

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR
THE HON'BLE JUSTICE AJAY KUMAR GUPTA

**CAN 1 of 2026
and
CAN 2 of 2026
in
MAT 690 of 2026**

Ainul Haque
vs.
The State of West Bengal & Ors.

For the Appellant	: Mr. Saptansu Basu, Sr. Adv. Mr. Mirza Firoj Ahmed Begg, Adv. Ms. Rita Patra, Adv. Ms. Pusmita Das, Adv. Mr. Suman Biswas. Adv.
For the State	: Mr. D.N. Ray, Ld. G.P. Ms. Susmita Saha Dutta, Ld. A.G.P. Mr. Madhu Jana, Ld. Jr. Govt. Adv. Ms. Tanusree Ghosh, Adv.
For the Respondent Nos. 3 – 6.	: Mr. Soumya Majumder, Sr. Adv. Mr. Pritam Roy, Adv.
For the Writ Petitioner/Respondent	: Mr. Abhratosh Majumdar, Sr. Adv. Md. T.M. Siddiqui, Sr. Adv. Mr. Suman Banerjee, Adv. Mr. Somnath Ganguly, Adv.
For the Applicant/Intervenor In CAN 2 of 2026	: Mr. Jaydip Kar, Sr. Adv. Md. T.M. Siddiqui, Sr. Adv. Mr. Suman Banerjee, Adv. Mr. Somnath Ganguly, Adv.
Judgment reserved on	: 09.06.2026
Judgment pronounced on	: 14.07.2026
Judgment uploaded on	: 14.07.2026.

Shampa Sarkar, J.

1. The appeal is directed against an order dated April 7, 2026, passed in WPA 3311 of 2026.

2. By the order impugned, the learned Single Judge held that clause D of the terms and conditions of the e-Auction notice dated December 31, 2025 had been incorporated by the tendering authority arbitrarily and with malafide intention, only to debar the writ petitioner from participating in the said tender process. Accordingly, the writ petition was allowed and the e-Auction process initiated by the Birbhum Zilla Parishad by the notice dated December 31, 2025, bearing No. WBZP-BHM-A-06-2025-26, was set aside and quashed.

3. The work order issued to the appellant, as also the order of rejection of the bid of the respondent No. 7/writ petitioner, were set aside. The tendering authorities were directed to initiate a fresh e-Auction process, by giving an opportunity to all the eligible bidders to participate and to complete the process within a period of eight weeks from the date of receipt of the order of His Lordship.

4. The writ petition was preferred by the respondent No.7, seeking cancellation and/or withdrawal and/or rescission and/or stay of clause D of the terms and conditions of the notice of e-Auction No. WBZP-BHM-A-06-2025-26 dated December 31, 2025 and also for cancellation and/or withdrawal of the decision of the tendering authority which was uploaded in the technical evaluation summary dated January 30, 2026. The writ

petitioner/respondent No. 7 was disqualified by the tendering authority, from participating in the later part of the e-Auction process for collection of toll tax from vehicular traffics plying through Sagarbandhi Dholkata and Raipur Habrafari Road, in the district of Birbhum.

5. According to the writ petitioner/respondent No.7, all the required documents and the earnest money, as contemplated under the said e-Auction notice, had been duly submitted. The schedule had been extended from time to time by issuing corrigendum. On January 30, 2026, the technical evaluation was scheduled. The technical evaluation summary was uploaded in the website on January 30, 2026, wherefrom, the respondent No. 7 came to know that he had not qualified in the technical round. On the basis of the communication dated January 28, 2026, of Executive Engineer Burdwan, North Highway Division, PWD Road Directorate, the respondent No. 7 was considered to be a defaulter. The tendering authority was informed that, in respect of similar work orders, there were outstanding dues against the respondent No.7. The respondent No.7, being aggrieved by the decision and alleged illegality in the method of evaluation of the technical bid, approached the writ court. Allegation of violation of the principles of natural justice was also made. It was contended before the learned Single Judge that, the disqualification of the respondent No. 7 in the technical evaluation round, entailed civil consequences. Therefore, the Birbhum Zilla Parishad was bound to give a hearing to the writ petitioner before cancelling his bid. It was further contended that the decision was violative of the principles enshrined under Article 14 of the Constitution of

India, inasmuch as, clause D of the e-Auction notice was arbitrary, discriminatory, irrational and tailor-made.

6. According to the writ petitioner, the said clause was intended to exclude competent, experienced and financially sound bidders from participating in the e-Auction process. The bidders were required to file their solvency certificates. The financial capacity of the bidders could be judged from such certificate. Outstanding dues in respect of other work orders given by other departments, was an irrelevant consideration. The said condition did not have any nexus with the object sought to be achieved. According to the writ petitioners, the validity of the dues of the PWD was the subject matter of WPA 12861 of 2023, which was pending adjudication. Until and unless the claim of PWD was decided by the competent court to be payable, the writ petitioner/respondent No. 7 could not be termed, as a defaulter. The alleged default had not been established.

7. It was also contended by the respondent No. 7 that, clause D in the e-Auction notice, penalized a bidder who had approached a court of law, by challenging the unjustified claim of the PWD. The respondent authorities had followed a pick and choose policy, in order to intentionally oust the writ petitioner from the competition. The clause was incorporated with an ulterior motive and for extraneous reasons. The Zilla Parishad had a vested interest and thus, had favoured the appellant. The dues did not remain unpaid on account of insolvency or financial incapacity. The dues were disputed. Thus, under such circumstances, clause D could not be applied in case of the writ petitioner. It was also urged that, although a query had been

made with regard to the outstanding dues of the writ petitioner, no such query had been made from the other authorities, to find out whether the appellant also had outstanding dues, in respect of prior contracts of similar nature.

8. The Zilla Parishad contested the said writ petition, inter alia, stating that, clause D was known to the writ petitioner and the respondent No. 7 had participated in the said e-Auction process without any objection to such clause. The respondent No. 7 affirmed an affidavit as per the format prescribed in the e-Auction notice, and categorically stated that there were no outstanding dues towards either the State Government or the Central government or in respect of any undertaking or autonomous or statutory body under any Ministry. He had also stated on oath that, no legal disputes, arbitrations or court cases were pending between him and such entities.

9. According to the Zilla Parishad, incorrect and false statements were made in the affidavit. The PWD Roads had forwarded a report to the Zilla Parishad, inter alia, informing that claims were pending against the respondent No. 7 in respect of two similar contracts, i.e., collection of toll tax from vehicular traffics plying through Lochan Das Setu over river Ajay at Natun Haat, in the district of Purba Burdwan. It was also urged that, as the respondent No. 7 participated in the process upon having accepted the said clause, he was estopped from challenging the validity of the said clause after being disqualified. In justification of the rationale behind the incorporation of clause D of the terms and conditions, it was submitted that the said clause was incorporated to avoid potential future disputes, recovery

complications and administrative inconvenience. It was considered prudent, to expressly incorporate the said condition, instead of confining such criteria to a formatted affidavit. The incorporation of clause D was a precautionary and a regulatory condition, which was imposed in order to ensure that honest, diligent and financially sound agencies participated in the process. Only those who were prompt in paying the annual lease value at the appropriate time, without any delay and/or without committing any breach of such contractual obligation, were eligible to participate.

10. The learned Judge did not accept the contentions of the Zilla Parishad and was of the view that as, every agency had to deposit the performance guarantee, adequate pecuniary measure had been employed by the authority in order to ensure that, in the event a successful bidder failed to comply with the terms and conditions, the performance guarantee could be invoked as a mode of recovery of the dues. Although, the respondent authority obtained a report from the Executive Engineer, Burdwan, North Highway Division, PWD Roads, which, inter alia, stated that there were some dues in respect of contracts awarded by them to the respondent No. 7, the quantum of the claim was the subject matter of a litigation before the High Court. Until and unless the issue was decided, the question of holding the respondent No. 7 to be a defaulter, did not arise. The writ petitioner rightly did not consider himself to be a defaulter and did not provide the necessary information in the affidavit. When the issue was pending before a court of law, the Zilla Parishad could not have prejudged the issue and held that the appellant was not technically qualified, on account of unpaid dues

of PWD Roads. His Lordship held that, as the dues of the PWD had not crystalized, the eligibility of the writ petitioner to participate in the said e-Auction and carry out the work successfully could not be adjudged on the basis of the said claim. According to His Lordship, the respondent authorities acted in a discriminatory manner. The authorities relied on clause D of the e-Auction notice and imposed the said condition on the writ petitioner, but failed to treat the appellant at par with the writ petitioner. The clause should have been equally applied to all, and consequently, information with regard to the appellant ought to have been sought for from the authorities under which the appellant had executed similar works.

11. Thus, His Lordship concluded that, clause D was arbitrary, irrational and had been incorporated with a malafide intention to oust eligible bidders. The work order issued in favour of the appellant was also set aside. The authorities were directed to initiate a fresh e-Auction process, upon giving opportunity to all eligible bidders to participate in the same.

12. Mr. Saptansu Basu, learned Senior Advocate appeared for the appellant and submitted that clause D was incorporated to ensure that the agency would deposit the annual lease rent as per the time schedule mentioned in the said e-Auction notice. This was done to avoid delay and disputes arising from non-payment of money, to a public authority. The money collected from the annual lease rent was used by the Zilla Parishad to serve the public. A person who had defaulted in making payment of money to public authorities could not be trusted. It was further submitted that defaulters were not allowed to participate in such e-Auctions held by

the Zilla Parishad even on earlier occasions. In the subject tender, a more stringent clause was incorporated to the effect that, an agency which was a defaulter in respect of similar contracts with the central, or state government, or undertakings, statutory bodies, local bodies etc., would also be debarred from participating. The clause was neither arbitrary, nor irrational. The Zilla Parishad had the jurisdiction to impose such clause, in order to ensure that financially sound, honest and experienced bidders, having good reputation with other authorities, would participate in the e-Auction. According to Mr. Basu, the pendency of a dispute with regard to the outstanding dues of PWD Roads, was a reasonable basis to assess and or evaluate the competence or eligibility of an agency. It was submitted that the clause has a reasonable nexus with the object sought to be achieved. Agencies who were not diligent, prompt and vigilant in paying up the dues, were sought to be excluded and the authority always had the right to do so.

13. According to Mr. Basu, the said condition was not tailor-made. It applied to all bidders. As many as seven persons had participated in the process. The author of the document was the best judge to decide what kind of precautionary and regulatory conditions would serve the best interest of the Zilla Parishad and ensure that future complications with regard to recovery of money, performance of work as per the terms and conditions, proper execution of the work etc, could be avoided. The intention was to protect public money.

14. Mr. Soumya Majumder, learned Senior Advocate for the Birbhum Zilla Parishad supported the submissions of Mr. Basu. The Zilla Parishad further

contended that the learned Judge erred in holding that the Zilla Parishad had acted in a discriminatory manner, by calling for a report with regard to the alleged outstanding dues of the writ petitioner, but did not call for any report with regard to the past dues of the appellant. It was contended that, as there was a complaint with regard to the eligibility of writ petitioner/respondent No. 7, at the instance of the appellant, the report was called for. Had there been any such complaint against the appellant as well, a similar step would have been taken. In the absence of any complaint against participants, the statements made by the participants in their respective affidavits were accepted to be true and correct. The appellant and the respondent No. 7 filed such affidavits in the prescribed format. Both stated that there were no outstanding dues. Only after the complaint was received in respect of the respondent No. 7 the query was made.

15. According to Mr. Majumder, a writ court was not empowered to set aside a tender condition, inter alia, holding that the same was incorporated with mala fide intention. Public authorities also have the freedom to enter into business transactions in the same manner as private entities. Some fair play in the joints must be allowed to the public authorities to frame their own conditions. Even if a condition was harsh or unfair, a writ court could not substitute such condition with its own opinion. Judges were not experts. Such matters fell within the domain of contractual obligations in commercial matters and should be left to the authority inviting such tender/e-Auction.

16. Rebutting the submissions of the appellant, Mr. Abhratosh Majumdar, learned senior Advocate for the writ petitioner/respondent No. 7 submitted

that the reasons afforded by the Zilla Parishad in disqualifying the writ petitioner at the technical evaluation stage, were not tenable in law. The writ petitioner could not be treated as a defaulter, inasmuch as, the claim of the PWD was disputed. A writ petition challenging such claim was pending. Until and unless the writ petition was dismissed, upon the court holding that the claim was correct and legitimate, the respondent No. 7 could not be termed as a defaulter.

17. It was next submitted that, clause D was unconstitutional and violative of Article 14 of the Constitution of India. In the field of contractual obligations, disputes with regard to the claim and counter-claim of the contractor and the employer were common. If a contractor or a bidder was engaged by the government or an authority, disputes with regard to payment often arose. Such disputes were often legitimate. Thus, the condition was not only stringent, but also irrational and unreasonable. Contractors/bidders could not be prohibited from raising any dispute with regard to the claims arising out of contractual obligations. If such stringent conditions were imposed, the right of a party to raise disputes and/or challenge the claims or actions of public authorities would be denied. This was antithetic to the very concept of dispensation of justice.

18. Relying on the decision of ***AKA Logistic Pvt. Ltd. Vs. Durgapur Projects Ltd. reported in 2012 SCC Online Cal 8568***, it was submitted that, the restrictive condition which operated at the threshold and disentitled participants who had any dispute with other state authorities or undertakings of public bodies, from participating in the subject tender, was

unconstitutional. The said condition debarred many deserving, experienced and financially strong candidates from participating in the process. Reliance was also placed on the decision of ***Adani Exports Ltd., Mumbai & Anr. Vs. Maharashtra State Electricity Board & Ors 2003(4) Mh.L.J. 391***, in support of the contention that, the statements in the affidavit could not be taken as false declaration. The claim of unpaid dues of PWD Roads, had not reached a finality. Moreover, Annexure 2 to the terms and conditions was a prescribed format. There was no scope to mention the exact nature of the litigation that was pending, and that the claim of PWD was unacceptable. The eligibility condition under clause D was illegal, arbitrary, unconstitutional and mala fide. Right to approach the court was an inherent right conferred by the constitution. Every person had the right to go to court for vindication of his grievance, and as such, in terms of the ratio laid down in ***AKA Logistics*** (supra), clause D was rightly struck down by the learned trial Judge.

19. A tender condition, which prevented a person from raising a dispute with an authority, on issues which emanated from breach of terms and conditions of another contract, should be struck down and His Lordship had rightly done so.

20. Mr. Jaydip Kar, learned Senior Advocate appeared for Sk. Nasir, another participant whose bid was also cancelled for the same reasons. An application for intervention was filed. Mr. Kar submitted that, the decision to place a bidder in the category of a defaulter, must be preceded by a declaration. At best, the writ petitioner and Sk. Nasir were alleged defaulters

and not declared defaulters. Whether the outstanding dues, as reported by PWD Roads, were actually payable under those contracts, was yet to be decided by a competent court of law, and as such, the Zilla Parishad ought to have taken note of such factor and allowed both Sk. Nasir and the respondent No. 7 to participate in the financial bidding. Reliance was placed on the decision of ***BN Joshi & Sons Limited vs. Nair Coal Services Limited & Others*** in this regard.

21. Having discussed the submissions of the parties in details, we proceed to deal with the issue involved. The Birbhum Zilla Parishad invited offers from eligible and resourceful agencies, for collection of fees for the works listed in the notice for e-Auction dated December 31, 2025. The name of the work and mode and manner in which the fees were to be collected and the rates, are quoted below:-

Name of Work

SL No.	Name of the work	Period of Lease	Base Value per Year	Bid Security/ EMD	Rate of increment Amount	Auction processing fees
1.	Collection of Toll Tax from the vehicular traffic plying through Sagarbandhi-	03 (Three) years from the date of	Rs. 2,40,03,375.00	Rs. 24,00,400.00	Rs. 5,00,000.00	Rs. 20,000.00

	Dhokata & Raipur- Habraphari Road in the district of Birbhum.	issue of work order.				
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Fees will be collected as per rate mentioned below

SL. No.	Type of Vehicle	Description of Vehicle	Rate per Trip
1.	Light Vehicles	Matador Tempo (Empty)	Rs. 15.00
2.	Light Vehicles	Light Vehicle Matador Tempo (Loaded)	Rs. 30.00
3.	Medium Vehicles	Bus, Truck, Lorry and Minibus (Empty)	Rs.45.00
4.	Medium Vehicles	Bus, Truck, Lorry and Minibus (Loaded/with Passenger)	Rs. 75.00
5.	Heavy Vehicles	JCB Six and above wheelers vehicles (empty)	Rs.90.00
6.	Heavy Vehicles	JCB Six and above wheelers vehicles (loaded)	Rs. 165.00

22. The successful bidder was required to abide by such terms and conditions which are quoted below:-

“A. Engagement of Sub-Contractor or Subletting the assignment is not permitted.

B. GST, Royalty, and all other statutory levies, cess, taxes, and charges (as applicable under prevailing rules and Government Orders) shall be borne by the bidder. The bidders shall quote their bid rate after considering all such financial implications. Under no circumstances shall the quoted rate be reduced at a later stage.

C. The selected bidder shall be required to execute an Agreement, in the prescribed format enclosed, on Non-Judicial Stamp Paper prior to commencement of the assignment.

D. If any bidder is found to be a defaulter against any outstanding dues with any Authority who previously issued a work order for a similar nature of assignment, at any stage of the auction process (including after the issuance of the Work Order), the bidder shall be disqualified from further participation, and the Earnest Money Deposit (EMD) submitted by the bidder shall be forfeited.

E. Birbhum Zilla Parishad may at any time, require the intending bidder to produce the original copies of the documents uploaded online for verification. For this purpose, a notice shall be issued to the intending bidder through the registered e-mail ID, requiring submission of the original documents within a specified period to the specific authority mentioned in the notice and before completion of technical evaluation. Failure to produce the required documents within the stipulated time and place shall result in cancellation of

the eligibility of the intending bidder, without any further communication.

F. No fees shall be collected from Government vehicles provided valid official authorization/identification is produced at the time of entry.

G. Any deviation from the approved rate chart during fee collection shall be treated as a serious breach and the lease will be cancelled forthwith.

H. The selected bidder shall deposit the annual lease value as has been accepted along with applicable Income Tax within fourteen (14) days from the date of issuance of the Letter of Acceptance, failing which the contract shall be treated as cancelled and the Earnest Money Deposit (EMD) shall be forfeited. Annual lease value for the subsequent year shall have to be deposited before expiry of the preceding year. No extension in this regard will be allowed. Failure to comply will result in termination of the lease without further notice.

I. No expenditure shall be borne by the Authority of Birbhum Zilla Parishad for establishing the fee collection centre or constructing any structure of any kind.”

23. The imposition of clause D, was the subject matter of challenge in the writ petition. The clause provides that, if a bidder was found to be a defaulter and had unpaid dues in relation to a contract/work order, for a similar nature of work with any public authority of the state or the central government, the bidder shall be disqualified from participation and the earnest money deposit submitted by the bidder shall be forfeited. Such

disqualification could also be made during the pendency of the work and after issuance of the work order. Under the special terms and conditions, it was stated that, an affidavit must be sworn by the prospective bidder as per the enclosed format, before a notary public/executive magistrate/judicial magistrate. Annexure 2 is the prescribed format for such affidavit, and the same is quoted below:-

“I, the undersigned, do hereby certify that all the statements made in the attached documents are true and correct. In the event that any information submitted is found to be false, incorrect, or concealed, the application shall be liable for rejection and I shall raise no objection or claim in this regard.

The undersigned understands that further qualifying information may be requested and agrees to furnish any such information as and when required by the Department or the Notice Inviting Authority.

As a participating bidder, I hereby declare and affirm that there is no outstanding amount payable by me/us to the State Government or Central Government, their undertakings, or any statutory/autonomous bodies under any ministry. I/we also confirm that there are no legal disputes, arbitrations or court cases pending against me/us with any such entities. In the event of any false declaration or suppression of facts in this regard, my/our bid shall be rejected outright and the Earnest Money Deposit (EMD) shall be forfeited.”

24. Clause H of the terms and conditions stipulates that, the bidder was required to deposit the annual lease value as had been accepted along with the applicable income tax, within 14 days from the date of issuance of the letter of acceptance, failing which the contract would be treated as cancelled and the earnest money deposit would be forfeited. Annual lease value for the

subsequent year should be deposited before the expiry of the preceding year. No extension in such regard would be allowed. Failure to comply would result in termination of the lease, without further notice. Thus, the respondent No. 7 participated in the e-Auction, without challenging the clauses and by accepting the same. A bidder, who was a defaulter and had outstanding dues in respect of a public authority which had previously issued work orders for a similar assignment, was ineligible to participate. In the event such fact came to light after issuance of the work order, the contract was liable to be terminated and the earnest money deposit submitted by the bidder was liable to be forfeited. The successful bidder was required to deposit the annual lease value as had been accepted along with the applicable income tax within 14 days from the date of issuance of the letter of acceptance, failing which the contract would be treated as cancelled and the earnest money deposit would be treated to be forfeited. The contract was for three years. The annual lease value for the subsequent years were to be deposited before the expiry of the preceding year and no extension in this regard would be allowed. Failure to comply would result in termination. These conditions were not challenged when the e-Auction notice was published. The writ petitioner/respondent No. 7 submitted his bid document upon accepting such conditions and also submitted an affidavit indicating that there were no outstanding dues. When the respondent No. 7 was disqualified upon being treated as a defaulter in respect of similar nature of contracts awarded by the PWD Roads, the writ petition was filed by challenging not only the disqualification, but also the basis for

disqualification, that is, clause D. Upon a harmonious reading of the clauses and the affidavit, we hold that clause D was a precursor to clause H and was imported to ensure fulfilment of the contractual obligation to make timely payment. We do not accept the contention of Mr. Abhratosh Majumder that, the respondent No. 7 did not have any option to disclose either the pending litigation with the PWD or the dispute with regard to the alleged outstanding dues of PWD, as Annexure 2 was a set format and there was no scope to provide any further information. As per the clause, any person who had outstanding dues with a public authority could not participate. In our view, clause D could not be read in the same manner as the clause in ***AKA Logistic Pvt. Ltd. (supra)***. In that case, the issue was whether requiring an undertaking from a prospective bidder to the effect that, they had not initiated any litigation against any employer in respect of a contract, could be a valid condition.

25. It was held that bidders who had approached the court for preservation, protection and enforcement of their rights, could not be prevented from participating in any tender process, and such a clause was not only unconstitutional, but an affront to the judicial process by which courts aimed to secure justice to the wronged. A bidder who approached the court, could not be treated to be less competent than one who did not approach the court for preservation of his right. Every man who suffered a legal wrong could approach the appropriate forum in order to seek justice. It was the duty of the constitutional court to preserve and protect the rights of the wronged. Access to justice was a right guaranteed by the Constitution

and under such circumstances, the decision was rendered in ***AKA Logistic Pvt. Ltd. (supra)***.

26. However, in the subject e-Auction notice, the authorities wanted to ensure that honest bidders, who were prompt in making payments, either of the annual lease rents, or the toll taxes collected in respect of similar contracts, would be eligible to participate. Bidders with outstanding dues towards the public authorities, should not be allowed to participate. This was done to avoid future disputes with regard to recovery of the annual lease rent, and also to avoid litigations. The clause was precautionary and regulatory in nature. Delayed deposit of lease rent or failure to deposit lease rent for the subsequent years, would result in loss of revenue and public interest would suffer. A clause which ensured financial discipline and accountability amongst bidders, is reasonable and rational. Public money was sought to be protected. This is not a case in which a clause had been incorporated to exclude all bidders having any kind of dispute in respect of earlier contracts. This clause clearly states that, if there were outstanding dues in respect of similar leases/assignments, in such event, bidders who had such dues would not be allowed to participate. The contract was for collection of toll tax, which required the successful bidder to deposit the annual lease rent for the first year along with the income tax payable within 14 days from the issuance of the letter of acceptance and thereafter, each year's annual lease was to be paid before expiry of the previous year. The annual lease rent to be paid for each year was a fixed amount. Similarly, toll tax to be collected, were also fixed as per the rates.

27. Hence, the ratio of ***AKA Logistic Pvt. Ltd. (supra)*** is not applicable in this case. This is not a case in which, if the clause is interpreted in its proper perspective, a person who had taken recourse to any legal proceeding would automatically be disqualified for having approached a court of law. The clause merely prescribed that, bidders who failed to pay the dues in respect of similar contracts awarded by the state government or the central government or any statutory authority, or any public authority, for similar works, could not participate. The reason/rationale underlying incorporation of such clause was that, a bidder who had failed to comply with the contractual obligation of payment of the lease rents or deposit of the toll tax which were collected under those contracts (as the case may be), could not be depended upon and trusted. Proper execution of the subject contract could not be guaranteed. The clause was inserted in public interest and to ensure timely payment of the money due to a public authority. The Zilla Parishad wanted to avoid protracted and expensive litigation, and also protect its exchequer.

28. Thus, the contentions of Mr. Abhratosh Mazumdar and Mr. Kar that the clause did not have any rationale with the object sought to be achieved, are not accepted. Secondly, it appears from the demand of justice of the writ petitioner that, the Executive Engineer, Burdwan, North Highway Division had instituted a criminal proceeding against the writ petitioner for wrongfully withholding government money. He was also suspended for not depositing the toll tax. Moreover, the Zilla Parishad cannot be prevented from expanding the scope of clause D, from what it stood earlier, by

prescribing that defaulters of similar contracts, in respect of work awarded by the state government/central government/public authority/statutory body etc., should not be allowed to participate in the proceeding. The authority has a right to incorporate any conditions it deems fit and proper, for effective execution of the work. Even, harsh and stringent conditions can be incorporated, so that reputed bidders participate, and the best amongst those, is ultimately awarded the work order. The said clause has a direct nexus with the reputation, bonafide and integrity of a bidder.

29. Thus, it cannot be said that the clause was incorporated with mala fide intention, in order to oust the writ petitioner/respondent No. 7. Moreover, the writ petitioner suppressed the factum of the pending litigation, including the pending criminal case. The complaint of Ainul Haque against the respondent No. 7 was considered. There was no such complaint against the appellant. As no right had been created in favour of the respondent No. 7 when such report in respect of the complaint had been sought for, granting a hearing to the writ petitioner would not change the situation. The respondent No. 7 would be disqualified in any case. It was a foregone conclusion.

30. The writ petitioner has not alleged that the information given by the PWD, was false. Even if a hearing was given to the writ petitioner, he could not have proved otherwise. The writ petitioner stood automatically disqualified, the moment it was found that there were outstanding dues with regard to a similar nature of work. Under such circumstances, the order impugned is set aside. Moreover, His Lordship proceeded on an incorrect

presumption that performance guarantee had been obtained from the bidders. The terms do not require furnishing of performance guarantee.

31. Clause D is neither tailor-made nor discriminatory. It has not been incorporated with any mala fide intention to oust the writ petitioner from the zone of competition. It applied equally to all participants. With regard to the decision cited by Jaydip Kar, we are of the view that the same does not apply in case of the writ petitioner. The decision was rendered in a situation in which, the clause provided that the bidder could not be allowed to participate if he was a declared defaulter. The Hon'ble Apex Court held that such declaration had a definite connotation. It was a statement of existence of material facts. It was a formal announcement or a deliberate statement. Such declaration must be announced and made known. When a person was declared to be a defaulter, such declaration must be preceded by a decision. The expression 'declared' was wider than the expression 'found' or 'made'. In clause D, the expression used is 'found to be a defaulter'.

32. The scope of judicial review in matters relating to award of tenders, is limited. In the matter of ***Maa Binda Express Carrier and Anr. vs Northeast Frontier railway and Ors.*** reported in ***AIR 2014 SC 390***, the Hon'ble Apex Court held as follows:-

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise 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.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn. of Management Studies* [(2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803] and *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617 : (2000) 1 SCR 505])

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India* [(1994) 6 SCC 651] , *Raunaq International Ltd. case* [*Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492] and in *Jagdish Mandal v. State of Orissa* [(2007) 14 SCC 517] besides several other decisions to which we need not refer.

11. In *Michigan Rubber (India) Ltd. v. State of Karnataka* [(2012) 8 SCC 216] the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p. 229, paras 23-24)

“23. From the above decisions, the following principles emerge:

(a) 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. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) *fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.* If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

20. 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'? and*

(ii) *Whether the public interest is affected?*

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

(emphasis supplied)

33. In ***Tata Cellular v. Union of India*** reported in **(1994) 6 SCC 651**,

the Hon'ble Apex Court held as follows:-

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

34. In the matter of ***Balaji Ventures Pvt. Ltd. vs Maharashtra State Power Generation Company Ltd. & Anr.*** decided in ***Special Leave to***

Appeal (C) No(s). 1616 & 1673 /2022, the Hon'ble Apex Court held as follows:-

“5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

5.2 In the case of ***Silppi Constructions Contractors vs. Union of India, (2020) 16 SCC 489***, it is observed in para 20 as under:

“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.”

5.3 In the case of ***Montecarlo Limited vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272***, it is observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying Wednesbury principle and also examining whether it suffers from arbitrariness or bias or mala fides.

6. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when it is found that clause 1.12(V) cannot be said to be arbitrary, mala fide and/or tailor made and the same shall be applicable to all the bidders/tenderers and there is justification also shown providing such a clause and even subsequently a corrigendum has been issued and even the Respondent No.2 private bidders also made it clear that uniform charge shall be quoted for each bidder and even clause 1.12(V) was modified to the extent the necessary permission/consent/no objection certificate that was required at the time of submission of the bid was now required to be submitted before the opening of the price bid and the date for submission of the bid was extended, the High Court has rightly dismissed the writ petition and has rightly refused to interfere with the decisions of the respondents providing clause 1.12(V) of the tender document.”

35. In the matter of ***Airport Authority of India vs Centre for Aviation Policy, Safety and Research (CAPSR) & Ors.*** decided in ***CIVIL APPEAL Nos. 6615-6616 of 2022***, the Hon’ble Apex Court held as follows:-

27. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.”

36. In ***Jagdish Mandal v. State of Orissa and Ors. WITH Laxman Sharma Vs. State of Orissa and Ors.*** reported in ***(2007) 14 SCC 517*** it was held as hereunder: -

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

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

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

OR

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

(ii) Whether public interest is affected.

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

37. In *Michigan Rubber (India) Limited vs. State of Karnataka and Ors. reported in (2012) 8 SCC 216* it was held as hereunder:-

24. 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”? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

* * *

* * *

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.”

38. With regard to the case of Sk. Nasir, as the writ petition is pending, we are not inclined to consider his specific averments in the connected application. We keep it open for the learned Single Judge to decide the

matter in the facts and circumstance of that case. This order will also not prejudice the proceeding which is pending before the writ court with regard to the demand of the PWD, against the respondent No. 7.

39. The order impugned is set aside. The decision of the Zilla Parishad is upheld. The appellant was already continuing with the work provisionally, on the basis of an interim direction passed by us. With the appeal being allowed and the order of the learned Single Judge being set aside, the work order issued to the appellant by the Zilla Parishad shall be finalized/treated as final. The condition imposed by us upon the appellant to maintain separate accounts of the toll tax collected by the appellant, is lifted. Further direction to furnish accounts before this court, is also lifted. If it is found in future that the appellants had outstanding dues as envisaged under clause D, the same clause shall be imposed upon the appellant.

40. The appeal is allowed. The applications are disposed of.

41. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the relevant parties upon fulfilment of requisite formalities.

(Shampa Sarkar, J.)

I agree.

(Ajay Kumar Gupta, J.)