

(2016) 03 MAD CK 0158

In the Madras High Court

Case No : W.P. No. 922 of 2016, W.M.P. Nos. 703, 704 of 2016, W.P. No. 1211 of 2016, W.M.P. Nos. 946, 947, 1466, 1467 of 2016, W.P. No. 2009 of 2016, W.M.P. Nos. 1748, 1749 of 2016, W.P. No. 1759 of 2016 and W.M.P. Nos. 1603 and 1604 of 2016

Divya Impex and Others

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 10-03-2016

Acts Referred:

Constitution of India, 1950 — Article 12, Article 14, Article 19, Article 19(1)(g), Article 226

Citation : (2016) 3 BC 159 : (2016) 3 MLJ 421

Hon'ble Judges : M. Duraiswamy, J.

Bench : Single Bench

Advocate : N.L. Raja for K. Kumaresh Babu, for the Appellant; A.L. Somiyaji, Advocate General Asst. by T.N. Rajagopalan, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

M. Duraiswamy, J.—1. W.P. No. 922 of 2016 has been filed by the petitioner viz., M/s. Divya Impex to issue a writ of certiorarified mandamus to call for the records pertaining to the impugned tender notification dated 11.12.2015 on the file of the 2nd respondent and to quash the same and consequently to direct the 2nd respondent to issue a fresh notification in terms of the tender notification issued in 1/2011 dated 18.02.2011.

2. W.P. No. 1211 of 2016 has been filed by the petitioner viz., M/s. Kumbhat Holographics to issue a writ of certiorari to call for the records relating to the invitation of tender in Tender No. 1/2015 issued by the 2nd respondent as Tender Inviting Authority for production and supply of Polyester Hologram Excise Labels dated 11.12.2015 and to quash the same.

3. W.P. No. 1759 of 2016 has been filed by the petitioner viz., M/s. Uflex Limited

to issue a writ of certiorari to call for the records of the 4th respondent relating to the invitation of tender in Tender No. 1/2015 for production and supply of Polyester Hologram Excise Labels on turn-key basis dated 11.12.2015 and to quash the tender condition No. 4.5, 4.6(a) in Tender No. 1/2015 in so far as increasing the years of experience from three to eight years in 2D/3D conventional system.

4. W.P. No. 2009 of 2016 has been filed by the petitioner viz., M/s. Divya Impex (who is also the petitioner in W.P. No. 922 of 2016) to issue a writ of Mandamus to direct the respondents to issue a fresh tender notification in terms of G.O. Ms.25 dated 25.08.2015 issued by the 1st respondent.

5. Since the issues involved in all these Writ Petitions are common, by consent of the respective counsels, the Writ Petitions are taken up together and disposed of by this common order.

6. The respondents are referred to in this order as referred to in W.P. No. 1211 of 2016.

7. Heard Mr. N.L. Raja, learned counsel for petitioner in W.P. Nos. 922 & 2009 of 2016, Mrs. Chitra Sampath, learned Senior Counsel for petitioner in W.P. No. 1211 of 2016, Mr. P. Wilson, learned Senior Counsel for petition in W.P. No. 1759 of 2016 and Mr. A.L. Somiyaji, learned Advocate General assisted by Mr. T.N. Rajagopalan, learned Special Government Pleader for all respondents in W.P. Nos. 922 & 2009 of 2016, respondents 1, 2 & 3 in W.P. No. 1759 of 2016 & respondents 1, 2 & 4 in W.P. No. 1211 of 2016.

8. The contentions of the petitioners are as follows:

"(i) The petitioner in W.P. No. 922 of 2016 & W.P. No. 2009 of 2016 is a Proprietary concern established in the year 2000 and has been carrying on the business of manufacture, trade and supply of hologram stickers, hologram labels, transparent labels, etc and other similar products. The petitioner in W.P. No. 1211 of 2016 is a registered Partnership Firm manufacturing security holograms in Chennai since 2000. The petitioner in W.P. No. 1759 of 2016 is a Company registered under the Companies Act dealing in excise adhesive labels for liquor bottles.

(ii) It is the case of the petitioners that the 2nd respondent viz., Commissioner, Prohibition and Excise/Tender Inviting Authority, Prohibition and Excise Department has issued the impugned tender notification in Tender No. 1/2015 for production and supply of Polyester Hologram Excise Labels on turn-key basis on 11.12.2015. The tender notification specified the technical specifications of the required hologram labels and it requires the bidders to submit technical bid as well as the price bid and the tender notification also specifies certain pre-qualifications for participating in the tender. As per the tender conditions, only those tenderers, who qualify in the technical evaluation, will be considered for price bid opening and the tenderers who do not qualify in the technical bid will

not be considered in the price bid opening.

(iii) According to the petitioners, the pre-qualifications prescribed by the 2nd respondent in the tender documents under Part-4 are arbitrary and unreasonable and it has been framed to favour the 3rd respondent viz., M/s. Holostik India Limited and to deprive the other indigenous manufacturers like the petitioners from participating in the tender process. According to the petitioners, the qualifications that has been prescribed is to suit only the existing manufacturer in the Excise Department. According to the petitioners, the tender notification fails to satisfy the test of reasonableness and there is absolute unfairness in prescribing the qualifications for participating in the bidding process. Further, the petitioners contended that the qualification prescribed under the impugned tender notification are in entire variation with that of the earlier notification issued by the 2nd respondent in the year 2011 for the very same procurement.

(iv) As per the impugned notification, 8 years of experience in the field of Master Origination is required, whereas in the 2011 tender notification, only 3 years experience was fixed. According to the petitioners, when there is no change in procurement of secured holograms, there is no need to modify the experience from 3 years to 8 years. According to the petitioners, the existing supplier viz., the 3rd respondent has got 8 years of experience in the Excise Department and in order to deprive the others, the 2nd respondent has increased the experience from 3 years to 8 years arbitrarily.

(v) Further according to the petitioners, the impugned notification specifies that the bidder should be a Company registered in India under the Companies Act, 1956/2013 whereas no such notification had been prescribed in the year 2011. Therefore, the impugned notification deprives the rights of the registered Partnership Firm from participating in the tender. According to the petitioners, absolutely there is no reasonableness or fairness that only a Company can participate in tender and it has been specified as the 3rd respondent is a Company registered under the Companies Act. According to the petitioners, the condition that the bidder should be a Company is absolutely in violation of Articles 14 & 19 of the Constitution of India and the condition has been so framed to select the 3rd respondent to deprive the other qualified manufacturers.

(vi) With regard to the other conditions that the bidder should have supplied at least 20 crores full polyester based security hologram labels to any State Excise Department during any one of the last three financial years is concerned, the petitioners contended that the said condition is not only arbitrary, but also tailor made to award the contract to the 3rd respondent. Further, according to the petitioners, earlier when the respondents invited tenders for the very same purpose for a period of 3 years in the year 2011, had awarded the contract for a period of 3 years to the 3rd respondent, whereas the present tender requires that the bidder should have supplied security hologram labels to the State Excise Department during the last 3 financial years denotes that only the existing awardee of the contract as per the earlier notification for the year 2011 alone can

participate in the present tender.

(vii) According to the petitioners, the Government of Tamil Nadu floated for the first time purchase of holograms in the year 2003 wherein only 3 years of business experience in the manufacture of hologram was prescribed. When the tender was floated in 2006, 3 years experience in the field of manufacture of hologram with Master Origination was prescribed. In the tender floated in 2011-12, only 2 Mastering Systems were prescribed with 3 years of experience of both Mastering Systems without even sparing any single system and according to the petitioners, now in 2015, the impugned tailor made insertion made in order to favour the 3rd respondent and denying the rights of the petitioners and other similarly placed persons from participating in the tender process. According to the petitioners, the very terms of the tender is in violation of G.O. Ms. No. 25 Home, Prohibition and Excise (P & E (VII)) Department dated 25.08.2015, which was specifically issued by the Government viz., the 1st respondent for the purpose of constitution of "Technical Specification Committee", "Tender Scrutiny Committee and Finalization Committee" for the purpose of procurement of hologram excise labels.

(viii) The petitioners also contended that the report of the Technical Specification Committee or the file noting have not been produced before the Court. According to the petitioners, the business experience as well as the technology experience have been clubbed together and has been summed up as 8 years in Clause 4.5 and 4.6(a) of the impugned tender. Such clubbing of the business experience in hologram and the technology experience viz., Mater Origination System in Conventional 2D/3D Origination System and Dot Matrix is done with malafide intention to suit only the 3rd respondent. The petitioners also contended that in other States like Meghalaya, Jammu and Kashmir, Mizoram, Puducherry and Sikkim, the experience in business and technology experience are comparatively less."

9. The contentions of the respondents 1 & 2 are as follows:

"(i) The respondents 1 & 2, in their counter, have stated that the Government in the order in G.O. Ms. No. 25 dated 25.08.2015 have ordered for constitution of Technical Specification Committee and Tender Scrutiny and Finalization Committee to process and finalize the tender for procurement of hologram excise labels. The respondents 1 & 2 have stated that the committee meeting was held on 20.11.2015 and had discussed about the availability of various features with different vendors and recommended the technical specification of the proposed hologram, which is to be generic in nature so as to ensure not less than 3 or more vendors to participate in the tender. Based on the recommendations made by the Technical Specification Committee, tender was floated on 11.12.2015 and the last date for receipt of application was fixed on 12.01.2016 at 12 noon.

(ii) According to the respondents, the specification for the procurement of excise hologram label has been notified after detailed study of various issues viz., excise

label system that are being practiced in other States, reports submitted by the expert committee, report submitted by the Technical Specification committee. The condition of 8 years experience has been considered this year for the reason that the supplier should have been continuously doing business activities in the same field at least for the past 8 to 10 years without any break, so that they may be considered to possess adequate man power/technical skills. Hence, the Committee recommended that the supplier should have at least 8 years of experience to participate in the tender. According to the respondents, while comparing with the other states like Meghalaya for the year 2013, Jammu and Kashmir for the year 2012, Mizoram for the year 2014, Puducherry for the year 2014 and Sikkim for the year 2013 fixation of 8 years experience is very reasonable.

(iii) According to the respondents, the Department had decided to adopt 3rd type of Master Origination, which is a new technology for the first time, so as to keep the competition for wider participation. The Department is using 2D/3D Conventional Origination and Dot Matrix Digital Origination for the past 12 years. The 2D/3D Conventional Origination System and Dot Matrix Digital Origination are existing in India for over 3 decades. Since the value of the tender is about Rs. 150 crores for 3 years, the Company has separate legal entity as against the Partnership Firm. The rights and liabilities under the Companies Act are different for the Company as against that of the Partnership Firm. The same is the position with regard to the dissolution of the Partnership Firm under the Companies Act. In case of default under the Companies Act, the Company is bound to inspection, enquiry and investigation by the Registrar of Companies and the Company is subject to penalty and the Managing Director, Directors of the Company, Company Secretary and the Auditors of the Company are subject to imprisonment and/or penalty as per the Companies Act. In the case of Partnership Firm and Proprietary Firm, there is no such regulations to penalize the defaulters. Therefore, in order to have stability in implementing the contract for the Department, which has been pursuing this for the past 12 years, had imposed the said condition.

(iv) As regards the condition with regard to the supply of minimum quantity of excise hologram (i.e.) at least 20 crores of full polyester based security hologram labels to any State Excise Department during any one of the last 3 financial years is concerned, according to the respondents is neither arbitrary or tailor made to suit the 3rd respondent. The said condition is not restrictive only to Tamil Nadu State Excise Department and the experience will be considered favourably if the prospective bidders have supplied to any State Excise Department all over India, including Union Territories. Unless the supplier has adequate experience in the production and supply of excise hologram labels with advanced equipments and high production capacity, he may not be able to supply. Considering the said fact, the Technical Specification Committee has recommended this norm after detailed study. Similar experience will help the Department in successful execution of the contract and continuous supply of excise labels without any hindrance. Since the

excise hologram label is a highly security product, which ensures revenue to the Government, the Department cannot rely on the experience of having supplied to a Private Firm because the chances of tampering the records or submitting duplicates cannot be stopped and each and every document submitted by the bidder cannot be checked. The Technical Specification Committee has thoroughly discussed the pros and cons and justified the reasons for framing the conditions not favouring anybody and also to ensure wider participation.

(v) According to the respondents, only open tender is called for by the Department as per the Tamil Nadu Tender Transparency Act, 1998 and Rules made thereunder. The Department prefers fair competition and wider participation as per the Act. Hence, the contention of the petitioners that it will create monopoly and the same is not healthy for the public, is not reasonable and worth considering. According to the respondents, there is no violation of Articles 14 & 19(1)(g) of the Constitution of India. There is no arbitrariness in the conditions imposed and nothing prevents the Department from improving the commercial conditions and technical specifications to set the bar high for standards of procurement even though the scope of the tender is same in the previous years. Since the value of the tender is more than Rs. 150 crores, the Department has taken every effort to allot the tender to the best available person.

(vi) Further, the respondents have stated that G.O. Ms. No. 25 dated 25.08.2015 was scrupulously followed during the tender process. In the letter dated 03.12.2015, 12 prospective bidders whose details were culled out from the previous tenders were requested to make a Powerpoint Presentation on the specifications available with them before the Technical Specification Committee on 12.09.2015. An invitation was also displayed in the Office of the Commissioner of Prohibition and Excise. Except M/s. Darashaw & Company Pvt., Mumbai, all other 11 prospective bidders made their Presentation on 12.09.2015. The Technical Specification Committee in its meeting held on 20.11.2015 had discussed about the availability of various features with different vendors and recommended the technical specification of the proposed hologram, which is to be generic in nature. Based on the recommendations made by the Technical Specification Committee, tender was floated on 11.12.2015 with a wide circulation in leading Dailies."

10. Mr. N.L. Raja, learned counsel appearing for the petitioners in W.P. Nos. 922 of 2016 & 2009 of 2016, in support of his contentions, relied upon the following judgments:

"(i) 2015 Writ L.R. 941 [CSEPDI - TRISHE Consortium represented by its Managing Director Sanjay K. Pillai, 6, Kasturi Rangan Road, Alwarpet, Chennai - 600 018 v. Tamilnadu Generation and Distribution Corporation Limited (TANGEDCO) rep. by its Chairman and Managing Director, 144, Anna Salai, Chennai - 600 002 & others] wherein the Division Bench of this Court held as follows:

"This was a case where the Supreme Court took a view that reasons for rejection should be made available to the concerned parties. The paramount indication in this judgment is that the State or its instrumentality, in commercial dealings, should act with credibility; improve culture of accountability; support actions with reasons for an objective review, and fairness. That appears to be the substance of Section 10(6) of the TTIT Act.

29.26. Absence of reasons clearly establishes a case of procedural impropriety, which is susceptible to judicial review, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 411, (the "GCHQ case"):

"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

It is quoted in the words of Professor Helen Fenwick-

"The development of appropriate administrative procedures is fundamental to any proper system of administrative law in the interests of orderliness, openness, timeousness and justice."

29.27. As to the necessity for giving reasons under Section 10(6) of the TTIT Act, it will be worthy to refer to the decision in *Jeyanthan case* [2000] 1 WLR 354, at 359B-359D, in the words of Lord Woolf,-

"Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation the tribunal's task will be to seek to do what is just in all the circumstances."

29.28. Reasoning for decision could be tested on the ground that breach was deliberate, which, we wish to hold in the present case, reasons have not been recorded deliberately and thereby, prejudice is apparent on the face of record. The manner in which evaluation was done and coupled with the lack of reasons in the proceedings in terms of TTIT Act, will invalidate the decision of the first respondent in determining the third respondent as L1. We feel, judicial review should be rightly exercised in this case to test the decision making process and

we are inclined to do so.

29.29. Insofar as rejection of bid of the appellant is concerned, drawing strength from the decision of the Supreme Court in *Star Enterprises* cases, referred *supra*, we find that the TANGEDCO is trying to take shelter by the detailed reply given on 27.9.2014 stating that reasons for rejection are contained therein. We are not able to accept such a contention. The reply of the TANGEDCO is to the representations of the appellant, which partly contain issues relating to the appellant and partly relating to the third respondent. There is nothing to show that it has a detailed evaluation and analysis of the offer made by the appellant and the reasons as to why their offer has not been accepted. The recording of reasons for rejection of the other tenders, namely, unsuccessful tenderers, is contained in Section 10(7) of the Act. Though it is stated that the such reasons should be sent to the Tender Bulletin Officer and the same has been published, we find that the said publication also calls for further introspection, of which we will deal with later. At present, we find that the reasons for rejection of appellant's representations cannot be termed as reasons for rejection of the bid of the appellant. Bid is separate from the substance of the representations. The two need not be confused, one for the other. The requirement of recording of reasons is in-built in the provision of Section 10 of the TTIT Act. The reasons in support of rejection of representations are based on the direction given by the Court. The first respondent's plea is that reasons in the order rejecting the representation are good enough. We do not accept that proposition. The requirement of the Act is compliance of Section 10, i.e. to record reasons which the first respondent failed to do."

(ii), 2008 (3) CTC 675 [*ION EXCHANGE WATERLEAU Ltd. having its Registered Office at Tiecicon House, Dr. E. Moses Road, Mahalaxmi, Mumbai v. The Commissioner, Madurai Municipal Corporations, Madurai-625 002*] wherein this Court held as follows:

"19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise 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. In the decision in *Tata Cellular* case, the Constitution Bench of the Supreme Court has authoritatively held that the principle of judicial review in the matter of contract would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the lowest or any other tender is always available to the Government. The right to choose cannot be

considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision-making process, the Court has to necessarily exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest."

(iii) , (1979) 92 LW 696 [Coimbatore Municipality, rep by its Commissioner v. C.G. Subbiah] wherein it was held as follows:

"We have carefully considered the decisions referred to above and also the arguments advanced by the learned counsel appearing on either side. The Municipality being a statutory body must follow a rational basis in fixing the fee for the various stalls within the market. No doubt, it has the Power to increase the totality of the fees, but while distributing the same to the various stall holders, it must apply a uniform principle and should not depend upon the extent of the trade carried on in each stall. In the decision rendered in W. P. 913 etc. of 1970, aforementioned, Ramaprasada. Rao, I (as he then was) has specifically held that difference in the rates of levy of fee should not be on the basis of the class of trade, since it would prima facie violate Art. 14 of the Constitution of India. The learned Judge has further held in that decision that the Municipality once it chooses to let out its stalls in a public market to enable the seller therein to bring together the persons interested in the articles vended by him for purposes Of Purchase etc. cannot make further inroads into the absolute right of the occupant to adopt an avocation or trade of his choice, The learned Judge has further held that may be the turnover of a commission agent is more than that of a retailer but that would not enter into the computation of the licence fee because it is an irrelevant consideration. We are of the opinion that though the nature of the trade carried on in the stalls may be taken as a basis for fixing the fee having regard to the extent of the stall, the extent of the trade carried on in the stall cannot be held to be a rational basis for fixing the fee."

(iv) , AIR 1989 P & H 117 [Punjab Drugs Manufacturers Association v. State of Punjab and others] wherein the High Court of Punjab and Haryana held as follows:

"10. The executive power of the State Government extends to the carrying of any trade, the purchase and sale of property and making of contracts for any purpose. While dealing with individuals in transactions of sale and purchase of goods, the State cannot arbitrarily deny any individual opportunity to trade with

it and the individual is entitled to a fair and equal treatment with others. The exercise of the executive functions in the matter of trade and making of contracts in subject to Part III of the Constitution. In the matter of making public contracts, the State has to provide equality of opportunity. While exercising the right to trade and enter into contracts, the State is under an obligation to observe equality, whereas ordinary citizens are free to choose not to deal with any person whom they don't like. The State has duty to observe equality in such matters. While entering into contracts, it cannot arbitrarily choose to exclude persons and discriminate against them. Indeed, the State can enter into contracts with any person it chooses and nobody has a fundamental right to insist that the Government must enter into a contract with it. Yet, citizens have a right to claim equal treatment with others to offer tenders and quotations for the purchase or sale of goods and the democratic form of Government demands equality and absence of arbitrariness and discriminations in such transactions. The State may not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This view fully comports with the ratio of the decision of the final Court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal*, , AIR 1975 SC 266, wherein it was observed :

"14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

17. The Government is a government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tenders or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of

arbitrariness."

Even if it be granted to the respondents that respondents 4 to 8 being public sector undertakings of the Government of India and respondent 9 being a joint sector company in which the PSIDC, a Punjab Government undertaking, held 50 per cent equity, could be separately classified and preferential treatment could be extended to them, the action of respondents 1 and 2 in creating a monopoly in favour of respondents 4 to 9 amounts to discrimination and denial of the guarantee of equal protection of law. In *Mannalal Jain v. State of Assam*, , AIR 1962 SC 386, Clause 5 of the Assam Food Grain (Licensing and Control) Order, 1961, which enabled the Licensing Authority to give preference to a co-operative society in the matter of grant of licence for dealing in rice and paddy was not held to be bad because it did not create the monopoly in favour of the cooperative society. Private dealers in rice and paddy were still eligible for applying for a licence. But the State Government had issued executive instructions creating a right of monopoly procurement of paddy in favour of co-operative society and had directed that no licences should be granted to individual dealers other than co-operative societies. The licensing authority complying with the executive instructions declined licence to the private dealers and granted licences in favour of the cooperative societies alone. This order was struck down being violative of the petitioner's rights guaranteed under Articles 14 and 19 of the Constitution, It was observed: --

"10. XX XX XX XX XX XX XX

In other words, the discrimination that has been made by the licensing authority is really in the administration of the law. It has been administered in a discriminatory manner and for the purpose of achieving an ulterior object, namely, the creation of a monopoly in favour of co-operatives, an object which, clearly enough, is not within Sub-clause (e) of Clause 5 of the Control Order, 1961. We have quoted earlier the various orders which the licensing authority had passed. Those orders clearly show that the licensing authority refused a license to the petitioner not on grounds referred to in Sub-clauses (a) and (b) of Clause 5 but on the ground that the State Government had decided to introduce a right of monopoly procurement of paddy in favour of co operative societies and, therefore, no licenses should be granted to individual dealers other than co-operative societies. Judged against the background of facts to which we have earlier referred in this judgment, the impugned order dated April 11, 1961 appears to us to have been based on the same ground, namely, the creation of a monopoly in favour of co operatives, even though the order refers to existing licenses and the quantity of food grains available in the locality."

(v) , (2008) 4 Mah LJ 657 [*Mahesh Varma and another v. State of Maharashtra and others*] wherein the Bombay High Court held as follows:

"20. We have carefully considered the rival submissions. The short question to be considered herein is, whether the decision of the MSRTC in inviting tenders for

supply of spare parts like tyres, tubes etc. only from OEM suppliers is valid in law or whether the same suffers from the vice of arbitrariness. In other words, the question is, whether the MSRTC is justified in excluding various manufacturers of spare parts from participating in the tender merely because they are not OEM suppliers.

...

28. It is pertinent to note that the petitioner No. 2 continues to be in the list of approved manufacturers of MSRTC. Therefore, it is improper on the part of MSRTC to introduce pre-eligibility criteria so as to exclude the petitioner No. 2 and others similarly situated, from the tender process on a wholly extraneous ground which is unsustainable in law. In the absence of any material to show that the OEM suppliers form a separate class based on the intelligible differentia, we have no hesitation in holding that by prescribing the impugned eligibility criteria, the MSRTC has practiced discrimination amongst the equals which is impermissible in law."

11. Mr. P. Wilson, learned Senior Counsel appearing for the petitioner in W.P. No. 1759 of 2016 in support of his contentions relied upon the following judgments:

"(i), (2014) 3 Supreme Court Cases 760 [Maa Binda Express Carrier and another v. North-East Frontier Railway and others] wherein the Hon'ble Supreme Court held as follows:

"9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See Meerut Development Authority v. Assn. of Management Studies , (2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803 and Air India Ltd. v. Cochin International Airport Ltd. , (2000) 2 SCC 617 : (2000) 1 SCR 505)"

(ii) , (2012) 8 Supreme Court Cases 216 [Michigan Rubber (India) Limited v. State of Karnataka and others] wherein the Hon'ble Supreme Court held as follows:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or

unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. 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"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

(iii), (2006) 11 Supreme Court Cases 548 [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others] wherein the Hon'ble Supreme Court held as follows:

"The following legal principles are applicable to the award of government contracts/tenders:

(i) The requirements in a tender notice can be classified into two categories: those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition.

(ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others.

(iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions

fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match the rates quoted by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

(viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it.

(ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefor, the same ordinarily being within employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into

consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities.

(x) Law operating in the field is no longer *res integra*. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor."

(iv) , (2000) 2 Supreme Court Cases 617 [Air India Ltd. v. Cochin International Airport Ltd. and others] wherein the Hon"ble Supreme Court held as follows:

"But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures 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. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

(v), (2016) 1 Supreme Court Cases 724 [State of Punjab v. Bandheep Singh and others] wherein the Hon"ble Supreme Court held as follows:

"4. There can be no gainsaying that every decision of an administrative or executive nature must be a composite and self-sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that any authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. If precedent is required for this proposition it can be found in the celebrated decision titled *Mohinder Singh Gill v. Chief Election Commr.* , (1978) 1 SCC 405: (1978) 2 SCR 272 of which the following paragraph deserves extraction:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji, Commr. Of Police v. Gordhandas Bhanji* , AIR 1952 SC 16 : 1952 SCR 135

"9. ... public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

5. We must reproduce the noting dated 18-6-2004 of the Director, Industries and Commerce since there is an endeavour by the appellant to add grounds and reasons thereto. It reads as follows:

"Above office note may kindly be perused. In my opinion the highest bids offered are marginally higher than the reserved price and it would be appropriate not to confirm those bids and go for re-auction."

This noting will palpably clarify that the element of cartelisation or grouping was not one of the reasons for taking the decision to re-auction the two properties, which contention has been strenuously canvassed before us.

6. As we have already mentioned, the auction notice itself stated that it is the Government and not any other person, including the Managing Director of the Punjab State Leather Development Corpn. Ltd., which was to approve the bid. Any challenge to the position that it is the Government on whom is reposed the final decision, is devoid of substance. It is pertinent to note the judgment of this Court in *Anil Kumar Srivastava v. State of U.P.*, (2004) 8 SCC 671, wherein it was held that the reserve price merely limits the power of the auctioneer by preventing a bid below this price from being accepted. This Court approved the view taken in *B. Susila v. Saraswathi Ammal*, 1968 SCC OnLine Mad 226 : AIR 1970 Mad 357, which held that: (*Anil Kumar Srivastava case*, (2004) 8 SCC 671, SCC p. 679, para 13)

"13. ... notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside."

7. The same principle was upheld more recently in *Ram Kishun v. State of U.P.*, (2012) 11 SCC 511 : (2013) 1 SCC (Civ) 382. However, we must hasten to clarify that the Government does not have a carte blanche to take any decision it chooses to; it cannot take a capricious, arbitrary or prejudiced decision. Its decision must be informed and impregnated with reasons. This has already been discussed threadbare in several decisions of this Court, including in *Sterling Computers Ltd. v. M & N Publications Ltd.*, (1993) 1 SCC 445, *Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617, *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*,

(2006) 11 SCC 548 and Jagdish Mandal v. State of Orissa , (2007) 14 SCC 517.

8. In the impugned judgment, the High Court has rightly concluded that no sustainable justification and rationalisation was recorded in writing at the relevant time for ordering the re-auction of only the two subject properties. However, we should not be understood to have opined that the Government is bound in every case to accept the highest bid above the reserve price. Needless to say, the presence of cartelisation or "pooling" could be a reason for the cancellation of an auction process. In addition, a challenge on the ground that the property has fetched too low a bid when compared to the prevailing market price, would also be valid and permissible provided this approach has been uniformly adhered to. In the case at hand, however, while the latter was ostensibly the reason behind the decision for conducting a fresh auction, no evidence has been placed on the record to support this contention. The highest bids, marginally above the reserve price, have been accepted in the selfsame auction. The factual scenario before us is clearly within the mischief which was frowned upon in Mohinder Singh Gill [Mohinder Singh Gill v. Chief Election Commr., , (1978) 1 SCC 405 : (1978) 2 SCR 272]. We, therefore, uphold the impugned judgment for all the reasons contained therein. The assailed action of the appellant is not substantiated in the noting, which ought at least to have been conveyed to the respondents."

(vi) , (2005) 6 Supreme Court Cases 776 [Punjab State Electricity Board Ltd. v. Zora Singh and others] wherein the Hon''ble Supreme Court held as follows:

"40. Furthermore, there cannot be any doubt whatsoever that even if an order is found to be not vitiated by reason of malice on fact but still can be held to be invalid if the same has been passed for unauthorised purposes, as it would amount to malice in law.

...

43. A "State" within Article 12 of the Constitution must act fairly and bona fide. It cannot act for a purpose which is wholly unauthorised and not germane for achieving the object it professes whether under a statute or otherwise."

12. Mrs. Chitra Sampath, learned senior counsel appearing for the petitioner in W.P. No. 1211 of 2016, in support of her contentions relied upon the following judgments:

(i) , (2007) 14 Supreme Court Cases 517 [Jagdish Mandal v. State of Orissa and others] wherein the Hon''ble Supreme Court held as follows:

"21. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review of award of contracts.

21.1. In Sterling Computers Ltd. v. M & N Publications Ltd. , (1993) 1 SCC 445 this Court observed:

"18. While exercising the power of judicial review, in respect of contracts entered

into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the "decision-making process". ... the courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

21.2. In *Tata Cellular v. Union of India*, (1994) 6 SCC 651 : AIR 1996 SC 11 this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus:

"(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 action. 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 in original)

This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14. 21.3. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492 this Court dealt with the matter in some detail. This Court held:

"9. 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 of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability

to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer, and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction."

(ii) , (2012) 8 Supreme Court Cases 216 [Michigan Rubber (India) Limited v. State of Karnataka and others] wherein the Hon"ble Supreme Court held as follows:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities

unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

13. Countering the submissions made by the respective learned senior counsel for the petitioners, Mr. A.L. Somiyaji, learned Advocate General, apart from raising the contentions stated above, also submitted that the scope of judicial review in respect of award of tender is very limited and unless there is malafide intention established as against the conditions imposed in the tender, the same cannot be interfered with by this Court under Article 226 of the Constitution of India.

14. In support of his contentions, the learned Advocate General relied upon the following judgments:

"(i) , (2000) 2 Supreme Court Cases 617 [Air India Ltd. v. Cochin International Airport Ltd. and others] wherein the Hon"ble Supreme Court held as follows:

"7. The law relating to the award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979)II LLJ 217 SC, *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India* , (1981) ILLJ 193 SC, *Asstt. Collector, Central Excise v. Dunlop India Ltd.* , 1985 ECR 4(SC), *Tata Cellular v. Union of India* , AIR 1996 SC 11, *Ramniklal N. Bhutta v. State of Maharashtra* , AIR 1997 SC 1236 and *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, , AIR 1999 SC 393 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 procedures 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. The State, its corporations, instrumentalities and agencies have the public duty to be

fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

...

12. As regards the merits of Cambatta's proposal, it was contended by Mr. Andhyarujina that all the three offers of Cambatta were superior in terms of parameters laid down by CIAL than Air India's offer. He submitted that even after CIAL unilaterally raised the licence fee of Air India from 17 per cent to 20 per cent in the 10th year to match Cambatta's offer and imposed a condition that Air India would not sub-contract, it did not become comparable with the offer of Cambatta as Air India did not offer to pay 2 per cent bonus in licence fee. It was also submitted that Air India's representation that it would be able to bring more traffic was illusory and for that reason also Air India's proposal cannot be regarded as superior or even comparable with the proposal of Cambatta. We do not think that CIAL did any wrong in taking into consideration the fact that Air India is an airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic airlines if it was awarded the contract. As regards the merits of the rival offers, we do not think it proper to look at only the financial aspect and hold that CIAL did not accept Cambatta's offer, even though it was better, because it wanted to favour Air India or that it had acted under the influence of Air India and the Ministry of Civil Aviation. In a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so when an overall view is taken. In such matters the court cannot substitute its decision for the decision of the party awarding the contract. On the basis of the material placed on record we find that CIAL bona fide believed that involving a public sector undertaking and a national carrier would, in the long run, prove to be more beneficial to CIAL. For all these reasons it is not possible to agree with the finding of the High Court that CIAL had acted arbitrarily and unreasonably and was also influenced by extraneous considerations during its decision-making process."

(ii) , (2005) 4 Supreme Court Cases 435 [Global Energy Ltd., and another v. Adani Exports Ltd. and others] wherein the Hon'ble Supreme Court held as follows:

"10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of

admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

(iii) , (2009) 6 Supreme Court Cases 171 [Meerut Development Authority v. Association of Management Studies and another] wherein the Hon'ble Supreme Court held as follows:

"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."

(iv) , (2008) 3 MLJ 173 [R. Kumar and R.K. Construction rep by its Managing Partner v. The Chief Engineer] wherein this Court held as follows:

"7. The contention of the learned Counsel for the petitioner is three folded, viz., (i) the requirement that the tenderer should be a registered supplier to TNEB or the Indian Railway for the railway track fitting is arbitrary (ii) the requirement that the bidder should have previously supplied the PSC Sleepers and fitting for a minimum order value not less than Rs. 30.00 lakhs in a single order to TNEB/ Indian Railways within the last three years is illegal, and (iii) the requirement that the bidder should have an Annual Turn Over of not less than Rs. 2.7 Crore in any one of the last three financial years is mala fide, since no uniform norms are being followed by TNEB in so far as tenders for thermal stations are concerned.

...

10. Following the principles and the ratio laid down by the Supreme Court in the above decisions, it can be stated herein that the terms and conditions in the tender are prescribed by the Board 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. Further, the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Board 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, merely because it feels that some other

terms in the tender would have been fair, wiser or logical. The Board 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. In addition, in the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters."

(v) , (2011) 7 MLJ 938 [Uflex Limited, represented by its Authorised Signatory Mr. R. Sundarr Doss v. State of Tamil Nadu, represented by the Secretary to Government, Prohibition and Excise Department and the Commissioner of Prohibition and Excise/Tender Inviting Authority] wherein this Court held as follows:

"17. In matters of tenders, the duty of the court is to confine itself to the question of legality. Its concern should be: Whether the Tender Inviting Authority--

1. 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 are: (i) Illegality; (ii) Irrationality; and (iii) Procedural impropriety. Further, The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies 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.

The above are the principles laid down by a Three Judge Bench of the Supreme Court in Tata Cellular's case cited above. In the very same judgement, the power of Judicial Review has been examined by the Supreme Court, wherein it has been held that 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 of 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. Therefore, restraint under judicial review is always limited to this Court and it has to be invoked rarely and hesitantly under Article 226 of the Constitution of India."

16. On a careful consideration of the materials available on record and the submissions made by the learned senior counsel appearing for the respective petitioners, the learned Advocate General appearing for the official respondents, it could be seen that the petitioners are mainly challenging Clause 4.1, 4.5 and 4.6 of the General Terms and Conditions of the tender notification dated 11.12.2015, therefore, it is pertinent to extract the relevant clause in the General Terms and Conditions of the tender notification, which reads as follows:

"General Terms and Conditions

Qualification criteria for technical bid

4.1 The bidder should have licensed manufacturing facility including the Master Origination facility in India in the same premises. In case a bidder has collaboration with any international manufacturer of Master Origination Facility, such Mastering Facility should be located in India and in the same premises only. The bidder should be a Company registered in India, under the Companies Act 1956/2013.

Turnover

4.2 The bidder should have an annual turnover of not less than Rs. 5 Crores per annum in security holograms for the preceding three financial years (2012-13, 2013-14 and 2014-15).

4.3 The bidder will be required to furnish copies of their audited profit and loss account and balance sheet for the preceding 3 financial years (2012-13, 2013-14

and 2014-15), duly certified/attested by a Chartered Accountant in this regard.

4.4 The bidder should submit copy of Registration with Ministry of Industry and Factory License.

Experience

4.5 The bidder should have at least 08 (eight) years of experience in the field of manufacture of Security Hologram with master origination.

4.6 (a) The bidder should also have 08 (eight) years of experience individually in both Dotmatrix Origination System and in Conventional 2D/3D Origination system (08 years in Dotmatrix Origination system and also 08 years in Conventional 2D/3D Origination System). The experience will be considered from the purchase of machines i.e., invoice date/bill of entry/custom clearance, etc.

(b) The bidder should have supplied at least 20 crores full polyester based security hologram labels to any State Excise Department during any one of the last three financial years (2012-13, 2013-14 and 2014-15). The Bidder must have direct agreement with the department or must have received direct purchase order from the department. The Bidder should also submit satisfactory performance certificate from the competent authority or end user.

(c) The bidder should submit an affidavit on a stamp paper of Rs. 100/- confirming that the performance statement given is correct along with sample copy of purchase order, copy of invoices, proof of payment received from Purchasers etc.

(d) The bidder should not have obtained/obtaining liquor manufacturing licence or liquor distribution licence in any of the States of India. An affidavit in this regard should be submitted on a stamp paper of Rs. 100/- along with the tender document."

17. It is pertinent to note that the hologram is a recording of reflected light in an object. The security hologram contains holographic features of optical laser technology, which are embossed through a master shim on stamping foil of metalized polyester film. Holographic label is used for multiple purposes throughout the world, since it has got high security features.

18. The respective learned senior counsels appearing for the petitioners submitted that the respondents 1 & 2 have incorporated 8 years of experience in the field of manufacture of security hologram with Master Origination under Clause 4.5 whereas in the previous years, the experience was fixed only at 3 years to suit the 3rd respondent. The 3rd respondent, who is supplying holograms since 2003 was a successful bidder in the year 2006 and 2011. According to the petitioners, the prescription of 8 years experience in 2015 by increasing the experience from 3 years to 8 years shows the malafide intention to favour the 3rd respondent and to put the other competitive bidders out of fray from the competition. In the year 2003, the Government floated for the first time

purchase of holograms wherein only three years of business experience in the manufacture of hologram was prescribed. When the tender was floated in the year 2006, 3 years experience in the field of manufacture of hologram with Master Origination was prescribed. In the tender floated in 2011-12, 2 Mastering Systems were insisted with 3 years of experience on both Mastering Systems without even sparing any single system was prescribed.

19. It is pertinent to note that in order to possess adequate man power technical skills, the experience was increased to 8 years. In the year 2011, the experience was fixed at 3 years. Now after a lapse of 4 years, the fixation of 8 years experience cannot be termed as arbitrary or unreasonable. Even in the State of Meghalaya for the year 2013 and in the State of Jammu and Kashmir for the year 2012, experience was fixed at 12 years and 10 years respectively. Therefore, the fixation of 8 years experience cannot be termed as unreasonable or arbitrary. Since the value of the tender is about Rs. 150 crores for 3 years, the respondents should take utmost care to allot the tender to the correct person. It is not the case of the petitioners that the 3rd respondent has not been discharging their work properly or they had committed any default in the supply of the holograms.

20. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. If the respondents 1 & 2 act reasonably, fairly and in public interest in awarding the contract, the interference by the Court is very restrictive since no person can claim a fundamental right to carry on business with the Government. A Court before interfering in tender or contractual matters in exercise of power under judicial review, should satisfy itself whether the process adopted or decision made by the Authority is malafide or intended to favour some one or whether the process adopted or decision made is so arbitrary or irrational that the Court can say that the decision is such that no responsible authority action reasonably and in accordance with relevant law could have reached and whether the public interest is affected. If the answer to these questions are in the negative, then there should be no interference under Article 226 of the Constitution of India.

21. The respondents 1 & 2 in their counter have stated that the Government in their Government Order in G.O. Ms. No. 25 dated 25.08.2015 have ordered for constitution of Technical Specification Committee and Tender Scrutiny and Finalization Committee to process and finalize the tender for procurement of hologram excise labels. As per the said Government Order, the respondents 1 & 2 by their letter dated 03.12.2015 have requested 12 prospective bidders whose details were culled out from the previous tenders were requested to make a Powerpoint Presentation on the specifications available with them before the Technical Specification Committee on 12.09.2015. An invitation was also displayed in the Office of the Commissioner of Prohibition and Excise. Except M/s. Darashaw & Company Pvt., Mumbai, all other 11 prospective bidders made their

Presentation on 12.09.2015. The Technical Specification Committee in its meeting held on 20.11.2015 had discussed about the availability of various features with different vendors and recommended the technical specification of the proposed hologram, which is to be generic in nature. Based on the recommendations made by the Technical Specification Committee, tender was floated on 11.12.2015 with a wide circulation in leading Dailies.

22. The purpose of affixing hologram label on the product is to ensure that there is no duplication or manufacture of spurious products. In order to ensure that the Government of Tamil Nadu should not suffer revenue loss and also keeping in view that public should not be supplied with spurious products which endanger the lives of the public, and in the public interest, the Government, through the respondents, is procuring the hologram labels for its use in the products of liquor.

23. With regard to the Clause-4.1, since the supply of hologram is not only with respect to supply, but also of continuance of the contractual obligations. The conditions imposing that only the Companies can participate cannot be said as unreasonable or arbitrary. A Company has separate legal entity as against the Partnership Firm or Proprietary Firm. The rights and liabilities under the Companies Act are different for the Company as against that of the Partnership Firm. In case of default of the Companies Act, the Company is bound to inspection, enquiry and investigation by the Registrar of Companies and the Company is subject to penalty and the Managing Director, Directors of the Company, Company Secretary and the Auditors of the Company are subject to punishment under the Companies Act, 2013. However, no such regulations are there for Partnership or Proprietary Firm. Therefore, in order to have stability in implementing the contract for the Department, which has been pursuing this for the past 12 years, the said condition was imposed in the tender notification, which cannot be said as malafide or arbitrary or unreasonable.

24. With regard to Clause-4.6 (b) is concerned (i.e.,) supply of 20 crores full polyester based security hologram labels to any State Excise Department during any one of the last 3 financial years is concerned, since the average requirement of excise hologram for the State of Tamil is approximately 30 crores per month, unless the supplier has adequate experience in the production and supply of excise hologram labels with advance equipments and high production capacity, he may not be able to supply the required quantity. Based on the study made by the Technical Specification Committee, the respondents have included the said condition and it is pertinent to note that the said condition is not restrictive to Tamil Nadu State Excise Department alone and the experience will be considered if the prospective bidders have supplied to any State Excise Department all over India including Union Territories. One can understand that if the respondents have included the said condition by stating that the prospective bidders should have supplied only to Tamil Nadu State Excise Department, then, in that case, it can be said as malafide or unreasonable. When the respondents had imposed the said condition stating that the prospective bidders should have supplied

holograms to any State Excise Department all over India or to Union Territories, it cannot be said as malafide or unreasonable.

25. The Court does not have the expertise to correct the administrative decision. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. 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 terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. Such decisions are made by experts. In view of the nature of the work, the qualifications or eligibility criteria prescribed by the 2nd respondent cannot be said to be unreasonable or discriminatory.

26. It is the prerogative of the Tender Calling Authority to impose pre-qualifying conditions in the tender process and therefore, the petitioner has no right to question the fixing of pre-qualification as the respondents have got every right and power to fix the pre-qualifications to suit the standards and performance of the materials to be produced. While issuing the tender notification, the procedure contemplated under the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder were followed by the respondents and no hideouts were played. Therefore, the contentions of the learned senior counsels for the respective petitioners that with malafide intention, the eligibility criteria has been stipulated cannot be sustained. As such, the petitioners have not made out any ground which warrants interference by this Court with the conditions stipulated in the General Terms and Conditions of the tender notification dated 11.12.2015.

27. For the foregoing reasons, all the above Writ Petitions deserve to be rejected. Accordingly, all the Writ Petitions are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.