

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

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**LPA No. 175/2023
CM No. 5866/2023**

*Reserved on: 18.10.2023
Pronounced on: 03.11.2023*

Manzoor Ahmed Malik Age 62 years
S/O Mohd. Shafi Malik,
R/O Badhoon, Rajouri.

.....Appellant(s)

Through: Mr. Ravi Abrol and
Mr. Sachin Gupta, Advocates.

Vs.

1. UT of Jammu and Kashmir,
Through Commissioner Secretary
PWD(R&B)
Civil Secretariat, Srinagar/Jammu.
2. Chief Engineer, PWD (R&B) Department,
Jammu.
3. Superintendent Engineer PWD (R&B)
Circle Rajouri.
4. Bikram Singh,
Superintendent Engineer PWD (R&B)
Circle Rajouri.
5. Fazal Rehman Dar
F. R. Dar Complex, Mal Mandi
Rajouri.

.....Respondent(s)

Through: Mr. Ravinder Gupta, AAG for R- 1 to 4.
Mr. R. K. Gupta, Sr. Advocate With
Mr. Khyati Sharma, Advocate for R-5.

**CORAM: HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR JUSTICE MOHAN LAL, JUDGE.**

JUDGEMENT

Sanjeev Kumar J

1. An order and judgment dated 16-09-2023 passed by a learned Single Judge of this Court [**“the Writ Court”**] in WPC No. 2397/2023 titled

Manzoor Ahmad Malik v. UT of J&K and others, is the subject matter of challenge in this intra Court appeal filed under Clause 12 of the Letters Patent. The impugned order is assailed on multiple grounds, but before we advert to these grounds of challenge, we deem it appropriate to set out few material facts.

2. The respondent No.3, in terms of e-NOIT No. 68 of 2022-23 dated 19-01-2023, invited bids from A-Class contractors, *inter alia* for up gradation of road from Lambibari to Tarkundi Gali Zayrat via Sarpanch Mohalla and Numbardar Nisar Khan Mohalla. Seven bidders responded to the e-NIT for the aforesaid work which included respondent No.5, Fazal Rehman Dar. The technical bids of all the six bidders, except respondent No.5, were declared as 'non-responsive'. The appellant, feeling aggrieved of the declaration of respondent No.5 as sole qualified bidder in the technical evaluation for the work in question and consequent issuance of letter of allotment of the work in his favour, filed WPC No. 2397/2023. In the writ petition the primary grouse of the appellant was that, respondent No. 3 could not have accepted the single bid and issued Letter of Allotment [LOA] dated 10-08-2023 in favour of the respondent No.5 as the same was contrary to and in violation of the CVC Guidelines enumerated in Vigilance Manual issued by the Central Vigilance Commission. The appellant prayed for a writ of certiorari for quashing the LOA dated 10-08-2023 issued by respondent No.3 in favour of respondent No.5 being in violation of the CVC guidelines. The appellant prayed for issuing fresh tenders for the work in question. The writ petition was opposed by the respondent No.5 who was on caveat. The learned counsel appearing for the respondent No.5 vehemently opposed the writ petition and

submitted that reliance placed by the appellant on the Central Vigilance Manual, to claim that single bid cannot be accepted and the work needs to be re-tendered, was totally misplaced, in that, the guidelines laid down in the CVC Manual stood replaced and substituted by the subsequent guidelines issued by the Department of Expenditure, Department of Finance, Government of India. Respondent No.5 placed strong reliance on the latest manual for procurement of works, which, in clause 5.6.7, clearly provides that subject to fulfillment of certain requirements, a single bid tender can be accepted and such bidder allotted the work.

3. The Writ Court considered the rival contentions and placing strong reliance on clause 5.6.7 of the manual for procurement of work issued by the Department of Expenditure, Ministry of Finance, Government of India, concluded that there was no illegality in accepting the bid of the respondent No.5 and that the appellant had failed to show that any of the requirements laid down in Clause 5.6.7 supra was not satisfied in the case of award of the contract to the respondent No.5. Resultantly, the Writ Court dismissed the writ petition in *limine* vide its order and judgment dated 16-09-2023, which the appellant has assailed before us in this appeal.

4. Before us also, the appellant reiterated his argument that acceptance of single bid and allotment of the work without any competition is contrary to and in violation of the guidelines on the subject issued by the Central Vigilance Commission. It is argued that despite there being subsequent instructions and guidelines by the Department of Expenditure, Ministry of Finance, the guidelines issued by the CVC were intact and, therefore, could not have been ignored by the respondent No.3.

5. Having heard the learned counsel for the parties and perused the material on record, we are of the considered opinion that the judgment passed by the Writ Court does not suffer from any legal infirmity and, therefore, does not call for interference by us.

6. Indisputably, only seven bidders participated in the tendering process initiated vide e-NIT No. 68 of 2022-23 dated 19-01-2023. On opening of the technical bids, six out of seven bidders were declared 'responsive' which included the respondent No.5. The appellant had not participated in the tendering process. Be that as it may, the respondent No.5, who had objected to declaration of other bidders as 'responsive' in the technical bid evaluation, approached this Court by way of WPC No. 585/2023, with the grievance that respondent No.3 was showing reluctance to consider his objection to the declaration of some of the bidders as 'responsive' despite not fulfilling the terms and conditions of the e-NIT. The writ petition was entertained by a Single Bench of this Court and while issuing notice to the respondents to file their objections, the writ Court provided that respondent No.3 herein shall not open the financial bid till the objections filed by the respondent No.5 (the writ petitioner in the said writ petition) were considered and decided by passing a speaking order.

7. It seems that in compliance to the interim directions dated 09-03-2023, the objections filed by respondent No.5 were considered and disposed of by respondent No.3 vide his endorsement No. SER/78/2023 dated 30-05-2023. As is evident from reading of consideration order dated 30-05-2023 (*supra*), the technical evaluation committee re-visited the relevant terms and conditions of the e-NIT and evaluated the bids in the light of the documents

uploaded by the each bidder along with their bid. It was found by the Technical Evaluation Committee that number of bidders, who had been held 'responsive' in the technical evaluation summary, had submitted their earnest money deposits/Bid Security in the form of Bank Guarantee on the Performance Security format instead of prescribed Bank Guarantee for bid security format. It was also detected that some bidders designated as 'responsive' had failed to provide essential documents with their bid, such as complete ITR as per clause 21, Bank solvency certificate and Bank Performance Security as per clause 1 and 8 of the e-NIT/SBD.

8. It is upon consideration of the objections raised by the respondent No.5 and re-evaluation made by the Technical Evaluation Committee, that as many as six out of seven bidders were found not fulfilling the mandatory requirements of e-NIT and were thus declared as 'non-responsive'. This left the respondent No.5 alone in the fray. The respondent No.3, vide its communication No. SER/22/4323/2023 dated 20-07-2023, took up the matter with the Chief Engineer PW(R&B) Jammu, informing the later that in the tendering process respondent No.5 was the only responsive bidder and, therefore, appropriate instructions were required to act further on single tender bid. The respondent No.3 also highlighted the fact that the work in question was approved under NABARD RIDF-XXVIII and the process of tendering had been substantially delayed. It was also pointed out that further tendering would entail more delay in the process which would further delay the execution of the work.

9. Responding to the communication of respondent No.3, the Chief Engineer vide his communication No. CEJ/TS/12338 dated 08-08-2023,

advised the respondent No.3 to complete the tendering process in accordance with the provisions of Rule 173 part (xx) of GFR 2017 and clause 5.6.7 of the Manual for Procurement of Works 2022. The respondent No.3, accordingly, proceeded in the matter and concluded that the three requirements provided in the GFR 2017 and Clause 5.6.7 of the aforementioned Manual were met in the case and, thus proposed to award the contract to the respondent No.5 despite the fact that he was a single responsive bidder. As a follow up, the letter of allotment dated 16-08-2023 was issued in favour of respondent No.5. The agreement dated 31-08-2023 between respondent No.3 and respondent No.5 was also executed and this paved the way for the respondent No.5 to take up the construction of the road from Lambibari to Tarkundi Gali Zayrat via Sarpanch Mohalla and Numbardar Nisar Khan Mohalla.

10. Before us it was not disputed that a substantial amount of work, as on date, has been executed by the respondent No.5.

11. From the narration of events given herein above and the rival submissions of the parties, we find that only question that begs determination in this appeal is, whether a single responsive bid can be accepted and contract awarded to such bidder. The allied question that would arise for consideration is; if the answer to the first question is in affirmative, under what circumstances the single bid can be accepted and the contract allotted to single bidder.

12. Ordinarily, a lawful agreement supported by lawful consideration is concluded on acceptance of reciprocal promises between the parties. The terms and conditions of the contract are those as are mutually decided by the parties to the contract. However, if one of the contracting party is State or

public authority, different considerations would prevail. Though nobody can compel the State or its instrumentalities to enter into a contract with him/her, however, if the State or its instrumentalities decides to enter into a contract with its citizen which has the effect of conferring the largesse and an opportunity to earn, the State cannot act arbitrarily or discriminately and thus violate Articles 14 and 19 of the Constitution of India. In the modern day dispensation, the State and its instrumentalities enter into contract with the contractors on open auction/open bid process basis and all eligible contractors are given opportunity to participate and compete for notified work/works. With a view to have maximum competition and get the Government works executed at the lowest rates with least stress on the public exchequer, a wide publicity is given to the notice inviting tenders. In many a contracts involving technical expertise and financial capabilities, two bid system is adopted, i.e. 'technical bid' and 'financial bid'. The technical qualification of the bidders is evaluated by a duly constituted Technical Evaluation Committee to determine the technical and financial capabilities of the bidders to execute the work and those who are found 'responsive' in the technical evaluation are considered in the price bid. The bidders similarly situated and declared responsive in the technical evaluation are considered in the financial bid and the bidder, whose bid is found lowest, is considered for award of contract. There may be cases where there is good competition amongst the bidders at the time of submission of bids but many of them fail to qualify the technical bid and cross that hurdle.

13. In the instant case, as many as seven bidders participated in the Technical Bid and six out of them were declared 'non-responsive' and ran

out of the race for award of the contract. It was respondent No.5 who alone was found responsive and his bid was considered. The star ground of challenge to the allotment of work in favour of respondent No.5 is that a single bid is required to be rejected and the work re-tendered in view of the guidelines laid down by the Central Vigilance Commission on the subject.

Clause (C) (iv) of the CVC Manual updated in 2021 reads thus:-

(iv) No response even after several rounds of tendering.

Single tenders should be avoided, as far as possible, because it is most restrictive mode of tendering and there is no competition; the bidder may quote unreasonable rates. Single tender process is to be followed only in exceptional and unavoidable conditions with proper reasoned justification. The urgency of procurement and OEM (Original Equipment Manufacturer) status of the item needs to be scrutinized to control manipulations and irregularities in procurement through this route. The guidelines issued by the Commission in this regard vide Circularly No. 005/CRD/19 dated 06-04-2021 may be kept in view.”

14. From reading of the Manual which contains CVC guidelines, it is evident that as per the CVC guidelines, single tender should be avoided as far as possible because it is most restrictive mode of tendering and eliminates competition. The reason for discouraging a single tender, as is apparent from clause (iv), is that in a single tender there is likelihood of the bidder quoting unreasonable rates. If we look at clause (iv) reproduced herein above carefully, we find that there is no complete prohibition or bar for accepting a single tender. What the CVC guidelines say is that single tenders should be avoided as far as possible but the single tender process can be followed in exceptional and unavoidable circumstances with proper justification. The CVC guidelines are requires to be read with Rule 173 (xx), which for facility of reference is also reproduced hereunder:-

“Rule 173: **Transparency, competition, fairness and elimination of arbitrariness in the procurement process.** All government purchases should be made in a transparent, competitive and fair manner, to secure best value for money. This will also enable the prospective bidders to formulate and send their competitive bids with confidence. Some of the measures for ensuring the above are as follows:-

(i).....

.....

(xx) Lack of competition in rule 173 (xix) shall not be determined solely on the basis of the number of Bidders. Even when only one Bid is submitted, the process may be considered valid provided following conditions are satisfied:-

- a. the procurement was satisfactorily advertised and sufficient time was given for submission of bids.
- b. The qualification criteria were not unduly restrictive; and
- c. Prices are reasonable in comparison to market values.”

15. That apart, there are general instructions on procurement and project management issued by the Department of Expenditure, Procurement Policy Division, Ministry of Finance dated 29th October, 2021, which, inter alia, deal with the issue of single bid tendering. Clause 11.8 of the said instructions reads thus:-

“11.8. Rejection of Single Bid: It has become a practice among some procuring entities to routinely assume that open tenders which result in single bids are not acceptable and to go for re-tender as a ‘safe’ course of action. This is not correct. Re-bidding has costs; firstly the actual costs of re-tendering; secondly the delay in execution of the work with consequent delay in the attainment of the purpose for which the procurement is being done; and thirdly the possibility that the re-bid may result in a higher bid.

Lack of competition shall not be determined solely on the basis of the number of Bidders. Even when only one Bid is submitted, the process should be considered valid provided following conditions are satisfied:-

- (i) the procurement was satisfactorily advertised and sufficient time was given for submission of bids;
- (ii) the qualification criteria were not unduly restrictive; and
- (iii) prices are reasonable in comparison to market values.”

16. More importantly, the updated Manual for procurement of works, 2022, which is latest on the subject, also deals with single tendering process in Clause 5.6.7 under the head, 'Consideration of Lack of Competition'. From reading of relevant clauses of the three documents referred to above, the following conclusions can be drawn:-

(a) There is no strict bar or prohibition in accepting a single offer/ single bid and single bid can be accepted provided the following three conditions are satisfied:-

- (i) the procurement was satisfactorily advertised and sufficient time was given for submission of bids;
- (ii) the qualification criteria were not unduly restrictive; and
- (iii) prices are reasonable in comparison to market values."

(b) Rejection or non-acceptance of single bid as a matter of course is not permissible. Resorting to re-bidding without good reasons has costs and contribute hugely to delays in execution of works. There is possibility of re-bid resulting into higher bid.

17. From the perusal of the record placed before us by Mr. Ravinder Gupta, learned AAG appearing for the official respondents, we find that respondent No.4 considered the entire issue in the light of Rule 173 (xx) of GFR 2017 read with Clause 5.6.7 of the Manual for Procurement of Works 2022 and concluded that single tender submitted by respondent No.5 was meeting all the three requirements. Accordingly, he proposed the award of the contract in favour of respondent No.5.

18. Aside, even in the absence of what is laid down in GFR 2017 and the Manual for Procurement of Works, 2022, there is no prohibition or bar from accepting the lowest single tender for execution of a particular work provided

the bid is responsive and is not a drain or burden on the public exchequer. Similarly the employer is well within its right to reject even a lowest bid in a well competitive tendering process if it does not find the bid responsive and in the interest of the public exchequer. There is always allowed some play in the joints to the Government while entering into contracts with its citizens. The only ground on which such discretion exercised by the Government and its instrumentalities can be judicially reviewed is when it is unfair, irrational, arbitrary and actuated by *mala fide* considerations. In short, any award of contract which is found in violation of Article 14 of the Constitution of India must be held to be bad in the eye of law. However, while exercising the judicial review powers in the matter of award of contracts by the State for undertaking infrastructure developmental activities, the Court should be loath to interfere unless a very strong case of violation of Article 14 is made out. Apart from considering other factors, the Courts would also keep in view the general public interest.

19. The observations made by Hon'ble the Supreme Court in the case of **M/s Star Enterprises and ors v. City & Industrial Development Corporation of Maharashtra Ltd. and ors, 1990 (3) SCC 280**, are note worthy and are set out below:-

“ 10. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an

opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process.....”

20. However, such power of judicial review cannot be unbridled and there are certain inherent limitations on its exercise as are enumerated in **Tata Cellular v. Union of India, 1994 (6) SCC 651**. Hon’ble the Supreme Court has held that tendering process and administrative decisions of public authorities can be subjected to judicial review only if, (i) the decision making public authority has exceeded its powers; (ii) has abused its powers; (iii) has committed breach of principles of natural justice, and (iv) is guilty of illegality, irrationality (Wednesbury unreasonableness), *mala fide* and procedural impropriety. The decision of Tata Cellular (*supra*) has been followed by Hon’ble the Supreme Court in later judgment in **The Vice Chairman and Managing Director, City and Industrial Development Corporation of Maharashtra Limited and anr. V Shishir Reality Private Limited and others, 2021 SCC online SC 1141** wherein the Court has reiterated that Article 14 of the Constitution abhors arbitrariness and, therefore, public authorities are to ensure that their administrative actions or decisions are free from bias and favoritism.

21. Interestingly, the amplitude of power and scope of judicial review of the administrative actions and decisions, as propounded in Tata Cellular (*supra*) was to some extent diluted by Hon’ble the Supreme Court in the later case of **Jagdish Mandal v. State of Orissa, 2007 (14) SCC 517**. Para 22 of the judgment reads thus:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 black-listing 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.”

22. In case of **National High Speed Rail v. Montecarlo Limited**, 2022

(6) SCC 401, Hon’ble the Supreme Court has cautioned the High Courts

exercising power of judicial review while dealing with writ petitions or grant of stay in respect of public authorities in awarding government contracts pertaining to mega projects. Para 48 of the judgment is relevant and is set out below:-

“48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner’s notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved.”

23. To conclude, we can say that no doubt the public authorities have a discretionary power to award contracts to a successful bidder/ tenderer if it substantially complies with the essential conditions of the tender document, however, said power is not unfettered and must be exercised by the public authorities within the four corners of the Constitution. The recent trend emerging from the decisions of Hon’ble the Supreme Court points to restrictive interference in contract matters, particularly those pertaining to mega developmental projects. It has been emphasised that in many a cases

the Court exercising judicial review may compensate the party by awarding compensation rather than stalling the execution of a contract by a contractor.

24. Having viewed the entire matter in the light of the legal position, we are of the considered view that the decision taken by the Superintending Engineer with regard to compliance of the three requirements laid down in Clause 5.6.7 of the Manual is not open to judicial review. We would have appreciated much if the Superintending Engineer, while considering the single offer made by respondent No.5, would have objectively considered the matter in the light of Clause 5.6.7 of the Manual read with Rule 173 (xx) of the GFR 2017 and taken a decision supported by reasons to come to the conclusion that the single offer made by respondent No.5 was capable of being considered and accepted. It, however, has not been done in the instant case. At the same time we cannot also lose sight of the fact that there is enough material in the contemporaneous record to demonstrate that the contract in question was sufficiently advertised and the eligible bidders were given sufficient time to respond in which as many as seven bidders submitted their e-tenders and sought consideration for allotment of the contract and the qualifications to be possessed by the contractors, as is apparent from the NIT, also do not seem to be unduly restrictive. Admittedly, the appellant has not been able to show as to how the qualification criteria prescribed in the NIT is unduly restrictive. Since the quoted rates of the respondent No.5 are less than the estimated rate at which the work was tendered, it would be wrong to say that the rates quoted by respondent No.5 are unreasonable in comparison to the market value. The work in question was advertised for an estimated cost of Rs. 592.75 lacs whereas the same has been allotted to the respondent

No.5 at the rate of 0.52% below the schedule of rates of 2022 i.e. for an amount of Rs. 5,36,07,009.40. We, therefore, cannot say that the rates quoted by the respondent No.5 are unreasonable as compared to the market rate and, therefore, a drain on the public exchequer.

25. In view of the discussion made hereinabove, we do not find any merit in this appeal and the same deserves to be dismissed.

26. However, before parting, we would like to make it clear to the State and its instrumentalities that the practice followed by the public authorities to reject a single bid in an open tendering process subject to some conditions as were laid down in the guidelines issued by the CVC has been replaced and substituted by the General Instructions on Procurement and Project Management issued by the Department of Expenditure, Procurement Policy Division, Ministry of Finance, Government of India vide its No. F.1/1/2021-PPD dated 29th October, 2021, clause 11.8 whereof clearly provides that even when only one Bid is submitted, the process should be considered valid provided following three conditions are satisfied:-

- (i) the procurement was satisfactorily advertised and sufficient time was given for submission of bids;
- (ii) the qualification criteria were not unduly restrictive; and
- (iii) prices are reasonable in comparison to market values.”

This is reiterated in the Manual for Procurement of Works updated in June 2022. We have already made it clear that even the CVC Manual did not clearly prohibit or debar the consideration of a single bid in all cases of contract. Otherwise also, there is no statutory or constitutional bar in accepting a single offer provided it is reasonable, cost effective and is not, in any manner, drain or stress on public exchequer. The authorities concerned

dealing with single bid tenders must bear in mind that mere reproduction of the aforesaid three requirements is not enough for taking a decision with regard to a single offer, but they should also apply their mind to the material available with them and record their satisfaction objectively. They should indicate by giving reasons as to how the three pre-requisites for considering the single offer are satisfied in a particular case. This would avoid arbitrariness and obviate allegations of *mala fide* that may be raised by the persons aggrieved of such process. This will bring in requisite transparency in the distribution of public largesse by the public authorities and prevent uncalled for litigation against the government.

27. We hope and trust that the authorities will adhere to the advice tendered herein above and respect the Rule of law while dealing with the allotment of contracts for development of minor, major or mega developmental projects and other activities of the Government.

28. With these observations the appeal in hand is dismissed.

29. The original record produced by Mr. Ravinder Gupta, AAG, be returned to him.

(Mohan Lal)
Judge

(Sanjeev Kumar)
Judge

JAMMU:

03.11.2023

Anil Raina, Addl. Registrar/Secy

Whether the order is reportable: Yes