
(2004) 02 BOM CK 0055

In the Bombay High Court

Case No : Writ Petition No. 1270 of 2004

Sri Shankaranarayana Construction Co. and Another

APPELLANT

Vs

Konkan Railway Corporation Ltd. and Others

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 2 ALLMR 636 : (2004) 2 BomCR 676 : (2004) 2 MhLj 968

Hon'ble Judges : C.K. Thakker, C.J.;S.A. Bobde, J

Bench : Division Bench

Advocate : Aspi Chinoy, Mustafa Doctor and Ajay Vazirani, instructed by Hariani and Co, for the Appellant; Kiran Bagalia, for Respodent Nos 1 and 2, Suresh Kumar and D.A. Dubey, Shyam Diwan, Ashwin Ankhad and Swapnila Rane, instructed by Ashwin Ankhad and Associates, for the Respondent

Final Decision : Allowed

Judgement

C.K. Thakker, C. J.

1. Rule. Ms. Kiran Bagalia, learned counsel, appears and waives service of notice of rule on behalf of respondent Nos. 1 and 2. Mr. Suresh Kumar, learned Advocate, with Mr. D. A. Dubey, appears and waives service of notice of rule on behalf of respondent No. 3. Mr. Shyam Diwan, learned Advocate, with Mr. Ashwin Ankhad and Swapnila Rane instructed by M/s Ashwin Ankhad and Associates, appears and waives service of notice of rule on behalf of respondent No. 4.

2. In the facts and circumstances and with the consent of parties, the matter was taken up for final hearing.

3. This petition is filed by a partnership firm, challenging arbitrary, capricious, discriminatory and unreasonable decision taken by Konkan Railway Corporation Limited, a Government of India Undertaking, respondent No. 1 herein, of awarding contract for construction of B.C. Single line tunnel No. 5 (Bakkal Tunnel) from KM. 43.040 to 48.940 on the Katra Laole section of the Udhampur-

Srinagar-Baramulla Rail Link Project to National Projects Construction Corporation Limited, respondent No. 4 herein, in preference to petitioners, even though bid submitted for the said project by respondent No. 4 exceeded the bid submitted by the petitioners to the tune of Rs. 7,81,40,062/-.

4. The case of the petitioners is that respondent No. 1 floated a proposal for pre-qualification of technology partners to construct tunnels on the Railway line referred to above. In pursuance of the said proposal, the petitioners submitted their pre-qualification bid with requisite supporting documents. By a letter dated 14th March, 2003, the first respondent informed the petitioners that they were qualified and had been empanelled for the said work. By another letter dated 15th December, 2003, the first respondent invited tenders for the said project. The petitioners were informed that the tender documents could be obtained from the office of the first respondent. The petitioners accordingly obtained the tender documents and submitted their tender. The tenders were opened on 7th January, 2004 at 15.30 hrs. They were opened in the presence of six tendering parties. The bid of the petitioners was for Rs. 1,56,98,35,486/-. It was found to be the lowest bid. The bid of respondent No. 4 was for Rs. 1,64,79,75,548/-. On 8th and 9th January, 2004, petitioner No. 2 was orally informed by respondent No. 2, Managing Director of respondent No. 1, that though the bid of the petitioners was lowest, the contract was likely to be awarded to respondent No. 4 on the ground that respondent No. 4 was a "Public Sector Undertaking". The second respondent also informed petitioner No. 2 that it was the policy of the Government to give preference to public sector undertakings when the price difference between the bids submitted by public sector undertakings and the lowest bid was less than 10 per cent. On 9th January, 2004, therefore, the petitioners made a representation to first respondent stating therein that they were not entitled to give purchase preference to respondent No. 4 since there was no stipulation to that effect in tender conditions. By another letter dated 13th January, 2004, the petitioners again made a representation to first respondent. The petitioners also intimated respondent No. 1 that respondent No. 4 had already tied up with those who did not possess requisite qualifications even before the tender and the bank guarantees towards earnest money were submitted by the intended subcontractors on behalf of respondent No. 4. Thus, respondent No. 4 had violated general terms and conditions of the contract and its tender was liable to be rejected.

5. The petitioners further stated that petitioner No. 2 personally met officials of the first respondent on 12th and 15th January, 2004. It is the case of the petitioners that they were informed by the officials of the first respondent that the first respondent "was considering the representation made by the petitioners and that a decision in the matter would be taken in due course". On 30 January, 2004, at about 12.00 noon, the petitioners were informed by a representative of the first respondent that the first respondent had written a Letter of Intent in respect of the project to respondent No. 4 on that day i.e. on January 30, 2004. According to the petitioners, the said action was clearly illegal, unlawful,

improper and unreasonable and it compelled the petitioners to approach this Court by filing the present petition on 31st January, 2004.

6. On 3rd February, 2004, the matter was placed for admission hearing. Notice was issued by this Court by making it returnable on 6th February, 2004. Ms. Kiran Bagalia, learned Advocate appeared on behalf of respondent Nos. 1 and 2 and Mr. Suresh Kumar, learned Advocate, instructed by Mr. D. R. Dubey appearing on behalf of respondent No. 3 waived service of notice. So far as respondent No. 4 was concerned, an affidavit was filed on behalf of the petitioners stating that an advocate's notice had already been served upon respondent No. 4. It was mentioned in the notice that the petitioners would be requesting the Court to take up the matter on that day i.e. February 03, 2004 at 2.45 p.m. In spite of that, nobody appeared on behalf of the said respondent. Accordingly, ad-interim relief directing respondents to maintain status quo and not to proceed further with the work in pursuance of Letter of Intent dated January 30, 2004 was granted. It was also stated that the notice would state that the matter would be heard and finally disposed of at the stage of admission.

7. An affidavit in reply is filed on behalf of respondent Nos. 1 and 2 by General Manager (Projects) of respondent No. 1 contending, inter alia, that the petition is not maintainable and is liable to be dismissed. It was stated that no prejudice was caused to the petitioners due to omission to include in the notice inviting tender a statement to the effect that 10 per cent purchase preference would be given to Central Public Sector Enterprises (CPSE) as it was based on Government policy. The petitioners have at all times been aware of the said policy. Since the petitioners had been working on Government contracts many years, they were aware that the said policy is mandatory in nature. They were also knowing that the fourth respondent was an Undertaking of the Union of India and was, therefore, entitled to the benefit of the said policy. Under the circumstances, "the omission to mention the fact that 10 per cent purchase preference has to be given to public sector undertakings, has not in any way adversely affected the petitioners". It is also contended that the petitioners had not indicated even in the slightest manner that any prejudice had been caused to them due to non-disclosure of the policy in the notice inviting tenders. It is also not their case that the petitioners would have altered their bid had this fact been disclosed. Non-disclosure of the said fact, therefore, did not cause any prejudice to the petitioners nor adversely affected them and cannot be made a ground for setting aside the contract entered into between the first respondent and the fourth respondent. It was admitted in the affidavit of the first respondent that the bid submitted by the petitioners was lowest but it was asserted that the said statement was misleading in the sense that as per the policy of the Government, respondent No. 4 was required to match the lowest bid. Respondent No. 4 had given a counter offer for Rs. 1,54,08,05,235/- which was nearly three Crores below the rate quoted by the petitioners. It was also stated that taking into account the nature and scope of the work and the capacity of the petitioners as disclosed at the time of preparation of pre-qualification panel, it was not possible

to make a viable offer to work at the price of more than 10 per cent lower than the final quotation by the fourth respondent. According to the first respondent, the policy of Government was notified by office memorandum dated 14th June, 2002 and the first respondent was bound by it.

The deponent then stated :

"Even though the said policy has not been specified in the Notice Inviting Tender, it is still incumbent upon the respondent No. 1 to give effect to the said policy. If the omission to specify the policy in the Notice Inviting Tender is interpreted to mean that the respondent No. 1 is not bound by the same, it would mean that any Government Undertaking can on its own avoid and give a go bye to the said policy by simply not specifying the same in the Notice Inviting Tender."

8. Respondent No. 1 contended that the policy of the Government cannot be said to be discriminatory or arbitrary and is based on rational classification between private individual and public undertaking. The first respondent had acted fairly, in public interest and consistent with the policy of the Government. The project is in the nature of commercial transaction and normally this Court, in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, would not interfere particularly when no mala fide has been alleged against the authorities. It was also stated that the project is a "high priority project of national importance". The prayer was, therefore, made to dismiss the petition.

9. An affidavit-in-reply is also filed by Deputy General Manager (C and M) of respondent No. 4. In the counter, it was contended that the petitioners had obtained ex-parte ad-interim order on 3rd February, 2004 "without giving proper/adequate notice to respondent No. 4". It is admitted that on 31st January, 2004, a forwarding letter of petitioners* advocate was faxed to the respondents' office at New Delhi intimating that they would be mentioning the matter on 3rd February, 2004 at 11.00 a.m. for urgent ad-interim reliefs at 2.45 p.m. or soon thereafter and respondent No. 4 was asked to remain present, if they so desired. But 31st January, 2004 was Saturday and the office was closed. It was also closed on 1st February, being Sunday and 2nd February, being ID-UL-JUHA (Bakri-Id). The fax message was, therefore, noticed by the Office Clerk only in the morning at 9.30 a.m. on 3rd February, 2004. It was, therefore, not possible for respondent No. 4 to contact Advocates and seek legal advice and in the circumstances respondent No. 4 could not remain present.

10. It was also the case of the fourth respondent that the petitioners were guilty of "gross delay and laches". As far back as 8th and 9th January, 2004, the petitioners were informed that the contract was to be awarded to respondent No. 4. Nevertheless, the petitioners did not move the Court till 31st January, 2004. By that time, a letter of award had already been issued in favour of respondent No. 4 on 29th January, 2004. Having regard to the stringent time frame of completion of the tunnel project, the fourth respondent immediately commenced mobilisation and assembled the teams and had dispatched teams for initial

survey work. The survey team comprising of seven Engineers left Delhi on 30th January, 2004 by road and arrived at Reasi, Jammu and Kashmir on next morning i.e. 31st January, 2004. On 1st February, 2004, initial survey work commenced for the project. Meanwhile, respondent No. 4 also engaged Mr. Sood of Ms. Hetrew, New Delhi, a consultant in tunnel work and Mr. Kasareni of Nagpur in relation to rock mechanics and they started their work. Before 3rd February, 2004, various steps and measures had been taken towards mobilisation including identification of the equipments required for the execution of tunnel work, arrangements for rendering the equipment operational and transporting them to the site and preliminary measures to place orders for special equipments not available in India. The fourth respondent had spent substantial amount to the tune of Rs. 82 lakhs as reflected in the counter.

11. The fourth respondent also contended that the petitioners had not approached this Court with clean hands and they were guilty of suppressio veri and suggestio falsi. They had suppressed relevant and important conditions of the bid document by not annexing "Regulations for tenders and contract and general conditions of contract". As the petitioners were all throughout aware of the discretion vested in respondent No. 1 regarding acceptance of tender conditions, it was not open to them to challenge the action of the first respondent. It is also the case of the fourth respondent that respondent No. 1 rightly awarded the project to respondent No. 4 on account of various factors mentioned in the affidavit. It is also stated that no loss was caused to the petitioners as the respondents bid was lower than the alleged lower bid offered by the petitioners. The final award dated 29th January, 2004 specified the total cost of Rs. 1,54,08,05,235/- which was nearly three crores lower than the bid of petitioners which was Rs. 1,56,98,35,487.40. It was, therefore, submitted that the petition deserved to be dismissed.

12. An affidavit in rejoinder was filed by the petitioners disputing and denying the assertions made and allegations levelled against the petitioners and reiterated what was stated in the petition. It was admitted that it was true that the petitioners were aware that there was a Government policy to grant purchase preference to CPSEs but "they were not aware that respondent No. 1 intended to apply the said policy to the tender in the present case". According to the deponent, the said policy itself stipulated that the provisions relating to the purchase preference should be specified in the notice inviting tender and after obtaining prior exemption from the Cabinet in consultation with the Department of Public Enterprises.

It was also stated :

"I submit that respondent No. 1 has never in the past applied the present policy or awarded a contract on the basis of the abovementioned policy to a single tender in which the petitioners have participated."

13. It was alleged that serious prejudice had been caused to the petitioners due

to omission in referring the policy in the notice inviting tenders. Had the petitioners known that the said policy would be made applicable to the tender, they would have considered whether to put in a bid for the project at all. In absence of the said condition in the tender, the petitioners made considerable effort, expenses and man-hours for the preparation of a bid. They furnished a bank guarantee to the tune of Rs. 4.68 crores as a pre-condition to participate in the tender. They also visited the project site in Kashmir with a large team of Engineers for ascertaining the quantum and nature of work required for the project and in preparation of bid documents. If the petitioners were informed in advance regarding Government policy, they would have been in a position to make an informed choice whether or not to participate in the tender. It was also alleged that the petitioners had learnt that respondent No. 4 does not intend to carry out the contract work itself but intended to sub-contract to a Company/firm known as Rithwick Projects Ltd. and/or Sri Constructions, controlled by C. M. Ramesh Group. According to the petitioners, neither of the two Companies/firms nor any other Company belonging to C. M. Ramesh Group had passed the pre-qualification process initiated by respondent No. 1 in July, 2002, It was also contended that as per the Government policy, purchase preference was required to be granted to CPSE at the lowest valid bid price. The fourth respondent, however, purported to revise its offer by Rs. 3 crores below the offer of the petitioners. In accepting the revised bid and entering into further negotiations with respondent No. 4, respondent No. 1 has acted contrary to terms of the policy as well as tender documents.

14. It was also denied that there was delay and/or laches on the part of the petitioners nor the petitioners had not come with clean hands. Pursuant to the representations made by the petitioners on 9th January and 13th January, 2004, there were meetings with the officials of the first respondent on 12th and 15th January, 2004. The officials of the first respondent indicated the petitioners that their representation was being considered. It was only on 30th January, 2004 that the petitioners learnt that a decision had been taken by the first respondent to award the contract to respondent No. 4. A specific averment had been made to that effect in the petition. Without any delay, the petitioners approached this Court on 31st January, 2004 and "at the first available opportunity" moved the Court on 3rd February, 2004 and obtained ad-interim relief. The petitioners also made all bona fide attempts to serve all the respondents by giving notice of the petition. It is, therefore, not correct that there was delay or laches. The petitioners had also not suppressed any fact whatsoever. All relevant documents have been produced by them. It was, therefore, submitted that the petition deserved to be allowed by quashing and setting aside the action taken by the first respondent and by directing the first respondent to consider the tender of the petitioners and award contract to them.

15. We have heard Mr. Aspi Chinoy, learned Counsel, with Mr. Mustafa Doctor and Mr. Ajay Vazirani, instructed by M/s Hariani and Company for the petitioners, Ms. Kiran Bagalia, learned Counsel for respondent Nos. 1 and 2, Mr. Suresh Kumar,

learned Counsel with Mr. D. A. Dubey, for respondent No. 3 and Mr. Shyam Diwan, learned Counsel with Mr. Ashwin Ankhad and Swapnila Rane instructed by M/s Ashwin Ankhad and Associates for respondent No. 4.

16. The learned counsel for the petitioner submitted that the impugned action of awarding contract in favour of respondent No. 4 is illegal, unlawful, arbitrary and deserves to be set aside. It was also submitted that when tenders were invited, the first respondent was under obligation to consider the terms and conditions mentioned in the tender notice and cannot take a decision relying on any extraneous consideration not specified in the tender. It was urged that when the "world at large" was informed as to the basis on which the bids and offers would be considered by first respondent, it would not be open to the first respondent to rely on so-called Government policy, if the said policy was not made part and parcel of offers disclosed to intending bidders. When the offer made by the petitioners was lowest, in absence of any relevant or germane consideration, respondent No. 1-instrumentality of State- could not have accepted the contract of respondent No. 4. The counsel submitted that there was no delay or laches on the part of the petitioners in approaching the Court and as soon as the contract was awarded by respondent No. 1 to respondent No. 4, immediately they have approached this Court. It was, therefore, submitted that the petition deserves to be allowed by granting relief to the petitioners.

17. The learned counsel for the contesting respondents, on the other hand, raised preliminary objection as to delay and laches. It was submitted that, according to the petitioners themselves, on or about 8th January, 2004, they came to know that respondent No. 1 was considering and contemplating awarding of contract to respondent No. 4 on the ground of Government policy of 10 per cent purchase preference. In spite of that, they did not approach this Court until 31st January, 2004. The contract is very important as also sensitive. A huge work is to be carried out by respondent No. 4 of constructing tunnel work on 43 kilometers on Katra-Baramulla Rail Link Project. It has to be completed in less than three years. In the circumstances, interference by this Court at this stage would be against public interest. It was also submitted that respondent No. 4 has spent huge amount and acted to their detriment on the basis of award of contract by respondent No. 1 in its favour and in turn has taken steps in furtherance of performance of contract by appointing certain expert agencies. It was submitted that Clause 7 of General Conditions of Contract (GCC) is clear and it authorises the first respondent that it would not be obligatory on the part of the first respondent to accept the lowest tender and no tenderer can demand any explanation for the cause of rejection of such tender nor the Railway is under obligation to assign reasons for declining to consider or reject any particular tender. Regarding concession of 10 per cent purchase preference, the Counsel contended that even, according to the petitioners themselves, they were aware of such a policy, they had dealt with the Government by entering into various agreements and work orders and thus they were in know of such policy decisions. Moreover, they have stated in the petition that when they enquired

about the tender in question on or about 8th or 9th January, 2004, they were informed that bid of respondent No. 4 was likely to be accepted on the basis of such policy decision. This is, therefore, not a case wherein surreptitiously some decision was taken by respondent No. 1 to favour respondent No. 4 and the petitioners were kept in total dark. No mala fide has been alleged either against respondent No. 1 or against respondent No. 4 and in absence of such allegation, a decision taken by the first respondent relying on Government policy and following it may not be interfered with by this Court. When the Government has accepted a policy, it was obligatory on the part of first respondent to follow the said policy and the action of respondent No. 1 in granting benefit to a public sector undertaking-respondent No. 4- cannot be said to be arbitrary, unlawful or otherwise objectionable. On all these grounds, it was submitted that the petition deserves to be dismissed.

18. Having heard the learned counsel for the parties, in our opinion, the petition deserves to be allowed. It is an admitted fact that tenders were invited for the purpose of carrying out the work in question. It is also an admitted fact that tenders were from open public i.e. Government Undertakings as well as other contractors like the petitioners. It is further an admitted position that the terms and conditions have been mentioned and specified in tender notice and it nowhere stated regarding giving of 10 per cent purchase preference to public sector undertakings. In the affidavit in reply filed on behalf of respondent No. 1 it was stated that "the omission to mention the fact that 10 per cent purchase preference has to be given to public sector undertaking, has not in any way adversely affected the petitioners". In other words, therefore, it is not even the case of the first respondent that the factum regarding 10 per cent purchase preference to public sector undertaking had been made known to general public in the tender notice itself. If this is the factual position, whether it was open to the first respondent to rely on Government policy of giving 10 per cent purchase preference to public sector undertaking and prefer respondent No, 4 to the petitioners.

19. In this connection, it would be appropriate to refer to a decision of the Supreme Court in Harminder Singh Arora Vs. Union of India (UOI) and Others, . In that case, tenders for supply of fresh buffalo/cow milk for Military Farm were invited. Tender of "A" was found to be lowest. In the tender conditions, no concession to Government suppliers was indicated and yet giving 10 per cent price preference to "B", his tender was accepted. "A" challenged the said action by filing a petition in this Court which was dismissed. Aggrieved "A" approached the Supreme Court. Allowing the appeal and setting aside the decision of this Court, the Supreme Court observed that once the Government decides to award contract on the basis of bid by tender, it must abide by the terms and conditions of the tender and it was not open to the Government to prefer Government Undertaking by giving price preference. The Court stated :

"If the terms and conditions of the tender have been incorporated in the tender

notice itself and that did not indicate any preference to the government undertakings of giving 10 per cent price preference to government undertaking, the authority concerned acted arbitrarily in allowing 10 per cent price preference to respondent No. 4."

The Court noted that the facility provided to the Government Undertakings was provided in paragraph 19 which contemplated that the Central or State Government departments need not pay tender forms fees and earnest money. That was the only concession available to Central/State Government or to Government concerns and no other concession or benefit was contemplated under the terms of tender notice. The Court proceeded to state that "A" (appellant) had known that 10 per cent price preference to Government undertakings would be given to "B" (respondent No. 4), he would have taken every precaution while submitting the tender.

20. Considering various previous decisions, the Court concluded :

"In the instant case, the instrumentalities of the State invited tenders for the supply of fresh buffalo's and cow's milk and, therefore, this case has to be decided on the basis of bid by the tenderers. There was no question of any policy in this case. It is open to the State to adopt a policy different from the one in question. But if the authority or the State Government chooses to invite tenders then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of respondent 4 although it was much higher and to the detriment of the State. The High Court, in our opinion, was not justified in dismissing the writ petition in limine by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or arbitrary. There was no question of any policy decision in the instant case. The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder he should have been granted the contract to supply, especially, when he has been doing so for the last so many years."

From the above observations, it is clear that, according to the Apex Court, where the instrumentalities of the State invite tenders, the decision has to be taken on the basis of the bid by the tenderers. There is no question of any policy in such cases. It is no doubt open to the State to adopt a policy different from the one in question but if it chooses to invite tenders, then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of any other bidder, although it would be higher, which would be detrimental to the State. The first respondent in his affidavit no doubt tried to distinguish Harminder Singh Arora stating therein that it was based on totally different set of facts. It was, inter alia, submitted that there was no policy of Government at the time of issuing the tender notice regarding 10 per cent preference, that the tender document provided that the lowest tender would be accepted which could be considered as promissory estoppel against accepting tender of any other than lower bidder; that the contract was awarded at a higher rate causing loss of more than Rs. 10

lakhs to the Government.

21. In our opinion, however, the ratio laid down by the Apex Court in Har minder Singh Arora is clear and free from doubt. The Court, in no uncertain terms, held that once the Government decides to award contract on the basis of bid by tender, it must abide by the terms and conditions of the tender - nothing more, nothing less. In our considered opinion, therefore, it is clear that if no terms and conditions have been mentioned in the tender notice, it is open to the State or its instrumentalities to rely on the general policy of the Government; but when it invites tender by issuing notice and by incorporating terms and conditions therein, it must include all such terms and conditions as intending bidders would proceed on the basis of those terms and conditions and take appropriate action. It is not open to the State or its instrumentalities to rely on other terms and conditions or policy of the Government not reflected in terms and conditions of tender notice.

22. In the instant case, as admitted by the first respondent itself, the policy as to 10 per cent purchase preference was omitted to be mentioned in the terms and conditions of tender notice and it was on the basis of general policy of the Government that the said benefit was granted in favour of respondent No. 4. In our judgment, therefore, the ratio laid down in Har minder Singh Arora squarely applies to the facts of the case and the action of the first respondent in awarding contract in favour of respondent No. 4 must be held to be illegal, arbitrary, unlawful and improper and must, therefore, be set aside.

23. We are not impressed by the argument that the petitioners were aware that 10 per cent purchase preference would be given to respondent No. 4 by respondent No. 1 as they had dealt with Government contracts in past. The case of the petitioners is that in the instant case, terms and conditions have been mentioned in the tender notice and on that basis they had submitted their bid. At no point of time before submission of tender by the petitioners, they were informed that over and above terms and conditions of tender, additional terms and conditions not included therein will also be considered and a decision would be taken on that basis. It, therefore, cannot be said that the petitioners are not entitled to any relief on that count.

24. We must frankly admit that we are also not impressed by the arguments that there was delay and/or laches on the part of the petitioners in approaching this Court. According to the petitioners, on 8th or 9th January, 2004, they came to know that respondent No. 4 was likely to be preferred to the petitioners on the jejune ground of 10 per cent purchase preference not reflected in the terms and conditions of tender notice. Immediately they made representations on 9th January, 2004 as also on 13th January, 2004. Petitioner No. 2 personally met officials of first respondent on 12th and 15th January, 2004. It is also the case of the petitioners that they were informed that their representation would be considered and appropriate decision would be taken in due course. It was only on 30th January, 2004 at about 12 Noon that the petitioners were informed by a

representative of the first respondent that the first respondent had written a Letter of Intent to respondent No. 4 on that day i.e. on January 30, 2004. The present petition was filed on January 31, 2004 i.e. next day. The petitioners have also taken due care in intimating in advance to all the respondents that they would be requesting the Court to take up the matter on February 3, 2004 for interim relief. In fact, on behalf of respondent authorities appearance was filed but on behalf of respondent No. 4, nobody appeared. The Court observed that fact and ad-interim relief was granted on 3rd February, 2004. Thus, the contention of delay and laches does not impress us and is hereby rejected.

25. So far as offer of petitioners is concerned, it was the lowest. The said fact is not disputed by any respondent. Ordinarily, therefore, it would be the petitioners who would be preferred and granted the work order. The learned counsel for the petitioners in this connection placed reliance on a noting dated 8th January, 2004 titled Minutes of the Tender Committee Meeting held on 8th January, 2004 for construction of Tunnel No. 5 (Bakkal Tunnel) on Katra-Laole section produced by the first respondent. In the said minutes, there was consideration of tenders by the Committee. There is hand-written noting by the Managing Director. The said relevant part of the note reads thus :--

"The tender should normally have gone to the lowest tenderer, M/s Shankaranarayana Shetty Construction. It has to be offered to M/s NPCC as a counter-offer due to Government order and hence does not tantamount to negotiation. As the lowest tenderer is otherwise qualified and eligible, they may be offered the contract in case M/s NPCC do not accept the counter offer."

It is thus clear that even according to the first respondent, the tender bid of the petitioners ought to have been accepted and tender submitted by them ought to have been accepted but for the purchase preference of 10 per cent.

26. In our opinion, reference to decisions of the Supreme Court in (i) Indian Drugs and Pharm and Others Vs. Punjab Drugs Manufactures Association and Others, , (ii) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , (iii) Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , (iv) Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, , (v) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and (I) W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors., (2001) 2 SCC 451 would not apply to the facts of the case. In all those cases, the Court has held that the power and jurisdiction of the Court in commercial transactions is limited and it cannot substitute its own decision for the decision taken by the authorities.

27. The instant case, as already stated hereinabove, is a case of inviting tenders by disclosing terms and conditions. Where such an action is taken by an instrumentality of the State, as per the law laid down in Harminder Singh Arora, the instrumentality of the State is bound by those terms and conditions and must take a decision, keeping in mind those terms and conditions only. Since the said terms and conditions nowhere mentioned about 10 per cent purchase preference,

the said fact could not have been taken into account in deciding competitive bids of petitioners and respondent No. 4.

28. We are also unable to uphold the contention of respondent No. 4 that due to delay and laches on the part of the petitioners, the fourth respondent has suffered. It is true that, according to respondent No. 4, it had spent an amount of Rs. 82 lakhs but it is also an admitted fact that the contract was awarded to fourth respondent only on 30th January, 2004 and the petitioners have approached this Court immediately on the next day i.e. 31st January, 2004. An advance notice was also* sent which even according to respondent No. 4 had received on the same day i.e. 31st January, 2004 at 2.30 p.m. Therefore, respondent No. 4 was aware that a grievance was made by petitioners against an action of first respondent giving contract to respondent No. 4, they had approached this Court by filing a petition and the matter is sub judice. It, therefore, cannot be said that the fourth respondent has suffered on account of delay, laches or negligence on the part of the petitioners in approaching this Court. Obviously, no action could have been taken by respondent No. 4 prior to 30th January, 2004, except usual expenditure which has to be incurred by all bidders. Such expenses have also been incurred by the petitioners themselves. If is only after the award of contract on 30th January, 2004 that the Court may take into account the expenses incurred by respondent No. 4. As is clear, immediately on 31st January, 2004, the petitioners have informed respondent No. 4 and hence even on that count, the petitioners cannot be refused relief, if otherwise they are entitled to such relief.

29. For the reasons aforesaid, in our opinion, the petition deserves to be allowed and is accordingly allowed. Action taken by the first respondent in giving 10 per cent purchase preference to respondent No. 4 is held to be illegal and unlawful and the first respondent is directed to take appropriate action in accordance with law by ignoring such purchase preference and on the basis of the submission of tenders by the bidders.

30. Rule is made absolute. In the facts and circumstances, there shall be no order as to costs.

Parties to act on an ordinary copy of this order duly authenticated by the Associate/Private Secretary.

31. The learned counsel for the petitioners, at this stage, submitted that a mandamus may be issued to take consequential action in the light of the order passed by us quashing and setting aside the order of the first respondent. It was submitted that in Harminster Singh Arora as also in Prestress India Corporation Vs. U.P. State Electricity Board and Others, , such a direction consequential in nature had been issued. He, therefore, prayed that since the petitioners' bid was lowest, respondent No. 1 may be directed to accept it.

32. In our opinion, when we declared the action of the first respondent illegal and unlawful, direction to the first respondent would be "to take appropriate

action in accordance with law by ignoring purchase preference and on the basis of submission of tenders by the bidders". No further direction is, therefore, necessary, and the prayer is rejected.

33. The learned counsel for the first respondent prayed that liberty may be granted to the first respondent to invite fresh tenders. We say nothing on the said prayer.

34. The learned counsel for respondent No. 4 submitted that ad-interim relief may be granted against direction issued by us in the order passed today, particularly keeping in view the fact that ad-interim relief was granted by this Court on 3rd February, 2004 in absence of respondent No. 4.

35. We are unable to accede to the prayer. So far as ad-interim relief is concerned, as observed in the judgment itself, advance notice was given to respondent No. 4 on 31st January, 2004 itself. We have also observed that on 31st January, 2004 itself, respondent No. 4 received the said intimation. It was, however, the case of respondent No. 4 that since office was closed on 31st January, 1st February and 2nd February, 2004, fourth respondent could not remain present in this Court on February 3, 2004. In our opinion, therefore, it cannot be said that there was default on the part of the petitioners in intimating the fourth respondent.

36. When we had granted ad-interim relief restraining respondent No. 1-Corporation from proceeding with the contract any more and we have allowed the petition, relief as prayed by respondent No. 4 can be granted, even though it was stated that respondent No. 4 will not claim any equity. Prayer is, therefore, rejected.