
(1994) 05 GAU CK 0006
In the Gauhati High Court
Case No : Civil Rule No. 443 of 1994

Subhash Projects and Marketing Ltd. and Another	APPELLANT
Vs	
State of Mizoram and Others	RESPONDENT

Date of Decision : 23-05-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1994) 2 GLR 183

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : A.K. Bhattacharya and M. Hazarika, for the Appellant; D.N. Choudhury, B.D. Das, K.P. Pathak for Respondents 1-4, B.K. Das, S. Dutta and K.K. Dey for Respondent 5, for the Respondent

Judgement

D.N. Baruah, J.—In this writ application under Article 226 of the Constitution the Petitioners have prayed for issuance of appropriate writ to quash the impugned decision of the 1st to 4th Respondents rejecting the offer of the Petitioners in respect of tender bearing No. 6/437/92/CE(PC)/4 for Serlui-B Hydro Electric Project and also prayed for a writ of Mandamus directing the Respondents to consider the offer of the Petitioners in respect of the said tender and also to open and consider the price bid given by them and further direction to the 1st to 4th Respondents to forbear from and/or refrain from awarding any work order to 5th Respondent and also for further direction to the Respondents to give all consequential reliefs they are entitled to.

2. The case of the Petitioners, in brief, may be stated as follows:

The 1st Petitioner is a company carries on business, inter alia, in execution work of Hydro Power Water Supply and Treatment, Project Consultancy and Turn Key Project. Water and Power Consultancy Services India Limited, for short "WAPCOS", is a Government of India undertaking of which the 4th Respondent is the Chief Engineer. The 5th Respondent is also a company incorporated under the Companies Act with its registered office at Chandigarh.

The 2nd Respondent issued Annexure -A notice dated 26.10.92 inviting lenders for construction of Serlui-B Hydro Electric Project on a Turnkey basis for civil, electrical and mechanical works including design, manufacture, erection, testing and commissioning of equipment. The estimated cost of the work was Rs. 30 Crores. As per the said Annexure -A notice sealed lenders were to be accepted till 1400 hours of 7.1.93 and were to be opened on the same day at the same time in the office of the 2nd Respondent in presence of the tenderers as per schedule given thereunder, Detailed tender specifications could be had on payment of Rs. 10,000/- only by Bank Draft drawn in favour of the 2nd Respondent. The tender specifications would also be available in the office of the 2nd Respondent. In partial modification of Annexure-A notice the 2nd Respondent issued Annexure - B notice dated 2.12.92 changing the dates regarding site inspection, issue of tender documents and opening of tenders. As per the said Annexure -B notice site inspection would be from 2nd week of December, 1992 and issue of tender documents from 14.12.93 and date of opening of tender was on 2.2.93. The 2nd Respondent issued yet another notice dated 15.1.93 (Annexure-C) further extending the date of opening of the tender upto 2.3.93.

3. The Petitioner company with a view to submitting tender obtained Annexure-D tender specifications on payment of Rs. 10,000/- As per Annexure-D specification the bidders were to forward their sealed bids in three separate envelopes marked "Confidential" and superscribing on the envelopes, the contents of the envelope. One envelope was to contain the demand draft of Rs. 10 Lakhs as Earnest Money in favour of the 2nd Respondent, the second envelope to contain technical and commercial bid alongwith tender documents Volume I to IV and the third envelope to contain price bid/bill of quantities duly filled in and signed. The above sealed envelopes were to be put in an envelope duly sealed and marked "Confidential" and addressed to the 2nd Respondent. The envelope containing earnest money/demand draft was to be opened first and thereafter commercial and technical bids for those tenderers who fulfilled the conditions regarding Earnest Money would be opened and evaluated and lastly the price/financial bids would be opened only of those tenderers who would fulfill the conditions of NIT and would be found suitable for undertaking the works.

4. In pursuance of the Annexure-A and Annexure-D the Petitioner company submitted its offer in three envelopes on or about 2.3.93 in strict compliance with the terms of NIT and tender specifications. However, in pursuance of NIT there was no offer from any party other than the 1st Petitioner. Therefore, the dates of submission and opening of tenders were further extended by the 2nd Respondent till 15th April, 1993 by issuing Annexure-E corrigendum dated 3.3.93. Thereafter, two other parties, namely, Eastern Overseas Corporation of Bombay and Punjab Power Generation Machines Ltd. of Chandigarh the 5th Respondent submitted their offers. On the said date the envelopes "A" & "B" of the said tenderers, namely, the Petitioner, 5th Respondent and said Eastern Overseas Corporation of Bombay were opened. After opening the "A" and "B"

envelopes the 4th Respondent sent a Fax message dated 28.5.93 calling upon the Petitioner company to send their confirmation/clarification on their offer in respect of Electrical and Mechanical Works with a request to send those directly to the 4th Respondent with copy to the 2nd Respondent, Thereafter, the 4th Respondent sent yet another Fax message dated 28th May, 1993 (Annexure-F) enclosing therewith the comments of the 4th Respondent in respect of carrying out the Civil works of the Hydro Electrical Project.

5. In the meantime, the 2nd Respondent called for a meeting in connection with the said project on 13.7.93 at Alzawl and the Petitioner company was also asked to attend the same. By Annexure-H letter dated 28.6.93 the Petitioner company replied to the Fax message (Annexure-G) giving clarifications sought for by the 4th Respondent. The Petitioner company confirmed in its letter dated 28.6.93 that it would attend the meeting on 13.7.93 at Aizawl, Again by Annexure-I express Telegram dated 2.7.93. the 4th Respondent confirmed the receipt of comments on the tenders and informed the Petitioner company that the successful bidder would be required to construct all the bridges, approach roads and infrastructure facilities including construction of magazines for explosives and would also be required to carry out all topographic surveys and necessary soil investigations for design of structures as per the requirement of Annexure-A. Procurement of explosives was also included in it Petitioner company was requested to bring detailed offers in respect of the above to Aizawl on 12.7.93 in order to finalise this aspect during the proposed meeting to be held from 12.7.93 to 14.7.93.

6. In the said meeting at Aizawl the representative of 3rd Respondent alongwith the officials of Bharat Electrical Limited and TEXMA Co. associates of 1st Petitioner were also present. Various technical and commercial aspects were discussed and explained to the 2nd Respondent as well as to the representatives of the 4th Respondent. All the queries made by the 4th Respondent were satisfactorily explained. The Petitioner by a letter dated 14.7.93 addressed to the 2nd Respondent informed that during the discussion held on 13.7.93 with the 2nd Respondent and other departmental officials, various points raised were clarified. By Annexure-J letter dated 14.7.93 the Petitioner company confirmed the points as per the annexure enclosed with Annexure-H letter dated 28.6.93. The other remaining points raised by the 2nd Respondent and the officials of the 3rd Respondent were also clarified by the Petitioner company by two several letters dated 28th and 30th July, 1993 (Annexure-K and K/I respectively). The 3rd Respondent by Annexure-L letter dated 6.8.93 wanted further confirmation/clarification from the Petitioner company regarding the security deposit, warranty and wanted certain modifications of the terms and conditions offered by the Petitioner company and to review certain aspects of the project and to furnish the biodata of the construction engineers who would be posted at the site for execution of civil works. The clarifications sought for by the 3rd Respondent were also duly clarified by Annexure-M letter dated 6.8.93

7. The 4th Respondent by yet another letter dated 10.8.93 requested the Petitioner company to attend another meeting at the office of the 4th Respondent for further discussion in New Delhi on 16.8.93 and accordingly the meeting was held. The Petitioner company, thereafter, sent Annexure-O letter dated 17.8.93 whereby it confirmed and clarified the various points raised in the said meeting. In spite of all the clarifications given by the Petitioner company, the 2nd Respondent by two several letters dated 7.9.93 and 9.9.93 (Annexure P and P/I) sought further clarifications/confirmations on certain conditions offered by the Petitioner company and the Petitioner company was requested if review some of the commercial terms, Petitioner company was also requested to submit a supplementary financial offer and was told that the last, date of submission of such offer was 20.9.93. The Petitioner company was informed that after decision on the supplementary financial offer given by the Petitioner company the date of opening of the commercial bid would be duly intimated, The date of submission of the revised final offer was extended till 27.9.93 by yet another Fax message dated 17.9.93 and 2nd Respondent also sent a telegram to the Petitioner company in respect of the same. Annexure-Q and O/1 are the said Fax message and telegram respectively.

8. In pursuance of the same the Petitioner company submitted a revised final offer and gave clarifications sought for. By annexure-R letter dated 24.9.93 the Petitioner company further requested the 2nd Respondent to intimate it the date of opening of the price bid. This Annexure-F letter was duly received by the 2nd and 4th Respondents as would appear from the summary record of the meeting held on 27.9.93. During a subsequent visit to Aizawl the Petitioner company could come to know that the State Government decided to reject the offer of the 1st Petitioner and to open the single offer of the 5th Respondent only. The Petitioner submitted Annexure-T representation dated 27.10.93 to the Chief Secretary of the 1st Respondent against the said decision. By Annexure-U and U/I letter dated 2nd and 6th November, 1993 respectively addressed to the 2nd Respondent, the Petitioner company confirmed various commercial terms brought out as per Annexure-P. The Petitioner company further confirmed by Annexure-V and V/I letters dated 13th and 19th November, 1993 various points raised by the 2nd Respondent.

9. The 2nd Respondent, thereafter by Annexure-W Fax message dated 24.11.93 informed that the financial bid for the project would be opened on 3.12.93 including the bid given by the Petitioner company provided the Works Advisory Board approved their technical and commercial bid and the Petitioner company was, requested to be present at the time of opening of the financial bid. As requested by Annexure-W Fax message, the Petitioner company intimated the 2nd Respondent that the company was agreeable to extend the validity of their offer upto 15.1.94 by Annexure-X letter dated 22.11.93. By Annexure-Y letter dated 3.12.93 the Respondent No. 3 sought further clarifications from the Petitioner company regarding the offer submitted by it As requested the Petitioner company furnished the clarifications and confirmations by Annexure-Z

letter dated 20.12.93. By Annexure-AA and AB letters dated 7.1.94 and 10.1.94 respectively, the Petitioner company was again requested to extend the validity of offer till 14.2.94.

10. On or about 17.1.94 the Petitioner company for the first time came to know at a meeting held at Aizawl attended by the 2nd Respondent and the officials of WAPCOS that they had decided to reject the offer given by the Petitioner company and the price bid of only the 5th Respondent would be opened on 18.2.94. However, no formal order was passed and the Petitioner company till the date of filing of the writ petition had not been intimated as to why the offer of the Petitioner company was rejected. The price bid of the 5th Respondent was opened on 18.1.94. The Petitioners had come to learn that though the estimated cost of the project was Rs. 30 Crores the 5th Respondent quoted Rs. 91 Crores its price bid.

11. Besides, according to the Petitioner, the 1st to 4th Respondent imposed different terms and conditions for the Petitioners and the 5th Respondent, While in case of the Petitioner the said Respondents insisted on by letter dated 13.11.93, Memorandum of Understanding the Petitioner company had with the Sub-contractors, but in case of 5th Respondent no such information was asked for. Thus the Petitioner and the 5th Respondent had been differently treated though they were placed in similar circumstances, According to the Petitioner the said Respondent Nos. 1 to 4 were aware that the Respondent No. 5 had not executed any work of this magnitude, On the other hand the Petitioner has successfully executed similar projects at several places in the country, The Petitioner company was financially sound but the 5th Respondent had no such financial soundness and this fact was very well known to the 4th Respondent. According to the Petitioner the authority had already accepted the offer of the Petitioner company as feasible one; request for extension of offer was a clear testimony of it. If the offer of the Petitioner was found to be not acceptable there was no reason why the 2nd Respondent would repeatedly request the Petitioner company to extend the validity of the period of its offer. The Petitioner further stated that the rejection of the Petitioner's offer without assigning any reason and acceptance of the offer of the 5th Respondent was arbitrary. While doing so, the Respondents had been acting with an oblique motive and the actions were not only arbitrary but also against the public interest. Besides the entire action of rejecting the offer of the Petitioner company was mala fide. The 1st Respondent being a State and the other Respondents namely, " 2nd, 3rd and 4th being the instrumentalities of State, they could not act Arbitrarily at their whims and caprice. They were bound by the public law limitations. The actions of the Respondents were arbitrary, illegal and discriminatory being violative of the equality clause of the Constitution. Therefore, the entire action were liable to be struck down. Hence, the; present petition,

12. Both 1st and 5th Respondents have filed affidavits-in-opposition-separately, The 1st Respondent in its affidavit has stated in detail about the necessity of

installation of Hydro Electric Project. The construction of such Hydro Electric Project is urgently needed for a backward State like Mizoram. In its affidavit the 1st Respondent has given details about the notice inviting tenders and receipt of offers from three different parties, namely the Petitioner, 5th Respondent and Eastern Overseas Corporation. It has also stated that the cost of the project was estimated approximately at Rs. 30 crores. According to the 1st Respondent, WAPCOS is an internationally reputed undertaking rendering consultancy services in Civil, Electrical and Mechanical works in different Hydro Electric Projects of different states in India and also abroad. The said consultancy has been regarded as a most competent consultancy firm in this line. This consultancy firm was entrusted with the duties of rendering consultancy services for design, engineering and construction, supervision for civil, electrical and mechanical works for the Project for the State of Mizoram and also to give its opinion or comment on the offer made by the Petitioner and other tenderers, namely, 5th Respondent and Eastern Overseas Corporation. It forwarded copies of the comments to the Petitioner and 5th Respondent to give their clarification and confirmation in respect of the comments made by it. The 2nd Respondent called for meetings at Aizawl on 13.7.93 and 14.7.93 in which the Petitioner company and 5th Respondent attended, but the 3rd tenderer - Eastern Overseas Corporation did not attend. A number of points in respect of the commercial and technical offers of the two tenderers were raised in the said meeting for clarification and confirmation. The 1st Respondent however, has denied that the Petitioner company clearly and satisfactorily explained all the queries made by the 2nd Respondent as well as by the officials of WAPCOS.

13. Several correspondences had been made between the Petitioner company and 2nd, 3rd and 4th Respondents and meetings were also held thereafter to consider technical and commercial offers. Clarifications/confirmation were sought for by 2nd, 3rd and 4th Respondents. Petitioner company as well as 5th Respondent submitted their clarifications and confirmations. The State Government after receipt of clarifications and confirmations appointed a team of engineers to evaluate tender documents of the Petitioner and 5th Respondent and also the financial capabilities of both the tenderers. They were also asked to consider capability of the tenderers to execute the work. Thereafter, the Government also constituted a High Power Advisory Board consisting of Administrative Officers including Chief Secretary and Engineers of various departments; for evaluation and consideration of the tender documents submitted by both the tenderers. After considering in detail, both the team of Engineers as well as the Work Advisory Board found that the tender documents of both tenderers were in order, however, certain conditions of the Petitioner company were found to be more stringent, and therefore, the Work Advisory Board recommended the Government to open the envelope "C" only of the 5th Respondent and not of the Petitioner company. Government of Mizoram approved the recommendation of the Work Advisory Board for opening the financial bid of the 5th Respondent. However, before opening the financial bid of the 5th

Respondent the Petitioner company submitted, a representation to the Chief Secretary and the Chief Secretary forwarded it to the Technical Committee for consideration, The Technical Committee after considering the matter rejected the representation submitted by the Petitioner company,

14. Before allotment of such huge work to any party the Government had to ensure that the successful bidder was capable of executing the work satisfactorily and within the schedule time, It was also necessary to see that any sub-contractor or associate partner of any successful bidder would not back out in midst of the work, leaving the main contractor alone, who might not be technically capable to continue and complete the work. The Petitioner company failed to give such firm commitment with its associate and partner, on the other hand, the 5th Respondent submitted a joint venture agreement with Continental Construction Ltd. stating that they should be jointly and mutually responsible to the Government of Mizoram for execution of project in the even of contract being awarded to them.

15. The Work Advisory Board in its meeting held on 17.1.94 considered all the terms and conditions as amended from time to time by the Petitioner and found that the Petitioner company tried to avoid further clarification and confirmation, the Work Advisory Board also found that the terms and conditions of the Petitioner company were too stringent.

16. Regarding allegation of escalation of price quoted by the 5th Respondent the 1st Respondent stated that whatever be the amount of the price bid made by the 5th Respondent it would not mean that the Government of Mizoram would accept the price bid at that amount. Negotiation with the 5th Respondent would be made in respect of their price bid and if a mutually agreed price was not reached, the offer of 5th Respondent would be liable to be rejected. The Petitioner was required to submit clarification and confirmation regarding security deposit, replacement of defective equipment and guarantee period in which the Petitioner was asked to submit detailed MOU with M/s BHEL and MOU with reputed Civil construction firm as the Petitioner company did not give it. On the other hand, 5th Respondent was not asked to clarify on these points in as much as the 5th Respondent had already agreed to the security deposit terms and submitted a MOU with Continental Construction Ltd. The 1st Respondent categorically denied that asking the Petitioner company to extend the validity of its offer would mean acceptance of their offer and the action of the 1st Respondent was arbitrary and against the public interest.

17. Similarly the 5th Respondent has also filed its affidavit. In their affidavit attempts have been made to show that they are capable to carry out the work offered to them. It has also supported the action of the 1st Respondent and stated that the action of the 1st Respondent in opening its third envelope regarding financial bid was just, proper and reasonable and it was opened in the public interest. The Petitioner cannot invoke the writ jurisdiction as the claim of the Petitioner is entirely based on the terms and conditions of the NIT-Annexure-

A, The contract being complex in nature requiring expertise scrutiny in respect of technical efficiency and commercial viability writ jurisdiction is not amenable to the Petitioner. Besides, the technical and commercial terms offered by the Petitioner company were stringent relating to security deposit, conditions for cancellation of contract etc as observed by the team of Engineers and Work Advisory Board, no interference is called for. The decision of the Government to offer the work to the 5th Respondent was not arbitrary and unreasonable Inasmuch as sufficient time and opportunity was given to the Petitioner for compliance of the NIT specifications but the Petitioner company failed to do so.

18. I heard the parties and perused the records placed before me. Mr. A.K. Bhattacharyya learned Counsel for the Petitioners urged before this Court that the action of the Respondents in not opening the envelope "C" containing the financial bid of the Petitioner company was most arbitrary and unreasonable, in spite of the fact that the Petitioner company agreed to all the points raised by the 1st Respondent. The 1st and 2nd Respondents most arbitrarily and unreasonably decided not to open the third envelope. The learned Counsel further submitted that the technical offer of the Petitioner company regarding electrical and mechanical equipments were found generally so and and therefore, the Petitioner company was asked to review/modify its commercial terms within the tender specifications in respect of security deposits, conditions of cancellation of contract, replacement/rejection of defective equipment, liquidated damages, guaranteed clauses, terms of payment of electrical and mechanical equipment and force majeure and price valuation formula etc. by several letters referred to in the writ petition. The Petitioner company clarified and explained all the queries. The 1st and 2nd Respondents without any reason decided not to open the envelope "C" containing the financial bid of the Petitioner company, Therefore, the actions of the said Respondents were illegal, unreasonable and malafide. Mr. Bhattacharyya further submitted that the 1st Respondent bring a State cannot act arbitrarily at its whim and caprice and award the contract at its own sweet will just to satisfy the desire of some interested persons. According to him, it was an admitted fact that the project cost was estimated to be Rs. 30 Crores approximately with ten per cent escalation clause in the tender. Thereafter, this amount was raised to Rs. 41 Crores and then reduced to Rs. 36 Crores without informing the public in general and the Petitioner and other tenderers in particular, The 5th Respondent having quoted an amount of Rs. 91 Crores in its tender, awarding the work to 5th Respondent would not be in public interest and for public good, The 1st to 4th Respondents kept all the matter under the veil of secrecy regarding the cost of the project. The Petitioner as a citizen of the Country and taking part in the bid was entitled to know the change of the estimated amount. The 1st Respondent being a State was guided by Public Law Limitation and, therefore, the Respondents could not act arbitrarily and unreasonably. But from the facts and circumstances, the actions of those Respondents were arbitrary, discriminatory and unreasonable and liable to be quashed and struck down.

19. Mr. D.N. Choudhury learned Counsel for the 1st to 4th Respondents, on the other hand, submitted that Mizoram was a backward State situated geographically and topographically in disadvantageous position.

There were lot of disadvantages in installing a project like the present one. Before electrical installation lot of civil, mechanical and other works were required to be done and due to geographical position of Mizoram such construction are to be made with much difficulties. If a small hill is dug there would be likelihood of falling of another lull. He further submitted that Mizoram being situated in a far flung area, cost of construction of a project of this nature was bound to be higher than the cost of construction of other places, like Calcutta and Delhi etc.

20. Mr. B.K. Das, learned Counsel on behalf of 5th Respondent, supported the action of the Government, Mr. Das submitted that the petition itself was not maintainable and this Court may not interfere with the decision of the Government in refusing to open the envelope "C" of the Petitioner company as per the advice of the Work Advisory Board. Besides, the team of Engineers and the Work Advisory Board being expert in line, this Court might not interfere with the decision of the Board in exercise of the writ jurisdiction. He also submitted that the Petitioner company having no past experience was not capable to undertake the project of this nature and therefor, 1st and 2nd Respondents rightly recommended to open the envelope "C" of 5th Respondent only. In view of the above, according to the learned Counsel, no interference was called for.

21. On the rival contentions of the parties the following questions require consideration:

(a) Whether the actions of the Respondents 1 to 3 are arbitrary, discriminatory and violative of the equality clause of the Constitution in refusing to open the envelope "C" of the Petitioner company.

(2) Whether it will be reasonable and in the public most to allow the Respondent Nos. 1 and 2 to consider the price bid of Respondent No. 5 who quoted Rs. 91 crores.

Point No. 1:

22. Installation of the Serlui - B - Hydro Electric Project is of complex nature. Such installation requires civil, mechanical and other works also. Besides, the geographical condition of Mizoram requires special attention in making construction of the civil engineering works. For that purpose proper survey, soil testing and other investigations are required to be made. The tender documents indicate the complex nature of works required to be done in the project. Therefore, it is only the technical persons having expertise knowledge in those type of work can properly evaluate the tender documents for the purpose of awarding the contract. In fact the Government of Mizoram sought the help of an Internationally reputed consultancy (WAPCOS) of which the 4th Respondent is

the Chief Engineer, Besides, the Government of Mizoram took the assistance of some other reputed concerns. By notifications dated 18.6.93 the Government of Mizoram formed a team of 6 Engineers to separately evaluate the tender documents relating to the construction of Serlui-B-Hydro Electric Project. This team consisted of Commissioner, P.W.D./P.H.E. as Chairman and Chief Engineers and Superintending Engineers of different departments as Members. After submission of the tenders by the Petitioner company 5th Respondent and said Eastern Overseas Corporation, there were several correspondences between the Respondent Nos. 2, 4 and the tenderers including the Petitioner. Several clarifications/confirmations were sought for and the Petitioners as well as the 5th Respondent gave the clarifications/confirmations. Thereafter, the team of Engineers evaluated the tenders. The 2nd Respondent also wanted to see the legal documents between the Petitioner company and its sub-contractors. As these took long time the 2nd Respondent requested the Petitioner as well as the 5th Respondent to extend the period of their offers. All these the tender documents were evaluated by the team of Engineers constituted as aforesaid in their meeting held on 2.9.93. The team found the terms and conditions of the 5th Respondent as amended and modified in consequence to discussions and correspondence to be generally acceptable and technical offers were also found to be sound. However, some minor deviations of the terms and conditions were noticed. The team, therefore, suggested that the 5th Respondent might be required to submit supplementary financial bids in regard to items where the terms and conditions were amended or modified after initial offers. However, in case of the Petitioner company the team gave its opinion that the terms and conditions even after amendment and modifications to be rather too stringent and not acceptable for the department. Therefore, technical offers regarding electrical and mechanical equipments were found generally sound. The team further noticed that there had been major deviation in respect of various matters which would not be acceptable. In short the team found the envelope "C" of the 5th Respondent suitable for opening. However, the offer of the Petitioner was not found suitable.

23. The Government of Mizoram also constituted a Work Advisory Board consisting of the Chief Secretary as Chairman and other 10 members. This Board in a meeting held on 17.1.94 unanimously recommended to open the financial bid of the 5th Respondent only and further recommended that the Petitioners' financial bid should not be opened as the Petitioner company failed to obtain proper tie-up and had allowed that aspect to be left Unsettled. The Government of Mizoram also accepted the said recommendation of the Work Advisory Board and decided to open the envelope "C" of the 5th Respondent and not the Petitioner and accordingly the envelope "C" of the 5th Respondent was opened. The team of Engineers and the work Advisory Board having expertise knowledge in this regard had recommended to open the third envelope (Envelope "C") of the 5th Respondent, this Court is not inclined to interfere with their decision in exercise of the power under Article 226 of the Constitution.

24. The contention of the learned Counsel for the Petitioners that the Petitioner company and the 5th Respondent, were treated differently inasmuch as 1st to 4th Respondents insisted on clarifications in respect of (sic) of Understanding with the sub-contractors. Such clarifications had not been insisted on from the 5th Respondent. The 1st Respondent has explained very clearly that such Memorandum of Understanding, etc, were already supplied by the 5th Respondent and, therefore, there was no necessity to seek such clarification from the 5th Respondent, The other contention of the learned Counsel for the Petitioners was that the technical and financial capability of the Petitioner was found suitable by Respondents 1 to 4, else there was no necessity for the said Respondents to request for extension of the period of offer.

25. From the facts available on record it appears that the Government, of Mizoram formed two expert bodies, namely, team of Engineers and Work Advisory Board to evaluate the tender documents. Besides, certain clarifications were also sought for from the tenderers, thus during this period the 1st to 4th Respondents did not come to any final conclusion in respect of the tender documents. Therefore, the request for extension of offer cannot be said to be an acceptance of the tender documents relating to technical and financial matter. In view of the above, I find no force in these submissions, Therefore, I am of the opinion that the decision of the 1st and 2nd Respondents in not opening the Petitioners' envelope "C" was not arbitrary, illegal and violative of equality clause of the Constitution of India.

Point No. 2:

26. Mizoram is a small State situated in the extreme corner of the North Eastern Region. It is a backward State so far the economic development is concerned. Geographically also the State is situated in a very disadvantageous position. Almost the entire supply of the daily necessities is to be carried, from other parts of the country and that too through the State of Assam Any disturbance in the State of Assam adversely affects the supply to the State. There is no industrial development worth the name in the State Mizoram is a beautiful State its people are well cultured and educationally advanced. However they are deprived from proper benefit they being far away, from the main stream. It is informed that there has been acute power. Shortage Necessity of construction of a hydro electric project of this nature is the more necessary for the rapid industrial development of the State and the completion of such project brooks no delay. At the same time the State has limited resources. Therefore, it is also necessary to see that construction of such project is made without putting much burden on the coffer of the State. State should make full endeavour to complete the construction of the project as early as possible at the least cost, While awarding a contract for construction of the project prime consideration should be to complete the construction within time bound period and at least cost. In view of the above, it is to be seen whether Respondents 1 and 2 while proceeding to award the contract to 5th Respondent had acted reasonably and fairly.

27. It is well established principles that every activity of a Government has a public element in it and it must therefore, be informed with reason and guided by public interest. If the Government awards a contract or otherwise deals with its property or grants any other largess, it will be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it will be unconstitutional and invalid. Again it must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State and such an action would be both unreasonable and contrary to the public interest. The Government, therefore, cannot give a contract for construction which is detrimental to the interest of the State. However, the Government may deviate from the principles with a view to advance or implement the Directive Principles.

28. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Supreme Court held that with the growth of the welfare State, new forms of property in the shape of Government largess are developing since the Government is increasingly assuming the role of regulator and dispenser of social services and provider of a large number of benefits including jobs, contracts, licenses, quotas, mineral rights, etc. More we move closer to welfare State, it is noticed that there is increasing expansion of the magnitude and range of governmental functions. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. The law has, however, not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights, while others have been given protection not only by forging procedural safeguards but also by confining, structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give largess in its arbitrary discretion or at its sweet will or on such terms as it chooses in its absolute discretion. There are two limitations imposed by the law which structure and control the discretion of the Government in that behalf. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess.

29. In *Kasturi Lal Lakshmi Reddy etc. v. The State of Jammu & Kashmir and Anr.* AIR 1930 SC 1992, the Supreme Court has elaborately dealt with the limitations of the Government in awarding contract or distributing largess. In the said decision the Supreme Court held that so far the limitation regarding distribution of largess is concerned, this limitation flows directly from the thesis that unlike a private Individual, the State cannot act as it pleases in the matter of giving largess. Ordinarily a private individual would be guided by economic consideration of self-gain in any action taken by him. It is only open to him under the law to act contrary to his self interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it

likes in granting largess such as awarding of contract etc. Whatever be the activity of the Government, it is still the Government and is subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner. It has to be exercised for the public good. Every activity of the Government has a public element in it and it must, therefore, be informed with reasons and guided by the public interest. Every act on taken by the Government must be in public interest; the Government cannot act arbitrarily and without reasons. If the Government does it, the action would be liable to be invalid. The other limitation is that Government unlike a private individual cannot choose persons to receive a contract or a State largess at its own sweet will. The action of the Government must be reasonable and fair. The concept of reasonableness in fact pervades the entire constitutional scheme. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and the various decisions of the Supreme Court show that this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles.

30. In *E.P. Royappa Vs. State of Tamil Nadu and Another*, and *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, the Supreme Court held that Article 14 strikes at arbitrariness in State action and since the principle of reasonableness and rationality which is legally as well as philosophically an essential clement of equality or non-arbitrariness, is projected by this article, it must characterise every governmental action, whether it be under the authority of law or in exercise of executive power without making of law. Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would prima facie incur the reproach of being unreasonable.

31. Where any governmental action fails to satisfy the test of reasonableness and public interest and is found to be wanting in the quality of reasonableness or lacking in the element of public interest it is liable to be struck down as invalid. If any action of the Government appears to be unreasonable and against the public interest such action must be held to be invalid and liable to struck down.

32. The Government has no unfettered discretion, Prof. Wade in his book "Administrative Law", Sixth Edition observed thus:

The principles of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalised administrative law in recent years. Although the principle itself is ancient, the cases in which it was invoked were few and far between until in 1968 - the *Padfield* case opened a new era. Today, on the other hand, it appears in reported cases almost every week, and in a substantial number of them it is invoked successfully. Its contribution to

administrative law on the substantive side is equal to that of the principles of natural justice on the procedural side.

He further added that one of the grounds of review is unreasonableness.

33. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223, Lord Greene MR expounded the unreasonableness thus:

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

34. In *Kasturi Lal* (supra) the Supreme Court further observed thus:

...The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the governmental action.

35. The action of the Government must be reasonable and aimed to achieve social justice. But then what actually the social justice is? There is no ritualistic formula or any magical charm in the concept of social justice. All that it means is that as between two parties if a deal is made with one party without serious detriment to the other then the court would lean in favour of the weaker section of the society. Social Justice is the recognition of greater good to larger number without deprivation of accrued legal rights of anybody. If such a thing can be done then indeed social justice must prevail over any technical rule. Besides, the concept of social justice is not foreign to legal justice or social well-being or benefit to the community rooted in the concept of justice. The challenge of social justice is primarily a challenge to the society at large. Social justice is one of the aspirations of our Constitution. But the Courts are pledged to administer justice as by law established. In formulating the concept of justice, however, the inarticulate factor that large number of human beings should not be deprived of if it is otherwise possible to do so cannot but be a factor which must and should influence the minds of Judges (see *Sadhuram Bansal Vs. Pulin Behari Sarkar* and

Others,

36. Keeping in mind the above decisions, it is to be seen whether the action of the Government in deciding to open the third envelope of the 5th Respondent can be said to be just, proper, fair and reasonable.

37. From the facts that emerges from the petition as well as from the affidavit in opposition, Annexure-A notice was issued inviting tenders for construction of the Hydro Electric Project. The manner of submitting tender was mentioned in Annexure-A and also in Annexure-D. In pursuance of Annexure-A and D the Petitioner company submitted its tender in strict compliance with the notice inviting tender (Annexure-A). Last date of receiving tender documents was mentioned in Annexure-A. However, only the Petitioner company submitted tender, No other tenderer came forward to take up the work for construction of the project, The Respondent Nos. 1 and 2, therefore, decided to extend time so that other tenderers could also participate in submission of the tender, As per Annexure-A, after the expiry of the time mentioned in the notice the Respondents could have proceeded with the evaluation of the tender. But it was probably felt by the Respondent Nos. 1 and 2 that it would not be prudent on the part of the Government to proceed with the evaluation of the lone tender filed by the Petitioner. The reason being that the price quoted by the Petitioner might not be the actual price for which a Government was required to pay for construction of the Hydro Electric Project. It was the wisdom of the Government to extend the period. In my view this was the right step taken by the Government in not accepting the tender submitted by the lone tenderer, i.e. the Petitioner company, as the Government was required to spend the public money and it might not be able to determine whether the price quoted was the correct price. When the time was extended, there tenderers, namely, the Petitioner company, 5th Respondent and said Eastern Overseas Corporation submitted their tenders. Thereafter, correspondence went on to determine the capability of the tenderers. In the meantime, one tenderer namely, Eastern Overseas Corporation did not participate any further it came out from making the bid. Then left with two tenderers, namely, the Petitioner and the 5th Respondent, The team of engineers, appointed by the 1st Respondent found both the Petitioner and the 5th Respondent financially and also technically sound. However, certain conditions of the Petitioner company were found to be more stringent and therefore, the team as well as the Advisory Board decided not to recommend to open the third envelope of the Petitioner company but recommend to open the third envelope of the 5th Respondent. Accordingly, the Government accepted the recommendation of the Work Advisory Board and decided to open the third envelope of the 5th Respondent and in fact it was opened on 18.1.94 and the Petitioner was thrown out of the competition with regard to the awarding of contract, The decision of the Expert Committee may be correct in not recommending as I have already said that as the contract is of complex nature requiring expertise knowledge in the subject and the expert having recommended only the name of the 5th Respondent it would not be possible for

this Court to interfere with the said decision. But then after rejecting the Petitioner only the 5th Respondent remained in the competition that means the 5th Respondent was in the same position as the Petitioner was before extension of time. Now, the price that may be quoted by the 5th Respondent is also of the similar nature. It is not possible for the Respondents to know whether the price bid was just and proper. According to the Petitioner the 5th Respondent quoted a sum of Rs. 91 crore even though the cost of the project was estimated at Rs. 30 crores at the time of notice inviting tender (Annexure -A). It is stated that this estimate was made by a reputed Consultancy. There could be a variation of 10% or so in such estimate. But the price quoted was more than 300% of the original estimate.

38. The other important factor is that during the pendency of the matter the estimated cost was again revised to Rs. 41 56 crores and then again reduced to Rs. 36 crores. This change of the estimated cost was never published or made known to the people. The people in general and the Petitioner and other tenderers in particular are entitled to know the reasons for making the change of the estimated cost. If the revised estimated cost would have been published, some other tenderers might have come and participated. Besides, the 5th Respondent is now only left with the competition in respect of the matter.

39. In a democratic country, the people have the right to know the affairs of the State. The State is not entitled to keep the public matters under veil of secrecy. Of course, there are exceptions to this principles.

40. In *The State of U.P. Vs. Raj Narain and Others*, the Supreme Court held thus-

In a Government of responsibility like ours, where all agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction done in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security. To cover with the veil of secrecy the common routine business is not in the interest of the public.

41. Justice Mathew in his article reported in (1979) 3 SCC Journal Section at page 19 concluded his article thus-

The impact upon the efficiency of the functioning of the executive on account of secrecy has always to be weighed against its simultaneous effect upon its responsiveness to public control. In a democracy the application of rules and procedures for maintaining secrecy cannot be measured entirely by the degree to which they contribute to the competence with which the task of Government is performed. Responsiveness, no less than competency, is the hallmark of a successfully functioning bureaucracy. And a practice of secrecy may so weaken the responsiveness of Government machinery to popular control, that no gain

that it may appear to afford to administrative efficiency is worth the price, taking into account that the gain may often be illusory. Here, as elsewhere, lies the necessity for finding a balance among competing claims.

42. In this case the estimated cost of Rs. 30 crores was raised to Rs. 41.56 crores and then again reduced to Rs. 36 crores without any information to public. While awarding a contract the public at large are entitled to know the estimated cost. If there is any variation for some reasons that also the people are entitled to know, For what reason the estimated cost was raised to Rs. 41.56 crores and then again reduced to Rs. 36 crores is not made known to public. Then again the Petitioners have categorically stated that the 5th Respondent alone remained in the competition for receiving the contract. It quoted Rs. 91 crores which is not denied by 1st to 3rd Respondents in their affidavit-in-opposition. On the other hand the said Respondents in paragraph 27 of their affidavit-in-opposition stated that if negotiation failed, the price bid of the 5th Respondent might also be rejected. I quote the relevant portion of paragraph 27 of the affidavit-in-opposition:

...whatever be the amount of the Price bid made by the Respondent No. 5, it docs not mean that the Government of Mizoram will accept the price bid at that amount. Negotiation with the Respondent No. 5 will be made in respect of their price bid and if mutually agreed price is not reached, the offer of the Respondent No. 5 will also be liable for rejection by answering Respondents.

43. From the above statement it appears that though the price bid of 5th Respondent is Rs. 91 crores, attempt would be made to bring down their price. However, the 1st to 3rd Respondents did not indicate to What amount they would persuade the 5th Respondent to come down.

It can be 10%, 20% less or anything. The entire matter is now left at the discretion of the 2nd Respondent. There is no indication what was the estimated cost and at what amount the contract would be awarded. Even if some amount is reduced, it would not be possible for the 2nd Respondent or other officers of the Government to determine the actual price as the 5th Respondent was the lone tenderer in respect of the project. Therefore, the actions of the Respondents in this regard cannot be said to be reasonable. If it is left with the officers there is every likelihood that a large amount of money would be required to be paid to the 5th Respondent from the State coffer exceeding the worth of the project. As I have already said, it is the duty of the Government to see that the project is completed without any delay and at the least cost. There being only one competitor, namely, the 5th Respondent the real cost of the project would never be known to the Government.

44. Under the circumstances It will not be prudent and expedient on the part of the State Government to award the contract to the 5th Respondent at the price quoted or at the price after negotiation.

45. It is argued that the Petitioner company being out of competition it has no

locus standi to urge before the Court to examine the reasonableness of the action of the State in awarding contract. Having come to know about the entire state of affairs, this Court cannot close its eyes.

46. In *Kasturi Lal (supra)*, the Supreme has observed that where the Court is satisfied that the Government action is unreasonable and not in the public interest it would be the plainest duty of the Court under the Constitution to invalidate the Government action. This is one of the most important functions of the Court and also one of the most essentials for preservation of Rule of Law.

47. Again in *Chaitanya Kumar and Others Vs. State of Karnataka and Others*, the Supreme Court while dealing with bottling licence observed thus-

...But, simultaneously, the court cannot close its eyes and persuade itself to uphold publicly mischievous executive actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the court cannot shirk its duty and refuse its writ. Advancement of the public interest and avoidance of the public mischief are the paramount considerations. As always, the court is concerned with the balancing of interests, and we are satisfied that in the present case the High Court had little option but to act as it did and it would have failed in its duty had it acted otherwise and refused to issue a writ on the ground that the allegation of personal bias against the Chief Minister was false. Had that been done the public mischief perpetrated would have been perpetuated. That is not what courts are for.

48. The action of the Government on the face of it, in my opinion was not reasonable and not for public good. That being so, this Court cannot remain as a silent spectator as held by the Apex Court in the above decisions. Besides, in respect of receiving State largess or Government contract, every citizen has a legitimate expectation. This legitimate expectation may come in various forms and owes its existence to different kinds of considerations. If such expectation is denied, the action cannot be said to be just, proper and reasonable. In the instant case, as I have already observed, the action of the Government is not reasonable and for public good and such action cannot be allowed to stand and liable to be quashed.

49. In view of my above observations, I hold that the decision of the Respondents in refusing to open the envelope "C" of the Petitioner company and opening the envelope "C" of the 5th Respondent cannot be interfered with. But I hold that the action of the Respondent to proceed with awarding the contract to 5th Respondent at an uncertain price is not reasonable and in the interest of public, more so, when the 5th Respondent is the lone competitor. Accordingly, I set aside the decision of the Respondents to proceed with the tender documents to award the contract to the 5th Respondent in the interest of the State as well as the people of Mizoram, I feel that there should be a re-tender giving full particulars including the estimated cost of the project and such tender notice should be widely published so that the tenderers competent to take up the job

thorough out the country may know. However, the Respondents must see that the construction of the project is done within a short time. If 5th Respondent also submits tender, its tender also should be considered.

50. With the above observation I dispose of this writ petition.

51. No costs.