

(2000) 12 CAL CK 0016
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction (Original Side) W.P. No. 791 of 2000

Skanska International Civil Engineering AB and Another	APPELLANT
Vs	
West Bengal State Electricity Board and Others	RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226

Citation : (2001) 2 CALLT 133

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. S.K. Kapoor, for the Appellant; Mr. Anindya Kumar Mitra, for the Respondent

Judgement

1. In this writ petition the petitioner has challenged the decision of the West Bengal State Electricity Board being the respondent No. 1 (hereinafter referred to as Board) rejected the tender submitted by the writ petitioner. The dispute in real sense in this matter is not so much as the subject matter of the writ petition is, which relates to works in Purulia Pump Storage Project, Lot-4.

2. The fact of this case in short is as follows:--

The petitioner after having been declared successful in pre-qualified stage for Inviting tender submitted bids both on Techno Commercial and Price pursuant to invitation of the Board dated 24th November, 1997 for entering into contract for execution of Main Civil Works in Purulia Pump Storage Project along with other participants. The entire work was sub-divided into several schedules. Schedule C related to works to be done on the Lower dam. The petitioner's bid on Techno Commercial aspect was declared by the Board to be substantially responsive. The initial bids of all the participants on price aspect were Ignored and they were asked to submit revised price bid for the works which was then sub-divided into 14 Schedules and marked "A" to "N". So, according to the instruction of the Board the petitioner along with other participants submitted revised price bid. However, on detection of mistake the Board informed all the three bidders, that

the same was to be rectified and accordingly corrigendum/addendum was issued. Therefore, necessary amendment of the Bill of Quantity was incorporated.

3. On 8th September, 1999 the petitioner submitted its price bid to the Board comprising of the following documents:-

- (i) Five sets of Volume 1 (Revised in April 1999),
- (ii) Five sets of Volume 1A-1 Chapter 5, Revised BOQ,
- (iii) Original revised diskette supplied by the Board,
- (iv) A separate diskette containing the Bill of Quantities with all the columns including unit prices and the amounts filled up, and
- (v) Five Bound Volumes containing print out of the Bill of Quantities made from the diskette of Skanska along with other supporting documents.

4. On 8th September, 1999 it was noticed that the petitioner submitted two copies of the details regarding sub-schedule C-3 and a copy of sub-schedule C-2 was inadvertently omitted. But, according to the petitioner, the diskette contained entire Bill of Quantity including missed out sub-schedule C-2 and was complete in all respects. So the petitioner by a letter dated 17th September, 1999 supplied the missing sub-schedule C-2 to the Board and it was received by the Project Manager of the Board without any objection. In the said letter the Board was informed that the diskette contained complete Bill of Quantities including sub-schedule C-2 and was complete in all respects. The petitioner wrote another letter dated 23rd December, 1999 requesting the Board to confirm the revised price bid is in order, but no reply was given to the same. The petitioner was not Informed of the decision on the bid until on 15th January, 2000 when it came across a news item published in the Economic Times stating that the Board had rejected the bid of Skanska as non-responsive. So another letter dated 11th March, 2000 was sent, through the learned Advocate, by the petitioner. No reply was given. Hence the present writ petition was filed on 21st March, 2000. On 27th March, 2000 in Court at the time of hearing the Board informed their decision that the price bid of the petitioner was declared to be non-responsive but the decision was not communicated formally to the petitioner. On 3rd April, 2000 by a letter pursuant to the order passed by Justice Bhattacharya on this writ petition the Board informed reasons for holding the revised bid of Skanska being non-responsive and liable to be rejected.

5. Mr. Kapoor, learned Senior Advocate, appearing in support of the petition contends highlighting the aforesaid fact that decision of rejection by the Board is wholly malafide and arbitrary. Under no circumstances the petitioner's price bid could be declared to be non-responsive as the petitioner submitted all necessary documents and papers as desired by the Board. Mere omission in submitting print out copy of price bid for the works under heading sub-schedule C-2 cannot be termed to be substantial non-compliance of terms and condition of tender document so as to declare the entire price bid or for that matter the Techno

Commercial bid to be non-responsive. In the summary sheet the price of the sub-schedule C-2 is mentioned. In the diskette such price is also mentioned. It is an accidental omission and such non-compliance is non-essential in nature. In any event before taking decision the petitioner rectified such mistake by supplying the same on 17th September, 1999. On the other hand purported decision was taken in December 1999. So the Board, had it acted bonafide could have considered this subsequent supply of print out copy of the price bid for the works under the heading sub-schedule C-2 which was inadvertently missed.

6. He contends the print out copy is a mere copy and the original price bids are recorded in the diskette. Under the law he contends when the original has been submitted duly, furnishing of print out copy is not at all relevant. The recording in the diskette is original one and this has been in principle, held by Supreme Court in case of N. Sri Rama Reddy, etc. Vs. V.V. Giri, and in another case reported in Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra and Others, .

7. He further contends in any event such decision is not the decision of the Board itself, at one point of time the members of the Board conceded that the petitioner's price bid was also substantially responsive. The decision of rejection has been taken by the Legal Remembrancer and not by the Board. The member of the Board and/or Selection Committee did not apply their own mind but acted and/or were influenced to act on the opinion of the Legal Remembrancer. So it appears the decision was arrived at on extraneous materials. This is an unheard of procedure. In this connection reliance is placed on a decision of Supreme Court reported in State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, .

8. In any event while taking decision the Board has overlooked the established principle of law enunciated by the Supreme Court that while dealing with this kind of cases the authority concerned (in this case the Board) should have Ignored non-compliance of non-essential terms and particularly when the petitioner has subsequently complied with the same. More so the Board Itself on earlier occasion asked for correction and corrigendum in price bid even after submission thereof. He submits the petitioner at all material times was always responsive to submit the price bid. The intention and conduct of the petitioner should have been looked into whether the petitioner's bid was responsive or not. Under the terms and conditions of the tender document the petitioner's bid was substantially responsive. Therefore such action is illegal and arbitrary. In support of submission he relies on a decision of Supreme Court reported in State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, .

9. Mr. Kapoor urges drawing my attention to the decision of the Supreme Court rendered in Tata Cellular Vs. Union of India, that it is open to the Court to review the decision maker's evaluation of the facts. In other words, he says a decision may not be scrutinised by the Court but the decision making process is always subject to scrutiny on the anvil of Article 14 of the Constitution. He submits that the Division Bench of the Bombay High Court in case of B.D. Yadav and M.R.

Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, held amongst other that while evaluating and assessing of particular tender the authority concerned should look into compliance of the essential terms and to be flexible as regard compliance of non-essential terms and conditions. He also draws my attention to a Kerala High Court Judgment reported in T.V. Subhadra Amma Vs. Kerala Board of Revenue and Others, to substantiate the same principle and point. When there is substantial compliance by the tenderer non-fulfilment of non-essential terms which do not really affect materially may be ignored and/or be regularised.

10. Mr. Kapoor contends further that the aforesaid principle of law laid down by Bombay High Court and Kerala High Court has been approved by the Supreme Court in a decision rendered by it in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , Tata Cellular case cited above also reiterates the same principle.

11. Significantly, the reasons for rejecting the petitioner's bid as mentioned in the affidavit-in-opposition do not find place in the records so this alleged additional reasons cannot be a basis and/or foundation for rejection. In support of this contention he has relied on a decision of Supreme Court reported in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

12. He also contends that by supplying print out of sub-schedule C-2 after opening up of the tender cannot be said to have indulged in canvassing the same nor it can be termed to be modification or amendment of the price bids. Therefore clauses 31.3 and 16.1 do not have any application at all.

13. Mr. Anindya Kumar Mitra, learned senior advocate while opposing the writ petition contends that the Board has not acted arbitrarily or illegally rejecting the tender of the petitioner as it has acted strictly in compliance of the terms and conditions of the tender document. He contends that the bid submitted by the writ petitioner was incomplete as such it is non responsive. The price bid is for several heads of work for which C-2 is consisting of item of civil works for Lower Dam. The petitioner did not quote any price bid in original signed bid for item No. C-2. When the petitioner realised that the bid was incomplete it sent to the W.B.S.E.B. a separate price bid for item C-2 on 17th September 1999 that is after 9 days after the deadline fixed for submitting tender. So W.B.S.E.B. could not consider the price bid for sub-schedule C-2.

14. He contends under clause 22 of the terms and conditions of the tender document no bid shall be modified by the bidder after the deadline fixed for submission of bid. He contends unless the price bid is complete the Board has no power even to consider the bid on merit. In this context he draws my attention to Tata Cellular case wherein it has been held that in order to be a valid tender it must be complete.

15. He contends further that the information supplied in the diskette is not

enough unless the bid paper contains complete bid containing prices of all the scheduled works the Board cannot look into this.

16. He contends further when the Board following the terms and conditions of the tender document has taken decision, it is not for the Court to review such decision. In this context he relies on a decision of the Supreme Court reported in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, . So he contends that the Board cannot be said to have acted arbitrarily following tender conditions. Reference is sought to be made to a decision of the Supreme Court reported in *M/ s. G. J. Fernandez Vs. State of Karnataka and others*, .

17. He contends moreover that terms and conditions are binding upon the Board as this project is financed by Foreign Agency, it can hardly afford to deviate from the terms and conditions laid down. This project is time bound and it had to follow time schedule.

18. Mr. Mitra contends further that tender invited with funding by Foreign Agency stands on different footing from the tender funded by the tenderers alone. So no discretion is left with authority inviting tender. Standard of fairness should be Judged in the aforesaid light. Mr. Mitra's further contention is that guidelines given by the Foreign Agency by IBIC have to be followed in the matter of evaluation of tender.

19. Therefore, the Court will not Interfere with the decision in a case like this. In this connection he has drawn attention to a Judgment of Supreme Court reported in *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, . Thus he contends the petition is liable to be dismissed.

20. Mr. AJoy Gupta, learned Advocate contends on behalf of the added respondents that the petitioner did not fulfil and/or comply with the terms and conditions in the tender document. He contends the terms and conditions of the tender document are rigid and have to be scrupulously followed, the Board has done so in this matter.

21. He contends that there is no violation of breach of the terms and conditions of the tender document. There is no arbitrariness and illegality in the decision making process. So the writ petition must fail.

22. I have heard the learned counsels and considered the materials. The issues involved in this writ petition are as follows :--

1. Whether this tender allegedly funded by Foreign Agency stand on different footing from that of other tender to test fairness and reasonableness under Article 14 of the Constitution of India.

2. Whether non-submission of price schedule in the signed bid document for the works under the heading sub-schedule C-2 is essential terms and conditions of the tender or not.

3. Whether the rejection of the tender because of non-filing of the signed bid

document relating to price schedule for the works under the heading sub-schedule C-2 is an arbitrary, unreasonable and unfair action or not.

23. Admittedly the writ petitioner did not submit signed computer generated print out of its revised price bid for the works under the heading sub-schedule C-2 for Lower Dam. However, it appears, shortly after opening of the tenders the writ petitioner had supplied the print out of the aforesaid price bid. In the diskette all the information as to revised price bid were supplied by the writ petitioner. Even in the summary sheet price bid for sub-schedule C-2 is mentioned. It is an admitted position before the decision was taken the price schedule under sub-heading C-2 had been submitted and the same was received without any intimation as to objection.

24. While examining the action of the State and/or instrumentality of the State of power of this Court and for that matter Supreme Court has been well settled by this time by number of pronouncements of the apex Court as well as various High Courts. Of hand I find one of the most exhaustive and elaborate decisions of the apex Court rendered in case of Tata Cellular v. Union of India reported in 1994(6) SCC 654. It appears from the aforesaid judgment that the "parameter of the Court's power and restraint of exercise of power has been given and this can be summarized for the purpose of this case. In its paragraph 70 it is observed as follows :--

"..... 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 purpose the exercise of that power will be struck down."

In paragraph 77 of the aforesaid Judgment it has been observed as follows :--

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

1. Whether a decision making authority exceeded its powers?
2. Committed an error of law,
3. Committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds

upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety. The above are only the broad grounds."

25. In the said Judgment it has been observed that if the authority concerned acts in accordance with the terms of the tender document such an action cannot be termed to be an arbitrary action. At the same time in paragraph 144 of the aforesaid judgment it has also been observed that to insist upon a strict compliance with each and every tender document is not the law and mistake in relation to a non essential matter that is in relation to peripheral and collateral matter be ignored and Intention to comply with terms of the bid should be looked into. For an accidental omission the bidder cannot be punished.

26. In another case, viz., Poddar Steel Corporation v. Ganesh Engineering Works reported in 1991 (3) SCC 272 the Supreme Court has been pleased to observe amongst other in its paragraph 6 that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a contractual irregularity of little or no significance. The requirements in a tender notice can be classified into two categories--those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

27. A decision T.V. Subhadra Amma Vs. Kerala Board of Revenue and Others, has laid down the same principle.

28. Given the aforesaid principles laid down by the judicial pronouncements now I have to examine as to whether the submission of print out signed price bid for the works under schedule C-2 in this case is essential terms and further whether omission in doing so within the dead line rendered the entire price bid invalid and whether there is reasonableness in the action of Board while rejecting the tender or not.

29. Under the terms and conditions of the tender documents it appears eligible tenderer has to submit the following documents.

(i) Five sets of Volume IA (Revised in April. 1999).

(ii) Five sets of Volume 1A-1 Chapter 5, Revised BOQ.

(iii) Original revised diskette supplied by the Board.

(iv) A separate diskette containing the Bill of Quantities with all the columns including unit prices and the amounts filled up.

(v) Five Bound Volumes containing print out of the Bill of Quantities made from the diskette of Skanska along with other supporting documents.

However, upon detection on 17th September, 1999 signed print out of the price schedule for the works under the heading sub-schedule C-2 was also supplied by the petitioner. It appears from the records from time to time the Board amended the terms and conditions for submitting a complete tender. So the Board itself did not adhere to time schedule. It would appear from the aforesaid fact of submission of the tender and the act and conduct of the petitioner that petitioner was all the time ready and willing to participate in the tender. It is true before deadline the petitioner did not submit signed print out of revised price bid, but the summary sheet being one of the tender document mentioning price bid for all the works including works under sub-schedule C-2 was submitted. Moreover, in the diskette from which print out is generated all the details were supplied.

Mr. Mitra's contention that the diskette has nothing to do with the submission of the tender and the original tender document is the signed Bill of Quantity and in which there was no mention of the sub-schedule C-2 so the tender was not complete, is not acceptable to me for the simple reason that if the diskette is not considered to be part of tender document, then the signed print out price bid cannot be a part thereof. In my view diskette, print out and summary sheet are all part and parcel of this price bid. One is supplement to another, otherwise there would not have been any necessity to call for the same.

30. I have called for the records of the document. Applying the principle laid down in the aforesaid Tata Cellular case I have decided to examine as to whether the decision making process has been arrived at by the respondent with the principle of reasonableness and for that matter whether the decision has indeed been taken by the selection committee and/or Board.

31. From the records I find and so also admitted in the affidavit-In-oppositlon that the Board did not take the decision of their own and it sent for the opinion from Legal Remembrancer. The exact text of the decision of the Board is quoted hereunder:--

"The Board perused the expert legal opinion of learned Remembrancer, West Bengal, on some questions of law and the synopsis of speaking orders saying that as per Clause 28 of General Conditions of Contract to be read with Clause 13 of ITB Clause 9 of AITB the bid of bidder No. 3 that is M/s. Skanska International Civil Engineering AB cannot be accepted. Considering all relevant aspects the Board have decided that bid of bidder No.3 that is M/s. Skanska International Civil Engineering AB is non-responsive and therefore cannot be accepted."

32. The Board thus absolutely acted on the basis of legal opinion and decided to reject the bid of the writ petitioner. The Legal Remembrancer is neither a

member of the Board nor could take part in the decision making process under law. The Board did not apply its own mind and has adopted and accepted without any addition or alteration to the views of Legal Remembrancer. So this process of decision making is not in consonance with the established Judicial principle as the same is not in accordance with published norms. The Board did not function Independently. Whether the aforesaid non-compliance of the terms relating to the tender document is essential or non-essential has to be examined by the Board. So I cannot uphold this decision which has been taken with the help of extra-constitutional authority.

33. In the case of State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, Justice Venkatachaliah (as His Lordship then was) in paragraph 55, as cited by Mr. Kapoor, observed as follows :--

"..... The authority cannot permit its decision to be Influenced by the dictation of other as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised, but someone else's. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power, plainly be contrary to the nature of the power conferred upon the authority."

34. While observing as above His Lordship was pleased to quote the version of De Smith which is reproduced hereunder.

"The relevant principles formulated by the Courts may be broadly summarized as follows :

The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it : it must not act under the dictation of another body nor desist from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a Judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories : failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive."

35. In terms of the ITB nowhere it has been provided that the Board will take a decision on the opinion or any guidance of third party rather it shall act on determination of responsiveness to be arrived at by Employer's authorized representatives (T.E.C.) in terms clauses 28.1, 28.2 and 28.3. From the records

it does not appear upon examination the TEC has determined the bid of the petitioner substantially non-responsive.

"Clauses 28(1) and 28(2) of the Instructions to Bidders which are the governing factor provide as follows :--

Prior to the detailed evaluation of bids, the Employer's authorised representative will determine whether each bid (i) meets the required eligibility criteria; (ii) has been properly signed; (iii) is accompanied by the required securities; (iv) is substantially responsive to the requirements of the bidding documents; and (v) provides any clarification and/ or substantiation that the Employer's authorised representative may require pursuant to Sub-Clause 15.3. of ITB.

A substantially responsive bid is one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one (i) which affects in any substantial way the scope, quality or performance of the works; (ii) which limits in any substantial way inconsistent with the bidding documents, the Employer's rights or the Bidders' obligations under the Contract; (iii) whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive bids; (iv) which is Incomplete or does not include all the works covered by the specifications."

36. Clause 13 of ITB provides documents and materials which consist of bid-

(i) form of tender,

(ii) appendix to tender,

(iii) bid security,

(iv) price Bill of Quantities,

(v) information and

(vi) any other materials required to be completed and submitted by Bidders in accordance with these Instructions to Bidders.

37. Clause 28(3) provides if a bid is not substantially responsive, it will be rejected by the employer and the bidder will not be allowed subsequently to make the same responsive by correction on withdrawal of non-conforming deviation or reservation. If any bid which is incomplete, obscure or irregular or only for a part of the schedule is liable to be rejected.

38. Thus, it will appear from the aforesaid that the Board is to consider the bid which consists of all the aforesaid details and it has to be read in totality not in Isolation of one from another. In this case at the time of opening of the price bid the petitioner's bid document did not consist of signed print out price bill of quantity in respect of the Lower Dam works under the heading sub-schedule C-2.

39. Under Clause 9(o) of Additional Instruction to Bidders (AITB) (which is

applicable here) if provides that at the time of opening of Revised price bid employer's authorised representatives will open Envelope No. 1 and 2 nothing and disclosing amongst other summary sheet of Revised BOQ (Vol. 1A) containing the bid price and total amount of each bid.

40. Under Clause 9(k) of (AITB) two envelopes shall contain :--

Envelope No. 1 :--Documents related to the revalidated Bid-Security for main civil works for Purulia Pumped Storage Project, confirmation about extension of Bid validity of Techno Commercial part.

Envelope No. 2 :--Volume No. 1 (Revised in April 1999). Chapter 5 Revised BOQ Vol. 1A-1 Print out of Revised Price schedule in bounded form supporting document to supplement the Revised Price, Part of Bid document. 3 1/2 diskette of BOQ (MS window 95 Version 7 Excel)-1 No.

41. Therefore, according to me, the Board should have examined all the materials contained in two envelopes and then it should have come to findings as to bid of the petitioner is substantially responsive or not. In other words on the date of opening of the respective bids all the contents of two envelopes need to be looked into. It appears the Board has only considered on that deny, signed print out of Bill 5 Quantity. The Board has not followed the procedure laid down in the aforesaid AITB while pronouncing the petitioner's bid being substantially non-responsive. The Board only noted the omission of the signed print out bill of quantity but did not consider the diskette and summary sheet which are part and parcel of the materials and conditions of envelope No.4. It is significant to mention that the Board did not return the signed left out Bill of Quantity submitted after deadline. Under Clause 9(M) AITB it could have done so.

42. So in my view while taking a decision the respondent has followed such a process which is absolutely unknown, alien to the published norms. This is an arbitrary decision. One should reasonably expect the decision taking authority would decide by himself or themselves. Once such decision is not taken by adopting usual and fair method then the reasonable expectation is frustrated.

43. In paragraph 77 of the Judgment of Tata Cellular case the Supreme Court has broadly laid down the grounds upon which an administrative action is subject to control by Judicial review. These grounds are--(i) Illegality : This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it, (ii) Irrationality, namely, Wednesbury unreasonableness and (iii) Procedural impropriety.

44. As I have already observed the Board has not taken its own decision rather accepted blindly the opinion of Legal Remembrancer, so decision, in my view, is rendered absolutely on procedural impropriety.

45. In the affidavit-in-opposition various grounds have been mentioned for rejection but those grounds do not find place in the record. Even the record does not specifically mention as to why the petitioner's bid is substantially non-

responsive. Nor record does contain any particulars or basis on which the price bid held to be non-responsive.

46. As far as the decision rendered in Asia Foundation and Construction Limited's case (1997(1) SCC 788) is concerned the principle laid down therein is reiteration of the Tata Cellular Case which I have applied so far as it can be done here. In paragraph 10 of the present Supreme Court decision rather pinpointed as saying "though the principle of Judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

47. In the ease before the Supreme Court it was factually found by that there was no justification for Interference with the award of contract as the element of arbitrariness or favouritism was not there.

48. Therefore, the power of judicial review in the matter of public tender, be it a commercial or non-commercial, is always on the hands of the Superior Courts and the same can be exercised irrespective of underneath transaction between the third party (inclusive of foreign agency) and the tender inviting authority when a question of arbitrariness is brought before the Court So, I accept the principle rendered by the Supreme Court in the said case.

49. Similar is the principle laid down in the case decided by the Supreme Court reported in JT 2000(1) 481 cited by Mr. Mitra. In paragraph 7 of the aforesaid Judgment it has been categorically stated amongst other than-

"..... But the State, its Corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to Judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fide unreasonableness and arbitrariness.

The State, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned"

50. Therefore, even assuming the decision of rejection of the petitioner's bid is of the decision of the Board still then the way and in the manner by which the decision has been taken is not according to terms laid down in the ITB and AITB.

51. I have already quoted above various decisions of Supreme Court and High Courts which observed that the non-essential terms of the tender while taking a decision should not be rigidly and strictly followed. It has to be seen whether the tenderer has bonafide acted and such bonafide action would appear from the conduct of the tenderer. From the records I find the petitioner all the time was interested in and did everything necessary for submitting responsive tender. The petitioner has submitted pre-tender earnest money and on deliberation appropriate officials of the respondents who are the technical men has observed

that the bid of the petitioner is responsive. These allegations in the petition has not been denied. Mere omission in submitting signed print out bill of quantity of the price schedule for the works under sub-heading C-2 does not render the bid incomplete. Though Mr. Mitra has submitted that such subsequent submission of the price for the works under sub-heading C-2 tantamounts to modification and/or alteration of the bid and/or price. I have not been able to convince myself as to how it can be termed to be an addition and/or alteration. Alteration means something which is in existence and the same is changed without obliterating altogether. In this case there is omission in submitting signed print out Bill of quantity for the works under sub-heading C-2. Admittedly in the diskette which is a part of the tender document for price and further in the summary sheet the aforesaid price under sub-schedule C-2 was Included. Particularly after discovery of the submission the writ petitioner supplied the lacuna.

52. Therefore, I hold that this is absolutely an Inadvertent omission in complying one of the terms. So relying on the aforesaid Supreme Court decisions reported in 1991(3) SCC 272 as well as Tata Cellular case and also the judgment of Bombay High Court and Kerala High Court as quoted above I hold that the respondents should have ignored this avoidable lapses.

53. I cannot accept argument of Mr. Mitra that the respondents having acted in accordance with terms of tender rejected bid because firstly it is not the decision of the respondents in real sense and secondly even it is assumed as being decision of the respondents then the respondents have not followed the legal principle as laid down in the aforesaid Supreme Court decisions and the published norms. The other ground, viz., the project is being financed by the foreign agency and their time schedule has to be adhered to strictly, is difficult for me to accept the same. When the public tender has been floated, acceptance and rejections thing whatever may be arrangement between funding agency and tender inviter, will always remain subject to judicial review, whenever it warrants. Private Internal arrangement cannot override the petitioner's fundamental right of getting Justice before the Court of law and such a decision and/or arrangement of the private bodies must yield to the constitutional provision.

54. Mr. Mitra's reliance on paragraph 16 of the Judgment of Supreme Court reported in M/s. G. J. Fernandez Vs. State of Karnataka and others, is of no help in this case as I observe that the respondent authority without their own understanding has decided this matter. I find rather in paragraph 16 of the said Judgment the Supreme Court observed it is not that the authority Inviting tender cannot deviate from guidelines at all in any situation, but that deviation if made should not result in arbitrariness or discrimination." in this case non-submission of price bid in print out statement cannot result in affectation of any party, more so when decision was not taken at that time.

55. Mr. AJoy Gupta's submission is not acceptable to me simply, as the entire action the Board is vitiated by the aforesaid illegality and/or Impropriety. So I hereby set aside the decision rejecting the petitioner's price bid at the threshold

I allow the writ petition directing the respondents to consider and evaluate the petitioner's price bid along with other eligible candidates, provided of course there is no subsisting order of stay on this subject by any competent Court of law.

The writ petition succeeds with costs assessed at 300 gms. to be paid by the respondents.

56. Petition succeeded