

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 04TH DAY OF MAY 2020 / 14TH VAISAKHA, 1942

WP(C).No.26853 OF 2019(F)

PETITIONER:

CHERIAN VARKEY CONSTRUCTION COMPANY (PVT) LTD
ENGINEERS AND CONTRACTORS, VTH FLOOR, ALFA PLAZA,
K.P. VALLON ROAD, KADAVANTHRA, KOCHI-682 020,
REPRESENTED BY ITS DIRECTOR, REJI.M. CHERIAN.

BY ADVS.

SRI.SANTHOSH MATHEW
SRI.ARUN THOMAS
SRI.JENNIS STEPHEN
SRI.VIJAY V. PAUL
SMT.VEENA RAVEENDRAN
SRI.ANIL SEBASTIAN PULICKEL

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY ITS CHIEF SECRETARY, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695 001
- 2 STATE OF KERALA,
REPRESENTED BY ITS PRINCIPAL SECRETARY TO
GOVERNMENT, PUBLIC WORKS DEPARTMENT, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695 001
- 3 BID EVALUATION COMMITTEE,
KERALA STATE TRANSPORT PROJECT, TC 11/39, SREE BALA
BUILDING, KESTOM, NANDANCODE, KOWDIAR,
THIRUVANANTHAPURAM-695 003, REPRESENTED BY ITS
CONVENER.
- 4 THE PROJECT DIRECTOR,
KERALA STATE TRANSPORT PROJECT, TC 11/39, SREE BALA
BUILDING, KESTOM, NANDANCODE, KOWDIAR,
THIRUVANANTHAPURAM-695 003

- 5 THE CHIEF ENGINEER,
KERALA STATE TRANSPORT PROJECT, TC 11/39, SREE BALA
BUILDING, KESTOM, NANDANCODE, KOWDIAR,
THIRUVANNATHAPURAM-695 003

- 6 STEERING COMMITTEE,
KERALA STATE TRANSPORT PROJECT, TC 11/39, SREE BALA
BUILDING, KESTOM, NANDANCODE, KOWDIAR,
THIRUVANANTHAPURAM-695 003, REPRESENTED BY ITS
CONVENOR.

- 7 M/S. DINESHCHANDRA R AGARWAL INFRACON PRIVATE LTD,
401, THE GRAND MALL SM ROAD, AMBAWADI AHMEDABAD-380
015.

- 8 M/S. RENJITH BUILDCON LTD.
RANJIT HOUSE, THALTEJ SHILAJ ROAD, OPP. SUN
RESIDENCY, NR. UPWAN BUNGALOWS, THALTEJ, AHMEDABAD-
380 054, GUJARAT.

BY SPECIAL GOVERNMENT PLEADER SRI.MANOJ KUMAR.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-02-2020, ALONG WITH WP(C).31556/2019(T), THE COURT ON 04-05-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 04TH DAY OF MAY 2020 / 14TH VAISAKHA, 1942

WP(C).No.31556 OF 2019(T)

PETITIONER:

RDS PROJECTS LTD.,
HEAD OFFICE - 427, SOMDUTT CHAMBERS - II,9,BHIKAJI
CAMA PLACE, NEW DELHI - 110066 REGIONAL OFFICE AT
SHIHAB THANGAL ROAD, PANAMPILLY NAGAR, KOCHI - 682
019 REPRESENTED BY ITS MANAGING DIRECTOR MR.SUMIT
GOYAL,AGED 64 YEARS, S/O M.L. GOYAL PH 2 RDS
RHYTHM, PADAMUGAL, KAKKANADU, KOHI - 682 036.

BY ADVS.

SRI.JOSEPH KODIANTHARA, SENIOR ADVOCATE
SRI.DEEPU THANKAN
SMT.UMMUL FIDA
SMT.LAKSHMI SREEDHAR

RESPONDENTS:

- 1 STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY, GOVERNMENT
SECRETARIAT THIRUVANANTHAPURAM - 695 001.
- 2 PRINCIPAL SECRETARY,
PUBLIC WORKS DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001.
- 3 KERALA STATE TRANSPORT PROJECT,
T.C. 11/339, SREE BALA BUILDING, KESTON ROAD,
KOWDIAR P.O., THIRUVANANTHAPURAM - 695 003
REPRESENTED BY ITS PROJECT DIRECTOR.
- 4 CONVENER,
BID EVALUATION COMMITTEE, KERALA STATE ROAD
TRANSPORT PROJECT, T.C. 11/339, SREE BALA BUILDING,
KESTON ROAD, KOWDIAR P.O., THIRUVANANTHAPURAM - 695
003

- 5 **STEERING COMMITTEE,
KERALA STATE ROAD TRANSPORT PROJECT, T.C. 11/339,
SREE BALA BUILDING, KESTON ROAD, KOWDIAR P.O.,
THIRUVANANTHAPURAM - 695 003**

- 6 **DINESHCHANDRA R. AGARWAL, INFRACON PRIVATE LTD.,
401, THE GRAND MALL, SM ROAD, AMBAVADI, AHMEDABAD -
380 015.**

- 7 **RENJITH BUILDCON LTD.,
RANJIT HOUSE, THALTEJ-SHILAJ ROAD, OPP. SUN
RESIDENCY NR.UPWAN BUNGALOWS, THALTEJ, AHMEDABAD-
380 054.**

BY SPECIAL GOVERNMENT PLEADER SRI.MANOJ KUMAR.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-02-2020, ALONG WITH WP(C).26853/2019(F), THE COURT ON 04-05-2020 DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

W.P.(C) Nos.26853 and 31556 of 2019

Dated this the 4th day of May, 2020

JUDGMENT

The reliefs sought in these writ petitions are virtually one and the same and they are, therefore, disposed of by this common judgement. The parties and documents are referred to in this judgement, unless otherwise mentioned, as they appear in W.P.(C). 26853 of 2019.

2. Pursuant to the decision of the Government of Kerala to apply part of the proceeds of the financial aid received from the World Bank through the Government of India for execution of the work, namely “KSTP-II -Upgrading Punalur to Ponkunnam Road (SH 8) Package 8A: Km 0+000 (Punalur) to KM 29+840 (Konni)”(the Work), the Kerala State Transport Project (KSTP), the Consultant Engineer of the Government of Kerala for the World Bank aided projects, invited bids for construction and completion of the Work. Ext.P1 is the procurement notice issued by KSTP in this connection. It is specified in Ext.P1 notice that the bidding will be conducted in accordance with the

procedures prescribed in the Guidelines issued by the World Bank for procurement under IBRD loans and IDA credits (current edition) and it will be open to all eligible bidders as defined in the said Guidelines to participate in the bidding process. In terms of the Invitation to Bid (ITB) published in this regard by KSTP, the prospective bidders could be individuals or joint ventures and they were to submit technical as also financial bids.

3. The petitioner is stated to be a contractor who has undertaken numerous civil works. They formed a joint venture with another contractor namely M/s.RDS Project Ltd, for participating in the bid process and undertaking the execution of the Work, and accordingly submitted bid pursuant to Ext.P1 notice. There were 5 bids in response to Ext.P1 notice. The Committee constituted by KSTP for evaluation of the technical bids found the Joint Venture of the petitioner as also respondents 7 and 8 technically qualified for participation in the bid process. Thereupon, with due notice to the Joint Venture of the petitioner as also to respondents 7 and 8, the financial bids were opened on 19.8.2019. The financial bid submitted by the Joint Venture of the petitioner was the lowest. Their bid was Rs.4,46,00,000/- below the bid submitted by the seventh respondent, the next lowest bidder. It is stated by the petitioner that while so, it has come out in newspapers that the Joint Venture of the petitioner has been excluded from the bid process since their Joint Venture

partner namely M/s RDS Project Ltd. is facing an enquiry in connection with another work namely `Construction of Palarivattom flyover', executed by them for another public body namely M/s. Roads and Bridges Development Corporation of Kerala. The case set out by the petitioner in the writ petition is that in so far as the Joint Venture partner of the petitioner has not been blacklisted by the State Government or by KSTP, the Joint Venture of the petitioner cannot be disqualified from the bid process. It is also their case that the Joint Venture of the petitioner being the technically qualified lowest bidder in the tender process, they are entitled to be awarded the Work. The petitioner, therefore seeks appropriate directions to the respondents concerned to award the Work to the Joint Venture of the petitioner.

4. On 23.10.2019, when the writ petition came for admission, this court passed an interim order directing that the Work shall not be awarded to anyone till 28.10.2019, and the said interim order was being extended from time to time.

5. W.P.(C). No.31556 of 2019 is one filed by M/s. RDS Project Ltd seeking virtually the same relief. It is alleged in the said writ petition that due to the appearance of a few cracks in the Palarivattom flyover, the Government of Kerala has ordered a vigilance enquiry into the awarding of the work relating to the flyover and pursuant to the said order, the Vigilance and Anti-Corruption Bureau of the State Government has registered a case against the Managing Director of

the petitioner therein and others for offences punishable under Section 13(1)(d), read with Section 13(2) of the Prevention Of Corruption Act and Section 120B of the Indian Penal Code. According to the petitioner therein, insofar as they have not been blacklisted from participating in public works of the instant nature, they cannot be prevented from participating in such works merely on account of the registration of the case referred to above. It was also contended in the said writ petition that the petitioner therein have been awarded other works by KSTP after the registration of the crime and the decision to exclude the Joint Venture of the petitioner is, therefore, vitiated by malice as well.

6. A statement has been filed initially in W.P.(C). No.26853 of 2019 on behalf of KSTP by its Chief Engineer contending, among others, that in terms of the Joint Venture agreement entered into by the petitioners in the writ petitions, M/s RDS Project Ltd. which is the lead member of the Joint Venture, alone is entitled to represent the Joint Venture and W.P.(C). No.26853 of 2019 instituted on behalf of the Joint Venture by the other Joint Venture partner is therefore not maintainable. It was also contended by KSTP in the statement that Clause 40 (1) of the ITB confers authority on KSTP to reject any bid and therefore the decision to disqualify the Joint Venture of the petitioner cannot be questioned by the petitioner on any ground whatsoever. It was also contended by KSTP in the statement that the construction of Palarivattom flyover by M/s RDS Project Ltd. was defective; that there

are sufficient and strong reasons to conclude that M/s RDS Project Ltd. have committed serious irregularities and indulged in corruption in connection with the execution of the said work and therefore they are liable to be disqualified from the bid process in the light of Annexure R5(d) Guidelines issued by the Central Vigilance Commission. It was also contended by KSTP in the statement that in the light of the case registered against M/s RDS Project Ltd., the bid valuation committee has recommended to reject the bid submitted by the Joint Venture of the petitioner, and the Steering Committee of the KSTP has accepted the said recommendation.

7. When the matter was heard after the statement, the learned counsel for the petitioner, among others, asserted that insofar as the Joint Venture of the petitioner is qualified to participate in the bid process pursuant to Ext. P1 procurement notice, in terms of the Guidelines issued by the World Bank as deputed in the procurement notice and insofar as they do not suffer from any disqualification in terms of the said Guidelines, a decision to disqualify the Joint Venture of the petitioner from the bid process cannot be taken without the concurrence of the World Bank, and to their knowledge, the concurrence of the World Bank has so far not been obtained by KSTP for disqualifying the Joint Venture of the petitioner. It was also submitted by the learned counsel for the petitioner that since the bidding process is one to be conducted in terms of the Guidelines of

the World Bank as proclaimed in Ext.P1 procurement notice, insofar as the Joint Venture of the petitioner does not suffer from any disqualification in terms of the Guidelines of the World Bank, the disqualification of the Joint Venture of the petitioner from the bidding process is wholly unjustified and arbitrary.

8. After the matter was reserved for judgement, a counter affidavit has also been filed on behalf of KSTP on 14.2.2020 by its Chief engineer contending additionally that the Steering Committee of KSTP has decided to execute the work with the state share of the amount earmarked for the KSTP projects and therefore the procurement Guidelines of the World Bank need not be followed as such. It is also contended additionally in the counter affidavit that insofar as the Joint Venture of the petitioner is liable to be disqualified from the bidding process, the Steering Committee of KSTP has also decided to award the work to the seventh respondent, the second lowest bidder, as they are willing to execute the work at the offer made by the Joint Venture of the petitioner. The decision taken by the Steering Committee of KSTP in this regard has also been produced along with the counter affidavit as Ext. R5(c).

9. After affording the petitioners an opportunity to file their pleadings in relation to the averments made in the counter affidavit, the learned counsel for the parties were heard again in the matter.

10. The learned Senior Counsel for the petitioner in W.P.(C) No. 31556 of 2019 then contended that the decision to exclude the Joint Venture of the petitioner from the bid process has the effect of blacklisting M/s. RDS Project Ltd and thereby preventing them from the privilege and advantage of entering into lawful relationship with the Government and public bodies for the purpose of gains. According to the learned Senior Counsel, decisions of that nature cannot be taken without affording them an opportunity of hearing and without the competent authority entering into an objective satisfaction as to the desirability to exclude them from entering into the advantageous relationship with the Government or public bodies. The learned Senior Counsel has placed reliance on the decisions of the Apex Court in **Erusian Equipment & Chemicals Limited v. State of West Bengal**, (1975) 1 SCC 70 and **Gorkha Security Services v. Government (NCT of Delhi)**, (2014) 9 SCC 105, in support of the said contention. According to the learned Senior Counsel, in so far as M/s. RDS Project Ltd has not been blacklisted by the State or KSTP, merely for the reason that a case was registered against them in connection with a work executed by them, respondents are not justified in disqualifying the Joint Venture of the petitioner. It was also argued by the learned Senior Counsel that M/s. RDS Project Ltd has been awarded other works by KSTP even after registration of the case, and the decision to exclude the Joint Venture of the petitioner from the

bidding process is therefore actuated by malice as well.

11. The learned counsel for the petitioner in W.P. (C). No.26853 of 2019 has pointed out that the case referred to in the statement and counter affidavit is one registered long after the date fixed for submission of the bids and its opening. According to the learned counsel, in so far as the Joint Venture of the petitioner was found technically qualified in the bid process, in the absence of any provision in the ITB to disqualify a bidder based on a subsequent development, the disqualification of the Joint Venture of the petitioner based on a subsequent event is arbitrary. It was also pointed out by the learned counsel that it was the Committee which has evaluated the financial bids of the technically qualified bidders that recommended for disqualification of the Joint Venture of the petitioner. According to the learned counsel, the Committee evaluating the financial bids was expected to assess only the acceptability of the financial bids and the competent authority, in the circumstances, ought not have disqualified the Joint Venture of the petitioner on that basis. It was also contended by the learned counsel that such a decision ought not have been taken by the competent authority since in the recommendation of the said Committee namely Ext.R5(b), it was categorically recited that there are no materials to indicate that the Joint Venture of the petitioner has indulged in any fraudulent act or corrupt practice in the matter of participating in the bid process. It

was also contended by the learned counsel that Ext.R5(b) recommendation was never communicated to the petitioner nor the explanation of the petitioner was sought on the said recommendation which has the effect of blacklisting the Joint Venture of the petitioner. Placing reliance on the decision of **Erusian Equipment and Chemicals**, the learned counsel has also contended that the decision to disqualify the Joint Venture of the petitioner is against all principles of natural justice as also the dictum laid down in the said case.

12. The learned counsel for the petitioner in W.P. (C). No.26853 of 2019 has also contended that in any case, the mere registration of a case does not constitute sufficient ground for disqualifying the Joint Venture of the petitioner from the bid process. It was argued by the learned counsel that every person has a right to be presumed innocent unless and until proven guilty through a fair trial. The relevant articles of Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights, 1966 were also relied on by the petitioner to substantiate the said contention. In order to bring home the point that the rights guaranteed under the above International Covenants can be claimed by Indian citizens, the learned counsel has placed reliance on the decision of the High Court of Punjab and Haryana in **Vijay Kumar v. State of Punjab**, 2013(2) ILR (Punjab & Haryana) 962. The learned counsel has further contended that it is since M/s. RDS Project Ltd does not suffer from any disqualification in

terms of Guidelines issued by the World Bank in the matter of participating in the bid process, the Steering Committee of KSTP has decided to execute the work without availing the finance of the World Bank. According to the learned counsel, the Steering Committee of KSTP does not have any authority to take such a decision, especially in the absence of any decision of the State Government in this regard. It was also contended by the learned counsel that at any rate, if KSTP were of the view that the Joint Venture of the petitioner was liable to be disqualified from participating in the tender process, the only option available to them was to re-tender the work. It was also argued by the learned counsel that there is no provision in the tender conditions enabling the tendering authority to negotiate with the second lowest bidder and give them an opportunity to match the financial bid of the lowest bidder and award the work to the second lowest bidder on that basis. According to the learned counsel, in the absence of any such provision in the ITB, KSTP could not have awarded the work to the seven respondent. It was also argued by the learned counsel that Ext. P10 circular issued by the Central Vigilance Commission also prohibits such a course of action as it was found that post-tender negotiations would also be a source of corruption. It is also pointed out by the learned counsel that even in terms of the Kerala PWD Manual, such a course of action is not permissible.

13. Per contra, the learned Senior Government Pleader

contended at the outset, that in the light of the Joint Venture agreement entered into by the petitioner with M/s RDS Project Ltd, the petitioner in W.P.(C) No. 26853 of 2019 is not entitled to seek relief on behalf of the Joint Venture and the said writ petition is, therefore, not maintainable. It was pointed out by the learned Senior Government Pleader that the construction of Palarivattom flyover by M/s. RDS Project Ltd was found to be defective and it was in that background that a case was registered against the Managing Director of M/s RDS Project Ltd. It was also pointed out by the learned Senior Government Pleader that exclusion of a bidder from a bidding process on the basis of their proved fraudulent conduct and conduct in indulging in acts of corruption is sufficient ground for the Government, or for that matter any public authority, to disqualify a tenderer from the tender process. It was pointed out that there are sufficient and strong reasons to conclude that M/s RDS Project Ltd has been guilty of corruption for personal gain in the matter of carrying out the construction of Palarivattom flyover and the same is certainly a reason to disqualify the Joint Venture of the petitioner from the bid process in exercise of the power of the competent authority under Clause 40(1) of the ITB. Placing reliance on the decision of the Apex Court in **Silppi Constructions Contractors v Union of India and another** (2019 SCC online SC 1133), the learned Senior Government Pleader contended that even an adverse remark in connection with the work

executed by a sister concern is sufficient reason to exclude a contractor from a bidding process. It was also contended by the learned Senior Government Pleader that even otherwise, the bid submitted by the Joint Venture of the petitioner was liable to be rejected in the light of Annexure R5(d) Guidelines of the Central Vigilance Commission. It was also contended by the learned Senior Government Pleader that Ext.R5(c) decision of the Steering Committee of KSTP is one taken bona fide in public interest, after taking note of the various facts and circumstances and such decisions cannot be challenged in a proceedings under Article 226 of the Constitution. The decision of the Apex Court in **South Delhi Municipal Corporation v. Ravinder Kumar and another**, (2015)15 SCC 545 was relied on by the learned Senior Government Pleader in support of the said contention.

14. Placing reliance on the decision of the Apex Court in **Sterling Computers Ltd. v. M/s.M & N Publications Ltd. & Others**, AIR 1996 SC 51, the learned Senior Counsel for the petitioner in W.P.(C). 31556 of 2019 has submitted in reply that if it is found that the procedure adopted by the competent authority in disqualifying the Joint Venture of the petitioner is against the mandate of Article 14 of the Constitution, the courts cannot ignore such action on the ground that the authorities must have some latitude or liberty in contractual matters and interference by courts would amount to encroachment on

the exclusive rights of the executive to take decisions in administrative matters.

15. I have perused the pleadings of the parties as also the documents produced and made available by them. I have also given my thoughtful consideration to the contentions raised by the learned counsel for the parties.

16. At the outset, I would like to deal with the contention taken by the respondents as to the maintainability of W.P.(C). No.26853 of 2019. As noted, the contention is that in the light of the joint venture agreement executed by the petitioner with M/s.RDS Project Ltd, only M/s. RDS Project Ltd is entitled to represent the Joint Venture and therefore the petitioner in W.P.(C).No.26853 of 2019 is not entitled to institute the writ petition for and on behalf of the Joint Venture. Merely for the reason that in terms of the joint venture agreement entered into by the petitioner with M/s.RDS Project Ltd, M/s. RDS Project Ltd was permitted to represent the Joint Venture, it cannot be contended that the petitioner who is one of the joint venture partners, is not entitled to approach the constitutional court for enforcement of their rights, especially since the Joint Venture which is not a legal entity, is entitled to institute any proceedings in its name. Further, the contention aforesaid has now become academic since M/s. RDS Project Ltd has also filed a writ petition seeking identical relief.

17. Before dealing with the matter further, it is necessary

to understand the principles of law governing the subject. After reviewing the key judgments rendered by the Apex Court over a period of fifteen years from **Tata Cellular v. Union of India**, (1994) 6 SCC 651, as regards the scope of judicial review in matters relating to contracts and after referring to **Raunaq International Ltd v. I.V.R. Construction Ltd** (1999)1 SCC 492, **Air India Ltd v. Cochin International Airport Ltd**, (2000)2 SCC 617, **Karnataka SIIDC Ltd v. Cavalet India Ltd**, (2005)4 SCC 456, **Master Marine Services (P) Ltd v. Metcalfe & Hodgkinson (P) Ltd**, (2005)6 SCC 138, **B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd**, (2006)11 SCC 548, **Jagdish Mandal v. State of Orissa** (2007)14 SCC 517, **Michigan Rubber (India) Ltd. v. State of Karnataka & others**, (2012)8 SCC 216, **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd** (2016)16 SCC 818, **Montecarlo v. NTPC Ltd**, AIR 2016 SC 4946, **Municipal Corporation, Ujjain and another v. BVG India Ltd and others**, (2018)5 SCC 462 and **Caretel Infotech Limited v. Hindustan Petroleum Corporation Limited and Others**, 2019 (6) SCALE 70, the Apex Court has summarised the principles in the very recent the judgement in **Silppi Constructions Contractors** thus:

“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. “

As evident from the extracted principles, even while the Court was emphasising on judicial restraint and overwhelming public interest to justify intervention in matters relating to contracts involving State and its instrumentalities and even while clarifying that the court does not sit like a court of appeal over the appropriate authority in such matters, and that interference of the court in such matters shall be minimal, it was made clear by the Apex Court that the courts will interfere in such matters to prevent arbitrariness, irrationality, bias, malafides or perversity. It is seen that one of the points highlighted by the Apex Court in **Tata Cellular** and which was followed in some of the latter decisions of the Apex Court was that the Government and its instrumentalities must have the freedom to enter into contracts and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. In **Sterling computers Ltd v. M/s. M and N publications Ltd and others**, (1993)1 SCC 445, while reiterating the principle that

by way of judicial review, the court would only examine the question as to whether the decision making process was in accordance with the principles of equality adumbrated under Article 14 of the Constitution, the Apex Court has clarified that if the procedure adopted by the competent authority in the matter of entering into a contract is found to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action, taking the view that the authorities concerned shall have some latitude or liberty in contractual matters, and interference by courts amounts to encroachment on the exclusive right of the executive to take such a decision. The relevant passage from the said judgement reads thus:

"If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

18. Having thus understood the law, the question falls for consideration is whether the decision of KSTP to disqualify the Joint Venture of the petitioner from the bid process pursuant to Ext.P1 procurement notice can be said to be one taken in accordance with the

mandate of Article 14 of the Constitution.

19. As noted, in Ext. P1 procurement notice, it was mentioned clearly that the Work is proposed to be executed with the finance of the World Bank and therefore the bidding for the Work would be in accordance with the procedures prescribed in the Guidelines of World Bank for procurement under IBRD loans and IDA credits (current edition) and that it will be open to all eligible bidders as defined in the said Guidelines to participate in the bidding process. The aforesaid Guidelines which were made available by the learned counsel for the petitioner in the course of the hearing reveal that the Government is not entitled to deny participation to any bidder in the procurement process for reasons unrelated to its capability and resources to successfully perform the contract. It is provided in the said Guidelines that the World Bank would reject a proposal for award of any work to anyone, if it determines that the bidder recommended for award has directly or indirectly engaged in corrupt, fraudulent, collusive, coercive or obstructive practice in competing the work. The Guidelines also provide for imposing sanction against bidders and thereby making them ineligible, either indefinitely or for a stated period of time, for awarding a World Bank financed contract. The Guidelines also provide that it is only with the concurrence of the World Bank that Government would be entitled to introduce into any contract for execution of a World Bank financed work any undertaking of the bidder to observe

the law of the country relating to fraud and corruption. The Guidelines also provide that prior no objection of the World Bank shall be obtained before rejecting all bids, soliciting new bids or entering into negotiations with lowest evaluated bidder. The Guidelines also provide that after bids have been received and evaluated, the Government shall, before a final decision on the award is made, furnish to the World Bank sufficient time for its evaluation and comparison together with the recommendations for award and such other information as the World Bank shall reasonably request. The Guidelines also provide that the Government shall award the contract only after receiving the no objection from the World Bank. The Guidelines also provide that if the Government receives protests or complaints after publication of the award from the bidders, a copy of the same shall be sent to the World Bank for its review and comments. It is seen that it is in the light of the aforesaid Guidelines that the petitioners have contended that the disqualification of the Joint Venture of the petitioner from the bidding process is not in accordance with the terms of the invitation. To a specific query from the Court, the learned Senior Government Pleader has clarified that it is unnecessary to consider the question as to whether the the disqualification of the Joint Venture of the petitioner from the bidding process is in accordance with the Guidelines of the World Bank since it has now been decided by the Steering Committee of KSTP to execute the work without the finance of the World Bank. In

other words, the stand taken by the learned Senior Government Pleader is that though the work is one which was sought to be executed with the finance the World Bank, it has been decided midway that the World Bank finance need not be availed for the same and that therefore the Guidelines of the World Bank need not be followed. In the light of the aforesaid clarification made by the learned Senior Government Pleader, it is unnecessary to consider the question as to whether the disqualification of the Joint Venture of the petitioner is in accordance with the Guidelines of the World Bank. Insofar as the decision of the State to execute the Work without the financial aid of the World Bank cannot be questioned by the petitioners, the question formulated for decision namely whether the decision of KSTP to disqualify the Joint Venture of the petitioner from the bid process pursuant to Ext.P1 procurement notice can be said to be one taken in accordance with the mandate of Article 14 of the Constitution is to be considered de hors the Guidelines of the World Bank.

20. The fact that the construction of Palarivattom flyover made by M/s. RDS Project Ltd is found to be defective is not disputed even by M/s. RDS Project Ltd. The question as to whether the defects found in the construction of the said flyover is attributable to any corrupt, fraudulent, or collusive practice resorted to by M/s.RDS Project Ltd., is not arising for consideration in these matters, for it is not precisely on that ground that the Joint Venture of the petitioner was

disqualified from the bid process. On the other hand, as evident from Ext.R5(b) recommendation, the Joint Venture of the petitioner was disqualified from participating in the bid process on account of the registration of the case against the Managing Director of M/s. RDS Project Ltd on the allegation that he entered into a criminal conspiracy with officials and obtained pecuniary advantage to him and the initiation of the process by the State Government to blacklist M/s. RDS Project Ltd to prevent them from executing any Government work and as the said allegations against M/s. RDS project Ltd would fall within the definition of 'fraud' and 'corruption' as per the Guidelines of the World Bank, that the Joint Venture of the petitioner has been disqualified from participating in the bid process. It is a fact that a case has been registered against the Managing Director of M/s. RDS Project Ltd and others as alleged in Ext.R5(b) recommendation. But the recital in Ext.R5(b) recommendation that the State Government has initiated process to blacklist M/s. RDS project Ltd does not appear to be correct as no material whatsoever has been made available by the respondents to substantiate that stand despite the specific contentions taken by the petitioners that no such steps have so far been taken. Similarly, as indicated in Ext.R5(b) recommendation itself that no indicators of any fraud, corruption/collusion were observed from the side of the Joint Venture of the petitioner in terms of the Guidelines of the World Bank. In other words, it is evident that the Joint Venture of

the petitioner has been disqualified from participating in the bid process on account of the registration of the case against the Managing Director of M/s. RDS project Ltd under Section 13(1)(d) read with Section 13(2) of the Prevention Of Corruption Act and also under Section 120B of the Indian Penal Code.

21. In **Erusian Equipment & Chemicals Ltd.**, the Apex Court held that blacklisting which creates a barrier between the persons blacklisted and the Government in the matter of transactions casts a slur and involves civil consequences, for it has the effect of preventing the person from the privilege and advantage of entering into lawful relationship with the Government for the purposes of gains. It was also held by the Apex Court in the said case that the power of the State to carry on trade is subject to Part III of the Constitution and unlike an ordinary individual, the State cannot choose to exclude persons in the matter of carrying on trade, and equality of opportunity would apply to matters of public contracts. It was also held therefore that when disability is created by blacklisting, the competent authority shall have an objective satisfaction as to the desirability to exclude the person blacklisted from entering into lawful relationship with the Government or otherwise it will not be legal. It was also held that fundamentals of fair play require that the person concerned shall be given an opportunity to represent his case before he is put on the blacklist. Paragraphs 12 and 20 of the said judgment read thus:

“12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

x x x x x x x x x x

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

In **Patel Engineering Limited v. Union of India and others**, (2012) 11 SCC 257, after reiterating the principles laid down in **Erusian Equipment & Chemicals Ltd**, it was held by the Apex Court that blacklisting shall be for a legitimate purpose and the only legal

limitation upon the exercise of such power is that the State or the instrumentality of the State shall act fairly and rationally without in any way being arbitrary. It was also clarified in the said judgement that what is the legitimate purpose that is sought to be achieved in a given case depends upon various factors. The relevant passage in the said judgement reads thus :

“It follows from the above judgment in *Erusian Equipment case* that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.”

In **Gorkha Security Services**, the Apex Court held that the fundamental purpose behind the serving of show-cause notice before blacklisting is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. As clarified in **Patel Engineering Limited**, the decision of the State or

its instrumentalities not to deal with a person or entity on account of the undesirability of entering into the contractual relationship with such person or entity is called blacklisting. The fact that the disqualification of the Joint Venture of the petitioner from participating in the tender process would amount to blacklisting cannot therefore be disputed. As noted, neither the Joint Venture of the petitioner nor M/s. RDS project Ltd has been given an opportunity to represent their case before they are put on blacklist. As found earlier, they are blacklisted solely on the premise that a case has been registered against the Managing Director of M/s. RDS Project Ltd with the necessary allegations falling under Section 13(1)(d) read with Section 13(2) of the Prevention Of Corruption Act and also under Section 120B of the Indian Penal Code. In the light of the decisions of the Apex Court in **Erusian Equipment & Chemicals Ltd, Patel Engineering Ltd.** and **Gorkha Security Services**, the decision to exclude the Joint Venture of the petitioner shall be held to be arbitrary and violative of all principles of natural justice and Article 14 of the Constitution. It needs to be made clear in this context that this Court has not considered the question as to whether registration of a case against the Managing Director of M/s. RDS Project Ltd with the necessary allegations falling under Section 13(1)(d) read with Section 13(2) of the Prevention Of Corruption Act and also under Section 120B of the Indian Penal Code, is sufficient for depriving the Joint Venture of the petitioner

or for that matter, M/s. RDS project Ltd from participating in the tender process, as the question whether the same is a legitimate cause for disqualifying the Joint Venture of the petitioner is a matter to be considered by the Government after affording the petitioners in the writ petitions an opportunity to represent their case. I take this view also for the reason that if an opportunity is given to the petitioners, they would certainly be entitled to contend that they are deprived of an opportunity to participate in the tender process for no reasons attributable to them, and had there been a due process for blacklisting M/s. RDS Project Ltd prior to the last date for submission of the bids pursuant to Ext.P1 procurement notice, they could have participated in the bid process either directly or with some other partner.

22. Placing reliance on Clause 40(1) of the ITB, the learned Senior Government Pleader contended that the said provision confers authority on KSTP to disqualify the Joint Venture of the petitioner from the bidding process on account of the registration of a case against the Managing Director of the said company for offences with the necessary allegations falling under Section 13(1)(d) read with Section 13(2) of the Prevention Of Corruption Act and also under Section 120B of the Indian Penal Code. Clause 40 (1) of ITB reads thus:

"40.1. The Authority reserves the right to accept or reject any bid, and annual the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability To Bidders. In case of annulment, all bids submitted and specifically, bid securities, shall be

promptly returned to the Bidders"

The clause aforesaid, according to me, does not enable the respondents to take any decision contrary to the constitutional mandate under Article 14, for such a requirement is inbuilt in every such sweeping provisions in tender documents conferring power on the competent authority to take legitimate decisions in public interest.

Another contention seriously pressed into service by the learned Senior Government Pleader was that Annexure R5 (d) Guidelines of the Central Vigilance Commission enables KSTP to disqualify the Joint Venture of the petitioner for the reasons made mention of in Ext.R5(b) recommendation of the Committee for evaluation of the financial bids. There is absolutely no merit in this argument also. As rightly pointed out by the learned counsel for the petitioner, the respondents have no case that an integrity pact in the nature of one referred to in Annexure R5 (d) communication has been signed between KSTP and the tenderers. An integrity pact in the nature of one referred to in Annexure R5 (d) communication would come into effect only once it is signed as clarified in Annexure R5 (d) itself.

23. The contention pressed into service by the learned Senior Government Pleader placing reliance on the decision of the Apex Court in **South Delhi Municipal Corporation** was that Ext.R5(c) decision of the Steering Committee of KSTP is one taken bona fide in public interest after taking note of the various facts and

circumstances and such decisions cannot be challenged in a proceedings under Article 226 of the Constitution. It has been clarified in the said decision itself by the Apex Court that such decisions shall not be arbitrary or unreasonable. Insofar as it is found that the decision to disqualify the Joint Venture of the petitioner was arbitrary, I do not think that the said decision would come to the rescue of the respondents.

24. The contention pressed into service by the learned Senior Government Pleader placing reliance on the decision of the Apex Court in **Silppi Constructions Contractors**, was that even an adverse remark on a sister concern of the bidder is sufficient to disqualify the bidder from the bid process. I do not find that the Apex Court has laid down such a broad proposition in the said case. **Silppi Constructions Contractors** is a case where the technical bid submitted by the bidder in a case similar to one on hand has been rejected by the competent authority on the ground that the bidder does not satisfy the eligibility criteria for submission of the bid, for its sister concern had suffered adverse remarks in respect of another contract. Though the decision of the competent authority was interfered with by the learned Single Judge, the said decision was reversed by the Division Bench and the same was affirmed by the Apex Court. It is seen from the decision of the Apex Court that one of the eligibility criteria prescribed for the bidders was that there shall

not be any adverse remarks against them in the Work Load Return of the concerned engineering authority. The bidder involved in the case was a firm. It had a sister concern, which was a company. All the partners of the bidder firm were directors of the sister concern. Admittedly, there were adverse remarks against the sister concern of the bidder in the Work Load Return of the concerned engineering authority. The question arose for consideration was as to whether the same was sufficient to disqualify the bidder. Insofar as it was found that the bidder and its sister concern were one and the same entity, and insofar as it was found that the sister concern of the bidder has suffered adverse remarks, and as one of the eligibility criteria prescribed for the bidders was that there shall not be any adverse remarks against them in the Work Load Return of the concerned engineering authority, the Apex Court has held that the same was sufficient to disqualify the bidder in terms of the notice inviting the bid. The said judgement, according to me, cannot have any application to the facts of the present case.

25. With the findings in paragraphs 21 to 24, the writ petitions could have been disposed of. But, since it is found that to mould the reliefs to be granted to the petitioners, it is necessary to consider the question as to whether the Steering Committee of KSTP was justified in taking a decision to award the work to the second lowest bidder after negotiating with them to match the offer made by

the Joint Venture of the petitioner also, I am considering the said question as well.

26. In **Ramana Dayaram Shetty v. International Airport authority of India**, (1979)3 SCC 489, the Apex Court, after referring to the observation made by Justice Frankfurter in **Viteralli v. Saton** (359 US 535: Law Ed (Second Series) 1012) that he that takes the procedural sword shall perish with the sword, held that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. It was also held by the Apex Court in the said case that the said rule of administrative law emanates from Article 14 of the Constitution. The relevant passage of the said judgement reads thus:

"Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by Respondent 1 and since the Respondents 4 did not satisfy this standard or norm, it was not competent to Respondent 1 to entertain the tender of Respondents 4. It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in *Viteralli v. Saton*¹ where the learned Judge said:

“An executive agency must be rigorously held to the standards by which it professes its action to be judged Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.”

This Court accepted the rule as valid and applicable in India in *A.S. Ahluwalia v. Punjab*² and in subsequent decision given in *Sukhdev v. Bhagatram*³, Mathew, J., quoted the above-referred observations of Mr Justice Frankfurter with approval. It may be noted that this rule, though supportable also as an emanation from Article 14, does not rest merely on that article."


In **G.J.Fernandez v. State of Karnataka**, (1990) 2 SCC 488, it was held by the Apex Court that the Rule in **Ramana Dayaram Shetty** shall be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race. The relevant passages of the judgement contained in paragraph 15 read thus:

"Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made,


should not result in arbitrariness or discrimination.

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x x x x x x x x

But, we are inclined to agree with the respondent's contention that while the rule in *Ramana case*¹ will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the 502 consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, therefore, rightly not called upon to go into this question".

In Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation, (2000) 5 SCC 287, the Apex Court has approved the view that if a term of the tender need to be altered, the only manner in which it could be done is by initiating a fresh process of tender or otherwise it will be like changing the rules of the game after it had begun, for by reason of the alteration of the term of the tender, the possibility of a larger participation or more attractive bids cannot be ruled out. The relevant paragraphs in the said judgment read thus:

“10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several  principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless 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.

12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative

permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered.”

In W.B. State Electricity Board v. Patel Engineering Company Ltd. & others, (2001)2 SCC 451, the Apex Court has held that relaxation or waiver of a rule or condition, unless so provided under the invitation to bid in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. It was also held by the Apex Court in the said case that such approach should always be avoided and where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. It was further held by the Apex Court in that case that adherence to the notice inviting bid or rules is the best principle to be followed, which is also in the best public interest. Paragraph 24 of the judgment reads thus:

“24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents

10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.”

As indicated above, though it was specifically stated in Ext.P1 procurement notice that the bidding process would be in accordance with the procedure prescribed in the Guidelines of the World Bank for procurement under IBRD loans and IDA credits, the said procedure has been given a go-by after the commencement of the bidding process and the specific case set out by the petitioner that the Joint Venture of the petitioner is not liable to be disqualified in terms of the aforesaid Guidelines of the World Bank has not been answered by the respondents on that ground. The relevant portion of paragraph 11 of the counter affidavit filed by KSTP wherein the aforesaid stand has been expressed reads thus:

"It is pertinent to note that the work being executed at own fund of State Government of Kerala, there is no substance in the contention that the procurement policy of the World Bank is to be followed as such"

The aforesaid stand has been expressed by the learned Senior Government Pleader in the argument note filed in the matter also, which reads thus:

"It is relevant to note that the contention of the petitioner based on the World Bank Procurement Guidelines is not relevant as of now, for the reason that the decision taken by the Steering Committee to reject and to award the work to L2 at the rate quoted by L1 is using state share of KSTP"

In other words, the fact that the disqualification of the Joint Venture of the petitioner from the bidding process was not in accordance with the Guidelines of the World Bank and with the concurrence of the World Bank is not disputed. Further, the provision, if any, in the ITB which confers authority on KSTP to award the Work to the second lowest bidder in a case of this nature after negotiating with them to match their offer with the offer made by the lowest bidder is also not brought to the notice of this court. In the circumstances, in so far as Ext.P1 procurement notice was issued on a specific condition that the bid process would be in accordance with the Guidelines of the World Bank and that it will be open to all eligible bidders as defined in the said Guidelines to participate in the bidding process, in a contingency where the said Guidelines cannot be followed, the only option left to KSTP was to re-tender the Work. I take this view also for the reason that as held by the Apex Court in **Monarch Infrastructure (P) Ltd.,**

had this been a case where the invitation was made otherwise than in accordance with the Guidelines of the World Bank, the possibility of a larger participation or more attractive bids could not have been ruled out. Yet another reason for me to take this view is Ext.P10 Circular of the Central Vigilance Commission which provides that post tender negotiations could often be a source of corruption and there shall not therefore be any post tender negotiations even with the lowest tenderer, except in exceptional situations specified in the circular. If post tender negotiation is not possible with the lowest tenderer, needless to say that there shall not be any post tender negotiations with other tenderers as well. The revised edition of the Kerala PWD Manual also prohibits negotiations of any kind after the opening of the tender. Above all, it has come out that even after registration of the crime against the Managing Director of M/s RDS Project Ltd., KSTP has required M/s RDS Project Ltd. to carry out the work as evidenced by Ext.P7 and P8 communications. There is, therefore, force in the contention that the exclusion of the Joint Venture of the petitioner from the bid process was due to extraneous reasons also.

In the light of the findings aforesaid, I deem it appropriate to dispose of the writ petitions quashing Ext.R5(c) decision taken by the Steering Committee of KSTP pending writ petitions to award the work covered by Ext.P1 procurement notice, and directing the State Government to complete the proceedings contemplated for

blacklisting M/s RDS Project Ltd., after giving them notice indicating the grounds on which they are proposed to be blacklisted from undertaking Government works. Ordered accordingly. It is also directed that if it is found in the said proceedings that M/s RDS Project Ltd. is liable to be blacklisted for any legitimate reason, work covered by Ext.P1 procurement notice shall be re-tendered. It is further directed that if it is found in the proceedings that M/s RDS Project Ltd. is not liable to be blacklisted, the work shall be awarded to the Joint Venture of the petitioner.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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APPENDIX OF WP (C) 26853/2019

PETITIONER'S EXHIBITS:

- EXHIBIT P1** TRUE COPY OF THE NOTICE INVITING TENDER DATED 11.01.2019 ISSUED BY THE 4TH RESPONDENT.
- EXHIBIT P2** TRUE COPY OF THE MINUTES OF THE TECHNICAL BID OPENING.
- EXHIBIT P3** TRUE COPY OF THE INTIMATION SENT BY THE TENDER INVITING AUTHORITY.
- EXHIBIT P4** TRUE COPY OF THE NEWS ITEM WHICH APPEARED IN MALAYALA MANORAMA NEWSPAPER ON 6.9.2019.
- EXHIBIT P5** TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER TO RESPONDENTS 1 TO 6.
- EXHIBIT P6** TRUE COPY OF THE INTERIM ORDER DATED 10.10.2019 IN WP.C NO.26405 OF 2019 OF THIS HONOURABLE COURT.
- EXHIBIT P7** TRUE COPY OF THE LETTER NO. KSTP/1584/2019- AE 8 DATED 31.08.2019 ISSUED BY THE CHIEF ENGINEER, KSTP.
- EXHIBIT P8** TRUE COPY OF THE COMMUNICATION DATED 03.10.2019 SENT BY THE CHIEF ENGINEER, KSTP TO M/S. RDS PROJECT LIMITED

EXHIBIT P9 TRUE COPY OF THE BID DOCUMENTS IN RELATION TO NATIONAL COMPETITIVE BIDDING FOR PROCUREMENT OF WORKS IN RELATION TO EXT.P1

EXT.P10 TRUE COPY OF THE CIRCULAR NO.4/3/07 DATED 3.3.2007 ISSUED BY THE CENTRAL VIGILANCE COMMISSION, UNION OF INDIA.

EXT.P11 TRUE COPY OF THE LETTER DATED 27.10.2017 ISSUED TO THE PRINCIPAL SECRETARY TO THE GOVERNMENT BY THE CHIEF ENGINEER, PWD, NATIONAL HIGHWAY, THIRUVANANTHAPURAM.

Ext.p12 TRUE COPY OF THE COMMUNICATION ISSUED BY THE PRINCIPAL SECRETARY TO THE CHIEF ENGINEER, NATIONAL HIGHWAY DT. 10.1.2018.

EXT.P13 TRUE COPY OF THE INTERIM ORDER PASSED BY THE HON'BLE SUPREME COURT ON 7.2.2020 IN SLP NO.3008-3015/2020.

RESPONDENTS' EXHIBITS :

- EXT.R5(a) TRUE COPY OF THE RELEVANT PAGES OF WPC NO.26405 & 26030 OF 2019
- EXT.R5(b) TRUE COPY OF SECTION 2 CLAUSE 12 OF BID EVALUATION FORM WHICH FORM PART OF BID DOCUMENT.
- EXT.R5(c) TRUE COPY OF DECISION TAKEN BY THE STEERING COMMITTEE.
- EXT.R5(d) TRUE COPY OF THE RELEVANT PAGE OF THE AGREEMENT BETWEEN THE UNION OF INDIA AND THE WORLD BANK.

APPENDIX OF WP (C) 31556/2019**PETITIONER'S/S EXHIBITS:**

- EXHIBIT P1 TRUE COPY OF THE NOTICE INVITING TENDER DATED 11-01-2019 ISSUED BY THE THIRD RESPONDENT.
- EXHIBIT P2 TRUE COPY OF THE JOINT VENTURE AGREEMENT DATED 19-02-2019 EXECUTED BY THE PETITIONER AND M/S. CHERIAN VARKEY CONSTRUCTION COMPANY (PVT) LTD.
- EXHIBIT P3 TRUE COPY OF THE MINUTES OF THE BID EVALUATION COMMITTEE DATED 19-08-2019.
- EXHIBIT P4 TRUE COPY OF THE INTIMATION SENT BY THE KSTP DATED 19-08-2019.
- EXHIBIT P5 TRUE COPY OF THE INTIMATION SENT BY THE KSTP DATED 31-08-2019.
- EXHIBIT P6 TRUE COPY OF THE INTERIM ORDER OF THIS HON'BLE COURT DATED 10-10-2019 IN WPC NO. 26405 OF 2019.
- EXHIBIT P7 TRUE COPY OF THE INTERIM ORDER OF THIS PHON'BLE COURT DATED 12-11-2019 IN WPC NO. 30487 OF 2019.
- EXHIBIT P8 TRUE COPY OF THE INTERIM ORDER OF THIS HONOURABLE COURT DATED 21.11.2019 IN W.P.C. NO. 26405 OF 2019
- EXHIBIT P9 TRUE COPY OF THE GOVERNMENT ORDER (MS) NO.52/2019 /PWD DATED 25.10.2019