(1997) 10 AP CK 0003

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10920 of 1997

Bhanu Constructions Company Limited and Another	APPELLANT
Vs	
A.P. State Electricity Board and Others	RESPONDENT

Date of Decision : 24-10-1997

Acts Referred:
Constitution of India, 1950 — Article 12, 14, 226

Citation : (1997) 6 ALT 328

Hon'ble Judges : T.N.C. Rangarajan, J

Bench : Single Bench

Advocate : C.V. Mohan Reddy, for the Appellant; K.N. Jwala, S.C. for Respondent Nos. 1 and 2, D.S.R. Krishna, SC for Central Government for Respondent No. 3 and E. Manohar, for the Respondent

Final Decision : Dismissed

Judgement

T.N.C. Rangarajan, J.—This writ petition is directed against the award of Letter of Intent to the 4th respondent for the execution of 400 KV Transmission Lines under Srisailam Left Bank Power House Transmission Scheme.

2. Facts:-

The Government of India (hereinafter referred to as the ''Borrower'') entered into a loan agreement No.IDP-85 dated 21-12-1992 with Overseas Economic Co-operation Fund (hereinafter referred to as the ''Fund'') for obtaining funds for the implementation of the Srisailam Power Transmission System Project. The use of the proceeds of loan was given in Section 2 as follows:-

"Section 2 : Use of Proceeds of Loan

(1) The Borrower shall cause the proceeds of the Loan to be used for the purchase of eligible goods and services necessary for the implementation of the Project from Suppliers, Contractors or Consultants (hereinafter collectively referred to as "the Supplier(s)") of the eligible source countries described in

Schedule 4 attached hereto (hereinafter referred to as "the Eligible Source Country(ies)") in accordance with the allocation described in Schedule 2 attached hereto."

The other terms and conditions were set-forth in the Fund''s general terms and conditions dated November, 1987. Section 9.01 of Article IX of General Terms and Conditions stated as follows:-

"Section 9.01. Applicable Laws:

The validity, interpretation and performance of the Loan Agreement and the Guarantee, if any, shall be governed by the laws and regulations of Japan."

They also provided for arbitration in case of dispute arising from the loan agreement between the Fund and the Borrower. Section 6.01 also provided that the Fund may by notice to the Borrower, suspend in whole or in part, rights of the Borrower if there is default in the performance of any terms and conditions. Section 4.03 further provided as follows:

"Section 4.03: Misprocurement:

The Fund does not finance expenditures for goods and services which have not been procured in accordance with the agreed procedures and the Fund will cancel that portion of the Loan allocated to goods and services that have been misprocured. The Fund may, in addition, exercise other remedies under the Loan Agreement."

Under Article III, Section 4, the Borrower authorised the Andhra Pradesh State Electricity Board (hereinafter referred to as the ''Board'') as the executing agency. The allocation of proceeds of the loan were in five categories. Category ''B'' being the local currency portion of material and equipment/civil works. The guidelines to be used for procurement under the loan was given in Schedule IV. Section 3(2) provided as follows:

"Section 3: The Fund''s review of decisions relating to procurement of goods and services (except consulting services):

(1) ....

(2) In the case of contracts to be financed out of the proceeds of the Loan allocated to the Category (B), as specified in Schedule 2 attached hereto, the following procedures shall, in accordance with Section 4.02 of the General Terms and Conditions, be subject to the Fund''s review and concurrence.

(a) With regard to any contract the value of which is estimated to be not less than FIVE HUNDRED MILLION Japanese Yen (Y 500,000,000):

(i) If the Borrower wishes to adopt procurement procedures other than Local Competitive Bidding, the Borrower shall submit to the Fund a Request for Review of Procurement Method(s) (as per Form No. 1 attached hereto). The Fund shall inform the Borrower of its concurrence by means of a Notice regarding

Procurement Method (s).

(ii) When the prequalified firms have been selected, the Borrower shall submit to the Fund for its review and concurrence a Request for Review of Result of Prequalification together with a Summary Sheet (as per Form No. 3 attached hereto). When the Fund has no objection to the said request, the Fund shall inform the Borrower accordingly by means of a notice regarding Result of Prequalification.

(iii) Before sending a notice of award to the successful bidder, the Borrower shall submit to the Fund, for its review and concurrence, a Request for Review of Analysis of Bids and Proposal for Award together with a Summary Sheet (as per Form No. 4 attached hereto). When the Fund has no objection to the said request, the Fund shall inform the Borrower accordingly by means of a notice regarding Analysis of Bids and Proposal for Award.

(iv) When the Borrower wishes to reject all bids or to negotiate with one or two of the lowest bidders with a view to obtaining a satisfactory contract, the Borrower shall inform the Fund of its reasons, requesting prior review and concurrence. When the Fund has no objection, it shall inform the Borrower of its concurrence. In the case of rebidding, all subsequent procedures shall be substantially in accordance with the sub- paragraphs (i) through (sic. to) (iii).

(v) Promptly after executing a contract, the Borrower shall submit to the Fund, for the Fund''s review and concurrence, a Request for Review of Contract (as per Form No. 5 attached hereto). When the Fund determines the contract to be consistent with the Loan Agreement, the Fund shall inform the Borrower accordingly by means of a Notice regarding Contract,

(vi) Any modification or cancellation of a contract reviewed by the Fund shall require the prior written concurrence of the Fund thereto, provided, however, that any change which does not constitute an important modification of the contract and which does not affect the contract price shall not require such concurrence of the Fund.

(vii) The Fund reserves the right to request the Borrower to submit documents concerning such procurement for the Fund''s reference."

3. The guidelines for procurement under O.E.C.F. loans also gave detailed procedure relating to International Competitive Bidding. The Central Electricity Authority was appointed as a consultant to evaluate the bids.

4. The Board notified an International Competitive Bidding for the design and supply of galvanised 400 KV Single Circuit and Double Circuit Transmission Towers and Check Survey, Erection, Testing and Commissioning of 400 KV Transmission Lines. Package ''A'' related to Hyderabad and Ghanapur while Package ''B'' related to Vijayawada. Under this notification dated 11-11-1994 the bid documents were to be sold upto 31-12-1994, the last date for receipt of bids was 16-1-1995 and the bid opening date was the same date. The bids were to be

kept valid for 180 days. The prequalifications for the bids were as follows:-

"I. GENERAL:

Bidder should have designed, manufactured, shop tested, supplied, erected, and commissioned similar equipment/material which are in successful operation for 36 months as on the date of opening the bid without any major replacement. Further refer Clause Qualifying Requirements Volume-I (Section 1NB) and also in Volume-II (Technical Specification). Agents/Trading Companies whom a manufacturer, possessing the prequalification requirements specified herein, specifically authorises to quote for this tender on his behalf can also submit their tenders on behalf of that manufacturer along with a Letter of authorisation in the specific format enclosed to the bid documents. Officers from other agents/ brokers/middlemen will be treated as non-responsive.

II. TECHNICAL FOR MATERIALS:

Item No. 1-

(a) Bidder should have designed, fabricated, galvanised, successfully tested and supplied at least 10,000 M.T. of 220 KV and above transmission line towers during the last five years.

(b) The bidder/collaborator/associate should have erected successfully tested and commissioned at least 100 KM of 400 KV and above class single circuit and/ or double circuit lines which have been in operation at least for the last two years and he/his collaborator/ associate should have at least 1 (one) set of tension stringing equipment and should arrange an additional tension stringing equipment at the time of stringing. The tenderer shall note that if he fails to arrange second stringing equipment at the time of stringing the purchaser will arrange stringing equipment to get stringing work done at the risk and cost of the successful tenderer.

Item No. 2.

The bidder must have designed, manufactured, erected, tested and commissioned at least 2 nos. transformers of the same type, rating or above class specified under this package which are in satisfactory operation for at least three years as on the date of bid opening.

III. In case the bidder is furnishing his bid based on the experience of his collaborator, his collaborator shall have the same experience as mentioned above."

Eventually, the date of submission and opening of the bids was shifted to 31-8-1995. The petitioner M/s. Bhanu Construction Company Limited (hereinafter referred to as the ''BCC'') gave its bid for Package ''A'' at Rs. 21,93,18,677/- on 22-1-1996. The Stores-Purchases Committee recorded in its minutes that BCC meets the qualification requirement and is considered responsive. It was decided to award the contract to BCC after obtaining approval of the Fund. The Consultant-Central Electricity Authority made an evaluation and also stated as follows:

"As the offer of M/s. Bhanu Construction Co, Hyderabad for Package ''A'' is found to be technically and commercially responsive and also lowest amongst all the bidders, APSEB have proposed to place order on them."

However, the final recommendations were as follows:-

"13.8. In view of above, it is recommended that the proposal of APSEB for placement of order on M/s. Bhanu Construction Co. Ltd., Hyderabad for design, supply of galvanised towers, check survey and erection of (i) Srisailam-Hyderabad 400 KV D/C lines, (ii) Hyderabad-Ghanapur 400 KV S/C line against Package-''A'' at a quoted price of Rs. 21,93,18,677/- (Rs.14,89,22,706/- + Rs. 7,03,93,971/-) and comparable price of Rs. 2,56,40,930.75 may be accepted, subject to APSEB satisfying themselves of the following:

(a) The agreement between M/s. BCC and their associates meets the specified requirements including their past performance as spelt out in Clauses 1.1.5 (Vol-II) and 3 (Vol-I) of the specifications;

(b) Financial capability of M/s. BCC and their associates for undertaking the work including the adequacy of the financial tie-up between M/s. BCC and M/s. Klen & Marshall.

In the event of placement of orders on M/s. BCC, APSEB shall also ensure that as already agreed to by M/s. BCC there shall be no additional cost while meeting the specified requirement of foundations volumes (excavation, concrete and reinforcement) for towers with extensions and for reinforcement in all types of dry foundations as per specification requirement/design checks.

13.9. In case APSEB are not able to successfully conclude a contract with M/s. BCC taking into account the above stated stipulations, they may consider placing the order on the next lowest acceptable bidder viz. M/s. Kalpataru Power Transmission, who are meeting the specified requirements."

The Fund stated on 11-11-1996 as follows:-

"We may like to mention that it is necessary to determine whether the bidder whose bid has been evaluated the lowest price-wise, has the capability and resources to carry out the contractual responsibilities effectively and in a timely manner. Evaluation should take into consideration not only the prices but the technical/commercial aspects as well. Although M/s. BCC is the L-1 bidder but with a complicated offer - five associate fabricators, one design consultant and one financier. The considerations for award should include not only the price but also the appropriate standards of capability and financial resources which are found lacking in the bid of M/s. BCC."

The Board gave certain clarifications on 20-12-1996 to the Fund. Thereafter, on 3-3-1997, the Fund took the following decision:-

"In accordance with the provisions of Loan Agreement No.ID-P.85 dated 21-12-1992 between the Overseas Economic Co-operation Fund and the President of India, we have reviewed your proposal for awarding the contract to M/s. Bhanu Construction Co. Ltd. for Package ''A''. We have also noted the observations and stipulations made by CEA. An analysis of various documents received from APSEB has been made by us and it is concluded that the responsiveness of L-1 bidder, particularly the specified requirements and financial capability of the bidder and its associates, has not been satisfactorily and adequately established to meet the bid specifications.

Please, therefore, proceed with the finalisation of the contract with the next lowest acceptable bidder, viz. M/s. Kalpataru Power Transmission Ltd, Gujarat."

5. Contentions of the Petitioner:-

This decision of the Fund was attacked by the petitioner on the ground that it was taken after a direct correspondence with the Board contrary to the Loan Agreement under which the party to that agreement was only the Borrower and the Board was only an executing agency. Secondly, it was contended that it was not for the Fund to award the contract, but the Board which had invited the bids. Thirdly, the Board is a statutory body and cannot be bound by the decision of the Fund. Fourthly, as an executing agency, the Board should have sought instructions from the Borrower but instead the Letter of Intent was given in a hurried manner which showed lack of bona fides. It was pointed out, in this connection, that the decision of the Stores- Purchase Committee was taken on 27-3-1997 at 6-30 p.m. and 28th, 29th and 30th were public holidays in Delhi but the Letter of Intent was given on 27th itself without waiting for the reply. It was also alleged that the Borrower by letter dated 22-4-1997 advised the Board to keep the matter in abeyance as the difference between the petitioner''s bid and the 4th respondent''s bid Was Rs. 1.52 crores. According to the petitioner, the rejection of the petitioner''s bid was arbitrary and denies its legitimate expectation of fair treatment when it was admittedly the lowest bidder. The petitioner also challenged the validity of Section 3(3) of the Loan Agreement as unconstitutional.

6. Contentions of the Board:-

The decision to reject the bid of the petitioner was justified on the basis of the conditions of the Loan Agreement by which the approval of the Fund was essential. It was contended that factually the petitioner did not meet the pre-conditions of the tender. It was also pointed out that the petitioner''s bank guarantee had not been kept alive and on that ground alone the tender had lapsed. With reference to the letter dated 22-4-1997, it was clarified that the Board had satisfied the Ministry that the correct procedure was followed and by letter dated 30-5-1997 the Borrower closed the matter by stating that "keeping in view the facts and the circumstances, explained by you and having regard to the criticality of the contract, APSEB may proceed with award of contract to M/s.

Kalpataru."

7. Contentions of the Borrower:-

No counter was filed on behalf of the Borrower but it was argued that the Loan Agreement cannot be tested with reference to the Indian law or the Indian Constitution. It was also submitted that the conditions of the agreement were matter of policy and are not justiciable. Further, the Fund itself was not a party to this proceedings and since its decision was binding on the Borrower and the Board as its executing agency, the writ petition is not maintainable.

8. Law:- Private Field

The Administrative Law is concerned with obliging the Government to control itself. In the field of private law, freedom of contract prevails. In an analogous case where, for instance, a bank were to give a loan to a company for setting up an industrial undertaking on BOT (Build, Operate and Transfer) basis, it will be prudent on the part of the bank to insist that its approval must be taken in selecting the contractor because unless the contractor is competent enough to complete the project successfully and in time, the profit making apparatus will not come into existence to enable the bank to recover its loan. Therefore, in order to see that the loan is not a non-performing asset, the bank can clearly insist upon such a condition and in the field of private law, it cannot be questioned even as an unconscionable bargain due to inequality of bargaining power. The fundamental rule, is if the parties have made an agreement the Court will enforce it unless it be manifestly unfair and unjust; but if it be unfair and unjust, the court will disregard it and decree what is fair and just. We do have the rule of Damdoopat as well as Moratorium in respect of agricultural debts. But they are cases where the Legislature has intervended to protect the weaker Sections. The leading commentary on Uniform Commercial Code states that most parties who assert the Code Section dealing with unconscionability and most of those who have used it successfully in reported cases have been consumers. Most of these successful consumer litigants have been poor or otherwise disadvantaged...........The Courts have not generally been receptive to pleas of unconscionability by one merchant against another. (See White & Summers, Uniform Commercial Code (2nd Edn., 1980) P.149 quoted in Chitty on Contracts, 1983 Edition Vol.1, para 519.).

9. Law: Public Field:

When it comes to public field, the fundamental rights granted by Part IV of the Constitution of India makes an obvious distinction. In the words of the Supreme Court in Shrilekha Vidyarthi v. State of U.P. (1993) 1 SCC 212

"The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

In the case of Food Corporation of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 77, the Supreme Court observed as follows:-

"There is no unfettered powers in public law; a public authority possesses powers only to use them for public good. This imposes duty to act fairly. The Court held that despite the term in the tender notice enabling the rejection of any tender without assigning any reason, such rejection must be for valid reason because every public body is under duty to act fairly."

10. Law: International Contracts of the Government:

The case of the petitioner is that because of his right not to be rejected arbitrarily and his legitimate expectation to be treated fairly, Section 3.2 of the Loan Agreement giving unfettered discretion to the Fund to withhold concurrence for any tender is unconstitutional. The agreement is governed by the general terms and conditions which provide that it shall be governed by the laws and regulations of the Japan. "One of the clearest rejections of any renvoi doctrine is to be found in the field of contract, it being thought that no sane businessman or his lawyers would choose the application of renvoi. Lord Diplock rejected the application of the doctrine in contract thus:

"One final comment upon what under English conflict rules is meant by the ''proper law'' of a contract may be appropriate. It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the Courts of that country might themselves apply if the matter were litigated before them. For example, if a contract made in England were expressed to be governed by French law, the English Court would apply French substantive law to it notwithstanding that a French Court applying its own conflict rules might accept a renvoi to English law as the lex loci contractus if the matter were litigated before it. Conversely, assuming that under English conflict rules English law is the proper law of the contract the fact that the Courts of a country which under English conflict rules would be regarded as having jurisdiction over a dispute arising under the contract (in casu Kuwait) would under its own conflict rules have recourse to English law as determinitive of the rights and obligations of the parties, would not make the proper law of the contract any the less English law because it was the law that a Kuwaiti Court also would apply."(See Cheshire & North''s Private International Law 1984 AC 50)

Therefore, it is a moot question whether the validity of the said provision in the agreement can be tested with reference to the Constitution of India. Inasmuch as the project is executed in India by a public body, we may still examine this question.

11. Basically, the curb on arbitrary power by reason of legitimate expectation of a citizen is not an absolute and substantive right. The Supreme Court has held in Union of India and others Vs. Hindustan Development Corpn. and others, that such a legitimate expectation cannot be equated to such a substantive right. Even if it were so, there can be a reasonable restriction of such a right in public interest. As we have seen above, the same provision in the agreement if it were in a private contract will be quite valid and it is attacked as unconstitutional only because it interferes with the right of the petitioner to have his tender considered.

12. In Tata Cellular Vs. Union of India, , the Supreme Court spelt out the parameters of judicial review in the following words:

"The duty of the Court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,

2. Committed an error of law,

3. Committed a breach of the rules of natural justice,

4. Reached a decision which no reasonable tribunal would have reached or,

5. Abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case.

Shortly, put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness,

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

In the case of Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, the Court applied these principles and came to the conclusion that such judicial review is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

In that case, it was noted as follows:-

"It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and Respondent 1 together with the consultant''s opinion after the so- called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring Court''s interference in the matter of an award of contract."

In spite of this observation, the question whether such a power for the bank in that case to accept or reject a bid is itself an arbitrary power was not addressed.

13. Decision:

In my opinion, the power is granted by the agreement between the Government and the Fund and it cannot be tested with reference to the Article 14 of the Constitution of India. Once it is conceded that it is a commercial contract and the power is given to the Fund, to veto any bid having regard to the capacity of the contractor to successfully complete the project in time, it must be accepted that the Fund will exercise that power only on commercial considerations. The learned Counsel for the petitioner submitted that it amounts to economic slavery. But the Court is not the forum for such an argument. The terms of the Loan Agreement are a matter of economic policy.

The commentary on Chitty on Contracts, 1983 Edition at para 516 is as follows:-

"But it remains uncertain in modern law whether there are any residuary equitable principles entitling the Court to interfere with freedom of contract on the ground that the contract (or a part of it) is, in all the circumstances of the case, a harsh and unconscionable bargain."

If the argument is that the Government as the Borrower ought not to have conceded an arbitrary power to the Fund to accept or reject the bids, it is a matter which could be tested only with reference to the accountability of the Government to the Parliament and not with reference to the possible impact on the legitimate expectation of a prospective contractor that his tender will be accepted. The contractor is a third party to the agreement, and therefore, cannot question the validity of that provision.

14. The second aspect canvassed on behalf of the petitioner was that even if that provision in the agreement was valid, the procedure followed by the Fund in exercising that power could be questioned. The AFCON''s case (supra 5) appears to illustrate this situation but as noted above, the Borrower, could not have

protested because even in that case it was clearly stated that the bank will deny the funds if its decision is not accepted. One who pays, calls the tune and if the Borrower needs the money, it has to go along with the decision of the Fund. There are Commonwealth authorities which hold that a person who is under no duty to enter into a contract with another, is entitled to set his own terms even though these may seem extortionate and the other party may have little choice but to comply. Our own Contracts Act gives an illustration in Section 16 as follows:-

"A applies to a banker for a loan at a time when there is stringency in the money-market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence."

Even otherwise the agreement itself provides for arbitration if there is any dispute as between the Borrower and the Fund, the contractor as a third party would not be able to challenge such a decision in those arbitral proceedings.

15. Once it is accepted that the provision in the Loan Agreement granting the power to the Fund to accept or withhold concurrence for the award of the contract is valid, any challenge to the decision of the Board, even if it may be a public body, can be successfully met by the answer that it is a decision of the Fund and not of the Board or the Borrower. It follows that the decision of the Board or the Borrower are not open to the judicial review on the ground of arbitrariness as long as it is a decision that has the concurrence of the Fund. The legitimate expectation or the right of any contractor with reference to the consideration of his tender, will be subject to the power of the Fund to accept or reject the tender. That power is a reasonable restriction on the right of the contractor because that power is conceded on high economic policy and cannot be questioned in a Court. The free flow to the Government from business community of commercial and financial information relevant to the government management of the country''s economic affairs is an instance of the confidentiality coupled with a public interest sufficient to protect the information from production in legal proceedings, (see Burmah Oil Co. Ltd. v. Bank of England ((1979)2 AllER 461).Though it has been held by the Supreme Court in Shrilekha Vidyarthi v. State of U.P. (1 supra) that the expression "without assigning any cause" is not to be equated with "without existence of any cause" and it only means that the reason need not be communicated based on public policy but such reason should exist to satisfy the judicial scrutiny, in a situation where the power has been given to the Fund which is not a public body or an instrumentality of the State within the meaning of the Article 12 of the Constitution of India, such reasons need not be made available for the judicial scrutiny. We may recall the observation of the Supreme Court in Sterling Computers Ltd. v. M & N Publications Ltd. (1993) 1 SCC 455:-

"While exercising the power of judicial review, in respect of contracts enterec into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141) where it was said that (P.144a):

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorised or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the Court."

By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry."

In my opinion, the existence of a provision in the Loan Agreement enabling the Fund to accept or reject a tender, is such a limitation on the scope of judicial review in contractual cases.

16. The real grievance of the petitioner is that under the perceived threat of the Fund not to grant loan to the Borrower, the Board as the executing agency and the Borrower have surrendered their duty to follow a fair procedure in evaluating the tenders. What is pleaded, is therefore, only undue influence by a third party and if proved, the third party would be liable to pay damages. But, where the third party is only carrying out a lawful power, it cannot be said that there was any undue influence. This line of reasoning also indicates that where the rejected contractor may not be able to sustain any action for damages it would also not be possible to sustain an action for judicial review. I am of the considered opinion that this is not a public law remedy at all because by virtue of the provision in the Loan Agreement, the entire transaction has once again been relegated to the private law field. The only manner in which the petitioner can ask for relief is to seek a mandamus requiring the Borrower and the Board as an executing agency to disregard the decision of the Fund. Though it is now well settled that if a public body weilds power which affects public interest or the rights which are of vital interest of the individual or organisations, such as right to earn a living, it will be subject to judicial supervision as to how that power is exercised. That legitimate expectation would still be subject to paramount public interest. If such a routine judicial review is not designed to promote public interest, Courts would be reluctant to evaluate such purely commercial matters. Reference may be made to the decision in Union v. Hindustan Development Corporation 1994 SC 988 as well as R. v. The Lord Chancellor, ex parte Hibbit and Saimders (A Firm) (1993) Pub L 372. Also see comments at page 214. It will only be in exceptional cases that Courts could be persuaded to interfere. All such cases will be cases where the public authority has acted in bad faith or for an improper purpose or awarded the contract to the financial supporters amounting to fraud. Needless to say that fraud vitiates every thing and such cases would clearly call for intervention. Except for such extreme cases, in international bidding there would be a further requirement of maintaining a level playing field. Can it be said that the Indian contractors could invoke the protection of the

Article 14 which may not be available to the contractors of other nations who may bid in the international tender and would it not amount to discrimination among the several bidders. All these considerations weigh in coming to the conclusion that in international contracts the decision must be understood as essentially a contractual decision not subject to judicial review unless there is some proof of fraud. In the present case, there is no allegation of such bad faith except to say that the Board has relied on the concurrence of the Fund without challenging it. Since these authorities are bound by the terms of the agreement to accept the decision of the Fund and that provision is found to be valid, the plea of the petitioner must necessarily fail.

17. Even on merits, I find that the petitioner has not made out any case. Though initially it was decided that the petitioner had fulfilled the pre-tender conditions, after an in depth study of the facts, it was decided that the tender of BCC was a complicated offer, and hence, its capability and resources to carry out the project effectively and in time was doubtful. This is a technical evaluation which the Court cannot assess. Though it is pleaded that the decision was taken hastily and was also reviewed by the Government, it appears from the record that the Government was satisfied with the evaluation and there is no allegation of any favouritism. There is also no question of any irrationality as it has not been shown that the decision was so outrageous in its defiance of logic or of accepted moral standards. Nor is there any procedural impropriety because it is not in dispute that all the facts were taken into consideration and there is nothing else that the petitioner could rely on in support of its contention that it satisfied the pre-tender requirement. I, therefore, hold that the writ petition is without merit. Accordingly, it is dismissed. No costs.