West Bengal State Electricity Board vs Patel Engineering Co. Ltd. & Ors on 15 January, 2001

Equivalent citations: AIR 2001 SUPREME COURT 682, 2001 AIR SCW 322, 2001 (2) SRJ 228, (2001) 2 JT 524 (SC), 2001 (1) SCALE 255, 2001 (1) ARBI LR 540, 2001 (1) COM LJ 360 SC, 2001 (2) LRI 457, 2001 (2) SCC 451, (2001) 1 COMLJ 360, 2001 (2) JT 524, (2001) 1 ARBILR 540, (2001) 1 CIVLJ 543, (2001) 1 SUPREME 154, (2001) 1 SCALE 255

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Bench: S.S.M.Quadri, S.N.Phukan

CASE NO.:
Appeal (civil) 4921 of 2000

PETITIONER:
WEST BENGAL STATE ELECTRICITY BOARD

Vs.

RESPONDENT:
PATEL ENGINEERING CO. LTD. & ORS.

DATE OF JUDGMENT: 15/01/2001

BENCH:
S.S.M.Quadri, S.N.Phukan

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J J U D G M E N T Syed Shah Mohammed Quadri, J.

This appeal by the West Bengal State Electricity Board is from the common judgment of a Division Bench of the High Court at Calcutta in M.A.T. No.398 of 2000, C.A.N. No.1089 of 2000 and M.A.T. No.523 of 2000 with cross objections (C.O.T. No.522 of 2000) dated April 4, 2000 dismissing the appeals and cross objections and confirming the order of the learned Single Judge in W.P.No.22458(W) of 1999 dated February 3, 2000. To appreciate the controversy in this case narration of the following relevant facts will be necessary. As a pragmatic solution to meet the peak demand of the energy/power by the West Bengal and also to cater to the requirements of the entire Eastern Region, the West Bengal State Electricity Board (for short, the appellant) formulated

Purulia Pumped Storage Project (for short, the Project), at an estimated cost of about Rs.3,188.9 crores with an installed capacity of 900 M.W. For funding that project the Central Government entered into a loan agreement with the Overseas Economic Cooperative Fund now Japan Bank of International Cooperation (for short, the J.B.I.C.). The Project is proposed to be completed in six Lots of which Lot No.4 relates to main civil works. For carrying out the work of Lot No.4, the appellant, after complying with the formalities and after satisfying itself of the pre- qualification of the bidders, invited revised tenders (hereinafter referred to as, the tenders). The bids were to be submitted on or before April 27, 1998. Three bidders are now in fray. The first is a consortium of four companies (respondent Nos.1 to 4), the second is M/s. Taisei Corporation (respondent No.10) and the third is M/s. Skanska International (respondent No.11). They submitted their bids along with the summary sheets thereof. On September 8, 1999 the bids were opened in the presence of the representatives of the bidders and they were read out; the bid of respondent Nos.1 to 4 was Rs.647.90 crores, of respondent No.11 was Rs.691.22 crores and of respondent No.10 was 726.50 crores. While the details of the bid were under scrutiny, by letter dated October 25, 1999, respondent Nos.1 to 4 informed the appellant that there was a repetitive systematic computer typographical transmission failure and requested that it be corrected. On December 17, 1999 they sent another letter stating that they had reason to believe that the appellant was evaluating their price bid by an illogical and incorrect application of the Instructions To Bidders (for short, the ITB) and pointed out that the mistake indicated in their letter of October 25, 1999 was that Indian Rupee unit rate stated in the first line Item 0.2 was repeated in the next two succeeding lines, which is clerical in nature and not an arithmetic error. They emphasised that their bid was the lowest at Rs.647.90 crores and assured that they would maintain the said bid price. Under the ITB, the appellant evaluated their bid and on December 18, 1999 informed them that during checking of their bid documents a good number of arithmetic errors was discovered. Copies of duly corrected documents were communicated to the said respondents for their response to be sent in writing to the appellant before December 27, 1999 (1700 IST). A caveat was also entered that the said letter did not provide any confirmation towards acceptance of their bid and subsequent award of contract by the appellant. Challenging the validity of the said letter of the appellant dated December 18, 1999, respondent Nos.1 to 4 filed the aforementioned writ petition in the High Court at Calcutta. On December 21, 1999 a learned Single Judge of the High Court granted an interim direction to the appellant to consider the representation which would be made to it by the writ petitioners (respondent Nos.1 to 4). A representation was accordingly made to the appellant on December 23, 1999, which was decided by the Evaluation Committee of the appellant on January 6, 2000. The decision taken by the appellant pursuant to the order of the High Court dated December 21, 1999 did not meet with the approval of the High Court. On February 3, 2000, while disposing of the writ petition, a learned Single Judge of the High Court directed the appellant to reconsider the representation of respondent Nos.1 to 4, after giving hearing to them, and to pass and communicate a reasoned order within one week from the date of the order. Against the said order of the learned Single Judge, the aforementioned appeals and cross-objections were filed both by the appellant as well as by respondent Nos.1 to 4. A Division Bench of the High Court at Calcutta, by the impugned common judgment, dismissed the appeals and the cross-objections upholding the order of the learned Single Judge, directed the appellant to permit respondent Nos.1 to 4 to correct the errors in the bid documents and then consider their bid along with the other bids and take a decision objectively and rationally. Mr. Altaf Ahmed, the learned Additional Solicitor General, appearing for

the appellant, has submitted that the appellant is bound by the ITB and it acted accordingly. The letter dated October 25, 1999 of respondent Nos.1 to 4 did not indicate the errors in the bid documents and the correction sought by them. Even their letter of December 17, 1999 did not specify in any detail the desired corrections, therefore, the appellant proceeded to evaluate the bid in terms of ITB. The actual scope of correction sought by respondent Nos.1 to 4 came to light in their representation dated December 23, 1999, filed after approaching the High Court. The appellant, submitted the learned Additional Solicitor General, committed no wrong in rejecting the representation as the same was not acceptable in terms of Clause 29 of the ITB because neither the unit rate can be changed nor the price bid can be altered at the request of the bidder; the unit rate quoted is final and the appellant can correct only arithmetic mistakes in the line total on the basis of the quoted unit rate. Mr.Ashok H.Desai, the learned senior counsel appearing for respondent No.11, argued that the resolution of the appellant rejecting the representation on January 6, 2000 was in accordance with Clause 29.1(b) of the ITB and that there was no case for interference by the High Court. The decision of the appellant in evaluating the bid documents in terms of ITB, submitted the learned counsel, could not be termed as arbitrary or illegal; in the example: A x B = C; B being the quantity for which the bid is offered; A and C being the unit rate and the result of the multiplication respectively, are unalterable at the instance of the bidder. If any arithmetic error in arriving at the line total is noticed by the appellant, that alone could be corrected by it. But, the correction sought by respondent Nos.1 to 4, was in effect a change in the unit rate which was impermissible and, therefore, the decision of the appellant could not have been interfered with by the High Court. Mr.Bhaskar P.Gupta, the learned senior counsel appearing for respondent No.10, submitted that the unit rate given by respondent Nos.1 to 4 was an essential term which would be evident from Clauses 14, 27 and 29 of the ITB, so permitting them to correct the bid would tantamount to modifying the essential term of the bid and as such the High Court ought not to have directed the appellant to permit correction of bid documents and further to consider their bid along with the other bids. Mr.P.Chidambaram, the learned senior counsel appearing for respondent Nos.1 to 4, argued that in Annexures 1 to 9 which comprised of 749 items there were mistakes in only 37 items due to the fault of the computer; the nature of mistake was not arithmetic (which would mean in multiplication or addition) but mechanical, attributable to the computer and that such mistakes are not covered by Clause 29 of the ITB; in a case of an unintended mistake, a court of equity would not be a silent spectator and the High Court, being both a court of law and equity, had rightly directed the appellant to permit correction of the mistakes by respondent Nos.1 to 4. It was submitted that having regard to the nature of the mistakes, the appellant itself ought to have sought clarification from the said respondents under Clause 27 of ITB instead of evaluating the bid on the basis of an unintended unit rate to reach an astonishing figure which was wholly disproportionate to the cost of the Project. His contention is that once the total bid price is maintained, the unit rate is a matter of arithmetic exercise which should have been corrected by the appellant; further the mode of payment by the appellant for the work done is not on the basis of each unit but on the basis of bid price. Accepting that the bid price is unalterable, the unit rate should be regarded as adjustable. It was also argued by Mr. Chidambaram that there was no mistake in giving the unit rate as such; the mistake was in giving the conversion equivalent in US Dollars and, therefore, the correction not being the one falling under Clause 29 of the ITB was rightly permitted to be corrected by the High Court. Finally, he contended that their bid being less than the bids of respondent Nos.11 and 10 by Rs.40 crores and Rs.80 crores respectively, the High Court rightly directed consideration of the bid of

respondent Nos.1 to 4 after due correction of the bid documents in public interest which did not warrant interference by this Court. In the light of the above contentions, we have to examine as to what is the permissible course of action under ITB. A reference to the relevant clauses of the ITB will be apposite here. Clause 14.1 says that unless stated otherwise in the bid documents, the Contract shall be for the whole Works as described in sub-clause 1.1 thereof based on the schedule of unit rates and prices submitted by the bidder. Clause 14.2 enjoins all the bidders to fill in rates and prices for all items of the Works described in the Bill of Quantities both in figures and words and cautions that items against which no rate or price is entered by the bidder will not be paid for by the Employer (the appellant herein) on the execution of items of those works and the same shall be deemed covered by the other rates and prices in the Bill of Quantities. With regard to the currencies of the bid, Clause 15.1 directs that unit rates and prices shall be quoted by the bidder in Indian Rupee (INR) and either in U.S. Dollar or Japanese Yen. The bidders are given option to assess the component of currency requirements as follows: (a) for those inputs to the Works which the bidder expects to supply from within the Employers country (the appellants country - India) in Indian Rupee; and

(b) for those inputs to the Works which the bidder expects to supply from outside the Employers i.e. outside India in U.S. Dollar or Japanese Yen.

In regard to modification and withdrawal of bids, Clause 24.1 provides that the bidder may modify or withdraw his bid after bid submission but before the deadline for submission of bids. The mandate of Clause 24.3 of the ITB is that no bid shall be modified by the bidder after the deadline for submission of bids. Inasmuch as Clauses 27 and 29 of the ITB deal with clarification of bids and correction of errors respectively and their true interpretation has a bearing on the decision in this case, it will be apt to quote them here : 27. Clarification of Bids 27.1 To assist in the examination, evaluation and comparison of bids, the Employers authorised representative may, at his discretion, ask any or all bidders for clarification of his/their Bids, including breakdowns of unit rates, technical information, documents and materials after opening of the Bid. The request for clarification and the response shall be in writing or by cable, but no change in the price or substance of the Bid after opening the Price Bid shall be sought, offered or permitted except as required to confirm the correction of arithmetic errors discovered by the Employers authorised representative in the evaluation of the bids in accordance with Clause 29 of ITB.

29. Correction of Errors 29.1 Bids determined to be substantially responsive will be checked by the Employers authorised representative for any arithmetic errors. Errors will be corrected by the Employers authorised representative as follows:

> (a) where there is a discrepancy between the amounts in figures and in words, the amount in words will govern;

and (b) where there is a discrepancy between the unit rate and the line item total resulting from multiplying the unit rate by the quantity, the unit rate as quoted will govern.

(c) Where there is a discrepancy between figures and in words of an unit rate, the unit rate as quoted in words will govern. 29.2 The amount stated in the Form of Bid will be adjusted by the Employers authorised representative in accordance with the above procedure for the correction of errors and shall be communicated to the Bidder in writing for his acceptance in writing within seven (7) days from the date of issue of such communication. Such corrections however shall be binding upon the Bidder. If the Bidder does not accept the corrected amount of bid, his bid will be rejected, and the bid security shall be forfeited in accordance with sub-clause 17.6(b) of ITB. It may be seen that Clause 27.1 enables the appellant or its authorised representative to ask any or all bidders for clarification of his/their bids, including breakdowns of unit rates, technical information, documents and materials after opening of the bid. The request for such clarification is required to be made in writing or by cable, so also the response to such request. It is important to note that the said clause prohibits seeking, offering or permitting any change in the price or substance of the bid after opening of the price bid. The exception provided to that mandate is correction of arithmetic errors discovered by the appellant's authorised representative in the evaluation of the bids in accordance with Clause 29 thereof. A plain reading of Clause 29.1 shows it has two limbs; the first limb imposes a duty on the appellants authorised representative to check bids determined to be substantially responsive for any arithmetic errors and the second postulates correction of such errors by the authorised representative in the manner laid down in sub-clauses (a) to (c) thereof. Sub-clause (a) says that in the event of discrepancy between the amounts in figures and in words, the amount in words will govern; sub-clause (b), which is germane for our discussion, provides that in case of a discrepancy between the unit rate and the line item total resulting from multiplying the unit rate by the quantity, the unit rate as quoted will govern; and the import of sub-clause (c) is that in case of a discrepancy between figures and in words of any unit rate, the unit rate as quoted in words will govern. Where errors are corrected in accordance with the above guidelines by the appellants authorised representative, Clause 29.2 specifies the procedure to adjust the amount stated in the Form of Bid. The authorised representative has to communicate the correction of errors to the bidder in writing for his written acceptance within seven days from the date of issue of such communication. It also provides that such corrections shall be binding upon the bidder and in the event of the bidder not accepting the corrected amount of bid, his bid will be rejected and the bid security is liable to be forfeited in accordance with sub- clause 17.6 (b) of the ITB. Now adverting to the Annexures, the statement of B.Upper Dam price bid submitted by respondents 1 to 4 discloses that with reference to each work item the quantity thereof is mentioned. The bidder is expected to give the unit price in Indian Rupee as well as in U.S. Dollar both in figures as well as in words and enter the line item total resulting from multiplying the unit rate by the quantity. A plain reading of sub-clause (b) of Clause 29.1, referred to above, leaves no room for doubt that once the unit rate and line item total are filled in by the bidder, both the quoted unit rate and item total are treated as unalterable at the instance of the bidder though arithmetic errors in arriving at line item total by multiplication are permitted to be corrected by the appellants authorised representative. This being the intendment of the ITB, we shall now examine :

> (i) whether the correction made by the appellant in the bid documents of respondent Nos.1 to 4 and consequential evaluation of their bid communicated with letter dated December 18, 1999 are valid in law; and (ii) whether respondents 1 to 4 are entitled to seek correction in their bid documents either under ITB or in equity and the direction

given by the High Court to the appellant to permit the correction of errors, is sustainable. Before proceeding to ascertain answers to the above questions, it will be useful to bear in mind the principles governing the exercise of power of judicial review by the High Courts. We consider it unnecessary to refer to cases on the scope of the power of judicial review of administrative action by the High Court as a three Judge Bench of this Court has, after exhaustive consideration of long line of authorities, succinctly summarised the position and laid down the following principles in Tata Cellular Vs. Union of India [1994 (6) SCC 651] : (1) The modern trend points to judicial restraint in administrative action. (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible. (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides. (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. In the light of these principles, we shall determine the aforementioned points. Taking up the first question first, it will be necessary to understand the nature of errors, correction made by the appellant and the relief sought by respondent Nos.1 to 4 in respect of 37 items in the bid documents. We shall extract here, as a sample of errors in 37 items, the price bid submitted by respondent Nos.1 to 4 relating to B. Upper Dam found on page No.70 of Vol.IV of the documents (marked A). It reads thus: Annexure B. Upper Dam A Price Bid as Submitted Item Work Item Esc.

Coeff.

Remarks Unit Quantity Unit Price Amount Clause In Specifica- tions INR US$ Figure Words

1.Care of river 02 Rock Excavation I Cum 148.08 One hundred forty-eight point nil eight 148,077.97 7.4 148.08 One hundred forty-eight point nil eight 3,384.64 03 Impervious Core Embankment I Cum 148.08 One hundred forty-eight point nil eight 328,418.53 9.5 1.92 One point ninety-two 7,506.71 According to respondents 1 to 4, the above price bid should be corrected to read as given in the following statement (marked B):

B Item Work Item Esc. Coeff.

Remarks Unit Quantity Unit Price Amount Clause In Specifica- tions INR US$ Figure Words

1.Care of river 02 Rock Excavation I Cum 148.08 One hundred forty-eight point nil eight 148,077.97 7.4 3.38 Three point thirty eight 3,384.64 03 Impervious Core Embankment I Cum 3,900

84..21 Eight four point twenty one 328,418.53 9.5 1.92 One point ninety-two 7,506.71 A perusal of the price bid statement A shows that the unit price filled in by the bidder in the first line against Item (02) - Work Item -, Rock Excavation is repeated in two lines - in the second line of the same item and in the first line of Item (03) - Work item - Impervious Core Embankment. In the quantity column, 1000 is noted by the appellant. The unit rate for Rock Excavation is given by respondent Nos.1 to 4 in the first line in Indian Rupee as Rs.148.08 both in figures as well as in words. In the amount column Rs.148,077.97 is entered which is arrived at by multiplying quantity, 1000, by unit rate, Rs.148.08.

It contains an arithmetic error; instead of Rs.148,080.00, it is noted as Rs.148,077.97. It has been noticed above that under Clause 29.1(b) of the ITB, such an error in the line total in the amount column is amenable for correction and not the unit rate noted by the bidder in the figure column. In the second line, the same entry is repeated though that line should contain unit rate in U.S.Dollar which is rupee equivalent of the unit rate mentioned in the first line. Respondent Nos.1 to 4 seek correction of 148.08 in the second line as 3.38 in the figure column and also in words to conform to 3,384.64 which is noted in the amount column, to wit as US Dollar equivalent of 148,077.97 Indian Rupee in the first line. This appears to be the import of their letter of December 17, 1999. Respondent Nos.1 to 4 seek correction of the entries in the third line also which is the first line against work item Impervious Core Embankment. It is plain that against this Work Item the entries in the first line are quite different. The quantity column is blank, though 3900 should have been noted therein. In that line also the entries in the first line are repeated. There the correction sought is that the figure column should read as 84.21 both in figure and words. It is stated that in the second line the unit rate 1.92 both in figures and words, represents U.S. Dollar equivalent of 84.21 Indian Rupee which is now sought to be inserted. The errors in other 36 items are said to be similar. Had the errors been confined to these aspects, it would not have resulted in material change in the unit rate because the unit rate in one of the permissible currencies is correctly given and there will be no discrepancy as envisaged in sub-clause (b) of Clause 29.1. It would not really be a case of incorporating a new unit rate but a case of either recording U.S. Dollar equivalent of the unit rate already noted in Indian Rupee or vice versa as given in statement B above. In such a case, perhaps, they would have been entitled to equitable relief of rectification of mistake. But here, as would be shown presently, the position is different. With regards to the mistakes in the bid documents, for the first time respondent Nos.1 to 4 informed the appellant in their letter of October 25, 1999 which runs as follows :

Re : Purulia Pumped Storage Project Lot 4 - Main Civil Works - Resubmittal Price Bid. Dear Sirs, We regret that certain repetitive systematic computer typographical

data transmission failure have occurred in items as per attached annexure in our bid submitted to you on 08.09.99. In order to dispel any doubts, we hereby unconditionally declare that we stand by the amounts (both INRs and US $) against the affected schedules A to I, announced at the opening of the revised price bid on the 8th of September at WBSEB and reiterate that there is no change in the price or substance of our bid. Our unit bid prices should be computed accordingly for the aforesaid items. This letter is strictly without prejudice to our rights and contentions. It may be noticed that in this letter they informed that certain mistakes had crept in the items mentioned in the annexure to the letter and declared that no change in the price or substance of the bid was asked for and that they stood by the amounts announced at the time of the bids on September 8, 1999. However, the actual mistakes are not pointed out. In their letter of December 17, 1999 they attempted to clarify the position. The relevant excerpt of that letter may be quoted here: West Bengal State Electricity Board Office of the Project Manager, Mr. S.K. Roy Choudhury, The Project Manager, Purulia Pumped Storage Project, Vidyut Bhawan, 5th Floor, Salt Lake City, Calcutta - 700 091, India, Fax No.0091 33 3591854 / 3581533 1999-12-17 Purulia Pumped Storage Project Dear Sir, We refer to our telefax dated 25th October 1999. A copy thereof is again enclosed for your convenience.

We request that the systematic computer typographical transmission failure pointed out in the said telefax is merely clerical in nature and not arithmetical and do not in any way affect the validity of our bid. Its nature is fully explained below.

I. The computer has unfortunately systematically copied, in the first page (Serial items 2 & 3) of the BOQ (Schedule A to I), the INR unit rates stated in line 1 Serial Item 2 to the next two succeeding lines i.e. the computer has overwritten the unit rates in US$ terms for the serial item no.2 and the INR unit rates for the immediately succeeding serial item.

However, the figures appearing the amount column of the BOQ for the said lines/items in which the above mentioned errors have occurred are the correct tendered figures both in US$ terms as well as INR terms.

II. Further the BOQ quantities stated in the quantity column of serial item no.3 on each and every page has been erased.

Enclosed is an attachment which would show the applicable unit rates (in the lower half) and the unit rates which were overwritten due to computer failure (in the upper half).

It is an admitted position that at the time of opening of the tender on 8th September 1999, our bid was the lowest at Rs.647.90 crores. The bid of Skanska was Rs.691.22 crores and that of Taisei was Rs.726.50. We confirm that we have all along maintained and still maintain the said bid price of Rs.647.90 crores.

However, we have reasons to believe that you have chosen to ignore our said letter and have proceeded to evaluate our price bid by an illogical and mis-application of the rules for the evaluation of the bids set down in the ITB.

We, therefore, once again call upon you to evaluate our bid after taking into consideration the applicable unit rates. As already mentioned in our earlier fax there is no change in the price or substance of our bid as mentioned in the amount column of the BOQ. (Emphasis supplied) Here, though the nature of mistakes are pointed out yet the scope of the correction sought is not indicated. The appellant could not have ignored these letters. Had the appellant taken note of these letters and the mistakes occurring due to repetition of entries in 37 items in the bid documents, it would not have proceeded with correction of such mistakes and evaluation of their bid without first seeking clarification from respondents 1 to 4 under Clause 27.1. We have already referred to the gist of that clause. The only prohibition contained therein is that no change in the price or substance of the bid after its opening can be sought, offered or permitted. In that regard they had made their position clear. The prohibition is, therefore, not attracted. In these circumstances any reasonable person in the position of the appellant would have sought clarification from respondent Nos.1 to 4 under Clause 27.1. Even assuming that after the letter of December 17, 1999, no further clarification was required to be sought by the appellant, we cannot but hold that correction of the errors taking note of the unit rates which are mere repetition of the unit rates quoted for a different work item is mechanical and without application of mind by the appellant. In our view such a correction is far beyond the scope of Clause 29. From the description of the mistakes, noted above, and the correction and evaluation made by the appellant, it is evident that except the error in the first line against the work item Rock Excavation and Schedule N day work, all other mistakes/errors are beyond the scope of Clause 29.1, so Clause 29.2 will not be attracted. It follows that the corrections in the bid documents of respondent Nos.1 to 4 carried out by the appellant, evaluation of bid under Clause 29.2 and the impugned communication of the appellant dated December 18, 1999 are unsustainable and of no consequence. Now, reverting to the relief of correction of errors, Mr. Chidambaram has argued that in the two lines against each of the Work Items, the first line denotes 50 per cent of the quoted unit rate in Indian Rupee and the second line represents the other 50 per cent of the unit rate in U.S. Dollar. According to him the actual rate quoted for quantity 1000 is the sum total of two lines i.e. 148.08 in Indian Rupee plus 3.38 in U.S. Dollar. This is not noted either in statement A or in statement B. Be that as it may, quoting the unit rate 50 per cent in Indian Rupee and 50 per cent in U.S. Dollar is not provided in the ITB. Nothing is brought to our notice to justify splitting of unit rate in that ratio. There is no indication of this fact in the price bid documents submitted by the said respondents to explain that the unit rate has been so quoted. This is also not in conformity with Clause 15 of ITB which, as noted above, requires a bidder to quote unit rates and prices in Indian Rupee and either in U.S.Dollar or Japanese Yen. The learned Additional Solicitor General, in our view, is right in his submission that till the representation was made by the said respondents on December 23, 1999, after the interim direction of the High Court, the appellant was unaware of the quoted unit rate being in such proportion. A combined reading of ITB and the annexure, extracted above, makes it clear that the second line against each work item is meant for writing U.S. Dollar or Japanese Yen equivalent of the unit rate and line total in the amount column entered in the first line and not for writing bifurcated unit price in different currencies in the ratio of 50 : 50. On these facts, the errors cannot be termed as mere clerical or mechanical. Permitting

correction of such errors, if they can be so called, would result in not only re-writing unit rates in 37 entries in which such errors are said to have been committed but also appending an explanation thereto regarding splitting of unit rates in terms of representation dated 23.12.1999 of respondent Nos.1 to 4. Neither Clauses 27 and 29 nor any other clause in the ITB permits such corrections. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as a repetitive systematic computer typographical transmission failure. It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos.1 to 4 to correct the same before submission of the bid. Had they been vigil in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of Clauses 24.1, 24.3 and 29.1 of ITB. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre- qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrarinessand favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casuality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest. For all these reason, in such a highly competitive bid of global tender, the appellant was justified in not permitting respondent Nos. 1 to 4 to correct the errors of the nature and the magnitude which, if permitted, will give a different complexion to the bid. The High Court erred in directing the appellant to permit respondent Nos.1 to 4 to correct the errors in the bid documents. Mr.Chidambram, however, submitted that in equity respondent Nos.1 to 4 would be entitled to relief of correction of mistakes. He invited our attention to para 84 of the American Jurisprudence (Second Edition, Volume 64, Page No.944). It will be useful to quote the relevant part of that para here: As a general rule, equitable relief will be granted to a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and where, upon the discovery of that mistake, he acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake particularly where he does so before any formal contract is entered into. The principle is based on the judgment of the Supreme Court of U.S.A. in Moffett, H. & C. Co. Vs. Rochester, 178 U.S. 373; 44 L Ed 1108, 20 S Ct 957. There the plaintiff gave proposals by way of bid for two works of excavation of earth, quoting the unit rate 1.5

Dollar instead of 15 Dollars and 50 cents instead of 70 cents per cubic yard. The City of Rochester which called for tenders, was promptly informed of the mistake by the plaintiffs agent as soon as it was discovered but before entering into contract. However, the proposal of the plaintiff was accepted by the City of Rochester in regard to one work and the other work was allotted to another bidder. The plaintiff declined to enter into a contract with the City of Rochester which took steps to enforce execution of the contract. The plaintiff filed the suit for correction of proposals to conform to the asserted intention in making them and for execution of the contract on corrected rates or alternatively for the recission of the proposals. It also sought injunction against the officers of the City of Rochester declaring it to be defaulter, its bond forfeited or enforced. It was found that the price noted was grossly inadequate and far below what would be the actual cost of the work under the most favourable circumstances. The trial court decreed the suit holding that the proposals of the bidder be rescinded, cancelled and declared null, void, and of no effect and granting the injunction prayed for. But on appeal the decree was reversed by the circuit court of appeals. On further appeal to the Supreme Court of U.S.A., it was observed that both the courts below found that there was a mistake and while the trial court opined it was clear, explicit and undisputed, the court of appeal was of the view that it was not a mistake in any legal sense but was a negligent omission arising from an inadequate calculation of the cost of the work and held that the mistake was not sufficient to preclude a claim for relief if the mistake justified it. The Supreme Court relied on the following observation in an earlier judgment of that Court in Hearne Vs. Marine Ins. Co. 22 L ed. 305, A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified. And it was concluded that the last two propositions might be claimed to be pertinent to that case even though the transactions between the parties be considered as a completed contract and held that the action of the City of Rochester in awarding one contract to another bidder and forcing the plaintiff to enter into the second contract after it had declared there was a mistake in its proposal was inequitable. Exceptions to the above general principle of seeking relief in equity on the ground of mistake, as can be culled out from the same para, are : (1) where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder; but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake. (2) where the bidder on discovery of the mistake fails to act promptly in informing to the concerned authority and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids, (3) where the bidder fails to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offer; however where the mistake is discovered after opening of bids, the bidder may be permitted to withdraw the bid. In the instant case, we have also noted that the mistakes in the bid documents of respondent Nos.1 to 4 even though caused on account of faulty functioning of computer, could have been discovered and notified by the said respondents with exercise of ordinary care and diligence. Here, the mistakes remained in the documents due to gross negligence in not checking the same before the submission of bid. Further Clauses 24 and 27 of ITB permit modification or withdrawal of bids after bid submission but before the dead line for submissions of the bids and not thereafter. And equity follows the law. Having submitted the bid they did not promptly act in discovering the errors and informing the same to the appellant. Though letters were written on October 25, 1999, and December 17, 1999, yet the real nature of errors/mistakes and corrections sought were not pointed out till December 23, 1999 when representation was made after

interim direction of the High Court was given on December 21, 1999. Indeed it appears to us that they improved their claim in the representation. In our view the said respondents are not entitled to rectification of mistakes/error for being considered along with the other bidders. Mr. Chidambaram relied upon a decision of the Superior Court of New Jersey in Spina Asphalt Paving Excavating Contractors, Inc., Vs. Borough of Fairview [304 N.J. Super 425] to justify the claim for rectification of mistakes. In that case, the Borough of Fairview invited tenders. Spina and one Tomaro participated in the bid. The bid was on a unit price basis and the proposals were submitted on Forms supplied by the Borough. The bid specifications provided, inter alia : in the event there is a discrepancy between the unit price and the extended total, the unit price shall prevail. The Borough reserved the right to waive any informality if deemed in the best interests of the owner. On the evening when the bids were opened, Spina discovered that its secretary had erroneously indicated the unit price for one of the items as 400 dollars per square yard though it should have been 4 dollars per square yard as reflected in the total bid for that work. Spina faxed the Borough indicating that the intended unit price was 4 dollars per square yard. On the basis of 400 dollars per square yard Spinas bid was calculated which obviously worked out far higher than the intended bid amount. Taking note of that amount the Borough awarded the contract to Tomaro. Spina instituted action claiming that the Borough arbitrarily failed to recognise that its bid was lower than that of Tomaro. The Law Division held that the error in the bid was non-material and subject to waiver. The Superior Court while agreeing with the Law Division observed that they did not hold that generally an error in the statement of a price could be treated as immaterial and it was only when as in that case the error was patent and the true intent of the bidder obvious that such an error might be disregarded. The Superior Court held that when as in that case the failure to waive the deviation would thwart the aims of the public bidding laws, the municipality was obliged to grant the waiver. (Emphasis supplied) Though Clause 29 in this case appears to be similarly worded as in the bid documents in Spinas case (supra), a close reading of these clauses shows that no power of waiver is reserved in the case on hand. That apart, the nature of the error in these two cases is entirely different. There, the error was apparent $ 400 for $ 4, non-material and waiveable by the Corporation; in the present case the errors pointed out above are not simply arithmetic and clerical mistake but a deliberate mode of splitting the bid which would amount to re-writing the entries in the bid document and cannot be treated as non-material. Therefore, the judgment in Spinas case (supra) does not help respondent Nos.1 to 4. The submission that remains to be considered is that as the price bid of respondent Nos.1 to 4 is lesser by 40 crores and 80 crores than that of respondent Nos.11 and 10 respectively, public interest demands that the bid of respondent Nos.1 to 4 should be considered. The project undertaken by the appellant is undoubtedly for the benefit of public. The mode of execution of the work of the project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and on the other hand it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work. Above all it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance

of rules and conditions cannot be ignored. It is obvious that the bid of respondent Nos.1 to 4 is the lowest of bids offered. As the bid documents of respondent Nos.1 to 4 stands without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it cannot be directed to be considered along with other bid on the sole ground of being the lowest. We find no force in the submission that as under Clause 14.2 items against which no rate or price is entered by the bidder will not be paid by the employer when executed and shall be deemed covered by the other rates and prices in the bill of quantities, the unit price in items containing errors be ignored and the bid be considered on the basis of total price bid which is the lowest. In our view, there is a basic distinction between a case where against some items no rates or prices are quoted and a case where some rate is quoted. Whereas in the former case the bidder will not be entitled to claim any specific amount for the work done by him in the absence of any rate for that work, because in the aforementioned clause it is clarified that the bidders will not be paid by the employer and that the execution of the work shall be deemed covered by other rates and prices in the bill of quantities but in the latter case the bidder will be entitled to claim for the work executed on the basis of quoted price/rate. We may, however, clarify that the appellant is not obliged to award contract to any of the bidders at their quoted price bid. It is always open to the appellant to negotiate with the next lowest bidder for awarding the contract on economically viable price bid. For the reasons abovementioned, though the impugned order of the High Court insofar as it relates to quashing of letter of the appellant dated December 18, 1999, falls within the purview of judicial review, yet the direction to the appellant to permit correction of errors by respondents 1 to 4 in their bid documents and consider their bid along with other bid, goes far beyond the scope of judicial review, as elucidated by this Court in Tata Cellular (supra). In the result, we uphold the impugned order of the Division Bench insofar as it relates to quashing of communication and letter dated December 18, 1999 and set aside that part of the impugned order giving direction to the appellant to permit respondent Nos.1 to 4 to correct bid documents and to consider their bid after correction along with other bids. The appeal is thus allowed in part. On the facts and in the circumstances of this case we leave the parties to bear their own costs.