquire any vested right to have the auction confirmed in his favour on that basis alone?*

iii.) *Whether the Supreme Court decision in case of **Sudhir Kumar Singh** (supra) on the point of compliance of principles of natural justice is applicable when a tender process is cancelled prior to confirmation of tender / auction in favour of a bidder?*

iv.) *Whether the Division Bench in case of **M/s. Bansal Infraprojects Pvt. Ltd** (supra) has correctly applied the Supreme Court's decision in case of **Sudhir Kumar Singh** (supra)?*

v.) *Whether it is permissible for the High Court exercising power of judicial review under Article 226 of the Constitution of India to direct the State or its instrumentalities to accept the bid of the lowest/highest bidder, upon interfering with the order of cancellation of tender on the ground of violation of principles of natural justice or such order not being a reasoned one?"*



2. The petitioner in both these writ applications challenged the notice dated 01.03.2024 issued by the opposite party No 2 - Engineer in Chief (Civil) Odisha, cancelling the Invitation for Bids (in short “IFB”) dated in respect of two works, issued by the opposite party No. 2 on 17.08.2023 for execution of various works and has prayed for a direction that the two works in which the petitioner has been declared as L1 (lowest) bidder, be awarded in its favour.

BRIEF FACTS

3. For execution of various works including “improvement such as widening and strengthening of double lane to four lane standard of Bhawanipatna / Khariar road from 3/550 KM to 19/000 KM (except 3/930KM to 4/970KM) in the district of Kalahandi under State Plan”, the petitioner had participated in the Bids and had qualified along with other bidders in the technical qualification. When the financial bids were opened on 09.11.2023 , the petitioner was declared L1 bidder in respect of two works. A recommendation was made by the Office of the Engineer-in-Chief (Civil), Odisha on 23.11.2023 to the Financial Advisor-cum-Special Secretary to Government, Works Department, Odisha for consideration of



approval by the Government in the Works Department as per the requirement in Note-I of paragraph 6.3.15 of the Odisha Public Works Department Code (in short the 'OPWD Code') (Vol-I). But by notice dated 01.03.2024, the IFB in respect of both the works were cancelled.

4. The petitioner challenged the cancellation notices dated 01.03.2024, in these two writ applications , primarily on two grounds:

i) Opportunity of hearing was not afforded to it before cancelling the IFB for the two works; and

ii) The grounds of cancellation were not reflected in the order of cancellation the IFB for the two works.

5. While hearing these cases on 17.11.2024, a Division Bench of this Court after perusing the decisions of the Supreme Court relied on by the parties and a few other decisions , had recorded its disagreement with the decisions of this Court in *Shree Ganesh Construction , Gangadhar Jena, Sampad Samal , Sical Logistics Ltd , Mackintosh Burn Ltd., Kolkata* and *Bansal Infraprojects Pvt. Ltd., Bolangir* , relied on by the learned counsel for the petitioner , for which it referred the questions mentioned in paragraph 1 of this judgment to a larger Bench , after observing as follows:-



*“ i.) The observations made by the Supreme Court in paragraph 8 of the **Mohinder Singh Gill** (supra) do not apply to a purely administrative decision cancelling a notice inviting tender by an authority taken before the decision making process for award of tender is over, with the acceptance of the bid of a successful bidder by a competent authority leading to inter-parte mutual contractual obligations, unless such decision takes away any vested right of a party.*

ii.) There is no necessity of giving an opportunity of hearing or a prior notice before cancellation of tender notice to the highest/lowest bidder or any other successful bidder as such bidder does not acquire any vested right to have the auction confirmed in his favour on that basis alone;

*iii.) The decision rendered by the Supreme Court in the case of **Sudhir Kumar Singh** (supra) on the point of compliance of principles of natural justice is not applicable*



when a tender notice is cancelled prior to confirmation of the tender/auction in favour of a bidder;

iv.) In any case, even if the Court interferes with the decision of the competent authority to cancel the tender notice, exercising power of judicial review, ordinarily it should not direct the authority to approve the tender submitted by a successful bidder, in view of the law laid down by the Supreme Court;”

SUBMISSIONS

6. We have heard Mr. K.B. Panda learned counsel for the petitioner and Mr. Pitambar Acharya learned Advocate General along with Ms. Aishwariya Dash learned Additional Counsel .

PETITIONER

7. Mr.K.B. Panda learned counsel for the petitioner has fairly admitted that no direction could have been issued by this Court in exercising power / discretion under Article – 226 of the Constitution of India to award the tender /accept the bid of any particular bidder but has urged that the



petitioner being the L1 bidder and its cases having been recommended , it should have been heard before the IFB was cancelled. On account of violation of the principles of natural justice, the orders of cancellation are liable for interference. He has also submitted that the order of cancellation is liable for interference as no reasons have been mentioned in the order. The explanation offered in the counter affidavit subsequently cannot be accepted as valid reasons in view of the authoritative pronouncement of the Supreme Court in the case of *Mohinder Singh Gill* (supra) which has been relied upon in a number of decisions of this Court starting with *Ganesh Construction* (supra).

7.1. In support of his submission that opportunity of hearing was not given before cancelling the IFB for the two works in which the petitioner had been declared as L1 bidder , Mr. K.B. Panda, learned counsel for the petitioner has relied on the following decisions:

i) *M/s. Shree Ganesh Construction v. State of Odisha: 2016*

(II) OLR 237;

(ii) *Gangadhar Jena v. State of Odisha: 2017 (II) ILR-CUT*

763;



(iii) *Sampad Samal v. State of Odisha; AIR 2017 ORISSA 33;*

(iv) *M/s. Sical Logistics Ltd. v. Mahanadi Coalfields Limited: 2017 (II) ILR- CUT 1035;*

(v) Order dated 01.05.2024 passed in W.P.(C) No.1309 of 2024 (*M/s. Mackintosh Burn Ltd., Kolkata v. State of Odisha and others*);

(vi) Order dated 24.06.2024 passed in W.P.(C) No.334 of 2024 (*M/s. Bansal Infraprojects Pvt. Ltd., Bolangir v. State of Odisha and others*).;and

(vii) *The State Of Uttar Pradesh vs Sudhir Kumar Singh : (2021) 19 SCC 706 .*

7.2. In support of his submission that the order of cancellation is liable for interference as being bereft of reasons and reasons furnished subsequently cannot be considered , Mr K.B. Panda , learned counsel had relied on the following decisions of the Supreme Court : -



- i) *Mohinder Singh Gill vs. The Chief Election Commissioner: (1978) 1 SCC 405 : AIR 1978 SC 851; and*
- ii) *Commissioner of Police, Bombay v. Gordhandas Bhanji: AIR 1952 SC 16.*
- iii) *State of Punjab vs Bandeep Singh and others (2016) 1 SCC 724*
- iv) *The D.F.O , South Kheri vs Ram Sanehi Singh : AIR 1973 SC 205 : (1971) 3 SCC 864 .*

OPPOSITE PARTIES

8. Mr Pitambar Acharya , learned Advocate General appearing for the opposite parties had submitted that Government in the Works Department had requested to re-examine and submit a report regarding the condition of the road for which IFB had been published as the road in question had earlier been developed under World Bank Assisted Odisha State Road Projects. Upon re-examination and during the visit of the Principal Secretary, Engineer-in-Chief (Civil), Odisha and other officials, it was decided to take up four lane work of the total length after



availability of encumbrance free land. Accordingly, a proposal was made to cancel the IFB and the IFB was consequently cancelled.

8.1 He has submitted that as no enforceable right had accrued in favour of the petitioner even though it was the L1 bidder, it was not necessary to grant an opportunity of hearing to it, before cancelling the IFB for the work. In support of such submission, he relied on the decisions of the Supreme Court in the cases of :-

- i) *Laxmikant v. Satyawan: (1996) 4 SCC 208,*
- ii) *M/s. Master Marine Services Pvt. Ltd. v. Metcalfe & Hodgkinson Pvt. Ltd.: (2005) 6 SCC 138*
- iii) *Rajasthan Housing Board And Another vs G.S. Investments And Another : 2007 (1) SCC 477*
- iv) *Jagdish Mandal v. State of Odisha: (2007) 14 SCC 517,*
- v) *U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma: (2013) 5 SCC 182,*
- vi) *Maa Binda Express Carrier And Anr vs Northeast Frontier Railway And Ors: 2014 (3) SCC 760*



vii) *Rishi Kiran Logistics P. Ltd v. Board of Trustees of Kandla Port Trust: (2015) 13 SCC 233* ,

viii) *State of U.P. vs AL Faheem Meetex Private Ltd : (2016) 4 SCC 716*

ix) *State of Jharkhand vs CWE-Soma Consortium vs : (2016) 14 SCC 172,*

8.2 The learned Advocate General has submitted that the principle laid down in the case of *Mohinder Singh Gill (supra)* and *Gordhandas Bhanji (supra)* had been wrongly applied by the Division Bench of this Court in case of *M/s. Shree Ganesh Construction (supra)* , *Sical Logistics (supra)* and other Division Bench decisions of this Court relied on by learned counsel for the petitioner as the order of cancellation is a purely administrative order .

8.3 Relying on the decision of *Maa Binda (supra)* and *Rishi Kiran Logistics (supra)* , he has submitted that the law has been settled by the Supreme Court in a catena of judgments that reasons are not necessary to be mentioned in the order and the bidder was not required to be heard , where no enforceable right had accrued in its favour . He has submitted that in the case of *Bandeep Singh* , the successful bidder had made



deposit of part of the bid money and in the case of **Ram Sanehi Singh** , pursuant to order and sanction of the authorities , the bidder had cut and removed part of the timber .

8.4 Mr. Pitambar Acharya, learned Advocate General has further submitted that the power of judicial review in tender matters is restricted as the court cannot substitute its decision with that of experts and should normally not interfere with a decision either awarding a contract or cancelling a tender unless the decision is arbitrary or smacks of *malafides*. The connected files / notesheets can be looked into by the Court , if the situation demands. He has also submitted that in the absence of a concluded contract , no right accrues on any bidder even if his / her / its bid is the lowest or highest as the case may be . Therefore there is no necessity of hearing such bidder before cancellation of a tender / IFB. He has finally submitted that the decision in the case of **Mohinder Singh Gill** (supra) will not be applicable to all administrative decisions / or orders of the State .

ANALYSIS



9. The law declared by the Supreme Court is binding on all the Courts but keeping in mind the *ratio decidendi* of a decision . The Supreme Court itself has cautioned the High Courts in a number of cases that its judgments and the law declared should not be applied mechanically but after due examination of the facts and circumstances of the case. In the case of ***Delhi Administration (Now NCT of Delhi) v. Manohar Lal, (2002)7 SCC 222,*** the Supreme Court has held as under:-

"5. We have carefully considered the submissions of the learned counsel appearing on either side. Apparently, the learned Judge in the High Court was merely swayed by considerations of judicial comity and propriety and failed to see that merely because this Court has issued directions in some other cases, to deal with the fact situation in those other cases, in the purported exercise of its undoubted inherent and plenary powers to do complete justice, keeping aside even technicalities, the High Court, exercising statutory powers under the criminal laws of the land, could not afford to assume to itself the powers or jurisdiction to do the same or similar things. The High Court and all other courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them....."



10. In the case of Bhavnagar University vs Palitana Sugar Mills Pvt Ltd :
, the Supreme Court has held as follows :

“A decision, as is well-known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well-settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Smt. Ram Rakhi v. Union of India & Ors. [AIR 2002 Delhi 458], Delhi Administration (NCT of Delhi) v. Manoharlal [AIR 2002 SC 3088], Haryana Financial Corporation and Anr. v. M/s Jagdamba Oil Mills & Anr. [JT 2002 (1) SC 482] and Dr. Nalini Mahajan etc. v. Director of Income Tax (Investigation) & Ors. [(2002) 257 ITR 123].

11. In the case of **ICICI Bank & Anr. v. Municipal Corporation of Greater Bombay & Ors.:** (2005)6 SCC 404 , the Supreme Court relied upon the decision in **Paisner v. Goodrich, (1955)2 All ER 530, (All ER at p.332 H-1)** and observations of Lord Denning held as under :-

“The ratio and effect of the judgment is required to be ascertained with reference to the question of law as decided by the Court. The ratio of the judgment or the principle upon which the question before the Court is decided is alone binding as a precedent. The decision of the Supreme Court upon a question of law is considered to be a binding precedent, and this must be ascertained and determined by analyzing all the material facts



and issues involved in the case. In the matter of Paisner versus Goodrich (1955) 2 All ER 330,332, Lord Denning in his Judgment has held:

"When the judges of this Court give a decision on the interpretation of an Act of Parliament, the decision itself is binding on them and their successors: see Cull v. IRC, (1939)3 All ER 761, Morelle Ltd. v. Wakeling, (1955)1 All ER 708. But the words which the judges use in giving the decision are not binding. This is often a very fine distinction, because the decision can only be expressed in words. Nevertheless, it is a real distinction which will best be appreciated by remembering that, when interpreting a statute, the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Wherever a new situation emerges, not covered by previous decisions, the courts must be governed by the statute and not by the words of the judges."

12. In the case of ***R.L. Jain (D) By Lrs. v. DDA & Others: (2004)4 SCC 79***, the Supreme Court has held that that:-

“ a decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made therein”.

Necessity of recording reasons in the order / Furnishing reasons subsequently .

13. In the case of ***Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16***, the Apex Court held as follows:



"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

*Similar view has also been taken in **Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another**, (2008) 4 SCC 144."*

14. In the case of **Mohinder Singh Gill** (*supra*), the Election Commission of India had cancelled the entire poll of a parliamentary constituency in the State of Punjab and Haryana with a direction to have a fresh poll for the poll constituency. The writ petition was filed before the High Court of Punjab and Haryana and was dismissed referring to the embargo under Article 329(b) of the Constitution of India. Pursuant to the Commission's direction, a repoll was held and a candidate was declared elected. An election petition was also filed by the petitioner and in the writ petition, the Election Commission had filed a counter affidavit stating that



the order of cancellation of polling was passed after taking into account the circumstances and the information including the oral representation of the appellant before the Supreme Court. The High Court had dismissed the writ petition holding that it had no jurisdiction to entertain the same.

15. The Supreme Court in paragraph 7 and 8 of its order after having noticed that pursuant to the repoll, the respondent no.3 had won the election, held that High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitution of India , and further held as follows:

“7. x x x Of course, if the Commission's order for re-poll fails in law, the second electoral exercise has to be dismissed as a stultifying futility. Two things fall to be mentioned at this stage, but, in passing, it may be stated that the third respondent had complained to the Chief Election Commissioner that the assistant returning officer of Fazilka segment had declined the request for recount unreasonably and that an order for re-poll of the Fazilka assembly part should be made 'after giving personal hearing'. Meanwhile, runs the request of the third respondent: 'direct the returning officer to withhold declaration of result of 13 Ferozepore Parliament constituency'. We do not stop to make inference from this document but refer to it as a material factor



which may be considered by the tribunal which eventually has to decided the factual controversy.”

*“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In **Gordhandas Bhanji (AIR 1952 SC 16)** (at p. 18):*

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".

Orders are not like old wine becoming better as they grow older.”

16. At paragraph 93 of its judgment , the Supreme Court has concluded as under:-



“93. In sum, a pragmatic modus vivendi between the Commission's paramount constitutional responsibility vis a vis elections and the rule of law vibrant with fair acting by every authority and remedy for every right breached, is reached.”

17. At paragraph 127 of the concurring judgment by Goswami, J. and Shingal, J. , it has been held as follows :

“127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Art. 226 of the Constitution, it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Art. 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the election court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Sec. 80A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under S. 116A, on any question, whether of law or fact, from every order made by the High Court in the dispute.”

18. From a careful perusal of the judgment in ***Mohinder Singh Gill*** (supra) , we are satisfied that the observations in paragraph 8 of the



judgment are not applicable to an administrative order passed by a tendering authority cancelling the tender notice , when contract has not been awarded to any of the bidders whether highest / lowest as in the absence of a contract , no vested right accrues in favour of the highest / lowest bidder before the auction / contract / bid is confirmed in his / her / its favour.

19. The Division Bench decision of this Court in the case of *M/s. Bansal Infraprojects Pvt. Ltd (supra)* has noticed the Supreme Court's decision in case of *State of Uttar Pradesh v. Sudhir Kumar Singh*, reported in (2021) 19 SCC 706 in order to arrive at a conclusion that the principles of natural justice are required to be followed before cancellation of a tender call notice .

20. In the case of *Sudhir Kumar Singh (supra)*, the agreement had been entered into between the U.P. State Warehousing Corporation and the contractor for execution of work under the tender. He had started work and after about one year , on the basis of two complaints , an *ex parte* enquiry was conducted and the tender was cancelled and disciplinary proceedings initiated against certain employees of the Corporation. The observations in



paragraph 26 were made in this background and it has been quoted by the Division Bench of this Court in case of *M/s. Bansal Infraprojects Pvt. Ltd* (*supra*). In the same case, the Supreme Court has held at paragraph 43 of its judgment as follows:-

“43. Judged by the touchstone of these tests, it is clear that Respondent 1 has been completely in the dark so far as the cancellation of the award of tender in his favour is concerned, the audi alteram partem rule having been breached in its entirety. As has been correctly argued by Shri Rakesh Dwivedi, prejudice has indeed been caused to his client, not only from the fact that one year of the contract period has been taken away, but also that, if the impugned High Court judgment [Sudhir Kumar Singh v. State of U.P., 2019 SCC OnLine All 5798] is to be set aside today, his client will be debarred from bidding for any of the Corporation's tenders for a period of three years.”

21. In the case of *Shree Ganesh Construction* (*supra*) a Division Bench of this Court relying on paragraph 8 of the decision in Mohinder Singh Gill (*supra*) and Gordhandas Bhanji has held that that the decisions in *Ma Binda Express* (*supra*) and *Air India Ltd* (*supra*) would not be applicable. The relevant paragraphs of the judgment are extracted below:-



“7. In the counter affidavit filed, the reasons have been assigned, which are not available in the impugned order of cancellation filed before this Court in Annexure-4 dated 5.2.2016. More so, while cancelling the tender, the principles of natural justice have not been complied with. It is well settled principle of law laid down by the Apex Court in **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851** that:

“When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.””

8. In **Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16**, the Apex Court held as follows :

“Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.”

Similar view has also been taken in **Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another, (2008)4 SCC 144**”



9. *In view of the law laid down by the Apex Court mentioned supra and looking at the impugned order in Annexure- 4, a conclusion can be drawn that by a cryptic order the cancellation of tender has been made, which has been explained by filing subsequent affidavit, the same is not permissible under law.*

10. *Relying on **Air India Ltd.** (supra), learned counsel for the State has urged that in exercise of judicial review, the Court cannot interfere with the decision, but it can interfere with the decision-making process on grounds of mala fides, unreasonableness or arbitrariness and Court should exercise its discretionary power with great caution and only in furtherance of overwhelming public interest.*

11. *In **Maa Binda Express Carrier**(supra), it is held that submission of a bid/ tender in response to a notice inviting tenders is only an offer which State or its agencies are under no obligation to accept and bidders participating in the tender process cannot insist that their bids/ tenders should be accepted simply because a bid is the highest or lowest.*

12. *None of the judgments referred to by the learned Addl. Govt. Advocate for the State is applicable to the present context.”*

22. The decision of the Division Bench in the case of **M/s. Shree Ganesh Construction** (supra) has been followed in the other five cases of this Court by relying on the decision in the case of **Mohinder Singh Gill** (supra), **Gordhandas Bhanji** (supra), **Bhikhubhai Vithlabhai Patel**



(supra) and *Shree Ganesh Construction (supra)*, the Division Bench has interfered with the order cancelling the tender notice in the case of *Shree Ganesh Construction (supra)* on the ground that the same is cryptic, and it was impermissible to explain the reasons in a subsequent affidavit. The Supreme Court has dismissed the SLP preferred against the judgment in the case of *Sri Ganesh Construction (supra)* in limine, and the decision in the case of *Sri Ganesh Construction (supra)* has been followed in all other decisions relied on by learned counsel for the petitioner.

23 In the case of *Bandeep Singh (supra)* , as per the terms of the auction notice , the successful bidders had deposited the EMD as well as 25% of the bid money and the balance amount after approval of the bid by the Government . The Chairman cum M.D of the Corporation had recommended for approval of the bids , but the Director Industries directed for re-auction noting that the bids were marginally higher than the reserve price . The relevant portion the judgment is extracted below: -

“8. In the impugned Judgment, the High Court has rightly concluded that no sustainable justification and rationalization was recorded in writing at the relevant time for ordering the re-auction of only the two subject properties. However, we should not be understood to have opined



that the Government is bound in every case to accept the highest bid above the reserve price. Needless to say, the presence of cartelization or “pooling” could be a reason for the cancellation of an auction process. In addition, a challenge on the ground that the property has fetched too low a bid when compared to the prevailing market price, would also be valid and permissible provided this approach has been uniformly adhered to. In the case at hand, however, while the latter was ostensibly the reason behind the decision for conducting a fresh auction, no evidence has been placed on the record to support this contention. The highest bids, marginally above the reserve price, have been accepted in the self-same auction. The factual scenario before us is clearly within the mischief which was frowned upon in Mohinder Singh Gill. We therefore uphold the impugned Judgment for all the reasons contained therein. The assailed action of the Appellant is not substantiated in the noting, which ought at least to have been conveyed to the Respondents.”

24. In the case of **Ram Sanehi Singh** (supra) , a contract for cutting timber was cancelled on the ground that they were cut after the allotted . The timber cut by the respondent were seized by the forest authorities and the timber which had already been cut and removed by him within the season with the sanction of the authorities, was directed to be treated to have been cut after the allotted season . While setting aside the order of the DFO , the Supreme Court held as under :-



5. *It is unnecessary to consider whether the order of the Divisional Forest Officer is made on "irrelevant grounds" because it is clear that before passing the order the Divisional Forest Officer did not call for any explanation of the respondent, and gave him no hearing before passing the order. It is averred in Paragraph-22(i) of the petition that the "cancellation order is in violation of the principles of natural justice having been done at a very late stage without affording any opportunity to the petitioner (respondent) to say anything against the action canceling his tallies". To that averment, no reply was made by the forest authorities against whom the petition was filed. Granting that the order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property. This Court in the case of **State of Orissa v. Dr. (Miss) Binapani Dei** held in dealing with an administrative order that "the rule that a party to whose prejudice the order is intended to be passed is entitled to a hearing applied alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our Constitutional setup that every citizen is protected against exercise of arbitrary authority by the State or its officers". The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rules of natural justice."*



25. From a careful reading of these decisions , it is apparent that where a right has accrued in favour of a party on account of issue of LoA / execution of an agreement or contract , it is necessary to hear such bidder and record reasons in the order of cancellation and communicate the same to him . But the lowest or highest bidder does not have any right to be heard and reasons are not necessary to be mentioned in the order before issuance of LoA or execution of contract .

26. In the case of *Tata Cellular v. Union of India* reported in (1994) 6 SCC 651, the Supreme Court has held, that the Government must have freedom of contract and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere but the decision must not only be tested by applying the Wednesbury principle of reasonableness but must be free from arbitrariness and bias and not actuated by mala fides. It has also observed that quashing decisions may impose heavy administrative burden on the administration and may lead to increase and unbudgeted expenditure.



27. In the case of *Air India Ltd. v. Cochin International Airport Ltd.* reported in (2000) 2 SCC 617, the Supreme Court has held at paragraph 7 as follows :-

“7. ...Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.”

28. In the case of *Assn. of Registration Plates v. Union of India* reported in (2005) 1 SCC 679, at paragraph 43 of the judgment , the Supreme Court has held as follows:-

“43. ... Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest.”



29 In case of *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.* : (2005) 6 SCC 138, the Supreme Court has held as follows in paragraph 12 which is quoted below:-

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)”

30. In the case of *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* : (2006) 11 SCC 548, the Supreme Court has held as follows:-



“56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.”

31. In the case of ***Jagdish Mandal v. State of Orissa*** reported in (2007) **14 SCC 517**, the Supreme Court after referring to a number of its earlier decisions has held in paragraph 22 as follows:-

“22.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.”



32. In the case of **Rajasthan Housing Board vs G.S. Investment** : (2007) 1 SCC 477, the observation of the Supreme Court in paragraph-9, which is relevant is extracted below:

“9. This being the settled legal position, the respondent acquired no right to claim that the auction be concluded in its favour and the High Court clearly erred in entertaining the writ petition and in not only issuing a direction for consideration of the representation but also issuing a further direction to the appellant to issue a demand note of the balance amount. The direction relating to issuance of the demand note for balance amount virtually amounted to confirmation of the auction in favour of the respondent which was not the function of the High Court.”

33. In **Maa Binda Express Carrier** (supra) , the Supreme Court while confirming the judgment of the Division Bench dismissing the writ petition , has held as under :

“8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply



because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process”.

34. In the case of *Meerut Development Authority Vs. Association of Management Studies* reported in *(2009) 6 SCC 171*, the Supreme Court has observed as follows in paragraphs 27 and 29 of its judgment:

“27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the



authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

“29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.”

35. In the case of ***U.P. Avas Evam Vikas Parishad*** (supra) , after noticing its earlier decisions in the cases of ***Meerut Development Authority*** (supra) and ***Rajasthan Housing Board*** (supra), the Supreme Court framed a specific question in paragraph 25(b) and then held that in absence of acceptance of bid offered by the plaintiff, there was no concluded contract. The question framed by the Supreme Court is extracted below:

“25. With reference to the aforesaid rival factual and legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court:”

“ (b) Whether there is any vested right upon the plaintiff/bidder until the bid is accepted by the competent authority in relation to the property in question? Merely because the plaintiff is the highest bidder by depositing 20% of the bid amount without there being approval of the same by the competent authority and it amounts to a concluded contract in relation to the plot in question ?”



36. In the case of *Laxmikant (supra)*, the Supreme Court found that as the highest bidder had not made the necessary payments held that as no confirmation letter was issued , no right had accrued to the bidder either on the basis of statutory provision under Rule 4 (3) or under the condition of the sale which had been notified before the public auction was held. The relevant portion of paragraph 4 of the judgment is quoted below:

*“4.The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the cases of **Trilochan Mishra v. State of Orissa [(1971)3SCC153]**, **State of Orissa v. Harinarayan Jaiswal [(1972) 2 SCC 36]** , **Union of India v. Bhim Sen Walaiti Ram [(1969) 3 SCC 146 : (1970) 2 SCR 594]** and **State of U.P. v. Vijay Bahadur Singh [(1982) 2 SCC 365]**. It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held. In the present case no right had accrued to the respondent either on the basis of the statutory provision under Rule 4(3) or under the conditions of the sale which had been notified before the public auction was held.”*



37. In the case of *M/s. Cwe-Soma Consortium (supra)*, after noticing the decisions in case of *Laxmikant (supra)*, *Rajasthan Housing Board (supra)* and *U. P. Avas Evam Vikas Parishad (supra)*, the Supreme Court has held as follows:-

“....It is well settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour.”

38. In the case of *State of U.P. v. Al Faheem Meetex (P) Ltd.*(supra) , the Supreme Court has held that since the bid by the competent authority, had not been accepted , no right (much less enforceable right) had accrued to the bidder and in such a situation, there was no question of giving any prior notice or opportunity of hearing to the said bidder.

39. *M/s. Shree Ganesh Construction (supra)* has been dismissed by the Supreme Court *in limine*. In the case of *State of Orissa v. Dharendra Sundar Das : (2019) 6 SCC 270* , the Supreme Court has held that *in limine* dismissal at the threshold does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution. The relevant paragraph of the decision is extracted below: -



*“It is a well-settled principle of law emerging from a catena of decisions of this Court, including **Supreme Court Employees’ Welfare Association v. Union of India & Anr. (1989) 1 SCC 187 (paras 22 and 23).**and **State of Punjab v. Davinder Pal Singh Bhullar (2011) 14 SCC 770 (paras 112 and 113).** , that the dismissal of a S.L.P. in limine simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such in limine dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution”.*

40. In view of the above discussion and the decisions of the Supreme Court, we are of the view that the opinions recorded by the Division Benches of this Court in the case of *M/s. Shree Ganesh Construction (supra)*, *Gangadhar Jena (supra)*, *Sampad Samal (supra)*, *Sical Logistics Ltd (supra)*, *Mackintosh Burn Ltd., Kolkata (supra)* and *Bansal Infraprojects Pvt. Ltd., Bolangir (supra)* do not lay down the correct law.

41. The observations made by the Supreme Court in paragraph-8 of the decision in *Mohinder Singh Gill (supra)* , do not have universal application to all decisions of the State within the meaning of Article 12 of the Constitution of India. It applies in three circumstances;-



- i) when a statute requires a statutory authority exercising statutory power to pass an order .
- ii) when such order has the effect of taking away or adversely affecting a person's right accrued to him / her / it
- iii) if such decision has civil consequences affecting an individuals's vested right.

42. It is apparent from a perusal of the judgments in the case of ***Bandeep Singh*** (supra) that the respondent had made deposit of 25% of the amount as provided in the terms of the auction notice which had been accepted by the Corporation and in the case of ***Ram Sanehi Singh*** , he had been allowed to cut and remove the timber after which the order was passed . The parties were therefore adversely affected hence it was necessary to hear them before passing the order of cancellation as it involved civil consequences .

CONCLUSION

43. In view of the above discussion and the decisions of the Supreme Court referred to above , we answer the questions referred to the Full Bench as under:-



i) While testing the correctness of a purely administrative order passed by an authority, that is State within the meaning of Article-12 of the Constitution of India , which does not essentially require recording of any reason and includes an order in the nature of cancellation of a tender process / notice where a bid has not been accepted , the observations made by the Supreme Court in paragraph-8 of the decision in ***Mohinder Singh Gill vs The Chief Election Officer: AIR 1978 SC 851***, will not have any application .

ii.) Before cancellation of a tender notice, there is no requirement of giving an opportunity of hearing or prior notice to the highest / lowest bidder, as such bidder does not acquire any vested right to have the auction confirmed in his / her / its favour on that basis alone.

iii.) When a tender process is cancelled prior to confirmation of tender / auction in favour of a bidder , the decision of the Supreme Court in the case of ***Sudhir Kumar Singh*** (supra) is not applicable

iv.) In ***M/s. Bansal Infraprojects Pvt. Ltd*** (supra) , the Division Bench of this Court has not applied the Supreme Court's decision in the case of ***Sudhir Kumar Singh*** (supra) correctly.



v.) The High Court while exercising the power of judicial review under Article 226 of the Constitution of India, cannot direct the State or its instrumentalities to accept the bid of the lowest / highest bidder by interfering with the order of cancellation of tender , solely on the ground of violation of principles of natural justice or on the ground that the order of is bereft of reasons, except in exceptional circumstances.

.....
(Savitri Ratho)
Judge

Chief Justice

I agree .

.....

(Chakradhari Sharan Singh)

Chief Justice

S.S. Mishra,J.

I agree .

.....
(S.S. Mishra)
Judge

*Oissa High Court, Cuttack.
The 15th day of January , 2025.
S.K. Behera, Senior Stenographer.*

Signature Not Verified



Digitally Signed
Signed by: SUKANTA KUMAR BEHERA
Designation: Senior Stenographer
Reason: Authentication
Location: Orissa High Court, Cuttack
Date: 22-Jan-2025 13:56:52