
(2009) 08 CAL CK 0063

In the Calcutta High Court

Case No : Writ Petition No's. 11766 (W) , 11939 (W) , 12241 (W) , 12341 (W) , 12527 (W) , 12534 (W) , 12603 (W) of 2009, 11881 (W) , 11955 (W) , 12728 (W) , 12812 (W) , 12815 (W) , 12914 (W) and 13434 (W) of 2009 and CAN No's. 6071, 6092, 6550 and 6970 of 2009

Bablu Mitra and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-08-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 19(1), 19(I)(g)

Citation : 114 CWN 307

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Saktinath Mukherjee, Saptangshu Basu, Sagar Bandhopadhyay, Soma Kar Ghosh, Prithi Bhusan Chakraborty, Amit Banerjee, Manmohan Basu, Sanjoy Kumar Ghosh, Anindya Mitra, Proshit Deb, Sagar Bandyopadhyay and Ranjan Saha and Moloy Kumar Basu, Kishore Datta, Biswaroop Bhattacharya, Bilwadal Bhattacharya and Ashmita Ghosh CAN 6072 of 2009, for the Appellant; Chameli Majumder, Swarup Paul, Supriya Bose, Soma Roy Chowdhury, Ashim Kr. Haider, Murari Mohan Das, Mrinal Kanti Sardar, Tanusree Pal Chowdhury, Tapas Kumar Banerjee and Krishnendu Mukherjee for the State, for the Respondent

Judgement

Sanjib Banerjee, J.—On the menu is a limited diagnosis of the state of health of the public healthcare in the State. A clutch of petitioners challenges a government memorandum of June 12, 2009 and subsequent notices inviting tender for supply of cooked diet for indoor patients at State-run hospitals and like institutions. Most of the petitioners, including the ones in the first petition, are existing suppliers of cooked diet to Government hospitals; some of the other petitioners are not existing suppliers but, like the petitioners in the first petition, intended to put in their bids at the time that the petitions were instituted. The petitioners challenge the notification and the tender terms on two primary grounds: that the eligibility criteria set therein are absurd and mala fide and

have no nexus with the work covered thereby; and, that the revised rates for supply of cooked diet to all Government-run hospitals are irrational and contrary to the observations found in at least one earlier order of this Court. Apart from the State which resists any judicial incursion into the executive's exclusive fiefdom, a rival group of caterers - some existing suppliers and some aspiring - are vehement in their opposition. A few of the rival contractors have applied to be impleaded. The substance of the opposition is that there is no obligation on the petitioners to offer to supply; if they feel that the tender terms are unfair or unsuitable or if they are of the opinion that the rates specified would not permit them to supply the food demanded, they may as well not participate and go away.

2. There is a history to these proceedings. Prior to 2001 the State engaged contractors for supply of raw materials to Government hospitals and the cooking thereat was conducted by the State through its employees. By a memorandum of November 26, 2001 it was decided that contractors would supply cooked diet to indoor patients at Government hospitals and offers were invited for supply of cooked diet to be begun on April 1, 2001. By a circular of May 20, 2002 the principal rate for supply of cooked diet was fixed at Rs. 28.50 per patient per day and a suggested diet with the break-up of the cost thereof was furnished. A further circular of July 24, 2002 fixed a daily rate of Rs. 28.50 for the standard diet for any indoor adult patient and Rs. 14.25 for patients upto the age of eight years. Such circular advised bidders to quote either at par or below the rates indicated which implied that the rates would be the highest to be paid. Paragraph 9 of the lead petition recounts that on August 23, 2002 a clarification was issued regarding the proposed invitation of offers for supply of cooked diet to Government hospitals. A subsequent notice inviting tender of June 16, 2005 was issued by the State. Such tender notice came to be challenged in WP No. 13434(W) of 2005 on which an interim order was made on July 13, 2005 arresting any further progress thereunder. The rates fixed in the year 2002 were not reviewed till 2007. By a Government order of February 20, 2007 it was notified that the rates fixed in the year 2002 would be applicable for the year 2007-08.

3. Three sets of contractors supplying cooked diet to Government hospitals instituted WP No. 5971(W) of 2007, WP No. 5976(W) of 2007 and WP No. 6076(W) of 2007. They contended that the rates fixed were unreasonable, unfair and unrealistic as quality diet could not be supplied at such rates. These petitioners appeared to espouse the patients' cause to obtain higher commercial rates for themselves. It is irrelevant that some of the petitioners who clamoured for higher rates in the year 2007 are satisfied with the new rates that have now been declared; or that some of the contractors who had opposed those petitions in 2007 seek an upward revision of the rates now set. In passing an interim order on the three petitions on March 29, 2007 the Court concurred with the view expressed when WP No. 13434(W) of 2005 had been admitted and observed that "when a patient is admitted in a hospital for treatment for any

disease that is ailing him, quality diet is as essential for his recovery as drugs and medicines are." The Court felt that asking the contractors to provide three meals a day and tea at the rate of Rs. 28.50 per adult patient made it "absolutely unrealistic and impracticable for anyone engaged in catering business to provide quality food at such abnormally low rate." The Court wondered whether there was any machinery for quality control and stayed further progress of the tender process in respect of some of the Government hospitals where the work orders had not been finalised or issued.

4. On April 16, 2007 a review committee was constituted comprising, inter alia, the director of medical education, the director of health services and a representative from the Directorate of Agricultural Marketing for assessing and recommending the rates of cooked food for indoor patients at Government hospitals. The relevant memorandum specified that the "quantity of food items will remain same as specified in (the Government notification) dated 20.5.2002." A further Government order followed on September 25, 2007 approving revised rates for cooked diet to be supplied to indoor patients at Government hospitals. The regular diet for Government hospitals in Kolkata and the Kolkata Metropolitan Development Authority area was fixed at Rs. 37.40 per adult patient per day and at Rs. 36.30 elsewhere per adult patient per day. This memorandum of September 25, 2007 was challenged in WP No. 23632(W) of 2007 and the present petitioners say that in view of the interim order passed on such petition, the revised rates could not be given effect to.

5. However, by a memorandum of June 18, 2008 the tenures of all existing contractors were extended for three months with effect from July 1, 2008 by enhancing the respective rates by 19 per cent, subject to the maximum of Rs. 28.50 per adult patient per day and Rs. 14.25 per child patient per day. The cap imposed by the memorandum of June 18, 2008 was lifted by a further notification of July 25, 2008 by which the respective rates of existing contractors stood enhanced by 19 per cent without any ceiling limit.

6. The rival group that has resisted these proceedings had also applied to be added as parties to WP No. 23632(W) of 2007 and be permitted to be heard therein. The applicants were not added as parties since their applications had been taken up at the final hearing of the earlier writ petition and it was also observed that if the petition succeeded, the applicants would not be prejudiced as they would also be entitled to supply cooked diet to Government hospitals at higher rates. WP No. 23632(W) of 2007 (Sudipta Dutta & Ors. vs. The State of West Bengal & Ors.), in which the enhanced rates announced in the year 2007 were challenged, was disposed of on September 23, 2008 by holding, inter alia, as follows:

"When a patient is admitted in a Hospital for treatment of any disease, quality of diet is as essential for his recovery as drugs and medicines are. Therefore, maintenance of quality of food is one of the important criteries for the purpose of taking care of health of an indoor patient of any Hospital. this Court cannot

ignore the fact of rise of prices of every commodity and particularly current market prices of foodstuff required to be supplied by the intending suppliers to different Hospitals of the State Government. Therefore, taking into consideration the revised price fixed by the impugned memo dated September 25, 2007 as also the minimum rates thereof taking into consideration the conditions of clause 7(b) of the above memo this Court has no hesitation to hold that, the decision making process followed by the respondent authority cannot be sustained in law. The intending suppliers will be compelled to enter into an unhealthy competition compromising with the quality and quantity of the diet to be supplied to the indoor patients of different Hospitals of the State Government in response to impugned memo dated September 25, 2007 at abnormally low rate.

Decision making process of the respondent authorities in fixing different rates for supply of diet to the indoor patients of different hospitals of the State in terms of memo dated September 25, 2007 cannot be sustained in law in view of the fact that it is revealed from the records produced before the court that the report of the Directorate of Agricultural Marketing, Government of West Bengal was not taken into consideration in fixing those rates.

In view of the aforesaid discussion I have no hesitation to say that the impugned memo No. HF/O/MS/ 552/W-45/07 dated September 25, 2007 is liable to be set aside keeping in mind the interest of the public at large and in particular keeping in mind the question of quality of diet to be supplied to the indoor patients of the Government Hospitals in the State. The impugned memo No. HF/O/MS/552/W-45/07 dated September 25, 2007 is therefore, quashed and set aside. However, this will not prevent the state respondents to issue tender notice afresh inviting the intending suppliers to supply cooked diet to the indoor patients of different Hospitals of the State Government -after determining the prices of different categories of such cooked diet keeping in mind the quality and quantity of such diet in the greater interest of the indoor patients as also to avoid unhealthy competition among the intending suppliers.

The writ application is thus disposed of."

7. WP No. 15125(W) of 2008 and WP No. 21406(W) of 2008 were instituted by persons claiming to be interested to supply cooked diet to Government hospitals for a mandamus on the Government to invite fresh offers for such supply and to curb the continuation of the existing suppliers. These petitions were disposed of on December 18, 2008 upon recording a concession made on behalf of the State and observing, inter alia, as follows:

"... Counsel representing the State, on instructions from the Joint Secretary to the Government of West Bengal, Department of Health and Family Welfare, M.S. Branch who was present in Court, submitted that the Government had decided not to prefer any intra court appeal against the judgment and order dated 25.09.2008 and would require at least six months time revise the rates of diet in compliance with such order.

"However, since it has been submitted on behalf of the State respondents that six months time would be required for determining the revised rates, this Court would direct them to proceed expeditiously in this respect keeping in mind the larger public interest and to determine the rates as early as possible but positively within six months from date so that on and from the first day of June of the following year, the process of tender for selection of agency to supply cooked diet to the indoor patients of the Government run hospitals may commence. Till such time tender process is finalized, it shall be open to the Government to obtain supply of cooked diet through such ad hoc arrangement it considers fit and proper."

8. The time limit set by the order of December 18, 2008 has subsequently been extended for a short duration. Within such enlarged time, a memorandum of June 12, 2009 has been published, the first page whereof narrates the history of the supply of cooked diet to indoor patients at Government-run hospitals and specifies the rates and diet to be now supplied:

"The suggested schedule of food items for indoor patients of the Government Hospitals and the rate of cooked food for contract supply was introduced in 2002 vide G.O. No. HF/O/MS/237/5S-1/ 01 dated 20.05.2002. Since then the rates have not been revised. A committee had been appointed by the Government vide G.O. No. HF/O/MS/160/W-45/07 dated 16.04.2007 to review the previous rate and schedule of cooked diet. The committee reviewed the rate and schedule of cooked diet. The recommendations of the committee were accepted by the Government and in line with those recommendations a Government Order was issued vide No. HF/ O/MS/552/W-45-07 dated 25.09.2007 which was challenged in the Hon"ble High Court, Calcutta regarding the merit of the recommendations. The Hon"ble High Court has directed the Government to review the rate and schedule of cooked diet expeditiously. Following the directions of the Hon"ble Court, a committee had been appointed vide G.O. No. HF/O/MS/870/ 1C-33/07 dated 30.12.2008 to review the rate schedule of cooked diet afresh. The said committee has reviewed the earlier schedule and has undertaken a detailed exercise to estimate the rates of different categories of cooked food based on the wholesale market prices provided by the Directorate of Agriculture Marketing, Government of West Bengal and the information collected through market enquiries.

"2. Based on the detailed exercise undertaken, the undersigned is directed by order of the Governor to say that Governor has been pleased to approve the revision of rates for cooked diet to be supplied to the indoor patients of different Government run Hospitals of the State and they are as follows:

Breakfast (Rs. 12.98)

Lunch (Rs. 15.62)

Dinner (Rs. 14.46)

Non Vegetarian

Vegetarian

Non Vegetarian

Vegetarian

Non Vegetarian

Vegetarian

Milk 250ml in pouch

Milk 250ml in pouch

Rice-150 gms

Rice-150 gms

Rice-100 gms

Rice-100 gms

Egg- 1

Sweet Sandesh-1

Dal-30 gms

Dal-30. gms

Dal-30 gms

Dal-30 gms

Banana- 1

Banana -1

Potato-50 gms

Potato - 50 gms

Potato-50 gms

Potato-50 gms

Bread - 50 gms

Bread - 50 gms

Mixed Vegetables - 100gms

Mixed Vegetables- 100gms

Mixed Vegetables - 100gms

Mixed Vegetables - 100gms

Sugar in packet- 10gms

Sugar in packet- 10gms

Fish-75 gms

Curd in packet - 100gms

Fish/Chicken - 75gms

Paneer-35gms

9. The rates approved are Rs. 43.06 per adult patient full diet per day; Rs. 21.53 for paediatric full diet upto the age of eight years per day; and, Rs. 12.98 per admission diet. The minimum quantum of food is specified in the table (for regular adult diet) and the competition between bidders now appears to be restricted to offers for additional quantum to be supplied at the same rate.

10. The State submits that there has been a substantive shift in stand following the reservation expressed in the earlier orders of this Court that the previous rates fixed did not permit quality diet to be supplied and, if bidders were permitted to quote at even lower rates, there was bound to be a further compromise on the quality of food made available to patients. The State suggests that reasonable rates have now been fixed and it is up to the bidders to offer more food than specified in the chart and it is on the basis of the extras offered that their bids would be assessed. The State insists that there has been both a qualitative and quantitative improvement in the specified cooked diet and the rates therefor.

11. The petitioners assert that several of the eligibility criteria set are meaningless and have been tailored to suit the State's favourites. The petitioners criticise the eligibility criteria as being extraneous to the purpose of the work and the quality thereof. The qualifications stipulated are, assailed as being irrational, discriminatory and mala fide. In particular, they question the rationale of the following qualifications:

"Eligibility Criteria for Participating in the Tender

"5. The bidder must have a physical office premise with telephone connection in the sub-division of the hospitals for which the bid is being made.

"6. The bidder should be registered with the Tax (PAN/TAN), EPF & ESIC Authorities, CEC for Service Tax, Sales/VAT Authorities as may be required for providing the services and material to be used for managing the work and up to date clearance should be taken from all the statutory authorities for the previous three years.

"10. The bidder must have at least two years experience in providing catering services to at least 250 persons per day (500 persons for Medical College Hospitals).

"11. The annual turnover of the bidder should be at least equal to twice the amount of the annual diet bills of the hospitals for which the bid is being made.

"12. The bidder should have a cash reserve equivalent to 4 months of diet bills of the hospitals for which the bid is being made.

"13. The bidder should be a profit making organization, having made a pre-tax profit of not less than 5% of annual turnover for the previous two financial years. (A Chartered Accountant certified copy of profit and loss statement of balance sheet for last three years is to be attached)"

12. Some of the same conditions have also been cited by the petitioners in their challenge to the new rates specified, though for different reasons. In the context of the attack on such eligibility criteria, the petitioners say that there is no need for an office premises with a telephone connection to be established in a sub-division if a bidder has applied for any of the hospitals in such sub-division. The petitioners say that it is possible that a party may apply for one or two of the six-bed hospitals within a sub-division and it would be meaningless to maintain an office with a telephone connection and an attendant in tow manning such office. As to the sixth clause, the petitioners say that some bidders with less than the statutory strength of employees would not be required to be registered with the employees' provident fund authorities and others may not be liable, both on account of the number of employees and the area of operation, to be registered with the Employees' State Insurance Corporation. They say that such conditions are irrational and geared to make room for the big fish and ruthlessly weed out the smaller players. They argue that in the tenth clause there is discrimination writ large in bidders for all categories of hospitals other than medical college hospitals to have the same extent of experience. The petitioners contend that neither the annual turnover criterion nor the cash reserve condition, set in the eleventh and twelfth clauses, respectively, makes any sense or is an influential guide as to the capability of an intending participant. They assert that it is irrelevant as to whether a caterer has made a profit over the previous two financial years, as required by the thirteenth clause, to gauge his competence to deliver.

13. The State and the opposing contractors remind of the scope of judicial review in assessing tender terms. They say that Courts have traditionally been reluctant and slow to receive a challenge to the terms set; that the State should be given sufficient elbow room to contract and be left free to identify the class of persons that it would like to do business with. The State's submission is liberally peppered with the now-clichéd expression, "free play in the joints." The substance of the submission is that in a matter of such public importance, concerning the food that patients at Government hospitals would partake of, the State would be well within its rights to insist that only capable contractors with proven performance were welcome to apply. The State says that the petitioners cannot base their claim on Article 19(1)(g) of the Constitution. The State reassures that it is in the patients' interest, which is the paramount concern of

the State, that the eligibility criteria have been set. The State asserts that it is in public interest that clean and warm food be supplied to indoor patients by able contractors.

14. On the fifth clause of the eligibility criteria, the State submits that there must be a points-person for a sub-divisional hospital to deal with. A responsible person should be available on call both to receive instructions and to be informed of any inadequacy for immediate action and correction. It is submitted that the tender terms do not require a separate office to be maintained to attend to matters relating to every sub-divisional hospital where supply is effected or proposed to be effected by a contractor or aspiring contractor; that if such clause had been inserted, then it would have been unreasonable. But in the tender terms stipulating one office for every sub-division, it is justified, there has been sufficient consideration shown and the maintenance of an office is vital for ensuring prompt and quality service.

15. Apropos the sixth clause the State clarifies that since the expression "as may be required" is included in the clause there is no reason to apprehend that all conditions envisaged by such clause would be made applicable to or binding on every applicant. On the tenth clause the State submits that it is the Government's considered view that only persons with established track record would be sought for supply of cooked diet to Government hospitals and the Court should not question such a matter of policy which has been deemed expedient.

16. The State justifies the eleventh, twelfth and thirteenth clauses on the same ground as the tenth and insists that if it is the Government's considered opinion that these criteria are essential to assess the capability of an applicant, the Court should refrain from reassessing what is essentially a policy decision.

17. Despite the pages and the sound bytes expended on the challenge to the eligibility criteria set in the memorandum and reproduced in the tender documents, the principal challenge is to the rates fixed thereby. The petitioners say that if the rates set in September, 2007 were found to be inappropriate by the Court, where the comparable general rate was fixed at Rs. 37.40 per regular adult diet per day, the present rate of Rs. 43.06 should not pass muster. The petitioners say that the tender terms entail various costs to be incurred by contractors other than for the raw material for supplies and in the State imposing several additional and expensive conditions on intending contractors, the price has not been enhanced in real terms. The petitioners suggest that the State has not determined the price in the light of the judgment rendered on September 23, 2008 on WP No. 23632(W) 2007. The petitioners argue that if all the cost components reflected in the tender terms are taken into account, it would be evident that the quality of food would have to be compromised.

18. The petitioners indicate several counts of challenge to the principal rate of Rs. 43.06 per adult diet per day at paragraph 26 of the lead petition. The petitioners question the basis of the rate being pegged to the wholesale market

prices provided by the Directorate of Agricultural Marketing. They say that overheads do not appear to have been taken into account. They submit that cost of utensils, labour cost and infrastructure expenses have not been kept sight of. The petitions complain of substantial additional expenditure being required to be made by contractors on account of employees' provident fund, employees' state insurance and service tax. The petition refers to service tax being payable at the rate of 10.3 per cent which would reduce the effective price of the daily diet to below Rs. 40/- per adult patient per day. The altruism in the petitioners come out in their averment that such depressed rate would lead to unhealthy competition, malpractice and jeopardise the interests of the patients. The petition refers to the Chittaranjan Cancer Institute in Calcutta, which is run as a Government-financed autonomous body fixing Rs. 65/- per adult diet per day for 2007-08. The petitions seek to make out that the diet chart of the cancer hospital is comparable to the one now approved for State Government hospitals. The petitions refer to the special terms and conditions incorporated in the tender documents and argue that the adherence to the same would have an impact on the cost at the hand of the contractor. The petitions cite the minimum daily wage of Rs. 122/- required to be paid for unskilled labour. The lead petition suggests, with the aid of a chart and contemporaneous newspaper figures of rates of vegetable, fish and chicken, that the approved daily diet would cost Rs. 86.03 per adult per day, inclusive of service tax. The petitioners submit that the raw material cost, excluding cooking charges, man power and other overheads, for breakfast would be Rs. 10.28; for lunch Rs. 19.25; and, for dinner Rs. 17.45. The petitioners claim a further Rs.5/- on account of daily cost of LPG per adult patient, Rs.7/- daily for cooking oil and spices, Rs. 12/- daily on account of labour, Rs.4/- daily for electricity and water charges and Rs. 4/- daily for other overhead expenses.

19. On the affidavit filed by the State, the petitioners say that only the prices of uncooked food items have been taken into account in fixing the rates which would betray an arbitrary exercise and irrational assessment. The petitioners question the decision in the decision-making process not taking into account relevant considerations.

20. The State's affidavit details both the process and the rationale for arriving at the figure of Rs. 43.06 per adult diet per day. The affidavit speaks of the review of the rates on the basis of the "rates prevailing at the material time i.e. 2007 and 2008 calendar year(s)." The relevant committee held its first meeting on January 6, 2009, the affidavit informs, and its last on May 14, 2009 when the calculated rates were discussed and recommended by the committee on the same day. The concurrence of the finance department was thereafter obtained and the approved rates published. The affidavit says that at its first meeting, the committee "resolved that the rates should be obtained on monthly basis from all the districts for the year 2007 and 2008 with annual average for each commodity." The State says that the relevant committee required an expert committee of dieticians from five medical colleges of Calcutta to suggest the diet

with specific quantities upon considering the calorific values thereof. The State's affidavit refers to the committee having "calculated the median value of each commodity from annual mean value of each district." The rate charts were supplied by the Directorate of Agricultural Marketing. The affidavit mentions the median price of milk and the committee's assessment, based on a national family health survey, that 0.0251kg of gas is expended per meal per person every day. The affidavit explains the basis for arriving at a figure of Rs. 1.01 per meal per day on account of LPG cost for cooking. The affidavit clarifies that the rates suggested are net of service tax which would be reimbursed to the contractor on actuals. The affidavit asserts that "it will be revealed that the tenderer will earn profit @ 10% of cost, per patient, which includes cost of deployment of staff and other incidental charges, while supplying the cooked diet at the rate fixed." According to the State, electricity charges work out to four paise per patient per day which has also been taken into account in the profit component.

21. There is only one further point of note in the State's affidavit. It is averred that "the present tender is to be submitted sub-division wise for all the hospitals and Health Centers of Sub-Division to enable the bidder to break even and hence the condition of 2 years experience of supplying meals to 250 persons per day." The affidavit proceeds to argue that since "at the lowest level is Primary Health Centers, the number of beds just a handful, it might be difficult for a contractor to break even and reap profit, but if he is also supplying to the large hospitals where he lacks a margin he will make up in numbers. It is thus desirable that there should be only one supplier for one subdivision." A few sentences later the affidavit says that "it is not possible for any contractor to supply cooked diet only to any smaller establishments like Primary Health Center."

22. There are two charts appended to the State's affidavit. In the second of such charts, out of the 18 districts in the State five have been categorised as large districts with at least five sub-divisions each, nine have been bracketed as medium-sized districts with three to four sub-divisions and the remaining four have been clubbed as small districts with upto two sub-divisions. An example of each category of districts has been displayed in the chart from which it appears that each sub-division in a large district would have well over 350 beds in all the Government-run hospitals therein; that each sub-division in a medium-sized district would also have at least 350 beds; and, a small-sized district would have in excess of 250 beds in every sub-division.

23. In course of submission, the State says that the rate fixation was made with the interests of patients being supreme and not to assess or ensure the commercial profit to be made by the contractors. The State submits that since the indoor patients at Government hospitals have to bear the entirety or a part of the meal cost, save for free beds and other exemptions, the decision-making process has also taken into consideration the burden on the patients.

24. The State has appended the recommendations of the committee made on

May 14, 2009. The committee reported that it had "reviewed the rate and schedule recommended by the previous committee and had undertaken a detailed exercise to estimate the rates of different categories of cooked food based on the wholesale market prices." The committee said that it obtained the "average rate of different commodities district-wise... calculated for the years 2007 and 2008." The report indicated that the "median rate (had) been calculated from the average district rates for that particular commodity." It justified the acceptance of the median rate "to prevent the skewness due to extreme outliers of the district averages." The individual diet rate was obtained by "multiplying the median rates of the individual commodities with the requirements of that commodity in the patient's diet as per the diet scale." After setting out the daily diet chart, which has been reproduced verbatim in the memorandum of June 12, 2009, the committee informed that it had assessed fuel cost for cooking at Rs. 1.01 per meal and had included in the rate "profit for contractor (at) 10% of costs which includes deployment of staff and other incidental charges."

25. Upon WP No. 11766(W) of 2009 being received on July 15, 2009 an order was made to the following effect, with almost identical orders being passed on the other petitions at the initial stage :

"The writ petitioners complain of a notification dated June 12, 2009. In the supplementary affidavit that the petitioners have been permitted to use the tender terms for supply of cooked diet to government hospitals have been challenged on various grounds. The petitioners say that the eligibility criteria set are arbitrary and irrational and meant only to favour the existing contractors and keep other intending offerers at bay. The petitioners say that the maximum price fixed for supply of cooked diet is unreasonable and it is impossible for the specified items to be supplied within the price indicated.

"The matter requires to be considered on affidavits. Affidavit-in-opposition be filed by July 27, 2009; reply thereto, if any, by July 29, 2009 and the matter will appear for final hearing at 2 p.m. on July 29, 2009.

"The petitioners will be permitted to participate in the tender process without prejudice to the respondents' contention that they may not be eligible. The petitioners' participation will not create any equity in favour of the petitioners. The rates indicated in the tender terms will abide by the result of the writ petition.

"The applicants in CAN 6072 of 2009 will also be permitted to use an affidavit-in-opposition to the petition. A copy of the petition be made over to such applicants in course of this day. The petitioners may use an affidavit-in-reply.

The records relating to the fixing of the price should be produced at the hearing."

26. The records have been produced. The solitary file contains papers relating to the constitution of the committee, copies of several orders passed in these and

previous proceedings, a set of the papers connected with the memorandum of June 12, 2009 and the papers presumably submitted by the committee which form the basis of the committee's recommendations. The minutes of the first meeting of the committee held on January 6, 2009, a copy whereof has been appended to the State's affidavit, reveal the initial steps taken for determining the appropriate rates. The committee resolved that "the rates should be obtained on monthly basis from all the districts for the year 2007 and 2008 with annual average for each commodity." The Director of Agricultural Marketing was requested to obtain the details. It was further resolved that an expert committee be formed of dietitians to consider the category of diet, quantities and calorific values thereof.

27. The records show that a committee of dietitians was constituted and such committee had met on January 21, 2009 and February 4, 2009. The minutes of meeting of the diet committee held on February 4, 2009 show that the existing diet schedule was found to be appropriate, but certain modifications were proposed. Under the heading of "Category of Diet", the dietitians, inter alia, suggested:

""Category of Diet:

? It was resolved that Bed Tea in the morning should be supplied in order to reduce the gap between previous day's dinner and next day's breakfast.

? In lunch, the 100gm curd should be supplied in cups taken from some Government Dairy supplied regularly.

? In the afternoon Tea with Two Biscuits or Tiffin cake of good quality should be supplied. This is mainly to reduce the gap between lunch and dinner."

28. Certain measures were proposed by the committee of dietitians on account of quantity and hygiene. They suggested that raw fish of weight of 100gm be provided to the adult patients since a 75gm piece would be reduced to less than 50gm after frying. They suggested that to ensure hygienic service, food should be served in covered containers, preferably in aluminum foil packets as the usual thalis carry the risk of contamination while cleaning and left over food creates general waste.

29. After observing that the "existing calorific value is optimum" and only suggesting additional curd and an increased size of the banana for breakfast, the dietitians recommended as follows:

"Recommendations :

1. Arrangement of purified filtered drinking water in all wards is required for which necessary instruments must be installed.
2. Seasonal fruits should be included in lunch.
3. Diet contractor should be visiting. MSVP once in every month for any sort of

feedback clarifications.

4. Each hospital must constitute local diet committee for supervision and monitoring.

5. Patient's satisfaction study should be periodically conducted. A specimen proforma of RGKMCH is enclosed herewith.

6. The respective instructions should daily supervise that the enlisted items in the Diet menu is strictly adhered."

30. Two other sets of petitioners added to the general submission made on behalf of the petitioners in WP No. 11766(W) of 2009. The petitioner in WP No. 12241(W) of 2009 complains of the respondents not permitting the petitioner to participate in the process notwithstanding the order dated July 22, 2009 made when such petition was received. The order recorded the petitioner's submission that the last date for depositing the bids had been extended till July 28, 2009 and provided that if such was the case the petitioner should be permitted to participate in the process. The petitioner complains that though the last date for receipt of bids had been extended, the date for supplying the tender documents had not been enlarged and this was the excuse used by the respondents for refusing the tender papers. CAN 6970 of 2009 has been filed to complain of the respondents' refusal to allow this petitioner to participate in the tender process.

31. This petitioner says that if only caterers with experience of having provided service to at least 250 persons per day are considered eligible, it would imply that only caterers who had previously supplied to Government hospitals could be considered, which would be arbitrary and discriminating against new entrants seeking to supply to Government hospitals. Such condition, according to the petitioner, would perpetuate the hegemony of the existing contractors and would amount to bias. The petitioner says that the abstract of the tender terms published in a local newspaper circulated in Malda, discriminated against aspiring applicants stationed in Calcutta or elsewhere since the exact conditions could be assessed only upon obtaining the tender documents. This petitioner relies on a judgment reported at NICCO Corporation Ltd. Vs. Cable Corporation of India Limited and Others, and another reported at 2009(2) CHN 699 (Biren Biswas vs. Dipti Narayan Biswas & Ors.) for the proposition that a notice inviting tender had to be widely publicised and mere the appearance thereof in a notice board of the issuing office would not amount to meaningful publicity. The judgments reported at (2008) 2 WBLR 393 (Sandeep Mitra vs. Jharua Mitra) and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, are placed for the well-known principle that the eligibility criteria cannot be subsequently altered unless express power to relax the same is reserved in the tender terms.

32. The grievance that this petitioner was unfairly excluded from the tender process cannot be accepted. The notice inviting tender was issued on or about July 3, 2009 and it indicated that the tender forms would be available till July 21, 2009 and the bids would be opened on July 22, 2009. Though the petition was

filed on July 14, 2009, the matter was mentioned only on July 21, 2009 to be included in the supplementary list and the matter was directed to appear on July 22, 2009. There was nothing that prevented this petitioner from either coming to Court earlier or being diligent in causing the matter to be taken up well ahead of July 22, 2009 which was the stipulated date for opening the bids. Since it is found that the petitioner had not proceeded with due despatch in the matter, there is no special feature to this petition and it has to be assessed on the general grounds that are common to all the petitions. In other words, if the memorandum of June 12, 2009 or the tender terms are struck down, this petitioner will be entitled to the benefit thereof as that would imply that the process undertaken by the respondent authorities would stand annulled. However, if the said memorandum is sustained and the tender terms are upheld, this petitioner would not get a look-in.

33. The petitioner in WP No. 12728(W) of 2009 has applied for supply to the Mahesh Bhattacharya Homoeopathic Medical College and Hospital which has a bed-strength of 50. It is a stand-alone notice that has been issued by the homoeopathic hospital for supply of cooked diet. In addition to adopting the general submission made on behalf of the lead petitioners, this petitioner says that the stipulation that a contractor had to obtain registration from the provident fund authorities and the Employees' State Insurance Corporation is mala fide and an attempt by the State to shirk its responsibility as principal employer. The petitioner places Section 16(l)(b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and the definitions of an employee and a principal employer under such Act to suggest that the State had attempted to evade its obligation under the Act and fasten the same on the contractors. Several provisions from the Employees' State Insurance Act, 1948 have been placed for similar purpose. This petitioner says that even if it be assumed that the State was within its rights to insist on bidders obtaining registration under both the 1952 Act and the 1948 Act, there would be a concomitant cost component thereof which has not been taken into account in fixing the rate. This petitioner suggests that the general mindlessness on the part of the State would be apparent from the contradictions and anomalies appearing in the technical bid form supplied by the homoeopathic hospital. The bid form appears at pages 138-139 of the relevant petition and requires, inter alia, a central excise licence number to be furnished, a bidder to attach certificates to establish three years' experience in daily catering to 150 persons and the annual turnover figures for the last five years. This petitioner says that such conditions are either not enumerated in the eligibility criteria set out in the tender papers appearing at page 135 of this petition or are contrary to such conditions.

34. There is substantial basis to this petitioner's attack on the apparent contradictions in the tender documents. Nothing in the eligibility criteria requires any central excise licence to be obtained. Clause 10 of the conditions at page 135 of this petition stipulates two years' experience in providing catering services to at least 100 persons per day, but the tender form demands three years'

experience in daily catering to 150 persons. Since clause 9 of the eligibility criteria demands that a bidder should have at least three years" experience in the field of catering, the tender form is unquestionably flawed in demanding annual turnover figures for five years.

35. The rationale of the process is questioned by the petitioners by referring to clause 20(f) of the terms and conditions for cooked diet tender set by the Government and appended to the memorandum of June 12, 2009. The relevant clause provides,

"20. Process of selection of successful bidder f. The commercial bids of these identified successful technical bidders will be evaluated and based on the criteria of maximum supply of diet at fixed rate, the bidder offering to supply the highest amount of diet over and above the minimum prescribed diet scale will be selected for acceptance of rates."

36. The State and the opposing contractors are quick to point out that clause 20(f) of the suggested terms is not as irrational as the petitioners make it out to be. They say that the relevant clause does not imply that a bid may be received with an additional banana or an extra egg being offered at the specified rate. They submit that at the foot of the commercial bid form there is the following that appears which would imply that an overall percentage of diet in excess of the minimum stipulated would have to be specified:

"Additional percentage of diet over and above minimum of the scale proposed by the tenderer at Total allowable cost

In words _____

In figures _____ "

37. The State says that the bidder who offers the most, in percentage terms, above the minimum stipulated diet for any particular hospital or in respect of any particular tender would, ordinarily, be regarded as the highest bidder and entitled to be awarded the contract. The State suggests that this measure adopted would ensure that neither the quality nor the quantity of the diet is compromised and that patients get more than the minimum stipulated quantum of diet.

38. The State asserts that the very fact that a large number of applications have been received following the notices inviting tenders, it would be evident that intending contractors perceive the new rates to be worthy of effecting supply on such basis. The State insists that there has been a significant upward revision of the rate. The 2007 general rate was Rs. 28.50 per daily adult diet. An ad hoc increase of 19 per cent has been allowed and contractors now supply at the general rate of Rs. 33.91 per adult patient per day. The figure of Rs. 43.06 reflects a 26 per cent increase in the general rate of Rs. 33.91 and a 51 per cent increase over the 2007 general rate of Rs. 28.50 per adult patient per day. It is submitted that since the State has decided that bids would only be accepted for all Government hospitals in every sub-division and not individual bids for

Government hospitals within a sub-division, the intending contractors would make up in volume what they may not be able to achieve by way of margin. A chart appended to the State's affidavit in the first petition is referred to. The chart shows that the minimum number of beds in all Government hospitals within a sub-division is in Islampur, Uttar Dinajpur, having 261 beds and the maximum is of 848 beds in Birbhum Sadar sub-division in district Birbhum.

39. As to the specific complaint of the petitioner in WP No. 12241(W) of 2009 that the advertisement was in abridged form and did not contain details of the eligibility criteria for an intending bidder stationed elsewhere to make an informed decision as to whether he would be eligible or ought to apply, the State says that the few beds covered by the advertisement did not warrant a bigger, more expensive advertisement being published.

40. In their rejoinder, the petitioners harp on the rates stipulated by the Chittaranjan Cancer Institute and submit that there is no justification which has been proffered by the State as to how the general rate at the cancer institute could be so much higher than the general rate for adult patients stipulated by the State Government. The petitioners submit that there is nothing more in the solitary file of records produced by the State that would throw any further light on the matter to justify the conduct complained of. They refer to a further contradiction apparent from the suggested tender terms appended to the memorandum of June 12, 2009. Though the memorandum indicates only three rates at clause 6 thereof- Rs. 43.06 for adult full diet, Rs. 21.53 for paediatric full diet upto the age of eight years and Rs. 12.98 per admission diet-the full fluid diet works out to Rs. 38.94 at Rs. 12.98 per meal which is anomalous since the seven categories of diet, other than paediatric diet are all shown to cost Rs. 43.06 at the second page of the memorandum. The petitioners reiterate that neither the form of the proposed agreement appended as annexure E to the memorandum nor elsewhere in the memorandum and its other appendices is it mentioned that bids would have to be for all hospitals within a subdivision and may not be made in respect of one or some of the hospitals therein. They submit that the service tax component in the price to be paid to the contractors had not been considered at all and only upon a challenge on such score in the petition, the State has responded in its affidavit by suggesting" that the service tax would be reimbursed to the contractors. The petitioners demonstrate that nothing in the proposed form of agreement would entitle the contractors to claim on account of service tax which, at over 10 per cent of the applicable rate, makes up a substantial part of the daily cost that had been completely overlooked both by the committee commissioned by the State and the State in perfunctorily accepting the recommendations of the committee.

41. Several judicial pronouncements have been brought on behalf of the parties to remind the Court of the relevant considerations to be taken into account in this jurisdiction. The petitioners rely on a decision reported at 2009 (2) CHN 122 (West Bengal State Electrical Contractors Association & Ors. vs. The

Commissioner, Employees" Provident Fund Organisation & Ors.) and refer to the observation that though the writ court would be slow to interfere with the eligibility criteria set by the State or any of its instrumentalities, such criteria could be undone "only if they were found to be arbitrary, discriminatory, mala fide or actuated by bias."

42. A decision reported at Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, is placed on behalf of the petitioners to demonstrate the expanse of the inquiry that may be made in judicial review. The appellant before the Supreme Court questioned the rationale of the consultant engaged by the employer in finding the appellant unworthy to progress to the commercial stage of bidding for the construction of the Mumbai Trans Harbour Link between Mumbai and Navi Mumbai. The consultant found that the consortium to which the appellant belonged did not meet the net cash profit floor-limit of Rs. 200 crore that the eligibility criteria specified. The consultant referred to accounting principles in treating the particulars furnished and upon the appellant crying foul and citing Articles 14, 21 and 19(1)(g) of the Constitution, the Supreme Court embarked on an exercise of assessing the figures after sifting through the knotty tools of accounting. The petitioners here say that the Supreme Court did not buy the lack-of-expertise-of-the-Court line that is the usual refrain of uncomfortable respondents in this jurisdiction. Paragraph 39 of the report is placed:

"39. In Reliance Airport Developers (P) Ltd. vs. Airports Authority of India the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In Reliance Airport Developers the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks

of each of the said factors and giving of marks at different stages. Objectivity was thus provided."

43. The opposing contractors cite a judgment reported at M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, on the limitation of the Court's powers when assessing the price fixed by the State. Paragraphs 49, 57 and 58 of the report are placed:

¶49. Where a question of law is at issue, the court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the court examines only the reasonableness of the findings.

When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to as a trier of fact. Whether an order is characterised as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law: See Rochester Tel. Corporation vs. United States. See also Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation."

"57. Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in Gupta Sugar Works: (SCC p.479, para 4)

"... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

"58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in Mississippi Valley Barge Line Company vs. United States of America

(292 US 282: 78 Led 1260)

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

44. The petitioners before the Supreme Court in such case were owners of sugar mills who challenged the validity of notifications issued by the Central Government in exercise of its power under the Essential Commodities Act. The petitioners contended that the prices did not reflect the actual manufacturing cost of sugar incurred by producers or secure to them reasonable returns on the capital employed. The judgment rests on the principle that when the legislature acts within the spheres of its authority and delegates power to an agent, the judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and are consistent with the laws of the land. There is, a fortiori, a judicial enquiry permissible to ascertain the reasonableness of the findings qua their mooring to the evidence on which they are founded.

45. The opposing contractors refer to another judgment reported at Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., to emphasise that price fixation is not the function of court. Again, the highest judicial forum in the country did not altogether rule out an inquiry as to whether relevant considerations had been taken into account in arriving at the price and irrelevant considerations kept out of the determination. Paragraph 4 of the report summarises the legal position:

"4. We start with the observation, "Price fixation is neither the function nor the forte of the court". We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The court will, of course, examine if there is any hostile discrimination. That is a different "cup of tea" altogether."

46. The Court is reminded of the bounds of its authority in exercise of the power of judicial review. A judgment reported at Rayalseema Paper Mills Ltd. and Another Vs. Government of A.P. and Others, is cited and paragraph 15 thereof

placed to suggest that the power of judicial review is not akin to the jurisdiction exercised by an appellate authority:

"15. this Court was examining the scope of judicial scrutiny in the matters of price fixation where it was governed by statutory provisions. The scope of judicial scrutiny would be far less where the price fixation is not governed by the statute or a statutory order. Where the legislature has prescribed the factors which should be taken into consideration and which should guide the determination of price, the courts would examine whether the considerations for fixing the price mentioned in the statute or the statutory order have been kept in mind while fixing the price and whether these factors have guided the determination. The courts would not go beyond that point. In the present appeals, there is no law, or any statutory provision laying down the criteria or the principles which must be followed, or which must guide the determination of rates of royalty. No doubt, any arbitrary action taken by the State would be subject to scrutiny by the courts because arbitrariness is the very antithesis of rule of law. But this does not mean that this Court would act as an Appellate Authority over the determination of rates of royalty by the Government. The Government is the owner of the products. While it had agreed to supply a particular quantity every year for specified period, it had never agreed to supply at a particular rate; nor did it stipulate with the mill-owners the basis upon which it would determine the rates of royalty. It is open to the Government to fix such price as it thinks appropriate having regard to public interest, which inter alia, may include interest of revenue, environmental, ecology, the need of mills and the requirements of other consumers. The price is not to be fixed keeping in mind the requirements of the mills alone."

47. The opposing contractors suggest that once a reasonable margin of profit has been provided for the contractors in the price fixed, there would be no arbitrariness or unreasonableness in the determination. A judgment reported at *Shree Meenakshi Mills Ltd. Vs. Union of India (UOI)*, is relied on to bring out the distinction between price and fair price:

"65. If fair price is to be fixed leaving a reasonable margin of profit, there is never any question of infringement of fundamental right to carry on business by imposing reasonable restrictions. The question of fair price to the consumer with reference to the dominant, object and purpose of the legislation claiming equitable distribution and availability at fair price is completely lost sight of if profit and the producer's return are kept in the forefront. The maintenance or increase of supplies of the commodity or the equitable distribution and availability at fair prices are the fundamental purposes of the Act. If the prices of yarn or cloth are fixed in such a way to enable the manufacturer or producer to recover his cost of production and secure a reasonable margin of profit, no aspect of infringement of fundamental right can be said to arise."

48. The next case brought is one reported at *The Wholesome Grain and Seed Merchants Association, Nagpur and Others Vs. The State of Maharashtra and*

Another, where the low margin of profit of 31/2 per cent of landed cost was considered to be reasonable in a price control order. Though the analogy may not hold good as the rates fixed in the present case are not under any price control order, the relevant passages from paragraphs 28 and 29 of the report may be noticed in the context of the State's suggestion that it has been the State's endeavour to keep the rates down to ensure that the ordinary patient at a Government hospital is able to afford the meals thereat:

"28.... The Order is made in exercise of powers under Rule 125 of the Defence of India Rules and an order made under those Rules is beyond challenge, except on the ground that the Order purporting to regulate the margin of profit cannot be made in the purported exercise of that power to control prices. We shall examine this attack based on this contention later on. So far as fixation of margin of profit by the Order is concerned, whether 1 per cent or 11/2 per cent or 5 per cent over and above certain expenses or what is called price paid by the dealer for the purchase of a particular food grain cannot be challenged as an unreasonable restriction on the right of the petitioners to carry on their trade. In this connection, in our opinion, the decision of the Supreme Court in *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, wherein an overall margin of profit of 31/2 per cent of the landed cost was fixed in controlling the price, has been sustained even though it may result in a few cases in eliminating the middleman, is a complete answer.

"29.... Under the proviso, the State Government has reserved to itself the right to fix different margins of profit in different areas or in respect of different food grains or of different varieties of food grains, or in respect of different consignments of food grains received for distribution and sale, having regard to the supply position in any area, or availability of different varieties of food grains or necessity for securing increased supply of any varieties of food grains. It cannot thus be said that fixation of margin of profit is rigid and unchangeable and does not and will not take into consideration the legitimate items of expenditure incurred by a dealer for the purchase of food grains, or, in other words, in determining the cost of food grains to the dealer and the price at which a dealer is expected to sell that commodity at the stated margin of profit, the requirement of the condition that a dealer shall not charge in respect of sales a margin of profit in excess of that fixed is vague or unreasonable."

49. The limited scope of inquiry permitted in assessing the reasonableness of the eligibility criteria set in the tender terms is emphasised by the opposing contractors. A decision reported at (2009)6 SCC 171 (*Meerut Development Authority vs. Association of Management Studies & Anr.*) as to the nature of the rights of a participant at a tender process is cited. Paragraphs 26 to 29 of the report capture the contemporary legal position:

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform

his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

"28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

"29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

50. The celebrated judgment in *Mangal Sinhji Dolatsinhji, etc. Vs. State of Gujarat*, is referred to for the principle that in a competitive world where a level playing field is provided by the State, a contractor or a permit holder may not whine against fierce or increased competition to assert a right guaranteed under Article 19(1)(g) of the Constitution.

51. The State has relied on several judgments in support of its contention that the rates that have been called into question in these proceedings were a matter of Government policy which would ordinarily not be questioned in this jurisdiction. A judgment reported at *Krishnan Kakkanth Vs. Government of Kerala and others*, is placed for the proposition that when it is a matter of government policy that falls for scrutiny in judicial review, the court is slow to interfere unless the policy is seen to be demonstrably capricious or manifestly arbitrary:

"27. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the

persons affected be petty traders (Mohd. Hanif vs. State of Bihar). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict..."

"36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy"."

52. There is no doubt that a citizen has a fundamental right to carry on trade or business but he has no right guaranteed under the Constitution to insist that the government or any other individual to do business with him. Any government has the same freedom as any individual or organisation to decide on the person or class of persons that it prefers to deal with and no restriction will ordinarily be imposed by a Court to fetter such freedom.

53. The State contends that the rates reflect an executive decision in a field of economic activity and, though it may not be perfect, the Court should leave the government free to experiment and even err in the trial for the government to subsequently correct itself in course of the experience. In support of such argument a judgment reported at BALCO Employees Union (Regd.) Vs. Union of India and Others, has been brought. The State relies on the passage at paragraph 36 of the report that quotes with approval from paragraph 34 of the judgment reported at State of M.P. and Others Vs. Nandlal Jaiswal and Others, :

"36.... What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid a priori considerations or on the application of any strait-jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or play in the joints to the executive. The

problem of Government" as pointed out by the Supreme Court of the United States in *Metropolis Theater Co. vs. State of Chicago* "are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void".

The Government, as was said in *Permian Basin Area Rate* cases, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision Would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution."

54. A judgment reported at *Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another*, is next cited by the State to show that the modern trend points to judicial restraint in its, scrutiny of administrative action:

"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)"

55. The State brings another decision reported at *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, to sketch the contours of judicial review upon a challenge to a tender process:

"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 situated.
- (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."

56. In a change of tack, the State places a judgment reported at *Arnit Das Vs. State of Bihar*, in furtherance of the argument that the order of September 25, 2008 on WP No. 23632(W) of 2007 did not take into account the desirability of the court going into the nitty gritty of price fixation and if the judgment implies that the court could supervise and have the final say on the rate of cooked diet to be supplied to government hospitals in the state, then such aspect passed *sub-silentio* in the judgment. As to the meaning of *sub-silentio*, paragraph 20 of the report is cited:

"20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the *ratio decidendi*. This is the rule of *sub-silentio*, in the technical sense when a particular point of law was not consciously determined. (See *State of U.P. vs. Synthetics & Chemicals Ltd.*, SCC, para 41.)

57. On the general principles involved in judicial review in a matter pertaining to the award of government contracts, the State cites a judgment reported at *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, and places reliance on paragraphs 9 to 12 of the report where the relevant previous pronouncements of the Supreme Court had been noticed :

"9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in *Tata Cellular vs. Union of India*. After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

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

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

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

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

"10. In *Air India Ltd. vs. Cochin International Airport Ltd.* this Court observed: (SCC p. 623, para 7)

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness." (emphasis supplied)

"11. This principle was again restated by this Court in *Monarch Infrastructure (P) Ltd. vs. Commr., Ulhasnagar Municipal Corpn.* It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

58. A more recent judgment reported at B.S.N.L. Ltd. and Another Vs. Bhupender Minhas and Others,) is placed by the State where the law as recognised in Educomp Datamatics Ltd. has been reiterated.

59. On behalf of the State, another judgment reported at U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others, is cited and paragraphs 12 to 16 thereof placed as to the principles to be kept in mind in applying the law laid down in previous authorities to the facts of a case in hand. A two judge Bench in Pooran Chand Pandey had distinguished a Constitution Bench judgment reported at Secretary, State of Karnataka and Others Vs. Umadevi and Others,) and observed that the "Constitution is the supreme law of the land, and any judgment, not even of the Supreme Court, can violate the Constitution." This judgment has, however, been held to be per incuriam and overruled in Official Liquidator vs. Dayanand [Official Liquidator Vs. Dayanand and Others, and it was inappropriate for it to be cited.

60. Further authorities have been presented by the State so that what is claimed to be its policy decision embodied in its determination of price is insulated from any searching inquiry in judicial review. The judgment reported at State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., is placed in support of the proposition that the Court would generally refrain from probing into any policy matter. The State relies on a sentence at paragraph 31 of the report that "the court would not interfere with any opinion formed by the government as it is based on relevant facts and circumstances or based on expert advice." On the same aspect of limited judicial interference in a policy decision, a judgment reported at Ram Singh Vijay Pal Singh and Others Vs. State of U.P. and Others, is placed where the Supreme Court reiterated the principle and quoted its earlier enunciation of the proposition in the BALCO Employees' Union case.

61. With particular reference to the petition in WP No. 12603(W) of 2009, the State says that the petitioner, Trilochan Ghosh, had no locus standi to bring the petition as it is evident from the opening paragraphs of the petition that the contractor and the intending bidder was a co-operative society and not the named petitioner. The State says that the affidavit in support of the petition would show no authority of the relevant co-operative society and the petitioner

had no right to bring a vicarious action on behalf of the society. The judgments reported at State of Manipur and Others Vs. Y. Token Singh and Others, and Raj Kumar Soni and Another Vs. State of U.P. and Another, are placed in the context to demonstrate that a petitioner ought to have a legal right to maintain proceedings in this jurisdiction and that the foundational facts have to be adequately pleaded in the petition to enable the respondents to meet the case. Paragraph 18 of the report in Y. Token Singh may be particularly noticed:

"18. Moreover, it was for the respondents who had filed the writ petitions to prove existence of legal right in their favour. They had inter alia prayed for issuance of a writ of or in the nature of mandamus. It was, thus, for them to establish existence of a legal right in their favour and a corresponding legal duty in the respondents to continue to be employed. With a view to establish their legal rights to enable the High Court to issue a writ of mandamus, the respondents were obligated to establish that the appointments had been made upon following the constitutional mandate adumbrated in Articles 14 and 16 of the Constitution of India. They have not been able to show that any advertisement had been issued inviting applications from eligible candidates to fill up the said posts. It has also not been shown that the vacancies had been notified to the employment exchange.""

62. A judgment reported at Puravankara Projects Ltd. Vs. Hotel Venus International and Others, is next placed to demonstrate the distinction between administrative law and contract law and paragraphs 32 and 33 of the report are referred to in furtherance of the contention that the principles of fairness or reasonableness cannot be invoked to alter the terms set in the tender documents by a government or any of its instrumentalities:

"32. In Asstt. Excise Commr. vs. Isaac Peter this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.

"33. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties."

63. The State refers to a judgment reported at Jagdish Mandal Vs. State of Orissa and Others, for the proposition that in judicial review of administrative action the court would only check whether the conduct is lawful and not whether the decision is sound. Paragraph 22 of the report is placed :

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

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

OR

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

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

64. The State has relied on a decision reported at S.S. and Company Vs. Orissa Mining Corporation Limited, for the proposition that a notice inviting tender should not be viewed in a pedantic or legalistic manner. Another judgment reported at (2007)11 SCC 704 (State of Assam vs. Abhinandan Trading (P) Ltd) is placed and the following sentence from paragraph 31 of the report is read out to suggest that the exercise to be undertaken by court is only to see if a prudent process had been adopted for fixing the rates:

"31.... Unless it can be shown that the said procedure had been misused to

favour any particular individual, which is not so in the instant case, it would not be proper for us to express any opinion as to the procedure the Government should adopt except to say that whatever procedure is adopted should be open, fair and transparent."

65. Finally, a judgment reported at State of Orissa and Others Vs. Gopinath Dash and Others, is cited in support the fundamental basis of the State's stand in these proceedings that the court should not substitute its view for the State's in a sphere which requires expertise.

66. In the context of the weight of legal authority that the parties have brought, the ground-rules should first to be set. Every judicial order needs to be moored to a basic legal principle; an order made on impression would be erroneous in form and substance. The scope of inquiry in judicial review is ordinarily confined to the decision-making process and to the question whether the decision is contrary to any statutory provision or in violation of the acknowledged rights or is opposed to the tenets of the Constitution. Even if the decision may not appeal to the court, it would scarcely barge in to the domain of the executive. The appropriate measure of assessment has always to be as has been recognised in the third Renusagar case (that of the lifting-of-corporate-veil fame) where the correctness of the quantum of electricity duty fixed was called into question.

"The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated." (State of U.P. and Others Vs. Renusagar Power Co. and Others, at page 104)

67. But first, the status of the intervening contractors - the applicants in the lead petition, who have brought a lot to bear on the discussion - is to be spelt out. They have been permitted to use an affidavit, have been heard on a matter of public importance and have, effectively, been taken on board. They have brought a different point of view and have introduced pluralism to the contractors' perspective. They have insisted that neither the conditions nor the rates make it inconvenient for the enterprising contractor to cater to the government demand. The applicants in CAN 6071 of 2009, CAN 6072 of 2009 and CAN 6550 of 2009 are all added as respondents to the respective petitions. The appropriate amendments to the cause titles should be carried out forthwith by the department.

68. The starting point of the present proceedings has undoubtedly to be the previous order of September 23, 2008. It was held therein that the determination of the rates for supply of cooked diet to Government hospitals was an administrative decision and could be "the subject matter of scrutiny of a court

so far the decision making process is concerned." It was held that rates had to be arrived at "keeping in mind the current price of the same." It was, however, the decisionmaking process that culminated in the rates being fixed by the memorandum of September 25, 2007 that was the subject matter of the previous proceedings. The Court found that the "decision making process... cannot be sustained in law... (as the) intending suppliers will be compelled to enter into an unhealthy competition compromising with the quality and quantity of the diet to be supplied... at abnormally low rate." The order directed that the State should determine the prices of different categories of cooked diet "keeping in mind the quality and quantity of such diet in the greater interest of indoor patients as also to avoid unhealthy competition among the intending suppliers." The State accepted the order and it was submitted on its behalf in course of the hearing in subsequent petitions that culminated in the order dated December 18, 2008 that "the Government had decided not to prefer any intra court appeal against the judgment and order dated 25.9.2008 and would require at least six months time to revise the rates of diet in compliance with such order." (Emphasis supplied)

69. If the entire exercise of the State which has now been called into question were to be in compliance of the order dated September 25, 2008, the State ought to have been conscious of the interest of the patients and the necessity to avoid unhealthy competition among intending suppliers. The memorandum of June 12, 2009 announces that the committee had been appointed by the Government "(following the directions of the Hon"ble Court" contained in such order. The decision-making process and the State's action have, per force, to be seen in the context of such previous order which the State unreservedly professed to accept.

70. Before the challenges on the two major aspects are taken up, it must be said that there has been a qualitative change in the Government's approach to the matter. The same would appear from the memorandum of June 12, 2009. Disregarding the few anomalies and minor contradictions, there appears to have been considerable thought which has gone in to the making of the document and the arrangement and content of the appendices thereto. The State has come a long way from the faltering steps in making the first memorandum of 2002 and the unsure approach evident even in the memorandum of 2007. The Government is much more organised and assertive in the terms and conditions now set.

71. The petitioners' attack on the eligibility criteria can only be probed to a limited extent since the State has to be left free to set its terms and choose the players that it wishes to deal with. In the fifth clause of the eligibility criteria the State has demanded that a bidder must have an office with a telephone "in the sub-division of the hospitals for which the bid is being made." The clause may have been inartistically drafted but it does not fail to convey the intended meaning. It is not unreasonable for the State to ask for one centralised location within the sub-division for the State to communicate with the contractor. It has

sufficient nexus with the work and can be seen to be inarguably for the ultimate benefit of the patients.

72. The memorandum of June 12, 2009 carries the model terms which have been suggested for all Government hospitals in the State to make them the basis for the tender terms individually set by them. The petitioners' apprehend that clause 6 of the eligibility criteria, which requires various licences and registration certificates to be produced by a bidder, would imply that irrespective of the requisite licence or certificate being necessary in respect of a particular hospital, the same would be required to be furnished. In view of the words "as may be required" appearing in the clause and the State's express clarification in such regard, the apprehension appears to be misplaced. The clause does not signify that all the licences and registration certificates referred to therein would be necessary in every case. For smaller hospitals requiring less manpower from the bidder, the various licences and registration certificates may be unnecessary. However, it is possible that the individual tender documents released by individual hospitals may incorporate such clause in its entirety without considering the applicability thereof to the particular case. It would have been more agreeable if the memorandum had clarified or even better if the memorandum had required one nodal person or a body or committee to vet the individual tender documents prepared by individual hospitals to ensure that the individual tender terms were in sync with the one suggested by the memorandum.

73. The second limb of challenge to clause 6 is that the Government as principal employer was seeking to pass off its liability in respect of the employees to the immediate employers or the contractors, whether on account of provident fund or employees' state insurance. The relevant statutes would not permit the Government as principal employer to shirk its responsibility and, whether or not the contractors as immediate employers meet the obligations, the State may still be found to be Primarily responsible if the employees are not included under any scheme that takes care of their provident fund and their insurance. The clause may have an impact on the cost component, but it is neither absurd nor mala fide for the Government to require the immediate employer to be liable for payment of the provident fund and insurance, wherever applicable, on account of the employees engaged by the contractor. It may happen, as the petitioners have suggested, that the employees remain the same at a number of the Government hospitals despite contractors changing. Even then the clause would not be unconscionable though it might fasten additional obligations on a contractor.

74. What is, however, missing from the clause and the relevant term in the proposed agreement is the payment on account of service tax. In view of the State's stand in its affidavit and submission made at the hearing, the relevant agreement should now include a clause providing for reimbursement or payment of service tax by the Government to the contractors.

75. Clauses 10, 11, 12 and 13 relate to the experience and financial ability of the

bidders. If in its wisdom the State has set norms for the contractors to meet on such counts, it is not open to the aspiring contractors to question the same; far less for the Court to interfere in the matter of a pure contractual requirement. None of the clauses is so absurd that it needs to be struck down. These criteria would ensure a better lot of contractors with proven track record and sound financial ability. The particular challenge to clause 13 that it should not be the State's concern as to whether a bidder had garnered profits in the previous two financial years, does not appeal. Again, if the State has reckoned it to be a relevant factor to be taken into account, unless it is demonstrably capricious the Court would hardly interfere with it in this jurisdiction. All the eligibility criteria have a realistic nexus with the nature of work required to be discharged and can be rationally perceived to be in the patients' interest.

76. Though the general refrain of the petitioners in dealing with the eligibility criteria has been a charge of mala fides, it is not shown as to who the State wished to confer undue benefits on and who, in particular, the State desired to exclude. The suppliers and intending suppliers axe all individuals or small organisations. The State has required such parties to show that they have the staying power to run the distance. The thirteenth clause would insulate Government hospitals against pretenders and fly-by-night operators masquerading as suppliers with little stamina to sustain consistent performance.

77. As much as the Government has put its best foot forward in laying down the conditions for bidders and contractors in the several appendices to the memorandum of June 12, 2009, commensurate effort does not appear to have been expended in arriving at the rates fixed. The eligibility criteria for participating bidders; the general terms and conditions set for bids; the enunciation of the special terms and conditions for preparation of cooked food, employment of manpower, responsibilities of the contractor and enumeration of other conditions; and, the specification of the standards of the food material - leave little room for criticism. There is, indeed, a qualitative improvement in the Government's approach. It appears to be more studied than the amateurish endeavours of 2002 and 2007. Yet, the considerations that have gone into fixing the rates for the different categories of diet leave room for considerable improvement and betray a pronounced lack of industry, imagination and foresight.

78. For a start, it is inexplicable that the committee appointed to revise the rates called for a further committee of dietitians to be formed to suggest the diet and yet the suggestions of the dietitians' committee were not taken into account. The records do not show that the rates committee considered the dietitians' proposals and turned them down. There are no meaningful minutes of the rates committee's three meetings held in January, March and May, 2009. The rates committee received inputs from the Directorate of Agricultural Marketing on the prices of vegetables and other ingredients that go into the patients' cooked diet before it projected the contractors' cost therefor. It was unnecessary for the

State to labour over the rates committee's choice of median rates over mean rates. In judicial review, the Court would hardly get into the nitty-gritty of a decision made by an expert body if it found that relevant factors had been taken into account. It is for such reason that the sundry challenges launched by the petitioners in respect of the price of potato and other ingredients are found unworthy of any anxious consideration. It is again for such reason that the petitioners' criticism of the 2007 and 2008 rates being used as the benchmark for supply in 2009 is found to be devoid of merit.

79. There does not appear to be any apparent arbitrariness in the decision-making process of the rates committee in respect of the matters that such committee took into account. But there appears to be a gaping hole in the decision-making process in that the rates committee failed to take into account divers germane matters. In the absence of there being anything in the records or in the state's affidavit it cannot be presumed that it was the rates committee that settled the eligibility criteria or stipulated the other special or general conditions or drafted the terms of the model agreement. It also does not appear from the records nor has it been asserted in the State's affidavit that all the material that now appear in the appendices to the memorandum of June 12, 2009 were placed before such committee or otherwise brought to its notice. It cannot be assessed, in such circumstances, whether the cost implications that the terms and conditions entail had been taken into account by the rates committee. Apart from the preliminary discussion held by the rates committee early in January of this year, it appears to have deliberated in silence as it spoke only in the recommendations that it made in May, 2009.

80. The State is free to set the bar high for worthy and classy contractors to effect supply of cooked food to Government hospitals. But enhanced standard would be directly proportional to the cost of supply. This fundamental principle has been lost sight of in the decisionmaking process and it is not necessary to speculate whether the rates committee was made aware of the qualitative improvement in the standards now set by the Government.

81. There are several terms in the appendices to the memorandum of June 12, 2009 which would have a material impact on the cost of cooked diet. If a contractor has to meet the expenses on account of provident fund contribution for its employees or for insurance premium, the relatable proportion thereof has to be added to the cost of supply. The infrastructure expenses incurred by a contractor have to also to be passed on to the user. The State is to be lauded for the exacting demands made to ensure service of cooked food in a hygienic manner; but covered trolleys, refrigerators, heating equipment, sparkling utensils, cooking implements, unsoiled uniform for staff, dishwashers and other overheads, including electricity and water charges, cost money. Even if some or most of them are capital expenses that should be borne by the contractors, the cost of servicing such capital or the depreciation cost needed to be accounted for in the determination of the rate. The myriad conditions included in annexure "D"

to the memorandum of July 12, 2009 particularly in respect of preparation of cooked food, employment of manpower, responsibilities of the contractor and payment conditions warranted such that factors carry commensurate weight in the assessment of the rate. Neither the records produced nor the State's affidavit offers any glimpse into the decision-making process having embraced such pertinent matters.

82 The relevant memorandum sets down breakfast cost at Rs. 12.98, lunch at Rs. 15.62 and dinner at Rs. 14.46 for the general adult diet per day. The recommendations of the rates committee indicate that the fuel cost for cooking would be Rs. 1.01 per meal. The daily general diet of Rs. 43.06 comprises the cost of the food ingredients, fuel cost and profit. There is a break-up running into four sheets and entitled "Working Sheet for the Calculation of Patient Diet Rates" that is appended to the State's affidavit. For every meal there are two columns: quantity and amount. The total quantity of a commodity forming part of the daily diet is multiplied by the median value to arrive at the daily cost on such head. The working sheet takes into account the cost of spices and condiments. There is absolute clarity in the determination of the cost of the food ingredients. On the last page of the calculations, the total cost on account of the food component for the general daily diet, inclusive of fuel charge, is shown to be Rs. 39.15. The median value of the contractor's profit is shown to be 0.10 (presumably, translating to 10 per cent) for a daily figure of Rs. 3.91. The last line of the calculations records the total daily costs for the three meals and the grand total of the daily cost for general diet to be Rs. 43.06. Though the first page of the two-page recommendation of the committee records at clause 6(d) that the "profit for contractor is taken as 10% of costs which includes deployment of staff and other incidental charges", the basis for including employees' cost and other incidentals is not reflected in the calculation sheet.

83. Profit, by its very nature, should not ordinarily include any cost element though it may include the tax payable thereon. Neither the recommendations of the committee nor any other document in the records produced reveal any assessment having been made on account of employees' cost or for incidentals or overheads. There is no opinion expressed that a 10 per cent top-up over the cost of the food ingredients is a generally accepted norm in such cases. If an expert body had opined as such, unless the same appeared to be demonstrably erroneous and absurd, the Court in judicial review would not have been minded to engage itself in the specifics. But there is nothing to show from the records that the decision-making process was alive to the various expenses which a contractor is likely to incur on account of the onerous but commendable terms set by the Government.

84. If the cost that a contractor has to sustain on account of the personnel required to be engaged is looked into, by way of example, it would indict the decision-making process involved in the impugned determination. A contractor is required to pay the minimum wages to any employee. The minimum wages

payable daily to an unskilled worker is Rs. 122/-. If a contractor is required to engage the "adequate number of personnel with required skill", as the several clauses under the heading "responsibilities of the contractor"" necessitate, it would have a material bearing on the cost of supply of cooked diet. The conditions require employees to be engaged in shifts. In one of the petitions, an existing contractor says he has engaged eight employees for supply of cooked diet to a 135-bed hospital even under the present, less stringent regime. The State does not say that under the new, stricter dispensation a contractor would require fewer hands to service such a hospital. Even if it is assumed that all eight are paid the minimum daily wages of Rs. 122/- each, the cost of the employees per day would amount to over Rs. 5/- per bed. The cost of labour per patient may be lower elsewhere, particularly in the bigger hospitals, but that is not the point. The point is that labour comes at a cost more than fish or milk or rice or curd. Yet the committee did not deem it necessary to factor in such major head of expense of the contractor in its detailed deliberations in the calculation sheet and relegated it to a parenthesis in the footnote as part of the top-up of 10 per cent euphemistically clubbed together as profit.

85. It would not be in the interest of the patients that high standards are set in the conditions and an enhanced quality of diet is proposed without commensurate rates being offered. It would only imply that there would not be any quality control at the post-award stage to ensure adherence to the exalted specifications. If the high standards as set by the Government are to be met at the rates offered, there would necessarily be a compromise on the quality. The standards demanded cannot be effective till a quality control mechanism is put in place to ensure that the norms are scrupulously followed. As honourable as the State's motive appears to be, the mechanism adopted for determining the rate is flawed to the point of arbitrariness and being insensitive to the patients' well being.

86. If one were to go on impression alone, a 51 per cent increase offered by the State over the rates fixed in the year 2002 or a 26 per cent increase over the immediate previous prevailing rate would appear to be reasonable. But supply, and particularly the cost thereof, depends as much on the quantity as on the quality of demand. An impression formed on an unsophisticated overview of the matter based only on the quantum leap reflected in the present prescribed rates, would be-as impressionistic appraisals often are-distressingly blemished. The qualitative improvement in the diet that the State insists it has introduced would have a spiraling impact on the cost. The rules of the game have now been changed. The simplistic suggestion that a substantial increase in the rate in rupee terms should deter the Court from probing into the specifics that went into the determination is unrealistic and utterly unacceptable.

87. One need not look much beyond the State's candid confession that a contractor intending to supply to one or a few of the hospitals within a sub-division would not be able to break even. Nothing in the memorandum or the

suggested or actual tender terms give so much as a hint that an aspiring contractor intending to supply cooked diet to a sub-divisional hospital had to bid to supply to all hospitals within the sub-division or to none at all. The question that arises is as to what happens, then, to the stand-alone cases like the Mahesh Bhattacharya Homoeopathic Medical College and Hospital. There is no room provided in the memorandum for increased rates for the stand-alone cases. More importantly, if the tender terms do not call for a clubbed bid for all hospitals within a sub-division, the State can hardly impose or imply it after bids have been received.

88. The singular failure to consider service tax would also demonstrate the irrationality in the decision-making process that culminated in the rate being fixed. If there were no petition challenging the process and if there were no affidavit filed by the state thereto, no contractor could have demanded reimbursement or payment of service tax from the government on the strength of the terms of the agreement that the government proposed to enter into with the contractors. The exercise undertaken by the rates committee may have been confined to the actual ingredients that go into the meal and not extended to matters beyond. But without any speculation, it can be said that all relevant factors that ought to have been taken into consideration in the process of determining the final rates were, in fact, not taken into consideration. Unlike the eligibility criteria and other conditions set which would be matters of policy, there is nothing in the manner in which the rates were assessed that would make the fixation a matter of policy. The government may have said that as a matter of policy it had decided to keep the rates at a particular level. It could then have worked out as to what could be supplied to the patients, and in what manner, at such fixed rate. The assessment in judicial review then may have been as to whether the policy was in-keeping with the patients' wellbeing. But there is no element of policy involved in the rates fixed here. A committee was set up to assess the rate on the basis of the cost of ingredients; the committee made its recommendations unmindful or unaware of the attendant conditions of supply; and, the government regurgitated the recommendations in an official memorandum without the slightest consideration as to whether the quality of service demanded could be maintained at such rates. The records do not reflect kind of churning of the matter in the government corridors subsequent to the committee's recommendations being received and prior to the memorandum incorporating the recommendations being published.

89. There is another aspect, though a matter of policy, which needs to be noticed. Clause 20(f) of appendix "C" to the memorandum of June 12, 2009 provides that the inter se assessment between technically responsive bids would be on the basis of who offered the most food at the specified rate. The rationale may be questioned both in the State's assumption therein that more is good (and, the corollary thereto that the original diet may be deficient) and in the obvious arbitrariness that is sown thereby in the final assessment of competing bids. The form of the bid requires the additional quantity offered to be expressed

in percentage terms. Theoretically, the difference could be in decimal points. Since the clause requires the best offer to be chosen, it may lead to an onerous appraisal of the quantitative difference in the marginal figures and in the mechanism to ensure that the exact percentage of increased supply is translated in the extra food on the patients' plate. It is possible to envisage a credible challenge on the possible ills in the implementation of the clause and the promised additional supply. It would have been no better if instead of percentage terms some other criterion had been stipulated which may have resulted in one bidder offering an extra slice of toast and another offering a handful more of rice- it would inevitably involve comparing the incomparables. A more imaginative method may have been desirable not only to arrest unhealthy competition among the bidders but also to preclude unsavoury allegations being levelled as to the final assessment and the implementation of the promised supply.

90. To return to the basis of the exercise undertaken in these proceedings, the order dated September 23, 2008 must again be seen. Such order which the State has accepted, called upon the State to take care of the patients' interests and to eliminate unhealthy competition among bidders. Neither seems to have been achieved in the process undertaken by the Government that culminated in the issuance of the memorandum and its several appendices. The interest of the patient is best served in the what and the how of the meal that arrives by his bedside; not in the piety trapped in cold print of noble-intentioned white sheets waiting to turn yellow in some stately cabinet. The proof of the pudding, as they say, is in the eating. If clause 20(f) of the special conditions portends an assessment of marginal percentage figures with no mechanism put in place to ensure commensurate delivery, the unhealthy competition between the bidders that the order of September 23, 2008 required to be eliminated, still looms large.

91. And yet, for all the public interest involved in the welfare of the ordinary and the less-privileged who flock to government hospitals this is not a public interest litigation. As much as the patients' interests have to be borne in mind, the motive and object of these petitioners cannot be missed. They come not to speak for the patients, but in the ultimate hope of filling their coffers.

92. The primacy of the executive in such matters of administration cannot be questioned. The manner of administration may sometimes fall for consideration in judicial review. Hospitals cannot be run from the coolth of court chambers or the high horse of a rostrum. For an old order to be changed and a new to be ushered in there would be inevitable teething problems and the Government must also be allowed its share of experimentation. A regime put in place in 2002 has not been perfected or even refined seven years down the line. But the Government did not have a fair run of trial to count its errors. Even with the imperfect process now brought in by the memorandum of June 12, 2009, the Government must be allowed a free run to assess and reappraise the process and the working thereof. It is on such consideration that the Government is left free to proceed with the memorandum of June 12, 2009 and the tender

processes commenced thereunder, with the rider that it would pay or reimburse service tax over and above the prescribed rates to the contractors selected in accordance with the new criteria set. The obvious arbitrariness reflected in the determination of the rates should be corrected by such appropriate measure, including the setting up of a more broad-based committee within a period of six months from date which should iron out all the creases before the next annual tender process for the year 2010-11 is commenced. The arbitrariness apparent in the determination of price can be ignored once to allow the Government the leverage to experiment, particularly when the errors do not appear to be mala fide, it may not be permitted to recur.

93. WP No. 12241(W) of 2009 and CAN 6970 of 2009 are dismissed. WP No. 12603(W) of 2009 is dismissed as being not maintainable. WP No. 11766(W) of 2009, WP No. 11939(W) of 2009, WP No. 12341(W) of 2009, WP No. 12527(W) of 2009, WP No. 12534(W) of 2009, WP No. 11881(W) of 2009, WP No. 11955(W) of 2009, WP No. 12728(W) of 2009, WP No. 12812(W) of 2009, WP No. 12815(W) of 2009 and WP No. 12914(W) of 2009 are disposed of. WP No. 13434(W) of 2005 is also disposed of as it has run its course.

94. There is an additional prayer in WP No. 12728(W) of 2009 that the State has not paid the money due to such contractor. If there is no dispute as to the dues, the State should release the payment overdue within six weeks from date.

95. There will be no order as to costs.

96. It is recorded that immediately prior to the delivery of this judgment, the records that had been produced by the State have been returned to counsel representing the State. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.