

(2000) 03 AHC CK 0127
In the Allahabad High Court
Case No : C.M.W.P. No. 3414 of 2000

Nand Kishore Nautiyal

APPELLANT

Vs

Tehri Hydro Development Corporation and others

RESPONDENT

Date of Decision : 09-03-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 51A

Citation : (2000) 3 AWC 2024 : (2000) AWC 2024 : (2000) 2 UPLBEC 1230

Hon'ble Judges : V.K. Chaturvedi, J;O.P. Garg, J

Bench : Division Bench

Advocate : Dinesh Dwivedi, for the Appellant; S.C., R.S. Maurya, Shashi Nandan, S.N. Srivastava, R. Sasiprabhu, Saket Bahuguna, R.P. Goel, S.P. Gupta, V.K.S. Chaudhary and Manish Goel, for the Respondent

Final Decision : Disposed Of

Judgement

O.P. Garg and V.K. Chaturvedi, JJ.—Over the confluence of the rivers Bhagirathi and Bhilangana in Tehri district, a mega project named as Tehri Dam, which is supposed to be the biggest of its kind in Asia is being constructed. It is proposed to be 260.5 metres high earth and rock fill dam. Its width at the bottom will be 1125 metres and at the top it will be 20 meters. It is a multi-purpose project as it will generate and produce the electricity of around 2400 mega watt and the discharge water is to be used for irrigation purpose. The approximate expenditure on this project is likely to be Rs. 5,000 crores. The implementation of this gigantic power project has been entrusted to Tehri Hydro Development Corporation Ltd. a joint venture of Government of India and Government of U. P. respondent No. 1 (hereinafter referred to as "THDC"). It issued notice inviting scaled bids under international competitive bidding from the prequalified bidders for the work of design, manufacture, supply, transportation, erection, testing and commissioning of over 420 KV SF 6 Gas Insulated Switch Gear 420 KV CGI Bus Duct for first Phase (1.000 MW.) The cost of this work is said to be Rs. 200 crores approximately. Obviously, since G.I. (Gas Insulated) Switch Gear and G.I.

Bus Duct are highly technical and specialized items, tailor-made against the specific technical requirements of the tender, certain pre-qualification requirements were fixed for the bidders to qualify for submission of bid for the desired equipment. The interested parties were invited to submit proof of their fulfilment of the pre-qualification criteria so fixed. The information submitted by the parties was verified and evaluated and, thereafter all those parties who fulfilled the pre-qualification criteria were short listed and M/s. Asia Brown Bover High Voltage Tech Ltd. respondent No. 6 (for short "M/s. A.B.B.") Switzerland. M/s. G.E.C. Alstom, France (for short "M/s. Alstom")-respondent No. 5, M/s. Siemens, Germany (for short M/s. Siemens) respondent No. 7, M/s. Mitsubishi Corporation Japan. M/s. Mitsui and Company Ltd.. Japan and M/s. Sumitomo Corporation, Japan were approved by the Board of Directors of THDC. The bidders were required to submit their bids in two parts. Part 1 of the bid was to contain the techno commercial aspect and the financial package details without the actual numerical data while part II pertained to the price bid and also the numerical details of the financing package. Out of the six pre-qualified parties, who had got the tender documents issued, the bids were submitted by only three pre-qualified parties. Bids of the first part techno commercial aspect were opened and M/s. Alstom Ltd., M/s. A.B.B. and M/s. Siemens-respondent Nos. 5, 6 and 7 respectively became successful and qualified themselves to bid for part II, i.e., price bid. The price bids submitted by them on 20th November, 1998 were valid upto 19.5.1999, i.e., for 180 days. THDC could not finalise the contract after opening the bids and on its request, the validity period of the price bids came to be extended from time to time, now upto the period 31.3.2000.

2. On 6.12.1999, M/s. A.B.B. addressed a letter to THDC intimating that the prices have gone down on account of subsequent development and it may be possible to substantially reduce/lower the prices as offered in November, 1998. To be precise and accurate, the contents of the letter of M/s. A.B.B. are reproduced as below (Annexure-10 to the counter-affidavit of Dhirup Chowdhary on behalf of M/s. A.B.B.).

"The price bids for the subject tender were submitted in November, 1998, i.e., over one year ago and they are to be opened. As previously conveyed to your good selves there have been changes and developments that make it possible for us to offer substantially lower prices today as compared to an year back due to the following reasons :

The technical and commercial clarification process resulted in price advantage to client.

At the time of submission of the price bids the risk perception about India was not favourable due to the aftermath of the nuclear tests. Over the past one year, however, the risk perception has changed dramatically in India's favour. World over the GIS prices have gone down steeply in the last one year period for a variety of reasons. We want this advantage of lower price passed on to our customers.

We once again confirm our intention to submit a revised price and financing offer on receiving your request which will result in the following :

This will be beneficial to THDC in terms of substantially lower prices. Our new price will have the same price adjustment basis as the prices submitted in November, 1998. We can submit the new price and financing offer in 2 weeks from your request."

Similarly, on 9.12.1999, M/s. Alstom wrote to THDC as follows (Annexure-II to the counter-affidavit of R.D. Pandey on behalf of M/s. Alstom).

"It is also to be mentioned that we had quoted for this equipment more than a year back and at that point of time, since India had conducted the nuclear explosion, the financial Institutions, world over, were reluctant to finance this Project in India. However, the French Government was more lenient and did allow us to quote for your esteemed project and also allowed for the financing of the equipment.

In view of the changed scenario, the international market have a changed outlook and are more keen to invest in India. As a result the prices of the equipment for which we had quoted to you more than a year back have been substantially reduced that would benefit THDC and the Government of India tremendously.

Since the reduction in price is substantial and cannot be covered by any price variation formula etc., we are, Therefore, very keen to submit our revised price bid and would request you to kindly let us have a date by which we can submit the revised price bid."

M/s. Siemens, respondent No. 7 resisted the move of M/s. Alstom and M/s. A.B.B. pointing out that unnecessary confusion is being created by them in order to cause delay in taking the decision in the matter. What Siemens wrote to THDC through their letter dated 15th December, 1999, runs as follows :

"You may kindly appreciate that as per the provision of the specification clause 2.18.2 (Section III, Instructions to bidders, pages 1-15) modification on the bid is not permitted. Further, as per provision of Government of India/CVC guidelines, re-bid as being suggested by other bidders at this stage, will be a violation of established contract norms. This further raises certain questions as to how does one know that the re-bid will lead to better prices and advantages to the Corporation unless the original bids are opened and the position is known. It is very apparent from the tactics of the other bidders that their intent at this stage is only to improve their own position or change their position.

"We are sure that you will appreciate our concern and not allow such moves and intentions which may harm the credentials of such a prestigious Corporation like yours and be against the norms of International Competitive Bidding besides denting credibility of transparency."

It appears that the suggestion made by M/s. Alstom and M/s. A.B.B. did not find favour with THDC and steps were taken to open the original price bids on 24th January, 2000.

3. The present Public Interest Litigation (for short "PIL") under Article 226 of the Constitution of India has come to be initiated by one Nand Kishore Nautiyal, claiming himself to be a Journalist and a social activist, to espouse and protect the cause of public interest. He is alleged to have received startling information with regard to the rampant corruption amongst high officials of the THDC inasmuch as, on account of repeated extensions of the validity of the price bids and undue delay caused by THDC in opening the bids, the original bids have lost relevance and it has become possible to lower the price of the said bids due to drastic global changes in the market all over the world and the liberal economic policy pursued by India. According to him, the lowering of prices has been made possible due to lifting of the sanctions, which were earlier imposed on India by the world community due to Pokhran atomic blast. The case of the petitioner, in short, is that there is nothing to bar THDC from accepting the lower bids which are in keeping with present market trends and conditions and if it is done, there may be a saving of about 40 crores which otherwise would be a colossal loss to the nation, if the contract is finalised on the basis of the original bids submitted in November, 1998. The following reliefs have been claimed by the petitioner :

(a) issue a writ, direction or order in the nature of mandamus or any other appropriate writ like order or direction calling upon the respondent No. 1 THDC to place the entire records pertaining to the Rs. 200 crore transmission line tender before this Hon"ble Court.

(b) Issue a writ, direction or order in the nature of prohibition or any other appropriate writ, like order or direction restraining the respondent No. 1 THDC from opening financial bids submitted by the respondent Nos. 5 to 7 (wrongly mentioned 6 to 8).

(c) issue a writ, direction or order in the nature of mandamus or any other appropriate writ like order or direction directing the respondent No. 1 THDC to permit the prospective bidders, respondent Nos. 5 to 7 (wrongly mentioned 6 to 8) to modify their financial bids for awarding of the proposed contract.

(d) issue a writ, direction or order in the nature of certiorari quashing and cancelling the tenders received by the respondent No. 2 THDC and call for the fresh bids.

(e) issue a writ, direction or order which may be necessary to meet the ends of justice and public interest."

4. By an interim order passed by this Court on 24th January, 2000, the opening of the bids was postponed.

5. Counter and rejoinder-affidavits have been filed. THDC has taken the stand that in view of various clauses contained in the bidding document. Annexure-1 to

the writ petition, it is not possible to entertain the request for modification of the bids and in any case, the new price bids may be considered if all the three bidders agree and that on analysis of the comparative merits of the bids even at the stage before opening of the bids is not liable to be examined by the Court. The respondent Nos. 5 and 6 have maintained that on account of subsequent developments, they are justified in asking for the lowering down of the bid prices which were quoted more than a year back and this course is permissible in view of the various clauses of the bidding document, which governs the rights of the parties. The respondent No. 7 has taken a stand that the original price bids cannot be varied and a decision has to be taken by THDC on the basis of the bids submitted in November 1998. The plea that the petitioner has absolutely no locus standi to maintain the present writ petition has also been taken.

6. Heard Sri Dinesh Dwivedi, learned counsel for the petitioner, Sri V.K.S. Chaudhary, learned senior advocate assisted by Sri R.S. Maurya, appearing on behalf of the THDC, its Managing Director and General Manager respondent Nos. 1 to 3, Sri Sashi Nandan for respondent No. 5, Sri Manish Goel, for respondent No. 6 and Sri S.P. Gupta, learned senior advocate assisted by Sri R. Sasiprabhu for respondent No. 7 at considerable length.

7. Before viewing the merits of the case, we would do better to clear the cobwebs with regard to the maintainability of the petition. Sri S. P. Gupta, senior advocate for M/s. Siemens with whom Sri V.K.S. Choudhary for THDC appeared to agree, with all vehemence and persistence, submitted that the petitioner does not have any focus standi in the matter and since the petition is liable to be thrown out even at the threshold. It would obviate the consideration of the case on merits. It was maintained that the petitioner has come forward to abuse the process of the Court by espousing and brokering the cause of M/s. Alstom and M/s. A.B.B. who otherwise would have run the risk of forfeiture of the earnest money deposited by them under the terms and conditions of the contract if they sought the modification of the price bids.

8. The above forceful and seemingly attractive submissions may be analysed with reference to the basic features and process of evolution and profound transformation of the developing and growing PIL. Though the seeds of the concept of PIL were initially sown in India (without assigning the terminology) in the case of, *The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai and Others*, , the expression "Public Interest Litigation" came to be used for the first time in *Fertilizer Corporation Kamgar Union v. Union of India* AIR 1981 SC 344 . This branch of law on gaining momentum in course of time burgeoned more and more expanding its branches in the cosmos of PIL and took its root firmly in the Indian Judiciary and fully blossomed with fragrant smell in *S.P. Gupta Vs. President of India and Others*, . Truly speaking, it is on the edifice of S.P. Gupta's case (supra) that the entire superstructure of the PIL now rests.

9. Lexically the expression "PIL" means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a

class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected, Janata Dal Vs. H.S. Chowdhary and Others, . In Sheela Barse Vs. Union of India (UOI) and Others, . Hon"ble Supreme Court defined frontiers of PIL in the following terms :

"In a public interest litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights, while in the ordinary conventional adjudications the party structure is merely bipolar and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions. The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social order and a welfare-State. Effective solutions to the problems peculiar to this transformation are not available in the traditional judicial system. The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation and the rights, constitutional or statutory. or sizeable segments of the society, which owing to poverty, ignorance social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these group-rights and interests. In order that these public causes are brought before the Courts the procedural techniques judicially innovated specially for the public interest action recognises the concomitant need to lower the locus standi thresholds so as to enable public minded citizens of social action groups to act as conduits between these classes of persons inherence (sic) and the forum for the assertion and enforcement of their rights. The dispute is not comparable to one between private parties with the result there is no recognition of the status of a Dominus litis for any individual or group of individuals to determine the course or destination of the proceedings, except to the extent recognised and permitted by the Court."

10. The expression "Public Interest" has been succinctly defined in "Black's Law Dictionary (Sixth Edition)" as follows :

"Public Interest--Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national Government.....

Similarly, in "Shrouds Judicial Dictionary, Volume 4 (IVth edition) Public Interest" is defined thus :

"Public interest (i) a matter of public or general interest does not mean that

which is interesting as gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

More importantly, the Court is not merely a passive, disinterested or on looker, but has a more dynamic and positive role with the responsibility for the organization of the proceedings, moulding of the relief and this is important also supervising the implementation thereof.

11. Another striking feature of PIL, which flows from the decision in *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, , is that in a PIL the petitioner and the State are not supposed to be pitted against each other, there is no question of one party claiming or asking for relief against the other and the Court deciding between them. The PIL is not adversarial in nature but is one of cooperation and co-ordination between the petitioner and the State. The state or public authority and the Court act in cohesion and collaboration with one another in achieving the constitutional goal and to accentuate the public good. In such a situation the concept of cause of action evolved in the background of private law and adversary procedure is out of significance.

12. Sri S.P. Gupta appeared to be of the view that unless the petitioner is an aggrieved person of the nature as elaborated in *S.P. Gupta's case (supra)*, the extraordinary jurisdiction and the novel strategy adopted by the Court in the form of PIL, cannot be invoked. A pointed reference was made to the observations made in the said decision, particularly in paragraphs 17, 18, 22 and 24. Para 17 of the report in *S.P. Gupta's case (supra)*, reads as follows :

"17. It may, therefore, now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of person is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226. . ."

In para 18, the Apex Court observed :

". . . But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the state of any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury. It would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it.

The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore, been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. . . ."

In para 22 of the report, it was further ruled :

"22. We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objectives. ."

In para 24, it was emphasized that :

"..... cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept, such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want."

On the strength of the above observations, Sri S.P. Gupta urged that the petitioner is not, in any manner, aggrieved person as he has failed to reflect any injury to his constitutional or statutory rights by any action or steps of THDC. Sri Gupta further urged that even if it be taken that the petitioner is an interested person, the PIL at his instance cannot be entertained if he has shown to have acted for personal gain.

13. The question of locus standi implies that the petitioner should be pro bono publico acting bona fide and not for self aggrandizement. A note of caution has been sounded by the Apex Court in S.P. Gupta's case (supra) :

"23. But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique

consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that political pressure groups who not achieve their aims through the administrative process and we might add, through the political process, may try to use the Courts to further their aims. These are some of the dangers in public interest litigation which the Court has to be careful to avoid."

14. There is a sharp distinction between the expression "locus standi" and justiciability. These two connotations have different contents and meanings. It is not every default on the part of a State or a public authority that is justiciable. Nevertheless, in defining the rule of locus standi in PIL, no "rigid litmus test" can be applied since the broad contours of PIL are still developing apace seemingly with divergent views on several aspects of the concept of this newly developed law and discovered jurisdiction leading to a rapid transformation of judicial activism with a far-reaching change both in the nature and form of the judicial process. In course of time, Supreme Court has widely enlarged the scope of PIL by relaxing and liberalising the rule of standing by treating letters of petitions sent by any person or association complaining violation of any fundamental rights and also entertaining writ petitions filed by public-spirited and policy-oriented activist persons or journalists or of any organisation rejecting serious challenges made with regard to the maintainability of such petitions and rendered many virtuosic pronouncements and issued manifold directions to the Central and the State Governments, all local and other authorities, within the territory of India or under the control of the Government of India for the betterment of the public at large in many fields in conformity with constitutional prescriptions of what constitutes the good life in a socially just democracy. The concept focus standi however, has been clarified that the petitioner who acts in a bona fide manner having sufficient interest in the proceeding of PIL and if this condition is satisfied he will undoubtedly have locus standi and can approach the Court for the enforcement of the fundamental rights, statutory duties and to promote the public interest. The Apex Court, however, has cautioned that a person who is motivated by personal gain or private profit or political or any oblique consideration has no locus standi. Similarly, a vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievance, it has been held, deserves rejection at the threshold. In *Janta Dal's case* (supra), the Supreme Court ordained that the Court should not allow its process to be abused by mere busy bodies, meddlesome, interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation of for glare of publicity. The observations, however, cannot be construed to mean that there is any retreating or recoiling from the earlier views expressed by the Supreme Court about the philosophy of public interest litigation. In *Janta Dal's case* (supra), one H.S. Chowdhary, an advocate, claiming himself to be General Secretary of an organization named as Rashtriya

Jan Parishad, which according to him was devoted to uphold the rule of law, fight against the injustice in any field and abide by the Constitution and respect ideals and institutions" filed a Criminal Misc. Case before the Supreme Court under Article 51A of the Constitution of India. The grounds taken in the petition were that in order to maintain the dignity, prestige and the fair name of the country and the ideals enshrined in the Constitution no rogatory letter be issued on the formal request of the CBI unless the allegations against named persons are established to satisfaction of the Apex Court, that no request for rogatory or freezing bank account be made to Swiss Government unless the concerned persons are noticed and heard on the subject, that the petitioner may be permitted to join during inquiry. The Apex Court took the view that not even a single ray of characteristic of public interest litigation is visibly seen in the petition of H.S. Chowdhary. advocate. A finding was recorded that he appeared to be very much concerned with the personal and private interest of the accused in the criminal case and it cannot be said that the litigation is in the nature of PIL to vindicate and effectuate the public interest. It was, in these circumstances, held by the Apex Court that Sri Chowdhary has no locus standi to file PIL as the petition under Article 51A of the Constitution cannot come within the true meaning and scope of PIL. Also see Rajnit Prasad Vs. Union of India (UOI) and Others, , in which a practicing advocate was held to have no locus standi or interest to invoke the jurisdiction of the Court in respect of departmental proceedings against an IPS officer initiated by the Government on the ground that he (the petitioner) was not even remotely connected with those proceedings and public interest in general importance is not involved in disciplinary proceedings.

15. All attempts to misuse the PIL which is sometimes fraught with danger, have to be thwarted. Courts have to be cautious and circumspect in entertaining PIL--reason being that instances of vindicating personal cause or feeding fat the grudge as also for personal gain or to ventilate the cause of others having oblique motives, may be multiplied. A Constitution Bench of the Apex Court in Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others, , adopted a very cautious approach by observing that those persons who are merely busy body or meddlesome interloper masquerade as crusaders for justice, they pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the judicial process from improper motives. The Court in such cases should do well to reject the application of all such busy bodies at the threshold. In Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others, , the Apex Court took the view that the Court should not take cognizance in such matters merely because of its attractive nature. The petitioner must inspire confidence of the Court and must be above suspicion. Similarly. In Dr. B.K. Subbarao v. K. Parasoran 1996 (7) JT 265 , the Supreme Court observed that no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice

should not be misused as a licence to file misconceived and frivolous petitions. Now it is well-settled law that when a person approaches a Court of equity in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, he should approach the Court not only with clean hands but with clean mind, clean heart and with clean objectives. *The Ramjas Foundation and Others Vs. Union of India and Others*,

16. The concept of focus standi as was chained in certain strait-Jacket formulae in earlier cases has come to be relaxed and new vistas and channels to vindicate the grievance have been opened up. There are spate of decisions in which journalists, advocates, bureaucrats and the taxpayers have been permitted to bring to the notice of the Court the acts of omission and commission or misfeasance or nonfeasance on the part of the State or other public authorities for suitable directions. *N. Parthasharthy a. Controller of Capital. JT 1991 (2) 218.* (PIL by lawyers challenging the commercial transactions of public institutions), *Harpal Singh Chauhan v. State of V. P. JT 1993 14) SC 1* . (Judicial review of appointment of Government counsel at the instance of Advocates), *Dr. J.C. Almeida, IAS (Retd.) Vs. State of Goa and Another, .* (PIL by a retired member of I.A.S. with regard to power-purchase agreements), *J. Jayalalita v. Government of Tamil Nadu and others. (1991) 1 SCC 53* . (PIL on behalf of taxpayers to prevent misuse or abuse or improper use of any public property-stadium by anyone) ; *The West Bengal Board of Secondary Education and Others Vs. Sm. Basana Rani Ghosh and Others, .* (guardians of students challenged the revision of the syllabus for History prescribed for VIII Class), *Ram Das Srinivas Naik and others v. Union of India. AIR 1995 Bom 325, (Enron's case).* *Common Cause a Registered Society v. Union of India and others (1996) 6 SCC 530* and *Second Common Cause Case v. Union of India and others. JT 1999 (5) SC 237* (in which the concept of public accountability, transparency and exercise of jurisdiction in just, fair and non-arbitrary manner by a registered society came to be canvassed) are such cases in which the genera] interest of the society has received predominance, unmindful of the concern of the petitioner. In a recent decision of the Apex Court in *Common Cause, A Registered Society Vs. Union of India and Others*, Advocates practicing in various Courts situate in Tamil Nadu were permitted to move petitions for cancellation of the bail granted to certain persons. In the gory episode, which took place in June, 1997. In a village of Madurai district, six persons belonging to Scheduled Caste community were done to death. The police arrested 34 persons in connection with the said massacre. In the months of March and April, 1998, Madras High Court enlarged many of them, totalling to 30, on bail a brother of one of the deceased along with others made a representation to the Chief Minister of Tamil Nadu. The Government did not favourably respond to it. It was in such a situation that R. Rathinam-appellant before the Apex Court and his 74 colleagues at the Bar filed petitions before the Chief Justice, High Court for cancellation of bail. The matter was referred to the Division Bench by the Chief Justice of the High Court. The Division Bench closed the suo motu proceedings by observing that "if such representations are

entertained then there would be no end and the High Court will be flooded with such petitions and the genuine petitioners and reliefs therein will be delayed and further judicial system itself will fail." The matter was carried to the Apex Court which allowing the appeal, observed that if so, any member of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power suo motu. It was further observed that "the Division Bench has gone wrong in holding that the petition submitted by the concerned advocates was not maintainable at all. Refusing to exercise the suo motu powers contemplated in Section 439 (2) cannot be on such a fallacious premise. The Division Bench ought to have considered the petitions on merits." Locus standi of the advocates to move the Court in a matter concerning the public interest was recognised.

17. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , the Apex Court adopted a cautious approach to entertain and view the PIL with reference to contractual matters. The caution reads as :

"When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tender the Court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The Court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained, the Court must be careful to weigh conflicting public interests before intervening. Intervention by the Court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any retendering is prescribed, cost of the project can escalate substantially. What is more important is that ultimately the public would have to pay a much higher price in the form of delay in commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electricity supply and the consequent obstruction in industrial development. If the project is for the construction of a road or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial setback to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate consideration and not arbitrarily, there is no reason why the Court should entertain a petition under Article 226."

18. In the backdrop of the expanded frontiers of the expression locus standi and the fact that the journalists, advocates and other elites and social activists have been permitted to raise the common cause in the public interest, now the point which really arises for consideration is whether or not Nand Kishore Nautiyal, the present petitioner has the locus standi to maintain the present petition. As would

be evident from the various averments made in the writ petition. Nand Kishore Nautiyal, a resident of a village in Pauri Garhwal (U. P.) claims himself to be a renowned journalist of national repute and is the printer, publisher and editor of Nutan Sabera, a Hindi Weekly being printed from Bombay and circulated all over India having its bureau all over the country including the districts of Tehri, Dehradun and Pauri, that he is also a social activist and has been associated with the movement of a separate State of Uttarakhand and has been raising the causes of public interest. He has earlier filed a public interest petition before this Court against the Union of India and the State of U. P. to vindicate the grievances of victims of the atrocities committed by the police and other district authorities at Muzaffarnagar on their pursuing Uttarakhand's cause. He has also been the editor of Hindi Blitz which was published by R K. Karanjia, an editor of name and fame from Bombay and is said to be associated with number of public institutions and is a member of Uttarakhand Journalist Forum. The antecedents of Nand Kishore Nautiyal clearly indicate that he is a public spirited person--a journalist of long standing and repute having past record of service to the society, in general, and to the people of Uttarakhand, in particular. These averments have found no denial. He cannot be condemned as a man of straw. The bald and wild allegation that he is acting as a broker to espouse the cause of respondent Nos. 5 and 6 which is supported by no evidence is nothing but adding an insult to injury. There is nothing on record to indicate that Nand Kishore Nautiyal has, in any manner, connived or colluded with respondent Nos. 5 and 6 to espouse their cause for personal gain. The analysis of the various rival contentions of the parties and the facts which are yet to be discussed would make it clear that it is not a case in the nature of a blind shot fired in the dark without even knowing whether there is a prey at all. There appears to be no flight of frenzy and fancy on the part of the petitioner. The controversy highlighted in the petition and as would be discussed presently, is well within the realm of reality and cannot be said to be unfounded. The effort made by the petitioner is beyond doubt and the petitioner has no axe to grind in the matter and is hardly interested as to who gets the contract or at what price. His simple anxiety as a responsible citizen appears to be that by lowering the price bids, which is necessitated on account of global market conditions, substantial public money may be saved from being pocketed by a private party and the saved money may usefully be utilised for the common good. Imbued by this pious and bona fide intention, the petitioner, a journalist has filed the present petition in the larger public interest. This fact cannot be disputed that a PIL is maintainable at the instance of a person who genuinely and honestly brings forth the facts for scrutiny before the Court that by arbitrary, unfair and unjust action of the State, its authorities and instrumentalities, public interest is going to be seriously jeopardized. There is nothing to inhibit the petitioner to move the Court, if he can make out a case that revision of price offers is in the large public interest.

19. In the conspectus of the above detailed discussion, the locus standi of Nand Kishore Nautiyal to maintain the present petition, in our view, is certainly beyond

the pale of controversy. It does not convince us a wee-bit that the petitioner is an alter ego of M/s. Alstom or M/s. A.B.B.

20. The controversy about locus standi may be viewed with yet another angle. Even if it may be assumed that Nand Kishore Nautiyal does not have a right to maintain the present petition, the fact remains that he has raised a question of public interest and now the Court is in seisin of the matter. The Court is bound to promote the public interest if it is likely to be thwarted on account of failure of the Government or its instrumentality to discharge its public duty. It is for this reason that it has been held that once a PIL has been initiated and the core facts have been brought to the notice of the Court, the petitioner cannot of his volition withdraw the petition as the Court being the sentinel and guardian of the public interest has to effectuate the same. The above observation finds support in the case of S.P. Anand Vs. H.D. Deve Gowda and others, , in which it was held that the petitioner is not entitled to withdraw his petition at his sweet will unless the Court sees reasons to permit withdrawal. This safety valve has been put with a view to guard against the possibilities of such litigants settling the matters out of the Court to their advantage and then seeking withdrawal of the case.

21. The Court has to tightly hold the thread till the controversy is brought to a logical end to fructify the public good. On this aspect of the matter, the Apex Court focussed the attention in Chaitanya Kumar and Others Vs. State of Karnataka and Others, . In that case, agreeing with the argument of Sri Venugopal that while institution of PIL is a good thing in itself, those professing to be public spirited citizens cannot be encouraged to indulge in wild and reckless allegations besmearing the character of others and so the Court must refuse to act at the instance of pseudo-public spirited citizens, the Court observed that :

"..... The Court cannot close its eyes and persuade itself to uphold publicly mischievous executive actions, which have been so exposed, when arbitrariness and perversion are writ large and brought out clearly, the Court cannot shirk its duty and refuse its writ. Advancement of the public interest and avoidance of public mischief are the paramount considerations. As always, the Court is concerned with the balancing of interest and we are satisfied that in the present case, that the High Court had little option but to act as it did and it would have failed in its duty had it acted otherwise and refused to issue a writ on the ground that allegations of personal bias against Chief Minister was false. Had that been done, the public mischief perpetrated, would have been perpetuated. That is not what Courts are for."

In another case, Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, , a public interest petition was filed disclosing a lamentable state of affairs in one of the premier Universities of India. The Apex Court dealing with the question that the petitioner might have moved the same in his private interest, observed that the enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. It further observed that:

"Such state of affairs having been brought to the notice of the Court, it was the duty of the Court to the public that the truth and the veracity of the allegations made be enquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public interest litigation and such an enquiry cannot be avoided if it is necessary and essential for the administration of justice."

The Court took note of the fact that it has to be borne in mind that such things are happening in public life which were never even anticipated before and there are several glaring instances of misuse of power by men in authority and position. This is phenomenon of which Court is bound to take judicial notice and in the context of this all pervading atmosphere, the Court should not shirk in commanding an authority to perform its public duty. It is an indubitable legal position that writ of mandamus shall lie if there is a breach of public duty. The PIL with its expanded wings has profoundly influenced judicial ethos. It provides an opportunity of judicial review of the various facets of actions of the State including the contractual powers and of opacity in governmental transactions. We have no hesitation in recording a firm finding that the petitioner has bona fide raised a controversy of larger public interest having wide ramification. The petitioner may not be having any interest in the controversy or may not be remotely connected with it but his effort has to be commended rather than condemned in bringing certain glaring facts to the notice of the Court for its scrutiny and to pass appropriate orders if the THDC has failed to perform its public duty. In the matter of public interest, the traditional limitations of locus standi are vanishing and the sphere of judicial scrutiny is expanding. The State activities too are becoming fast pervasive as the State has descended into commercial arena as the giant field of public utilities are growing up. The stake of public exchequer is also large justifying social audit, judicial control and review by opening of the public gaze. In such circumstances the THDC, or for that matter, Siemens should not be undue emphatic and insistent about the person who has brought the cause before the Court. How it matters, if ultimately the public interest is going to be subserved. We are not inclined to agree with the learned counsel for the THDC and Siemens that the petition should be dismissed at the threshold as being not maintainable.

22. Having cleared the decks about the maintainability of the petition, now it is the time to consider the merits of the case. From the analysis of the above facts, it would be apparent that the dispute relates to the grant of a contract pursuant to the terms and conditions contained in the bidding document, a copy of which is Annexure-1 to the writ petition, after taking into consideration the price tenders submitted by Alstom, A.B.B. and Siemens and subsequent reduction of the prices due to the changed market conditions. In the sphere of contractual relations, the powers of the Court, known as judicial review, under Article 226 of the Constitution of India, have now been crystallized by a catena of decisions of the Apex Court, which may be summarised by stating that in the matter of

entering into a contract, the State does not stand on the same footing as a private person, who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover, a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently, the discretion in the matter of selection of the person for award of contract has to be exercised keeping in view the public interest involved in such selection. Therefore, while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational, or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere--See, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, ; *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, : *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, : *Fasih Chaudhary v. Director General Doordarshan* (1989) SCC 89 ; *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*, ; *Tata Cellular v. Union of India* (1994) 6 SCC 651 ; *Union of India and others Vs. M/s. Graphic Industries Co. and others*, ; *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, ; *Life Insurance Corporation of India and others v. Consumer Education Research Centre and others* JT 1995 41 SC 366 ; *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, : *Raunak International Ltd. v. IVR Construction Ltd. (supra) and Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*,

23. In the case of *Tata Cellular (supra)*, the Apex Court has examined the scope of judicial review in the field of exercise of contractual powers by State, its instrumentalities, public authorities or those whose acts bear insignia of public elements and after noticing current mood of judicial restraint in England, laid down 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 facets 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.

"Wednesbury principle of reasonableness" to which a reference has been made by the Apex Court in *Tata Cellular case* (supra), is a decision in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*. (1948) 1 KB 223, wherein it was held that a decision of 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 the relevant law and acting reasonably could have reached. It must follow as necessary corollary "that the Government cannot act in a manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and contrary the public interest.

24. One of the basic principles laid down by the Apex Court for the guidance of the Courts in arriving its determination on the question of reasonableness of the State action is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting any reasonableness or is not informed with public interest. This burden is heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest. But, where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the Government's action. This is one of the important functions of the Court and also one of the most essentials for preservation of rule of law. While making the above observations, the Apex Court in *M/s. Kasturi Lal's case* (supra) further went on to say that it may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest is different from that of mala fide though it may in a given case furnish evidence of mala fide.

25. The neat legal position is that where any governmental action fails to satisfy the test of reasonableness and a public interest, and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it

should be liable to be struck down as invalid and it must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and a contrary to the public interest. The State and its instrumentalities are enjoined to act in a manner which is fair, just, and equitable and after taking relatively all the options into consideration and in a manner, i.e., reasonable, relevant and germane to effectuate the purpose of public good and general public interest, it must not take any irrelevant or irrational factors into consideration or act arbitrarily in its decisions. The private parties are concerned only with their personal interest but the public authorities are expected to act for public good and in public interest. The impact of every State action is to be gauged with reference to public interest. Necessity of acting in public good and public interest, vis-a-vis., the duty of the State came to be considered in the case of *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, . *Food Corporation of India v. Kamdhenu Cattle Feed Industries*. 1993 (1) SCC 7 , *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , *Union of India v. M/s. Graphic Industries Company* (1994) SCC 398, and a host of other decisions.

26. A short and swift reference may be made to the submission of the learned counsel for the THDC and Siemens that the Court should be slow enough in interfering with the contractual obligations between the parties and must keep in mind cost escalation of the project as a result of delay that would be caused by its interference. In support of this submission, reference was made to the two decisions of the Apex Court in *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, and *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, . In the case of *Raunak International (supra)*, the Apex Court reminded that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work, which is as much in public interest as a low price. The Hon''ble Supreme Court further cautioned that the Court should not substitute its own decision for the decision of an expert evaluation committee. There can be no quarrel about the proposition of law laid down in the aforesaid decision. The test is whether wrong complained of is of such a nature as to require intervention of the Court where the decision making process has been structured and the tender conditions set out the requirements the Court is entitled to examine whether these requirements have been considered. The Court would be well within its province to set right the

decision making process though it would not substitute its own opinion for that of the experts.

27. In the instant case, the competency, expertise capability and the resources of the tenderers, i.e., Alstom, A.B.B. and Siemens is not in dispute. After intensive scrutiny, they have been found to be standing at par in all respects as they all have successfully withstood the test of techno commercial aspect of the contract. All the three tenderers are foreign companies of repute and there is no doubt about their credentials. The technical capllen and competence of any of the three bidders to undertake the work is not in question. Therefore, the various observations made in Raunak International and Asia Foundation and Construction (supra), are not attracted to facts of the present case.

28. The sole question which arises for consideration by this Court is whether THDC should take the advantage of the alleged fall of price and should it shut its eyes to the global market conditions which has been responsible for drastically lowering down the prices. An ancillary question in this context would be whether the bidding document inhibits the THDC to take into consideration the subsequent market conditions, which have resulted slashing the prices. The stand of the THDC on the point is not very clear. It is lukewarm. The THDC, on the one hand, has asserted that the bidding document does not permit acceptance of the reduced prices after the submission of the tenders and on the other hand. It has taken the stand that if all the bidders agree, it is ready to consider the newly tendered lower prices. From the correspondence referred to above, it is clear that the Alstom and A.B.B. have offered to reduce their price bids but this attempt on their part has been resisted by Siemens. If the THDC is prepared to accept the tenders at the reduced price on account of the changed global market condition, question of agreement or disagreement on the part of Siemens does not arise for one simple reason that before the offers are opened and contract is finalized. Siemens has no right to object even though ultimately it may be found that its original price bid was the lowest, in *Trilochan Mishra, etc. Vs. State of Orissa and Others*, *State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others*, and *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, , it was held that the Government is under no obligation to accept the highest bid and that no right accrues to the bidder merely because his bid happens to be the highest. Similarly, in the case of *Asia Foundation and Construction (supra)* it was held that lowest bidder may not claim an enforceable right to get the contract though ordinarily, the concerned authorities should accept the lowest bid. Therefore, at this stage, Siemens has no right to oppose the reduction of the rates if they are offered by Alstom and A.B.B.

29. Now let us examine the various terms and conditions of the bidding document with a view to ascertain whether THDC is forbidden or entitled to take into consideration, in public interest the subsequent market developments and the bids at prices lower than the original ones. Clause 2.18 of the bidding document deals with the period of validity of the bid. Clause 2.18 provides that

the bids shall remain valid for 180 days from the deadline for opening of bids pursuant to clause 2.24.0. A bid valid for a shorter period may run risk of rejection by the owner as non-responsive. Clause 2.18.2 provides that the owner may solicit the bidder's consent to an extension of the period of validity. The request and the responses thereto shall be made in writing (or by cable or fax to be confirmed in writing within 15 days). The earnest money deposit provided under clause 2.17.0 shall also be suitably extended. The bidder, however, will not be permitted to modify his bid. Clause 2.23 deals with modification and withdrawal of bids. Clause 2.23.1 provides that no bid may be modified subsequent to the deadline for submission of the bids. Clause 2.23.2 makes a provision that the bidder may modify or withdraw its bids after the bid submission, provided that written notice of the modification including substitution or withdrawal of the bids is received by the owner prior to the deadline prescribed for submission of bids. Clause 2.23.4 lays down that no bid may be withdrawn in the interval between the deadline for submission of bid and the expiry of the period of bid validity specified as in clause 2.18.0 withdrawal of a bid during this interval shall result in the bidder's forfeiture of his earnest money deposit pursuant to clause 2.17.6. Clause 2.25.0 dealing with the qualification of bids provides that during evaluation of bids the owner may ask the bidder(s) for a clarification of his bid. The request for clarification of the response shall be in writing and no change in the price or substance of the bid shall be sought, offered or permitted. Clause 2.33 deals with the owners (THDC)'s right to accept any bid and to reject any or all the bids. It provides that the owner reserves the right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract without thereby incurring any liability to the affected bidder(s) or any obligations to inform the affected bidder(s) of the grounds for the owner's action. On the strength of the above terms and conditions contained in the bidding document, it was urged that the bidders have no right to withdraw or modify their price bids and if they do so after the expiry of the deadline, they run the risk of forfeiture of the earnest money deposited pursuant to clause 2.17.6. This submission, though attractive, does not impress us. It is true that the bidders cannot withdraw or modify their price bids but a reading of the bidding document as a whole indicates that there is nothing to prevent the owner/THDC to itself accept the modified price bids after the deadline taking into consideration the sharp variations in the market conditions which have taken place on account of lapse of about a year reckoned from the deadline, i.e., 20.11.1998 on which date, after the scrutiny of techno commercial aspect, price bids were made.

30. The legal position about the interpretation and construction of the commercial documents is well embedded. In interpreting the various clauses, the Court's approach must be guided not by any verbal or formalistic cannons of construction but by the paramount object and purpose for which the provisions have been made in the contract. The requirements in a tender notice may be classified into two categories--those which lay down the essential conditions of

eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In other case, it must be open to the authority to deviate from and not to insist upon the strict liberal compliance of the condition in appropriate cases. This aspect was examined by the Apex Court in *C. J. Fernandes v. State of Karnataka* (1990) 2 SCC 448 and *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, Although the above observations were made not in an entirely identical situation as the present one, the observations in the two judgments support our view. In *New Horizon's Ltd. case* (supra) it has been ruled that the terms and conditions of a document of tender have to be construed from the stand point of a prudent businessman even though it may be a governmental agency.

31. The various submissions made on behalf of THDC and Siemens would have found approval of this Court if the price bids had been considered and finalized without loss of time after the deadline, i.e., 20.11.1998. The whole difficulty has arisen on account of long passage of time and inordinate delay in finalising the contract, in terms of the bidding document, the price bids were valid initially for a period of 180 days. Three bidders kept on extending the validity period on the request of the THDC. After the expiry of 180 days on 19.5.1999, the validity period was extended from time to time upto 31.3.2000, i.e., for a period more than 300 days in addition to original 180 days. During this long period, within which contract should have been finalized, the market conditions obviously changed for variety of reasons as have been stated by Alstom and Siemens in their letters dated 6.12.1999 (Annexure-10 to the counter-affidavit of Dhirup Choudhary on behalf of A.B.B.) and letter dated 9.12.1999 (Annexure-2 to the counter affidavit of R.D. Pandey on behalf of Alstom). It was specifically pointed out that at the time of submission of price bids the risk perception about India was not favourable due to the aftermath of nuclear test and the imposition of certain sanctions. During the past one year, perception has changed dramatically in India's favour, prices have gone down. World over, there is sharp decline in the GIS prices during the last one year for myriad of reasons. After the lifting of the sanctions, world scenario has entirely changed. The outlook of international commercial agencies changed and they are now keen to invest money in India and to undertake various projects. All these facts contributed to substantial reduction of price after the deadline.

32. The averments that the global market conditions have changed and over a period of one year reckoned from the deadline the prices stood substantially reduced remains virtually unrebutted. The lone and tenor of the various assertions made in the counter-affidavit filed on behalf of the THDC and Siemens is that they have not challenged the position that there has been substantial reduction in the prices.

33. Without dilating upon the question as to under what circumstances the THDC delayed the finalization of the contract or what factors contributed for seeking

extension in the validity period of the bids by the THDC itself, we would do well to observe that it is not understandable as to what prevents the THDC to take advantage of the substantial reduction of the price on account of subsequent changes which have brought about and influenced favourable market conditions.

34. On behalf of THDC, it was argued that in case the fresh price bids are permitted, modifying the earlier bids, in that event the project would be unnecessarily delayed and substantial loss is likely to occur on account of escalation of the prices and the entire tendering process has to be taken recourse of de novo. To fortify the submission, strong reliance was placed on certain observations made by Hon"ble Supreme Court in Raunak International's case (supra). We have thoroughly scrutinized this submission and find that the bogey of delay raised by THDC in finalising the contract on account of intervention, if any, of the Court, lacks lustre. The notice to invite tenders of the contract, in question, was issued way back in the year 1996. The pre-qualification bids were opened in November, 1996. It was only in June, 1998 that THDC forwarded copies of final tender forms to the desiring parties and 21st September, 1998, was fixed for the submission of tender documents in two part. Part I-techno commercial aspect of the tender was opened on 20th November, 1998, on which the three parties, namely, Alstom, A.B.B. and Siemens were found to have withstood the test of scrutiny and they qualified to submit price bids. Since 20th November, 1998, which is considered to be the deadline under the bidding document, the price bids were not finalised and the matter was allowed to pend for considerable long time and as said above, the validity period of bids extended on the request of the THDC is to expire on 31.3.2000. It is true that normally where a gigantic project is undertaken, a detailed consideration of the need, viability, financing, cost effectiveness of the project, and, offers received takes place at various levels consuming considerable time in finalising the matter. In the instant case, for whatever reasons it may be, delay is not only inordinate but unconscionable. In any case, if on account of the reduction of prices due to changed market conditions all over the world. THDC is benefited, this factor cannot be ignored merely on the ground of delay. It would not be necessary to call the tenders afresh. The exercise of price modification in view of the revised price bids. Is to be undertaken only in between three tenderers who have already submitted the price bids, as no other agency had passed through the ordeal of techno commercial aspect. Not only this, if ultimately, for certain reasons, THDC/owner chooses to annul or cancel the tenders by rejecting the price bids, in view of the provisions of clause 2.33.0 of the bidding document, obviously, there would be delay and the entire exercise is to be undergone de novo. It is not a case where the Court is going to throttle the entire bidding process or is likely to put the contract process in the reverse gear. The submission that intervention of this Court is likely to delay the finalisation of the contract is nothing but an attempt to subterfuge the consideration of the reduction in the prices which have been bona fide offered for the benefit of THDC itself by Alstom and A.B.B.

35. A serious objection was taken on behalf of THDC as well as Siemens that the present writ petition is premature, inasmuch as, the price bids have not been opened and it is not known whose price bid is the lowest. It was urged that the petitioner should have waited for the opening of the bids and thereafter the question of modification of the bids could be considered. This again is a submission, which deserves rejection outright. After the market conditions have improved and the price have gone down, the Alstom and A.B.B. wrote to the THDC in the month of December, 1999, to take into consideration the stark reality that there has been a sharp decline in the prices and it should take advantage of the reduction of the prices which may be offered through revised bids for consideration at the time of opening the original bids. Obviously, this suggestion of Alstom and A.B.B. did not find favour with THDC and 24th January, 2000, was fixed for opening of the original bids virtually refusing to take into consideration the subsequent market conditions and the reduction of the prices. It is true that it is not yet known as to what would be the position of the original bids as it is hidden in the penumbral zone far away from scrutiny till the original price bids are opened but the fact remains that after the bids are opened and the contract is finalised in favour of either of the three price bidders in that event, a vested right under the contract would inhere in favour of the party in whose favour the contract is finalised and it would not be possible to consider the revised reduced price offered by any one of the price bidders. The proper time to take into consideration the reduction in the prices on account of changed market conditions after the deadline as contemplated in the bidding document is the occasion when the original bids are to be opened. Though in a different context this matter came to be considered in para 17 of the report in *Raunak International's case (supra)*, wherein it was observed that if breach of law in the execution of project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the Court must be raised. The Court observed thus :

"We would expect that if such objection or material is placed before the Government, the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the Court may intervene. Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained."

The above observations of the Apex Court furnish a complete answer to the submission of THDC and Siemens that the petitioner should have waited till the original price bids are opened and that the present petition is premature. As a matter of fact, the petitioner has chosen a right time to file the writ petition before the opening of the original bids, lest they were finalized to his chagrin and volteface.

36. We do not make a venture to refer to all such circumstances and scrutinize them on the basis of allegations and counter allegations made by the parties and to enter into the arena of the controversial facts. We, however, feel that the facts and circumstances noticed above cannot be termed to be frivolous, baseless, concocted or referred to mala fide only for the purpose of undermining the working of THDC or frustrating the price bid of Siemens. We feel contented to summarize the whole controversy and the impact or fallout of the subsequent changes in the market conditions as below :

(1) The original bids made in the month of November, 1998, have lost relevances for two reasons. Firstly, there has been considerable delay in the finalisation of the bids in spite of the fact that the bidders have agreed to extend the validity period of the bids from 180 to a further period of more than 300 days on the request of THDC, and, secondly, during this intervening period, the market conditions considerably changed on account of lifting of the sanctions imposed due to nuclear blast at Pokhran and the liberalised economic policy adopted by India thereby attracting the foreign establishments to invest their money and execute the projects.

(2) On account of changed market conditions, the material which was costlier in November, 1998, has become cheaper.

(3) Various clauses in the bidding document are not immutable or sacrosanct. Though the bidders have been inhibited to alter, withdraw or modify their bids, there is nothing to prevent the THDC/owner to take into consideration the reduction in the prices for the reasons stated above after the deadline. On account of the subsequent developments, the THDC is in a position to negotiate for the reduction in the rates amongst the three price bidders and if it is done. THDC is likely to be in an advantageous position and substantial public money is bound to be saved.

(4) One is wonder-struck and amazed at the attitude of the THDC in not acting as a prudent buyer by taking advantage of the reduction in the price when such a course is not legally prohibited. The THDC being an instrumentality of the State is duty-bound to save the public money and to bargain at the price which accentuates the public good. Failure of the THDC in performing its public duty is bound to be adversely viewed and commented upon and in exercise of its power of judicial review, this Court under Article 226 of the Constitution of India can compel it to act in a manner which would promote the- public cause. The arms of the High Court are not shackled of technical rules or of procedure. The actions of an instrumentality of the State are amenable to judicial review and the validity of such an action is to be tested on the anvil of larger public interest. The plea that intervention of the Court is likely to result in substantial delay in finalizing the contract is a lame excuse and in any case, what of it, if the public interest is likely to be subserved if the contract is finalised at the reduced price.

(5) Intervention of the Court before opening of the bids is necessary to prevent

the colossal loss or public money which may be collected by a private party at the sufferance of the tax-payers for no corresponding advantage if the opening of the original bids is permitted without taking into consideration of the offer for price reduction which is resultant effect of the subsequent market conditions.

(6) It was not expected of a State instrumentality that it should raise preliminary objection that the petition was not maintainable. As a matter of fact, the THDC should have welcomed the suggestion and taken advantage of the reduction of the price well before the opening of the bids. The agreement or resistance on behalf of the price bidders is hardly of any consequence as before finalisation of the contract no legal right is created in favour of either of them.

(7) Without repeating the facts all over again, we once again emphasize that it has become necessary for the THDC to take cognizance of the reduction of the price after the deadline, as contemplated in the bidding document, on account of substantial price reduction occasioned due to the global market conditions. If the contract had been finalized before the conditions were changed, the complexion of the controversy would have been entirely different.

In the conspectus of the above discussion and the summation, this writ petition is finally disposed of with the direction that in view of the reduction in price due to the changed global market scenario and other conditions, the THDC shall entertain the revised bids within the period specified by it and the revised bids may be opened with the original bids after notice to all the three price bidders, namely, Alstom, A.B.B. and Siemens. The original bids and the revised bids shall be taken into consideration and after negotiations, if necessary, the contract may be finalised in the best interest of the corporation, according to law.