(2001) 01 MP CK 0048

In the Madhya Pradesh High Court

Case No : L.P.A. No. 118 of 2000

Pressure Sensitive System (India) Ltd. — APPELLANT

Vs

Aristocraft International Pvt. Ltd. and Others — RESPONDENT

Date of Decision : 02-01-2001

Acts Referred:
Constitution of India, 1950 — Article 14, 299

Citation : AIR 2001 MP 135 : (2001) 5 MPHT 130 : (2001) 3 MPLJ 520

Hon'ble Judges : Bhawani Singh, C.J;Arun Mishra, J

Bench : Division Bench

Advocate : R.S. Patel, for Union of India and Security Paper Mills, Rajendra Tiwari, Ravindra Shrivastava and Mininder Bhatti, for the Appellant; R.N. Singh, V.K. Tankha and S.K. Seth for Responent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.

Present Letters Patent Appeals - L.P.A. No. 118/2000, L.P.A. No. 124/2000 and L.P.A. No. 127/2000 have been respectively preferred by M/s. Pressure Sensitive System (India) Limited, Union of India and M/s. Aristrocraft International Private Limited, aggrieved by the order passed in Writ Petition No. 4223/99 by single Bench of this Court on 3-4-2000, whereby the lowest tender of M/s. Pressure Sensitive System (India) Limited which was accepted by Union of India, has been quashed. The Union of India and its Security Paper Mills and lower tenderer which is M/s. Pressure Sensitive System (India) Ltd. are challenging the part of the order quashing the contract for supply of security thread used in currency notes whereas M/s. Aristrocraft International Pvt. Ltd. whose writ petition was allowed, has preferred Letters Patent Appeal No. 127/2000 aggrieved by part of the order holding M/s. Pressure Sensitive System (India) Ltd. eligible and qualified to make the supply.

Government of India, Ministry of Finance, Department, of Economic Affairs, Security Paper Mill, Hoshangabad floated global tender for supply of 40 M.Ts. of Polyster Base Vacuum Metaliaed Security Thread with negative dematalised transparent letters, fluoresceing blue on both sides under Ultra Violet light with firm bonding used in manufacturing Bank Note paper from manufacturers having in-house facility for the same or their authorised dealers. Notice inviting the tenders was published in the Times of India on 12-4-1999. Tenders were required to be submitted by 10''OClock on 23-6-1999 in the office of the General Manager, Security Paper Mill, Hoshangabad, Tenders were to be opened at 4''Clock in the evening the same day i.e. 23-6-1999 in the presence of tenderers/ authorized representatives. As per the terms of the tender notice the technical tender, commercial tender and the price bids is to be submitted in the sealed covers as per the procedure. Technical part and part second XXX commercial part was to be opened at 16th hours on 26-6-1999 and commercially acceptable tender was to be opened on one month after on 26-7-1999 at 16th hours at Securty Paper Mill after completing valuation of technical and commercial tender in the presence of tenderers or their authorized representatives whose technical and commercial tenders have been found acceptable and have been informed accordingly. The relevant terms and conditions of the tender contained in Section IV, Clause 1.3 provides the tenderers to submit the tender based strictly on the terms and conditions and specification contained in the tender document and not to stipulate any deviations. Security Paper Mill, Hoshangabad also reserved the right to reject/accept the tender containing deviation to the terms and conditions and requirements stipulated in the tender document. As per Clause 1.13 the tenderers shall satisfy the purchasers that he possesses the necessary experience and qualification and that he has at his disposal suitable modern facilities and specialised employees to ensure that his work is of best quality and workmanship, according to the latest technology and engineering practices. The tenderer shall satisfy the purchaser that he is financially in a position to fulfil contractual obligations offered to be undertaken by him. Section IV, Clause 7 requires tenderers who are in a position to supply may send about one Kg. sample wound on spools on or before the due date specified. The quantity required was 40 MTs. As per Clause 8 of Section IV of the tender document the exact quantity may vary at the time of placement of order. Besides Govt. of India reserved the right to place an option order for 50% of the quantity of the final order on the same terms, condition and rate. The completion time as per para 12 of Section IV is essential. The completion time is the essence of the contract. The tenderers shall complete the supply of Securty Thread within the period of 16 months from the date of issue of Letter of Intant. It was not necessary for the Government to accept the lowest tender as per the Clause 19 contained in Section IV and a tender evaluation is provided under Clause 22 of Section IV to ascertain the best and lowest evaluated tender in the interest of the purchaser, for the complete supply covered under the Technical specifications and documents. As per Section V of the tender document which contains terms and conditions, Clause 2.1 mentions that it was not necessary to accept the lowest or any tender and right has been reserved of accepting the whole or any part of the tender or portion of the quantity offered by the Supplier and supplier shall supply the same at the rate quoted. The delivery was to commence within four weeks from the date of opening of L.C./ Letter of Intent and supplies to be completed within the specified delivery period of 16 months. Phased delivery schedule with maximum possible quantity per month to be quoted by the tenders. The tentative delivery schedule was fixed 3 MTs per month for a period of eight months and thereafter 2 MTs per month till full quantity is supplied. However, as already noticed that the exact quantity may have varied at the time of placement of order as per Clause 8.1 contained in Section IV, the liquidated damages and and risk purchase clause are also contained in clauses 16 and 17 of Section V and it also contains other usual terms and conditions.

W. P. No. 4223 of 1999 was filed by M/s. Aristrocraft International Private Ltd. on 15-5-99. It appears to the drafted on 4-7-99. Lateron it was amended. Initially the relief prayed in the writ was to issue direction to Union of India and Security Paper Mill, Hoshangabad to award the contract to the petitioner company and also to hold that the respondent No. 3 M/s. Pressure Sensitive Systems (India) Ltd. ineligible as it does not fulfil the basic qualification for supply of 40 MT of Security Thread in a period of 16 months was not entitled to participate in the Tender Process and his price bid part of tender should not have been considered. The relief clause was amended so as to incorporate the prayer to quash the sanction order/acceptance letter dt. 14-9-99 (Annexure P-12) as void, arbitrary and illegal.

Before opening the price bids, it appears that a team of expert inspectors was appointed to inspect and submit capacity assessment record of M/s. Pressure Sensitive Systems (India) Ltd. on 8-7-1999. They conducted the inspection on 15-7-99. The inspecting team consists of Shri R. K. Mangwani, Dy. General Manager and Head of the Department, Security Paper Mill, Hoshangabad (MP) and Shri Sumeet Sinha, Works Manager, Currency Note Press, Nasik. In their report team of experts found that the firm though a new entrant, will be in a position to undertake the job. Though the firm has no experience of registered slitting, but they have vast experience of 30 years of slitting polyster reels of various thickness and width. Central Exicse Gate Pass for the sample submitted with samples in Technical Tender was also given to the investigating team as mentioned in the report. It appears that the report was considered by Special Tender Evaluation Committee (hereinafter called as ''STEC'') constituted by Government of India, and M/s. Pressure Sensitive Systems (India) Ltd. was found eligible.

Against the global tender floated, following five offers were received :

(1) M/s. Aristrocraft International Pvt. Ltd., New Delhi.

(2) M/s. Colonac International Pvt. Ltd., Chennai.

(3) M/s. De La Rue Tapes, UK.

(4) M/s. Pressure Sensitive Systems Pvt. Ltd., Mumbai.

(5) M/s. Hindustan Adhesives Ltd., New Delhi.

Out of the aforesaid five tenderers, four firms submitted their samples. M/s. De La Rue Tapes, UK requested for exemption from submitting the sample. The techno commercial bids were opened on 26-6-1999 and evaluation of the samples submitted with technical tenders were carried out at Security Paper Mill itself. On testing and examination of thread out of four samples received the samples of only three firms namely; M/s. Aristrocraft International Pvt. Ltd., New Delhi, M/s. Colonac International Pvt. Ltd., Chennai and M/s. Pressure Sensitive Systems Pvt. Ltd., Mumbai were found meeting the parameter of the specifications stipulated in the tender. The sample of M/s. Hindustan Adhesives Ltd., New Delhi failed to pass. The Laboratory test and also the bid bond submitted was not as per the tender enquiry. Out of three firms, whose samples were found acceptable, M/s. Pressure Sensitive Systems, Mumbai was a new entrant in the manufacture of security thread and had no past experience in the field. The STEC, therefore, before opening the price bids sought for capacity assessment report. The STEC in the light of the report submitted by inspecting team also considered M/s. Pressure Sensitive Systems (India) Ltd. qualified for opening of their price bid. M/s. Aristrocraft International Pvt. Ltd. submitted the tender for supply of 20 MTs only and its rate was Rs. 3375/- per Kg. M/s. Colonac International Pvt. Ltd.''s rate was Rs. 4050/-per Kg. The rate quoted by M/s. De La Rue Tapes, UK was Rs. 4060.16 per Kg. plus frieght. M/s. Pressure Sensitive Systems was the lowest tenderer and price worked out Rs. 3011/- per kg. if the quantity ordered above 20 MTs, 5% discount was offered and it was the only tenderer who had submitted the tender to supply 40 MTs within a period of 24 months and the petitioner M/s. Aristrocraft International Pvt. Ltd.''s offer was only to supply 20 MTs within a period of 16 months whereas M/s. Pressure Sensitive Systems who was the lowest tenderer was ready to supply 25 MTs within this period of 16 months and remaining 15 MTs in additional 8 months. It appears that none of the tenderers was ready to supply 40 MTs within the stipulated period of 16 months. Thus, Govt. of India took the decision to accept the tender of lowest tender L-1 of M/s. Pressure Sensitive Systems and supply was ordered to be made of 40 MTs within 24 months. In 16 months M/s. Pressure Sensitive Systems was supplying the maximum quantity of 25 MTs. Thus, both; quantitywise as well as ratewise the tender was considered to be best.

The STEC recommended that the rates received in the instant tender have been highly competitive and much cheaper than the last purchase price of Rs. 4062/- per kg. The L-1 price is Rs. 3011/- per kg. resulting in saving of Rs. 5.00 crores to the Government of India as per the last purchase/order effected from petitioner M/s. Aristrocraft International Pvt. Ltd. However, STEC recommended to split the order on more than one firm, at L-1 rate, after necessary perusal to safeguard availability of uninterrupted supply of security thread. However, it appears that this suggestion of STEC of splitting the supply was not accepted by Government of India and offer of M/s. Pressure Sensitive Systems at L-1 rate to supply 40 MTs quantity within 24 months was accepted and letter of intent No. 7/1 /99-Cy-1 (SPM) dated 14-9-99 was issued for procurement of 40 MTs of security thread by Security Paper Mill, Hoshangabad at the rate of Rs. 3011/- per Kg. inclusive of all duties, of a total cost of Rs. 12,04,41,600/- (Rupees twelve crores four lakhs forty one thousand and six hundred only) on F.O.R. Hoshangabad basis subject to the condition that complete supply of initial quantity of 3 MTs of security thread before end of February, 2000. The order for the balance quantity of 37 MTs at the rate of 2 MTs per month will be placed only after successful trial production with the initial supply. The SPM would satisfy about the performance result of the thread and inform the firm of it or otherwise for chalking out further supply schedule. This condition was imposed as M/s. Pressure Sensitive Systems is a new entrant in the field of supply. The proportionate Security Deposit, risk purchase clause liquidated damage clause were other conditions mentioned.

The petitioner M/s. Aristrocraft International Pvt. Ltd. alleges that they are indigenous supplier and have been supplying the security thread to Security Paper Mill and they made huge investment to meet the requirement of Security Paper Mill. They have been supplying the security thread for the last 15 years and they have the technical knowhow. At the relevant time they were supplying the security thread to Security Paper Mill. They had submitted the tender persuant to the global tender notice. The petitioner apprehended that the tender of M/s. Pressure Sensitive Systems was going to be accepted. The essence was supply of 40 MTs of security thread within 16 months time limit. Time was the essence of the contract. Hence, the time limit of 16 months was not flexible else the petitioner company would have given a lower rate than that of M/s. Pressure Sensitive Systems. As the time limit of 16 months was mentioned, marginally higher rate was quoted by the petitioner company i.e. M/s. Aristrocraft International Pvt. Ltd. After opening of the price bid on 28-7-99, M/s. Aristrocraft International Pvt. Ltd. also offered to lower their price at par with the respondent No. 3 i.e. M/s. Pressure Sensitive Systems. Petitioner also submits that M/s. Pressure Sensitive Systems was not fulfilling the requisite conditions of the tender notice and subsequently capacity of production has been enhanced by the petitioner which was mentioned in the representation dt. 1-9-99. Another representation was submitted on 6-9-99. Another representation was submitted on 6-9-99. The tender submitted by M/s. Pressure Sensitive Systems was based on business rivalry. By incorporating the amendment the petitioner submits that the sanction dt. 14-9-99 is bad in law. It is also the case set up that M/s. Pressure Sensitive Systems does not have the supply capacity of 40 MTs security thread within the stipulated time of 24 months and at present it was not having capacity to produce the de-metalised security thread. Some additional equipments were required by it for registered slitting as per the capacity assessment report dt. 15-7-99. Thus, tender of M/s. Pressure Sensitive Systems could not have been accepted and there was possibility of sub-contracting which was prohibited. In the rejoinder. It is the case set up that action of the Government of India is contrary to the instructions contained in D.G.S. &D. manual for purchase of store. The supply should have been restricted and not given to a new entrant. General Finance Rules 102, 103 have also not been adhered to. In the rejoinder it is further averred that M/s. Pressure Sensitive Systems is not having in-house facility and some process had to be carried out in P. V. Traders, New Mumbai (NAVI MUMBAI) which is at some distance from Raigarh Maharashtra where the factory of M/s. Pressure Sensitive Systems is situated. It is also submitted that the STEC''s recommendations should have been accepted to split the supply and the revised offer submitted to lower down the price after opening the price bid part of tender ought to have been accepted and acted upon by the Union of India.

In the counter-affidavit filed on behalf of Union of India and Security Paper Mill by the Finance Advisor and Chief Accounts Officer he was one of the member of Special Tender Evaluation Committee (STEC). It is urged in counter-affidavit that the security thread is required for the currency notes. The material used was to be purchased through global tender notice and is always procured on quantity basis in accordance with the purchase procedure. A lowest tender was accepted. The tender of M/s. Aristrocraft International Pvt. Ltd. was to the extent of 20 MTs whereas the requirement was 40 MTs. It was mentioned in Clause 1.3 of Section IV of the tender document that the Security Paper Mill, Hoshangbad, reserves the right to reject/ accept tenders containing deviation to the terms and conditions and requirement stipulated in the tender document. Petition relates to purely a contractual matter. However, delivery schedule is tentative and in the circumstances it was open to the exchequer to take into consideration all other relevant commercial aspects, stock in hand and stock due. The offer of M/s. Pressure Sensitive Systems was considered in all the aspects to be cheaper and has been rightly accepted. Earlier the said contract was given to M/s. Aristrocraft International, but, its supplies were found to be defective and it has failed to meet the delivery schedule. On earlier occasion the security thread supplied by the petitioner firm was not defect free. Certain instances have also been given of 1994, 95 and 98 regarding the failure to maintain the delivery schedule and or material was found to be sub-standard. It is contended that it is wrong to allege that the petitioner is having full technical knowledge to meet the requirements of the Security Paper Mill. It is further contended that the petitioner firm''s offer was costlier and conditional and offer was limited to 20 MTs only and the petitioner have put the condition that if at any stage during the execution of the contract, there is a change in the rage of excise duty due to amendments in the fiscal policy of the Government of India or the authorities decide to classify the product under a different tariff heading, the effect on the F.O.R. price quoted by them, shall be to the account of the Security Paper Mill also, any and all other levies imposed on the product by the Central/State Governments at any stage during the execution of the contract, shall be payable to petitioner additionally.

Similarly, on the date of preparation of this tender by the petitioner, central sales tax at a concessional rate of 4% is applicable against Form "D" to be provided by the purchaser. However, in case any levy is imposed by the Government after due preparation of the tender or if the rate of sales tax/central tax is revised by the authorities concerned, any effect on the price quoted by the petitioner because of the same shall be to account of Government, and shall have to be promptly reimbursed by Govt. of India to the petitioner. Whereas there was no such stipulation in the offer of the respondent; M/s. Pressure Sensitive System which is unconditional and cheaper and is economical in the interest of exchequer. The delivery schedule is always tentative. Various financial aspects have been taken into consideration and blockade of public money, which procuring material in the public interest. Moreover the petitioner had not offered for 40 MTs security thread and restricted their offer only to 20 MTs. There can be no negotiation except with L-1 tenderer as per the instructions of the Central Vigilance Commission. All post tender negotiations are banned except in the case of negotiations with L-1 i.e. lowest tenderer. The petitioner in the previous year had supplied much higher rate and the supply was still very deficient and delayed. Capacity assessment report was called for by the STEC and the sample was also found to be up to the mark of M/s. Pressure Sensitive System. Thus, offer L-1 is in the interest of public exchequer. The supply involves sovereign functions to manufacture the Note Paper which would come to a grinding halt, and there would be a great hue and cry all over the country over bank notes, which would have a greater impact on the National economy. Hence, no interference in the writ petition is called for in the contractual matter in the interest of public.

M/s. Pressure Sensitive Systems also filed its return and contended that it was having in-house modern laboratory and meets with all the parameters stipulated in the tender and has the capacity to manufacture the security thread. The sample submitted by it has been found to be up to the mark. The petition is not in the public interest and lacks in bona fide. As a matter of fact M/s. Aristrocraft International Pvt Ltd. offer was not for supply of 40 MTs and was not, thus, disentitled to participate in the tender and cannot file the writ petition to quash the sanction. They are having the vast experience in slitting of coated polyster reels and thus competent to submit the tender and make the production and its capacity has been rightly adjudged to produce the requisite security thread. There has been no arbitrariness committed in accepting the tender. Various documents with respect to its capacity are annexed which were also filed along with the tender containing the details and pro forma report for capacity assessment.

The learned single Bench of this Court has allowed the writ petition. The single Bench held that M/s. Pressure Sensitive System possesses the requisite qualification and the decision of Union of India in that regard is based on capacity assessment report which has been accepted by STEC calls for no interference. However, the award of contract in favour of the lowest tenderer; M/s. Pressure

Sensitive Systems has been quashed on the solitary ground that for effecting the supply of 40 MTs of the security thread time was essence of the contract. The period fixed in the tender for supply was 16 months whereas time of 24 months has been given. It was not open to Union of India to relax the condition.

Aggrieved by the said decision of single Bench, Union of India as well as M/s. Pressure Sensitive Systems have preferred the Letters Patent Appeals respectively L.P.A. No. 124/2000 and L.P.A. No. 118/2000 and M/s. Aristrocraft International Pvt. Ltd. has preferred L.P.A. No. 127/2000.

On behalf of Union of India and M/s. Pressure Sensitive Systems it is urged that since none of the tenderers was ready to supply the quantity of 40 MTs in 16 months and M/s. Pressure Sensitive System''s tender was not only the lowest, but, it was also ready to supply 40 MTs. Since within the requisite time of 16 months none was ready to effect the supply of 40 MTs it became essential for the Union of India to relax the condition of supply in 16 months. Thus, no arbitrariness has been committed while extended the time and accepting the lowest tender of M/s. Pressure Sensitive System. It is further urged by learned senior counsel: Shri Rajendra Tiwari that M/s. Aristrocraft International Pvt. Ltd. was ready to supply only 20 MTs within 16 months, hence, it cannot complain of any violation of relaxation of condition in favour of the lowest tenderers. The rates quoted by M/s. Aristrocraft International were higher. The past experience of M/s. Aristrocraft International Pvt. Ltd. as reflected in the return of Union of India is that it has effected the supply at higher rate and the quality was not up to the mark and the quantity agreed to was also riot supplied as per the time schedule fixed. It is further submitted that power to relax any condition is available with the Union of India under the terms of the tender notice. Had it not been relaxed in the instant case the only course open was to reissue the global tender which would have taken at least 9 months'' time including the process of its finalization and further fact that need is of urgent nature and relates to the national economy as security thread is required for currency note and by accepting the lowest tender of M/s. Pressure Sensitive System as compared to last year purchase rate exchequer it has been benefited by 5.6 crores. Previous year the supply was effected by M/s. Aristrocraft International Pvt. Ltd. The decision of Union of India is in the national interest and interest of public exchequer. It is further urged that the Govt. has to be allowed some play in the joints and Court possesses limited power of judicial review until unless there is violation of larger public interest in the matter of contract, entering into contract, no interference is called for by the Court while exercising the power of judicial review.

The submissions have been countered by senior counsel Shri R. N. Singh appearing for M/s. Aristrocraft International Pvt. Ltd. and it has been urged strenuously that the condition of supply in 16 months could not be relaxed by Union of India as the time is essence of the contract and essential condition of tender notice. The action is wholly arbitrary. They also submit that the suggestion of STEC should have been accepted of splitting the supply between M/s. Pressure Sensitive Systems and M/s. Aristrocraft International Pvt. Ltd. as per the recommendation contained in Annexure-P/16. They further placed reliance on purchase of store guidelines contained in Chapter V of DCS and D Manual regulation 113. They also placed reliance on Rule Nos. 102 and 103 of General Finance Rules to contend that the store purchase rules should be adhered to and the purchase should be made in the most economic manner. It is also submitted by Shri Vivek Tankha, senior counsel appearing in L.P.A. No. 127/2000 filed by M/s. Aristrocraft International Pvt. Ltd. that the decision of the learned single Judge about the qualification of M/s. Pressure Sensitive Systems is incorrect. From the capacity assessment report it cannot be concluded that M/s. Pressure Sensitive Systems fulfilled the requisite criteria, hence, its price bid could not be opened and in the matter of grant of contract merely quoting the lowest price cannot be the criteria. M/s. Aristrocraft International Pvt Ltd. is an indigenous supplier, better equipped and was effecting the supply for the last several years. Counsels have also referred to various clauses of the tender documents. They have placed reliance on the Apex Court decision in case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, to contend that the eligibility requires compliance. The other condition can be relaxed. Ancillary or subsidiary condition can be relaxed not the primary condition. They further placed reliance on the decision of the Apex Court in case of Mewa Ram Kanojia v. A.I.I.M.S., 1989 (2) SCC 235), (1989 Lab IC 1348) where the contract was directed to the split up between the appellant and the other contractor in the ratio of 1/4 : 3/4. Learned counsel have also pressed into service the Apex Court''s decision in case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others,) to contend that the condition as to eligibility cannot be changed and rule of game cannot be changed in between after its commencement.

Before we proceed to examine the relevant conditions of tender and the other documents and the submissions raised the relevant decisions relating to scope of interference by Court while exercising power of judicial review and what are relevant consideration to be kept in mind while making interference.

In case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, relied on by Shri Rajendra Tiwari, Their Lordships of Apex Court have laid down that interference in the writ petition is called for in the matter of award of a contract only when some elements of public interest is involved in entertaining such a petition when the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. Award of contract is a commercial transaction. While making intervention it has also to be kept in mind that proposed project may be considerably delayed and the result in escalation in the cost and interference is called for only to cater to substantial amount of public interest or the transaction is entered into mala fide, the Court should not intervene under Article 226 in dispute between two rival tenderers.

In Raunaq International (supra) it has been further laid down that award of a contract is essentially a commercial transaction and commercial considerations relevant to enumerate (1) price (2) case being of requisite specifications (3) ability to deliver (4) ability to do the work of the requisite standard and quality (5) past experience (6) time (7) ability to take follow-up action. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction. The Court has further to examine the previous record of public service rendered by the organisation. It has also to be kept in mind that public would have to pay much higher price, in the form what public interest would suffer if the delay takes place. It is also relevant consideration 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, thus set back to the country''s economic development has to be taken into consideration where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the Court should entertain a petition under Article 226. It has also been laid down that the expert committee''s special knowledge plays a decisive roll in deciding which is the best offer and Court should not substitute its own decision for the decision of an expert evaluation committee. The Apex Court in case of Raunaq International (supra) while considering the fact that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two Thermal Power Units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resultant job opportunities for a large number of people. Apex Court held that there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Limited.

In case of Tata Cellular Vs. Union of India, , referring to R. v. Panel on Take-overs and Megers, ex p Datafin plc, (1987) 1 All ER 564 it was laid down that an application for judicial review is not an appeal. In Lonrho plc v. Secretary of State for Trade and Industry. (1989) 2 All ER 609, Lord Keith said : "Judicial review is a protection and not a weapon" and in the words of Lord Donaldsoh in R. v. Panel on Take-overs and Mergers, ex p in Guinness plc, (1989) 1 All ER 509 - "it is only supervisory." The Apex Court laid down the efforts to find out legality of (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.

The Court is concerned with the manner in which the decisions have been taken and fairness has to be adjudged in the facts and circumstances of a particular case. Illegality, irrationality and procedural impropriety etc. can be the grounds. However, golden rules is that the Court should "consider whether something has gone wrong of a nature and degree which requires its intervention." Charming principles of Wednesbury unreasonableness cannot be used as a magical formula as observed in R. Askew 1998 ER 139, it is only when arbitrary, capricious or biased decision is there, interference may be made. Their Lordships referred to Wednesbury principle - The Supreme Court Practice 1993, Vol I, pp. 849-850 as under :

"4. Wednesbury principle.--A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceeding 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. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947) 2 All ER 680, per Lord Greene, M. R.)"

Irrationality may occur when weight of the facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Action can be unreasonable if it is unequal in its operation as between different classes. It is not for the Court to adhere to entrust the case to the public utility operation. Court has also to take into consideration that it is not an expert while assessing the technical matter. In the words of Lord Denning it is the duty of the Court to supervise that the decision making body acts fairly in accordance with law and interprets correctly and also to see whether its decisions are influenced by ulterior consideration and whether the decision is so unreasonable that a reasonable person would not come to it and whether the decision making body had gone outside its powers or misconstrued the extent of its powers. The Court can always make an interference. This is the law culled out from the decisions in Healey v. Minister of Health (1955) 1 QB 221 : (1954) 3 All ER 449, H. K. (an infant), Re (1967) 2 QB 617 and R. v. Gaming Board for Great Britain, ex p Benaim and Khaida (1970) 2 QB 417, Punton v. Ministry of Pensions and National Insurance (1963) 1 All ER 275, Ashbridge Investments Ltd. v. Minister of Housing and Local Government (1965) 3 All ER 371, Padfield v. Minister of Agriculture, Fisheries and Food (1968) 1 All ER 694.

Their Lordships of the Apex Court referring to various decisions in Tata Cellular (supra) came to the following proposition : "keeping in mind that the judicial restraint has to be exercised to confine itself to the manner in which decision was made and Court does not possess expertise, the decisions of experts are not to be interfered ordinarily and Government must have freedom of contract. In other words, a fair play in the joints is necessary.

A tenderer has to conform to the terms of obligation has to be made at the proper place, form, time and person must be able and willing to perform his obligations. It must be of full amount as observed in Tata Cellular (supra).

In case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, wherein Evaluation Committee constituted by CLAL finding offers of Cambatta Aviation Ltd. and Air India suitable having regard to various aspects but recommended

Cambatta for awarding the contract in view of its higher offer -''Board of Directors of CIAL taking note of the fact of Air India being a public sector undertaking and a national carrier, took a tentative decision to award the contract to it --therefore, the Board entered into negotiation with Air India by inviting it to make a fresh presentation before it and revise its offer. In response Air India agreed to make its offer more beneficial to CIAL and accordingly the Board took a final decision to award the contract to Air India. Their Lordships observed that "The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiation before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot, depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when incomes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

In case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, a supplemental contract was given for publication of telephone directories granted to a contractor who repeatedly committed defaults in performance of the original contract for the same work affecting thereby the public service. It was also found that the contract was granted by taking into account irrelevant factors while period of the original contract had already expired. It was held that fresh tenders should have been invited and supplemental contract executed was violativee of Article 14 and void.

First we take up L.P.A. No. 118/2000 and L.P.A. No. 124/2000. In the backdrop of the aforesaid legal position we proceed to examine the submission that whether time was essence of the contract and deviation in time of delivery made is permissible. In order to appreciate them it is necessary to quote certain clauses contained in the tender document. Section IV, Clause No. 1.3 envisages as under :

"1.3 All Amendments/revisions to tender documents issued by the Security Paper Mills, if any, must be signed and submitted along with the tender, the tender submitted by the tenderer shall take into account all such amendments/

revisions. The tenderers are advised to submit the tender based strictly on the terms and conditions and specifications contained in the lender documents, and not to stipulate any deviations. If acceptance of the terms and conditions given in the tender document has any price implications the same should be considered and included in the price part. Security Paper Mill, Hoshangabad reserves the right to reject/accept tenders containing deviation to the terms and conditions and requirements stipulated in the tender documents."

As per clause No. 1.5 contained in section IV tender has three parts; Technical, Commercial and Price. It is relevant to quote Clause 1.5 :

"1.5 The tenders so submitted shall be in three separately sealed envelopes in three parts as follows :

Part - I : TECHNICAL TENDER ;

Containing un-priced tender consisting of complete technical packages as at 1.11 below, on original and one duplicate copies shall be submitted. It should not have any commercial and price aspects.

Part - II : COMMERCIAL TENDER :

Containing un-priced tender consisting of commercial package including all terms and conditions. One original and one duplicate copies shall be submitted. No price details to be given in this tender.

Part - III : PRICE TENDER :

(a) Containing price with detailed breakup of price of each item along with unit rate as per format (Table A, B, C annexed) both in figures and words. One original and on duplicate copies shall be submitted.

(b) Only one price for the item should be quoted.

Table 1 (a) for Overseas supplier

Table 1 (b) for Indigenous Supplier

Table 1 (c) (in case of imported item but quoted in Indian rupees)

Part-I and Part-11 should be submitted under a covering letter indicating clearly the summary of tender chapters, annexure/ schedules of the complete tender. The Part-Ill shall also be submitted along with Part-II blanking the price together with list of annexures.

For Indian suppliers, indigenous component to be explicitly mentioned and quoted in firm Indian rupees and foreign exchange component, if any, be quoted in suitable foreign currency and conversion rate applicable."

Further Clause 8, 12, 22 and 24.2 contained in Section IV of the tender document run as under :

"8. Quantity required : 40 MTS

1 The exact quantity may vary at the time of placement of order.

2 Besides Govt. of India reserves the right to place an option order for 50% of the quantity of the final order on the same terms, condition and rate."

"12. COMPLETION TIME :

The completion time is the essence of the contract. The tenderers shall complete the supply of Security thread within the period of 16 (Sixteen) months from the date of issue of Letter of Intent. (Refer para 3 of Section V Terms & Conditions)."

"22. TENDER EVALUATION :

The tenders received and accepted will be evaluated to ascertain the best and lowest evaluated tender in the interest of the purchaser, for the complete supply covered under the Technical specifications and documents."

"24. COMPARISON OF TENDER :

2 Technical, Commercial and Price evaluation of tenders as well as evaluation of financial packages offered by the tenderers shall be the basis for award of the contract."

Section V of the tender document contained terms and conditions. Condition No. 3 provides delivery schedule of the supply. Clause 3.1 contains tentative delivery schedule which reads thus :

1 TENTATIVE DELIVERY SCHEDULE:

01 MTs per month for a period of Eight months & thereafter.

02 MTs per month till full quantity is supplied.

Clause 9 of Section V contained Delivery Schedule which reads thus :

DELIVERY SCHEDULE :-

The stores will have to be supplied in instalments as specified in the contract/ supply order from the date of placement of order or from the date opening of Letter of Credit. The Overseas supplier shall deliver the stores ordered F.O.B. Port of Shipment/ Airport basis and booked to Bombay Sea/ Airport/F.O.R. Security Paper Mill, Hoshangabad (MP)."

Clause 12 of Section V contained provision of Shipment.

On the basis of the aforesaid clauses of tender document it is clear that under Clause 1.3 of Section IV though the tenderers are advised to submit the tender based strictly on the terms and conditions and specifications contained in the tender documents and not to stipulate any deviations. However, significantly right is reserved with the Security Paper Mill to reject or accept tenders containing deviation to the terms and conditions and requirements stipulated in the tender documents. Thus, Clause 1.3 of Section IV has to be interpreted in a pragmatic manner. In the instant case none of the tenderer was ready to supply within 16 months 40 MTs quantity which was the time stipulated in Clause 12 of Section IV. Thus, relaxation became essential. In case there can be no deviation in the completion time of 16 months and quantity of 40 MTs is considered to be mandatory for supply within 16 months then it does not lie in the month of M/s. Aristrocraft International Pvt. Ltd. to contend that its tender which was for only 20 MTs supply in 16 months ought to have been accepted:

Clause 8 of section IV though mentions the quantity required to be of 40 MTs, but, the exact quantity may vary at the time of placement of order and Government has further reserved the right to place option order for 50% of the quantity of the final order on the same terms, condition and rate. Thus, if the submission of M/s. Aristrocraft International Pvt. Ltd. is accepted, in that case there can be relaxation either in the quantity of 40 MTs or supply time of 16 months as may relaxation would amount to violation of an essential term and conditions of the tender, but, Clause 8 itself pre-supposes that the exact quantity may vary at the time of placement of order and in the circumstance in which the Union of India was placed, as no offer of full quantity supply in 16 months was received, it cannot be said that while accepting the bid of the lowest tenderer it has not acted in fair manner or has acted with unreasonableness in extending the period originally fixed for supply. Firstly, we are of the opinion that the deviation made was called for in the public interest and in the interest of national economy and considering the sensitive nature of the requirement of banknote paper on which depends national economy, cannot be said to be an arbitrary decision taken by the Union of India if all offers were to be rejected for want of relaxation of time period it would have delayed the printing of currency note.

Certain measure of free play in joint is necessary in administrative body functioning in its administration as held in case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, : 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, , Fasih Chaudhary Vs. Director General, Doordarshan and Others, , Sterling Computers Limited v. M & N Publications Limited, (1993) SCC 445 : (AIR 1996 SC 51), Union of India and others Vs. Hindustan Development Corpn. and others, . At the same time State in exercise of various functions is governed by mandate of Article 14, it cannot act arbitrarily. It has to act fairly and reasonably and in the matter of award of contract has to satisfy this criteria. Public interest can not be given a go by in the choice of a person. In our opinion relaxation of time frame was necessitated and cannot be termed as action beyond permissible free play in joints envisaged while entering into contract.

In case of Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, , wherein lowest tender offered was sought to be revised by the Government on the ground to bring in its viability range was made higher. The acceptance of a tender at a higher rate was quashed being against the interest of revenue. But in the instant case we find offer L-1 has been accepted.

Matter of relaxation of the condition was considered by the Apex Court in case of M/s. G. J. Fernandez Vs. State of Karnataka and others, in which it has been laid down that "It is not that the authority inviting tenders cannot deviate or relax the prescribed standard in any situation, But any deviation, if made, should not result in arbitrariness or discrimination. The rule laid down in Airport Authority case : Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general." We find no discrimination in present case as note of tenderers was ready to supply full quantity in 16 months.

Another question is that mere fixation of period of delivery or a time in regard thereto whether make the time as essence of the contract ? This question has been considered by their Lordships of the Apex Court in case of M/s. Arosan Enterprises Ltd. Their Lordships have clearly laid down that mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract.

23. In M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, while considering the question when the time can be held to be essence of the contract in the purview of Section 55 of the Contract Act 1872 while considering the time is essence of the contract all the terms and conditions have to be examined and intention of the parties together. Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. To quote paragraphs 21, 22, 23 and 24 of the aforesaid judgment (at pp 3814-3815 of AIR):

"21. It needs to be noted here that the Clause as regards any cargo being underloading/afloat on the date of the contract has been subsequently deleted. The contract term as regards the shipment period expressly provide thus that the shipment should reach Indian ports not later than 31st Octomber, 1989 but the issue is whether in the contextual facts time was the essence of the contract and in the event the answer is in the affirmative, then and in that event whether there was subsequent extension of time and what is the effect therefor. Herein before in this judgment we did refer to the effect of subsequentextension, but the issue as regards the factum of the time being the essence of the contract was left to be dealt with at the later stage and as such, it would be convenient to note the same at this juncture. Clause 3 of the Agreement namely the Shipment period expressly records that Shipment within contract delivery period was of the essence of the contract and it was clearly understood between the parties that except for reasons of force majeure the Seller would be deemed to be in default and buyer would have the absolute right to cancel the contract at the cost, risk and responsibility of the seller. The particular clause however itself provided that the buyer may however extend the delivery period at a discount to be mutually agreed to between the buyer and the seller : the contract therefore, envisaged specifically an extension of the period on a mutually agreed term. The price Clause also is of some relevance in the matter of appreciation of the Agreement between the parties vis-a-vis the time. Clause 4 (ii) records that the buyer had the option to discharge the sugar at a port on the coast, other than the basic coast by paying additional charge and in terms of Clause 4(iii) the buyer had the option to discharge the sugar at two ports upon payment of additional charge. It is therefore, apparent that different rates have been provided for different ports and specific naming of the port is thus required before delivery is expected in the matter. On the wake of this factual detail as appears from the record and by reason of non-fulfilment of the buyers'' obligations in terms of the agreement, can it be said that the time was the essence of the contract ? In our view the answer to this all important question is in the negative. The contract itself provides reciprocal obligations and in the event of non-fulfilment of some such obligations and which have a direct bearing on to them --strict adherence of the time schedule or question of continuing with the notion of the time being the essence of the contract would not arise. The obligations are mutual and the terms of the agreement are inter-dependent on each other.

Incidentally, paragraph 761 of Halsbury''s Laws of England (4th Ed: Vol.41) seems to be very apposite in this context. The passage reads as below :

"761. Place of Delivery uncertain. Where the place of delivery is not indicated by the contract, and is within the option of the sellor or of the buyer respectively, it is a condition precedent to the liability of the buyer or of the seller respectively to accept or to deliver the goods that he should receive notice of the place of delivery. "

If any credence is to be given to the above noted passage in Halsbury''s Laws of England being read with the terms of the contract, we do not find any justification for the Appellate Bench of the High Court to come to a conclusion that in fact time was the essence of the contract. Since the condition precedent has not yet had taken place, neither the requirement of appointment of Surveyor has been complied with: the contract ought to be read with the time clause but subject however to certain other conditions. The essential point is that the seller must be instructed in accordance with the terms of the contract as to the way in which he can perform his duty in terms of the agreement and effect delivery upon the goods being put on board -- In the event the Port of Discharge is not named -- can the goods be put on board or can the seller be made responsible for his failure to put the goods on board? The answer cannot but be in the negative. In the contextual facts, the goods were on the high seas and to be diverted to the ports of India, shortly, as such nomination of the port, was an essential requirement, in Order to make the seller liable for breach and entitlement of the buyer to claim damages. In this context a passage from Benjamin''s Sale of Goods Act (4th Edition) seems to be rather appropriate: paragraph 20-040 reads as below:

"The essential point is that the seller must be instructed, in accordance with any relevant terms of the contract, as to the way in which he can perform duty to put the goods on board. If no shipping instructions are given, or if shipping instructions are not given within the time allowed by the contract, the seller is not liable in damages for non-delivery; and the buyer is liable in damage for non-acceptance."

Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the Agreement ought to be notice in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the instant case, the Port of Discharge has not been named neither the Surveyor is appointed without whose certificate, question of any payment would not arise can it still be said that time was the essence of the contract, in our view the answer cannot but be a positive ''No''."

It has been mentioned in the counter affidavit filed by Union of India that supply schedule has been so fixed that after supply of 40 MTs in 24 months the Security paper Mill would be left with stock of one year in addition after utilising the thread in the period of 24 months. Thus, it cannot be said that the requirement has been given a go-by while relaxing the condition. Moreover, Clause 8 of Section IV of tender document indicates that the exact quantity may vary at the time of placement of order. The completion time has to be considered in the context of conditions of Clause 8 of Section IV when exact quantity may vary then supply of 40 MTs in 16 months has to be taken to be not an essential condition. If no order is placed by Government no supply could be made as order is to be made of quantity every time which may vary as per consumption and requirement. Again the delivery schedule contained in Clause 3.1 of section Vis tentative, not final. Thus what emerges is that the Govt. could vary the exact quantity while placing the order for supply/shipment. Further more shipment instructions are also required to be made as per Clause 12 of section V of the terms and conditions contained in the tender document.

Delivery Schedule as per Clause 9 of section 5 which contains terms and conditions in the tender document reads thus :

DELVIERY SCHEDULE :

The stores will have to be supplied in instalments as specified in the contract/ supply order from the date of placement of order or from the date opening of

Letter of Credit. The Overseas supplier shall deliver the stores ordered F.O. B. Port of Shipment/ Airport basis and booked to Bombay Sea/Air Port./F.O.R. Security paper Mill, Hoshangabad (MP)."

It is apparent that the store will have to be supplied in instalments as specified in the contract/supply order from the date of placement of order or from the date of opening of Letter of Credit. The Overseas supplier shall deliver the stores ordered F.O.B. Port of Shipment/Airport basis. Thus, there is reciprocal obligation contained in the tender document. It is open to the Govt. to vary the quantity and delivery schedule contained in Clause 3.1 of Section V is only a tentative. In case Government fails to place the order there is no possibility of effecting the supply within the period fixed. Thus, the strict adherance of the time schedule or the time being essence of the contract would not arise. The obligations are mutual and terms of the agreement in the instant case are inter-dependent. The time clause is subject to other clauses including the Clause 1.3 of Section IV which enables deviation to the terms and conditions read with Clause 8.1 in the same Section IV exact quantity may vary at the time of placement of order. In the instant case we find that seller has to be instructed as per the terms of the agreement to perform his duty and effect delivery thereafter not otherwise. Thus, ratio of the decision in case of M/s Arosan Enterprises Ltd. (supra) is attracted and it cannot be said that the time is essence of the contract and could not be varied. Quantity and time both could vary as they are inter-dependent.

We also find in any view of the matter that in facts and in the circumstances it was open to Union of India to grant relaxation for the bona fide reason as none of the tenderers was ready to supply 40 MTs within 16 months. The departure from the term cannot be said to be arbitrarily done so as to favour M/s Pressure Sensitive System, but, it was found in the interest of revenue being lowest in price.

There is yet another compelling reason for us at the cost of repetition not to interfere with the deviation so made as quashing the contract would occasion major detriment to the public as the requirement is connected with the national economy. We find no overwhelming public interest in stopping the supply which is essential for interference. We find the relaxation in furtherance of the public interest and "free play in the joint" is required to be given in the field of contract. It appears to us to be a case between the two rival bidders not involving any public interest. Interference can only be made when overwhelming public interest requires a court to intervene which is not the case here.

We find that in case Government had not relaxed the condition on the time being essence of the contract and literal interpretation is adopted without adverting to the other clauses, such as supply order etc. in the event none of the tenderer was for the supply full quantity in 16months, hence, all the tenders were containing the deviation for which no relaxation could be made and the only option available to Union of India to have issued fresh global tender which is a cumbersome process involving delay, wastage of precious time considering the nature of the requirement. It cannot be said that the Union of India has acted irrationally nor any illegality has been committed as per the test laid down in the decision in Tata Cellular (supra). While floating the tender the equal opportunity was granted, but, deviations were made by all the tenderers in the delivery schedule. Thus, it was open to the Government to accept the L-1 tender which it has found fit on its proper evaluation in the interest of revenue. Had the relaxation not been granted then the purpose for which the time was fixed would have been defeated further by folating fresh global notice inviting tender.

Learned counsel appearing for M/s Aristrocraft International Ltd. placed reliance on the decision of the Apex Court in case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, . In the said case the High Court set aside the award of contract in favour of M/s Monarch Infrastructure (P) Ltd. because it had not fulfilled the condition regarding the Clause 6(a) of the tender notice. Same was deleted subsequent to the last date of acceptance of the tenders. The Apex Court approved the decision as the fresh tenders were already invited by the time the matter came to be decided by the Apex Court. The Apex Court considering the public interest allowed the tender process to be completed by accepting the highest offer made by M/s Monarch Infrastructure (P) Ltd. subject to raising its bid to match with that of Ramchand Mahadeo Rao, though invalid. It is true that the terms of the tender were deleted in the said case had the same effect after the supplier entered into arena rules of the games are changed after game had begun.

In the present case the quantity offered to be supplied by M/s Pressure Sensitive System was 25 MTs and its tender was lowest and had offered for supply of entire 40 MTs in the original tender document, whereas the offer of M/s Aristrocraft International was confined to 20 MTs in the original tender document. It is the case of petitioner M/s Aristrocraft International Pvt. Ltd. that it had given the quantity of 20 MTs as it expected that the Government may accept more than 20 MTs within 16 months, by this stand it is clear that the delivery schedule is merely tentative and the parties understood it to be so and the deviation was made and it can be accepted as per Clause 1.3 . We find in the instant case no rule has been changed, no condition has been deleted after the players had entered the game and it had begun.

On behalf on M/s Aristrocraft International Pvt. Ltd it has been urged that as per the recommendation of STEC, recommendations contained in Annexure-P/16 the supply should have been divided between the petitioner; M/s Aristrocraft International Pvt. Ltd. and the lowest tenderers; M/s Pressures Sensitive System. It is to be seen that the price bid of M/s Pressure Sensitive system was lowest and in the interest of revenue and Central vigilance Commission prohibits post tender negotiation except with the L-1 tenderer. Before us there is another intervenor; M/s Colonac International Pvt. Ltd, Chennai who has come up saying that in case M/s Aristrocraft International Pvt. Ltd. is allowed to take post tender negotiation the same opportunity has to be granted to it also. As a matter of fact if there has to be any post tender negotiation that has to be in fair and equal manner not with the person who has only chosen to challenge the award of contract, but, with other qualified tenderers. The submission raised is rejected that only petitioner; M/s Aristrocraft International Pvt. Ltd. revised post tender offer ought to have been accepted by negotiating with him.

In view of the finding that the delivery schedule was tentative supply could vary and also the fact that the delivery schedule so fixed would still leave surplus for one year, it cannot be said that the purchase/ supply ought to have been divided. As a matter of fact M/s Aristrocraft International Pvt. Ltd. and M/s Colonac International Pvt. Ltd. wrote voluntarily and unsolicited letters to STEC offering to match their prices with the L-1. But, this was clearly an after thought. If the other tenderers are allowed to lower their bid after opening of their tenders the entire purpose of fetching the best competitive price by inviting the sealed tenders would be frustrated and in the facts and cicumstances of the case it cannot be said that accepting tender of M/s Pressure Senstitive System, any arbitrariness has been committed. It was found by the STEC, that the rates received in the instant tender have been highly competitive and much cheaper compared to the last purchase price of contract No. 3, which was price Rs. 4062/- per k.g. the price now received is Rs. 3011/- per k.g. lower by 25.87% thereby rersulting in saving of around 5.60 crores to the Government of India. Thus, the action of accepting L-1 bid has clearly subserved interest of exchequer.

Our attention has also been drawn to the DCS and D Manual for purchase of store. Clause 113 Chapter V with respect to purchase of store contained in the said Manual provides that a trial order can be placed on an untried or un-registered firm provided their capacity is reported upon as satisfactory. The order which has been placed in the instant case as contained in Government of India, Economic Affiars, letter dt. 14-9-99 (Annexure-P/12) sanction was conveyed subject to the condition that the firm should complete supply of initial quantity of 3 MTs of security thread before end of February 2000 (i.e. at the rate of 1 M.T. per month starting from December, 1999), The order for the balance quantity of 37 MTs @ 2 MTs per month will be placed only after successful trial production with the initial supply. The Security Paper Mill would satisfy about the performance result of the thread and inform the firm of it or otherwise for chalking out further supply schedule. Thus, sanction (Annexure-P/12) accorded by Government of India is in accord with the para 113 Chapter V of DCS and D Manual. The team of inspectors was appointed. They submitted their capacity assessment report. Sample was also submitted and the sample was also found upto the mark of test being conducted as mentioned in Annexure-P/16, the minutes of the STEC meeting. Its central excise gate pass was also collected by the team of the inspectors on 15-7-99 on the date of inspection as mentioned in the capacity assessment report Annexure-P/15. Rule 103 of the General Financial Rules (Annexure-P/19) provides that purchase shall be made in the most economical manner in accordance with the definite requirements of the public service. Stores shall not be purchased in small quantities. Periodical indents shall be prepared and as many articles as possible obtained by means of such indents. At the same time, care shall be taken not to purchase stores much in advance of actual requirements, if such purchase is likely to prove unprofitable to Government. Thus, considering all the relevant factors Government had taken the decision not to split the supply and at acted prudently to order first to try the initial supply and there is no complaint in the trial order as to the quality has been found as submitted by Union of India.

Learned counsel for M/s Aristrocraft International Pvt. Ltd. also place reliance for splitting the supply on the decision of the apex court in case of Mewa Ram Kanojia v. A.I.I.M.S., 1989 (2) SCC 235), (1989 Lab IC 1348) . In the said case the Apex Court came to the conclusion that the appellant had a prima facie case but instead of creating any dead lock it was agreed that the contract should be split up in the interest of justice and the appellant should be assigned one-fourth of the contract and respondent No. 1 was to supply reminder. But, in the instant case no such agreement is in between the parties and in our considered opinion it is not for the court to substitute a contract to divided to the supply until unless agreed to between the parties. We have found nothing arbitrary in the decision of Union of India to split the supply in the facts of the case.

Learned counsel for the petitioner M/ s Aristrocraft International Pvt. Ltd has also drawn our attention to the decision of the Apex Court in case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, wherein the Apex Court has classified the requirement in a tender notice into two categories those which lay down the essential condition of eligibility and the others which are merely ancillary or subsidiary with the main object to be levied by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. We have already found that time frame had to be deviated by compulsion considering the quantity offered in the tender there were reciprocal obligations. Thus, in our opinion the time was not the essence of the contract and otherwise also in facts of the case it was open for the Government to deviate.

D.P.A.No 127-2000 has been filed by M/s Aristrocraft International Pvt. Ltd. the appellant/ petitioner so as to assail the finding of the learned single Bench holding that M/s Pressure Sensitive System fulfilled the eligibility criteria. Learned counsel appearing for the appellant Shri V. K. Tankha has invited our attention to section III relating to Submission of Tender which in Clause 6 contained that evidence of experience of execution of contracts of Security Thread and magnitude carried out by the tenderer was required to be enclosed. It is further submitted that Section IV Clause 1.11(v) contains that the technical tender, as submitted, in addition to the Technical details of security Thread offered by the tenderer, will consist the details of Security Thread of similar type supplied in the past Clause 1.13 in Section IV has also been pressed into service which provides that the tenderer shall also satisfy the purchaser that he possesses the necessary experience and qualifications and that he has at his disposal/suitable modern facilities and specialised employees to ensure that his work is of best quality and workmenship according to the latest technology and engineering practices. The tenderer shall satisfy the purchaser that he is financially in position to fulfil contractual obligations offered to be undertaken by him. Clause 7 contained Section IV of the tender document deals with pre-production sample which reads thus :

PRE-PRODUCTION SAMPLE :

Tenderers who are in a position to supply may send about one kg. sample wound on our spools on or before the due date specified above. Two Spools are being supplied along with tender documents.

In this context our attention is also drawn to Clause 19 contained in Section IV of the tender document that Lowest Tender was not necessary to be accepted. Clause 22 provides the tenders received and accepted will be evaluated to ascertain the best and lowest evaluated tender in the interest of the purchaser, for the complete supply covered under the Technical specification and document.

Technical tenders were opened on 23-6-99 and after finalisation of the technical tender determining the eligibility the price bids were opened after more than one month. Clause 13 of Section V of Terms and Conditions has also been pressed into service in connection with eligibility to contend that the contractor will not be allowed to assign and/or transfer his/their obligation or benefit under the contract either in full or in part to other agencies. However, under extreme circumstances where sub-contracting of part of the contract is unavoidable, prior written permission of the General Manager, Security Paper Mill, Hoshangabad shall be taken by the supplier. Section VI of the tender document contains Technical Specification for Special Security Thread Common for Embodied/ Windowed Application For New Family of Notes provides specification for width of thread, thickness of thread, fluorescence, solubility, height of letters, centre Line of the letter, light fastness of blue fluorescence, appearance in paper, bonding of the thread with paper, pull out of the thread, weathering resistance, migration of fluorescence, chemical resistance and test conditions for all types of threads.

The samples were submitted with the tender document by M/s Pressure Sensitive System. Central Excise gate pass were also submitted to the Inspector as mentioned in the capacity assessment report Annexure-P/15. The capacity assessment report has found that the firm; M/s Pressure Sensitive System is committed in their techno-commercial tender, will be in a position to undertake the job. Though the firm has no experience of registered-slitting but they have vast experience of slitting polyster reels of various thickness and width. STEC minutes (Annexure-P/16) contains that the testing and examination of the sample thread was carried out by two independent sub-committes in SPM. Out of the 04 samples received, the samples of only 03 firms, namely M/s Aristrocraft International Pvt. Ltd. M/s Colonac International Pvt. Ltd. and M/s Pressure

Senstive Systems (India) Ltd. Mumbai were found meeting the parameters of the specifications stipulated in the tender. The 4th sample of M/s Hindustan Adhesives, failed to pass the lab tests, and also the bid bond submitted was not as per the terms of tender inquiry. The sample submitted by M/s Pressure Sensitive Systems was found to be acceptable. However, it was wrongly mentioned by STEC that M/s Pressure Sensitive Systems has quoted for supply of 25 MTs, its offer was actually for 40 MTs. STEC has found M/s Pressure Sensitive Systems fit for placing the order at L-1 rates, it appears that necessary safeguards were also observed while adjudging the eligibility. The court does not have the expertise to correct the decision of the expert bodies. The capacity has to be adjudged qualitatively by experts which has been done in the instant case. Commercial consideration to requisite specifications price etc. have been taken into consideration. We do not find plea of mala fide substantiated by the petitioner.

In case of Raunaq International Ltd. (supra) in para 16 the apex court laid down thus (at p. 398) :

"16. It is also necessary to remember that price may not always be the sole cirterian 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 roll 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 roll in deciding to whom the contract should be awarded. At times, a higher price for a 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 court should not substitute its own decision for the decision of an expert evaluation committee."

We are unable to agree with the submission of the learned counsel that M/s Pressure Sensitive Systems tender could not be accepted as it was not having past experience for supply of security thread, as a matter of fact manufacture of security thread is prohibited except in case of order being placed by the Government or required by it thus, it is not possible for a new entrants to possess the past experience in the filed and monopoly of only one would remain if the submission is accepted no supplier can ever enter the field or compete because of the nature of the product required to be supplied, production of which is prohibited otherwise on specific order by Union of India. As a matter of fact same was a case when for the first time the petitioner M/s Aristrocraft International Pvt. Ltd. started manufacture. Capacity assessment report clearly speaks of the vast experience. It appears that experience of more than decade is available with M/s Pressure Senetive Systems of slitting polyester yarn which has been accepted by STEC and it was having knowhow in the field of registered slitting also and court cannot sit over the capacity assessment report, laboratory test in which sample has been found fit and the fitness evaluated by STEC.

It is also urged that from the capacity assessment report it is clear that part of the operation are to be carried out by M/s P.V. Traders and not by M/s Pressure Senstive Systems alone. We do not find any merit in the submission as in rejoinder it is submitted that the lease has been obtained by M/s Pressure Sensitive Systems and it has taken the responsibility of doing that. In the writ petition, it appears that this point has not been taken and also was not raised before the learned single Judge. However, we find that in the capacity assessment report and STEC the evaluation has been properly done. M/s Pressure Sensitive Systems has been found fit to effect the supply. It is not the case set up that the subcontracting has been done. We do not find any merit in the submission so raised.

It is submitted on behalf of Union of India that best and lowest evaluated tender in the interest of the purchaser for the complete supply covered under the technical specifications and tender document has been accepted as per Clause 22 of section IV of the tender document.

It is further submitted that the purchaser has to take into consideration all the other relevant commercial aspects, stock in hand and stock due etc. also which will have direct impact on the overall cost of the material to be procured and the offer is techno-commercially best and cheaper. If is also submitted that the petitioner; M/s Aristrocraft International Pvt. Ltd.''s offer would have incurred additional liability on the Government. In the counter reply filed by Union of India it is submitted by Union of India that its past experience with the petitioner; M/s Aristrocraft International Pvt. Ltd. has not been satisfactory as in the previous contract No. 20(S) 97-98/GT/ST/ S.O.3 dt 6-10-98 awarded to the very same petitioner, the supply of security thread did not conform to the laid down specifications, the deficiencies were communicated on 15-3-99 The supply of M/s Aristrocraft International Pvt. Ltd. in the previous year was also not defect free. Even liquidated damages was recovered in the year 1994. In 1995 347.75kg. material was found to be of substandard and rejected and 5-2-98 the petitioner firm could not meet the delivery schedule indicated in the contract and on their own request the delivery schedule was further amended. It is further submitted that against the order dt. 2-9-98 placed to M/s Aristrocraft Internation Pvt. Ltd. for 2 MTs security thread, the petitioner firm could supply only 500 kg (i.e. 1/2 MT) and the order was amended and short-closed to that extent and the order placed on 6-10-98 for 16 MTs security thread placed on the petitioner firm, the delivery schedule has been revised on their own request on three occasions and, as a result of not adhering to the delivery schedule, a sum of Rs. 3,937-00 has been recovered towards L.D. and as such as per Union of India petitioner lacks technical competency to meet the requirement, Whatever that may be but, it appears that the delivery schedule has been extended time and again in the previous contract.

It is further submitted by Union of India that the condition put by the petitioner of change of rate because of duty due to amendments in the fiscal policy and other levy imposed was onerous whereas no such condition has been imposed in the offer of M/s Pressure Sensitive System which is unconditional, cheaper, economical in the interest of exchequer. It is also clear that as per the instructions contained in para 38 of Annexure to Rule 128 of the General Financial Rules, late tenders, delayed tenders and post tender offers should not be considered at all, as such the subsequent after thought offer made by M/s Aristrocraft International Pvt. Ltd. could not be accepted. Post tender negotiations are banned by Central Vigilance Commission, except in the case of negotiations with L-1(i.e. lowest tenderer). Thus we find no merit in the submissions raised by petitioner.

Thus, we find that Writ Petition is liable to be dismissed while we affirm the decision of the learned single Bench relating to the question of eligibility. However, we set aside the part of the order quashing the award of the contract in favour of M/s Pressure Sensitive Systems.

In the result L.P.A. No. 118/2000 filed by M/s Pressure Sensitive Systems (India) Ltd. and L.P.A. No. 124/2000 filed by Union of India are allowed and L.P.A. No. 127/ 2000 filed by M/s Aristrocraft International Pvt. Ltd. is dismissed. The writ issued by the learned single Judge is set aside and the petition is dismissed. Costs on parties.

