

**(1996) 01 OHC CK 0005**

**Orissa High Court**

**Case No:** Original Jurn. Case No's. 3509 and 3510 of 1995

G.K. Pasayat

APPELLANT

Vs

Orissa State Housing Board and  
Others

RESPONDENT

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**Date of Decision:** Jan. 22, 1996

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 162

**Citation:** AIR 1996 Ori 136

**Hon'ble Judges:** D.P. Mohapatra, Acting C.J.; R.K. Patra, J

**Bench:** Division Bench

**Advocate:** J. Patniak, Sanjit Mohanty, B.P. Ray, Pradip Mohanty and N.C. Sahoo, for the Appellant; P.K. Mishra, B.K. Nayak, F. Mishra, A.K. Sahoo, L. Pangari, R. Sahoo, B. Jena and S.N. Sukla and S.K. Nayak-1, P.K. Patra and A.K. Baral, Addl. Govt. Advs., for the Respondent

**Final Decision:** Allowed

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### **Judgement**

R.K. Patra, J.

In the twin writ petitions one common order being the subject-matter of challenge, they were heard together and are disposed of by this judgment.

2. The Chief Engineer, Orissa State Housing Board, Bhubaneswar (opposite party No.3) invited sealed tenders as per Annexure-1 from contractors of special class registered under the State P.W.D./ C.P.W.D./M.E.S./OS.H.B. and/or other Central Government Organizations and Undertakings having successfully completed building projects costing not less than rupees 1.50 crores per year during the last three years for the following two items of work :

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	Name of work	Estimated cost.
1.	Construction of houses under Chhend Housing Scheme, Ph.III, Stage "A" at Rourkela, (HIG "A" 6f Nos., HIG "B" 11Nos.	Rs. 273.70 lakhs
2.	Construction of houses under Chhend Housing Scheme, Ph. III, Stage "A" at Rourkela (HIG "B" 267 Nos.)	Rs. 396.03 lakhs.

Item No. 1 of the aforesaid work is described as Group I and item No. 2 as Group II hereinafter for the sake of convenience. The Government in the Housing and Urban Development Department, in its letter No. 14867/HUD dated 15-5-1995 at Annexure-4 allotted Group 1 of the work to M/s. B.P.R. & Co., opposite party No. 4 in O.J.C. No. 3509 of 1995, and Group II of the work to M/s. Orissa Construction Corporation Ltd. ("O.C.C. Ltd. for brief), opposite party No. 4 in O.J.C. No. 3510 of 1-995. The petitioner G.K. Pasayat being aggrieved by such allotment of work to M/s.

B.P.R. & Co. and O.C.C. Ltd. has filed the aforesaid writ petitions for quashing of the same.

### 3. factual matrix:

Pursuant to the tender call notice (Anne-xure-1), the petitioner submitted his tenders in two separate covers, one for pre-qualification bid and the other for the item rate bid, along with eight others including M/s. B.P.R. & Co. and O.C.C. Ltd. On consideration of the pre-qualification bids by the Orissa State Housing Board, opposite party No. 1 (hereinafter referred to as "the Housing Board"), the petitioner was found to have necessary qualifications and was declared qualified for consideration of item rate bids. According to the petitioner, M/s. B.P.R. & Co. had not completed any building project costing Rs. 1.50 crores per year during the last three years, Similarly, O.C.C. Ltd. had not executed any civil work (building work) of more than Rs. 1.50 crores for which neither of them was qualified for being considered to the item rate bids. It is his specific case that the Housing Board waived both the pre-conditions, (i) the tenderer should be special class contractor registered under the State P.W.D./C.P.W.D. M.E.S./O.S.H.B. and/or other Central Government Organisations and (ii) must have successfully completed building project costing Rs. 1.50 crores per year during the last three years, and considered all the nine cases for item rate bids. Accordingly, on 12-4-1994 the tenders were opened and the petitioner's tender was found to be the lowest.

4. It is the allegation of the petitioner that the Housing Board did not accept the tenders of the petitioner (first lowest tender), M/s. Master Construction Co. Ltd. (second lowest tender) and Mahendra Swain (third lowest tender) and directed to negotiate with the fourth lowest tenderer, i.e. O.C.C. Ltd. Against the said decision of the Board, M/s. B.P.R. & Co. and others represented to the State Government (opposite party No. 2) for re-consideration of their cases. The Government called for report and on the basis of the report submitted by the Chief Engineer, opposite party No. 3. it decided by order dated 3-2-1995 to accept the offer made by the petitioner his tender being the lowest. The petitioner has further alleged that following the installation of the new ministry in the State, B.P.R. & Co. made representation to the Government which without considering the matter in proper perspective issued the impugned letter (Annexure-4) allotting the work of Group I to M/s. B.P.R. & Co. and the work of Group II to O.C.C. Ltd. The Petitioner claims that his tender being the lowest, the State Government had rightly decided on 5-2-1995 to accept it and it has no power to review the said decision and issue the impugned letter (Annexure-4).

5. The Housing Board and its Chief Engineer (opposite parties 1 and 3) have filed counter-affidavit in which it has been stated that all the tenders were evaluated by adopting a formula of awarding marks and on that basis the position of the tenderers was as follows:

	Name of the tenderer		Marks secured
1.	M/s. Orissa Construotion Corpn. Ltd.	◆	100
2.	M/s. Uttar Pradesh Rajakiya Nirman Nigam	◆	89
3.	Sri Mahendra Kumar Jena	◆	85
4.	M/s. B. K.. Parida & Brothers	◆	72
5.	Sri Mahendra Swain	◆	65
6.	Sri Sambhunath Prasad	◆	62.05
7.	M/s. Master Construction Co. Ltd.	◆	55

8.	M/s. B. P. R. Company	?	60
9.	Sri G.K. Pasayat	?	45

The aforesaid details were placed before the authority of the Housing Board with recommendation that the cut off mark for the pre-qualification was kept at 60. As a result, only seven tenderers got themselves pre-qualified and the petitioner and M/s. Master Construction Co. Ltd. were disqualified. The Chairman of the Housing Board, however, decided to consider the tenders submitted by the petitioner as well as-by M/s. Master Construction Co. Ltd. Accordingly, all the tender papers were opened on 12-4-1994 and after incorporating the individual item rates offered by different contractors, the position -of tenderers on merit emerged as follows :

Sl. No.	Agency	Estimated amount	Tendered amount	Tender position and percentage	
1.	M/s. OCC Ltd.	2,71,70,484.00	27,02,631/-	+20.36%	1-4
2.	M/s. BK Parida & Brothers	?	3,36,63,698/-	+23.90%	1-6
3.	M/s. GK Pasayat	do	3,16,87,702/-	+16.63%	1-1
4.	Sri Sambhunath Prasad	do	3,50,04,694/-	+28.83%	1-7

5.	M/s. BPR &  Co.	❖ do❖	3,29,36,081/+21.22%	1-5
6.	M/s. UPR Nirman Nigam	❖ do❖	4,19,98,220/+54.75%	1-9
7.	Sri Mahendra K. Jena	❖ do❖	3,59,75,440/+32.41%	1-8
8.	M/s. Master Const. Co. Ltd.	❖ do❖	3,18,04,883/+17.06%	1-2
9.	Sri Mahendra Swain	❖ do❖	3,21,98,160/- +18.50%	1-3

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Thereafter the tender papers were placed before the Tender Committee on 20-5-1994 which accepted the tender papers of O.C.C. Ltd. and recommended the case of O.C.C. Ltd. to the Housing Board for its approval. The Housing Board in its meeting held on 31-5-1994 approved the recommendation of the Tender Committee. The Matter was referred to the State Government for its approval. The Government (opposite party No. 2) on consideration decided that O.C.C. Ltd. would not be able to complete both the works in time as the project has sufficiently got delayed. Consequently, it decided to allot the work of Group I to M/s. B.P.R. & Co. and the work of Group II to O.C.C. Ltd. The said decision was communicated as per Annexure-4. In terms of the Government order, negotiation was held with M/s, B.P.R. & Co. which reduced its rate to rupees 3,16,87,470/-. It is contended in the counter-affidavit that the impugned decision was taken rightly and there Was no illegality or irregularity in the matter.

The State Government which is opposite party No. 2 has filed a separate counter in which it has been stated that the proposal of the Housing Board to accept the tender of O.C.C. Ltd. was submitted to the Government for orders, but order was passed to accept the petitioner's o"ffer which was the lowest amongst the nine tenderers. No order, however, could be issued to the petitioner in view of the model

code of conduct imposed by the Election Commission for the impending Assembly Elections. After the new ministry was formed, the file was submitted to the Government for orders. The Government found that the petitioner being a "B" Class licence-holder is only eligible to offer tenders up to the maximum value of Rs. 50 lakhs. Accordingly, it rejected the offer made by the petitioner and accepted the recommendation of the Tender Committee to allot the work to O.C.C. Ltd. According to the Government, since O.C.C. Ltd. would not be in position to complete work of both the projects in time as the project work had sufficiently got delayed, to ensure the completion of project work in time, Group I work was allotted to M/s. B.P.R. & Co., which is the second lowest quoted tenderer, and Group II work to O.C.C. Ltd. M/s. B.P.R. & Co. (opposite party No. in O.J.C. No. 35D9 of 1995) and O.C.C. Ltd. (opposite party No. 4 in O.J.C. No. 3510 of 1995) have filed their respective counter-affidavits denying the allegations made by the petitioner in the writ petition.

6. Shri Patnaik, learned Counsel for the petitioner, first submitted that the Government having earlier decided to accept the tender of the petitioner, which was the lowest, it is not competent to review the said decision. We do not find any merit in this submission. It is an admitted fact -that pursuant to the decision of the Government dated 3-2-1995, no order accepting the tender was issued to the petitioner. It is well settled that a decision to become binding upon the Government, it must be communicated to the party concerned. Until that is done, the decision continues to remain as provisional and no right can be founded on such decision made in the file. In view of the fact that no order was communicated to the petitioner and before its communication, the decision was varied by the Government, the petitioner cannot stake his claim on the basis of an order made in the Government file.

7. It was next contended that M/s. B.P.R. & Co. has not fulfilled the precondition, i.e. successful completion of building project costing not less than Rs. 1.50 crores per year during the last three years, and as such, no work could have been allotted to it. Similar allegations has also been made by the petitioner against O.C.C. Ltd. The Housing Board in its counter has replied to the allegations by stating that M/s. B.P.R. & Co. executed building works in Rourkela Regional Improvement Trust worth Rs. 100 lakhs during 1993-94 and the Jai Hanuman Trust Work at Rourkela worth Rs. 52 lakhs. With regard to O.C.C. Ltd., the Housing Board has stated that,

"..... It is not correct that M/ s. O.C.C. Ltd. had not executed any building work of more than Rs. 50 lakhs-inasmuch as the M/s. O.C.C. Ltd. have very recently constructed Upper Kolab Power House Project of total value of Rs. 433.31 lakhs and Rayagada Railway Project for Rs. 56.20 lakhs. ...."

8. The O.C.C. Ltd. in its counter-affidavit has stated that it has successfully completed a large number of multi-purpose river valley projects, major buildings and industrial infrastructures, roads, buildings, bridges, harbours, thermal power stations and railways. It has also completed all the industrial buildings of NALCO, Damanjodi

multi-stored residential and non-residential buildings for Industries Department, Paradip Port Trust, HAL Sunabeda, etc. The claim by the O.C.C. Ltd. in its counter-affidavit regarding completion of different works does not find mention in the counter-affidavit of the Housing Board because apparently of the fact that they were not indicated in the tender papers filed by the O.C.C. Ltd. Had they been found mentioned in the tender papers, the Housing Board would not have left them out without being mentioned in its counter. As indicated, the Housing Board in its counter-affidavit has stated about two works done by the O.C.C. Ltd., i.e. Upper Kolab Power House Project and Rayagada Railway Project. There is also no mention that O.C.C. Ltd. has successfully completed building project not less than Rs. 1.50 crores per year during the last three years.

9. M/s, B.P.R. & Co. in its counter-affidavit has. stated that it has completed building projects costing more than Rs. 1.50 crores in the year 1993-94. In support of its claim, two certificates (Annexure-C/4 and D/4) have been enclosed. Annexure-C/4 is a document granted by the Rourkela Regional Improvement Trust certifying that M/s. B.P.R. & Co. have taken up building work valued Rs. 1.70 crores under the Rourkela Regional Improvement Trust and they have completed the work valued more than rupees one crore during the last one year 1993-94. Annexure-D/4 is a certificate granted by one Jai Hanuman Trust to the effect that M/s. B.P.R. & Co. has constructed three temples, open-air theatres, etc. during the year 1993-94 and the approximate value of the work is more than Rs, 50 lakhs including the materials. Both the certificates (Annexure.-C/4 and D/4), however, do not satisfy the precondition mentioned in the tender call notice which requires the concerned contractor to have successfully completed building projects costing not less than Rs 1.50 crores per year during the last three Tears. In other words the intending tenderer should have completed building project costing not less than Rs. 1.50 crores during the last three years, i.e. 1993-94, 1992-93 and 1991-1992. The certificates, Annexures-C/4 and D/4 do not show any work done by M/s. B.P.R. & Co. for 1991-92 and 1992-95. M/s. B.P.R. & Co. has thus fallen short of fulfilling the condition. From the foregoing discussions, it would be clear that M/s. B.P.R. & Co. and O.C.C. Ltd. have not been able to satisfy the pie-condition, i.e. completion of building works of not less than Rs. 1.50 crores per year during the fast three years.

10. We may state here that we are dealing with a case of exercise of contractual powers of a statutory body like the Housing Board and the State Government. In [Tata Cellular Vs. Union of India](#), ), the Supreme Court observed in paragraph 70 of its judgment, as follows (Para 85, at pp. 3366-67 of AIR SCW):

"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."

After discussing the decisions of English Courts and of the Supreme Court, in paragraph 94 of the judgment, the Court has deduced the principles which are as follows (Para 113, at p. 3378 of AIR SCW):

"(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation tender cannot be open to judicial scrutiny because the invitation tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere." However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness (including its other aspects pointed out above) but must be free from arbitrariness not "affected by bias or actuated by mala fides.

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

11. The (sic) legal position, we have to consider whether we can interfere with the decision making process of the Government and strike down Annexure-6. The learned Counsel for the State has produced the relevant Government file for our perusal. We have carefully gone through it. It appears from the noting of the file that the concerned Minister rejected the case of the petitioner on the ground that he is a "B" Class licence-holder for which he is not able to tender offers beyond Rs. 50 lakhs. If such pre-condition was applied to the petitioner to reject his bid, the same test should have been applied to the cases of M/s. B.P.R. & Co. and O.C.C. Ltd., who have also not fulfilled the second precondition, i.e. completion of building work costing not less than Rs. 1.50 crores per year during the last three years. Double

standard having been applied on the fact situations, the decision-making process has become vulnerable. It is nothing but arbitrary and unfair on the part of the Government to reject the offer made by the petitioner on the ground that he had not satisfied the pre-conditions. If the tender is liable to be rejected on that ground, the same consideration should have been bestowed while taking up the cases of M/s. B.P.R. & Co. and O.C.C. Ltd.

For the aforesaid reasons, we have no hesitation to quash the ultimate decision of the Government reflected in the impugned letter, Annexure-4.

12. In the result, the impugned letter of the State Government, Annexure-4, is quashed. The opposite parties 1 to 4 are directed to consider de novo the tenders submitted by the petitioner, M/s. B.P.R. & Co. and O.C.C. Ltd. This reconsideration is to be confined to the aforesaid three tenderers because there was no-grievance raised by any other person who submitted tenders in the matter.

13. The writ petitions are accordingly allowed. There shall be no order as to costs.

D.P. Mohapatra, Actg. C.J.

14. I agree.