
(2000) 06 CAL CK 0015
In the Calcutta High Court
Case No : Writ Petition No. 603 of 2000

Seimens Limited and Others	Vs	APPELLANT
W. Bengal State Electricity Board and Others		RESPONDENT

Date of Decision : 20-06-2000

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : 104 CWN 1095

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This writ application attacks the decision of the West Bengal State Electricity Board ("WBSEB") granting work order in favour of the consortium consisting of Bharat Heavy Electrical Ltd., ("BHEL") "ABB Ltd." and Crompton Greaves Ltd. ("BHEL") after changing its initial recommendation in favour of the consortium of Siemen A. G. and Siemen India Ltd. ("Seimens"). In the year 1997, the Chairman of WBSEB invited tenders for establishment of sub-stations in West Bengal for strengthening and augmentation of its transmission system. Such programme was undertaken by the WBSEB on the basis of proceeds of loan from Overseas Economic Cooperation Fund, Japan ("OECF") under loan agreement No. ID-P. 117. The subject matter of this application is lot III and lot IV of such scheme.

2. A per terms of the tender, WBSEB will determine the responsiveness of the bids and is vested with the absolute authority to reject the bids if those do not conform to the conditions mentioned therein. However, the final evaluation of the WBSEB will be subject to the approval of OECF and only after such approval, the successful bidder selected by the WBSEB will be asked to contract negotiation.

3. In the instant case, although there were several bidders, all except Siemens and BHEL were eliminated at the first two stages of evaluation and at the final

stage the aforesaid two bidders fought out. Since the quotation of Siemens was rupees forty eight crores lower than that of BHEL, WBSEB selected the petitioners as most responsive bidder and sent its evaluation papers to OECF, since renamed as Japan Bank for International Co-operation CUBIC") for approval.

4. JBIC after consideration of the evaluation by WBSEB was of the view that Siemens had failed to fulfil the requirements of must conditions" of the tender and advised WBSEB to approach" "BHEL" for work negotiation as the said consortium was the only other bidder, competed up to the final stage being the "second lowest bidder".

5. WBSEB, however, as it appears from the records, took the aforesaid verdict of JBIC with indignation and immediately wrote back to the JBIC not only justifying its selection but also pointing out various defects in the papers submitted by BHEL. thus questioning the advice of JBIC to start negotiation with BHEL. JBIC did not sit idle and flung back its reply reiterating its stand and asked WBSEB to give sufficient explanations justifying reversal of JBIC's decision. The exchange of letters continued for months, both of them not moving an inch from their respective view and the JBIC even threatened to withdraw from the project if WBSEB further pressed for Siemens. The situation thus came to such a pass that at the instance of Union of India, a meeting was held on September 1999 for the purpose of putting an end to such impasse. It appears from the record of notes of such discussions that in the said meeting WBSEB reaffirmed that the objections raised by it "were good enough to form the basis of rejecting the. bid of BHEL consortium and secondly their bid value was much higher than that of Siemens consortium." In view of such stand of WBSEB. OECF itself offered for a limited rebidding among the original participating bidders which was partially accepted by WBSEB, suggesting complete rebidding open to all to avoid litigation and such suggestion was accepted by OECF.

6. Notwithstanding such unanimity between WBSEB and JBIC for fresh open bidding, for the reasons best known to the latter one, it retracted from its proposal for rebidding and again insisted on work negotiation with BHEL resulting in another round of exchange of letters, WBSEB having maintained its earlier view.

7. Thereafter, WBSEB in its meeting dated January 14, 2000 all on a sudden decided not to press further for rebidding considering the fact that considerable amount of delay had already occurred and communicated such decision to JBIC with a request to permit it to place orders with the lowest bidder as per its evaluation viz. Siemens. JBIC by its letter dated January 31. 2000 flatly refused to approve Siemens as the most responsive bidder and made it clear that WBSEB should invite BHEL if the project was to be completed.

8. The aforesaid letter of JBIC was considered by the WBSEB in its meeting dated February 7. 2000 when it took specific note of the threat of JBIC to withdraw

from the project in the event WBSEB decided not to place order in favour of BHEL. The Board further recorded in its minutes that arrangement of alternative source of funding for the project might not be so easy and even if such fund was available, negotiation of fresh loan and implementation of the project thereafter might cause abnormal and extraordinary delay in implementation of project in addition to the problem of increase in cost. The minutes further acknowledged that JBIC was "undoubtedly the best source of funding available in completing this type of project."

9. In the said meeting, WBSEB ultimately resolved to countermand its earlier decision in favour of Siemens and to negotiate with BHEL as suggested by JBIC. In arriving at such conclusion WBSEB recorded the following reasons:

The Board duly noted the fact that initially, Board also had some hesitation/reservation about the bid of M/s. Siemens India led consortium, but after the clarifications and suggestions of review consultants WBSEB was inclined to accept bid of M/s. Siemens consortium to be responsive. Now it is abundantly clear that the defects in the bid of M/s. Siemens, that were considered very minor in nature by the Board, have been viewed extremely seriously by JBIC and in the view of JBIC these defects/deviations amount to non-compliance of some important must conditions" and certain other bid conditions and make the bid non-responsive. Considering the high professional reputation of JBIC and their vast experience in evaluation of such bids and also in the background of facts narrated in previous paras, the Board re-examined the entire matter in detail and found substance in the stand of JBIC. Therefore, Board resolved to agree with the opinion of JBIC." (Emphasis supplied)

10. The aforesaid revision in favour of BHEL has given rise to this writ application at the instance of Siemens.

11. Mr. Pal, the learned counsel appearing in support of this application has made fourfold submissions.

12. Mr. Pal has firstly contended that the decision of the WBSEB and JBIC in its meeting dated September 6, 1999 for rebidding was a final one and after taking such decision, WBSEB could not revoke such decision on the plea of alleged non-approval of such decision by JBIC.

13. Mr. Pal next contends that power of annulment of bids or to take a decision for fresh bidding lies exclusively with the WBSEB and as such there was no necessity of taking any approval from JBIC for a rebidding.

14. Mr. Pal further contends that assuming for the sake of argument that the previous decision of WBSEB for rebidding was not final, even in that event, the reasons assigned by WBSEB in its meeting dated February 7, 2000 for change of its earlier opinion manifestly reflect arbitrariness on its part and such decision is not based on merit but is influenced by extraneous considerations.

15. Mr. Pal lastly contends that WBSEB itself having recommended cancellation of

the bid of BHEL on various grounds including that of illegally trying to canvass in favour of bid and influence the evaluating as well as approving authority, could not proceed to negotiate with BHEL, as most responsive bidder without assigning any reason whatsoever for deviating from its earlier view.

16. In support of the aforesaid contentions, Mr. Pal relies upon the following decisions of the Supreme Court and prays for a direction upon the respondents to implement the decision of rebidding or to declare that Siemens is the only qualified bidder:

(1) Ramana Dayaram Shetty vs. The International Airport Authority, AIR 1979 SC 1628

(2) G. J. Fernandez vs. State of Karnataka and Ors., 1990 (2) SCC 488

(3) Tata Cellular vs. Union of India, 1994 (6) SCC 651

(4) The Commissioner of Income Tax vs. Dinesh Chandra, AIR 1972 SC 29

(5) Andi Mukta Sadguru vs. V. R. Rudani and Ors., 1989 (2) SCC 691

17. Mr. Saktinath Mukherjee, the learned counsel appearing on behalf of Crompton Greaves Limited and ABB Limited, two of the members of the consortium of BHEL has seriously opposed this application by raising various points which may be summarised thus:

(a) It was rightly pointed out by JBIC, the approving authority that Siemens could not fulfill the must conditions" and as such its bid was liable to be cancelled.

(b) Siemens having no requisite eligibility for non-fulfilment of "must conditions" cannot dispute the process or evaluation of the tender. [Raunaq International vs. I.V.R. Construction, 1999(1) SCC 492; University of Cochin vs. N.S.K. 1997 (4) SCC 426; Madan Lal vs. State of J & K. AIR 1995 SC 1088; Municipal Corporation vs. Dr. Sushil 1991 Lab I.C. 1638)

(c) The petitioners having participated in the tender cannot question the legality and propriety of the scheme including the guidelines issued by JBIC and the terms and conditions of the tender floated by WBSEB under the scheme of financial assistance agreed between the Government of India and JBIC.

(d) The decision taken by WBSEB is a policy decision and such policy decision is not justiciable unless the same is wholly capricious, arbitrary and whimsical offending the rule of law enshrined in Article 14 of the Constitution or such policy decision offends any statutory provision of the Constitution. Save as aforesaid, the court cannot embark on uncharted ocean of Public Policy [State of Rajasthan vs. Sevaniatra Karmaclari Hitkaiy Samity, 1995 (2) SCQ 117; Sher Singh vs. Union of India, 1995 (6) SCC 515; All India Ex-Emergency Commissioned Officers vs. Union of India, 1995 (Suppl) (1) SCC 78].

(e) The alleged decision of September 6, 1999 was not final decision.

Assuming for the sake of argument that such a decision was taken, the same conferred no right upon the petitioners unless it is proved that such decision was communicated to the parties. (Bachitter Singh vs. State of Punjab, AIR 1963 SC 393; State of Punjab vs. Sodhi, AIR 1961 SC 493).

(I) An administrative decision can always be reviewed and it cannot be contended that once a view is expressed, the same is immutable (AIR 1980 SC 1461).

(g) In the fact of the present case, the defects pointed out by the JBIC and ultimately accepted by WBSEB are all vital and go to the root of the matter. At any rate, this type of decision, in the absence of judicially manageable standards, is not susceptible to the judicial process and accordingly is not justiciable [A. K. Kaul vs. Union of India. AIR 1995 SC 1403).

(h) WBSEB, previously refused to change its decision by relying upon the advice of Review Consultant although mistake in the decision was pointed out by JBIC. Since the role of Review Consultant was not indicated in the tender document, WBSEB was entitled to ignore the advice of Review Consultant and in the long run good sense has prevailed upon WBSEB.

(i) The judiciary is a part of the State and Article 51 of the Constitution requires that the State should endeavour to maintain just and honourable relation between the States. It appears from the communications between JBIC and WBSEB that they are always striving to maintain friendly relation between the two countries and were avoiding misunderstanding or disruption in the co-operative endeavour. Therefore a litigant should not be permitted to challenge the propriety of the decision of the JBIC by attributing evil motive to its decision.

18. Mr. Das the learned counsel appearing on behalf of respondent No. 7 had adopted the argument advanced by Mr. Saktinath Mukherjee appearing for the respondents No. 8 and 9 and in addition to those submissions has tried to convince this court in details that Siemens did not fulfill the "must conditions" of the tender and that there was no defect in the tender of BHEL.

19. As regards the allegation of WBSEB of influencing the bidding process. Mr. Das contends that a bid can be rejected for violation of IB-22(b) only if such bidder does anything which relates to confidential part of the process of evaluation. But. Mr. Das submits, various envelopes were opened in the presence of the qualified bidders at every stages and the bidders have right to point out that the bids of other bidders do not conform to the conditions of the tender. According to him. the respondent Nos. 7 to 9 by writing letters merely pointed out that bid of Siemens was deficient and was liable to be rejected. He affirms that in none of those letters the respondents No. 7 to 9 requested the WBSEB or JBIC to grant work order in their favour. Mr. Das further submits that it was Siemens who tried to influence the authority for getting the work order and as such Siemens is guilty of violation of that Clause.

20. As regards the question of rebidding. Mr. Das contends that rebidding can be ordered only if the conditions mentioned in Section 5.10 under the head "Rejection of Bids in the procurement guidelines are fulfilled and WBSEB is to satisfy JBIC on such requirements before rebidding could be resorted to. Therefore, according to him, approval of JBIC is necessary for rebidding.

21. Regarding the role of Review Consultants. Mr. Das submits that it is no part of their job to deal with the formalities of the bid or the final evaluation. They are simply advisors with regard to fulfilling the conditions of the bid and that their decision is not binding upon the executing agency. He however submits that the Review Consultants not having been made parties, there is no document to prove their role in the evaluation process.

22. Mr. Das next contends that if a bid is sent to JBIC for approval, such fact does not indicate rejection of other bids. According to him, bid of Siemens having been disapproved, JBIC was quite competent to approve that of BHEL, the same being the only other responsive bid in the field.

23. Mr. Das lastly strongly relied upon the decisions of the Supreme Court in the cases of (a) Air India Limited vs. Cochin International Airport Ltd.. 2000(2) SCC 617, (b) Asia Foundation vs. Trafalgar House, 1997(1) SCC 738. (c) Tata Cellular vs. Union of India 1994(6) SCC 651 and (d) Raunaq International Limited vs. I.V.R. Construction Ltd.. AIR 1999 SC 393 and contends that the principles laid down in those decisions strongly recommend non-interference in this type of a case even if there is some deviation from the terms and conditions of the tender. Mr. Das thus prays for dismissal of the writ application.

24. Mr. S. B. Mukherjee, the learned counsel appearing on behalf of WBSEB has practically reiterated the submissions made by Mr. Saktinath Mukherjee and Mr. Das on most of the points. The special feature of his argument is that he has tried to make out a new case not borne out by the materials on record. Mr. Mukherjee has emphatically asserted that WBSEB recommended both Siemens and BHEL for approval to JBIC because according to his client those two bidders were responsive. While sending their bid-sheets, the name of Siemens was placed at top because Siemens was the lowest bidder. But that does not necessarily mean. Mr. Mukherjee submits, that either BHEL was rejected or Siemens alone was recommended. Mr. Mukherjee contends that his client has subsequently accepted the explanation of JBIC that Siemens could not satisfy "must conditions" and as such there was no illegality in placing work order in favour of BEHL, the only other responsive bidder in the competition.

25. Mr. Mukherjee further contended that neither any of the letters written nor any of the resolutions adopted by WBSEB would show that it had "rejected" the bid of the BHEL at any point of time. He thus contends that no question of giving work order to a rejected bidder as contended on behalf of the petitioners arises; nor can it be contended that JBIC has overstepped its limit by creating pressure upon WBSEB to select a disqualified bidder.

26. Mr. Mukherjee has next placed before this court xerox copies of the documents disclosing the terms of appointment of the Review Consultant" and contended that the decision of such consultant is not binding upon the WBSEB. He submits that although WBSEB was initially satisfied with the reasons assigned by the Review Consultant that the petitioners complied with must conditions but in the long run has accepted the view of JBIC by rejecting the opinion of Review Consultant. Mr. Mukherjee submits that no mala fide can be inferred from the aforesaid decision of his client. According to Mr. Mukherjee this court should not scrutinize such decision as an appellate court but can at the most see whether such decision was arrived at after complying the norms prescribed in the terms of tender.

27. Mr. Mukherjee has also placed before this court the xerox copies of the letters written by the members of BHEL and has contended that by writing those letters the provision contained in IB-22(b) has in no way been violated. Mr. Mukherjee repeats the contention of Mr. Saktinath Mukherjee and Mr. Das that by those letters, the writers thereof merely pointed out the defect in the bid of Siemens and that those are permissible. Mr. Mukherjee in this connection submitted that the petitioners also wrote these type of letters, copies of which have also been placed before this court.

28. Mr. Mukherjee next submits that Siemens Limited is neither a citizen of India nor a company owned and controlled by Indians. It is a subsidiary of a German Concern viz. Siemens A.G. The petitioner No. 2 may be an Indian citizen but it cannot be said that the carries on business through the instrumentality of Siemens Limited. According to Mr. Mukherjee. he is an insignificant share holder and has no control over the management or affairs of Siemens Limited. In fact, he is an employee of the petitioner No. 1. Therefore. Mr. Mukherjee proceeds, it does not lie in his mouth to allege infringement of constitutional or fundamental right. The petitioner No. 3 is admittedly a German firm. Therefore, Mr. Mukherjee submits that the contract having been awarded to a consortium led by Bharat Heavy Electrical Limited, a Government of India undertaking, this court should not entertain this writ application.

29. Mr. Mukherjee lastly relies upon the decisions cited by Mr. Das and contends that the points involved in this writ application are all covered by those decisions and as such this court should dismiss the writ application.

30. I have already indicated that Mr. Mukherjee in addition to the aforesaid submissions has also adopted that entire arguments advanced by Mr. Saktinath Mukherjee and Mr. P. K. Das.

31. The most important question that falls for determination in this writ application is whether JBIC, the funding agency, under the agreement of loan, apart from approval or disapproval of the selection by borrower or suggesting modification of terms and conditions of the contract with the selected bidder, can also either insist on selection of a particular bidder not found to be responsive by

the borrower or desist the borrower from taking a decision of fresh bidding.

32. As mentioned earlier, the tender for the project in question has been floated by WBSEB in accordance with agreement for loan. The terms and conditions of the tender have been prepared in conformity with guidelines of such agreement of loan.

33. After going through those guidelines annexed to the affidavit-in-reply and terms and conditions of tender I find that WBSEB is the executing agent for implementation of the project. The entire process of selection of the contractor will be carried out under the supervision of WBSEB who will of course follow the guidelines of loan. Neither the guidelines the terms and conditions of tender give any right to the JBIC to question the decision of the executing agent as regards rejection of a particular bid. The power of rejecting all the bids or of calling afresh bid is also with WBSEB and except Section 3(IV) of the agreement between OECF and Union of India there is no provision enabling the financier to dispute the decision of WBSEB on the above question. According to the terms of the tender formulated in accordance with the guidelines of loan the final selection of a contractor by WBSEB will be however subject to the approval of JBIC. Over and above, JBIC is also vested with the authority to suggest modification of the terms of the contract with the selected contractor and no contract will be entered into unless such selected contractor agrees to the modified terms suggested by the tender. Such modified terms, it goes without saying, must be in accordance with the spirit of the guidelines of loan.

34. Now the question is whether power of "approval" includes power of selection of a bidder who has been found wanting by the selecting authority. There is hardly any dispute that power of approval includes power of disapproval. Therefore if JBIC on the basis of evaluation report decides not to approve the selection of WBSEB, the court in the absence of apparent arbitrariness, mala fide or illegality to such decision will not interfere with such decision simply because the decision of the WBSEB is also a possible view.

35. According to ordinary dictionary meaning, "approval" means feeling or showing or saying that one thinks that something is good or acceptable or satisfactory. (Oxford Advanced learner's). The word "approve" according to Harrap's English Dictionary means "to express agreement with something".

"Black Law Dictionary", 5th edition defines approval as under:

The act of confirming, ratifying, asserting, sanctioning or consenting to some act or thing done by another. Approval implies knowledge and exercise of discretion after knowledge.

According to Stroud Judicial Dictionary, a thing done with approval of A. means that, and only that, which he has, with full knowledge approved.

36. Therefore for the purpose of exercising its power of approval of the selected bidder by the borrower, the lender should limit its scrutinisation only to the

extent of satisfying itself that the bidder so recommended by the borrower has the required capability of performing the job in accordance with the guidelines of loan and that such bidder has been so selected strictly in accordance with the terms and conditions of the tender. Keeping in view the aforesaid objects, the lender is entitled to approve the selection of the borrower subject to fulfilment of such further terms as may be suggested by it for incorporation in the final agreement with the bidder for work order. The lender may also refuse to approve the selected bidder, if such bidder has practised fraud or corruption in competing the tender in question or any other tender funded with ODA loan of the lender or other Japanese ODA.

37. But the lender cannot, in my view, while considering the selection of the borrower for approval, ask the borrower to select another bidder who has not been found to be most responsive bidder by the borrower instead of the recommended one.

38. At this stage I propose to consider whether to the case in hand, Section 3(IV) of the contract of loan has any application. For the purpose of appreciating the aforesaid question the aforesaid provision is quoted hereunder:

Section 3(IV). - When as provided in Section 5.10 of the procurement guidelines, the borrower wishes to reject all bids or to negotiate with one or two of the lowest bidders with a view to obtaining a satisfactory contract, the borrower shall inform the fund of its reasons, requesting prior review or concurrence. When the fund has no objection, the fund shall inform the borrower of its concurrence. In the case of rebidding all subsequent procedure shall be substantially in accordance with the sub-paragraphs (i) through (iii).

39. Section 5.10 of the Procurement Guidelines as mentioned above is also quoted below:

Section 5.10 Rejection of Bids.-

Bidding documents usually provide that the borrower may reject all bids. However, all bids shall not be rejected and new bids invited on the same specification solely for the purpose of obtaining lower prices in the new bids, except in cases where the lowest evaluated bid exceed the cost estimates by a substantial amount. Rejection of all bids may also be justified when (a) no bid is substantially responsive to the bidding documents or (b) where there is a lack of competition. If all bids are rejected, the borrower shall review factors that made such rejection necessary and consider either revision of specification or modification of the project (or the amounts of work or items in the original invitation to the bid) or before inviting new bids. When exceptional circumstances justify tills, the borrower may, as an alternative to rebidding, negotiate with the lowest evaluated bidder (or failing a satisfactory result of such negotiation, With the next lowest evaluated bidder) to try to obtain a satisfactory contract.

40. The aforesaid provisions make it clear that Section 3(IV) above applies only

to a case where the borrower wishes to reject all bids or to negotiate with one or two of the lowest bidders as provided in Section 5.10. Section 5.10 however speaks of a case where the borrower proposes to reject all bids and invite new bids on the same specification solely for the purpose of obtaining lower prices in the new bids. This case is not a case where the borrower without selecting any bidder has rejected all bids and has taken a decision of rebidding on same specification as none of those is substantially responsive to the bidding document or that there is a lack of competition. On the other hand in the present case the borrower selected a particular bidder for the job and sent its recommendation for approval of JBIC. Along with the recommendation, the borrower also sent its entire evaluation report including the papers of other bidders in the field for the purpose of justifying their selection and enabling JBIC to scrutinise whether such selection was in conformity with the procedure prescribed. JBIC not only disapproved the selection but directed the borrower to select the other bidder. Borrower immediately expressed its inability to select BHEL, as it had, according to the borrower, violated the terms and conditions of the tender. In my view, this part, of the decision of WBSEB rejecting BHEL for violation of the terms of tender cannot be questioned by JBIC. In this connection reference may be made to the Clause IB-35 of the terms of tender which is quoted below:

Right to Reject Bids:

WBSEB reserves the right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders the reason for WBSEB's action.

41. The aforesaid provision gives right to the borrower to reject a bid at any time prior to contract. Therefore, it is not necessary that in order to reject a bid such decision must be taken at the initial stage. Even after recommendation of a selected bidder and approval of lender, the borrower can reject that bidder and select another bidder for approval and if the second recommendation is approved by lender, work contract can enter into with such bidder. Therefore after disapproval of Siemens by JBIC, WBSEB was within its power to reject even BHEL for violation of the terms of the contract. Thus, in such a situation rebidding was inevitable and no concurrence of JBIC was necessary for such rebidding.

42. For instance, if at the initial stage, WBSEB decided to rebid after rejecting both BHEL and SIEMEN for violation of the terms of contract, JBIC could not under the terms of contract insist on prior approval. Thus Section 3(IV) of the contract of loan has no application to the fact of the present case.

43. Next, I propose to answer the contention of Mr. S. B. Mukherjee that Siemens alone was not selected but both BHEL and Siemens were recommended. As mentioned earlier, under the terms of the tender, WBSEB will select the offer which is fully compliant with the specification after taking into account all the amendment and accepted deviation, if any, during pre-bid and post-bid

discussion and most competitive on the basis of evaluated price (arrived as per evaluation procedure) will be selected". (See IB 31). The use of the phrase "most competitive* leaves no doubt that there is no scope of sending more than one recommendation for approval.

44. I am unable to accept the contention of Mr. S. B. Mukherjee that as the valuation report of BHEL was also sent to JBIC it should be presumed that WBSEB recommended both. As pointed out earlier, the entire evaluation chart concerning the bidding process was sent enabling JBIC to assess the evaluation for approval. If I accept the aforesaid contention, then in a given case where there are ten bidders at the price opening stage and after selecting one, borrower sends the entire evaluation chart for approval, it can be argued that all ten bidders were recommended for approval. Use of the word "most", a word of superlative degree in IB 31 negatives the aforesaid contention. Over and above, it appears from the chart itself that Siemens was recommended, not BHEL. So many subsequent letters written and the resolutions of January 14, 2000 and February 7, 2000 taken by WBSEB give no scope of such argument. Therefore, I do not find any substance in the contention of Mr. Mukherjee that Siemens alone was not recommended.

45. The other contention of the learned counsel for the respondents that WBSEB never rejected BHEL is equally devoid of any substance. The following documents produced before this court will falsify such contention :

- (a) letter dated July 30, 1999 written by WBSEB,
- (b) Recording of the discussion of the meeting dated September 6, 1999 among borrower, lender and Union of India,
- (c) letter dated July 21, 1999 by OECF.
- (d) letter dated August 14, 1999 by OECF,
- (e) letter dated October 5, 1999 by WBSEB,
- (f) letter dated November 9, 1999 by JBIC,
- (g) letter dated September 8, 1999 by OECF.

46. It appears from the letter dated October 5, 1999 written by WBSEB to OECF that the former has given the following reasons for not finding the bid of BHEL as acceptable in terms of OECF guidelines:

- (1) Incomplete price bid.--The bidder did not submit the detailed price schedules in respect of Haldia, Chanditala. Pingla, Jangipara. New Haldia and Falta sub-stations. The bidder submitted only lump sum prices for five sub-stations out of the above six. For Chanditla sub-station, even the lump sum price was not submitted. The offer was thus considered incomplete and non-responsive.
- (2) Submission of unsigned and improper bid.-For number of substations price bids were submitted in loose condition and those price bids were not even signed

and stamped. Those schedules did not bear any authentication of the bidder and thus violated Section 5.05 of OECF guidelines.

(3) Alteration of bids. While submitting supplementary prices for land development, earthing mat and false ceiling, the bidder either corrected or changed the original prices for some is. Moreover, such changes or correction of bid prices after the opening of the price bids are contrary to the basic principles of tendering. Moreover, the bidder made such changes inspite of clear advice from WBSEB that any price other than land development, false ceiling and earthing mat. if mentioned in the supplementary price offer, would make its offer liable for disqualification. In some cases the bidder has even altered their erection, testing and commissioning prices to several times of its original quoted price.

(4) Violation of General Condition of Contract Clause IB 25(b). The bidder has attempted to interfere and influence in the bid evaluation process and in decision making for award of contract by sending a number of letters commenting on other bidder's tenders.

(5) Consortium agreement.--Such agreement was furnished on a plain paper mentioning that the partners of the consortium "have agreed to submit their common bid as an external consortium without legal entity". The legal adviser opined that the bidder cannot be treated as a consortium of firms under such conditions. In spite of direction to submit their consortium agreement on a non-judicial stamp paper, the bidder did not submit the same.

(6) Power of Attorney for Bid Signatory. The power of attorney in favour of the signatory for M/s. ABB Ltd. was not submitted along with the bid but the same was submitted subsequently. Therefore, at the time of submission of bids, the signatory of M/s. ABB Ltd. did not have any authorisation for signing the bids.

47. For the purpose of appreciating the question of violation of Clause IB 25(b) mentioned above, the said Clause is quoted below:

Any effort by a bidder to influence WBSEB or others connected in the process of examination, clarification, evaluation and comparison of bids and in decision concerning the award of contract, may result in the rejection of his bid.

48. I am unable to subscribe to the submission of the learned counsel for the respondents that notwithstanding prohibition imposed by the said Clause, the bidders are free to write letters to WBSEB or JBIC pointing out the defects in other's bid. Moreover, from Crompton's letter dated February 15, 1999 it appears that it enlightened its merit in the earlier part of the letter whereas complained about the bid of Siemens in the later part and concluded that bid of Siemens should be rejected. Similarly, Bharat Heavy Electrical Limited in its letter dated December 18, 1998 described BHEL's offer as the only complete bid. Therefore BHEL did not stop by pointing out the defect of Siemens but also blew its own trumpet. Curiously enough, JBIC by its letter dated November 9, 1999

advised WBSEB not to take exception in such letters "since writing of letters by bidder has not in any way altered or influenced the decision taken by WBSEB" Thus, JBIC was of the view that a bidder in violation of Clause IB 25(b) of General Condition of contract could go on attempting to influence and there was no wrong so long WBSEB was not actually influenced.

49. Such interpretation of the said clause is ludicrous. It may be mentioned here that JBIC however did not opine that Clause IB 25(b) did not prescribe writing of letters by a bidder pointing out defects of the other during the process of evaluation.

50. For the aforementioned reasons, I am of the firm view that WBSEB rejected the bid of BHEL and was under no obligation to take approval of JBIC before rejection of the said bid. After rejection of the bid of BHEL. there was no necessity of taking approval of JBIC as the case is not covered u/s 3(IV) of the contract of loan. However, in the instant case, it appears from record that WBSEB has run after JBIC's prior approval of fresh bidding although no such approval was necessary. It further appears from record that OECF (renamed as JBIC) demanded "enough justification" for rejection of the bid of BHEL from WBSEB although under the terms and conditions of the. tender and as per guidelines of loan, the borrower is the sole authority to reject a bid and is not answerable to the lender for such rejection.

51. Ultimately. JBIC threatened to withdraw from the project if BHEL was not given the work order, thus compelling WBSEB to give up the idea of rebidding and to place the work order on BHEL.

52. It is therefore apparent that In this case the lender overstepped its limit and forced upon the borrower its choice at the illegal threat of withdrawal from the project and the borrower gave in by putting its pride in its pocket.

53. Now the next question is whether in spite of such state of affairs, the respondents can resist this application on the basis of the different pleas raised by them.

54. The first and foremost submission of all the learned counsel appearing on behalf of the different respondents is that in this case WBSEB, a State within the meaning of Article 12 of the Constitution of India, after considering the fact "that JBIC was undoubtedly the best source of funding available to complete this type of work" and that "arranging alternative source of funding of Lot-III and Lot-IV of the project may not be very easy and even if such funding may be available, negotiating the fresh loan and implementing the project thereafter may cause abnormal and extra-ordinary delay in implementation of the project "having taken a decision not to go for rebidding and to give the work order to BHEL, such decision should be treated to be a policy decision of the State and as such the said policy decision cannot be impugned in this writ application.

55. I am afraid the position is not so simple as simplified by the learned counsel

for the respondents.

56. In this case the "Policy decision" to take loan from JBIC was taken long ago. Accordingly, an agreement was entered into and consequently the terms and conditions of the tender were also framed. Tender was thus floated by WBSEB. Bidders responded. Some of them were rejected at the initial stage. Tender process continued. In the long run, WBSEB evaluated Siemens as the most responsive bidder and recommended its name for approval to JBIC. JBIC refused to approve Siemens.

57. Up to that stage there was no problem. The parties acted within the terms of agreement. But the matter did not stop there.

58. JBIC not only refused to approve the selection of WBSEB but also transgressed its authority under the agreement by demanding "sufficient justification" for the decision of rebidding proposed by WBSEB and by insisting on placement of work order in favour of BHEL who according to WBSEB was not at all suitable having violated the terms and conditions of tender. In Line process, JBIC even reminded WBSEB of the consequence of not accepting its aforesaid demands on the threat of withdrawal from the project resulting in the aforesaid decision of WBSEB, impugned in this writ application and the same has been described as "policy decision of the state by ail the counsel for the respondents.

59. Thus, in this case a foreign lender going beyond the terms of agreement has illegally forced the State to change its decision of rebidding and to negotiate with a bidder who according to State is not most responsive and has violated the terms and conditions of the tender justifying rejection of its bid. State in this case has allowed the foreign lender to interfere with its own prerogative for the purpose of favouring an incompetent bidder thereby offending the rule of law as enshrined in Article 14 of the Constitution of India. Therefore, the decision of the State conies within the exceptions indicated by the Supreme Court in the case of State of Rajasthan vs. Sevanivaira Karmachari Hitkari Samity. reported in 1995(2) SCC 177.

60. I. therefore, find no substance in the aforesaid contention of the counsel for the respondents and hold that the decision impugned herein Is not a decision of the State of its own accord but has been illegally imposed upon it by the lender on usurpation of the power of the State.

61. The next objection of the respondents is that Siemens did not fulfil the must conditions and was thus ineligible to get order and Siemens itself having been found to have no requisite qualification, cannot maintain a writ application challenging the selection of a bidder.

62. The aforesaid objection as a proposition of law is a sound one subject to one exception.

63. If a particular bid is rejected for non-fulfilment of any of the terms and conditions of the tender, such bidder cannot challenge the ultimate work order

unless it can show that rejection of its bid was illegal. But if such a bidder can establish that the bid which has been selected also does not fulfil the conditions of the tender but notwithstanding such fact State has issued work order after illegally reversing its earlier decision of rebidding it can successfully maintain a writ application alleging arbitrariness and violation of Article 14 of the Constitution of India. As pointed out earlier, WBSEB in its various letters pointed out various defects in the bid of BHEL and alleged violation of Clause IB 25(b) of general conditions of contract and expressed its inability to recognise the bid of BHEL as a responsive one. Such decision of WBSEB could not be interfered with by JBIC under the terms of loan.

64. Therefore, even if JBIC rightly held that Siemens did not comply with the terms and conditions of tender. Siemens can successfully plead that in that event bid of BHEL is also liable to be rejected and there should be fresh bidding as initially decided by WBSEB.

65. In this connection reference may be made to the following observation of the Supreme Court in the case of *Romano vs. LA. Authority* (supra) made at paragraph 9 of the judgment:

That takes us to, the next question whether the acceptance of the tender of the 4th respondent was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf of the 1st and 4th respondents that the appellant had no locus standi to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondent was wrongly accepted. A person whose tender was rejected might very well complain that the tender of some one else was wrongly accepted but it was submitted, how could a person who never tendered a, who was at no time in the field put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondent, but that he was differentially treated and denied equality of opportunity with the 4th respondent in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondent was concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in

law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity.

66. In my view, the aforesaid observation of the Supreme Court gives complete answer to the aforesaid point of locus standi raised by all the learned counsel for the respondents.

67. The next submission on behalf of the respondents was that an administrative decision can always be varied and modified by subsequent decision and that unless a particular decision is communicated to the petitioners no right accrues in their favour. Thus, the counsel submits, the petitioners cannot rely upon the decision of rebidding if at all taken by the WBSEB earlier. In support of such contention strong reliance has been placed upon the decision of the Supreme Court in the case of *Bachhittar Singh vs. State of Punjab and Anr.*, reported in AIR 1963 SC page 395.

68. In the aforesaid case before Supreme Court, the appellant therein was appointed as kanungo in the former State of PEPSU in the year 1950. On December 1, 1953 he was promoted to Assistant Consolidation Officer. Certain complaints having been received regarding tampering with the official records he was suspended and an enquiry was held against him by the Revenue Secretary of PEPSU Government. As a result of that enquiry, the Revenue Secretary dismissed him by order dated August 30, 1956 on the ground that the appellant was not above board and was not fit to be retained in service. This order was communicated to the appellant. Thereupon the appellant preferred an appeal before the State Government. It would appear that he had submitted an advance copy of his appeal to the Revenue Minister of PEPSU who called for the record of the case immediately. After perusing them he wrote on the file that the charges against the appellant were serious and that those were proved. He also observed that it was necessary to stop the evil with a strong hand. He however expressed the opinion that as the appellant was a refugee and had a large family to support, his dismissal would be too harsh and that in stead of dismissing him outright he should be reverted to his original post of kanungo and warned that if he did not behave properly in future he would be dealt with severely. On the next day the State of PEPSU merged in the State of Punjab. After the merger, the file was put up before the Revenue Minister of Punjab who viewed the matter as "serious charges" and with his remark placed the file before the Chief Minister, Punjab who recorded the following order:

Having regard to the gravity of the charges proved against this official, I am definitely of the opinion that his dismissal from service is a correct punishment and no leniency should be shown to him merely on the ground of his being a displaced person or a large family to support. In the circumstances, the order of dismissal should stand.

69. The said order having been communicated to the appellant, he preferred an application under Article 226 of the Constitution of India which was dismissed.

70. Against the order of High Court although the appellant went to Apex Court but the validity of the order of the Revenue Secretary dismissing him from service was not challenged.

71. The point urged before Supreme Court was that the order of Revenue Minister of PEPSU having reduced the punishment from dismissal to reversion, the Chief Minister of Punjab could not sit in review and set that aside. Two grounds were pressed in support of such point. The first was that the order of the Revenue Minister of PEPSU was the order of the State Government and was not open to review. The second ground was that in any case it was not within the competence of the Chief Minister of Punjab to deal with the matter inasmuch as it pertained to the port folio of the Revenue Minister.

72. In answering the first ground aforesaid. Supreme Court held that before something amounts to an order of the State Government two things are necessary. The order is to be expressed in the name of the Governor as required under Clause (1) of Article 168 of the Constitution and then it has to be communicated. It is not till this formality is observed that the action can be regarded as that of the State. It is possible that after expressing one opinion about a particular matter at a particular stage, a Minister of the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Therefore to make the opinion of the Minister amount to a decision of the Government it must be communicated to the person concerned. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again.

73. The principle laid down in the aforesaid decision cannot have any application to the fact of the present case. In the case before Supreme Court as pointed out in paragraph 6 of the judgment that the order of dismissal of the appellant by the Revenue Secretary was not at all challenged. But the appellant maintained that such order was set aside by the Revenue Minister of PEPSU and as such cannot be further reviewed.

74. In the case before us, the petitioners grievance is that a right decision was initially taken by WBSEB in their favour but such decision has been recalled and a contrary decision has been adopted which is an imposed one at the instance of the lender on the point of threat and the illegal imposed decision has been challenged herein. The petitioners have not based their right on the earlier decision has been referred to only for the purpose of showing that the same was a just one whereas the latter one is vitiated and have demanded an explanation from WBSEB for such retraction. In such a situation, in my opinion, the court can scrutinize the explanation of the State authority for the purpose of verifying whether the latter one is really tainted by any improper pressure or whether the same was taken to appease the foreign lender. I have already pointed out that Bachitter Singh neither disputed the correctness of the decision of the Revenue Secretary dismissing him nor did he challenge the decision of Chief Minister on

merit: but restricted his submission by claiming his right through an uncommunicated decision of Revenue Minister. PEPSU. In the instant case the decision of WBSEB has been challenged on merit. Therefore, the decision of the Supreme Court In the case of Bachitter Singh (supra) is of no avail to the respondents.

75. The next point I propose to deal with is an important one seriously raised by all the respondents.

76. The long and short of their contentions is that JBIC is a part of Japanese Government and should be treated as a foreign State. Thus, if WBSEB. a State within the meaning of Article 12 of the Constitution of India, in order to keep friendship with a foreign State accepts the suggestion of such a foreign State, such decision is not a justiciable one. No person, the respondents contend, should be permitted to make wild allegations of mala fide or bias against such a friendly foreign State and the principles laid down in Section 86 of the CPC should be applicable in this writ application. WBSEB in paragraph 82 of its affidavit has gone even to the extent that JBIC is not subject to the jurisdiction of this court and the decision of JBIC cannot be assailed in a writ proceeding.

77. In my opinion, protection given to a Foreign State as mentioned in Section 86 of the CPC is restricted to suits and by taking aid of Section 141 of the Code, the said provision cannot be made applicable to a proceeding under Article 226 of the Constitution of India for at least two reasons. Firstly, the explanation added to Section 141 of the Code by its amendment of 1976 specifically excludes a proceeding under Article 226 of the Constitution of India and secondly, by virtue of Section 141 of the Code, only procedural part of the Code can be made applicable to other Miscellaneous Proceedings; but right conferred u/s 86 of the Code is a substantive right. [See *Mirza Ali Akbar Kashani vs. The United Arab Republic and Am.*, AIR 1966 SC 2 *Mr. Nur Nahar Bewa vs. R. N. Deb*, 1988(1) CHN 461 (S.B.) and *State of ukraine vs. Elitarious Limited*, 1999(1) CLJ 14 1].

78. I am at one with Mr. Pal. the learned counsel appearing on behalf of the petitioners that the actions of an approving authority, approving or disapproving the action of an instrumentality of State will be subject to review under Article 226 of the Constitution of India as such approving authority will be a "person or authority" within the meaning of that Article.

79. The Supreme Court in the case of *Asia Foundation and Construction Limited vs. Trafalgar House Construction (I) Ltd.* (supra) has clearly held that such foreign lenders are subject to the decision of a writ court. The Apex Court, however, reiterated the well settled principle that in this type of a case, circumspection from a court in the matter of interference is expected. It was pointed out therein that in the absence of proof of malice, ulterior motive, favouritism, abuse of power etc., the court should not interfere. In the said decision the Supreme Court pointed out that when such foreign institutions grant huge loans they always insist that any project for which loan has been

sanctioned must be carried out "in accordance with the specification and within the scheduled time and that "the procedure for granting award must be duly adhered to". The aforesaid observations of the Supreme Court clearly indicate that in a case where the specifications or the procedure for granting award are outrageously violated, the court should interfere.

80. Thus, I hold that actions of JBIC is subject to the scrutiny of the court within the limitations imposed by the Apex Court in the case of Asia Foundation and Construction Ltd. (supra).

81. Now I turn to the other question whether the decisions of the Supreme Court in the cases of Air India Ltd. vs. Cochin International Airport and Authority, Tata Cellular vs. Union of India, Raunaq International vs. IVR Construction Ltd. and Asia Foundation and Construction Company vs. Trafalgar House Construction, all mentioned earlier, stand in the way of this court In granting any relief to the petitioners.

82. Air India Ltd. vs. Cochin International Airport Authority, is the decision of a Supreme Court Bench consisting of two Hon?ble Judges. Cochin International Airport Authority ("CIAL") which was established for setting up and maintaining a new international Airport at Cochin, for the purpose of awarding contract for ground handling services at the new airport invited offers by writing letters to eight companies having experience of that type of job. Five of them responded to such letters and gave their respective proposal. The committee constituted by CIAL for evaluation of the offers found that Cambatta, Air India, M/s. DNATA and Ogden Aviation were on a par as regards technical competence, organisational capacity and past experience. It took note of the fact that Cambatta and Air India were Indian Organisations operated mainly in India and had better proven adaptability for operating in Indian conditions. Out of those two. it recommended Cambatta for awarding the work. In the meantime, the Government of India wrote a letter to the Government of Kerala recommending Air India on the ground that Air India is a national carrier and has better experience. Thereafter a meeting took place between the Managing Director of Air India and the Chief Minister followed by exchange of letters. Air India gave further offer informing detailed presentation to the Board of CIAL on the advantages CIAL would derive" if AIR India was given offer. Carabatta, having come to know about the aforesaid development protested and requested CIAL not to accept the revised offer of Air India. Ultimately, CIAL changed its earlier decision and gave award to Air India. Cambatta filed a writ application before Kerala High Court challenging the actions of CIAL on the ground that CIAL had not acted fairly and impartially as it had carried on negotiation with Air India behind the back of Cambatta and no opportunity was given to Cambatta to give a better offer. The learned Single Judge of Kerala High Court rejected the writ application after having held that the offer of Air India "was superior or more beneficial. The matter went to the Division Bench in appeal and the Division Bench allowed the appeal with a finding that the Board of Directors were influenced by the threat to the effect that if Air

India was not given the contract, the International Air Port would be bereft of flights as Air India would not allow other flights to land there. The Division Bench thus held that the action of CIAL in awarding contract to Air India was arbitrary, illegal and opposed to principles of natural justice. The matter thus went to Supreme Court at the instance of Air India.

83. The Supreme Court in paragraph 7 of the judgment took note of several decisions of that court on the point and observed in the following terms:

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. 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 accepting one of the offers made to it. Price need not always be the sole criteria for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such 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 the decision is not amenable to judicial review, the court can examine 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 making out 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 it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

84. Ultimately, the Apex Court concluded that CIAL did not commit any wrong in taking into consideration the fact that Air India is an airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic airlines if it was awarded the contract. According to the Supreme Court, in a commercial transaction of such a complex nature a lot of balancing work has to be done while weighing all the relevant factors and the final decision has to be taken after taking an overall view of the transaction.

85. The Apex Court thus set aside the decision of the Division Bench of High Court and proposed not to interfere with the decision of CIAL.

86. In my opinion, the aforesaid decision cannot be of any help to the respondent. As pointed out by the Apex Court, the transaction involved therein was of such a complex nature, a lot of balancing work had to be done while weighing all the relevant factors. The financial aspect of the offers by the parties

was not the sole criterion. For the purpose of having maximum gain out of such a commercial transaction, CIAL's decision to give work order to Air India was not interfered with. No such factor is coming into play in the case before vs. Here, as pointed out earlier, the financier in violation of the terms of agreement has imposed its own decision upon borrower. The borrower although has not infringed any of the terms has been compelled to give order to a rejected bidder at the threat of the lender. Even in the aforesaid case of Air India, the Apex Court as mentioned above, held that the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standard and procedure laid down by them and they have a public duty to be fair to all concerned. The learned counsel for the respondents verbatimly relied upon the last three sentences of paragraph 7 of the judgment as quoted above and contended that even if there is some defect in the decision making process, this court should not interfere as there is no infringement of public interest. In my view, nothing can be more appalling than surrender of an instrumentalities of a State to an illegal threat of a lender at the cost of the right of equality of a person. WBSEB should bear in mind that it has all along acted within the terms of the loan and if JBIC decides to withdraw in violation of the terms of loan it should charge JBIC for breach of agreement. Thus, I am of the opinion that elements of public interest are very much present and in furtherance of public interest this court should interfere.

87. In the case of Tata Cellular vs. Union of India, AIR 1996 SC 191. the Apex Court pointed out the factors which would be scrutinized by a court in the matter of judicial review of contractual power by the Government. According to the Apex Court, the duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its power?
2. Committed 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 power.

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

- (a) illegality.
- (b) Irrationality,
- (c) procedural impropriety.

89. Again in paragraph 113 of the judgment, the Supreme Court summarised the principles in the following manner:

- (i) The modern trend points to judicial restraint in administrative action,
- (ii) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made,
- (iii) The Court does not have the expertise to correct the administrative decision. If a review of administrative decision is permitted it will be substituting its own decision, without necessary expertise which itself may be fallible.
- (iv) The terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (v) The Government must have freedom of contract. In other words, fairplay 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 fides.
- (vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

90. Keeping in view the aforesaid principles I now propose to examine the case in hand.

91. In the instant case, Mr. Pal assiduously endeavoured to convince this court that the petitioners did not commit breach of must conditions" and that the assessment of JBIC to that effect was wrong. Since this court in this proceeding cannot sit over the decision of the approving authority as an appellate court and since this court is not an expert in the field. I have decided not to interfere with the decision of JBIC on that point as the view taken by JBIC is also a possible view and such decision was taken within the authority of JBIC as per terms of the loan agreement.

92. In this proceeding there is no scope of disputing the legality of the terms of the tender as the parties have participated by accepting those terms Mr. Pal also did not raise any such question..

93. But as stated earlier, the actions of JBIC demanding "enough justification" for rejection of the bid of BHEL was unwarranted and the ultimate decision of WBSEB to give work order to BHEL on the threat of JBIC was arbitrary resulting in gross violation of Article 14 of the Constitution of India. Similarly, the demand of explanation for or concurrence to the decision of rebidding by JBIC was beyond the scope of the agreement for loan. Therefore, in this case JBIC not only

exceeded its power but also abused the same and the decision impugned herein is the result of such abuse of authority bringing the case within the conditions mentioned in the case of Tata Cellular justifying interference.

94. Moreover, no reasonable Tribunal will hold that inspite of restriction imposed by IB 25(b) of the terms of tender, a bidder can go on writing letters justifying its own bid and pointing out defect of other so long the evaluation authority is not influenced by such communication. It is pertinent to mention here that such letters were written when evaluation process was going on and the selecting authority and "Review Consultant" were assessing such bids. Therefore even assuming for the sake of argument that JBIC had power to question the rejection of a bid by WBSEB. such absurd reasoning given by JBIC was liable to be set aside within the guidelines of the Apex Court in the aforesaid case. Therefore, the decision of the Supreme Court in the case of Tata Cellular rather approves interference with the decision impugned herein.

95. In the case of Raunaq International Ltd. vs. I.V.R. Construction Limited, the matter went to the Supreme Court against an interim order of injunction granted by the Bombay High Court in a writ application filed by I.V.R Construction Limited ("IVR") challenging the grant of work order granted by Maharashtra State Electricity Board in favour of Raunaq International Ltd. ("Raunaq"). In the writ application only ground of challenge was that Raunaq did not fulfill the qualifying criterion of having laid pipe line of 3 Km. But the challenger viz. IVR also did not fulfill the " requirement. Under Clause 1.4 of the qualifying criteria it was provided as follows:

Notwithstanding anything stated above the owner reserves the right to assess the bidders capability and capacity to perform, should the circumstances warrant such an assessment, in the overall interest of the owner.

96. It was pointed out by Maharashtra State Electricity Board that Raunaq had designed, fabricated and commissioned M.S. Pipes of 2000 mm. diameter buried underground but for a distance of less than 3 Kms. They also had requisite experience of doing such work for thermal power units of 210 MWS. and they had more than 2 years experience in this work. Under such circumstances, Board granted relaxation as mentioned in Clause 1.4 to Raunaq after considering their other experience and thus granted the order in their favour. Under such circumstance, Monohar. J. opined that when IVR themselves did not fulfill the requisite criteria and even if the criteria can be relaxed both for Raunaq and IVR, it was clear that the offer of Raunaq was lower than that of IVR and it was on that ground that the Board had accepted the offer of Raunaq. Therefore, the Apex Court held, there was no justification of staying the work order granted in favour of Raunaq. Therefore, the fact of the said case is totally different. Here it is nobody's case that there is any provision like Clause 1.4 nor is it the case of respondents that any relaxation has been given to BHEL considering their other qualifications. Here, it is the definite case of WBSEB that BHEL was not rejected although records speak otherwise. As pointed out earlier, the principles laid down

by Supreme Court in the *Ramana Dayaram Shetty* (supra) squarely applies and thus petitioners inspite of being rejected can dispute the selement of BHEL, another rejected bidder. I have already held that element of public interest is very much present in this case. Thus, the decision of Raunaq International is of no avail to the respondents in resisting the claim of the petitioners.

97. In the case of Asia Foundation and Construction Limited, there were three bidders viz. Afcons, Trafalgar and one Muhibbah. The consultants evaluated the bids and found Trafalgar to be the lowest bidder. The tender committee of Paradeep Port Trust accepted the recommendation of the consultant and sent such recommendation for approval of the lender Bank. The Bank however did not accept the recommendation and in the opinion of the Bank Afcons was the most responsive bidder. On getting the communication of Bank, the Port Trust authority asked their consultants about the bid evaluation report. The Bank in the meantime suggested that the contract should be given to Afcons so that work could be financed from the loan and that if the contract was awarded to others no loan should be sanctioned. The Bank further informed that if the Port Trust decided to rebid, in theat event also there would be no loan. On receipt of such communication from Bank, the tender committee again met and called Afcons for some clarification. Afcons appeared and responded to the clarifications sought for. After getting such additional information the project manager informed that if the additional information had been available at the time of assessment, the outcome would appear to favour award to Afcons. It was further observed that in view of additional information then available, there was no technical barrier to grant award to Afcons. Trafalgar, being aware of such fact approached High Court and ultimately sought the relief of quashing of award in favour of Afcons.

98. The High Court took note of several Clauses of the bid documents and came to the conclusion that there was scope of amending the bid documents, for modification of the bids and of correction of bids. But inspite of such findings, drew adverse inference against Bank for non appearance in the proceeding and held that award should be quashed and directed the Port Trust to negotiate with both Afcons and Trafalgar by giving them opportunity to make fresh offer and then to select the lower bidder. It was further ordered that if no negotiation was made within (sic) month the port trust was free to proceed with rebidding. Being dissatisfied. Afcons went to Supreme Court.

99. The Supreme Court after considering the materials on record was of the view that in the matter of tender, a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid. The Apex Court further took note of the following conclusion arrived at by the Port Trust which was reflected in the letter dated July 12, 1996:

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

to favour the award to AFCONS.

100. After recording the aforesaid observation mentioned in the letter dated July 12, 1996, the Apex Court concluded that on the face of such materials the High Court was not justified in interfering with the award by going into different clauses of the bid documents and then coming to the conclusion that Trafalgar being the lowest bidder there was no reason for the Port Trust to award contract in favour of Afcons.

101. In my view, the fact of the present case is totally different from that of the aforesaid case. In the case before Supreme Court, the "Port Trust on the basis of additional materials itself came to the conclusion that Afcons was the most responsive bidder and the terms of tender permitted modification or amendment of bid documents. In the present case, WBSEB has rejected the bid of BHEL for violation of different conditions of tender but notwithstanding such fact the lender insisted on grant of award to a rejected bidder. It however does not appear from the judgment of the Apex Court whether under the terms of loan or of tender, the approver in that case was authorised to dispute rejection of a bid by the Port Trust or to suggest selection of any bidder. Be that as it may, in our case after disapproval of the bid of Siemens, the only other bid having been rejected by WBSEB, rebidding was the only possible way and as such no question of grant of award to BHEL arose. The resolutions dated January 14, 2000 and February 7, 2000 clearly indicate that WBSEB charged its decision of rebidding and granted award to BHEL on the illegal threat of JBIC bearing in mind that it would be difficult to get alternative suitable loan and even if such loan was available it would cause delay. I would have appreciated the aforesaid stand of WBSEB if the terms of the loan or of the tender authorised JBIC to interfere with the decision of rejection of the bid of BHEL or with the decision of rebidding in the fact of the fact of the present case. But WBSEB having acted within its authority in terms of the agreement of loan and of tender and the JBIC having exceeded its limit, WBSEB should not succumb to the illegal threat of a lender at the price of infringement of constitutional right of a person. If JBIC really withdraws from the project for the lawful decision taken by the borrower, the latter should take appropriate step against JBIC for violation of the terms of the agreement

102. Therefore, the decision of the Supreme Court in the case, of Asia Foundation and Construction Co. Ltd. (supra) is of no assistance to the respondents.

103. Lastly, I do not find any substance in the contention of Mr. S. B. Mukherjee that the petitioner No. 1 being a subsidiary of a German firm, it does not lie in their mouth to allege infringement of constitutional or fundamental right. The protection of Article 14 of the Constitution of India being available to all the petitioners, they are entitled to maintain this writ application.

104. In view of the reasons mentioned earlier, the writ application succeeds in

part. The awards of contract in respect of Lot-III and Lot-IV, which are the subject matter of this application, given in favour of the consortium of respondent Nos. 7 to 9 are set aside. The respondents No. 1 to 3 are directed to proceed with rebidding in accordance with the terms of the tender.

105. After this judgment has been delivered Mr. Gooptu and Mr. Sen, the learned Counsels, appearing on behalf of the respondents pray for stay of operation of this order. In view of what have been stated above, I do not find any reason to stay the operation of the order. Such prayer is, therefore, rejected. Let xerox copy of the judgment be delivered to the parties by tomorrow upon their undertaking to apply for and obtain certified copy thereof on payment of usual charges.