(2009) 03 GAU CK 0030

In the Gauhati High Court

Case No : Writ Petition (C) No. 396 (AP) of 2008

Kading Panio Multipurpose Co-Operative Society Ltd. and Another — APPELLANT

Vs

State of Arunachal Pradesh and Others — RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:
Arunachal Pradesh Co-operative Societies Act, 1978 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2010) 5 GLR 382 : (2009) 4 GLT 90

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : T. Michi and R. Sonar, for the Appellant; G. Deka and T. Pertin, for the Respondent

Final Decision : Allowed

Judgement

P.K. Musahary, J.—Heard Mr. R. Sonar, learned Counsel for the petitioners and Ms. G. Deka, learned Addl. Senior Government Advocate, appearing for the State respondents. Also heard Mr. T. Pertin, learned Counsel for the respondent No. 6.

2. In this writ petition, the legality and validity of the settlement of tender at the highest rate disregarding the lowest rate for appointment as PDS Whole Sale Nominee-cum-Carriage Contractor in respect of Kurung Kumey District for the year 2008-09 for carriage of PDS rice through road transport (vehicular) have been challenged.

3. The petitioner No. 1 is a co-operative society registered u/s 9 of the Arunachal Pradesh Co-operative Societies Act, 1978 represented by petitioner No. 2. The Government of Arunachal Pradesh, through the office of the Deputy Commissioner, Kurung Kumey District issued notice dated 27.6.2008 inviting sealed tenders from the interested cooperative societies of Kurung Kumey District registered under Arunachal Pradesh Co-operative Societies Act, 1978 for appointment of PDS Whole Sale Nominee-cum-Carriage Contractor in respect of

Kurung Kumey District for the year 2008-09 for carriage of PDS rice through road transport (vehicular). The said PDS carriage would cover entire district of Kurung Kumey, except Tali, Damin, Sarli, Parsiparlo, Chambang, Pipsorang, Gangte and Phassang Circles. The petitioner society and 2(two) other co-operative societies, namely, M/s. K.K. Tapokporiang MPCS Ltd., Koloriang (respondent No. 6), M/s. Donyi-Polo Co-operative Societies, Tali, submitted tenders in response to the said NIT. A Board consisting of 4(four) members with Shri T. Messar, EAC, Koloriang, was constituted for scrutiny and verification of the relevant documents as required under terms and conditions prescribed in the NIT. On 6th August, 2008 at 1530 hours, the Board opened the sealed tender box in presence of the bidders and found 3(three) tenders including that of the petitioner. After opening the bids, the Board scrutinized and verified the relevant documents and found that the aforesaid 3(three) Co-operative Societies quoted rates as follows:

1. M/s. K.P.M.P.C.S. Ltd. Nyapin

Rs. 116 per Qntl. per K.M.

2. M/s. Donyi-Polo Co-operative Societies, Tali

Rs. 1.34 per Qntl. per KM.

3. M/s. K.K. Tapokporiang MPCS Ltd, Koloriang

Rs. 2.65 per Qntl. per KM.

4. The rate quoted by the petitioner society is found to be lowest amongst all the bidders and prepared a comparative statement. But the Board observed that it may be impossible to carry out the works at such low rate in the difficult hilly terrain like Kurung Kumey District of Arunachal Pradesh and recommended for settlement of the tender with the private respondent No. 6 at the rate quoted above, which is highest amongst the rates quoted by the tenderers. The Deputy Commissioner, Kolorinag by his letter dated 7.8.2008, forwarded the Board proceedings and its recommendation to the Director of Food and Civil Supplies, respondent No. 3 for finalization, approval of the same and accordingly, by the impugned order dated 4th September, 2008, the Secretary (Food and Civil Supplies), Government of Arunachal Pradesh conveyed appointment of respondent No. 6, as a PDS Whole Sale Nominee-cum-Carriage Contractor for drawal, lifting and transportation of PDS items excluding "Wheat and Levy Sugar" for Kurung kumey District. Arunachal Pradesh for the year 2008-09 with immediate effect up to 31.3.2009 @Rs. 2.00 per Qntl./per KM for transportation by road. The said appointment would remain valid up to 31.3.2009.

5. Mr. R. Sonar, learned Counsel for the petitioners submits that the petitioner society has past experience of handling the PDS items as a carriage contractor and distributor with financial soundness. It offered the lowest price bid at Rs. 1.16 per Qntl./per KM after making the rate analysis and keeping in mind the bare minimum rate worked out by the Government which is fixed at Rs. 1.15 per Qntl/per KM for vehicular transport as provided under Clause 10 of the terms and

conditions detailed in the NIT after consultation with expert agency. The Board rejected the petitioners'' lowest bid merely on the presumption/feeling that the rate quoted by the petitioner society is not workable being one paisa above the bare minimum workable rate which is illegal, irrational, arbitrary and against the public interest and as such, the decision of the Board dated 6th August, 2008 and the impugned appointment order dated 4th September, 2008 is liable to be quashed and set aside.

6. It is submitted by Mr. Sonar that the Board found the rate quoted by the petitioner society as unworkable merely on the basis of surmises, conjectures and on extraneous considerations without taking into consideration any yardstick, criteria and material on records and without making assessment regarding the suitability of the tenderers, the element of public interest and financial viability of the respective competing bidders objectively. As per Clause 9 of the NIT, every tenderer should submit along with the tender papers a rate analysis, showing the basis on which the rate has been quoted. Again in Clause 13 of the NIT, it is provided that the rate tendered shall be inclusive of loading and un-loading charges, transportation charges by vehicles, all unforeseen/ incidental charges including those arising out of natural calamities, etc. The private respondent No. 6 failed to submit such rate analysis. He submitted only a monthly bill of expenditure and profit purported to be a rate analysis and even assuming that the same is a rate analysis, the purported rate analysis submitted by the private respondent No. 6, does not disclose the basis on which the rate of Rs. 2.65 is quoted and it does not specify as to whether the said rate is per Qntl./ per KM. The respondent No. 6, therefore, failed to comply with the pre-requisite for accepting his tender papers and as such, the tender submitted by it ought to have been rejected outright by the Board. Although, the respondent No. 6 quoted the rate of Rs. 2.65 per Qntl./ per KM, the respondent authorities settled the tender @ Rs. 2.00 per Qntl./per KM after a secret negotiation with respondent No. 6 to the exclusion of the petitioner society and other tenderer, which is illegal and untenable in the eye of law. The Board and the respondent authorities were pre-determined to settle the tender with the respondent No. 6 and as such, the settlement was made through negotiation behind back of other tenderers.

7. It is further submitted by the learned Counsel for the petitioners that as per Clause 7(a) of the NIT, every tenderer has to deposit of Rs. 17.00 lakh, as earnest money, in the form of deposit at Call Receipt/FDR in favour or the Deputy Commissioner, Kurung Kumey District, Koloriang. Under Clause 15 of the NIT a successful tenderer is required to furnish security deposit in the form of DCR/FDR drawn on a recognized bank in favour of the Deputy Commissioner within one week from the date of issue of acceptance letter for both PDS wholesale nominee ship and carriage contract separately failing which, the earnest money deposited would be forfeited. According to Mr. Sonar, the private respondent No. 6 submitted an application for release of the earnest money deposited with the Deputy Commissioner, Kurung Kumey District as he was unable to furnish the

required security deposit. The said Deputy Commissioner by showing undue favour to the private respondent No. 6 released the earnest money deposit on the same day, i.e., 5.9.2008 itself in favour of the respondent No. 6 before furnishing the security amount in violation of the aforesaid terms and conditions of the NIT. This was not permissible but the respondent No. 4, Deputy Commissioner, released the earnest money to bail out the private respondent No. 6 from its financial constraint and complete the process of settlement with it illegally, which smacks collusion of respondent authorities and pre-determination for settlement of the tender on extraneous considerations.

8. Citing the case of Mr. Kumud Barman v. State of Assam and Ors. 2006 (Suppl) GLT 150, Mr. Sonar, learned Counsel for the petitioners submits that the settlement of tender with private respondent No. 6 is liable to be interfered with and quashed in the light of the judgment and order passed by this Court in the said case inasmuch as law has been settled that the higher bid accepted by the settling authority rejecting the lowest rate without assigning reasons suffers from non-application of mind and the work order issued in favour of the party quoting the higher bid is liable to be adjudged as illegal and set aside.

9. It is submitted by Mr. Sonar that the respondent authorities no doubt have discretion to settle the tender at the higher rate but they are bound to exercise such discretion in a lawful and reasonable manner and in good faith. But in the present case, the respondent authorities, without doing so, decided to settle the tender with the private respondent No. 6 without application of mind to the relevant factors and with predetermination to settle the tender. Such decision and action on the part of the respondent authorities is liable to be interfered with by this Court in exercise of power of judicial review under Article 226 of the Constitution of India. In this regard, he cites the case of Sangita Advertising Agency v. Union of India 1997 (1) GLT 521. In the said case, according to Mr. Sonar, the post, negotiation settlement has been discouraged and criticized by this Court.

10. Mr. Tony Pertin, learned Counsel for the private respondent No. 6 raises preliminary objection to the maintainability of the petition inasmuch as in the cause title, the Petitioner No. 1 has been introduced as Co-operative Society represented by Shri Kipa Tuglo, as its Proprietor, while the petitioner No. 2, who represents the Petitioner No. 1, has been introduced as a permanent resident of Village-Sango, PO/PS-Nyapin, Kurung Kumey District, Arunachal Pradesh. In the introductory paragraph or in any part of the writ petition, no averment has been made that the petitioner No. 2 is the chairman or a member of the petitioner society, but he has been introduced as proprietor of the petitioner No. 1, Co-op. Society. The affidavit accompanying the writ petition has been sworn by Shri Kipa Tuglo, wherein, in para 1, it is reiterated that he is the ''proprietor'' of the petitioner co-operative society and no mention has been made that he is holding any office or a member of the society and that he has been authorized by the Executive Body of the said co-operative society to file the writ petition. Having

not stated that the petitioner No. 2 is an office bearer and/or authorized to file the writ petition and swear the affidavit, the petitioner No, 2 has no locus standi to approach this Court. The instant writ petition is not maintainable in the present form and the same may be dismissed on this count without going into the merit of the petitioners'' case.

11. Mr. Pertin further submits that the Government of Arunachal Pradesh by a Notification dated 6.2.2006 (Annexure-5 to the writ petition) issued guidelines for appointment of PDS carriage contractor-cum-PDS wholesale nominee for drawal and transportation of PDS items. Clause-VIII of the aforesaid guidelines provides for constitution of a Board for opening of tenders with the ADC as Chairman, DSO (SUP) as Member and two officers from other departments to be nominated by the Deputy Commissioner concerned as Members. Such committee was constituted in respect of the Kurung Kumey District and the said committee opened the tenders and after consideration of tenders in details, which are reflected in the proceedings of the Board dated 6.8.2008, recommended the rate of Es. 2.65 per Qntl./per KM quoted by the respondent co-operative society for appointment of PDS Wholesale Nominee-cum-Carriage Contractor. It is not obligatory on the part of the settling authority to accept the lowest rate offered by a bidder. The settling authority may accept the higher rate on consideration of various factors particularly, feasibility in carrying out the works at the rate offered by a bidder and involvement of public interest.

12. It is further argued by Mr. Pertin that under Clause 10 of the terms and conditions of the NIT, the rate at Its. 1.15 per Qntl./per KM for vehicular transport has been fixed by the Government as per back as in 2005-06. The rate of Rs. 1.15 per Qntl./per KM has been fixed as ''the bare minimum workable rate'' which does not necessarily mean that a person who has quoted Rs. 1.15 should be given the contract work without considering other relevant factors like increase in the fuel, higher charge of transportation and increase in price of other materials and also location of the places of dispatch and destiny. The area under Kurung Kumey District is bordering China in inaccessible hilly terrain without any good road condition where most of the roads are yet to be black-topped. Because of the price rise and inaccessibility of the area, if the rate is fixed at Rs. 1.16 and the contract is awarded to the petitioner society, there would be every possibility that the Works would not be executed fully and the food grains would not be made available to every nook and corner of the State, particularly, the far-flung inaccessible areas and as such, the recommendation of the Board in favour of the respondent No. 6 at the rate of Rs. 2.65 per Qntl./per KM, i.e., less than the prevailing rate of Rs. 2.70 cannot be termed as bad and made on extraneous considerations.

13. The question of negotiation with the petitioner society, according to Mr. Pertin, learned Counsel for the private respondent No. 6, does not arise inasmuch as the petitioner No. 2, was given opportunity to raise objection, if any, but he himself after considering the rate quoted by him as not workable, issued a

letter in his official pad to the effect that the rate quoted at Rs. 1.16 per Qntl./ per KM is not workable in Kurung Kumey District and he withdrew the tender without any prejudice in support of the respondent co-operative society. The said letter has been annexed as Annexure R/I to the counter affidavit of the private respondent No. 6.

14. It is further submitted by Mr. Pertin that the present writ petition has been filed in the form of an appeal and called upon the writ court to adjudicate upon the matter as an appellate authority, which is not permissible under the existing law. The writ court is not bound to examine the legality or illegality of the order settling the contract work in favour of a party. In other words, the wisdom of the settling authority cannot be questioned in the writ proceeding. The writ court may interfere with the settlement order provided it is found that the order has been passed by the settling authority in violation of the terms and conditions of the NIT and established procedure and relevant statutory rules, if any, framed by the Government/Competent authority. Referring to decision in Tata Cellular v. Union of India (1994) 6 SCC 651, he submits that writ court does not sit as a court of appeal but merely reviews the manner in which the decision was made because court does not have the expertise to correct the administrative decision and if the review on the administration decision is permitted it would amount to permitting substitution of the administrative decision without the necessary expertise which itself may be fallible. The Government has the freedom of contract and the court cannot interfere with Government''s freedom of contract, invitation of tender and refusal of any tender which pertains to policy matter. The court may interfere, if the decision/action is found vitiated by arbitrariness, unfairness, illegality, irrationality or against the Wednesbury''s Principle of reasonableness.

15. First of all, to deal with the preliminary objection raised by the private respondent, it appears to be sound but little or no importance is to be given to it going by the stand taken in its return that the petitioner No. 2 as Chairman of the petitioner society addressed a letter to respondent authorities requesting them to recommend the case of the respondent society and on the basis of the said letter, the Board recommended its case and ultimately Government also approved the same in its favour. The preliminary objection as raised by Mr. Pertin in his oral submission not being taken in the county affidavit, runs counter to the main stand of the respondent No. 6 for rejecting the petitioners'' case. The matter involves substantial amount of public interest and it would go against public good and justice if the present petition is thrown aside on such technical ground. Hence, I propose to examine the matter on merit in the interest of justice. The preliminary objection stands rejected.

16. Before dealing with the legal point involved in this case, it is more important to find out whether the Board, while recommending settlement of tender with private respondent No. 6 objectively considered the eligibility, merit and suitability of the respective tenderer in terms of the guidelines issued by the

Government and also in terms and conditions as specified in the NIT. First of all, let me refer to the notification dated 6th February, 2006 by which, the Government issued the guidelines for appointment of PDS Carriage Contractor-cum-PDS Wholesale Nominee for drawal and transportation of PDS items. The guidelines provide that appointment of PDS carriage contractor and PDS wholesale nominee should be invariably through open tender only ''on district wise basis'' for which combined tender should be floated and after floating the tender, the concerned Deputy Commissioner would forward the specific recommendations with full justifications and with all relevant papers, terms and conditions, comparative statement duly prepared and signed by the Board members, suggestions and recommendations of the Board, copy of the local newspaper wherein the tender notice was published, etc., to the Director of Civil Supplies for his scrutiny and obtaining the Government approval. Under Clause (viii) of the guidelines, a Board should be constituted for opening of tenders with the following officers:

ADC

Chairman

In the absence of ADC the senior most EAC may be the Chairman of the Board.

DSO(SUP)

Member

Two Officers from other department to be nominated by the concerned DC.

Member

17. The other important clause of the guidelines is Clause (x), which is quoted below:

The carriage rates shall be obtained on a per qtl. per km basis in respect of vehicular transport; head load and there should be no separate rate for summer/ winter and hills area/plain area. The recommendation of the Board and the Deputy Commissioner should be specific and with full justification. Mere forwarding of the tender papers without any specific recommendation from the Deputy Commissioner will not be accepted.

There is yet another important clause namely, Clause (xii), which is also quoted below:

To avoid quoting of un-reasonably low rates and also to avoid quoting of high rates, a bare minimum workable rate shall be worked out by the Government through an expert committee periodically preferably once in two years and shall be communicated to the concerned Deputy Commissioners well in advance of publication of NIT. This rate should be cleanly indicated in the terms and conditions of the tender by the concerned Deputy Commissioners for information of tenderers. Rates quoted below the bare minimum workable rate shall not be accepted. In the event of more than one qualifying tenderers quoting the same lowest rate, the award of contract shall be finalized by drawing lots.

18. Clause (xiii) of the guidelines provides that rejection of any tender should be justified with specified reasons and should be recorded. In Clause (xiv) every tenderer is required to submit along with tender papers, a rate analysis, showing in details the basis on which the tenderer has quoted the rate. Further, Clause (xv) provides that if there are less than three valid tenders, the concerned Deputy Commissioner should issue NIT for re-tender.

19. The aforesaid guidelines issued vide notification dated 6.2.2006 was amended by a subsequent notification No. SCS-64/2006 dated 22.2.2008 providing that Co-operative Societies registered under Arunachal Pradesh Co-operative Societies Act, 1978 of a particular district, would only be eligible to participate in the tender process in respect of that district.

20. Now, let me refer to the relevant and important terms and conditions of the NIT. As per term and condition No. 7, the tenderer is to submit the tender along with all supporting documents, namely:

(a) Earnest money of Rs. 17.00 lakh in the form of deposit at Call Receipt FDR in favour of the Deputy Commissioner, Kurung Kumey District, Koloriang and the earnest money would be returned on finalization of the tender;

(b) Financial soundness certificate from a nationalized bank to the effect that the tenderer is capable of undertaking the contract for a minimum amount of Rs. 50.00 lakh only;

(c) No dues certificate from all banks (SBI, APSCABL, UCO, Vijaya Bank, UBI, APRB, etc.,) should be furnished by the tenderers along with the financial soundness certificate;

(d) Preference shall be given to tenderers having experience in transportation of food grains and/or other Government stores and details of experience should be attached with the tender;

(e) Income tax clearance certificate/income tax exemption certificate, as the case may be;

(f) A duly signed copy of these terms and conditions with seal should be enclosed with the tender in acceptance of the same;

(g) Details of trucks owned by the tenderer along with attested copies of registration certificates and road permits (minimum four trucks) or attested copies of lease agreement executed before a Magistrate (minimum four trucks) with attested copies of registration certificates and road permits.

Under term/condition No. 8, the tenderer must have central storage go-down at District HQ Koloriang and at least one transit go-down at Palm and one transit go-down at base area located within the State of Arunachal Pradesh preferably at

Kimin (all well connected with road). The central storage go-down and transit godown(s) should be of sufficient storage capacity and fit for prolonged storage of food grains. The godown may either be owned or rented/leased. The tender is required to submit along with tender papers a rate analysis, showing the basis on which the rate has been quoted as per term and condition No. 9. Again under term, condition No. 10, the bare minimum workable rate is worked out by the Government at Rs. 1.15 only per Qntl. per KM for vehicular transport and the rate quoted below the bare minimum workable rate would not be accepted.

21. It is necessary to verify as to whether the aforesaid Board constituted by the Deputy Commissioner as per guidelines dated 6th February, 2006, received tenders from the tenderers along with necessary documents as per the terms and conditions of the NIT. It is also necessary to examine as to whether the said Board considered the relative merit/ eligibility of the tenderers while recommending the case of the private respondent No. 6. For this purpose, this Court directed the learned State Counsel to produce the relevant records at the time of hearing. The same being produced by Ms. G. Deka, learned Addl. Senior Government Advocate today, I have perused and examined the same.

22. The aforesaid Board for settlement of tender assembled on 4th August, 2008 under the Chairmanship of one, Shri T. Messar, Extra Assistant Commissioner, office of the Deputy Commissioner, Kurung Kumey District, Koloriang and 03 other official members. They opened the sealed tender papers and scrutinized and verified relevant documents and also prepared a comparative statement. The said comparative statement contains the name of the tenderers, rate quoted for vehicular transport and the rate quoted by them. It recorded that all documents were submitted by the tenderers but nothing has been recorded whether the documents submitted by the tenderers have been verified and found valid and in order. In the remarks column, nothing has been recorded about the same. The minutes of the meeting is also silent about the same. The Board did not record its finding regarding deposit of earnest money of Rs. 17.00 lakh, financial soundness certificate, furnishing of rate analysis, possession of own trucks for transportation of foodgrains and/or other Government storage, Central storage godown and transit godown(s) with sufficient storage capacity fit for prolonged storage of foodgrains, etc., as required under the aforesaid guidelines and the terms and conditions of the NIT.

23. In the minutes of the proceedings, it is not reflected whether the tenderers submitted the rate analysis as required under terms and conditions No. 9 and examined its correctness or reasonableness of the basis on, which the rate has been quoted by each of the tenderers. The Board simply recorded the rate quoted by the tenderers and it is found that the rate quoted by the petitioner society may be impossible to carry out the works in difficult hilly terrain like Kurung Kumey District comparing the rate quoted for vehicular transportation with rate quoted by one M/s. Nguffa Group at Rs. 2.70 per Qntl. per KM during 2005-2006 which was approved by the authority. In the minutes, the Board

observed that in view of the price hike/enhancement of the POL items (HSD), it was very difficult to carry out the carriage works at the rate of Rs. 1.16 per Qntl. per KM as quoted by the petitioner society, which is only one paise above the ''bare minimum workable rate'' and in view of the prevailing price hike and rate quoted by the petitioner society seems to be impossible and impracticable.

24. The Respondent-Deputy Commissioner vide letter dated 7th August, 2008 forwarded the aforesaid proceedings of the Board and its recommendation to the Respondent-Director (Food and Civil Supplies) for appointment to the PDS Wholesale Nominee-cum-Carriage Contractor in respect of the Kurung Kumey District and the aforesaid Respondent-Director, in his turn, forwarded the same to the Government for approval. From the office note dated 22.8.2008 in file No. DF & CS /PDCI/KK/2008 Pt, it is found that the Deputy Commissioner, Koloriang forwarded only the Board''s proceedings and comparative statement with its recommendation, not accompanied by any tender documents, paper cutting of the tender notice, etc. In the said office note, it is recorded that as per the Government Notification dated 16.4.2008, tender should be floated amongst the Large Sized Agriculture Multi Purpose Societies, known as ''LAMPS'' only but in the instant case, not a single ''LAMPS'' participated in the tender and only 3 (three) registered co-operative societies of the District participated. In the aforesaid note, it is reflected that Chairman of the petitioner society submitted a representation against the aforesaid recommendation for settlement of the tender with private respondent No. 6 and on the basis of the said representation, it was suggested that the authority may like to further examine the case and submit the same to the Government for taking an appropriate decision. The Respondent-Director did not call for the entire tender papers submitted by the tenderers for his verification and examination and to find out whether the Board took its decision on the basis of the documents furnished and as per the guidelines and terms and conditions of the NIT. He mechanically forwarded the matter to the Government with a request for taking appropriate decision at the earliest vide U.O. No. 339 dated 25.8.2008. The matter was placed before the Minister (Food and Civil Supplies), who observed as follows:

The recommended rate of Rs. 2.65 per Qntl. per KM by D.C., Koloriang is too high in comparison to the rate allowed t6 other districts. Affect careful consideration of the whole issue, the transportation rate @ Rs. 2.00 per quintal per KM is hereby approved in favour M/s. K.K. Tapokporiang, MFCS Ltd. Koloriang for a period of one year.

The said Minister also without calling for the tender papers and the relevant records from the Deputy Commissioner, Koloriang and without objectively considering the eligibility of the tenders submitted by the parties took the aforesaid decision.

25. On screening the records, it is found that one Shri Takam Sorang, MLA and Chairman of Donyi Polo MPSC Tali and Shri Balo Raja, MLA, by a joint letter dated 2.8.2008, informed that they have agreed upon to work together for public

interest and requested the Minister, Food and Civil Supplies to extent approval with the present rate quoted in the tender paper by the respondent society.

26. In Civil Secretariat file No. SCS-93/2005, it is found that Minister of Education, Lab and Emp. etc., Arunachal Pradesh, vide his note dated 28.8.2008 apprised the hon''ble Chief Minister that the Deputy Commissioner, Kurung Kumey in violation of GFR and guidelines of the Government recommended the respondent society and did foul play in the matter of appointment of PDS Wholesale Nominee-cum-Carriage Contractor in Kurung Kumey District and requested the hon''ble CM to take immediate action. The hon''ble CM directed the Minister (Food and Civil Supplis) to examine the matter and put up in file. In the said note it is stated that the tenderer M/s. Donyi Polo MPCS, Tali is a defunct society. The Minister (Food and Civil Supplies) neither called for the records nor did he examine the matter as directed by the hon''ble Chief Minister. It is found that without obtaining any approval from the hon''ble Chief Minister, the Minister (Food and Civil Supplies), hastily ordered settlement at the rate of Rs. 2.00 per Qntl. per KM reducing the rate quoted by the private respondent No. 6, which was at Rs. 2.65 per Qntl. per KM, behind the back of the other tenderers including the petitioner without sending back the matter for reconsideration by the Board.

27. It is apparent from the aforesaid notes that a vested interest including some MLAs, have been pursuing the Minister (Food and Civil Supplies) for settlement of the tender with respondent No. 6 and they succeeded in their attempt. If the office note dated 22.8.2008 in the Directorate file is correct that all three tenderers are not ''LAMPS'' and also if the Minister (Education)''s note dated 28.8.2008 to the effect that one of the tenderers society namely, M/s. Donyi Polo MPCS is a defunct society, none of the aforesaid societies who participated in the tender process, is eligible. It was the basic duty of the Board to examine as to whether the parties including the petitioner and the respondent No. 6 who submitted tenders were ''LAMPS'' and were eligible for submitting the tenders under the amended guidelines dated 22nd February, 2008 issued by the Government and also to examine whether one of the participants society was defunct. If M/s. Donyi Polo MPCS is found to be a defunct society, there would be only two tenderers and in that case, the authorities concerned are required to resort to re-tender under Clause (xv) of the guidelines dated 6th February, 2008.

28. I must put on record that the tender papers submitted by the tenderers have not been made available to this Court. The records produced by the learned Addl. Senior Government Advocate do not contain the tender papers. No reason has been given for withholding the tender papers from this Court. It may be with some intention other than bona fide and to prevent the court from having a chance to look at and examine the documents objectively and judicially. This is definitely against the principle of transparency in public administration. The attitude of the respondent authorities in withholding the public record is a pointer to the allegation that the decision to settle the tender with the private

respondent is a result of pre-determination.

29. An enquiry was to be made by the respondent authorities to find out the truth in view of the allegation made in this regard by the Minister (Education). The allegation of the Minister (Education) may not be taken lightly because of the fact that two MLAs supporting the M/s. Donyi Polo MPCS by a joint note dated 2.8.2008 aforesaid conveyed their desire to work together with the respondent Society in a dramatic manner and requested the Minister (Food and Civil Supplies) to approve the rate of the respondent Society. There are certain tenders which are floated by the Government where highest bid is always preferred for earning maximum revenue. In such tenders, the priority is always given on the prospect of earning more revenues and settlement is made to the highest bidder on fulfillment of usual terms and conditions. In such tenders, if better bids are not found, the settling authority resort to settlement by negotiation from amongst the participant tenderers at the highest offered bid, for the best revenue interest of the State.

30. The present tender is quite different. Here is no question of earning more revenue. The Government in the present case is rather more concerned with better service to people by spending minimum from the public fund for distribution of essential commodities to the grassroot people in the far flung areas through PDS. Here the Government has to see how the essential commodities could be sent to the people at the cheapest possible rate and save the public fund avoiding extravaganza. It was, therefore, the bounden duty of the expert committee/Board to take into consideration all these aspects by gathering necessary in formations on the cost of transportation, price rise, etc., but the authorities concerned have given an approach in terms of earning profit for a particular party at the cost of public exchequer in the name of fair and smooth functioning of the public distribution system by spending maximum public money. The Board and the respondent authorities have lost sight of this important public interest, may be just to give maximum benefit to the contractors.

31. In the backdrop of the case it is not necessary to deal with the case laws referred to by the learned Counsel for the parties inasmuch as there is no dispute on the exercise of judicial review by the court in the matter of settlement of contract by the authorities. I have examined and discussed the matter only on the decision making process adopted by the respondent authorities without any intention to interfere with the decision taken by them. The manner in which the Board has recommended for settlement of the contract with the private respondent No. 6, at its highest rate, without looking into the tender papers to find out the relative suitability on the basis of experience in transportation, financial soundness, rate analysis, etc., as per the Government guidelines and terms and conditions of the NIT, leaves a scope for reconsideration of tenders, even by resorting to re-tender, as discussed above. It is also apparent from the records that some vested interest have been playing its role for settlement of the

tender in favour of the private respondent No. 6 inasmuch as the respondent-director being the settling authority, without calling for the tender papers, mechanically forwarded the Board''s recommendation to the Government and the Government also, in their turn, without calling for the tender papers, not to speak of making even any summary inquiry into the allegation as to whether the participants tenderers are "LAMPS" as per the Government guidelines dated 22nd February, 2008 and other factors mainly different rates quoted by the tenderers.

32. Before coming to a conclusion, let me refer to and rely on Jagdish Mandal v. State of Orissa (2007) 14 SCC 517. Wherein it is hold by the Supreme Court that the interference in tenders or contractual matter in exercise of power to judicial review is permissible only if (i) the process adopted or decision made is mala fide or intended to favour some one; or (ii) the same is so arbitrary or irrational that no responsible authority acting under law could have arrived at or (iii) it affected the public interest. It is also held in the said case that while invoking power by judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders and awarding of tenders are essentially commercial of functions and principles of equity and natural justice, stay at a distance in such matter and if the decision relating to award of contract is bona fide and is in public interest, courts would not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The principle laid down in the aforesaid case, in my considered view, is squarely applicable to the present case inasmuch as from the discussions made earlier, it is found that the Board took the decision without adhering to the guidelines of the Government and terms and conditions of the NIT, and without evaluation of tenders with pre-determination with intention to favour the respondent No. 6 which is not only mala fide but also arbitrary and irrational on the part of the Board as well as the respondent authorities that has greatly affected the public interest.

33. Last of all, it may not be irrelevant to quote some observations of the Apex Court from Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, which is the centre point of the entire discussions and conclusion arrived at. This is from paragraphs 17 and 19:

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 tender 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 from 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 a person''s character and

personality. Blacklisting tarnishes one''s reputation.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those; persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sections involved therein.

34. For what has been discussed above and reasons recorded, the impugned order dated 4th September, 2008 (Annexure-8 to the writ petition) is found liable to be quashed and the same is accordingly quashed and set aside. The respondent authorities are directed to place the tender papers of the participants/ tenderers forthwith before the Board for reconsideration of tenders as per the guidelines of the Government and terms and condition of the NIT and also in the light of the discussions made in the judgment. The respondent authorities after obtaining the recommendation from the Board shall settle the tender in accordance with the existing rules and procedure.

35. With the above observations and directions, this writ petition stands allowed in part and disposed of.

36. No order as to costs.

