* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd NOVEMBER, 2022

IN THE MATTER OF:

\+ **W.P.(C) 1236/2020**

JMC PROJECTS (INDIA) LIMITED ..... Petitioner

Through: Mr. Akhil Sibal, Senior Advocate with Mr.Vikas Mishra, Mr.Sancht Gawri, Mr.Krishna Dev Yadav, Ms.Anu Tiwari, Mr.Sudher Kumar, Advocates

versus

UNION OF INDIA AND ANR ..... Respondents

Through: Mr. Chetan Sharma, ASG with Mr.Ripudaman Bhardwaj, CGSC along with Mr.Amit Gupta, Mr.Rishav Dubey, Mr. Saurabh Tripathi, Mr.Kushagra, Mr.Sahaj Garg, Advocates

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The instant writ petition has been filed seeking the quashing and setting aside of Office Memorandum No. DG/SOP/5 dated 10.01.2020 issued by Respondent No.2, i.e. the Central Public Works Department (CPWD) pertaining to *"Modification in initial criteria for eligibility in SOP Annexure-24, Para 7.3 (CPWD Works Manual 2019)"*.

2. The facts leading to the instant petition are that *vide* Office Memorandum No. DG/SOP/5 dated 10.01.2020 *(hereinafter referred to as*

"Impugned OM"*)*, the CPWD allegedly amended and modified the eligibility criteria set out in Paragraph 7.3 in Section-II of Annexure-24 of the CPWD Works Manual as well as in Form 'A' in Section-III of Annexure-24. By way of the supposed amendment, CPWD stated that the balance sheet furnished by a Public/Private Ltd. Company would entail both its standalone financial statement as well as its consolidated financial statement, and that the same would stand true for the calculation of Profit/Loss. The impugned OM has been reproduced as follows for ease of comprehension:

Rule	***Existing Provision***	***Modified Provision***
7.3	*The bidder should not have incurred any loss (profit after tax should be positive) in more than two years during available last five consecutive balance sheets, duly certified and audited by the Chartered Accountant.*	*The bidder should not have incurred any loss (profit after tax should be positive) in more than two years during available last five consecutive balance sheets, duly certified and audited by the Chartered Accountant. (The balance sheet in case of Pvt./ Public Ltd. company means its standalone finance statement and consolidated financial statement both)*
SECTION III INFORMATION REGARDING ELIGIBILITY	*FINANCIAL INFORMATION (FORM 'A')* *(ii) Profit/Loss.*	*FINANCIAL INFORMATION (FORM 'A')* *(ii) Profit/ Loss (standalone finance statement and consolidated financial statement both)*

3. Aggrieved by the impugned OM, the Petitioner herein submitted a representation dated 14.01.2020 to the Respondents, enumerating its concerns pertaining to the modification of the financial eligibility criteria of the bidders and requested for the withdrawal of the said modification with immediate effect. In view of the lack of response to the said representation, the Petitioner has approached this Court by way of the instant petition, seeking quashing and setting aside of the impugned OM.

4. Mr. Akhil Sibal, learned Senior Counsel appearing for the Petitioner, at the outset, submits that the impugned OM is bad in law as it violates Article 14 and Article 19(1)(g) of the Constitution of India, 1950, and should be set aside for the reason that it is discriminatory, manifestly arbitrary and has no basis in law. He has advanced the following arguments to support the relief that is being sought in the instant petition:

a) The impugned OM has been issued without the sanction of the competent authority and is, therefore, void *ab initio*. Reliance is placed on Para 1.6 of the CPWD Works Manual as per which the Director General of CPWD is the Competent Authority for revision of any provisions in the Manual. However, with regard to provisions relating to financial policy, the Ministry of Housing and Urban Affairs, i.e. Respondent No.1 is the designated authority to deal with the same. As the amendments stipulated in the impugned OM do not deal with "engineering or technical matters", but come within the domain of financial policy, the fact that the impugned OM has been issued by one Mr. V.P. Sahu, the Superintending Engineer (C&M) with the approval of the DG, CPWD. However, the approval or sanction of Respondent No.1 has not been sought.

b) The impugned OM is violative of Articles 14 and 19(1)(g) of the Constitution of India as, by conflating the financial statements of the bidder along with its subsidiaries, there is a violation of the level-playing field that must be guaranteed to all bidders under Article 19(1)(g). In this regard, reliance has been placed on Reliance Energy Ltd. and Ors. v. Maharashtra State Road Development Corporation Ltd., **(2007) 8 SCC 1**, to submit that the principle of non-discrimination under Article 14 must be read in conjunction with Article 21 which includes the "right to opportunity". By modifying the eligibility criteria, the impugned OM virtually places certain bidders, who may or may not have subsidiaries, in a more advantageous position, thereby treating unequals equally as it potentially favours large entities whose subsidiaries would not be posting losses in the preceding give years. Further, the amendment of the eligibility criteria has no rational nexus with the object sought to be achieved by the CPWD Works Manual. With regard to violation of Article 14, it is contended that the impugned OM creates a "class within a class" and fails to provide any reasonable classification for doing so.

c) The impugned OM violates the principle of maximum participation by effectively disqualifying prospective bidders like the Petitioner herein from even participating in a bid floated by Respondent No.2. Bidders whose consolidated financial statements, as against their standalone financial statements, reflect losses are prohibited from even participating in the bid. If the purpose of the CPWD Works Manual was to evaluate the

consolidated financial strength of the bidder, then the same could have been achieved at the bid evaluation stage by scoring in accordance with the existing marks-based evaluation criteria which is set out in Clause 8.0 of Section-II of Annexure-24 of the Manual. The impugned OM, therefore, reduces competition and is not in public interest as it unreasonably and unfairly excludes bidders who have the technical and financial capabilities to execute the projects. Accordingly, In Re: Special Reference No. 1 of 2012, **(2012) 10 SCC 1**, has been cited to submit that action of the State has to be tested on the touchstone of Article 14 and that the State's endeavour must be towards maximization of revenue returns which stands defeated if bidders are hindered from participating.

d) The impugned OM is contrary to the provisions of the CPWD Works Manual as Paragraph 2.3 in Section-II of the Annexure-24 of the Manual defines "Bidder" as an "individual, proprietary firm, firm in partnership, limited company private or public or corporation". As the clear intention of CPWD is to ensure that the term "Bidder" denotes a single entity, then the impugned OM is inconsistent with this intention. Further, the term "Bidder" does not feature any usage of the term "subsidiary". Consequently, seeking the consolidated financial statement of the bidder, which includes the financial statements of the bidder's subsidiaries, rather than seeking the standalone financial statement of the bidder, is impermissible in law. Additionally, Annexure-23 of the CPWD stipulates a bar on the acceptance of bids submitted by Joint Ventures (JVs) which only

fortifies the submission that the term "Bidder" is meant to denote a single entity. The impugned OM is further inconsistent with the provisions of the CPWD Works Manual to the extent that the minimum solvency that the bidder is required to possess refers to the solvency of the bidder only, and not the subsidiary companies. Reference has been made to M/s Pratap Technocrats Pvt. Ltd. v. M/s Bharat Sanchar Nigam Limited, **2017 SCC OnLine Del 8747**, to argue that it is the bidder, and the bidder alone, that should fulfil the eligibility criteria.

e) The impugned OM is contrary to the settled legal position that a subsidiary is a separate legal entity and is different from its holding/parent company. Relying upon Sections 19, 135, 198 of the Companies Act, 2013, and Vodafone International Holdings BV v. Union of India and Anr., **(2012) 6 SCC 613**, it is noted that every company is a separate legal persona and that if the owned company is wound up, it is the liquidator and not the parent company that would get a hold of the assets of the subsidiary. This is enumerated in Section 36 of The Insolvency and Bankruptcy Code, 2016, which states that the assets of any Indian or foreign subsidiary of the corporate debtor shall not be included in the liquidation estate. Calculation of profit and payment of income tax as per the Income Tax Act, 1961, is determined on the basis of its standalone financial statements and not consolidated financial statements.

f) The impugned OM is an attempt to "lift/pierce the corporate veil" of the subsidiaries and that there is no justification to consider the financial strength/performance of a subsidiary of

the bidder to evaluate the eligibility of the said bidder under the CPWD Works Manual and SOP.

g) The impugned OM is irrational, illogical, perverse, manifestly arbitrary and has no nexus with the ultimate objective that is sought to be achieved by the CPWD Works Manual and SOP. Reliance has been placed on Sumitomo Chemical India Pvt. Ltd. v. HLL Lifecare Ltd. and Ors., **2012 SCC OnLine Del 5000**, to submit that though Courts should refrain from interfering with matters of administrative action or changes made therein, however, in cases where the government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*, then the Courts may exercise judicial review. The impugned OM fails to take into consideration the aspect that the subsidiaries in question may not be engaged in businesses which are analogous to that of the bidder, and that there is no rationale behind considering the financial credentials of the subsidiaries of the bidder if the bidder is financially sound.

h) Retrospective operation of the impugned OM is illegal and violative of accrued right of participation. As executive authorities such as CPWD are not competent to enact provisions with retrospective effect, unless there exists the sanction under a statutory enactment or delegated legislation, the amendment/modification made to the eligibility criteria could not have been done.

5. Mr. Akhil Sibal, learned Senior Counsel for the Petitioner, submits that the Petitioner has executed multiple projects awarded by CPWD, worth

a cumulative sum of Rs. 577.52 crores, between the years 2010 to 2019. He states that this includes a construction project of an Additional Office Complex for the Supreme Court of India worth Rs. 440 crores and that this was regardless of the fact that the subsidiaries of the Petitioner had posted losses. He further submits that this demonstrates that the financial capacity and the capability of the Petitioner to execute projects/works successfully does not have any relation with the profits and losses of the subsidiaries. Mr. Sibal states that the modified eligibility criteria has the effect of penalising a bidder for merely having subsidiaries.

6. *Per contra*, Mr. Chetan Sharma, learned ASG appearing for the Respondents, submits that the impugned OM is merely a clarification which was added to avoid confusion in interpretation of the eligibility criteria. He states that there has been no material change to the eligibility criteria and as the impugned OM is merely a clarification of the provisions of the CPWD Works Manual, the Director General of CPWD would be the Competent Authority to issue the same. He further submits that the clarification issued is in consonance with Section 129 of the Companies Act, 2013, as per which the financial statement of a company/companies shall give a true and fair view of its state of affairs, and where a company has one or more subsidiaries, it shall, in addition to the financial statements provided under Section 129(2), prepare a consolidated financial statement of the company and of all its subsidiaries.

7. The learned ASG further submits that consolidated financial statements are also necessary to assess the true and accurate position of the financial health of a company as per Regulation 33 of the SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015, and Accounting Standards Ind AS 110. He submits that as most projects involve

huge amounts of expenditure and a long gestation period, it becomes imperative to prescribe a financial eligibility criteria so as to ascertain the capability of the bidder. He states that the prescription of a financial eligibility criteria and the clarification issued thereafter by way of the impugned OM is not an alien concept and is routinely undertaken by the Respondents and other government undertakings. Relying upon Paragraph 9.0 in Section II of Annexure-24 to the SOP, Mr. Sharma submits that the SOP requires the bidder to furnish an annual financial statement for the last five years as well as a solvency certificate.

8. Mr. Chetan Sharma, the learned ASG, refers to an Order of this Court dated 24.02.2020 wherein this Court had made an observation that the impugned OM does bear a rational nexus to the purpose of obtaining a fair, true and correct state of the financial health of a bidder. He states that the assessment of the financial strength of the bidder has always been a precondition for the qualification to bid. Mr. Sharma argues that the rationale behind assigning a financial criteria is to ensure maintenance of market competition so that the contract/tender may be awarded to a responsible bidder, thereby keeping in mind the larger public interest. Further, as the impugned OM applies to all bidders, there is no question of discrimination.

9. The learned ASG argues that the impugned OM cannot be said to be either arbitrary or *mala fide,* or violative of Articles 14 and 19(1)(g) as the sole purpose of the clarification was to minimise confusion with regard to furnishing of financial statements which was meant to demonstrate a greater transparency in the selection procedure. He states that the reliance of the Petitioner on provisions of the Companies Act, 2013, to demonstrate that for the purposes enumerated in the said provisions only a standalone financial

statement is required, is misplaced. Mr. Sharma concludes his submissions on the note that the impugned OM forms a rational nexus with the object sought to be achieved and is also in consonance with various statutory provisions, and thus, should not be set aside.

10. Heard Mr. Akhil Sibal, learned Senior Counsel appearing for the Petitioner, Mr. Chetan Sharma, learned ASG, and perused the material on record.

11. The challenge to the impugned OM by the Petitioner herein is premised on the contention that the said OM is violative of Article 14 of the Constitution of India by way of being unreasonable, irrational, manifestly arbitrary and intending to create a "class within a class". It has further been submitted that the impugned OM does not bear any rational nexus with the object sought to be achieved as stated in the CPWD Works Manual and SOP. In this context, it becomes imperative for this Court to delineate the perception and interpretation of Article 14 as has been propounded by the Supreme Court.

12. Article 14 of the Constitution of India secures for all persons within the territories of India protection against arbitrary laws as well as arbitrary application of laws. It is thus meant to prevent the State from devising provisions/policies that, though are fair and impartial on the face of it, rear their ugly heads of discrimination when administered. Further, it does not allow any kind of arbitrariness, and ensures fairness and equality of treatment on the part of the State. In fact, as observed as by the Supreme Court in E.P. Royappa v. State of Tamil Nadu and Anr., **(1974) 4 SCC 3,** it can be stated that equality is antithetical to arbitrariness, for equality and arbitrariness are sworn enemies; one belongs to the rule of law in republic while the other, to the whim and caprice of an absolute monarch. When a

law is challenged as violative of Article 14, it thus becomes necessary to first ascertain the policy and the object intended to be achieved by it. Having ascertained the same, the Court has to apply a dual test in examining its validity [Refer to State of West Bengal v. Anwar Ali Sarkar, **1952 SCR 284**]:-

> i. Whether the classification perpetuated by the policy is rational and based upon intelligible differentia?
>
> ii. Whether the basis of discrimination has any rational nexus or relation with the object sought to be achieved?

13. Dealing with a reference by the President of India under Article 143 of the Constitution of India, the Supreme Court considered the validity of the policy of holding auctions as the sole permissible method for disposal of all natural resources across all sectors and in all circumstances in Natural Resources Allocation, In Re: Special Reference No. 1 of 2012, **(2012) 10 SCC 1**. Therein, the Supreme Court discussed the mandate of Article 14, including the test of reasonable classification. The relevant paragraph has been reiterated as follows:

> *" **183**. The parameters laid down by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paras 159 to 182, above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the main opinion that it has to be fair, reasonable, non-*

> *discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, criteria or procedure have to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency."*

14. Delineating the concept of reasonable classification, the Supreme Court in Budhan Choudhry v. State of Bihar, **(1955) 1 SCR 1045**, while considering the constitutionality of Section 30 of the Code of Criminal Procedure as it stood then, observed as follows:

> *"**5**. The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, Chiranjit Lal Chowdhuri v. Union of India [(1950) 1 SCR 869] , State of Bombay v. F.N. Balsara [(1951) 2 SCR 682] , State of West Bengal v. Anwar Ali Sarkar [(1952) 3 SCR 284] , Kathi Raning Rawat v. State of Saurashtra [(1952) 3 SCR 435] , Lachmandas Kewalram Ahuja v. State of*

Bombay [(1952) 3 SCR 710] and Qasim Razvi v. State of Hyderabad [AIR 1953 SC 156 : (1953) 4 SCR 581] and Habeeb Mohamad v. State of Hyderabad [(1953) 4 SCR 661] . It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court."

15. In State of Tamil Nadu and Anr. v. National South Indian River Interlinking Agriculturist Association, **2021 SCC OnLine SC 1114,** while deliberating upon any classification perpetuated by a provision/policy, the Supreme Court noted that the same was closely related to the test that determined the relationship of the "means to the end". It was observed that arbitrariness in classification was to be tested on the anvil of the rational nexus test. Thus, though reasonable classification is permitted, it should be

based on intelligible differentia and must have a rational nexus with the object sought to be achieved. This was observed by the Supreme Court in National Council for Teacher Education and Ors. v. Shri Shyam Shiksha PrashikshanSansthan and Ors., **(2011) 3 SCC 238**, and the relevant portion stating the same has been reproduced as under:

> *"**22**. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In Special Courts Bill, 1978, In re [(1979) 1 SCC 380] Chandrachud, C.J., speaking for majority of the Court, adverted to large number of judicial precedents involving interpretation of Article 14 and culled out several propositions including the following: (SCC pp. 424-25, para 72)*
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> > *"72. (2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.*
> >
> > *(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in*

any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based

> *on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."*

16. As early as 1974, the Supreme Court had discussed the principle of equality and inhibition against discrimination enshrined in both Article 14 and Article 16 in E.P. Royappa v. State of Tamil Nadu and Anr. **(1974) 4 SCC 3,** and had observed that Article 14 strikes at arbitrariness in State action and requires for State action to be based on valid relevant principles applicable alike to all similarly situate. The relevant paragraph of the said Judgement has been reproduced as follows:

> *"85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the*

application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact

> *the latter comprehends the former. Both are inhibited by Articles 14 and 16."*

17. With reference to invalidation of legislation as well as subordinate legislation under Article 14, the Supreme Court has also discussed the test of manifest arbitrariness by stating that the same should be something done by the legislature irrationally and/or without adequate determining principle. A policy/legislation could also be manifestly arbitrary if it is done in an excessive and disproportionate manner. In this sense, the test would be apply to negate any provision or policy under Article 14 [Refer toNavtej Singh Johar and Ors. v. Union of India,**(2018) 10 SCC 1** andJoseph Shine v. Union of India,**(2019) 3 SCC 39**].

18. A perusal of the foregoing judicial precedents demonstrates that any action of the State does not violate the equality clause in Article 14 of the Constitution if such action operates equally on all persons who are roped in that group. Classification will also not suffer the bias of arbitrariness or caprice if it bears a reasonable nexus to the object sought to be achieved. The State is given the utmost latitude in making the classification and it is only when the classification made has no rational relation to the objectives sought to be achieved, that necessity of judicial interference arises [Refer to Kathi Raning Rawat v. State of Saurashtra,**1952 SCR 435**].

19. Having discussed the aforesaid legal principles concerning the mandate of Article 14, this Court shall now delve into whether the purported classification advanced by the impugned OM is reasonable in nature. In the instant case, *vide* the impugned OM, the CPWD has stated that the eligibility criteria for participating in the securing of projects/works of CPWD, a private/public limited company must provide its balance sheet. The balance

sheet in question means the standalone finance statement of the bidder as well as its consolidated financial statement. This consolidated financial statement includes the balance sheets of the subsidiaries of the bidder. It is the contention of the Respondents that the rationale behind seeking the consolidated financial statement is to ensure that the bidder is competent enough to undertake and oversee the projects/works, which involve the dispensation of a huge amount of money, if awarded the same.

20. This reasoning provided by the Respondents does not hold much water and there is strength in the contention of the Petitioner that the impugned OM discriminates between those entities who have subsidiaries and those who do not. In the event that a bidder, despite showing profits, has subsidiaries, which are unconnected with the work sought to be executed, that show losses, it would place such a bidder at a disadvantageous position as compared to a bidder which does not have any subsidiaries or does not have loss-making subsidiaries. The applicability of the impugned OM to all bidders does not do away with the semblance of discrimination if the application itself propagates the treatment of unequals as equals. Consequently, the impugned OM creates a class within a class by creating an artificial distinction between those bidders who have subsidiaries and those bidders that do not.

21. Section 19 of the Companies Act, 2013 reads as under:

> ***"19. Subsidiary company not to hold shares in its holding company.***— *(1) No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void:*

Provided that nothing in this sub-section shall apply to a case—

(a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(b) where the subsidiary company holds such shares as a trustee; or

(c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company:

Provided further that the subsidiary company referred to in the preceding proviso shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b) of the said proviso.

(2) The reference in this section to the shares of a holding company which is a company limited by guarantee or an unlimited company, not having a share capital, shall be construed as a reference to the interest of its members, whatever be the form of interest."

22. Section 19 of the Companies Act, 2013 bars a subsidiary company from holding shares in its holding company either by itself or through its nominees, and also bars a holding company from allotting or transferring shares to any of its subsidiary companies. Such transfers by a holding company to a subsidiary company or *vice versa* is void. The legislative intent is, therefore, to maintain a separate identity for the holding company and the subsidiary company. In light of the above, this Court fails to understand the *raison d'etre* for preparing a consolidated financial balance

sheet of the holding company in addition to its standalone financial statement. The provisions of Section 129 (3) of the Companies Act, the Accounting Standards and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations) cannot be made applicable while granting tenders simply for the reason that the bidder is a single entity and status of the bidder cannot be combined with the credentials of its subsidiary companies, if any.

23. The impugned OM, therefore, does not create a classification that is reasonable and its application reveals discrimination, and this classification bears no rational nexus with the object sought to be achieved. It has been argued by the learned ASG that, at the outset, the impugned OM is merely clarificatory in nature and it is not an amendment/modification, and that the object of the clarification was to enable Respondent No.2 to assess a true and fair view of the state of financial affairs of the bidder. It has further been submitted that this clarification was issued keeping in mind larger public interest, and after giving due consideration to the current economic set of circumstances and serious nature of financial irregularities that have been cropping up. Furthermore, the prescription of a certain financial eligibility criteria is necessary so as to allow for the selection of competent contractors who have the requisite technical and financial capability, and it is not a concept which is alien to the domain of government-issued tenders. Therefore, for the purposes of assessing the financial strength of the bidder that can guarantee ease in execution of the project/works, the consolidated financial statement of the bidder is essential.

24. This Court finds no merit in the submission of the learned ASG for the simple reason that it is trite law that a subsidiary is a separate legal entity from its holding/parent company, and that the finances of the subsidiary will

have no bearing upon the financial capabilities of the main bidder itself. As stated above, there is a prohibition of a subsidiary company in holding shares of its holding company and *vice versa*. When the bidder is a separate legal entity, the financial strength of the subsidiary company when the holding company is the bidder or the financial strength of the holding company when the subsidiary company is the bidder is of no consideration. The bidder has to be evaluated on its own financial strength, past experience and the performance of the bidder alone. The financial strength of the other holding companies/subsidiary companies can never be a criteria to assess the capacity of the bidder while awarding a contract.

25. The reliance placed by the Petitioner upon Vodafone International Holdings BV v. Union of India and Anr. **(2012) 6 SCC 613**, is meritorious as the said Judgment aptly cements how not just India, but jurisdictions all over the world have statutorily recognised a subsidiary company as a separate legal entity. There is also strength in the contention of the Petitioner that, until and unless there is some form of fraud or sham devised to defeat the interests of the shareholders, investors, parties to the contract, or to propagate tax evasion, revealing the finances of the subsidiaries of the bidder would amount to lifting the corporate veil of the same, which can only be done by the Courts in these limited circumstances. The relevant paragraphs of the Judgement stating the same have been reproduced as under:

> *"**256**. Subsidiary companies are, therefore, the integral part of corporate structure. Activities of the companies over the years have grown enormously of its incorporation and outside and their structures have become more complex. Multinational companies*

having large volume of business nationally or internationally will have to depend upon their subsidiary companies in the national and international level for better returns for the investors and for the growth of the company. When a holding company owns all of the voting stock of another company, the company is said to be a WOS of the parent company. Holding companies and their subsidiaries can create pyramids, whereby a subsidiary owns a controlling interest in another company, thus becoming its parent company.

***257**. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In Bacha F. Guzdar v. CIT [AIR 1955 SC 74] , this Court held that shareholders' only right is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting. Refer also to Carew and Co. Ltd. v. Union of India [(1975) 2 SCC 791] and Carrasco Investments Ltd. v. Directorate of Enforcement [(1994) 79 Comp Cas 631 (Del)] .*

***258**. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed*

decentralised management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.

xxx

***277**. Lifting the corporate veil doctrine is readily applied in the cases coming within the company law, law of contract, law of taxation. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction.*

***278**. This Court in CIT v. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819] held that the court is entitled to lift the veil of the corporate entity and pay regard to the economic realities behind the legal facade meaning that the court has the power to disregard the corporate entity if it is used for tax evasion. In LIC v. Escorts Ltd. [(1986) 1 SCC 264] this Court held that: (SCC p. 336, para 90)*

> *90. ... the corporate veil may be lifted where a statute itself contemplates lifting [of] the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a [beneficial] statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.*

***279**. Lifting the corporate veil doctrine was also applied in Juggilal Kamlapat v. CIT [AIR 1969 SC 932 : (1969) 1 SCR 988] , wherein this Court noticed that the assessee firm sought to avoid tax on the amount of compensation received for the loss of office by claiming that it was capital gain and it was found that the termination of the contract of managing agency*

> *was a collusive transaction. The Court held that it was a collusive device, practised by the managed company and the assessee firm for the purpose of evading income tax, both at the hands of the payer and the payee.*
>
> ***280**. Lifting the corporate veil doctrine can, therefore, be applied in tax matters even in the absence of any statutory authorisation to that effect. The principle is also being applied in cases of holding company-subsidiary relationship, where in spite of being separate legal personalities, if the facts reveal that they indulge in dubious methods for tax evasion."*

26. Further, Paragraph 2.3 in Section-II of Annexure-24 to the SOP itself defines "Bidder" as "individual, proprietary firm, firm in partnership, limited company, private or public corporation" and this definition can be construed as the bidder being a single entity without the addition of its subsidiaries. This interpretation of the "bidder" is in consonance with other statutory provisions, including Section 36 of the Insolvency and Bankruptcy Code, 2016, which considers the assets of a subsidiary to be distinct and separate from the assets of its holding company. There is also discernible inconsistency with the CPWD Works Manual itself with Paragraph 74 in Section-II of Annexure-24 to the SOP and Form 'B' in Section-III of Annexure-24 to the SOP stipulating the minimum solvency that the bidder is required to possess being confined to the bidder and not its subsidiaries.

27. This Court is inclined to agree with the Petitioner on the aspect that a holistic reading of the CPWD Works Manual does not envisage a "bidder" to include its subsidiary companies, but is only limited to itself being a single entity liable for the project/works. Moreover, reliance of CPWD placed on Section 129 of the Companies Act and Regulation 33 of the SEBI

(Listing Obligations and Disclosure Requirement) Regulations, 2015, is misplaced as the same cannot be read in isolation or stretched to infer that a consolidated financial statement would be necessary to ascertain the eligibility of the bidder. As already established in Vodafone International Holdings BV v. Union of India and Anr. (supra), calculation of income tax that a company is liable to pay is also determined on the basis of standalone financial statements, and the financial statements of the subsidiary companies are not to be considered. In view of the foregoing reasoning, this Court is of the opinion that the Respondents have failed to justify or substantiate a rational nexus between the amendment/modification made *vide* the impugned OM and the object that it seeks to achieve. The impugned OM has the effect of not only discriminating against bidders who have subsidiaries that, though unconnected, are showing losses, but it virtually reduces the competition amongst bidders seeking to bid for the projects/works, thereby violating the principle of maximum participation. In lieu of being for the benefit of the public, the impugned OM impedes public interest and is devoid of application of mind. It is evident that there is no adequate determining principle underlying the impugned OM and it is clearly a violation of Article 14 of the Constitution of India.

28. Having arrived at the conclusion that the impugned OM contravenes the fundamental right to equality under Article 14, this Court deems it necessary to embark upon the scope of judicial review in matters of tenders/public auction. This scope has been explored in depth by the Supreme Court in a catena of judgements wherein it has been observed that allegations of illegality, irrationality and procedural impropriety would be sufficient for Courts to assume jurisdiction and remedy such ills. Recently, in State of Punjab and Ors. v. Mehar Din, **(2022) 5 SCC 648**, while taking

into account the principles regarding judicial intervention that have been established over the years, the Supreme Court observed as under:

> *"**21**. In Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] it was held that judicial review of government contracts is permissible in order to prevent arbitrariness or favouritism. It was fearlessly opined in this case as under : (SCC pp. 687-88, para 94)*
>
> *"94. The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) 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.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.*
>
> *Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(5) The Government must have freedom of contract. In other words, a 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 principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(emphasis in original)

***22**. The exposition of law on the subject has been consistently followed by this Court even in the later decisions holding that superior courts should not interfere in the matters of tenders, unless substantial public interest was involved or the transaction was mala fide. It was consistently stressed by this Court that the need for overwhelming public interest should always be kept in mind to justify judicial intervention in contracts involving the State and its instrumentalities and while exercising power of judicial review in relation to contracts, the courts should consider primarily the question whether there has been any infirmity in the decision-making process.*

***23**. This view has been further considered by this Court in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , wherein it was observed as under : (SCC p. 531, 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."

***24**. This Court in a recent judgment in Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] held as under : (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."*
>
> ***25. The law on the subject is settled that the courts being the custodian of fundamental rights are under an obligation to interfere where there is arbitrariness, irrationality, unreasonableness, mala fides and bias, if any, but at the same time, the courts should exercise the power of judicial review with a lot of restraint, particularly in contractual and commercial matters."*** (emphasis supplied)

29. Therefore, there has to be a finding of irregularity or illegality which would justify the interference of a Court exercising its writ jurisdiction in contractual matters. In fact, in such circumstances, it becomes the duty of the Court to intervene and ensure that arbitrariness, irrationality, bias, *mala fide* or perversity is prevented in administrative decision-making. The exercise of judicial review is not excluded at any juncture and the caveat for the same is that every State action must be informed by reason, and an act uninformed by reason would be *per se* arbitrary. This line of thought was propounded by the Supreme Court in Union of India and Anr. v. International Trading Co. and Anr., **(2003) 5 SCC 437**, wherein the principle of how Article 14 applies to matters of governmental policy was observed, and how the said policy or any action of the government, even in contractual matters, would be held as unconstitutional if it failed to satisfy

the test of reasonableness. The relevant paragraphs stating the same have been reproduced as follows:

> ***"14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.***
>
> ***15****. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.*
>
> ***16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by***

reason and it follows that an act uninformed by reason is per se arbitrary." (emphasis supplied)

30. As has been established above, the impugned OM does not satisfy the test of reasonableness and contravenes every dimension of Article 14 of the Constitution of India. In view of this, this Court deems it fit to exercise its writ jurisdiction under Article 226 to quash and set aside the impugned OM. The Respondents are consequently directed to issue a clarification noting that solely the standalone financial statement of the bidder, and not its consolidated financial statement, shall be required to ascertain the eligibility of the bidder in participating in the tender for a certain project/work.

31. Accordingly, the instant writ petition is allowed, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

NOVEMBER 02, 2022
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