
(1999) 06 AP CK 0026

In the Andhra Pradesh High Court

Case No : Writ Petition No. 36174 of 1998

Lanco Constructions Ltd., Hyderabad

APPELLANT

Vs

Govt. of A.P., Irrigation and Command Area Development
Depart., Hyderabad and others

RESPONDENT

Date of Decision : 18-06-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1999 AP 371 : (1999) 4 ALD 5 : (1999) 4 ALT 176

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : Mr. M.L. Ali, for the Appellant; A.A.G., for the Respondent

Judgement

1. The proceedings issued by the 5th respondent No.SE/SRBC-3/Nd1/ DB/D1/FP/12/320-M, dated 18-12-1998 rejecting the tender of the petitioner is assailed in this writ petition.

2. The relevant facts leading to the filing of the writ petition are as follows :

The World Bank has released certain funds to the Government of Andhra Pradesh towards the construction of the Irrigation Projects. Accordingly, various irrigation projects were notified by the Government for construction. Srisailem Right Bank Canal is one such project, which is constructed with the credit assistance with the World Bank. The 5th respondent invited National competitive Bidding on 16-10-1997 for "work of construction of OWK Reservoir Complex from Km. 116.481 to Km. 119.717 of SRBC comprising of Paleru Earth Dam, Gollaleru Earth Dam with Spillway and Thimmaraj Earth Dam with Head Regulator" (hereinafter called Package XII). Number of intending bidders obtained the tender documents and submitted their respective bids to the 5th respondent. It is submitted that the Bids received in pursuance of the tender notification were scrutinised and the bid offered by the petitioner was found to be lowest and therefore the 5th respondent recommended the bid of the petitioner. It is also stated that the Chief Engineer has also recommended the case to the

Commissionerate of Tenders, the 3rd respondent herein, who is the final authority in the finalisation of tenders.

3. The grievance of the petitioner is that the 3rd respondent-Commissionerate did not scrutinise the tenders and the matter was transmitted to the State Government on the directions of the State Government, and ultimately the present impugned orders are passed.

4. It is the case of the petitioner that news item was published in Vaartha Telugu Daily on 1-11-1997 that the World Bank did not agree to the request of the Government for rejection of all the bids in respect of package XII. But, however, the Government pursued the matter with the sole idea of depriving the allotment of work to the petitioner, the said action is illegal and contrary to public interest. It is also stated that on account of political rivalry, the Government has adopted such an attitude. Even in the Legislative Assembly, this matter was discussed. It is stated that the Honourable Minister for Major Irrigation reported to the House that there was no cartel and the apprehension was baseless. The petitioner submits that the impugned order is wholly illegal and bareft of reasons and also violative of the Article 14 of the Constitution of India. It is also stated that it is not in the public interest that the bid should be cancelled. Therefore, the writ petition is laid for quashing the order and for consequential directions.

5. The Government have filed the counter stating that under Clause 32.1 of the Information for Bidders, the Government reserves the right to accept or reject any bid and to cancel the bidding process. It was denied that on account of political rivalry, the present impugned order has been issued. In fact the sister concerns of the petitioner Company was allotted a major work for constructing power project at Kondapally. But, however, it is stated by the Government that on receipt of the credible information that fraudulent practice took place in regard to the tendering process of the package XII. On investigation, it was found that the fraudulent practices had been indulged and in public interest the Government considered it necessary that the entire tendering process should be cancelled and fresh bids should be invited. Since the fraudulent practices indulged in tendering practices are grave and serious in nature, the Government has resorted to cancellation of the bids. It is also stated that the SSR rates for the year 1998-99 expired on 31-5-1999 and fresh rates will come into force from 1-6-1999 and therefore, fresh tenders which will have to be floated are to be based on new SSR rates. Therefore, any delay in the process will result in escalation of value of work.

6. The 5th respondent-Superintending Engineer also filed separate counter-affidavit. It is stated that 30 bids documents were sold and 7 bids were received and six bids were found to be fit for evaluation. It is also stated that out of the 7 bids received only 3 were found responsive conforming to the specified qualification criteria. After evaluating the tenders submitted by the bidders, he recommended the tender of the lowest responsive bidder namely petitioner and they were submitted to the 3rd respondent-Commissioner of Tenders on

27-12-1997. It is stated that the Government opined that the tender premium quoted by the responsive bidder was exorbitant and it decided to recommend for cancellation in view of the credible information received about the inducement of undesirable practices by papers (sic bidders) and others. After obtaining clearance from the World Bank, the impugned orders are passed and the same was informed to the bidders. The Government in Memo dated 5-1-1998 enclosing press clippings of Vaartha daily dated 5-12-1997 to the effect that a Syndicate was formed in Package XII directed the Chief Engineer to submit a detailed report. Accordingly, report was submitted to the Government on 23-1-1998 informing that it was not possible for the Chief Engineer's Office to cause verification and if concerned persons are contacted, no information will be shared. He also stated that the tenders received did not give scope for such conclusion. Thereafter, the 3rd respondent by letter dated 11-12-1998 informed the Chief Engineer to furnish substantiation with data and excess tender premium quantitative analysis. But, however, in the meanwhile, the Zonal Inspector of Police, CID Kurnool on 6-3-1998 took the connected records for the purpose of enquiry. He also recorded the statement of one Deputy Executive Engineer. A detailed report was submitted by the Chief Engineer to the Commissioner of Tenders by letter dated 18-4-1998. Another Report on the evaluation of the work was submitted by the Chief Engineer to the Government on 28-4-1998. But, however, the 3rd respondent-Commissioner of Tenders issued further instructions to analyse the break down of Unit rates furnished by the lowest bidder. Accordingly, the said information was furnished on 4-4-1998. The Government again called for the further information on 29-5-1998 and the same was also furnished on 30-5-1998. Since the tenders were not finalised, the Government was reminded to take a decision with regard to the finalisation of the tenders. Government have also addressed the World Bank seeking approval to cancel the tenders and to float fresh tenders for which the World Bank has conveyed its concurrence. Accordingly, the proceedings were issued cancelling the bid of the petitioner and to re-advertise the tender notification.

7. The learned senior Counsel Mr. E. Manohar, appearing on behalf of the petitioner submits that the entire action of the respondents cancelling the tender of the petitioner is wholly illegal, arbitrary and violative of the Article 14 of the Constitution of India. He submits that no reasons were assigned in the impugned order for not accepting the bid of the petitioner, even though it was found to be lowest and it is incumbent on the part of the respondent to furnish reasons while rejecting the offer made by the lowest bidder. He relied on various decisions of the Supreme Court in this regard.

8. The learned Government Pleader appearing for the respondents submit that the writ petition itself is not maintainable as the matter falls in the contractual spheres between the Government and the petitioner. Even otherwise, he submits that the power of judicial review cannot be exercised to set aside the decision of the Government cancelling the bid. Ms. G. Rohini, the learned Govt. Pleader submits that the Government received credible information that some fraudulent

practices had crept in the tendering process in respect of package No.XII and therefore, a report was called from the Police. Considering the report it was decided to cancel the tenders. She submits that even though the tender submitted by the petitioner is the lowest still it is open for the Government to reject his tender without assigning any reasons by virtue of Clause 32 of the Booklet containing information to the bidders.

9. There is no dispute about the parameters of interference that can be undertaken by the process of judicial review under Article 226 of the Constitution of India in respect of contractual matters. I need not refer to catena of decisions on this aspect which were dealt with by the Supreme Court time and again and this Court on number of occasions. Suffice it to say that the power of judicial review is not directed against the decision taken by the administrative authorities, but it is only against the process adopted by the authorities in arriving a decision. Decision becomes immaterial. But, if the process is found to be illegal or contrary to the principles settled by the Supreme Court, it is always open for the Court to interfere and issue appropriate directions.

10. In *Tata Cellular Vs. Union of India*, , the Supreme Court had an occasion to consider the applicability of the judicial review in contractual matters and after considering various English decisions and the decisions of this Court right from *International Airports Authority of India Vs. K.D. Bali and Anr*, , observed as follows:

"It cannot be denied that the principles of judicial review 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. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question infringement of Article 14 if the Government tries to get the best person or the best quotation. 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.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

The Apex Court recorded its finding as to the limits within which the Court has to confine. Para 77 is extracted below :

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

- (1) whether a decision-making authority exceeded its powers ?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable Tribunal would have reached or,
- (5) abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

- (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex. Brind* (1991) 1 AC 707, 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."

In *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, , it was a case in which the Court was concerned with the Award of a contract- show of sponsored T.V. Serial. The Supreme Court observed "it is well settled that there should be fairplay in action in a situation like the present one, as was observed by this Court in *Ram and Shyam Company v. State of Haryana* 1995 (3) SCC 267. It is also well settled that the authorities like Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism (See : Observations of this Court in *Haji T.M. Hassan Rawther v. Kerala Financial Corporation* 1998 (1) SCC 166, para 88 is extracted below ;

"We may now look at some of the pronouncements of this Court including the authorities cited by *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, , was a case in which the Court was concerned with the award of a contract for show of sponsored TV serial. At page 92 in paragraphs 5 and 6 it was held thus :

"It is well settled that there should be fair play in action in a situation like the

present one, as was observed by this Court in *Ram and Shyam Company Vs. State of Haryana and Others*, . It is also well settled that the authorities like Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, .

While, as mentioned hereinbefore, fairplay in action in matters like the present one is an essential requirement, similarly, however, "free play in the joints" is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.""

After considering the decision in *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, , *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , *Union of India and others Vs. Hindustan Development Corpn. and others*, , the Supreme Court deduced the following principles:

- (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.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

In Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, , a contract was Awarded to the Asia Foundation and Construction. However, the matter was carried by the respondent before the High Court. The High Court allowed the writ petition and quashed the award, against which the appeal was filed. The Supreme Court set aside the order of the High Court and upheld the allotment of tender in favour of the appellant. It has again considered the power of judicial review and its interference and after referring to Tata Cellular's case (supra), the Supreme Court observed as follows :

"Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran, learned senior Counsel that the High Court committed a factual error in coming to the conclusion that Respondent No.1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr. Sorabjee, learned senior Counsel that it has been conceded by all parties conceded before the High Court that on corrections being made respondent No.1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid. Further we find from the letter dated 12-7-1996 that Pradip Port Trust itself has come to the following conclusion:

"The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Pradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS."

11. The issue that arises for consideration is whether the impugned proceedings dated 18-12-1998 are sustainable in law?

12. The learned senior Counsel for the petitioner Mr. E. Manohar submits that admittedly, the petitioner is the lowest tenderer and it is incumbent on the part of the authorities to accept his tender. He further submits that even though it is open for the Government to reject the lowest tenderer, yet, the Government has to. communicate the reasons to the petitioner as to know under what circumstances, his tender even though lowest could not be considered. From the impugned order, he submits, no reasons were assigned and it was only stated that the bid for the work was not considered. The contention appears to be well founded. The Supreme Court has made it clear that even though it is not

incumbent on the part of the authorities to accept the lowest tender, yet, it has to record the reasons. But, the question that arises for consideration is whether the matter should be remitted back to the authorities for communicating the reasons. Even though reasons were not communicated, in the counter the respondents came out with certain particulars justifying the impugned action.

13. In the counter filed on behalf of the Government it is stated that the authorities are empowered to accept or reject any bid and cancel the bid process under Clause 32(1) of the information to the bidders and therefore such power has been exercised by the Government. In view of the Supreme Court judgment it has to be now held that even though the Clause empowers to cancel any bid and the bidding process, but, yet, it is always open for this Court to scrutinise whether the process adopted or action taken was fair suffers from vice of arbitrariness offending Article 14 of Constitution of India. In para 7, the Government has furnished the reasons which is extracted below :

"It is respectfully submitted that on receipt of credible information, investigation was conducted and it was found that fraudulent practices had been indulged in with regards the tendering process of the OWK reservoir complex work. The Government, in public interest, considered it necessary and proper that the entire tendering process should be cancelled by rejection of bids and that the tendering process, by inviting fresh tenders, be initiated. The fraudulent practices indulged in the earlier tendering process are grave and serious in nature which necessitated cancellation of the bids and calling for fresh tenders."

Thus, it is averred that certain fraudulent practices have been indulged and therefore, the entire tendering process was cancelled. But, however, in the counter filed by the Superintending Engineer, it is stated that the Government had opined that the tender premium quoted by the responsive bidder was exorbitant and finally decided to recommend for cancellation to the World Bank keeping in view the credible information received by the Government about certain undesirable practices by the bidders and others in the tender process. Since the reasons assigned by the Superintending Engineer and the Government do not travel in the same course, I have called for the concerned file from the Government so as to satisfy as to what exactly the process adopted and the action taken in this regard.

14. It is not in dispute that tenders were floated for various works including the work in package No.12 which is the subject matter of the writ petition. The Vigilance Commissioner by letter dated 25-11-1997 forwarded certain press clippings to the Government stating that certain persons were pressurising the contractors not to participate in the tenders. Again another press clipping from Vaartha news paper dated 5-12-1997 stating that the Chief Minister was understood to have taken a decision to cancel the tenders. Even that clipping was sent to the Government and the Chief Engineer (Projects) has clarified that no such cancellation took place, that no Syndicate was found and that it was not possible to cause verification as to whether a Syndicate was formed in submitting

the tenders. He has also stated that the tenders received for OWK Complex (Package XII) did not give any scope for such consequences. The letter is extracted below:

"No instructions have been received in this office from the Government on the cancellation of any tender. Therefore, the veracity of the News Report is not possible to be confirmed. Regarding the report that a Syndicate was formed it is to be informed that it is not possible for this office to cause verification. Even if the concerned persons are contacted no information will be shared. The tenders for the OWK Complex received do not give scope for such conclusions. Reputed firms like L&T, Orissa Construction Corporation, HSCL and JP Industries participated in the tenders. It is unlikely that such big firms participate or become partners in shady deals."

The Superintending Engineer and the Chief Engineer have processed the tenders submitted by various bidders and finally they recommended the lowest responsive bid of the petitioner which is plus 22.11 per cent by letter dated 27-12-1997. But, however, the Commissioner of Tenders (COT) appears to have asked for some more information and he did not finally evaluate the tenders. On the other hand, the Commissioner of Tenders (for short "COT") by communication dated 15-4-1998 while referring to para 11 of the status notes informed the Government that approval of the Government for processing the letter was awaited and as soon as clearance was received from the Government, the action will be taken to finalise the tenders. In the meanwhile, it appears that a note from Additional Secretary to Chief Minister was sent to the Secretary, Irrigation Department on 7-4-1998 with the following remarks:

"Kindly find enclosed a note from the IG of Police, Intelligence regarding the irregularities committed in the filing of Tenders for OWK Reservoir. In view of the confirmed information that the tendering process was tampered with, Chief Minister desires that action may be taken to cancel these tenders and to recall fresh tenders immediately."

This report may not be cited in any official correspondence as desired by Intelligence Department."

The note of the Inspector General of Police was dated 5-12-1997 which states that the lowest tender quoted by the petitioner was 29.9 per cent excess. The note further states as follows :

"Discreet enquiries disclosed that xxxxxxxx (name withheld for confidentiality purpose) interfered in the OWK Reservoir tenders and reportedly demanded more than Rs.10 crore towards the good-will amount from xxxxxx (name withheld for confidentiality purpose) who quoted the lowest tender. Negotiations are reportedly being held between the Contractor and xxxxxxxx (name withheld for confidentiality purpose) and no agreement has been reached so far. Some contractors, who have taken the tender schedules, informed that they could not file the tenders because of the threatenings from xxxxxxxx (name withheld for

confidentiality purpose) usually the contractors have to pay the good-will amounts demanded by the faction leaders, otherwise it would be highly difficult for them to execute the construction works.

Moreover, the lowest tender quoted by xxxxxxxx (name withheld for confidentiality purpose) with 21.9% excess than the estimated cost of the tender i.e., about Rs.32.4 crore excess than the estimated cost of the contract. It is learnt that the OWK Reservoir Work can be completed with Rs.50 crores. The tenders filed in the matter have not been finalised by the authorities concerned. In view of the above, the Government may consider cancellation of the present tender."

On the directions of the Government, the Chief Engineer (Projects) has also sent the evaluation report to the Government 28-4-1998. In the said assessment report, it is clearly stated that lowest responsive bidder for the package 12, M/s. Lanco Constructions Limited (Petitioner) satisfied the bid capacity and thus he can be awarded a contract in terms of the 31.1 of the ITB. Even the Chief Engineer in his letter dated 4-5-1998, addressed to the COT has further confirmed that it was reasonable to allot the work at 22.11% which amounts to award of the work 10 per cent above the estimated cost due to be revised with new S.S.R. rates which will come into effect from 1-6-1999.

15. The learned Government Pleader submits that the Commissioner of Tenders is the competent authority to scrutinise the tenders received from the bidders and to give clearance. She submits that the Government issued G.O. Ms. No.234, dated 3-6-1997 constituting Commissionerate of Tenders which will function under the directions of the Chief Secretary. It is entitled to deal with tenders of Irrigation and Command Area Development and Roads and Buildings in Panchayat Raj Department. All the tenders of the value of Rs.30 lakhs and above are required to be referred to State Level Commissionerate for invitation and finalisation of the tenders. The procedure of the working of the Commissionerate was also mentioned in the Annexure-II of the said G.O. As can be seen from the said Annexure, the Commissioner is the final authority in processing and finalising the tenders. The method and manner of publication of tenders whether to call the tenders directly or prequalified tenders in the interest of the work are some of the essential functions of the Commissionerate. The said Annexure-II of the said G.O. is extracted below :

"The Commissionerate would receive proposals for calling of tenders from the Chief Engineers with full technical details sanctioned estimate and draft tender schedules. On receipt of these proposals, Tender Notices would be published not only in the Tender Digest, but also in one or more newspapers depending upon the extent of publicity that needs to be given. In case of sophisticated work like tunnelling, it would be necessary to give wider publicity than that would be required for earth work, etc. The Commissionerate would also send copies of Tender Notice to all Builders' Associations and other Contract Associations registered with them on payment of prescribed fees, so that these also could

give wide publicity among their members. The Commissionerate would also decide whether in the interest of work it would be necessary to pre-qualify the tenders or call for tender offers directly. The tenders would be received upto the due date and time in the office of the Commissionerate and would be opened in the presence of tenderers present. Technical Cell of the Commissionerate would scrutinise the tender documents, evaluate the bids and prepare a detailed note for the consideration of Commissionerate. The Commissionerate would finally evaluate the proposals and give its decision as to in whose favour the tender has to be accepted and under what terms and conditions. The Commissionerate would also determine by what date the agreement should be entered into. The concerned Superintending Engineer would then enter into an agreement with the selected contractor on those terms. From then on, it would be departmental responsibility to have the work executed as is being done now."

From the said Annexure, it is clear that the Commissionerate has been vested with powers to notify the tenders and to fix the yard-stick. The technical Cell would scrutinise the tender documents, evaluate the bids and prepare a detailed note for consideration of Commissionerate who would finally evaluate the proposals and give its decision as to in whose favour, the tender has to be accepted under what terms and conditions. Therefore, the ultimate authority is the Commissioner of Tenders. In the instant case, the Tenders received from various bidders were processed by the Superintending Engineer and also the Chief Engineer (P) and the tenders submitted by the petitioner was found to be acceptable. Accordingly, a Report was sent to the COT for according approval to the tender submitted by the petitioner. The tenders were not evaluated by the Technical Cell of the Commissionerate nor the Commissionerate recorded any findings on the tenders received from the bidders. But, however, six bids received from various persons including the petitioner and the related correspondence was transmitted to the Government by the COT through communication dated 24-4-1998 on the basis of the telephonic instructions. On 25-4-1998, the COT also sent Status Report, wherein it was stated that in response to bid call 13 perspective bidders purchased the bid documents, only 7 bids were received, out of 7 bids, the bids submitted by the Orissa Construction Corporation was rejected. With regard to the remaining 6 bidders, finally the bid submitted by 3 bidders did not fulfil the qualification criteria. When the COT, asked for clarification from the Chief Engineer to substantiate by quantitative analysis excess premium quoted in the lowest tender recommended responsive bidder (petitioner), the Chief Engineer had stated that the quantum of work and the specifications of the work and other works are entirely different and not comparable. Thus, the Chief Engineer tried to vindicate his stand that the bid of the petitioner could be accepted as it fulfils in all respects. But, however, the COT found that the reasons given by the Chief Engineer were not convincing. Hence, the Chief Engineer was requested further to furnish the details and the report is awaited. Thus, it is seen that the entire issue relating to the tenders were taken over by the Government and the COT was not allowed to process the tenders as

required in the G.O. referred to above. The Chief Engineer by Lr. dated 4-5-1998 had further stated as follows :

"New SSR will come into force from 1-6-1998 and there is every likely hood that the S.S. Rates may increase by about 10%. In case the tender premium is not acceptable and tenders are to be recalled, estimate has to be revised with fresh SSR. This means an increase of about 10% in the estimate for inviting tenders over the 1997-98 rates. There is no guarantee that the tender premium will be less even in the recall.

It is hardly one month before new SSR will come into existence. I feel that it is reasonable to award the work to the lowest bidder at 22.11% which amounts to awarding the work at about 10% above the estimate cost due to be revised with new SSR that will come into force from 1-6-1998. In this connection it is submitted that some of the recent tender of SRBC Blocks are awarded at 18.82% and the present tenders also at 22.11% is almost in the proximity of accepted tenders and the analogy of accepted tenders may also be extended to this package and approval communicated."

As can be seen from the file, a news was published in Vaartha News Paper dated 5-12-1997 which stated that the Chief Minister directed to cancel the tenders as the tenders became controversial. The news also stated that on account of instigation of local leaders, the tenderers formed Syndicate. When this matter was referred to the Chief Engineer for his Report he stated that there is no truth in the news and with regard to the Syndicate lie was of the Opinion that it is not possible to cause verification and no information will be shared by the concerned persons. He also opined that tenders received did not give scope for such conclusion as reputed firms had participated. It was unlikely such big firms become partners in the shady deals. I have already extracted the letter at page No.18. Thus, the Chief Engineer was of the opinion that there was no Syndicate and none of the symptoms of shady deals could be detected. But, as seen from the letter dated 15-4-1998, the Commissionerate of Tender was awaiting the clearance from the Government to process the tenders. In the meanwhile, the Additional Secretary had sent a note to the Secretary (Projects) of the Irrigation Department on 7-4-1998 enclosing the note prepared by the Inspector General of Police, Intelligence. He indicated that the Chief Minister had desired that action may be taken to cancel the tenders and to recall the fresh tenders immediately. It is rather surprising as to how the Chief Minister could take such an important decision orally without properly considering the matter as per the business rules. The file does not disclose that the Chief Minister had taken the decision to cancel the tenders before 7-4-1998. Though there was a news on 5-12-1997 that the Chief Minister was understood to have directed cancellation of tenders, it was denied in the report of the Chief Engineer dated 23-1-1998. The work under package XII is a major work involving crores of rupees. If any major decisions are taken they are always borne out by the records. It is not known what prompted the Additional Secretary to circulate the note to the Secretary

(Irrigation) stating that the Chief Minister desired that tenders should be cancelled. The note submitted by the Inspector General of Police, Intelligence Department is neither investigation report nor an enquiry report. It did not contain even the signature of a Police Officer, who prepared the note. The authorities were made to give undue weight to the note prepared by the Intelligence Department which was circulated by the Additional Secretary to Chief Minister vide note dated 7-4-1998. Even otherwise, the note did not indicate at all that the corrupt practices had crept in nor any fraud has been played in the tender process system. The relevant extract has already made supra. The note never stated that corrupt practices had been resorted to by the Tenders and the petitioner and that fraud was played. It was stated in the note that the petitioner submitted the tenders 21.9% excess while it is the case of the authorities that the excess 21.11%. Thus, the note itself contained incorrect particulars. The note also states "it is learnt that OWK Reservoir work can be completed with Rs.50 Crores." It is rather surprising as to how this kind of findings could be given by the police authorities. Further, a suggestion was made to the Government to consider the cancellation of the present tender. From this it is seen that the entire note was prepared on pure imaginations. Processing tenders and the preparing estimates are purely technical in nature. The police cannot discharge either of the functions referred to above. More over no fraudulent practices could be culled out from the said note. The Additional Secretary in a note stated that tendering process was tampered with. This finding was also based on no material. Thus the note emanated from the Chief Minister's Office under the signature of Additional Secretary to the Chief Minister to the Secretary (Irrigation) did not contain the authenticated information received from the reliable sources. That is the reason why the note says that the report may not be cited in any official correspondence. Basing on the note circulated by the Additional Secretary to the Chief Minister a detailed note was prepared in the note file after referring to various events. Para 20 of the note (marked X) is extracted below :

"The Addl. Secretary to the Chief Minister in his note dated 7-4-1998, has furnished a brief note of the Inspector General of Police, Intelligence regarding the irregularities committed in the filing of Tenders for OWK Reservoir, and stated that the Chief Minister desires that action may be taken to cancel these tenders and to recall fresh tenders immediately, in view of the above tendering process was tampered."

The Officer immediately endorses as under:

"Under the circumstances reported at "X" above, we may cancel the tenders and addressed the World Bank to call tenders afresh."

But, however, the Principal Secretary in his note has cautioned that the cancellation of the lowest tender without valid reasons may lead to legal complications. The note recorded by him on 1-5-1998 is as follows :

"It is seen from the file that Lanco Constructions has offered the lowest bid with 22.11% excess over the estimates and many reputed firms, who have submitted their tenders, have quoted higher excess rates. Cancellation of lowest tender without valid reasons may lead to legal complications. This aspect may have to be considered. The general trend of tenders is on high side compared with the present lowest tender. Cancellation of the tender will also further delay the execution of work and we will lose the present working season. These aspects may have to be kept in view while taking a decision."

Again the lower Officer recorded the note on 28-5-1998 as follows:

"Number of allegations have been published in local news papers. The Intelligence Department, which has made an enquiry has made certain serious observations which reflect unfair manner in which the bids were tendered in. Certain corrupt practices have also been stated in the report as goodwill amounts were demanded by xxxxxxxx (name withheld for confidentiality purpose).

Considering the fact corrupt practices have been indulged in besides High premium especially on current SSR rates do not warrant any plausible justification. The COT has been of the opinion that the high premiums are unjustifiable. Under the circumstances, it would worthwhile to cancel the tender after seeking confirmation from the World Bank. This would also sent strong signals to all the concerned. For orders whether we may cancel the tender for package XII and put to re-tender the same after obtaining the concurrence of the World Bank."

In the said note, the Principal Secretary recorded his views on 25-6-1998 as follows :

"The preceding notes from p. 12 ante, are not relevant for the issue at consideration. While deciding such matters of finalisation of tenders, the lowest tender has to be accepted. Acceptance of tender of the contractor is contract. Under what circumstances the contractor has offered the terms and conditions of the contract is not for us to investigate. However, Government have a right to execute a particular work or not to execute it. If Irrigation Department thinks that this particular work is of secondary priority, tenders should not have been floated for this work. As the Department feels that this work can wait, concurrence of Bank may be obtained for cancellation now and retender later on ."

Thus, it is seen that the note circulated by the Additional Secretary has virtually influenced the authorities to process the case in tune with the alleged desire of the Chief Minister even though they were reluctant. The authorities did not apply their mind to the facts of the case, but only swayed away with observations made by the Additional Secretary to the Chief Minister. No decision could be taken without minutously considering the matter. But, in the instant case, since the alleged desire of the Chief Minister was expressed by the Additional Secretary even though it was not recorded by the Chief Minister in the file, the

entire process took on a wrong route. If the Chief Minister had really desired that the tender should be cancelled, he could have definitely made a note in the file or referred to the circumstances which lead to believe that the tenders should be cancelled. The file did not contain any such decision of the Chief Minister. As can be seen from the file, such a decision was taken by the Chief Minister only on 16-7-1998. Thus, in the instant case, the cart was put before the horse. There was no iota of evidence with regard to the alleged corrupt practices. With regard to the Syndicate already the Chief Minister had opined that there was no scope for such a Syndicate. As regards alleged excess bid, the Chief Engineer stated that if the new SS rates are applied the excess in fact would be 10%. Moreover the COT was never allowed to evaluate the tenders.

16. The authorities tried to take clue from the conditions of the contract namely that the authorities will reject a proposal for award if it determines that the bidder recommended for award has engaged in corrupt or fraudulent practices in competing for completing the contract in question. The corrupt and fraudulent practices have been defined under 37 of the General Conditions of the Contract which reads as follows :

"37. Corrupt or Fraudulent Practices

37.1 The Bank requires that Borrowers (including beneficiaries of bank loans), as well as Bidders/Suppliers/Contractors under bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, the Bank :

(a) defines for the purpose of this provision, the terms set forth below as follows :

(i) "corrupt practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in procurement process or in contract execution; and

(ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the borrower and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Borrower of the benefits of free and open competition."

These ingredients cannot be traced at all in the present case. The power vested with the Government is required to be exercised fairly and reasonably and it cannot be allowed to be abused. Thus the Government cannot take the shelter under Clause 37 of General Conditions.

17. Further, it is also seen that the World Bank was not fully convinced with the action of the Government. The Secretary to the Government by Letter dated 18-7-1998 addressed Senior Irrigation Engineer, World Bank for according concurrence for cancellation of the tenders in respect of Package XII. In the said letter, it is stated as follows :

"In the meanwhile it has come to the notice of the Government on credible information that certain undesirable and corrupt practices have been indulged by the bidders and others."

The said information is wholly incorrect and I may say rather misleading. The so called note of the Intelligence Department did not contain that undesirable and corrupt practices had been indulged in by the bidders and others. To this letter the World Bank recorded the following observations vide letter dated 30-7-1998:

"In this connection kindly note the Banks policy in such cases as under :

"Rejection of all bids, irrespective of value to be referred to the Bank for review and issue of no objection. Format for seeking no objection of Bank provided separately (copy attached).

Rejection of bids due to submission of collusive (unreasonably high) prices will attract provisions of para 1.15 of Procurement Guidelines. In such cases bidders must be requested to furnish breakdown of unit rates in terms of Clause 25.1 of ITB (NNCB works) providing justification for higher bid prices. If this justification, after review, is determined rational, contract should be awarded to the lowest evaluated responsive bidder. If not, these bidders must be declared as ineligible from bidding in the rebid for that contract as specified in Clause 4.8 of ITB (NCB Works)."

We look forward to receipt of your determination after obtaining breakdown of prices from bidders for our review."

The Government again wrote the Operations Advisor on 27-8-1998 to which the Bank again replied vide letter dated 3-9-1998, stating as follows :

"We have reviewed and regret we cannot offer our no objection to your proposal for rejection of all bids. Our comments are attached :

There is good competition and bid prices quoted are competitive, being within a range of 2.1% to 11% only over your 1997-98 rates.

Bids of Bidders who have indulged in corrupt or fraudulent practice as defined in para 1.15 of procurement guidelines should be rejected and action as stated in para 1.15(d) has to be initiated for which Bank should be furnished with complete details.

Other bids should be evaluated for responsiveness and the lowest evaluated responsive meeting with specified qualification criteria, considered for award.

The bids were opened on November 27, 1997 and you have approached Bank first time on August 27, 1998 i.e., after a delay of 9 months as against the bid validity of 3 months. We are concerned at the abnormal delay in evaluations contrary to all agreed procedures. (Please note that such delays will attract provisions of Para 1.15 of the Procurement Guidelines)."

A.D.O. letter was sent on 12-10-1998. The reference in the D.O. to the alleged

excess bid made by the Contractors was never a ground for taking a decision to cancel the tenders. Moreover, the appropriate authority is the COT, who did not at all record his findings on the tenders received in respect of the package XII. The very purpose of constituting the Commissionerate of Tenders is frustrated if the Government is allowed to process the tenders without any technical assistance. The alleged competitive nature in the bids was also not the ground which weighed with the Government at the time of taking decision to cancel the tenders. It was stated that 30 parties took the bid documents, only 7 bidders have filed the documents out of which one was rejected. All the balance six bids only three were found to be responsive and this would not constitute good competition. But, this information is contradictory to the note of the COT, who stated that only 13 bid documents were sold and the same was also reiterated in other correspondence. As can be seen from the note prepared by the COT, he has clearly stated that in response to bid call, 13 prospective bidders were purchased bid documents. While in the report of the Superintending Engineer and Chief Engineer it is stated that 30 tender schedules were purchased by the bidders and this cannot be said to be non-competitive. Even assuming so, there is no rule that the prospective bidders having taken the tender schedules should invariably file the tenders and if the tenders are not filed that cannot be construed either as Syndicate or less competitive. But, finally the World Bank on repeated persuasions by the Government had gave its concurrence very reluctantly by letter dated 7-12-1998 which is extracted below:

"Thank you for your letter of December 8, 1998.

We reluctantly agree to Government of Andhra Pradesh's proposal for bidding in this case. We are disappointed that no sanction will be taken by you against alleged fraudulent contractors. However, inform us the measures taken by you to obtain better pricing and/ or preclude a repeat of alleged corrupt practices in the rebidding process."

Thus, the World Bank also realised that the proposal of the Government in seeking to cancel the tenders was not convincing.

18. As already stated, the power of judicial review in administrative matters are to be directed in the process of taking decision and not the decision itself. If the decision is taken without there being any material or record or on the basis of irrelevant or extraneous matters it attracts the wrath of Article 14 of the Constitution of India and this Court is empowered to nullify such a decision. It is also not brought out in any of the correspondence that the petitioner had indulged in any corrupt practices. In the normal course of events he had submitted his bid, and the Government did not even allow the COT to apply its mind and withdrew the entire matter from him for the reasons best known to it. The report of the COT is also not available before taking a decision to cancel the tenders. The COT was never allowed to function and record his findings as contemplated in G.O. Ms. No.234 dated 3-6-1987. The note of Additional Secretary was made the basis to believe the authorities conclusively that certain

corrupt practices had crept which in fact were not borne out by any documents whatsoever including the note of the Intelligence Department. The administration of the Government must be fair and transparent and there should not be any scope for either suppression or suspicion. As already observed by me, the alleged note of Intelligence Department exceeded its normal limits and it contained incorrect information. The petitioner has no vested right to the award of work, but he has a right to claim that his bid should be considered objectively in a fair and proper atmosphere more especially when his bid was found to be lowest and recommended by the Superintending Engineer and Chief Engineer. It is not the subjective satisfaction of the Government, but objective consideration in the requirement under Article 14 of the Constitution of India. Thus, the Government in the guise of public interest cannot act arbitrarily and unreasonably. Viewed from any angle, the inescapable conclusions are that the process adopted by the Government in rejecting the bid of the petitioner cannot be said to be fair and reasonable. I accordingly hold that the impugned proceedings are illegal and arbitrary.

19. The next question is what is the further course of action to be taken. In the normal course, the bids are required to be evaluated by the technical cell of the COT and the Commissionerate will have to take a decision either approving or rejecting the tenders. Since, in the instant case, the Commissionerate was not permitted to exercise the power granted to it. Therefore, it is necessary that the matter should be dealt with by the Commissionerate in a proper atmosphere in accordance with the existing guidelines. Accordingly, the Government is directed to transmit the bids and connected documents in respect of Package XII to the 3rd respondent-Commissioner of Tenders. The Commissioner of Tenders shall evaluate the tenders received in respect of Package XII and take appropriate decision uninfluenced by the note of the Additional Secretary to Chief Minister and also the Intelligence Department including the opinions recorded by various officers. He shall come to a fair and honest conclusions basing on the material available keeping in view the reports sent by the Superintending Engineer and the Chief Engineer. The entire exercise shall be done within a period of four weeks from the date of receipt of a copy of this order.

20. The writ petition is accordingly allowed with the above directions. No costs.