

(2000) 03 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 28910 of 1999

Kirloskar Brothers Limited and Another	APPELLANT
Vs	
Bangalore Water Supply and Sewerage Board and Others	RESPONDENT

Date of Decision : 15-03-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 5 KarLJ 373 : (2000) 4 KCCR 285 SN

Hon'ble Judges : V.P. Mohan Kumar, J

Bench : Single Bench

Advocate : Mrs. Indira Jaysingh, Seniour Counsel, Sri R. Parthasarathy, Sri K.R. Ganesh, for Sri Rangarajan and Sri Prabhakaran, for the Appellant; M/s. Cariappa and Copmpany, Sri Acharya, for Sri S.N. Keshava Murthy and Sr K.G. Raghavan and M/s. Fox Mandal, Assistants and Smt. Rosa Paramel, Government Pleader, for the Respondent

Judgement

V.P. Mohan Kumar, J.—The moment the State desires to enter into contractual relationship in the matter of its activities it is beset with various hurdles one such being the opposition of prospective business contenders. The State, like any other, is entitled to arrange its activities in a legitimate and reasonable manner. Various judgments have been rendered by the Apex Court and High Courts laying down the principles to be followed by the State in the matter of bestowing any of its largess in favour of any person. In essence it discloses that it cannot show undue preference to any and it shall treat all competing parties equally giving them equal opportunity to compete and secure the contract. The Courts have ruled that the ultimate decision is that of the discretion of the State and the power of judicial review do not confer the discretion on the Court to sit as an Appellate Authority reviewing that decision. This limitation is of course, subject to the State satisfying the requirement that it has adopted the correct decision making process and that the authority has kept in mind correct parameters while forming its conclusion and has eschewed in that process irrelevant considerations. In a given case if the State satisfies these considerations the

Court cannot step in and conduct any judicial autopsy.

2. This is the considerations that should prevail while examining various contentions urged in the instant case. The 1st respondent who is a State, in exercise of its power formulated certain project for the purpose of supply of water to the public at large. This project was referred to as W(3b) Project, to wit, to erect a clear Water Pumping Station using Mechanical and Electrical equipment. In this behalf it invited tenders from intending tenderers to set up the project. The petitioner and respondents 3 to 5 were the competitors.

3. Before proceeding further, it has to be noted that subsequent to the filing of the writ petition, there has been a change of circumstances, in that, the tender now stands awarded to the 4th respondent in consortium with the 5th respondent and the challenge relates to this awards. As such, other facts pleaded with respect to the merits and demerits of the other claimants vis-a-vis, which has consumed considerable part of the voluminous pleading can be conveniently omitted.

4. The brief facts of the case as can be culled out from the petition is as follows:

With reference to the project referred to in the writ petition, tenders were invited by the first respondent. It is seen from the tender document that there are two stages for consideration of tenders. The first stage being the prequalification bid which relates to the evaluation of the technical aspect of the tenders. Second stage is the financial bid. Certain paradigms are set in the tender document itself with respect to the consideration of two stages. The petitioner alleges the following circumstance to disqualify respondent 3, on the one hand and respondents 4 and 5 on the other. As far as the 3rd respondent is concerned the defects pointed out are the following:

- (i) That in the tender form they did not disclose the pending litigation;
- (ii) It did not disclose the details regarding the pending electrical work;
- (iii) The claim regarding the efficiency of the pump was incorrect.

Consideration of these disqualifications need not detain us inasmuch as, the 3rd respondent is not the tenderer to whom tender has been awarded. With respect to the consortium of respondents 4 and 5 are concerned, it was pointed out as under:

- (i) That the partner to submit tender bid along with 4th respondent was ABS Pumps International Ab, and that joint venture has been changed to joining the 5th respondent. This change has taken place after the final prequalification evaluation stage, which is forbidden, under the tender condition.
- (ii) That the tender submitted by the 4th respondent was belated.
- (iii) That the tender did not include certain vital equipments needed for the functioning of the pumping station. It is alleged that, the 4th and 5th

respondents were subsequently permitted to improve their tender by satisfying the said requirement by offering an equipment later. It is further alleged that it is clear from the tender document that the tender should be responsive to the prequalification eligibility. A detailed examination would be made by the Technical Consultant of first respondent of the tenders submitted by the various participants. According to the petitioner, the 5th respondent to whom tender had been awarded in consortium with the 4th respondent is not qualified since it was found that the tender submitted was not responsive. This argument is developed on the following question and answer:

"Q. Is it possible for prequalified tenderers and/or members of prequalified joint ventures of consortiums to make a new consortium with members who were prequalified in applications to the prequalification other than their own".

"A. No. Joint Venture/Consortia must respond as prequalified".

It means in the facts of the present case after prequalification stage, the 4th respondent could not have dropped the earlier partner and joined with the 5th respondent. Elaborating this aspect according to the petitioner one of the principal tender conditions as could be seen from the tender document is that there may not be change in the consortium of person who submit tenders and which was scrutinized for prequalification. Annexure-A is the tender notice. Annexure-A makes mention of several conditions to be satisfied. It is accompanied by Annexure-B, the tender document. A brief note is attached to the tender document with reference to prequalification for contract W(3b). Clause 5.6 thereof mentions as follows:

"It should be noted that from the date of submitting the Prequalification Document, until the issuance of the Defects Liability Certificate, or the return of the Tender Bond in the case of unsuccessful tenderers, there shall be no change whatsoever in the type, formation and nature of a company or consortium of companies selected by this prequalification process".

(emphasis supplied)

5. Further, in paragraph, 5.4 of Annexure-B, it is stated as under:

"If the consortium has not been formed but intends to do so if invited to submit a tender, the nominated leading company shall complete Forms A and C, plus D to N inclusive on behalf of the consortium and shall provide evidence of intent to form the consortium from each member company. In addition each member of the consortium shall complete and attach to the consortium submission Forms B; D to J; plus L to N inclusive".

(emphasis supplied)

The factual basis for the allegations are that the 4th respondent had submitted the tender in consortium with A. B Sweden and that tender document was found responsive. Subsequent thereto, there was change in the consortium and the 4th

respondent joined with 5th respondent and formed a new consortium. This is not permitted and this amounts violation of tender condition referred to supra i.e., 5.6.

6. At this stage it has to be noted that independently, the 5th respondent satisfied the tender conditions and was responsive. It is not as if that the 5th respondent has to depend on the 4th respondent in order to be responsive to the tender.

7. But Clause 5.4 extracted above may reflect different interpretation to this contention. It postulates formation of a consortium after the prequalification stage, subject to production of certain documents which are referred to in para 5.4 of the tender document. Forms A and C are letters of applications and company details. Forms D to N relates to Financial Status, Manpower, Experience Record: Joint venture/consortium, Experience Record: Major projects, Experience Record: Design Manufacture, etc., Current Work, Key Personnel, Project Execution Plan, Equipment and Plant (proposed and owned), Record of Arbitration and Litigation, Additional Information. If there be a total prohibition as sought to be interpreted by virtue of Clause 5.6, what is the need of the said Clause 5.4? In Part 6 of the document, at paragraph 6.6, it is stated that:

"Joint Venture/consortium applications will be evaluated to each member's declared participation in the Joint Venture or Consortium in respect of financial capability and on an aggregate basis for general experience and technical capability".

This clause has to be understood in consortium with Clause 5.4. If so, a change of partner is contemplated by the rules itself at appropriate stage.

8. To contend that change of consortium is not permitted, the petitioner relies on the replies furnished to M/s. Kirloskar Brothers Limited, Annexure-F by the first respondent. The question 184 formulated states as under:

"Is it possible for prequalified tenderers and/or members of prequalified joint ventures of consortium to make a new consortium with members who were prequalified in applications to the prequalification other than their own".

In answer thereto, it is stated as under:

"No. Joint Venture/Consortia must respond as prequalified. The prequalification document made it clear that a party could only participate in one grouping".

9. Now as regards of the teaming of respondents 4 and 5 the main stress of the argument of the learned Counsel has been that there has been a fundamental departure from the requirement set down in the tender document. When it is clearly stated by the tender document that no changes in consortium will be permitted now there has been a violation of this requirement. It is stated that if such permission could have been granted to petitioner as well, they would have also negotiated and secured a better competitive partner and a competitive

tender. Further, it is submitted that after the finalisation of the prequalification tender, there has been negotiations with the successful tenderer by the first respondent, behind the back of other tenderers especially in the matter of changing of a particular equipment. Namely the "Telemetry System" was allowed to be included by the successful bidder after opening of the tender. This inclusion according to the petitioner is illegal. This did result in the lowering of the Bid price thus enabling those bidders to gain an advantage. If there be any such permission, it should have been made known to the petitioner as well so that they could have improved their financial bid and reduced the same. In effect such variation of the tender amounted to showing undue preference to the 4th and 5th respondents. It is further alleged that.--

"Tenders must be received by the employer at the address specified in Tender Document no later than the time and date stated in the Tender Data Sheet". The tender submitted by the contesting respondent was belated.

The tender submitted by respondents 4 and 5 was belated by 5 minutes. As such it should have been rejected outright, so contends the petitioner relying on the above paragraph.

But simultaneously we may also notice paragraph 17.2 of the tender document which reads:

"The employer may, at its discretion, extend this deadline for submission of tenders by amending the Tender documents in accordance with ITT Sub-clause 7.3, in which case all rights and obligations of employer and tenderers will thereafter be subject to the deadline as extended".

10. Paragraph 6(1), it is provided for seeking clarification with respect to tender document. It is stated that,

"A prospective Tenderer requiring any clarification of the Tender documents may notify the Employer in writing or by cable with respect to the clarification sought. The employer will respond in writing to any request for clarification or modification of the tender documents that it receives no later than twenty-eight days prior to the deadline for submission of tenders. Written copies of the employer's response will be sent to all prospective Tenderers that have received the Tender documents".

10-A. According to the petitioner such a provision do not contemplate granting permission for changing the partners. As such, there has been violation in this behalf as well. If as a matter of fact at any point of time any permission was granted to the 4th respondent to change the consortium, grant of such a permission should have been intimated to all the tenderers so that they would also have been in a position if need be to make proper modification or changes as regards their partners. This opportunity has been denied in the instant case.

11. The first respondent has filed a detailed statement of objection. It is submitted that it has acted in the interest of the State in accepting the tender

submitted by the 4th and 5th respondents. After ascertaining as to whether the tender is technically responsive, it made a search of the appropriate persons with whom, it should deal with. It felt that 4th and 5th respondents would be the appropriate persons to be selected. It has acted in the interest of the institution alone and has not been persuaded by any other consideration. In paragraph 3 of the statement of objections filed by the first respondent, it is specifically stated as under:

"It is submitted that the implementation of a project work in question is taken up by the respondent-Board on the basis of the agreement entered into between President of India (respondent 6) represented by the Board as executing authority and Overseas Economic Co-operation Fund of Japan (for short "OECF"). The Board being executing authority is to abide by the terms and conditions of the agreement and the guidelines. Copy of the agreement and guidelines of OECF are produced and marked as Annexures-R1 and 2 respectively. It is submitted that any decision taken by the Board is subject to the concurrence of the OECF. The petitioners were aware of the agreement between respondent 6 and OECF and further it is also within the knowledge of the petitioners that the decision of the OECF fund is binding on all the parties in the matter of awarding contract as per loan agreement (Annexure-R1). The decision of the OECF is binding on all the parties herein. Hence the decision taken by OECF is not questionable under Article 226 of the Constitution of India. The respondent-Board after taking careful consideration of all aspect of the matter and as per tender conditions and guidelines of OECF has taken the decision in awarding the contract to the respondents 4 and 5 and that there is no illegality or irregularity committed by the Board as has been alleged by the petitioners".

12. It can thus be seen that the contention of the first respondent is that it had kept in its mind the interest of the institution and nothing else. It is further stated that first respondent acts is in accordance with the guidelines issued by the OECF wherein it is provided as under:

"The formation of a joint venture after prequalification and any change in a prequalified joint venture, will be subject to the written approval of the Borrower prior to the deadline for submission of bids. Such approval may be denied if (i) as a result of the change in a prequalified joint venture, any of its partners individually or collectively does not meet the qualifying requirement or (ii) in the opinion of the Borrower a substantial reduction in competition may result".

13. According to the 1st respondent by means of the change made, these two disqualifying circumstances did not exist in the case of the consortium formed by the 5th respondent. It is also stated that money for the work has been lent by the OECF and the contract is controlled and concluded by the guidelines laid down by the OECF. Annexure-R1 is the guidelines controlling the contract. In Annexure-R1 at paragraph 1.01(d), it is stated as under:

"These guidelines govern the relationship between the Fund and the Borrower,

who is responsible for the procurement of goods and services. No provision of these guidelines shall be construed as creating any right or obligation between the fund and any third party, including those bidding for the procurement of goods and services. The rights and obligations of the Borrower vis-a-vis bidders for goods and services to be furnished for the project will be governed by the bidding documents which the Borrower issues in accordance with these guidelines".

(emphasis supplied)

14. Again, it is provided in the guidelines that every tender being granted shall be subject to approval of the OECF. In view of the circumstances it is contended by the first respondent that it being a subsidiary unit, first respondent has entered into contract on behalf of OECF. Without making them party the present writ petition is not competent, as first respondent cannot independently decide the issues.

15. I do not think it is necessary for this Court to examine the rival contentions of the other contesting respondents as the gravamen of the arguments revolves round the allegation that there has not been proper consideration by the 1st respondent of the tender submitted by the petitioner. The power of judicial review of an administrative action in the field of contractual relationship cannot be a disguised merits review. When the decision maker is free to decide the weight to be attached to conflicting facts and it is shown to have been given proper, genuine and realistic consideration to the claim of the rival contenders, then the doors of judicial review is shut. Before proceeding further on these issues we will briefly refer to the important decisions cited at the Bar.

16. Ms. Indira Jaysingh, learned Senior Counsel for the petitioner, who argued the case with commendable clarity relied on several decisions to bring home her point regarding judicial review. The entire case law has been reviewed in the *Tata Cellular Vs. Union of India*, , and the following paragraphs summarise the scope and area of judicial review:

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

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law.
3. Committed a breach of the rules of natural justice.
4. Reached a decision which no reasonable Tribunal would have reached or,
5. Abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent

of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

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

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v Secretary of State for the Home Department, ex parte Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases, the test to be adopted is that the Court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

78. What is this charming principle of Wednesbury unreasonableness? Is it a magical formula? In *R. v Askew*, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later:

"It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practice this profession is trusted to the College of Physicians and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less; warped by resentment, or personal dislike".

79. To quote again, Michael Supperstone and James Goudie; in their work *Judicial Review* (1992 Edn.) it is observed at pp. 119 to 121 as under:

"The assertion of a claim to examine the reasonableness been done by a public authority inevitably led to differences of judicial opinion as to the circumstances in which the Court should intervene. These differences of opinion were resolved in two landmark cases which confined the circumstances for intervention to narrow limits. In *Kruse v Johnson*, a specially constituted divisional Court had to consider the validity of a bye-law made by a local authority. In the leading judgment of Lord Russell of Killowen, C.J., the approach to be adopted by the Court was set out. Such bye-laws ought to be "benevolently" interpreted, and credit ought to be given to those who have to administer them that they would be reasonably administered. They could be held invalid if unreasonable: Where for a instance bye-laws are found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the

rights of citizens as could find no justification in the minds of reasonable men. Lord Russell emphasised that a bye-law is not unreasonable just because particular Judges might think it went further than was prudent or necessary or convenient,

In 1947 the Court of Appeal confirmed a similar approach For the review of executive discretion generally in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*. This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that "no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not". In an extempore judgment, Lord Greene, M.R. drew attention to the fact that the word "unreasonable" had often been used in a sense which comprehended different grounds of review. (At page 229, where it was said that the dismissal of a teacher for having red hair (cited by Warrington, L.J. in *Short v Poole Corporation*, as an example of a "frivolous and foolish reason") was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described as being done in bad faith; see also *R. v Tower Hamlets London Borough Council, ex parte Chetnik Developments Limited* (Chapter 4, page 73, *supra*). He summarised the principles as follows:

"The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not as an Appellate Authority to override a decision of the local authority, but as a judicial authority which is concerned, the concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them".

This summary by Lord Greene has been applied in countless subsequent cases.

"The modern statement of the principle is found in a passage in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service*:

"By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Limited's case, supra*). It applies to a decision which no sensible person who had applied his mind to the question to be decided could have arrived at" ".

80. At this stage, *The Supreme Court Practice*, 1993, Vol. 1, pp. 849-859, may be quoted:

"4. Wednesbury principle.--A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on relevant law and acting reasonable could have reached it. (Associated Provincial Picture Houses Limited's case, supra, per Lord Greene, M.R.)".

The Court then noticed two other facts of irrationality. They are:

"81. Two other facets of irrationality may be mentioned.

(1) It is open to the Court to review the decision-maker's evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in *Emma Hotels Limited v Secretary of State for Environment*, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in *R. v Barnet London Borough Council, ex parte Johnson*, the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down".

Finally after reviewing various authorities the Court stated thus:

94. The principles deducible from the above are:

(1) The Modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

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

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play

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

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

The other judgments cited by Ms. Indira Jaysingh, learned Counsel reiterate the points referred to above and does not require repetition. We will test the decision making process of the 1st respondent, keeping the above principles in mind.

Now, in an inquiry of this nature, as stated supra, this is not a sphere of judicial autopsy. The inquiry essentially is to find out whether the authorities have acted fairly and kept in mind the parameters referred to above. In this behalf we will scan the allegations levelled against the decision making process of the first respondent and the decision arrived.

17. In the first place it is alleged that it has shown undue favour to the successful tenderers, by in the first place, allowing the change of joint partners, secondly, substitution of an equipment and thirdly receiving the tender beyond the time-limit. When we examine the first grievance, we have to keep in mind whether the petitioner has furnished any answer to the question whether given the same opportunity, whether the petitioner had a better offer to make. The 1st respondent is not investigating into the comparative suit abilities of various companies. It has a specific object in the inquiry it carries out. It is in fact scouting for a suitable organisation that could take up the work and who will deliver the goods. It has to keep in mind the paramount interest of the public as well. It acts as a trustee for the limited purpose of the funds in its hands while utilizing the same. As such, it has to make the best selection. As stated earlier this Court is not to act as an Appellate Authority in such matters. All that is to be examined is, in the given situation, would a reasonable man addressed in his responsibilities and placed in a similar situation as the 1st respondent, arrive at the same conclusion without suffering substantial loss? The answer in this case, an evaluation of the facts, is in the positive.

18. The first contention seriously urged is that, after the authorities decided that the tenders submitted on the basis of the partnership formed are responsive, a change in the consortium in regard to respondents 4 and 5 was permitted. This according to the petitioner is against the fundamental tender condition. Factually, I do not think that this a flaw which goes to the root of the matter and totally invalidates the tender. This argument is developed with reference to the answer given by the 1st respondent to M/s. Kirloskar Brothers Limited and Clause 5.6 of the tender conditions. In the first place, nowhere in the tender document it is stated that such a change would totally invalidate the tender already submitted. In other words, there is no penal clause accompanying the clause to make such a

clause mandatory. Next, the rigor of the clause is watered down by other clauses in the tender document itself; such as Clause 5.4 extracted above which contemplates the formation of a consortia at a future stage. The need to furnish the details mentioned therein only need be disclosed in the event of change in the consortia is permissible and acceptable. That circumstances discloses that change of partners in a joint venture was always in the contemplation of the 1st respondent. Now, we will also advert the nature of its answer. If the formation of a joint venture after the prequalification scrutiny is over, is inherently bad, then the answer to the question put by M/s. Kirloskar should have been a mere "no". Besides, it is a statement of an official and no principles of estoppel can operate if it adversely affects the interest of the first respondent.

19. At this stage it may be relevant to remember the guideline issued to the 1st respondent in the matter of tender, by the OECF with whose assistance the 1st respondent is functioning. Now, in the guidelines issued by them they have in explicit terms permitted forming of the joint venture and change in prequalified joint venture subject to their approval and non-existence of certain circumstances. That such an overriding clause did exist, in the tender agreement is known to the petitioner and is not a secret provision. With full knowledge of the clause the petitioner came forward to participate in the tender. In such a bid, 1st respondent cannot be faulted if one of the rival bidder took advantage of the clause and secured a relaxation from the OECF (The Overseas Economic Co-operation Fund). Besides, it is not shown how the petitioner could have tilted the balance in his favour if the 1st respondent had disclosed the change of the partners insofar as the 4th and 5th respondents are concerned. The petitioner is not indicating that he would have secured a better partner for himself for among the already prequalified tendered which alteration would have in any manner secured better gains for the 1st respondent. To repeat, the first respondent is not conducting a market survey to shortlist the tenderers for its future need.

20. Now there is yet another larger aspect to be taken note of. The 1st respondent is controlled by OECF is arranging its affairs in the matter of carrying out the tender work. The clauses in the agreement executed by them show that they have all pervasive influence and control in the matter of concluding of the tenders. This means, it is as if it exercises the powers of an Appellate Authority as to setting of the choice of the tenderer, who should carry on its work. In this behalf, clauses (ii), (iii) and (iv) of the agreement (Ex. R. 1 produced by the 1st respondent) executed, may be referred to:

"(ii) Before sending a notice of award to the successful bidder, the Borrower shall submit to the Fund, for its review and concurrence, a request for Review of Analysis of Bids and Proposal for Award (as per Form No. 3 attached hereto). When the Fund has no objection to the said request, the Fund shall inform the Borrower accordingly by means of a notice regarding Analysis of Bids and Proposal for Award.

(iii) When the Borrower wishes to reject all Bids or to negotiate with one or two

of the lowest bidders with an view to obtaining a satisfactory contract, the Borrower shall inform the Fund of its reasons, requesting prior review and concurrence. When the Fund has no objection, the Fund shall inform the Borrower of its concurrence. In the case of re-bidding, all subsequent procedures shall be substantially in accordance with the sub-paragraphs (i) and (ii).

(iv) Promptly, after executing a contract, the borrower shall submit to the Fund, for its review and concurrence, a duly certified copy of the contract, together with a request for review of contract (as per Form No. 4 attached hereto). When the fund determines the contract to be consistent with the Loan Agreement, the Fund shall inform the Borrower accordingly by means of a Notice regarding Contract".

Obviously, the decision taken by the 1st respondent may be in terms of the above clauses. This discloses the pervasive control, the OECF exercises in the matter of the execution of the work. If that be so, it is difficult for this Court to further examine and avowedly attempt to set right the assumed illegality committed by the 1st respondent, especially when OECF is not party to the present proceedings.

21. The petitioner cannot thus proceed ignoring the OECF and its decisions. If that be so, no relief can be granted to the petitioner in the absence of them in the party array.

22. Nevertheless, this Court shall render its finding on other points as well, as the Counsel has addressed the arguments.

23. As stated earlier, it is essential for the petitioner to show as to how the infraction of the rules have infringed their rights. I do not think that there exists any fundamental right in the petitioner to be awarded the contract by the 1st respondent. And mere infraction of any rule or requirement of guidelines set down by the 1st respondent or the person from whom they borrow does not ipso facto make its action justiciable.

24. In this context, it will be well-advised to bear in mind the need as to why the 1st respondent has settled so many conditions in the matter of award of the contract. Certainly, it has not included them solely for the purpose of disqualifying as many tenderers as possible. It is with the object that they may make the best choice to carry out their work. It will also be with the purpose of choosing the best among the equals. These clauses are not arrows providing grounds for the rival participants to shoot down each other. The first respondent cannot certainly use these conditions for negative purposes. They should be examined objectively and the Courts should be very slow to interfere in such decisions unless the decision taken is such that no common man would take and would shock the judicial conscience. If the first respondent is satisfied with the tenderer and it is not demonstrated that there is something inherently vitiating or arbitrary in the selection, then, the Courts should rely on the decision of the experts than making inexpert voyages in those realms.

25. It was then contended that the tender submitted by the 4th and 5th respondents were incomplete in that one of the required equipment was not included in their bid and that they were later on allowed to be included. In short, the contention is that they gained an undue advantage by the alleged post-tender negotiation while the petitioner did not have this benefit. The allegation is that, if, the 1st respondent wanted to negotiate with the 4th and 5th respondents subsequent to the opening of the tender, then, such an opportunity should have been given to the petitioner as well. Strangely, in the writ petition, the petitioner who has known of the advantage gained by the contesting respondents, do not disclose what is the advantage the 1st respondent would have gained if similar opportunity be given to the petitioner. This elaboration would have helped the Court to evaluate the gravity of the allegation or the loss the 1st respondent could have prevented. This certainly is not an adventure to ascertain the knowledge of the 1st respondent in the matter as to how it arranges its day-to-day affairs. This Court does not emulate the role of a Headmaster evaluating the performance of the employer who awards the tender. Besides, the customer is the 1st respondent. It is for them to decide as to which is the required equipment that they needed. They have the choice. That apart, the OECF which is a third party expert body, oversees the operation of the 1st respondent as well. Mere low quotation is not an entitlement to be awarded the tender. The customer should be satisfied that the offerer would be in a position to discharge the contract. All these are matters to be decided by the 1st respondent and it is not for this Court to re-examine its decision.

25-A. Now as regards the allegation of belated submission of tenders by the contesting parties is concerned, besides Clause 17(2) extract above, I have to take note of the explanation offered by the contesting respondents. Due to the mechanical defect in the lift, the contesting respondents could not reach the premises in time. It cannot be assumed that they delayed deliberately. The delay has been properly explained as to why the tender could not be done on the dot of the time. There was some defect in the lift using which they were supposed to reach the premises where the tender had to be submitted. For that reason the tender could not be submitted on time. Even if assuming that there had been delay of five minutes in doing so, in the fact and circumstance, such delay is certainly not fatal going to the root of the matter. I do not think the petitioner was justified in highlighting these aspects.

26. From the concepts of facts stated above and the discussions, it is to be held that the first respondent has adopted the correct procedure in the decision making process. It has not committed any breach of principles of natural justice nor has it committed any error of law in the decision making process. The decision arrived is not one, any other person placed in similar circumstances would not have arrived at. I have pointed out that in these areas, this Court cannot decide whether the decision taken is correct or not. That is not the jurisdiction of this Court. If this Court is to say that the decision is wrong, then it would be attempting for a merit review of the decision. Judicial review is not

merit review. Judicial review has to be confined to the decision making process and not beyond that. The function of this Court under the Judicial Review power is to review the legality, not the merits of administrative decisions and the Court cannot substitute its own decision for that of the decision maker, The merits of administrative action to the extent that they can be distinguished from legality are for the repository of the relevant power and subject to such control of the repository alone. The Court cannot overstep and disguise the judicial review into merit review.

In the result, the writ petition is dismissed. But there will be no order as to cost.