(2009) 12 BOM CK 0116

In the Bombay High Court

Case No : Writ Petition No''s. 3985, 3986 and 3987 of 2009

Satish Kumar Sharma under the Name and Style of S.K. Sharma as a sole Proprietor — APPELLANT

Vs

Bharat Heavy Electricals Limited, a Government of India Undertaking — RESPONDENT

Date of Decision : 08-12-2009

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2010) 1 ALLMR 733 : (2010) 3 BomCR 357 : (2010) 112 BOMLR 771

Hon'ble Judges : F.M. Reis, J;D.D. Sinha, J

Bench : Division Bench

Advocate : T.D. Khade, for the Appellant; R.S. Sundaram, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Rule. Returnable forthwith. Heard finally by consent of parties.

2. The petitioner are challenging the action of the respondent authority for not considering his technical bid pursuant to the Tender Enquiry Notice dated 10.6.2009. The Writ Petition No. 3985/2009 is in respect of notice inviting sealed tenders relating to T.S No. BHEL/PW/PUR/VNT/ MMS/654 from the bidders for the purpose of receipt of materials, unloading, verifying, shifting, staking, preservation and handing over of components of boiler and auxiliaries, electrostatic precipitator and its auxiliaries, electrical systems, controls and instrumentation of boiler and TG packers, HP and LP Piping, Refractory and Insulation, BHELs T & P and Components and Equipments of various other items and providing services for Material Management for 2 x 500 MW Super Thermal Power project Stage-IV Unit Nos. 11 and 12 at NTPC Vindhyachal, Distt. Sidhi Madhya Pradesh.

The Writ Petition No. 3886/2009 is with regard to the notice inviting sealed tenders relating to TS No. BHEL/PW/PUR/RTS/MMS/660 from bidders for the purpose of receipt, unloading, verifying, stacking, preservation etc. of project materials of boiler & aux, steam turbine, turbo generator & aux, electrical, C&I, piping, lining & insulation and other materials including BHEL T & P, providing materials management services etc for for 2 x 500 MW Unit#5&6, Rihand Super Thermal Power station of NTPC, Distt. Sonbhadra, UP.

The Writ Petition No. 3887/2009 is in respect of notice inviting sealed tenders relating to TS No. BHEL/PW/PUR/RGIT/MMS/662 from bidders for the purpose of receipt of materials, unloading, verifying, shifting, stacking, preservation and Bunker and Bunker Structure and handing over of components of boiler and auxiliaries, steam turbine and auxiliaries, turbo-generator and auxiliaries, electrostatic precipitator and its auxiliaries, electrical systems, controls and instrumentation of boiler and TG packers, HP and LP Piping, Refractory and Insulation, BHELs T & P and Components and Equipments of various other items and providing services for Materials Management for 4 x 500 MW Super Thermal Power project Jindal Power Limited Phase-III (4x600 MW JPL STPP) Salibhat Tamnar Village, Distt. Raigarh, Chattisgarh.

As all the contentions raised by the parties are common and as such the petitions are heard and disposed of by a common judgment.

3. It is the case of the petitioner that the respondent floated a notice inviting the sealed tenders from the bidders for the purposes of carrying out the work referred to herein above and that the tender specifications with complete details was posted on the Web Site of the respondent. Accordingly, the petitioner down-loaded the same and decided to submit his offer. All the documents required for submitting the said tender form were obtained by the petitioner and as he fulfilled all the qualifications, requirements as mentioned in such notice and was eligible in every respect to participate in bid for the said job as individual, the petitioner was interested in submitting the said form. Along with the notice inviting tender, the petitioner also obtained the procedure, mode and manner of filing the technical bid, specifications under the said contract. The said tender form was to be submitted in two packets in separate sealed cover, describing as Part-I Technical Bid and Part-II Price Bid and indicating on each of the covers the tender & specification number, due date and time as mentioned in the tender notice. The two separate covers being Part-I and Part-II were to be enclosed in a 3rd envelop Cover-3 along with requisite earnest money deposit and those sealed covers were to be subscribed and submitted to the Additional Manager (Purchases), having its office at Bharat Heavy Electrical Limited, Power Sector, Western Region, 345, Kings Way, Nagpur. The petitioner on 23rd June, 2009, sought certain clarifications regarding the said notice inviting tender and by letter dated 2nd July, 2009, the queries posed by the petitioner were duly clarified by the respondent. The date for submitting the tender was extended to 6th July, 2009 and the technical-cum-commercial bid was intended to be opened on 7th July, 2009. The petitioner submitted his bid in the prescribed format with the appropriate authorities of the respondent strictly in terms of the technical bid,

specifications and notice inviting tender, on 6th July, 2009, before 18.00 hours. As per the schedule, the technical bids were due to be opened on 7th July, 2009, and as such the petitioners authorized representative was present in the office of the respondent at the time of opening of the technical-cum-commercial bid, along with 7 other intending bidders. To the utter surprise of the petitioners representative, the envelop in Cover-3 containing petitioners technical-cum-commercial bid was not opened by the concerned officers of the Respondent. The said representative protested against the non-consideration of the technical-cum-commercial bid of the petitioner and was verbally informed by the said Officials that the said bid will not be opened due to unsatisfactory performance report for the earlier material management contract executed by the petitioner on 2 x 500 MV STP Project No. 2006-07. The petitioner disputed the said contention of the respondent and lodged a written complaint with the Executive Director complaining the arbitrary action on the part of the respondent, particularly the officials of the respondent, for not considering the technical-cum-commercial bid. As the petitioner did not receive any feedback from the respondent with regard to the steps in opening the technical- cum commercial bid, a reminder was sent on 18th July, 2009 and a copy was also forwarded to the Chairman of the respondent. Despite of representations, no favourable response came forward from the respondent. Thereafter the petitioner learnt that part-two of the tender documents were to be opened, which means that the technical-cumcommercial bid of the petitioner would not be considered and 4th accordingly, by letter dated September, 2009, the petitioner again issued a reminder to the respondent requesting to look into the matter and to stop from further processing of the said tender till such issue was resolved. It is further the case of the petitioner that such action on the part of the respondent is mala fide as respondent cannot refuse to consider the technical-cum-commercial bid of the petitioner on any justifiable ground. It is further his contention that the decision making process adopted by the respondent under the said tender suffers from legal infirmity and that by refusing to open and consider the technical-cumcommercial bid of the petitioner, the respondent has acted in an unfair and discriminatory manner and such action on their part fails to satisfy the test of reasonableness and is unreasonable. It is further his contention that his right to compete with the other bidders has been violated and consequently he filed the petitions for a writ and/ or direction to consider the technical-cum-commercial bid of the petitioner along with the other competitors and for the other relief''s as stated in the petitions.

4. This Court by order dated 17th September, 2009, issued notice to the respondent and in the meantime, the respondent was directed not to issue work order in relation to tender in question. Thereafter, on 14th October, 2009, learned Counsel for the respondent stated that the entire tender process in respect of tender in question was completed and a work order had not been issued in view of the interim order by this Court. The respondent was directed to file an affidavit stating the steps taken pursuant to the notice inviting tenders. Thereafter on 16th October, 2009, this Court had passed an order, inter alia

permitting the respondent to proceed further with process of the tender without prejudice to the rights of the petitioner.

5. The respondent filed their preliminary submissions on 17th September, 2009. It is the contention of the respondent that the petitioner has not come with clean hands and suppressed the material facts from this Court. It is the contention of the respondent that it is made very clear in the notice inviting tender that the respondent reserves the right to accept or reject any or all tenders without assigning any reason whatsoever and it was made very clear in the notice that respondent reserve their right to reject any tender on the basis of unsatisfactory performance of the bidders in any on going job or any similar job for the last 7 years or for furnishing false information/declaration in the offer. It is further their contention that due to power shortage in the country, all the projects are time bound and any delay on their part will directly upset the completion of the project schedule and thereby affecting the electrical generation and cause huge loss to the respondent and heavy penalty is imposed by the customers on the respondent Company in the form of liquidity damages and power generation loss etc., as per clauses of the contract and therefore, the respondent company is bound to exercise caution while awarding the contracts to its enlisted bidders and thus, those whose performance was found very satisfactory and time bound and meeting the tender qualifications are only considered by the Tender Committee and therefore, the technical bid and price bid are opened and the work is awarded after going through the entire procedure. It is further the contention of the respondent that Clause 12 of Qualification of Tender, Section 1 of General Conditions of Contract, revised one, dated 18/07/2008, only tenderers who have previous experience in the work of other nature and description- details in the tender specifications are accepted. As per Clause 1.3.3. of the Section, it is mandatory on the part of a tenderers to give a statement giving particulars, details supported by documentary evidence of the various services tendered, value of each work, site location, duration and date of completion and also list of all site locations and particulars and value of various services that are under progress. It is further the contention of the respondent that as per Officer Order No. BHEL.PW/PUR/654, dated 7th July, 2009, a Committee was formed to consider the suitability of the petitioner for the current and future tender of material management package price, based on review of their performance of BHEL Vindyachal Stage-3 Site in view of the submission of final bill by the petitioner. The committee obtained the reports for the years 2003-04, 2004-05 and 2005-06. As per the recommendations of the said Committee vide report dated 5th August, 2009, the over all score of the petitioner worked out to 52.5% and it was concluded by the said Committee that the performance of the petitioner was unsatisfactory. All the review reports were signed by both the respondent companies and the authorized representative of the Petitonier Company Mr. Choube, and the true copy of the said report dated 5th August, 2009, has been produced by the respondent. The said recommendations were confirmed by the report dated 17th August, 2009. It is further the contention of

the respondent that the petitioner is not entitled for any reliefs in the present petition.

Thereafter, the petitioner filed his reply dated 30th September, 2009 to the said preliminary submissions. It is not disputed by the petitioner that the respondent has reserved the right to reject the tender on the basis of unsatisfactory performance of the bidder in any on going job for the last 7 years, but, however, it is the contention of the petitioner that he had obtained the annual reports feedback report for 2003 to 2007 work as satisfactory. It is further his contention that the process of constituting the committee was deliberately started without any notice or hearing to the petitioner, which resulted in injustice to the petitioner.

6. Additional Counter affidavit was filed by the 8th respondent on October, 2009, along with the annual performance feedback report and valuation of the performance for the work performed by the petitioner. An affidavit dated 15th October, 2009, was also filed by the respondent. A reply thereto was filed by the petitioner on 15th October, 2009. Another affidavit was filed by the petitioner on 4th November, 2009. An additional affidavit was filed by the respondent on 6th November, 2009, along with the annexures.

7. We have heard Mrs. T.D. Khade, learned Counsel appearing for the petitioner as well as Mr. R.S. Sunderam, learned Counsel appearing for the respondent and perused the records in the above petitions, and notes of submissions filed by the respective counsels. The learned Counsel for the petitioner submitted that the respondent have acted arbitrarily and deliberately refused to open the technicalcum- commercial bid of the petitioner. It is further submitted that the respondent has as an after-thought issued a show cause notice and has fabricated the documents to contend that the work performance of the petitioner was unsatisfactory. It is further the contention of the petitioner that the whole exercise by the respondent was only after the date of opening of the technical bid or offer, which suggest that the respondent were acting in a high handed manner and fabricated the record for the purposes of denying the right of the petitioner to submit his tender along with other bidders for the work. It is further her contention that the question of appointing a committee to re-evaluate the performance of the petitioner did not arise at all, as, in any way, such exercise is in breach of the principles of natural justice, as no opportunity was given to the petitioner to submit his views with regard to the allegations sought to be raised against the petitioner. It is further the submission of the petitioner that he had been issued a satisfactory certificate and the whole exercise on the part of the respondent is to show that such certificate has been wrongly issued by resorting to means whereby documents have been procured to show that the certificate is not genuine. It is further the contention of the petitioner that the petitioner has been deliberately side-lined from taking part in the tender process and as such he is entitled for direction to the respondent to open his technical-cum-commercial bid submitted to the respondent. In support of her contentions, the

learned Counsel has relied upon the following judgments;

(i) Meerut Development Authority Vs. Association of Management Studies and Another, .

(ii) Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, .

(iii) M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another, ...

8. On the other hand, learned Counsel appearing for respondent has submitted that the work done by the petitioner was unsatisfactory and in support of his contention, he produced the documentary evidence of monthly valuation of the work done by the petitioner, which discloses that except for the first two months, the work done in subsequent months was unsatisfactory. It is further his contention that the certificate relied upon by the petitioner is not authentic and the same has been issued by wrong manner without any authority and without following due process for issuance of such certificate. It is further his contention that an Evaluation Committee was constituted to evaluate the performance of the petitioner and after reviewing the record of the respondent, the Committee came to the conclusion that the performance of the petitioner was unsatisfactory. It is further the contention of the learned Counsel that the monthly reports have been duly signed by the authorized representative of the petitioner and as such the petitioner was very well aware of the score he attained during the period when his performance was being evaluated. It is further his contention that the work which is tendered is in connection with the power generation and as such the same was time bound and consequently it was an interest of the respondent to ensure that the parties who are entitled to bid have a good reputation and were not subjected to any unsatisfactory work at the earlier point of time. It is further the contention of the learned Counsel that considering the evaluation/ performance of the petitioner, the respondent were justified in refusing to open the technical bid of the petitioner as his performance was unsatisfactory. It is further his contention that the petitioner is not entitled to any reliefs in the present petitions as the action on the part of the respondent is in conformity with the law and there is no arbitrariness or any mala fides established by the petitioner which calls for interference in the present petition. It is also the contention of the learned Counsel that the tender process has been completed and the respondent have issued the work order to the successful tenderer whose bids have been accepted. It is further his contention that pursuant to the show cause notice and based on the committees recommendations, the respondent had issued a letter dated 24th October, 2009, suspending the business dealing with the petitioner for a period of six months. The learned Counsel has relied upon the judgment reported in Jagdish Mandal Vs. State of Orissa and Others, .

9. From the forgoing submissions, the only point to be considered is as to whether the respondent were justified not to open the technical bid of the petitioner since his performance for the earlier contract awarded at Vindyachal

Site (Stage-III 2x500 MW) executed from 2003 to 2007 was unsatisfactory.

10. The learned Counsel for the petitioner has relied upon the annual performance feed-back report which is at page 139 to 147. On perusal of the same, we find that the said report is signed by the Head of the Department and discloses that the performance of the petitioner was satisfactory. But, however, the correctness of the said report is vehemently disputed by the respondents. It is their contention that the said document is not authenticated and genuine document and that same is not signed for and on behalf of the respondent by an authorized officer. It is further their contention that it is not a genuine and clarificatory document and as such the same does not disclose the correct picture of the performance of the petitioner in the earlier contract.

11. In fact, the said document does not carry any date, nor does it have any signature of the Construction Manager. Apart from that, the respondent have produced the monthly review with the suppliers along with the annual performance feed-back of supplier for the different months during the period when the petitioner carried work for the respondent. On perusal thereof, we find that for the month of December, 2003, the weightage score as per the monthly review between the petitioner and the respondent worked out to 73.3%. For the month of January 2004, the same worked out to 60%. For the months of January to April 2004, the total weightage score is 41.76%. For the month of June, 2004, the said score is 45.6%. For September 2004, the score is 46.30%. For October 2004, it is 43.6%. For December 2004, it is 42.0%. For February 2005, the same is 30.40%. From April to June 2005, it is 36.80%, for July 2005, the score is 45.3%. For August to September, 2005, the same is 45.3% and from November 2005 to January 2005, the same is 35.3% and from February 2006 to March 2006, the same is 33.3%. There is no dispute that, to attain the performance as satisfactory, the weightage score should be 61% to 80%. From the forgoing annual performance feedback with the supply report, we find that except for the months of December 2003 and January, 2004, the weightage scored for all the remaining months during the period when the petitioner carried out the works for the respondent, the performance was unsatisfactory. The said reports are supported by the scores scored in each of the different heads such as quality rates, delivery rates, service rates and other rates, duly countersigned by the representative of the petitioner as well as the respondent. The contention of the learned Counsel for the petitioner that the said reports were not submitted to the petitioner cannot be accepted as we find that the scores scored in each of the said heads for each of the period referred to hereinabove have been duly signed by the representative of the petitioner. The performance feed-back report for respective periods is only the sum total of scores scored in each of the head as referred to in the report of the monthly review with the supplies, which has been produced along with the individual annual performance feedback of the suppliers. There is no dispute raised by the petitioner to the effect that the said reports have not been signed by the representative of the petitioner. As such, it cannot be accepted on the basis of the evidence on record that the petitioner were not

aware that as per the scores scored by the petitioner during the period when the work was carried out by the petitioner, the same was not to the satisfaction of the respondent. On the face of such evidence produced by the respondent, we find that the annual performance feed back of the suppliers produced by the petitioner for the period from 1.11.2003 to 30.4.2007 is not in conformity with the scores scored by the petitioner for the individual months during the said period. This shows that prima facie the evaluation made as per the said document produced by the petitioner at page 139 is not in consonance with the records which otherwise disclose that the performance of the petitioner was unsatisfactory. Consequently, the said documents which have been produced by the respondent and which are maintained as per the procedure in the regular course of the execution of the work disclose that the work of the petitioner prima facie was unsatisfactory considering the scores scored by the petitioner during the months referred to hereinabove.

12. In terms of the agreement, the said reports were prepared in view of the Clause 11.5.1, executed between the petitioner and the respondent, which inter alia contemplates that the contractor shall submit periodical progress report and on the basis thereof the work of the petitioner was evaluated. Considering the said documents produced by the respondent, the Committee constituted by the respondent submitted a report on 5th August, 2009 and came to the conclusion that the annual performance of the petitioner from the period 1.11.2003 to 31.3.2004 was unsatisfactory; 1.4.2004 to 31.3.2005 was also unsatisfactory and from 1.4.205 to 31.3.2006 was also unsatisfactory. The respondent have also produced the statements of Mr. S.L. Sohani and Mr. R.N. Deshpande to the effect that the said certificate issued by them was given by oversight by not considering the earlier reports of the petitioner. As such, it appears that there are disputed questions of fact as to the genuineness of the said annual report produced by the petitioner and on the basis of material on record, we find that, prima facie, the said document is not in accordance with the monthly reports prepared and maintained by the respondent.

13. There is no dispute that one of the condition of tender stipulated that the respondent were entitled not to consider the tenders of the tenderers in cases in which the work performed by them was unsatisfactory. As such, on the basis of material on record, prima facie, we find that in view of the documents produced by the respondent, the work performed by the petitioner was unsatisfactory and as such the petitioner was not entitled to take part in the tender process.

14. Be that as it may, we find that the manner in which the respondent have acted in the present matter is not at all appropriate. The terms of agreement executed between the petitioner and the respondent clearly provided that the respondent had a right to take necessary action against the petitioner including the power to terminate the contract and seek justification for delay & unsatisfactory work, which admittedly was not exercised by the respondent. This shows that the respondent have not been vigilant to exercise the rights reserved

for them during the period of the contract to ensure that the work was performed satisfactorily during the period of the contract. The contract was up to March 2007 and only after the tender process in the present case had started, the respondent thought it fit to take necessary steps to re-evaluate the performance of the petitioner and appointed a Committee for the purpose of assessing the work performed by the petitioner during the said period. This delay on the part of the respondent does not at all augure well for the purpose of transparency & due performance of a public authority. Such inaction has not at all been explained by the Respondent. It is not at all comprehended as to how a certificate could have been issued in such a casual manner by an official of the respondent to the effect that the work done by the petitioner was satisfactory, when, on the contrary, the record discloses otherwise. The action sought to be taken by the respondent does not appear effective & decisive and we expect that necessary action shall be taken against the concerned officials to see that such conduct is not repeated. The procedure whereby the performance is to be evaluated has to be promptly streamlined and transparent to ensure that the decision making process of the respondent cannot be faultered. We assume that the General Manager of the respondent shall take remedial measures to ensure that such certificates are not issued without proper compliance of the requirements as contemplated in the procedure framed by the respondent.

15. When a person desires to enter into a contract, the credibility of a person who is to be entrusted with the performance of the work is very important. This can be ascertained by evaluating the past experience and work done by such a person. This exercise has been done by the respondent by appointing the said Committee which came to the conclusion that the performance of the petitioner was unsatisfactory. The decision of the respondent not to open the technical bid of the petitioner was on the basis of evaluating his past history of the manner in which previous work was conducted by the petitioner for the respondent. Considering the material produced by the respondent, we find that such decision making exercise cannot be faultered.

16. In the judgment reported in Meerut Development Authority Vs. Association of Management Studies and Another, relied upon by the learned Counsel for the petitioner, the Apex Court has held that a tender is an offer & that terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of the contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by the interested person in response to notice inviting tender in a transparent manner and free from hidden agenda. In the present case, we find that the respondent were justified in not opening the technical bid, as, on the basis of material on record, the performance of the petitioner during the earlier work was

prima facie unsatisfactory. The said documents were duly signed also by the representative of the petitioner. As such, it cannot be said that there was any hidden agenda on the part of the respondent to side-line the petitioner from said process. The petitioner also has not demonstrated that any other tenderer in similar situation has been benefitted by the respondent.

17. In the judgment of Datta Associates Pvt. Ltd. (Supra), the Apex Court has held inter alia that the decision making process should be transparent, fair and open. And in the judgment of M/s. Southern Painters (Supra) relied upon by the learned Counsel appearing for the petitioner, the Apex Court reiterated that black listing without a show cause and an opportunity to be heard would entitle the contractor from being included in the list of qualified contractors. In the present case, the petitioner has not been black listed. On the contrary, a show cause notice has been given and the petitioner has duly replied to the same and the action is initiated. We are not called upon to decide or consider whether the action on the part of the respondent to issue such show cause notice and the action sought to be initiated thereby is justified. The same will have to be decided on its own merits in case such occasion arise in appropriate Forum.

18. In the judgment of the Apex Court relied upon by the learned Counsel for the respondent in the case of Jagdish Mandal v. State of Orissa and Ors. (Supra), the Apex Court has held that when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances , wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such inferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. In the present case, we find that it would not be appropriate to interfere in he tender process considering that the respondent have stated on affidavit that time being the essence of contract, the contract work has been awarded to the successful tenderer and they are already executing the work at site. The tender in the present case relates to power project and work has to be completed within stipulated time period. As the work has already been allotted and considering that the project has to be completed within a specific time frame, it would not be appropriate to interfere with such tender process which would result in additional expenditure to the respondent

and delay the work initiated. Apart from that, the petitioner can claim damages in a Civil Court in case the stand of the respondent is established and found to be incorrect.

19. In Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, the Apex Court has held that the Government is the guardian of finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purposes, the exercise of that power will be struck down. Principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The modern trend points to judicial restraint in reviewing administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, which will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. 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, but must be free from arbitrariness not affected by bias or actuated by mala fide. The quashing decisions may impose heavy administrative burden on the administration and lead to increased un-budgeted expenditure. It has further been held that the award of a contract, whether it is by private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications. The State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. In the present case, we find that the respondent have in fact appointed a Committee for the purposes of evaluating and finding out the ability of the petitioner to carry out the work which is sought to be tendered and the Committee came to the conclusion that the work performed by the petitioner earlier was unsatisfactory. The said findings are based on material on record and as such, it would not be proper to interfere in such tender process in exercise of our powers of judicial review considering the judgments of the Apex Court referred to hereinabove. The method evolved

by the Respondents cannot be considered arbitrary and the decision making process does not appear to be vitiated. We find that respondent have acted within the ambit of law in not opening the technical-cum-commercial bid of the petitioner, as prima facie the record establishes that the work earlier performed by him was unsatisfactory, which weighed on the respondents to take such a decision, and considering the nature of work to be performed seems to be justified.

20. In view of the above, we find that no interference is called for in the tender process initiated by the respondent and consequently the above petitions deserve to be dismissed with no order as to costs. Rule is discharged.

