IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.08.2015
Delivered on : 7.09.2015

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MS.JUSTICE K.B.K.VASUKI

W.A.Nos.712 and 713 of 2015

CSEPDI – TRISHE Consortium
represented by its Managing Director
Sanjay K.Pillai
6, Kasturi Rangan Road
Alwarpet, Chennai – 600 018. .. Appellant in both appeals

Vs.

1. Tamilnadu Generation and Distribution Corporation Limited (TANGEDCO)
   rep. by its Chairman and Managing Director
   144, Anna Salai, Chennai – 600 002.

2. The Chief Engineer/Civil/Project and Environment, TANGEDCO
   Third Floor, Eastern Wing, NPKRR Maligai
   144, Anna Salai, Chennai – 600 002.

3. Bharat Heavy Electricals Limited (BHEL)
   rep. by its Chairman
   BHEL House, Siri Fort
   New Delhi – 110 049. .. Respondents 1 to 3 in both appeals

4. The Chief Engineer/Projects
   TANGEDCO, Fifth Floor, Western Wing
   NPKRR Maligai, 144, Anna Salai
   Chennai – 600 002. .. 4th Respondent in W.A.No.713/2015

PRAYER: Appeals under Clause 15 of the Letters Patent challenging the order dated 7.4.2015 passed by the learned Single Judge in W.P.Nos.26762 and 27529 of 2014.

For Appellant	:	Mr.Sriram Panchu, Senior Counsel and Mr.N.L.Rajah
For Respondents 1 and 2 in both appeals and 4th respondent in W.A.No.713 of 2015	:	Mr.A.L.Somayaji Advocate General assisted by Mr.P.Gunaraj
For 3rd respondent in both appeals	:	Mr.Krishna Srinivas For M/s.S.Ramasubramanian Associates

COMMON JUDGMENT

R.SUDHAKAR,J.

The appellant/consortium, having met its waterloo before the learned Single Judge, has filed these appeals challenging the order dated 7.4.2015 passed in W.P.Nos.26762 and 27529 of 2014.

A THUMBNAIL SKETCH OF THE FACTS

2.1. The first respondent vide tender notification dated 6.5.2013 floated a tender for setting up of two units of 660

MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS. In all, four bidders, including the appellant and third respondent (BHEL), participated. The two other bidders who participated in the tender were disqualified as they failed to meet the Bid Qualification Requirements. The appellant is a Consortium of Trishe Energy Infrastructure Services Private Limited, a company registered under the provisions of the Indian Companies Act, and Central Southern China Electric Power Design Institute (CSEPDI), a power engineering, survey and design, and general engineering contracting company.

2.2. The bids of appellant and the third respondent were taken up for consideration by respondents 1 and 2. Prior to the opening of the price bids, the appellant and the third respondent submitted Supplementary Price Bids on 5.2.2014. The price bids were opened on 5.2.2014 by the second respondent in the presence of the representatives of the appellant and the third respondent.

2.3. Thereafter, as the tender process was hanging fire, the appellant sent its representations dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014 to the first respondent, highlighting various aspects of the bid and the relevance of Clause 29.0(viii) of the Instructions to Bidders which deals with rejection of bids of the tender whose past performance/vendor rating is not satisfactory, more particularly, the poor track record and past performance of the third respondent, and also pointing out the wrong and improper calculations made contrary to financial statements submitted by the appellant.

2.4. As the first respondent did not pay heed to the request made by the appellant, it filed W.P.No.19247 of 2014 seeking issuance of a writ of Mandamus to direct respondents 1 and 2 to consider the appellant's representations dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014, and take necessary action on the same in accordance with the tender terms and the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (for brevity, "*the TTIT Act*").

2.5. When the said writ petition was taken up for hearing, the learned Advocate General appearing for the first respondent undertook that post-bid representations submitted by the appellant will be duly considered while finalizing the tenders and appropriate orders will be passed in accordance with the tender specifications, TTIT Act and the Tamil Nadu Transparency in Tenders Rules, 2000 (for brevity, "*the TTIT Rules*") Rules framed thereunder. Recording the said undertaking, the learned Single Judge, by order dated 31.7.2014 made in M.P.No.1 of 2014 in W.P.No.19247 of 2014, directed respondents 1 and 2 to consider and pass orders on the representations of the appellant herein after affording them an opportunity of personal hearing and till such orders are passed, it held that the tender should not be finalized.

2.6. Calling into question the order dated 31.7.2014 made in M.P.No.1 of 2014 in W.P.No.19247 of 2014, respondents 1 and 2 filed W.A.No.1065 of 2014. A Division Bench of this Court, by judgment dated 19.8.2014, disposed of the writ appeal and writ petition by modifying the order of the

learned Single Judge only to the extent of holding that the rules did not contemplate personal hearing to the person who is objecting. The appellant was permitted to submit additional particulars/documents raising all its objections and the first respondent was directed to pass an order and communicate the same to the appellant and the third respondent. It is the specific plea of the appellant that the Division Bench did not modify the order of the learned Single Judge holding that till the first respondent passed an order on the representation, finalization of the bid/tender could not be done.

2.7. Pursuant to the direction issued by the Division Bench, the appellant sent its representation on 25.8.2014 along with necessary documents. However, the first respondent vide its communication dated 27.9.2014 (alleged to be received by the appellant on 29.9.2014), rejected the representation made by the appellant. Challenging the same, the appellant filed W.P.No.26762 of 2014 seeking a writ of Certiorarified Mandamus calling for the records of the first respondent culminating in the impugned communication

bearing Lr.No.CE/P/SE/M/P/EE-10/E/P/F.2x660MW Ennore SEZ/D.58/2014 dated 27.9.2014, quash the same and forbear the first and second respondents from in any manner taking any steps to proceed with the tender with the third respondent in respect of SPEC.No.CE/C/P&E/EE/ E/OT No.3/2013-14 issued by the first and second respondents for the 2 x 660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS in accordance with the provisions of Clause 29(viii) of the Tender Document read with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000.

2.8. At the time of hearing of W.P.No.26762 of 2014, the learned Advocate General produced a copy of the letter dated 27.9.2014 awarding the contract to the third respondent (BHEL). Based on the acceptance letter of the third respondent dated 27.9.2014, which makes reference to price negotiation meetings held by the first respondent with the third respondent on 5.6.2014, 13.6.2014 and 27.6.2014, and the exchange of correspondence dated 26.6.2014, 30.6.2014 and

2.7.2014, the appellant sent a letter dated 1.10.2014 to the first respondent highlighting the arbitrariness, anomalies and inconsistencies in its reasoning and the mala fide intent in the matter of evaluating the bid submitted by the appellant. However, the Chief Engineer (Projects), TANGEDCO, by letter dated 10.10.2014, informed the appellant that the subject tender has been finalised and awarded to the third respondent. Assailing the letter dated 27.9.2014 awarding the contract to the third respondent and the subsequent communication dated 10.10.2014, the appellant filed W.P.No.27529 of 2014 seeking a writ of Certiorarified Mandamus calling for the records of the fourth respondent's impugned proceedings bearing Lr.No.CE/P/SE/M/P/EE-10/E/P/F.2x660MW Ennore SEZ/STPP/ D.60, dated 27.9.2014 awarding to the 3rd respondent the tender bearing SPEC.No.CE/C/P&E/EE/E/OT No.3/2013-14 issued in respect of the 2x660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS invited by the 1st and 2nd respondents culminating in its Lr.No.CE/P/SE/M/P/EE-10/E/F.Ennore SEZ/D.64/14 dated 10.10.2014, quash the same and direct the 1st, 2nd and 4th respondents to

determine the award of the tender strictly in terms of the Tender/Bid document bearing SPEC.No.CE/C/P&E/EE/E/OT No.3/2013-14 taking into account the petitioner's bid and the comparative merits of the petitioner and the 3rd respondent.

2.9. It is the case of the appellant that after culmination of hearing before the learned Single Judge, certain files were handed over to the learned Single Judge, without furnishing them a copy of it, and the learned Single Judge, by order dated 7.4.2015, dismissed the writ petitions primarily based on the current/note files containing a purported Consultant Report dated 30.5.2014, holding that the conduct of process of evaluation of the tenders, does not appear to be arbitrary, capricious or unfair; and that the price bids of the appellant as well as the third respondent had been evaluated as per the parameters indicated in the tender notification, by an independent consultant, who himself was selected through a tender floated earlier. The reasoning of the learned Single Judge truly hinges on the Consultant’s report to the effect that the third respondent is identified as L1 and hence, appellant

has no role after L1 has been identified.

2.10. Assailing the said common order passed by the learned Single Judge, the present appeals are filed.

CONTENTIONS MADE ON BEHALF OF THE APPELLANT

3. Mr.Sriram Panchu, learned Senior Counsel appearing on behalf of the appellant and Mr.N.L.Rajah, learned Counsel for the appellant, pleaded for setting aside the order of the learned Single Judge and to direct the first respondent to evaluate the two bids on the basis of the bids submitted, the representations and letter clarifying the issue, based on comparative merits. Their contentions on varied issues are recorded in the succeeding paragraphs issue-wise.

(A)VIOLATION OF THE STATUTORY PROVISIONS:

4.1. The proceedings dated 27.9.2014 awarding the tender to the third respondent, and the proceedings dated

10.10.2014 intimating the appellant that tender has been awarded to the third respondent are cryptic and bereft of reasons. That apart, there is no comparative analysis of the tenders submitted and, therefore, the same runs counter to the provisions of Section 10 of the TTIT Act, 1998, Rule 30 of the TTIT Rules, 2000 and Section 4(1)(d) of the RTI Act, 2005.

4.2. In the said impugned communications, the end result has only been communicated without reasons and the same is contrary to Section 10(6) of the TTIT Act, 1998 which mandates that "*If the Tender Accepting Authority proposes to accept the tender as per the provisions of this section, he shall pass orders accepting the tender together with reasons for such acceptance*", and the same also runs counter to the procedure contemplated under Section 4(1)(d) of the Right to Information Act (for brevity, "*the RTI Act*") which states that every public authority shall provide reasons for its administrative or quasi judicial decisions to affected persons. It is pleaded that the lack of reasoning in the impugned proceedings is evidence of the fact that the pith and substance

of TTIT Act and TTIT Rules have been violated and there is something more to it than meets the eye.

4.3. The object behind Section 10(7) of the TTIT Act is to inform the public as to why one tenderer was chosen over the others, however till date no iota of evidence is produced to show that the Tender Accepting Authority has intimated the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the Tender Bulletin Officer. Even though the learned Advocate General pleaded before the learned Single Judge that the tender evaluation report has been sent to the Tender Bulletin Officer as contemplated under Rule 30(3) of the TTIT Rules, no material has been placed before the Court in support of the said stand.

4.4. Referring to paragraph (35) of the order of the learned Single Judge, which reads as under:

> "*First of all, what is contemplated under Section 10(6) is only an obligation to record reasons for accepting the tender of one. Once these reasons*

> *are communicated to the losers, Section 10(6) would stand satisfied. Secondly, victors neither need reasons nor would be interested in knowing the reasons. For them, victory is sufficient. Thirdly, Section 10(6) speaks only of an obligation to record reasons for acceptance of tender and does not speak of any obligation to communicate the reasons.*",

it is contended that the said observations are self-contradictory, as in the first reasoning the learned Single Judge has observed that once reasons are communicated to the losers, Section 10(6) of the TTIT Act would stand satisfied and subsequently, it is observed that there is only an obligation on the authorities to record reasons for acceptance of the tender but there is no such obligation to communicate the reasons.

4.5. Dissecting the communication dated 27.9.2014, it is pleaded that the said communication does not contain: (a) the comparative analysis; (b) particulars as to who are L1 and L2; (c) that the third respondent (BHEL) is the lowest bidder; and (d) that the offer of BHEL is accepted or the offer of the appellant is rejected. Therefore, it is not an order with reasons

in compliance of the provisions of the TTIT Act and RTI Act.

4.6. A statute should not be construed as a theorem of Euclid, but must be construed as to the purpose which lies behind the statute. The rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled. In other words, if the process in which they have to express the result is regulated by a statute, it has to be done that way and when the authority has not complied with the same, the Court is empowered to interfere and direct the authorities to follow the procedure prescribed by law.

4.7. To fortify the said plea of violation of the statutory provisions, attention of this Court was specifically invited to Sections 10(6) and 10(7) of the TTIT Act to plead that the same contemplate that reasons should be stated. In support of this plea, reliance is placed on the decision of the Delhi High Court in *Indian Oil Corporation ltd. v. SPS Engineering Ltd., 2006 (88) DRJ 93 (DB)*, wherein it is held as under:

"27. In this connection, it may be mentioned that earlier there were only ***two rules of natural justice viz:***

(i) Giving opportunity of hearing (audi alteram partem)

(ii) the rule against bias.

28. ***However, in recent times a third rule of natural justice has been developed by courts all over the world, namely, the requirement to give reasons in the order affecting rights or liabilities.***

29. The above decision has been followed in a series of decisions of the Supreme Court subsequently, the latest one being *State of Orissa* v. *Dhaniram Lohar* (2004) 5 SCC 58: (AIR 2004 SC 1794) wherein the Supreme Court observed (vide paras 7 and 8):

> '*Reason is the heartbeat of every conclusion, and without the same it becomes lifeless.*
>
> Even in respect of administrative orders Lord Denning M.R. In *Breen* v. *Amalgamated Engg. Union*, (1971) 1 All ER 1148 : (1971) 2 QB 175 : (1971) 2 WLR 742 (CA) observed: "The giving of reasons is one of the fundamental of good administration." In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree*, 1974 ICR 120 (NIRC) it was observed: "Failure to give

reasons amounts to denial of justice." "**Reasons are live-links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The inscrutable face of the sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance.'**

....

32. It is well settled that the impugned order cannot be supplemented by additional material either in the form of an affidavit or otherwise vide *Mohinder Singh* v. *Chief Election Commissioner*, AIR 1978 SC 851; *State Govt, Houseless Harijan Employees Association* v. *State of Karnataka*, (2001) 1 SCC 610 (Para 49): (AIR 2001 SC 437, Para 48); *Pavanendra Naraian Verma* v.*SGPGI of Medical Science*, (2002) 1 SCC 520: (AIR 2002 SC 23) (Para 34): *Union of India* v. *GTC Industries* (2003) 5 SCC 106 (Para 13): (AIR 2003 SC 1383), etc. In our opinion, reasons must be contained in the order under challenge, and mere existence of reasons in the show-cause notice, or any material referred to in the show-cause notice, is not sufficient. **In our opinion, the authority concerned must, at least in brief, deal in the impugned order with the explanation given in the reply to the show-cause notice. This in our opinion is even more necessary where a personal hearing is not being given. The authority concerned must discuss the explanation given in the reply, and give its reasons for holding that the explanation is not satisfactory. In the present case all that has not been done."**

(*emphasis supplied*)

(B) ARBITRARINESS:

5.1. It is pleaded that the department cannot adopt two yardsticks in the process of awarding tender and when the process of granting tender is based on indecisiveness and vagueness, the Court can correct the error in decision making process. To buttress the said argument, reliance was placed on a decision rendered by one of us (R.Sudhakar,J.) in *SAP Industries v. Tamil Nadu Electricity Board, 2010 SCC Online Mad 4138*, more particularly, paragraph 17(xviii) and (xix), which reads as under:

> "17. .... (xviii) Assuming for a moment that the price quoted by the SSI Unit of other State is the price which is to be taken for consideration, necessarily the petitioners should be given the benefit of Rule 29(f) read with the Government's clarification issued by the Principal Secretary to Government, Micro, Small and Medium Enterprises(F) Department in Lr. No. 561/2009-3 dated 5.5.2009 For denying the benefit to the petitioners, the Department on one hand relies upon the price quoted by the new entrant, and in the same breath the Department relies upon the price quoted by the SSI Unit of other State, but refuses to extend the benefit that has to flow from Rule 29(f) and the Government clarification in letter dated

5.5.2009 This is a contradiction in terms. Therefore, the two letters impugned in the writ petition cannot form the basis of finalizing the tender. ***The Department has to therefore, necessarily follow the provision of Section 10 of the Tamil Nadu Transparency in Tenders Act, 1998 and Rule 29 of the Tamil Nadu Transparency in Tenders Rule, 2000 and first evaluate the lowest price on comparison of the tenderers and thereafter give the price preference in terms of Rule 29(f) of the Rule*** and the Government's clarification issued by the Principal Secretary to Government, Micro, Small and Medium Enterprises(F) Department in Lr. No. 561/2009-3 dated 5.5.2009 if the price of SSI Unit of other State is taken as the lowest evaluated price which is the case on hand.

(xix) ***The second respondent cannot adopt two yardsticks in the process of awarding the tender. Since the entire process of granting the tender is based on indecisiveness and vagueness, this Court has to step in to correct the error in decision making process. Irrelevant factors, like negotiated price, are stated in the impugned letters and that leads to confusion. The Department is adopting two variables to deny the benefit to the petitioners which cannot be justified*****.** Hence, this Court has

no hesitation to hold that both the letters impugned in the writ petition No.4423 of 2010 are liable to set aside and are set aside."

(emphasis supplied)

5.2. Reliance was placed on a decision of the Punjab and Haryana High Court in *S.C.T.Limited and another v. Punjab State Electricity Board and others, AIR 2006 P&H 44*, to contend that the courts can interfere with the award of contract if it is arbitrary or discriminatory or *mala fide* or it has no nexus with the object it seeks to achieve. The relevant portion of the said decision reads as under:

"17. In *Tata Cellular* v. *Union of India, (1994) 6 SCC 651*, the Apex Court restated the law in the realm of public contracts and policies that impact upon commercial or economic matters, after reviewing its previous decisions on the scope of judicial review. One of the principles, out-lining the powers and duties of the State of its instrumentalities, was stated thus:

"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 reasonbleness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.***"

18. As to what precisely is "Wednesbury unreasonableness" or irrationality was discussed in great detail in the same judgment and it would be apposite to extract a quotation from *R.* v. *Tower Hamlets London Borough Council*, (1988) 1 All England Reports 961:

"***The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take into account matter which they ought to take into account.*** Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a

conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere……."

19. In cases involving award of tenders, the Apex Court as well as the High Courts have been consistently following the principles culled out in *Tata Cellular's case* (supra). These principles can, briefly, be summarised as follows:

(a) The Courts can interfere when the policy or the award of contract is arbitrary or discriminatory of mala fide or it has no nexus with the object it seeks to achieve (see: Monarch Infrastructure (P) Ltd. v. Commissioner, Lilhasnagar Municipal Corporation, (2000) 5 SCC 287 and Directorate of Education v.Edu Comp Datamatics Ltd., 2004 (2) RCR (Civil) 486 (SC) : (2004) 4 SCC 19).

(b) The power of judicial review has to be used to interdict State agencies' policies or actions in the realm of award of contracts with great care and circumspection and not merely because according to the Courts, the policy or measure is incorrect, (see M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 and Air India Ltd. v. Cochin International Airport Ltd., 2000 (2) RCR (Civil) 670 (SC) : (2000) 2 SCC 617). In Cochin International Airport Ltd.'s case (supra), it was also emphasised that

judicial intervention would be warranted only when the overwhelming public interest so requires."

(*emphasis supplied*)

5.3. It is pleaded that as per the specific direction of the Division Bench dated 19.8.2014 in W.A.No.1065 of 2014, which is as under:

"13. On a perusal of the statutory provisions, we find that the rule nowhere contemplates affording of personal hearing to the person who is objecting. *Hence, the 1st respondent cannot demand personal hearing, as a matter of right. However, it is made clear that if any clarification is required regarding the documents submitted by the 1st respondent to the appellants to consider its objections, the same shall be called for from the 1st respondent and if such clarification is sought, the same shall be communicated to the 2nd respondent also and* ***after considering the clarification to be given by the 1st respondent, the 1st appellant shall pass an order as directed by the learned Single Judge***. It is also made clear that if an opportunity of personal hearing is afforded to the 1st respond, if it is required to be afforded, after considering the clarification given by the 1st respondent, the same shall be extended to the 2nd respondent also."

the appellant was always ready and willing to give further particulars other than what was submitted, but the TANGEDCO did not call for particulars despite the specific direction of the Division Bench to seek clarifications from the appellant if so advised, as was done with BHEL and the same would tantamount to discriminatory treatment, violating the doctrine of level playing field. In this regard, reliance was placed on a decision of the Supreme Court in *Reliance Energy Limited and another v. Maharashtra State Road Development Corporation Limited and others, 2007 (4) RAJ 139 (SC)*, wherein it was observed as under:

> "36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life".
>
> It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho* v. *State of T.N.* [(2007) 2 SCC

1], Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. ***"Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution***. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(*g*) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, ***however, subject to public interest***. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(*g*) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(*g*). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect

which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

....

38. ***When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".***

39. In *Reliance Airport Developers (P) Ltd.* v. *Airports Authority of India,* [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the

decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. ***The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms***. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. ***The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety.*** In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law.

> In *Reliance Airport Developers*[(2006) 10 SCC 1] the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided."
>
> (emphasis supplied)

5.4. The learned Single Judge while passing orders in the earlier writ petition in W.P.No.19247 of 2014, and subsequently the Division Bench while disposing of W.P.No.19247 of 2014 and W.A.No.1065 of 2014 gave opportunity to the appellant to send representation and additional particulars/documents. Accordingly, representation was sent highlighting the issues that require to be considered and in spite of it, the order passed by the TANGEDCO is bereft of reasons. Highlighting the plea that reasons have to be reflected in the impugned order, reliance is placed on a decision of this Court in *Hasbi Traders v. The Chief Engineer (Distribution), TNEB, (Judgment dated 18.11.2008 made in W.A.No.2059 of 2004)*, wherein it is held as under:

> "4. ***The Tamil Nadu Electricity Board is a public authority and even in contractual matters, it***

cannot have an unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authority, it is bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review*.** Clause 5(b) of the tender specification empowers the Tamil Nadu Electricity Board to reject any or all the tenders without assigning any reasons there of whatsoever. Even though such discretion is given to the authorities, whether it could be exercised in an arbitrary manner is a question to be further considered. In *R.D.Shetty v. International Airport Authority of India, (1979) 3 SCC 489* as well as in *Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722*, the Supreme Court has held that ***an instrumentality of the State should act within the ambit of Rule of Law and would not be allowed to conduct itself arbitrarily and in its dealings with the public would be liable to judicial review.

5. In fact the very same question as to whether this Court would be justified in interfering with such orders of rejection of tender without any reason came up for consideration before the Supreme Court

in *M/s Star Enterprises and others v. City and Industrial Development Corporation of Maharashtra Ltd.and others, (1990) 3 SCC 280* and in paragraph-9, the Supreme Court has held as follows:-

> "The question which still remains to be answered is as to whether when the highest offer in response to an invitation is rejected, would not the public authority be required to provide reasons for such action? Mr.Dwivedi has not asked us to look for a reasoned decision but has submitted that it is in the interest of the public authority itself, the State and everyone in the society at large that reasons for State action are placed on record and are even communicated to the persons from whom the offers came so that the dealings remain above board; the interest of the public authority is adequately protected and a citizen knows where he stands with reference to his offer."

In the very same judgment, as to the power of judicial review of administrative action, the Supreme Court has held as follows:-

> "***In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded.***

State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process."

6. Mr.P.Srinivas, learned counsel appearing for the Tamil Nadu Electricity Board, however, would submit that though the order dated 21.2.2004 had not assigned any reason for not accepting the tender, pursuant to the notice issued by the very same appellant dated 28.2.2004, a reply was sent to him on 5.3.2004 stating that the tenders have not been

approved by the tender committee as the market rate was higher than the rate offered by the tenderers. Hence the appellant had been communicated with the reasons which would satisfy the act of the authority as to its fairness. We are not inclined to accept the said submission as the order impugned before this Court should be judged with reference to the contents of the order. The Tamil Nadu Electricity Board is not entitled to withdraw its case later on after the orders were passed. That apart, by a subsequent order dated 5.3.2004, though the respondent-Board had taken the stand that the tender of the appellant was not accepted as the same was not approved by the tender committee as the market rate was higher than the rate offered by the tenderers, in the counter affidavit it takes entirely a new stand for not accepting the tender of the appellant. In paragraph-4 of the counter affidavit, it is stated that contrary to clause 6(e) of the tender specification in quoting separate amount for four lots, namely, lot nos.5, 9, 13 & 14, the appellant had quoted a lumpsum of Rs.22,10,000/- for all the four lots, which is in violation of the tender specification. From the above two different stand taken by the respondent-Board, it appears to us that even the respondents were not confident of the reasons for which the tender of the appellant was not accepted and the same was communicated by the letter dated 21.2.2004. *Further the counter*

affidavit cannot supplement the reasons as held by the Supreme Court in *Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851*. In paragraph-8 of the said judgment, the Supreme Court has observed that "***the validity of an order must be judged by the reasons so mentioned and the order cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.***"

Hence the reliance placed by Mr.P.Srinivas, learned counsel for the respondent-Board that the reasons for the rejection were communicated to the appellant subsequently cannot cure the defect in respect of the violation of Article 14 of the Constitution of India."

(emphasis supplied)

5.5. In any event, it is pleaded that while awarding tenders, the comparative merits of bidders, i.e., past performance and vendor rating, have to be assessed and guidelines should be framed. In support of such plea, reliance is placed on the decision of the Supreme Court in *Manohar Lal Sharma v. The Principal Secretary and Others, 2014 (9) SCALE 693,* wherein it is held as under:

"132 Significantly, the guidelines framed and applied by the Screening Committee for the period from 14.07.1993 (1st meeting) to 19.8.2003 (21st meeting) are conspicuously silent about inter se priority between the applicants for the same block. In the 18th meeting, the Screening Committee considered the issue of determining inter se merit of applicants for the same block as well as certain other issues for bringing in transparency. The Screening Committee felt that guidelines for determining inter se priority among claims for block between public sector and private sector for captive use and between public sector for non- captive use and private sector for captive use need to be evolved. However, no guidelines for determining inter se priority of applicants for the same block was evolved. ***The guidelines also do not contain any objective criterion for determining the merits of applicants and lack in healthy competition and equitable treatment.*** In the first counter affidavit filed by the Central Government, it is admitted that from the 1st meeting (held on 14.07.1993) to the 21st Meeting (held on 19.08.2003), the guidelines did not deal with the subject of determining inter se priority between applicants.

.....

151. *The entire exercise of allocation through Screening Committee route thus appears to suffer*

from the vice of arbitrariness and not following any objective criteria in determining as to who is to be selected or who is not to be selected. There is no evaluation of merit and no inter se comparison of the applicants. No chart of evaluation was prepared. The determination of the Screening Committee is apparently subjective as the minutes of the Screening Committee meetings do not show that selection was made after proper assessment. The project preparedness, track record etc., of the applicant company were not objectively kept in view. Until the amendment was brought in Section 3(3) of the CMN Act w.e.f. 09.06.1993, the Central Government alone was permitted to mine coal through its companies with the limited exception of private companies engaged in the production of iron and steel. By virtue of the bar contained in Section 3(3) of the CMN Act, between 1976 and 1993, no private company (other than the company engaged in the production of iron and steel) could have carried out coal mining operations in India. Section 3(3) of the CMN Act, which was amended on 09.06.1993 permitted private sector entry in coal mining operations for captive use. The power for grant of captive coal block is governed by Section 3(3)(a) of the CMN Act, according to which, only two kind of entities, namely, (a) Central Government or undertakings/corporations owned by the Central Government; or (b) companies having end-use

plants in iron and steel, power, washing of coal or cement can carry out coal mining operations. The expression "engaged in" in Section 3(3)(a)(iii) means that the company that was applying for the coal block must have set up an iron and steel plant, power plant or cement plant and be engaged in the production of steel, power or cement. The prospective engagement by a private company in the production of steel, power or cement would not entitle such private company to carry out coal mining operation. Most of the companies, which have been allocated coal blocks, were not engaged in the production of steel, power or cement at the time of allocation nor in the applications made by them any disclosure was made whether or not the power, steel or cement plant was operational. They only stated that they proposed to set up such plants. Thus, the requirement of end-use project was not met at the time of allocation.

....

154. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14.07.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of arbitrariness and legal flaws. *The Screening Committee has never been consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have*

seldom been its guiding factors, there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad-hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal."

(emphasis supplied)

Placing strong reliance on the above said decision, it is pleaded that the procedure adopted must be fair and transparent; there should be guidelines; there should be objective criteria for evaluation of comparative merits; and application of mind.

5.6. On the issue as to how vendor rating should be assessed, reliance is placed on the decision of the Delhi High Court in ***Telephone Cables Ltd. v. Bharat Sanchar Nigam Limited and Others, (2004) 112 DLT 112 (DB)***, wherein it is held as under:

"4. Thus, this petition is to be decided on the simple issue as to whether it was permissible for the BSNL, under the Tender Conditions, to alter the Delivery Rating of the tenderers after the date of opening of the tender, *i.e* 22.5.2001 and, if so, to what extent? In order to arrive at an answer, it would be necessary to refer to certain clauses of the Special Conditions of Contract pertaining to the tender in question. We need to note Clauses 13(i), 13(ii), Clauses 19, 19.3.8 and Clause 22(d). The aforesaid clauses are set out hereinbelow:

> "13(i). The purchaser intends to limit the number of bidders selected for ordering against this tender to 2/3rd of the participating and eligible bidders in each group (eligible as per Clause 2 of Section II of the Bid Documents). The bidders for placement of order will be selected from the list of technically and commercially responsive bidders arranged in decreasing order of the Vendor Rating starting from the highest. Any fraction below 0.5 in the number of vendors, as computed above shall be ignored and the same equal and above 0.5 will be rounded off to the next higher integer.
>
> 13(ii). The bidder with the highest Vendor Rating (V-I bidder) will be considered for about 30% of his tendered quantity. The balance quantity will be distributed amongst the

remaining selected bidders in each group in direct ratio of their Vendor Rating."

"19. All the vendors will be rated as per the following Vendor Rating formula.
VENDOR RATING (VR)=0.6 PR + 0.3 DR + 0.1 QR
Vendor PR=Price Rating.
DR=Delivery Rating
QR=Quality Rating."

"19.3.8 If the delay is caused due to Departmental reasons as certified by Competent Authority or *Force Majeure* Conditions, it will not be taken into account in computing delays in supply."

"22. Clarifications on VRS:
xxx
xxx
(d) Any modification obtained by supplier on his request made after the date of NIT which are in the nature of affecting the existing DR will not be taken into account.
xxx"

In the light of the said decision, it is submitted that the provisions of TTIT Act as well as the guidelines issued by the Central Vigilance Commission should be followed in letter and

spirit, more so in cases of this nature, where the value of work involved is high and technical. In the case on hand, Clause 29.0 (viii) – Rejection of Bids states that the tender shall be rejected if it is from the tenderer whose past performance/vendor rating is not satisfactory, but there is no formulae or guidelines formulated in this regard. This has lead to arbitrariness in the tendering process, particularly evaluation.

5.7. It is submitted that the partners of the appellant consortium are world renowned companies and they have done many projects worldwide. In support of the said plea, End-User Certificates were also produced.

5.8. Inviting our attention to paragraph (51) of the order passed by the learned Single Judge, wherein it is recorded as under:

> "51. I have carefully considered the above submissions. **I*t is true that in the previous writ petition, the first respondent took a stand that the process of evaluation was still on*. *But it is seen from the current files that the Consultant***

appointed by TANGEDCO had already submitted a report on 30.5.2014. As per this report titled "Price Evaluation Report", the third respondent was identified as L1. ..... "

it is contended that the Consultant's Report is erroneously treated by the learned Single Judge as evaluation of L1 in terms of Section 10(1) and 10(2) of the TTIT Act. According to the provisions of the TTIT Act, the Consultant is not empowered to complete the evaluation and he can at the best make recommendation. However, in the case on hand, since opportunity was given to the third respondent to reduce interest after the Consultant's Report, it is quite obvious that the Consultant is treated as tender accepting authority, whereas the first respondent took a stand before the Court in the preceding paragraphs that the process of evaluation was still on, which shows that the tender evaluation process is vitiated by non observance of the TTIT Act and TTIT Rules. Besides, the whole exercise is illegal and arbitrary and suffers from procedural impropriety.

5.9. With regard to the report of the Consultant, who has loaded on the appellant an upfront fee of Rs.801.18 Crores and only Rs.8.925 Crores for the third respondent, it is pleaded that out of the said sum of Rs.801.18 Crores, there is no dispute about the management fee and guarantee fee, which amounts to Rs.489.136 Crores. The Commitment fee of Rs.156.184 Crores, besides the Interest During Construction (IDC) on Financial Charges to the tune of Rs.127.613 Crores, as included by the Consultant is perverse and unreasonable. This has been deliberately misstated to load the cost on the appellant's bid and tilt the balance in favour of the third respondent. In support of the said pleading, they have filed a brief memo on financials, which we extract as such:

> "B. The Consultant has loaded on the Appellant an upfront fee (including interest) of Rs.801.18 Crores (See page 1298, Vol.III). The said figure of Rs.801.18 Crores consists of the following components:

a.	Guarantee Fee	:	Rs.371.743 Crores
b.	Management Fee	:	Rs.117.393 Crores
c.	Commitment Fee	:	Rs.156.184 Crores
	(the above three components are termed as Financial Charges)		
d.	Interest for 36 months on financial charges	:	Rs.127.613 Crores
e.	Moratorium interest (from	:	Rs.28.247 Crores

36th to 42nd month) on financial charges

Rs.801.180 Crores

(Consultant had evaluated the bid of the Appellant at 9207.264 Crores.)

If Commitment Fee and Interest on Management Fee and Guarantee Fee are excluded and accordingly the Moratorium Interest reduced to 17.875 Crores, the Consultant could have only loaded Rs.489.136 Crores.

C. The Repayment Schedule submitted by the Appellant for repayment (Principal and Interest) by TANGEDCO on the loan is at page 616, Vol I (See Clause 14.10, page 48, Vol I). The relevant figures are:

Net Loan Amount which comprises of		:	Rs.10012.9286/-
a.	Loan amount (85% of Total EPC Cost of 9709.3822 Crores)	:	Rs.8252.9748/-
b.	Interest During Construction for 36 months on the loan amount	:	Rs.896.2032/-
c.	Guarantee Fee	:	Rs.392.0163/-
d.	Management Fee	:	Rs.123.7946/-
e.	Moratorium period interest for 36th to 42nd month	:	Rs.347.9396/-
	Total	:	Rs.10012.9286/-

The Net Loan Amount does not include Commitment Fee or Interest on Management and Guarantee Fee during the construction period of 36 months.

A sum of Rs.5025.3628 Crores is the total Interest payable on the above loan amount calculated at 7.2% (mentioned at page 616, Vol.I).

The total of the Principal (Rs.10012.928 Crores) and Interest (Rs.5025.3628 Crores) is Rs.15038.2914 Crores.

On this basis, the EQI (Equated Quarterly Installments) payable every quarter for 12 years is Rs.313.2977 Crores.

(This figure would come down as the Repayment Schedule was submitted by the Appellant for 9709.3822 Crores while the Consultant had evaluated the bid of the Appellant at 9207.264 Crores (after disallowing Rs.508 Crores)).

D. If the Appellant's offer of reduction in interest rate from 7.2% p.a. to 6.2% p.a. had been accepted, TANGEDCO would have saved over Rs.1300 Crores on Total Cost of Ownership (TCO) basis (See Representation dated 16.6.2014 at page 628).

Actual savings would have been Rs.1562.512 Crores as per the comparative chart submitted by the Appellant at page 1220, Vol.III.

This has not been disputed by any of the Respondents."

5.10. With regard to the observation of the learned Single Judge that the appellant in effect wants the Court to work out

the financial aspects of the tender, it is pleaded that the appellant never sought for working out the financial aspects and what has been prayed for is to see whether the relevant factors have been properly considered and applied and eschew irrelevant factors.

5.11. Qua the binding effect of the report of the Comptroller and Auditor General which was produced by the Appellant questioning the virtues of BHEL, reliance was placed on the decision of the Supreme Court in *Arun Kumar Agrawal v. Union of India and others, (2013) 7 SCC 1*, wherein it was held as under:

> "67. The question that is germane for consideration in this case is whether this Court can grant reliefs by merely placing reliance on the CAG's Report. The CAG's Report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG Report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for Parliament to decide whether after receiving the report i.e. PAC to make its comments on the CAG's Report.
>
> 68. ***We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective***

> ***Ministries have to offer on the CAG's Report. The Ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues.*** For instance, we cannot as such accept the CAG report in the instance case."
>
> (*emphasis supplied*)

It is pleaded that since the report is from a Constitutional Functionary, it cannot be brushed aside as such.

5.12. In effect, it is pleaded that non-consideration of all the above vital factors fortifies their plea of arbitrariness in the tender process.

(C) RATE OF INTEREST AND PUBLIC INTEREST (NON CONSIDERATION)

6.1. It is the specific plea of the appellant that even though they originally offered interest at 7.2% per annum and subsequently, on 5.6.2014, offered to reduce the same to 6.2% per annum, the respondents 1 and 2, without assigning any reasons, accepted the tender of the third respondent, who agreed for interest reduction from 12.25% to 12.15% later

on, i.e., 27.6.2014. It is pleaded that on this score alone, the first respondent would have been benefited with a savings of over Rs.1300 Crores had he accepted the offer made by the appellant. This reduction of interest is in larger public interest.

6.2. In support of the plea that the decision taken by the respondents must be free from arbitrariness and favouritism and must be in public interest, reliance is placed on a decision of a Division Bench of the Bombay High Court in *B.Himmatlal Agrawal and another v. Western Coalfields Limited and Others, 2006 SCC Online Bom 887*, wherein it is held as under:

> "27. ***It is no doubt true that right to choose a bidder as per conditions and procedure stipulated in the tender document is of the Authority/Tender Committee and the Court does not sit in appeal on the decision taken by the Authority in this regard. Nevertheless such decision must be free from arbitrariness and favouritism, must be in the public interest and must be taken by the Tender Committee after proper application of mind*.** The decision taken by the Tender Committee, in view of mandatory condition 3.5(b), therefore, must demonstrate that the Tender Committee has applied its mind to the contingencies mentioned in the said condition and on the basis thereof, has considered performance of work executed by the bidder on the earlier occasion and it must show that it is only thereafter the Tender Committee has concluded the issue of disqualification. If the decision of the Tender Committee is silent on these aspects, such decision,

> in our view, undoubtedly would be arbitrary, unjust and no amount of explanation given in the affidavit filed on behalf of the Authority can legitimise such decision, which does not show proper application of mind by the Tender Committee as required in view of essential conditions of tender. It is the decision, which must show that same is taken by the Tender Committee after proper application of mind and such inference cannot be drawn on the basis of explanation or justification given by the Authority in the affidavits filed in the Court."
>
> (emphasis supplied)

6.2. It is contended that even for awarding the contract in favour of the third respondent-BHEL, the respondents must be satisfied that it is in public interest. In support of the said plea, reliance was placed on the decision in *Bharat Biotech International Ltd. v. Directorate of Medical Education and Research and others, 2010 SCC OnLine Bom 1845*, wherein, a Division Bench of the Bombay High Court held as under:

> "17. There is merit in the submission that the entire tendering process has suffered from a clear case of arbitrariness. Tenders were specifically invited with reference to the Government Resolution dated 27 March, 2000. A public body when it invites tenders is duty bound to comply with the terms of the tender and by the norms of fairness that Article 14 of the Constitution embodies. When the Tender Approval Committee holds that a bidder is disqualified, it is totally arbitrary then to proceed to award contract to that very bidder on the ground that other bidders have not matched the commercial

bid of a disqualified bidder. Once a bid is disqualified, the bid in its entirety has to be kept aside and no part of that bid can be utilized for evaluating the merits of the other bidders. Once a bid is disqualified, it is impossible to conceive how a contract can be awarded to that very party on the basis that the commercial bid quoted by it is the lowest and the other bidders have not matched the bid. The question of comparing commercial bids arises between bidders similarly circumstanced, that is to say, between bidders who meet the requirement of technical eligibility. Bidders who meet eligibility requirements are not equal to bidders who are disqualified and do not stand on the same basis as bidders who are eligible. To equate them is to treat unequals equally: something that is forbidden by Article 14 of the Constitution. As a matter of fact, the committee, as we have already noted, has not even come to the conclusion that the decision to disqualify the second respondent was erroneous or that the second respondent was not a defaulter.

18. In *W.B. State Electricity Board* v. *Patel Engineering Co. Ltd.*, (2001) 2 SCC 451 the Supreme Court applied the principles, and observed as follows:

> '***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 with the rules and conditions cannot be ignored***.'"

(emphasis supplied)

6.3. With regard to the power of the Court to interfere in tender or contractual matter, reliance was placed on a decision

of the Supreme Court in *Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517*, wherein it is held as under:

> "24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> ***(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and***
>
> ***(ii) Whether the public interest is affected?***
>
> ***If the answers to the above questions are in the negative, then there should be no interference under Article 226.***"
>
> (emphasis supplied)

In the case on hand, it is contended that when lack of public interest has been paraded, the learned Single Judge has rejected the same.

(D)FILE NOTINGS:

7. With regard to the value of file notings and jottings, on which heavy reliance was placed by the learned Single Judge, it is pleaded that such file notings and jottings are not a final

decision and they are merely expressions of opinion of the individual and what the Court should consider is the validity of the ultimate order passed, that is under challenge. In the case on hand, the Consultant's Report is the opinion of an individual and nothing transcribes into an actionable order. To substantiate the said plea, reliance is placed on the decision of the Supreme Court in *Shanti Sports Club v. Union of India, (2009) 15 SCC 705*, wherein it is held as under:

> "41. The issue deserves to be considered from another angle. All executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in such manner as may be specified in rules to be made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. Article 77(3) lays down that:
>
> > "77. (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."
>
> Likewise, Article 166(3) lays down that:
>
> > 166. (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or

under this Constitution required to act in his discretion."

42. This means that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.

43. *A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.*

44. In *State of Punjab* v. *Sodhi Sukhdev Singh* [AIR 1961 SC 493] this Court considered the question whether a provisional decision taken by the Council of Ministers to reinstate an employee could be made the basis for filing an action for issue of a mandamus for reinstatement and held: (AIR p. 512, para 42)

"*42*. … We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the

respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent."

45. A somewhat similar question was considered by the Constitution Bench in *Bachhittar Singh* v. *State of Punjab* [AIR 1963 SC 395 : 1962 Supp (3) SCR 713] in the backdrop of the argument that once the Revenue Minister of PEPSU had recorded a note in the file that the punishment imposed on the respondent be reduced from dismissal to that of reversion, the same could not be changed/reviewed/overruled by the Chief Minister. This Court proceeded on the assumption that the note recorded by the Revenue Minister of PEPSU in the file was an order, referred to the provisions of Article 166 of the Constitution and held: (AIR p. 398, paras 9-11)

"*9*. … ***Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary.*** The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As along as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones.

10. The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution,

therefore, requires and so did the Rules of Business framed by the Rajpramukh of PEPSU provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the Head of the State, the Governor or Rajpramukh (till the abolition of that office by the amendment of the Constitution in 1956), is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the 'order' of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned. In this connection we may quote the following from the judgment of this Court in *State of Punjab* v. *Sodhi Sukhdev Singh* [AIR 1961 SC 493] : (AIR p. 512, para 42)

> '*42*. … Mr Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling

the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent.'

Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. *For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character*.

11. We are, therefore, of the opinion that the remarks or the order of the Revenue Minister, PEPSU are of no avail to the appellant."

(emphasis added)

(E) ALTERNATIVE REMEDY:

8. With regard to the plea of the respondents that the appellant has not availed the alternative remedy available

under Section 11 of the TTIT Act and has directly knocked the doors of this Court, it is submitted that the appeal against the order passed by respondents 1 and 2 lies to the Government and since the Secretary to Government, Energy Department will be the signatory to the said decision, the appeal will go only from Caesar to Caesar. It was also pleaded that even assuming, there is an appellate forum, it is not functioning as on date and, therefore, there is no question of alternative remedy. In this regard, reliance is placed on a decision of a learned Single Judge of this Court in *Consolidated Construction Consortium Ltd. v. Tidel Park Coimbatore Ltd. And others, 2009-5-LW-858*, wherein it is held as under:

> "20. *Therefore, even from the object of the Act, the TTIT Act was enacted to prevent executive interference and also to prevent recurrence of irregularities by the procuring entity. It presupposes that the Appeal that is contemplated under Section 11 of the TTIT Act can be filed by the tenderer aggrieved by the order passed by the tender accepting authority favouring one tenderer. It impliedly means that any internecine dispute between various tenderers can be referred to the Government by way of an appeal and the Government can decide the matter as it being the*

controlling authority of all the schedule mentioned organizations. The appellate authority has not been clothed with any power of recording evidence nor any power of civil court has been entrusted to the Government when deciding an appeal.

21. In the present case, the dispute is between the plaintiff and the first defendant company and it being Government company, the Government cannot decide such a dispute. *Justice must not only be done, but must be seen to be done. If allowed it can be an appeal from caesar to caesar and law never permits such a power for a Government, functioning under a written Constitution. If the intention of the TTIT Act is only to provide an appellate forum for resolving disputes between various tenderers, who had stake their claims, then the present dispute may not come within its ambit.*"

(emphasis supplied)

However, it is fairly conceded that since the learned Single Judge went into the merits of the issue and the respondents have not filed any appeal, this issue is not seriously canvassed by them.

(F) ALLEGATION OF GAINING INSIDE INFORMATION:

9. With regard to the observation of the learned Single Judge that the appellant gained inside information and only thereafter made representations, it is contended that both the appellant and the third respondent were visiting the TANGEDCO office regularly and were discussing the formula as to how evaluation should be done and that does not mean that the appellant had gained inside information. In this regard, he placed reliance on a decision of a learned Single Judge of this Court in *M.Ramalingam v. N.Thangavelu, 1997-2-LW-35*, wherein it is held as under:

> "14. In 'Estoppel by Representation' - by Spencer Bower and Turner-3rd Edition (First Indian Reprint 1994), in Chapter XII, at page 285, regarding 'Encouragement or Acquiescence', the learned authors have, after elaborating the case-law, considered as to what is meant by 'acquiescence', as understood in law. The relevant portion reads thus: —
>
> "Regarded in the light of "acquiescence", the essential elements of the form of estoppel under consideration have been precisely and lucidly stated by the Court of Appeal, in a memorable judgment, as follows:—
>
> "**If *a person having a right, and seeing another person about to commit, or in***

the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the Act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term 'acquiescence' and in that sense it may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct**".***

A good, though rather diffuse, statement of the rule, in terms of "encouragement", rather than of "acquiescence", is to be found in one of the judgments pronounced by Lord Eldon, L.C:

> "this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous impression of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation

> that the lessor would not throw an objection in the way of his enjoyment. Still, it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt that he acted upon that sort of encouragement… In order to give a person a larger interest in the property than he derives under the instrument making his title, it must be shown that with the knowledge of the person under whom he claims, he conceived he had that larger interest, and was putting himself to a considerable expense, un-reasonable compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment".

Without using either the term "acquiescence" or the term "encouragement". Loard Cran Worth L.C stated the necessary conditions of the kind of estoppel now under consideration in the following terms.

> "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and, leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his

own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to stage my adverse title; and that it would be dishonest in me to remain wholly impassive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that, to raise such an equity, two things are required, first, that the person expending his money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights. It follows are a corollary from these rules, or, perhaps, it would be more accurate to say that it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me taking possession of the lands and buildings when the tenancy has determined. He knew the extent of his interest, and it was his

folly to expend money upon a title which he knew he would or might soon come to an end."

Finally, in a passage which is always referred to in this connection, and which, like the first of those already cited, is not limited to encroachments on land, but is framed with the utmost generality. Sir Edward Fry deduced from the previous authorities in his judgment in *Willmott* v. *Barber*, the following condensed statement of the requisites of a good case of acquiescence or encouragement. In the first place, the plaintiff — in the case before him, the person said to have been "encouraged" happened to be the plaintiff — must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act… on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing to call upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he

has done, either directly or by abstaining from asserting his legal rights."

CONTENTIONS MADE ON BEHALF OF TANGEDCO

10. Per contra, Mr.A.L.Somayaji, learned Advocate General appearing on behalf of TANGEDCO, pleaded for dismissal of the writ appeals and his submissions are recorded under various heads in paragraphs hereunder.

(A) SCOPE OF JUDICIAL REVIEW:

11.1. At the outset, the learned Advocate General, while emphasizing the scope of judicial review in contractual matters, relied on the following decisions of the Supreme Court and other High Courts:

(a) *Maa Binda Express Carrier and another v. North-East Frontier Railway and others, (2014) 3 SCC 760*, wherein the Supreme Court held as under:

"8. The scope of judicial review in matters relating to award of contract by the State and its

instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. *It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision.* This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided

such relaxation is permissible under the terms governing the tender process.

9. *Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest*. (*See: Meerut Development Authority v. Association of Management Studies and Anr. etc. (2009) 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505*).

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India, (1994) 6 SCC 651*, *Raunaq International Ltd.'s case (supra)* and in *Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517* besides several other decisions to which we need not refer. In *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors., (2012) 8 SCC 216,* the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

> "19. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person

can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis supplied)

(b) *Ratnagiri Gas and Power Private Limited v. RDS Projects Limited and others, (2013) 1 SCC 524*, wherein the Supreme Court held as under:

"38. *We need hardly point out that in cases where the decision making process is multi-layered, officers associated with the process are free and indeed expected to take views on various issues according to their individual perceptions. They may in doing so at time strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision*

> *that is most appropriate under the circumstances shaped.* ***If every step in the decision making process is viewed with suspicion the integrity of the entire process shall be jeopardized. Officers taking views in the decision making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for mala fides reasons which would in turn affect public interest.*** Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions. We have, therefore, no hesitation in holding that the findings recorded by the High Court to the effect that the process of annulment of the tender process or the rejection of the tender submitted by RDS was vitiated by mala fides is unsustainable and is hereby set aside.... ”
>
> (emphasis supplied)

and submitted that in the case on hand also the decision-making process is multi-layered.

(c) *Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa and another, (2012) 6 SCC 464*, wherein the Supreme Court held as under:

"19. It is also noteworthy that *in the matter of evaluation of the bids and determination of the eligibility of the bidders Municipal Council had the advantage of the aid & advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of respondent No.2.*

20. We may while parting point out that out of a total of Rs.19.5 crores representing the estimated value of the contract, respondent No.2 is certified to have already executed work worth Rs.11.50 crores and received a sum of Rs.8.79 crores towards the said work. More importantly the work in question relates to a drinking water supply scheme for the residents of a scarcity stricken municipality. The project is sponsored with the Central Government assistance under its urban infrastructure scheme for small and middle towns. The completion target of the scheme is September 2012. *Any interference with the award of the contract at this stage is bound to delay the execution of the work and put the inhabitants of the municipal area to further hardship.*

…

33. *Interference with the on-going work is, therefore, not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible giving relief to the thirsting residents of Sendhwa.* This is particularly so when the allotment of work in favour of respondent No.2 does not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant-company."

(emphasis supplied)

(d) *Siemons Public Communication Pvt. Ltd. v. Union of India, AIR 2009 SC 1204*, wherein the Supreme Court held as under:

"33. As was noted in the case of Asia Foundation & Construction Ltd. (supra) though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

34. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award

of contracts, certain special features have to be considered. *A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.*"

(emphasis supplied)

(e) *Reliance Airport Developers (P) Ltd. v. Airports Authority of India and others, (2006) 10 SCC 1*, wherein the Supreme Court held as under:

"84. In the ultimate, the question would be whether in the process of selection the Government had adopted transparent and fair process.

....

89. The extent of judicial review in a case of this nature where the texture cannot be matched with one relating to award of contract, the observations of this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors. (1999 (1) SCC 492)* are relevant. It was observed as follows:

'13. Hence *before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully*

weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.'

...

91. In the Queens Bench decision in *R. v. Department of Constitutional Affairs (2006 All ER (D) 101)* it was inter- alia held as follows:

'*It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review*.'"

(emphasis supplied)

(f) *Johnson and Johnson Ltd. v. State of J & K and others, AIR 2010 Jammu and Kashmir 113*, wherein a Division Bench of the Jammu and Kashmir High Court held as under:

"6. In the writ petition, it was contended that Suturing materials, manufactured and sold by the writ petitioner-respondent, have no complaint as regards their quality but, surprisingly, the tender submitted by writ petitioner-respondent has not been accepted and, instead, tender submitted by appellant has been accepted, although, the price offered by respondent- writ petitioner was almost 40% lower than the price offered by appellant.

...

21. The materials discussed above, would indicate that it is not a case of absence of any material. All those materials suggested that the quality of materials to be supplied by appellant is without any defect and the said reputation has been maintained by appellant for a considerable period of time. On the other hand, there is a view that materials of other suppliers, including those of writ petitioner -respondent, used by them do not have such unblemished record. In other words, the materials on record depicted that whereas materials to be supplied by appellant are doubt free, but materials to be supplied by petitioner-respondent and other tenderers are with some ting of doubt. The Tender Committee, at that stage, could do many a things. One of them could be sending the samples of materials to be supplied by different tenderers to a laboratory, as has been directed by the judgment and order under appeal, but only after specifying standard. They could take assistance of Indian Standard Institution. They could also approach many other bodies in India and abroad. But before a Judicial Review Court, the question is not what they could do, but what they did. It is possible that they could devise a mean for the purpose of making it absolutely doubt free that the quality of materials to be supplied by appellant is better than the quality of the materials to be supplied by respondent writ petitioner. It is also possible that by taking recourse

to such device they could bring on record factors which would show that they have done a stupendous work. However, they have not done so. The decision taken by them is based on the aforementioned materials. A Judicial Review Court could pronounce that what they have done could not be done, for, there was no material to support what they have done. For that purpose, it was necessary for the Judicial Review Court to say that none of the opinions contained in the recommendation as well as those six letters hold good. The original recommendation may be ignored, some of those letters may also be ignored but can all of them be ignored? If all of them cannot be ignored, then the conclusion would be that there was some material, on the basis of which the decision as was taken could be taken. *If the logical conclusion is that the decision on the materials, as were placed before the Purchase Committee, is one of the plausible decisions, but may not be the perfect or best decision, a Judicial Review Court may not touch the decision."*

(emphasis supplied)

11.2. Relying on the above said decisions, it is submitted by the learned Advocate General that the contract is a commercial transaction and it is not open to judicial scrutiny

and any interference would only delay the execution of the work.

(B) COMPLIANCE OF STATUTORY REQUIREMENTS

12.1. Referring to the provisions of the TTIT Act, he submitted that the Tender Accepting Authority is bound to accept the lowest tender in terms of Section 10(2) of the TTIT Act. Only with the lowest bidder, negotiation can be held in terms of Section 10(3) of the TTIT Act. Before accepting the bid in terms of Section 10(6) of the TTIT Act, Section 12 of the TTIT Act empowers the Tender Accepting Authority to negotiate with the lowest tenderer and reject the tender with reasons.

12.2. Expatiating the above said plea, it is submitted that the Techno-Commercial Bid was opened on 26.7.2013. The Board Level Tender Committee (for brevity, "the BLTC"), in its 129th Meeting held on 18.11.2013, accepted the Bid Qualification Requirements (BQR) of the appellant and the

third respondent and rejected the other two bids. In the 140th meeting convened on 27.1.2014, the BLTC approved opening of price bids of the appellant and the third respondent. The 44th Board Meeting held on 30.1.2014 granted approval for opening of the price bids of BHEL and the appellant as per the recommendation of the BLTC. In the said meeting, it was also resolved to negotiate with the evaluated L1 bidder after evaluation of their price-cum-financial offer. This is stated to be in due compliance of Section 10(1) of the TTIT Act. Thereafter, price bids were opened on 5.2.2014. It is stated that Supplementary Price Bids submitted by the appellant and the third respondent on 5.2.2014 were also considered. Thereafter, the Consultant gave his recommendation on 30.5.2014. On 2.6.2014, BLTC granted approval for conducting negotiation with the third respondent. After some intervening proceedings, in the 51st Board Meeting dated 26.9.2014, the Board resolved to accept the tender of the third respondent and this is stated to be in compliance of Section 10(6) of the TTIT Act. It is submitted by the learned Advocate General that under Section 10(2) of the TTIT Act, the lowest tenderer is

identified and it is only formal acceptance, based on which negotiation is done with the lowest tenderer as contemplated under Sections 10(3) and 12 of the TTIT Act. In the order under Section 10(6) of the TTIT Act, the reasons for such acceptance are stated. Thereafter, by proceedings dated 27.9.2014, the reasons for not accepting the appellant's representations were set out in detail and communicated to the appellant.

12.3. In the case on hand, there is no violation of statutory provisions as alleged by the appellant and, therefore, the order passed by the learned Single Judge does not warrant interference.

(C) VIOLATION OF INSTRUCTIONS TO BIDDERS BY THE APPELLANT

13.1. Highlighting Clause 7.3 of the Instructions to Bidders which states that the owner is not bound to give any reason for the rejection of the bid, it is contended that the

appellant having accepted the tender conditions is not bound to seek reasons for rejection of the bid.

13.2. Inviting attention to Clause 25.4 of the Instructions to Bidders which states that while the bids are under consideration, bidders and/or their representatives or other interested parties are advised to refrain from contacting by any means, the purchaser and/or his employees/representatives on matters related to the bids under consideration, it is pleaded that despite such specific clause in the Instructions to Bidders, the appellant had sent representations on 30.5.2014, 5.6.2014, 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014 to exert pressure on TANGEDCO.

13.3. That apart, Clause 25.5 of the Instructions to Bidders states that any effort by a bidder to influence the owner in the owner's bid evaluation, bid comparison or contract award decision may result in the rejection of the bidder's bid. However, the appellant sent representation on 16.6.2014 giving comparative statement of evaluation of the

bids of BHEL and the appellant; alleging poor track record of the third respondent, and also stating about the wrong evaluation done by the TANGEDCO. This is in clear violation of Clause 25.5 of the Instructions to Bidders. In effect, it is pleaded that the representations sent by the appellant are in gross violation of Clause 25 of the Instructions to bidders.

13.4. It is submitted that Rule 27 of the TTIT Rules mandates that the process of tender evaluation to be confidential until the award of the contract is notified. The appellant could not have knowledge of what has been considered and there is no scope for them to know about it. Moreover, as per Rule 27(iii) of the TTIT Rules, the tenderers shall not make any attempt to establish unsolicited and unauthorised contact with the Tender Accepting Authority, Tender Inviting Authority or Tender Scrutiny Committee and, therefore, the representations made by the appellant are meant to exert pressure on the Tender Accepting Authority. It is pleaded that this aspect should be considered in the light of the fact that there are only two qualified bidders.

(D) PUBLICATION IN TENDER BULLETIN:

14.1. It is contended that as per Rule 30(3) of the TTIT Rules, there is no requirement that the tender evaluation report should be sent to the Tender Bulletin Officer. All that is contemplated to be sent to the Tender Bulletin Officer is a statement of evaluation of tenders with a comparative statement of tenders received and decision therein for publication in the Tender Bulletin. The learned Advocate General submitted that publication has been effected in the Tender Bulletin on 9.10.2014 complying with Section 10(7) of the TTIT Act and Rule 30(3) of the TTIT Rules. The copy of the tender bulletin was filed for the first time before this Court.

14.2. Be that as it may, taking support from the judgment of the learned Single Judge, more particularly, paragraph 37, it is pleaded that even if the procedure contemplated under Section 10(7) of the TTIT Act read with Rule 30(3) of the TTIT Rules is not complied with, it will not

vitiate the tender process, as post finalization of tender only the said provisions come into play.

(E) SECTION 4(1)(D) OF THE RIGHT TO INFORMATION ACT:

15.1. The obligation under Section 4(1)(d) of the Right to Information Act is only to furnish information and not reasons. What is "information" is mentioned in Section 2(f) of the RTI Act. This information will not include the reasons for the decision. Even for getting information under Section 4(1)(d) of the RTI Act, he has to make a request under Section 6 of the RTI Act. It is submitted that, in any event, this provision will apply only for administrative or quasi-judicial decisions and not to contractual matters. Moreover, seeking reasons for a decision is not information within the meaning of Section 4(1)(d) of the RTI Act. In any event, Section 4(1) of the RTI

Act is only a guideline. In support of the said submission, reliance was placed on a decision of the Bombay High Court in *Dr.Celsa Pinto v. Goa State Information Commission and Another, AIR 2008 Bombay 120*, wherein it is held as under:

> "8. As regards the requisition Nos. 2 & 3 by which the petitioner was called upon to give information as to why the post of Curator was not filled up by promotion and why the Librarian from the Engineering College was not considered for promotion, the petitioner had initially answered by stating that the information was N.A.(Not Available). Thereafter, she had clarified by stating that it means I don't know. The Commission has initially observed in para. No. 13 that it does not see anything wrong in the petitioner's reply that she does not know the information because P.I.O. cannot manufacture the information. However, in para. No. 14, the Commission has observed that the petitioner has not supplied a correct information because she corrected information on points No. 2 & 3. It can be recalled that the petitioner corrected the information by explaining that Not Available meant she does not know. It is not possible to accept the reasoning of the Commission. There is no substance in the observation that merely because the petitioner initially said Not Available and later on corrected her statement and said she does not know and the

petitioner provided incomplete and incorrect information. In the first place, the Commission ought to have noticed that the Act confers on the citizen the right to information. Information has been defined by Section 2(f) as follows.

> 'Section 2(f) - Information means any material in any form, including records, documents,memos e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;'

The definition cannot include within its fold answers to the question why which would be the same thing as asking the reason for a justification for a particular thing. The Public Information Authorities cannot expect to communicate to the citizen the reason why a certain thing was done or not done in the sense of a justification because the citizen makes a requisition about information. Justifications are matter within the domain of adjudicating authorities and cannot properly be classified as information."

(emphasis supplied)

15.2. That apart, he also placed reliance on a decision of a Division Bench of this Court in *M.Vasudevan v. The Chief*

Executive Officer, CMDA, Chennai and others, AIR 2006 Madras 45, wherein it is held as under:

> "4. Mr.R.Krishnamurthy, learned senior counsel appearing for the appellant submitted that no reasons have been given in the order rejecting the petitioner's tender. He relied on section 12 of the Tamil Nadu Transparency in Tenders Act, 1998 and has contended that reasons must be given for rejecting the tender.
>
> 5. We do not accept this contention. *An order rejecting tender is not a quasi judicial order nor is it even an administrative order which affects rights and liabilities. Hence neither reasons have to be given in the said order nor opportunity of hearing has to be given before passing the said order*."

15.3. It is submitted that the provisions of the TTIT Act cannot be interpreted in the light of the RTI Act, as TTIT Act is a special enactment dealing with tenders. In this regard, reliance was placed on Sections 19 and 20 of the Act, more particularly Section 20 of the Act, which states that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, which also includes the subsequent enactments.

15.4. That apart, Rule 7(1) of the TTIT Rules states that the tender bulletin shall contain only information of the notice inviting tenders and the orders accepting a tender and does not in itself create a legal right or liability. Therefore, even a successful bidder cannot claim any right.

15.5. The Division Bench in the earlier round of litigation (dated 19.8.2014 in W.A.No.1065 of 2014) has directed the TANGEDCO to communicate the reasons and the same have been duly communicated in compliance of the said order, even though reasons need not be given in terms of the decision of the decision of the Division Bench of this Court in M.Vasudevan case, referred supra.

15.6. In any event, the impugned communication dated 27.9.2014 of the first respondent deals with as to how each item of evaluation is done. They refer to some materials and if those materials are sufficient for consideration by the TANGEDCO, then it cannot be said that all other aspects have not been considered. He submitted that adequacy of material

will not affect the decision and in this regard, he placed reliance on the decision of the Supreme Court in *Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216,* wherein after referring to *Jagdish Mandal case* and *Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa and another, (2012) 6 SCC 464*, it was held as under:

> "23. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) *fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in*

those circumstances, the interference by Courts is very limited;

(c) *In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted*;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

(emphasis supplied)

15.7. Repudiating the contention of the appellant that the impugned order does not contain comparative evaluation; the Tender Bulletin did not contain comparative evaluation nor placed any material with reference to comparative evaluation, it is submitted that the said plea is hypertechnical and on that ground the tender process cannot be interfered with. There

are materials before the authority to show that decision has been taken after proper application of mind and the same does not vitiate the tender process.

15.8. There cannot be any two different opinions on the question that this project is of great public interest because, it is for a power starved State. That apart, just because two views are possible commercially, it cannot be a ground for judicial review.

(F) RATE OF INTEREST:

16.1. Rule 14(5) of the TTIT Rules states that "*The tender documents shall clearly indicate whether any variations in the commercial terms prescribed in the documents will be permitted and if so to what extent such variations would be considered*." In the case on hand, Clause 25.4 of the Instructions to Bidders does not permit to change the substance of the bids, after the bids have been opened. However, the appellant claims that they have offered lower rate of interest. The original interest rate offered is not in

accordance with tender terms. As per Clause 14.0(d)(5), the rate of interest the bidder should quote should be fixed, whereas the appellant has not specified the fixed rate of interest. However, in the term sheet submitted on behalf of the appellant, it is stated that "*Both rates are estimated based on current market conditions. The final pricing is subject to the lender's final discretion, and may be adjusted in the future*." This quote of variant rate of interest is against the Tender conditions and, therefore, it cannot be considered. However, it is not disputed that before opening of the bid, namely on 5.2.2014, the appellant has produced a letter from its bankers dated 13.1.2014, agreeing for fixed rate of interest (hedged) till the entire tenor of loan.

16.2. On the question of reduction of interest, it is submitted that as per Rule 23 of the TTIT Rules, changes and alternations are not permitted after opening of the tender. In this case, there is a material change because this interest forms part of substance of the bid, in terms of Clause 12.0, which states that the price bid shall include all taxes and duties

and interest and finance charges, commitment fees, etc. during IDC period. Therefore, according to the learned Advocate General, any change in the rate of interest would be material change affecting the substance of the bid. That part, Clause 25.4 of the Instructions to Bidders does not permit the bidders to change the substance of the bids, after the bids are opened.

16.3. In the case on hand, the price bid was opened on 5.2.2014 and supplementary bid was submitted by the appellant and third respondent on the said date. The offer of the appellant for reducing the rate of interest from 7.2% to 6.2% was given on 5.6.2014. The Consultant's report is dated 30.5.2014. As per the terms of Rule 23 of the TTIT Rules, one cannot alter the price bid after it is opened and the substance of the bid cannot be altered in terms of Clause 25.4 of the Instructions to Bidders.

16.4. In response to the plea of the appellant that Clause 25.3 of Instructions to Bidders enables the respondents to

relax or waive any of the conditions of the specification in the best interests of the TANGEDCO, the learned Advocate General submitted that the appellant cannot claim such relaxation as a matter of right. The TANGEDCO reduced the rate of interest for third respondent on 27.6.2014 in exercise of the power under Section 10(3) of the TTIT Act, which permits negotiation. Even if Clause 25.3 of the Instructions to Bidders permits relaxation of the conditions in the best interests of the TANGEDCO, in view of Rule 23 of the TTIT Rules, no alterations can be permitted after tender opening.

(G)COMMITMENT FEE:

17.1. Anent Commitment Fee, in the term sheet it is stated that *"The accrued commitment fee (1% per annum) is payable on the last day of each successive interest period which ends during the availability period, on the last day of the availability period and, if cancelled in full, on the cancelled amount of the relevant Lender's Commitment at the time the cancellation is effective."* According to the learned Advocate

General, the Commitment Fee is part of Financing Charges specified in Clause 14.0 (d)(6) and the appellant cannot contend that the same should be excluded for the purpose of bid evaluation. He submitted that payment of commitment fee is contingent, but the TANGEDCO decided to include it and such terms have been accepted by the appellant and now the appellant cannot resile from such commitment. It is within the exclusive prerogative of the employer to include commitment fee in the price. When the terms of tender are clear that commitment fee cannot be excluded, the appellant cannot quote in contra terms.

17.2. As per Clause 14.0 (d)(1) of the Instructions to bidders, the loan amount should include "*at least 75% of the Total EPC Cost + 100% of Interest during construction and Financing Cost*". Therefore, interest on the entire loan amount from the date of signing has to be reckoned separately based on the drawal. The failure on the part of the appellant to include commitment fee in the repayment schedule found at Page 616 of Volume I, while including the same in the break-

up of financial charges found at Page 615 of Volume I is nothing but an error of calculation and cannot be interpreted to his advantage. In support of the said plea, the Repayment Schedule found at page 616 of Volume I is extracted as such:

2 x 660 MW ENNORE SEZ SUPERCRITICAL THERMAL POWER PROJECT

Repayment Schedule — **All Values in INR Crores**

Net Loan Amount	INR 10012.9286
Rate of Interest/annum	7.2%
No. Of Years	12
No. Of Payments Per Year	4
Total No. Of Payments	48
Interest During Moratorium Period of six months	INR 347.9396

EQI	INR 313.2977
Total Re-Payment with Interest	INR 15038.2914
Total Interest Part	INR 5025.3628

Instalment No.	*Equated Quarterly Installment EQI*	*Oustanding*	*Balance*	*Principal*	*Interest*	*Cumulative Payment*	*Cumulative Interest*
1	INR 313.2977	INR 10012.9286	INR 9879.8635	INR 133.0650	INR 180.2327	INR 313.2977	INR 180.2327
2	INR 313.2977	INR 9879.8635	INR 9744.4034	INR 135.4602	INR 177.8375	INR 626.5955	INR 358.0703
3	INR 313.2977	INR 9744.4034	INR 9606.5049	INR 137.8985	INR 175.3993	INR 939.8932	INR 533.4695
4	INR 313.2977	INR 9606.5049	INR 9466.1242	INR 140.3806	INR 172.9171	INR 1253.1910	INR 706.3866
5	INR 313.2977	INR 9466.1242	INR 9323.2167	INR 142.9075	INR 170.3902	INR 1566.4887	INR 876.7768
6	INR 313.2977	INR 9323.2167	INR 9177.7369	INR 145.4798	INR 167.8179	INR 1879.7864	INR 1044.5947
7	INR 313.2977	INR 9177.7369	INR 9029.6384	INR 148.0985	INR 165.1993	INR 2193.0842	INR 1209.7940
8	INR 313.2977	INR 9029.6384	INR 8878.8742	INR 150.7642	INR 162.5335	INR 2506.3819	INR 1372.3275
9	INR 313.2977	INR 8878.8742	INR 8725.3962	INR 153.4780	INR 159.8197	INR 2819.6796	INR 1532.1472
10	INR 313.2977	INR 8725.3962	INR 8569.1556	INR 156.2406	INR 157.0571	INR 3132.9774	INR 1689.2044
11	INR 313.2977	INR 8569.1556	INR 8410.1026	INR 159.0529	INR 154.2448	INR 3446.2751	INR 1843.4492
12	INR 313.2977	INR 8410.1026	INR 8248.1867	INR 161.9159	INR 151.3818	INR 3759.5729	INR 1994.8310
13	INR 313.2977	INR 8248.1867	INR 8083.3564	INR 164.8304	INR 148.4674	INR 4072.8706	INR 2143.2984
14	INR 313.2977	INR 8083.3564	INR 7915.5590	INR 167.7973	INR 145.5004	INR 4386.1683	INR 2288.7988
15	INR 313.2977	INR 7915.5590	INR 7744.7414	INR 170.8177	INR 142.4801	INR 4699.4661	INR 2431.2788
16	INR 313.2977	INR 7744.7414	INR 7570.8490	INR 173.8924	INR 139.4053	INR 5012.7638	INR 2570.6842
17	INR 313.2977	INR 7570.8490	INR 7393.8265	INR 177.0225	INR 136.2753	INR 5326.0615	INR 2706.9595
18	INR 313.2977	INR 7393.8265	INR 7213.6176	INR 180.2089	INR 133.0889	INR 5639.3593	INR 2840.0484
19	INR 313.2977	INR 7213.6176	INR 7030.1650	INR 183.4526	INR 129.8451	INR 5952.6570	INR 2969.8935

Instalment No.	Equated Quarterly Installment EQI	Oustanding	Balance	Principal	Interest	Cumulative Payment	Cumulative Interest
20	INR 313.2977	INR 7030.1650	INR 6843.4103	INR 186.7548	INR 126.5430	INR 6265.9548	INR 3096.4364
21	INR 313.2977	INR 6843.4103	INR 6653.2939	INR 190.1164	INR 123.1814	INR 6579.2525	INR 3219.6178
22	INR 313.2977	INR 6653.2939	INR 6459.7555	INR 193.5384	INR 119.7593	INR 6892.5502	INR 3339.3771
23	INR 313.2977	INR 6459.7555	INR 6262.7333	INR 197.0221	INR 116.2756	INR 7205.8480	INR 3455.6527
24	INR 313.2977	INR 6262.7333	INR 6062.1648	INR 200.5685	INR 112.7292	INR 7519.1457	INR 3568.3819
25	INR 313.2977	INR 6062.1648	INR 5857.9860	INR 204.1788	INR 109.1190	INR 7832.4434	INR 3677.5009
26	INR 313.2977	INR 5857.9860	INR 5650.1320	INR 207.8540	INR 105.4437	INR 8145.7412	INR 3782.9446
27	INR 313.2977	INR 5650.1320	INR 5438.5367	INR 211.5954	INR 101.7024	INR 8459.0389	INR 3884.6470
28	INR 313.2977	INR 5438.5367	INR 5223.1326	INR 215.4041	INR 97.8937	INR 8772.3367	INR 3982.5407
29	INR 313.2977	INR 5223.1326	INR 5003.8512	INR 219.2814	INR 94.0164	INR 9085.6344	INR 4076.5570
30	INR 313.2977	INR 5003.8512	INR 4780.6228	INR 223.2284	INR 90.0693	INR 9398.9321	INR 4166.6264
31	INR 313.2977	INR 4780.6228	INR 4553.3763	INR 227.2465	INR 86.0512	INR 9712.2299	INR 4252.6776
32	INR 313.2977	INR 4553.3763	INR 4322.0393	INR 231.3370	INR 81.9608	INR 10025.5276	INR 4334.6384
33	INR 313.2977	INR 4322.0393	INR 4086.5383	INR 235.5010	INR 77.7967	INR 10338.8253	INR 4412.4351
34	INR 313.2977	INR 4086.5383	INR 3846.7982	INR 239.7400	INR 73.5577	INR 10652.1231	INR 4485.9928
35	INR 313.2977	INR 3846.7982	INR 3602.7429	INR 244.0554	INR 69.2424	INR 10965.4208	INR 4555.2351
36	INR 313.2977	INR 3602.7429	INR 3354.2945	INR 248.4484	INR 64.8494	INR 11278.7186	INR 4620.0845
37	INR 313.2977	INR 3354.2945	INR 3101.3741	INR 252.9204	INR 60.3773	INR 11592.0163	INR 4680.4618
38	INR 313.2977	INR 3101.3741	INR 2843.9011	INR 257.4730	INR 55.8247	INR 11905.3140	INR 4736.2865
39	INR 313.2977	INR 2843.9011	INR 2581.7935	INR 262.1075	INR 51.1902	INR 12218.6118	INR 4787.4767
40	INR 313.2977	INR 2581.7935	INR 2314.9681	INR 266.8255	INR 46.4723	INR 12531.9095	INR 4833.9490
41	INR 313.2977	INR 2314.9681	INR 2043.3398	INR 271.6283	INR 41.6694	INR 12845.2072	INR 4875.6185
42	INR 313.2977	INR 2043.3398	INR 1766.8222	INR 276.5176	INR 36.7801	INR 13158.5050	INR 4912.3986
43	INR 313.2977	INR 1766.8222	INR 1485.3272	INR 281.4949	INR 31.8028	INR 13471.8027	INR 4944.2014
44	INR 313.2977	INR 1485.3272	INR 1198.7654	INR 286.5618	INR 26.7359	INR 13785.1005	INR 4970.9373
45	INR 313.2977	INR 1198.7654	INR 907.0454	INR 291.7200	INR 21.5778	INR 14098.3982	INR 4992.5150
46	INR 313.2977	INR 907.0454	INR 610.0745	INR 296.9709	INR 16.3268	INR 14411.6959	INR 5008.8419
47	INR 313.2977	INR 610.0745	INR 307.7581	INR 302.3164	INR 10.9813	INR 14724.9937	INR 5019.8232
48	INR 313.2977	INR 307.7581	INR 0.0000	INR 307.7581	INR 5.5396	INR 15038.2914	INR 5025.3628

(H)INTEREST ON MANAGEMENT FEE AND GUARANTEE FEE CANNOT BE EXCLUDED:

18.1. The lender in his letter dated 21.10.2013 had clearly confirmed that all fees, including management fees, commitment fees and legal fees, insurance premium, etc., will form part of debt-financing. The appellant is not disputing the liability for payment of interest on financial charges, but wants such interest to be reckoned only for the moratorium period which begins after the completion of the project. It is submitted that all the above charges fall due during the period of construction and, therefore, the plea of the appellant not to include interest on these amounts during the construction period is totally flawed. Therefore, there is no perversity or arbitrariness in the decision taken as per the terms of the tender; as per the banking practice and as per the term sheet given by the lender.

18.2. The learned Advocate General submitted that overwhelming public interest should be the consideration even in cases where a legal point has been made out. In support of

this plea, he relied on the decision of the Supreme Court in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another, (2005) 6 SCC 139*, wherein it is held as under*:*

> *"15. The law relating to award of contract by State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd. 2000 (2) SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere."*
>
> *(emphasis supplied)*

The only public interest the appellant is arguing is that there is a difference in the interest rates and if that is reckoned, the appellant would be the lowest bidder. In fact, the interest rate quoted by the appellant is variant and vague and not fixed as contemplated under the Instructions to bidders.

(I)APPOINTMENT OF CONSULTANT:

19. In the case on hand, Consultant was appointed pursuant to the Board Resolution dated 28.1.2012. He participated in all pre-bid and post-bid meetings and the minutes are signed by all the parties and the consultant and, therefore, the appellant was very much aware of the appointment of the consultant and the role played by him and cannot plead ignorance.

(J) VENDOR RATING & PAST PERFORMANCE:

20.1. Vendor rating is not defined in the terms of conditions. But there is a reference to such term in Clause 29(viii). There is no statute which defines vendor rating or prescribes the method for vendor rating. Therefore, assessing

the vendor rating and past performance is within the subjective satisfaction of the employer or the purchaser.

20.2. The appellant relied on the following circumstances to show that the vendor rating and past performance of BHEL is not satisfactory:

(i)The letter from the Hon'ble Chief Minister dated 26.11.2013 addressed to the Hon'ble Prime Minister of India;

(ii)The Counter Affidavit filed by Tamil Nadu Electricity Board in W.P.(MD) No.3730 of 2012 before the Madurai Bench of the Madras High Court;

(iii)The report of Comptroller and Auditor General of India, New Delhi dated 17.2.2014;

(iv)Order of the Central Electricity Regulatory Commission, New Delhi, dated 19.6.2014; and

(v)various newspaper reports and the contents of the TANGEDCO website.

20.3. In response to the above, the learned Advocate General submitted that the letter of the Hon'ble Chief Minister has referred to the fact that many Central Generating Stations

have been shut down at the same time and there is no specific reference to BHEL.

20.4. With regard to North Chennai Thermal Power Station Stage-II, Unit-I, it is submitted that the said power station is in operation now. The reason for the delay is an accident to generator stator. The Tamil Nadu Electricity Board filed a counter affidavit in W.P.(MD) No.3730 of 2012 before the Madurai Bench of the Madras High Court stating that penalty towards delay in completion of the project is attributable to BHEL and the same will be recovered from them. It is submitted that it cannot be the sole criterion for deciding the past performance of the vendor.

20.5. With regard to the report of the Comptroller and Auditor General, it is stated that it is not for this Court to look into it and draw any inference. In support of the said plea, reliance was placed on a decision of the Delhi High Court in *Sarvesh Bisaria v. Union of India (Order dated 3.12.2014*

made in W.P.(C) No.8502 of 2014), wherein it is held as under:

> "20. The *role of CAG Reports thus, is to enable the legislature to oversee that functioning of the Government and it is for the legislature to take action on the basis of CAG Reports or to direct the Government to take action on the basis thereof and till the legislature has not so directed, this Court cannot direct any action to be taken on the basis of the CAG Reports.* The Supreme Court, in Centre for Environment & Food Security Vs. Union of India (2011) 5 SCC 668, concerned with directions sought for proper implementation of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005, ordered investigation by CBI in reference to the CAG Report, only after satisfying itself that the CAG Report had been accepted by the Government and the Government itself had directed follow up action in terms thereof. The petitioner herein however wants us to issue a mandamus, for the CAG Reports, even before they are placed before the Parliament / Legislature and before the Parliament / Legislature has accepted or rejected the same, to become the basis of investigation by CVC and / or Lokpal / Lokayukta. The same is clearly not permitted under the Constitutional scheme."
>
> (*emphasis supplied*)

It is submitted that only when the report is placed before the Assembly and accepted, action can be taken based on such report.

20.6. He also placed reliance on a decision of this Court in *C.Selvaraj v. State of Tamil Nadu, (Order dated 21.8.2014 made in W.P.No.34038 of 2014)*, wherein it was held as under:

> "16. Learned Advocate General has also referred to the unreported judgment of the Division Bench of Delhi High Court decided on 03.12.2014 in W.P. (C) No.8502 of 2014 (Sarvesh Bisaria vs. Union of India and others), which in turn has referred to certain earlier judicial pronouncements in respect of the major controversy raised in the present petition. The Division Bench of the Delhi High Court in CWP No.1716/2000 (B.L.Wadhera vs. Union of India) decided on 16.05.2001 raised the issue of follow-up action on the reports of the CAG pointing out irregularities or illegalities. A preliminary objection was raised regarding the subject matter as the same was within the specific domain of the Parliament. The Court opined that the validity of any proceedings in the Parliament cannot be called into question in the Court and held that once it was found that the Legislature had the power and privilege, it must be left to the House itself to determine whether there in

fact has been any breach of privilege, while taking support from the judgment of the Hon'ble Supreme Court in Pandit M.S.M.Sharma vs. Dr.Shreekrishna Sinha (AIR 1960 SC 1186).

17. *It is enunciated that once the CAG Report is laid before the Assembly, it is dealt with by the Rules and Procedures of the Assembly. The role of CAG report is to enable the Legislature to oversee that functioning of the Government and it is for the Legislature to take action on the basis of CAG Reports or to direct the Government to take action on the basis thereof.*

18. On the conspectus of the legal position enunciated aforesaid and the averments made in the petition, it is quite obvious from the cryptic petition that there only allegations of misappropriation and mis-utilisation of thousands of crores! It, thus, appear that the past history of disputes between the petitioner and its employer, the second respondent, 11 has coloured the thinking of the petitioner to make allegations largely on the press reporting or averment in other petitions, other than the aspect of minority view, of the third respondent/Commission, which is stated to be the subject matter of challenge in appeal proceedings.

> 19. The substratum of the submissions of the learned counsel for the petitioner really arose over the aspects emanating from the report of the CAG, the procedure for which has been explained aforesaid. We are faced with the position where in terms of the procedure, the COPU is stated to be still examining the matter, and no finality has been achieved as yet. Only on submission of the COPU report, the same being placed before the Legislative Assembly, would the occasion arise for final view to emerge in terms of Rule 217(1) and even the reports of COPU are to be treated as confidential until presented to the Assembly. Thus, what is the confidential material disclosed to us was to satisfy our conscience and cannot be relied upon or that material required to be produced and filed before the Court."
>
> (emphasis supplied)

The report of CAG on BHEL will be examined and considered by the Public Undertakings Committee and it is not for this Court to pass any order based on such reports.

20.7. Moreover, the reference made by the appellant to the order of the Central Electricity Regulatory Commission, New Delhi, dated 19.6.2014; and various newspaper reports and the contents of the TANGEDCO website is of no

consequence, as the project referred to in the order of the CERC is in operation as on date, and with regard to newspaper reports, it is stated that TANGEDCO cannot act on media reports and has to act only based on acceptable documents furnished by the bidders.

20.8. With regard to the past performance of the appellant, it is submitted by the learned Advocate General that most of the projects undertaken by them are sub-critical projects. That apart, the work involved in BTG (Boiler Turbine Generator) is only 40% of the total work involved in supercritical project. The scheduled completion period in respect of one of the projects undertaken by the members of the appellant consortium was delayed for years, and in yet another project the name of the appellant consortium is not found.

(K) ALTERNATIVE REMEDY:

21. The writ petition is not maintainable because of the alternative remedy of appeal available under Section 11 of the

TTIT Act. All the issues now raised by the appellant have to be gone into by the Appellate Authority both factually and legally. There is a statute and there is a statutory appeal. With regard to the plea of the appellant that the appeal would be from Caesar to Caesar, the learned Advocate General submitted that in terms of Rules 9 and 12 of the Tamil Nadu Government Business Rules the appeal has to be decided by the Hon'ble Minister and the signing authority is the Secretary to the Government of the department concerned and, therefore, the appeal if filed would be decided on its own individual merits. The writ petitions are liable to be rejected on the plea of alternative remedy.

(L) FINANCIAL STATUS OF THE APPELLANT:

22. With regard to the financial status of the appellant, the Chief Engineer/Projects, TANGEDCO has filed an affidavit dated 25.8.2015 stating that proceedings have been initiated under Securitization and Reconstruction of Financial Assets and Security Interest Act, 2002 against Trishe Renewable Energy Services Limited, to which proceedings the appellant stood as

guarantor and, therefore, it is submitted that all is not well with the financial status of the appellant and it is pleaded that this subsequent event should also be considered by the Court to assess the conduct of the appellant.

CONTENTIONS RAISED ON BEHALF OF THE THIRD RESPONDENT

23.1. Mr.Krishna Srinivas, learned counsel appearing for the third respondent contended that the appellant lacks the basic credibility to make any allegation against the third respondent. The Consortium Agreement itself was born on 11.5.2013, after the Notice Inviting Tender was issued on 6.5.2013. Trishe, the local company, was incorporated on 31.10.2011 and there is no material produced to justify their competence in the field of energy. The entire focus is only on CSEPDI, which is a design institute. He pleaded that a reading of Brief Introduction and Achievement shows that CSEPDI undertook only design projects and they are not EPC Projects. In effect, it is argued that design is the core area of the leader

of the consortium and moreover, they have no experience in India insofar as supercritical Thermal Power Projects.

23.2. He pleaded that BHEL has been granted "Maharatna" status by the Department of Heavy Industries, Ministry of Heavy Industries and Public Enterprises, Government of India, which has been so far awarded to only seven Central Public Sector Enterprises in the country. He also brought to the notice of this Court the various awards given to BHEL by the Ministry of Power for Outstanding Performance.

23.3. It is pleaded that the present tender is an International Competitive Bidding, whereas the consortium has got private contracts to the maximum by negotiation.

23.4. With regard to the letter of the Hon'ble Chief Minister dated 25.11.2013 addressed to the Hon'ble Prime Minister of India, it is pleaded that BHEL has not been singled out, so vendor rating need not fall and this does not vitiate the

fact that the third respondent has done a lot in the power sector.

23.5. With regard to the reports of the CAG; the order of the CERC and other newspaper reports, he reiterated the submissions made by the learned Advocate General.

23.6. The third respondent produced a status report of the project, stating that the work is under progress and they have expended substantial amount.

REPLY OF THE APPELLANT

24.1. Refuting the above said contentions made on behalf of the respondents, Mr.Sriram Panchu, learned Senior Counsel appearing for the appellant argued that:

(i)The Consultant's report is dated 30.5.2014 and the Consultant in any way declared that BHEL is L1. That apart, the day on which the Consultant's report was submitted, namely 30.5.2014, is a Friday and there is no chance for the

Board to take a decision by 2.6.2014, namely within two days (Saturday and Sunday), after scrutinizing voluminous records submitted by the appellant, BHEL and the Consultant.

(ii)The Board Level Technical Committee is also not the Tender Accepting Authority. They cannot declare BHEL as L1. Only the Board can do it and it cannot delegate the legal duty cast on it to the BLTC. At best, BLTC can be an evaluation or scrutiny committee, but not Tender Accepting Authority. When the appellant submitted representations, BHEL was not L1 and, therefore, the representations should have been considered, more so, in compliance of the direction of the Division Bench of this Court in the judgment dated 19.8.2014 made in W.A.No.1065 of 2014.

(iii)In the representation dated 13.6.2014, it has been clearly stated that "*there shall be No Commitment Fee, if the loan amount is fully utilized as per the Schedule spelt out in the Financial Contract*." Despite such stand taken by the appellant, the TANGEDCO has included it.

(iv) It is pleaded that the Consultant has loaded on the appellant an upfront fee (including interest) of Rs.801.18 Crores. According to the appellant, if Commitment Fee and the Interest on Management Fee and Guarantee Fee are excluded and accordingly, the Moratorium Interest is reduced to Rs.17.875 Crores, the Consultant could have only loaded Rs.489.136 Crores. However, the Consultant has erroneously evaluated the bid of the appellant at Rs.9207.264 Crores.

(v)Moreover, if the appellant's offer dated 5.6.2014 for reduction of interest rate from 7.2% per annum to 6.2% per annum had been accepted, TANGEDCO would have saved over Rs.1300 Crores on the Total Cost of Ownership basis. The appellant offered reduction of interest rate from 7.2% to 6.2% much before the third respondent offered interest reduction from 12.25% to 12.15% only on 27.6.2014, however the same was not considered by TANGEDCO.

(vi)With regard to the fixed rate of interest, it was pointed out that in the email dated 10.1.2014 sent by the Chief Engineer, enclosing a tabular column, it is specifically

clarified at Sl.No.9 with regard to "Interest Rate" that "*the fixed rate of interest has already been indicated in the Financial Term Sheet and the exact value has been submitted along with the price bid*". This, even according to TANGEDCO, was the bidder's response vide letters dated 18.12.2013 and 7.1.2014. If any clarification was required, the same ought to have been sought for, as in the case of the third respondent, before taking a decision on who is L1. Failure to consider renders the decision making process bad on account of procedural impropriety, one of tenets of Wednesbury's Principle.

(vii)As per Section 10(1) of the TTIT Act, the Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the prevailing market rate for procurement. The appellant is procuring money. Therefore, the Tender Accepting Authority should take into account the prevailing market rate, saving interest to the tune of Rs.1300 Crores. This is an issue that should have been considered in public interest.

24.2. Mr.N.L.Rajah, learned counsel for the appellant argued that:

(i)As per Clause 14.0 of the Instructions to Bidders, more specifically Clause 14.0(b), the Financing Term Sheet shall be based on *preliminary appraisal* of the project jointly by the bidder and the lender satisfying themselves on the project financial viability. Laying emphasis on the term "preliminary" it is pleaded that it is only a preliminary stage and the TANGEDCO ought to have called for clarifications, if so advised. If in the repayment schedule the appellant has stated anything wrong, the lender will rectify it, there is nothing for the TANGEDCO to ring alarm bells.

(ii)The poor performance in executing the project by BHEL, referred to in the order of CERC, is not only on account of shutdown, but also on technical reasons and, therefore, the past performance of BHEL should also be considered.

(iii)The CAG report says Rs.3200 Crores is to be collected from BHEL by TANGEDCO, but there is no reply from TANGEDCO. Even if the CAG report requires approval from the Public Undertakings Committee, there must be an

answer by the TANGEDCO to the Court as to the veracity of the said disclosure in the CAG report.

(iv)It cannot be said that the appellant is a private player and just because the appellant is a private enterprise, it cannot be disregarded. The appellant produced End-user Certificates. However, the learned Single Judge has held that the appellant has no experience in India, when the tender is an International Competitive Bidding. The learned Single Judge has erroneously restricted the scope of the work to the projects done only in India.

(v)It is stated that on 2.6.2014, BHEL was identified as L1. However, on 18.7.2014 TANGEDCO submitted before the Court in the first round of litigation that performance evaluation is yet to be done and they will look into the representation of the appellant. Therefore, BHEL could not have been identified as L1 by then and the entire proceedings reeks of malafide.

(vi)Sections 10(2) and 10(6) of the TTIT Act should be read together. If at all Section 10(3) of the Act is to be invoked by the Authority, it can only be after 26.9.2014, on which

day the Board resolved to accept the tender of the third respondent in compliance of Section 10(6) of the TTIT Act. Therefore, for negotiation under Section 10(3) of the TTIT Act, the appellant should have also been called for.

(vii)The non-obstante clause in Section 10(3) of the TTIT Act should be read harmoniously and should not obliterate the effect of Section 10(2) of the TTIT Act. Section 10(2) of the TTIT Act states that after evaluation and comparison of tenders, the Tender Accepting Authority shall accept the lowest tender. Only after evaluation, the Tender Accepting Authority can come to a conclusion as to who is the lowest tenderer. Only after that stage, negotiation under Section 10(3) of the TTIT Act should have been called for and not as stated by the learned Advocate General immediately after Section 10(2) of the TTIT Act.

CONSIDERATION

25. We have heard the rival contentions at length, perused the order passed by the learned Single Judge; the documents filed in these appeals; the records produced before this Court as was produced before the learned Single Judge,

and given our anxious consideration to the issue involved in these appeals. We heard the appellant and the respondents for several days, i.e., 3.6.2015, 9.6.2015, 10.6.2015, 16.6.2015, 19.6.2015, 25.6.2015, 1.7.2015, 15.7.2015, 16.7.2015, 20.7.2015, 21.7.2015, 22.7.2015, 23.7.2015, 27.7.2015, 29.7.2015, 31.7.2015, 7.8.2015, 20.8.2015, 21.8.2015, 24.8.2015 and 25.8.2015, in the course of our regular hearing, some in part and the rest specifically at their request.

ALTERNATIVE REMEDY

26.1. With regard to the plea of the learned Advocate General that the appellant instead of filing an appeal as contemplated under Section 11 of the TTIT Act has directly invoked the writ jurisdiction and, therefore, the writ proceedings are not maintainable, it is to be noted that the learned Single Judge in the order under challenge has clearly observed that:

> "38. Incidentally, one more contention was raised in this regard, with respect to the failure of the first respondent to notify the appellate authority under Section 11 of the Tamil Nadu Transparency in

Tenders Act, 1998. But, in this case, there is actually no scope for considering the said contention. As admitted by the petitioner themselves, the supplementary bid was submitted by them on 05.02.2014. Thereafter, the petitioner sent several representations not only to the first respondent, but also to the Government on 16.6.2014, 17.6.2014, 01.7.2014 and 08.7.2014. These representations were addressed to all important officers of the Government, including the Chief Secretary, the Secretary to Government, Environment and Forests, etc. The petitioner even came up with a writ petition in W.P.No.19247 of 2014 seeking a Mandamus to direct the first respondent to dispose of his representations. Therefore, ***this is a case where the petitioner ignited the fire of litigation much before the finalisation of the tenders. In such circumstances, I do not think that the notification of an Appellate Authority would have really made a difference. In any case, I do not propose to hold the non availing of an alternative remedy of appeal under Section 11 against the petitioner. This is the second round of litigation in respect of the same contract, with the first one preceding the finalisation.*** *Therefore, this incidental plea relating to non notification of the Appellate Authority cannot be accepted by me*."

(*emphasis supplied*)

26.2. In respect of challenge to tender, Courts have been entertaining the writ petition on certain parameters and availability of an alternative remedy is not an absolute embargo. The said view of this Court is fortified by the following decisions:

(a) In *Harbanslal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107*, the Supreme Court held as under:

> "***In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11.*** The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the

High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

(b) In *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., (2004) 3 SCC 553*, the Supreme Court held as under:

"8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

***

23. ***It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent***.

***

28. However, ***while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power*** [See : Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.] And ***this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.***

***

53. From the above, it is clear that ***when an instrumentality of the State acts contrary to public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution***."

(c) In *Coal India Ltd. v. Alok Fuels (P) Ltd., (2010) 10 SCC 157*, the Supreme Court observed as under:

> "15. It is settled by a series of decisions of this Court starting from Kumari Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 537] that ***even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.*** In Sterling Computers Ltd. v. M/s M & N Publications Limited and Others [(1993) 1 SCC 445] in para 28, however, this Court held:
>
> > 'Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones.'"
>
> (emphasis supplied)

(d) *In Union of India v. Tantia Construction Private Limited, (2011) 5 SCC 697*, the Supreme Court has categorically held that:

> "… even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, ***it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative***

remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that ***the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.*** We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company."

(e) In *Maa Binda Express Carrier and another v. North-East Frontier Railway and others, (2014) 3 SCC 760*, the Supreme Court held as under:

"**9.** ***Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest*****.*** (*See: Meerut Development Authority v. Association of Management Studies and*

Anr. etc. (2009) 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505).

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India, (1994) 6 SCC 651*, *Raunaq International Ltd.'s case (supra)* and in *Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517* besides several other decisions to which we need not refer. In *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors., (2012) 8 SCC 216,* the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

> "19. From the above decisions, the following principles emerge:
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in

those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis supplied)

26.3. In any event, the TANGEDCO has not filed any appeal challenging the said portion of the order of the learned Single Judge. This is the fourth litigation on this tender and mostly the allegation is on the first respondent on the ground of arbitrariness, unjust and unfair treatment, besides being against public interest. Therefore, the plea of alternative remedy has no bearing at this point of time. Accordingly, this Court does not propose to entertain the said plea of availability of alternative remedy at this stage and would proceed to consider the appeals as under.

SCOPE OF CONSIDERATION

27. We are of the considered opinion that these appeals will have to be tested on the touchstone of the tests laid down by the Supreme Court in *Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517*, wherein it is held as under:

> "24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'? and
(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

(emphasis supplied)

(I) FIRST TEST - TENDERING PROCESS:

28. On the basis of the law enunciated in the decision referred supra, let us at first analyze the process adopted and decision made in the tender by TANGEDCO.

(A) IS THE PROCEDURE FLAWED?

29.1. On 6.5.2013, TANGEDCO invited tenders for 2 x 660 MW Ennore SEZ Supercritical Thermal Power Project at

Ash Dyke of NCTPS, Chennai – 600 057. During July, 2013, the bids submitted by the appellant and the third respondent were taken up for consideration. By letter dated 3.2.2014, the second respondent requested the appellant to submit its supplementary price schedule. In due compliance of the same, the appellant submitted its Supplementary Price Bid on 5.2.2014.

29.2. The second respondent opened the price bid submitted by the appellant and the third respondent in the presence of their respective representatives on 5.2.2014 itself. It is borne out by records and the files produced, as was produced before the learned Single Judge, that the appellant's quoted price of Rs.9709.3822 was evaluated at Rs.9207.258 Crores by the Consultant after disallowing a sum of Rs.508 Crores and thereafter certain amounts are added, which tilted the balance in favour of the third respondent (BHEL). The report of the Consultant, we wish to state was not revealed before the learned Single Judge, in the first round of litigation, while the Court passed the two interim orders, as above, and

the Division Bench on 19.8.2014. It is not stated so in the counter affidavit or in the appeal memorandum. So to say it was not in public domain.

29.3. Even prior to filing of the first writ petition (W.P.No.19247 of 2014) on 17.7.2014, the appellant offered reduction of interest from 7.2% to 6.2% on 5.6.2014 itself. Thereafter, the appellant sent representations to the first respondent on 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014 impressing upon them the various aspects of the Bid, namely, lowering of interest, commitment fee, interest on management fee and guarantee fee, etc., and the relevance of Clause 29(viii) of the Instructions to Bidders in the matter of bid consideration, particularly in the context of various materials on the vendor rating and the poor track record of the third respondent, and also inviting their attention to the wrong and improper calculations made contrary to financial statements submitted by the appellant. It is apposite to refer to Clause 29.0 (viii) of the Instructions to Bidders, which reads as under:

"29.0. Rejection of Bids:
The tender shall be rejected if it is:
(i) to (vii) ***
(viii) From the tenderer whose past performance/vendor rating is not satisfactory."

29.4. As the representations sent by the appellant did not evoke any response, the appellant filed W.P.No.19247 of 2014 seeking issuance of a writ of Mandamus to direct respondents 1 and 2 to consider the appellant's representations dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014 and take necessary action on the same in strict compliance with law, particularly in accordance with Sections 10(1) and 10(2) of the TTIT Act read with Clause 29 of the Tender Documents issued by TANGEDCO.

29.5. In the interim order dated 18.7.2014 passed in M.P.No.1 of 2014 in W.P.No.19247 of 2014, it is specifically recorded as under:

"3. .... The learned Advocate General would further submit that *in respect of tenders floated, Techno-Commercial bid was opened on 27.06.2014 and the price bid was opened on 8.6.2014 and the* ***performance evaluation is yet to be done*** *and*

> *while doing so, all the representations of the petitioners dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014 would definitely be considered and seeks time to get written instructions in this regard.* The said submission of the learned Advocate General, assisted by Mr.P.Gunaraj, learned counsel appearing for respondents 1 and 2, on instructions, is placed on record."
>
> (*emphasis supplied*)

The date of opening of price bid along with the Supplementary Price Bid submitted by both tenderers was 5.2.2014 and not 8.6.2014. This is an error in recording of date.

29.6. Consequent to the above order, the first respondent addressed a communication dated 20.7.2014 to the Advocate General, wherein it is averred as under:

> "I inform that *the post bid representations of the bidder M/s.CSEPDI-TRISHE CONSORTIUM* relating to the award of contract for establishment of Ennore SEZ Thermal Power Project cited in the reference, *will be duly considered by the Board of Directors of TANGEDCO as the tender accepting authority* ***while finalizing the tender*** *and appropriate order passed strictly in accordance with the Tender Specifications and Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000.*"
>
> (emphasis supplied)

29.7. When the said communication dated 20.7.2014 was produced before the learned Single Judge in the first round of litigation, an interim order dated 31.7.2014 was passed in M.P.No.1 of 2014 in W.P.No.19247 of 2014, and it is as follows:

> "25. It is well settled position of law that as per the series of decisions rendered by the Hon'ble Supreme Court of India in the matter of award of contracts, *the Government and its agency, have to act reasonably and fairly at all points of time and to that extent the tender has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. Therefore, it cannot be said that writ petition is not maintainable*.
>
> 26. This Court can take judicial notice of the fact that this State is reeling under power shortage and the commissioning of the above said projects is vital and very much important to the welfare of the State and therefore, excepts the respondents 1 and 2 to act fairly and reasonably by considering the representation of the petitioner dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014. The letter dated 20.7.2014 addressed to the learned Advocate General by the Principal Secretary/Chairman-cum-

> Managing Director of TANGEDCO also states that the above said post bid representations submitted by the petitioner will be duly considered by its Board of Directors while finalizing the tenders and appropriate orders will be passed strictly in accordance with the tender specifications and Tamil Nadu Transparency in Tenders Act, 1998 and the rules framed thereunder and being a State Agency, it is under obligation to do so and *till the respondents 1 and 2 considers and pass orders on the above said representations, after affording opportunity of personal hearing to the authorized representatives of the petitioner and communicate the same to the petitioner,* ***finalization of the bid/tender cannot be done***."
>
> (emphasis supplied)

29.8. Aggrieved by the said interim order dated 31.7.2014 passed in M.P.No.1 of 2014 in W.P.No.19247 of 2014, TANGEDCO filed W.A.No.1065 of 2014 before the Division Bench. The Division Bench tagged the writ petition along with the writ appeal and disposed of the same by common judgment dated 19.8.2014, holding as under:

> "12. We have considered the rival submissions made by the learned counsel on either side and we have also gone through the order passed by the learned Single Judge as well as the provisions under the Tamil Nadu Transparency in Tenders Act, 1998 read

with Rule 27 of the Tamil Nadu Transparency in Tender Rules, 2000.

13. On a perusal of the statutory provisions, we find that the rule nowhere contemplates affording of personal hearing to the person who is objecting. *Hence, the 1st respondent cannot demand personal hearing, as a matter of right. However, it is made clear that if any clarification is required regarding the documents submitted by the 1st respondent to the appellants to consider its objections, the same shall be called for from the 1st respondent and if such clarification is sought, the same shall be communicated to the 2nd respondent also and* ***after considering the clarification to be given by the 1st respondent, the 1st appellant shall pass an order as directed by the learned Single Judge***. It is also made clear that if an opportunity of personal hearing is afforded to the 1st respond, if it is required to be afforded, after considering the clarification given by the 1st respondent, the same shall be extended to the 2nd respondent also.

14. At this juncture, the learned counsel for the 1st respondent submitted that the 1st respondent is having some additional materials to prove the disqualification of the 2nd respondent and he has prayed for a reasonable time to submit the said documents in support of its contention.

15. In view of the above submission made by the learned counsel for the 1st respondent, ***the 1st respondent is granted one week time from the date of receipt of a copy of this order to submit the additional particulars/documents before the 1st appellant along with a copy of this order and the 1st appellant shall pass an order as stated above***. The order to be passed by the 1st appellant shall be communicated to the 1st respondent as well as the 2nd respondent. ***The order of the learned Single Judge is modified accordingly***."

(emphasis supplied)

29.9. Further to the above said order passed by the Division Bench, the appellant submitted a representation dated 25.8.2014 enclosing relevant documents. However, the first respondent vide communication dated 27.9.2014 rejected the representations submitted by the appellant. This proceedings is challenged in W.P.No.26762 of 2014.

29.10. Without prejudice to the right of the appellant to challenge the first respondent's communication dated

27.9.2014, the appellant sent a representation dated 1.10.2014 to the first respondent highlighting the arbitrariness, anomalies and inconsistencies in its approach and the malafide writ large in the matter of evaluating the merits of the third respondent's bid, despite materials placed by the appellant for rejection of the third respondent's bid. It also pleaded for considering the financial terms clarified before proceeding to finalize the bid.

29.11. When things stood thus, at the time of hearing of W.P.No.26762 of 2014, namely on 8.10.2014, the learned Advocate General produced a copy of the fourth respondent's proceedings dated 27.9.2014 addressed to the third respondent awarding the tender in favour of the third respondent and the letter of the third respondent dated 27.9.2014 accepting the award of tender.

29.12. Thereafter, the fourth respondent, by proceedings dated 10.10.2014, informed the appellant that tender has been

finalized and orders have been placed on the evaluated L1 bidder, namely the third respondent.

29.13. Aggrieved by the proceedings dated 27.9.2014 of the fourth respondent awarding the tender in favour of the third respondent and the consequential proceedings dated 10.10.2014 informing the appellant that the tender has been finalized in favour of BHEL, the appellant filed W.P.No.27529 of 2014.

29.14. In this factual matrix, let us analyze the process adopted in finalizing the tender. At the outset, a reading of the judgment of the Division Bench of this Court, dated 19.08.2014, makes it clear that but for a clarification that personal hearing cannot be demanded by the appellant herein, no part of the order of the learned Single Judge in the first round of litigation has been modified, which in effect, is a direction to consider the post-bid representation submitted by the appellant. The appellant was granted one week time further to submit additional particulars/documents and the first

respondent was directed to pass orders as directed by the learned Single Judge, by the Division Bench. Even at this stage, TANGEDCO never averred or stated before the Division Bench or before the learned Single Judge that the tender has been finalized and the third respondent is L1. The date of the learned Single Judge's order is 31.07.2014 and the order of the Division Bench is dated 19.08.2014. The Division Bench did not modify that portion of the order of the learned Single Judge directing TANGEDCO not to finalize the bid/tender till TANGEDCO passes orders on the representation of the appellant and communicates the same to the appellant.

29.15. This stand clearly reveals that the evaluation process was going on and nothing was finalized and, therefore, the claim of the appellant would be considered. This is fortified by the letter of the Chairman and Managing Director, TANGEDCO, dated 20.7.2014, wherein it is stated that "*post bid representations of the bidder M/s.CSEPDI-TRISHE CONSORTIUM* relating to the award of contract for establishment of Ennore SEZ Thermal Power Project cited in

the reference, *will be duly considered by the Board of Directors of TANGEDCO as the tender accepting authority* ***while finalizing the tender*** *and appropriate order passed strictly in accordance with the Tender Specifications and Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000."* This undertaking clearly establishes the case that there was no evaluation of L1. This contradiction clearly shows that to get over the impasse, the BLTC decision dated 2.6.2014 is quoted as a decision taken to identify L1, consequent to which negotiation was done with L1, i.e., the third respondent (BHEL).

29.16. On the face of it, there appears to be a misstatement of fact before the Court. If the letter of the Chairman and Managing Director, TANGEDCO dated 20.7.2014, recorded by the Court is taken into account, then the evaluation of L1 said to be done on 2.6.2014 is clearly a misrepresentation of fact. It was agreed by the Chairman and Managing Director, TANGEDCO that before finalizing the tender, all the issues raised in the representations will be considered. It is on record that the decision on issues raised on financial

aspects, vendor rating, etc., was taken only on 27.9.2014. The comparative analysis of the tenderers was done in the month of September, 2014, but the first respondent however has proceeded to negotiate with the third respondent (BHEL) on and from 2.6.2014. This is also evident from the various references cited by the third respondent (BHEL) in their letter of acceptance dated 27.9.2014. Simultaneously, the first respondent has been proceeding with the award of the tender with the third respondent, despite an undertaking to the Court in the above terms. We find that this itself is a breach on which the Court can interfere with, as the tendering process is mired in illegality and arbitrariness, coupled with bias in favour of the third respondent. We have no hesitation to hold so.

29.17. The learned Advocate General submitted that on 2.6.2014 itself, a decision was taken by BLTC that the third respondent was L1 and it was decided to negotiate with them. It is the plea of TANGEDCO that the Consultant submitted its report on 30.5.2014. This could be done only after an evaluation under Section 10(1) of the Act is completed. However, in the earlier round of litigation during July and

August, 2014, it was submitted before the Court that performance evaluation is yet to be done. Such statement of the learned Advocate General is clearly recorded in the order dated 18.7.2014 passed in M.P.No.1 of 2014 in W.P.No.19247 of 2014, extracted supra. If such performance evaluation is yet to be done as on 18.7.2014, it is hard to accept the submission of the learned Advocate General that on 2.6.2014 itself a decision was taken by BLTC that the third respondent (BHEL) was L1 and negotiations should be held only with them. In any event, BLTC cannot step into the shoes of the Tender Accepting Authority as mandated by Section 10 of the TTIT Act. Neither the provisions of Section 10 nor any other provision of TTIT Act provide that the role of the Tender Accepting Authority could be delegated and such delegatee can perform the act. When the provisions of the Act prescribe a thing to be done in a particular manner, it has to be done in that manner and not otherwise.

29.18. It is not the case of the TANGEDCO at any point of time, before this Court in the first round of litigation that they have already accepted BHEL as L1 based on the Consultant's

report. It is the finding of the learned Single Judge that L1 was identified on 30.5.2014 (i.e.,) the date of the Consultant's report, that too, on perusal of the files. That is also not the recommendation of the Tender Scrutiny Committee or the decision of the Tender Accepting Authority. We fail to understand as to how the Court can set the clock back so as to enure a benefit to BHEL, which the Tender Accepting Authority did not decide at that point of time.

29.19. At this juncture, the aspect which gains prominence is the submission of the learned Advocate General that BLTC may be treated as Tender Scrutiny Committee. As per Rule 24 of the TTIT Rules, the Tender Scrutiny Committee may be constituted to scrutinize the tender documents, supervise opening of tenders, to carry out the preliminary examination and detailed evaluation of the tenders received and to prepare an evaluation report for the consideration of the Tender Accepting Authority. The BLTC is not the Tender Accepting Authority. Section 10 of the TTIT Act, which prescribes the procedure for evaluation and acceptance of tender clearly stipulates that evaluation and acceptance should

be done only by the Tender Accepting Authority. Moreover, there is no reference to the proceedings of the BLTC dated 2.6.2014 in any of the proceedings, either it be the first round of litigation or before the learned Single Judge in the present round of litigation, which order is impugned.

29.20. Despite such direction given by the Division Bench of this Court on 19.8.2014, it is admitted by TANGEDCO that they did not go back to the Consultant on the clarifications provided by the appellant. Moreover, till the date of passing of the judgment, i.e. 19.8.2014, it is never the case of TANGEDCO that tender has been finalized in favour of the third respondent. The first respondent apparently kept the issue fluid and fixed the dates based on the turn of event. If this is not an arbitrary and malafide action in the Transparent Tendering process, we fail to know what else.

29.21. The impugned proceedings dated 27.9.2014 of the fourth respondent addressed to BHEL, accepting their offer, is extracted hereunder:

"***We are pleased to inform that the Board of TANGEDCO has accepted your offer as the successful tenderer and decided to award the work*** 'Design, engineering, inspection and testing at manufacturer/sub vendor's works, supply, storage, erection, testing and commissioning of complete coal fired Supercritical Thermal Power Plant including all Mechanical, Electrical, Civil/Structural/Architectural, Control & Instrumentation' for the establishment of 2x660 MW Ennore SEZ Supercritical Thermal Power Project in the ash dyke of North Chennai Thermal Power Station, Vayalur Village, Tiruvallur District, in Tamil Nadu, for a total contract price of Rs.7788 Crores (Rupees Seven Thousands Seven Hundreds and Eighty Eight Crores only), which is inclusive of CIF component price of Rs.1510 Crores, taxes & duties under single EPC cum debt financing basis availing loan from Power Finance Corporation (PFC) for an amount not less than 75% EPC cost plus 100% IDC with fixed rate of interest @ 12.15%.

The details terms and conditions will be issued shortly. Kindly acknowledge the receipt of the acceptance of award of tender."

(emphasis supplied)

In the written submissions submitted on behalf of TANGEDCO, it is stated that the 51st Board Meeting convened on 26.9.2014 decided to pass an order in compliance of Sections 10(2) and

10(6) of the Act, whereby the third respondent (BHEL) was accepted as L1. Hence, the plea of the first respondent that on 2.6.2014, they could negotiate with the third respondent (BHEL) on the premise that the third respondent (BHEL) is L1 appears to be a fallacy. It is nothing but an unfair approach in the tendering process. Procedural impropriety is writ large. This itself establishes the case that the tender process adopted and the decision taken by TANGEDCO are malafide or intended to favour the third respondent (BHEL), besides being arbitrary and unjust. The TANGEDCO has clearly breached the undertaking given to the Court and proceeded to negotiate with the third respondent identifying it as L1.

29.22. The shallowness in the case of the TANGEDCO has been buttressed by placing reliance on the Consultant's report in the order of the learned Single Judge, which was on the basis of the files circulated in the Court. But on going through the files, we find that the decision to accept BHEL as L1 was made on 26.9.2014, in the 51st Board Meeting of the TANGEDCO. Therefore, by any stretch of imagination, there

cannot be two evaluations and two tender acceptances one by the Consultant and the other by the Tender Accepting Authority. The scheme of Section 10 of the TTIT Act does not provide that evaluation and comparison of tender as done by the Consultant should be accepted by the Tender Accepting Authority. Section 10(1) of the TTIT Act postulates that it is the Tender Accepting Authority which shall cause objective evaluation of the tenders based on the schedule of rates mentioned in the tender document; prevailing market rate for procurement; and comparison of tenders in accordance with the procedure and criteria specified in the tender document. Thereafter, in terms of Section 10(2) of the TTIT Act, after evaluation and comparison of tenders as specified in Section 10(1) of the TTIT Act, the Tender Accepting Authority shall accept the lowest tender that too on the basis of objective and quantifiable factors specified in the tender document. There is also a further emphasis that relative weights of the participating tenderers should be made. All this makes it clear that the Tender Accepting Authority has a role to cause objective evaluation of the tenders and it cannot merely fall

back on the opinion of the Consultant and they have in this case just did it that way. It is nothing but abdication of their role and a stark procedural irregularity. It hits the root of tendering procedure. At best, the Consultant's report could be a guiding factor. The decision making has to be by the Tender Accepting Authority and not by any other authority, much less the Consultant.

29.23. Before adverting to the procedure for evaluation and acceptance of tenders, it is apposite to refer to Sections 10(1), 10(2), 10(3), 10(6) and 10(7) of the TTIT Act, which read as under:

> **"10. Evaluation and Acceptance of tender.-**
>
> (1) The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the tenders in accordance with the procedure and criteria specified in the tender document.
>
> (2) After evaluation and comparison of tenders as specified in sub-section (1), the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors specified in the tender document and giving relative weights among them.

(3) Notwithstanding anything contained in sub-section (2), if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, he may negotiate for a reduction of price with that tenderer.

….

(6) If the Tender Accepting Authority proposes to accept the tender as per the provisions of this section, he shall pass orders accepting the tender together with reasons for such acceptance.

(7) The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers."

29.24. The procedure for evaluation and acceptance of tender is specified in Section 10 of the TTIT Act. We are at this stage concerned with Section 10(6) of the Act, which reads as under:

"If the Tender Accepting Authority proposes to accept the tender as per the provisions of this section, the said authority shall pass orders accepting the tender together with reasons for such acceptance."

In the said proceedings dated 27.9.2014, extracted above, as pleaded by the appellant, we find no reasons as contemplated under Section 10(6) of the Act. The learned Single Judge supports the reasoning of the TANGEDCO that BHEL will not be interest in knowing the reasons for his acceptance, but that is not the issue here. The provisions of Section 10(6) of the TTIT Act state that when the Tender Accepting Authority proposes to accept the tender as per the provisions of the Act, it is incumbent on them to pass an order accepting the tender together with reasons for such acceptance. This should be considered in the light of the objects of the TTIT Act, which provides for transparency in tenders. When such reasoned orders are passed, it gives sufficient material to the other party to know as to what is the ground on which the tender has been accepted in favour of the lowest tenderer. Section 10(7) of the TTIT Act provides that the Tender Accepting Authority should intimate the information regarding the name and address of the tenderer whose tender has been accepted along with reasons for rejection of other tenders to the Tender Bulletin Officers. Therefore, the two provisions need not be

confused with each other. If the question posed is whether the TANGEDCO has complied with the provisions of Section 10(6) of the TTIT Act and if the answer is "NO", then the provisions of the TTIT Act having not been complied with, the order can be tested by way of judicial review, as it is not only a clear breach of the said provision, but also a case of procedural impropriety, unfair approach and arbitrariness.

29.25. In this context, it would be apposite to refer to an observation of the Supreme Court in *Star Enterprises and others v. City and Industrial Development Corporation of Maharashtra Ltd., (1990) 3 SCC 280*, wherein it was held as under:

> "*In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public*

gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr. Dwivedi, therefore, commends itself to our acceptance, namely, that *when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so*."

(emphasis supplied)

This was a case where the Supreme Court took a view that reasons for rejection should be made available to the concerned parties. The paramount indication in this judgment is that the State or its instrumentality, in commercial dealings, should act with credibility; improve culture of accountability; support actions with reasons for an objective review, and

fairness. That appears to be the substance of Section 10(6) of the TTIT Act.

29.26. Absence of reasons clearly establishes a case of procedural impropriety, which is susceptible to judicial review, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 at 411, (the 'GCHQ case')*:

> "I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

It is quoted in the words of Professor Helen Fenwick-

> "The development of appropriate administrative procedures is fundamental to any proper system of administrative law in the interests of orderliness, openness, timeousness and justice."

29.27. As to the necessity for giving reasons under Section 10(6) of the TTIT Act, it will be worthy to refer to the

decision in *Jeyeanthan case [2000] 1 WLR 354, at 359B-359D,* in the words of Lord Woolf,-

> "Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation the tribunal's task will be to seek to do what is just in all the circumstances."

29.28. Reasoning for decision could be tested on the ground that breach was deliberate, which, we wish to hold in the present case, reasons have not been recorded deliberately and thereby, prejudice is apparent on the face of record. The manner in which evaluation was done and coupled with the lack of reasons in the proceedings in terms of TTIT Act, will invalidate the decision of the first respondent in determining the third respondent as L1. We feel, judicial review should be

rightly exercised in this case to test the decision making process and we are inclined to do so.

29.29. Insofar as rejection of bid of the appellant is concerned, drawing strength from the decision of the Supreme Court in Star Enterprises cases, referred supra, we find that the TANGEDCO is trying to take shelter by the detailed reply given on 27.9.2014 stating that reasons for rejection are contained therein. We are not able to accept such a contention. The reply of the TANGEDCO is to the representations of the appellant, which partly contain issues relating to the appellant and partly relating to the third respondent. There is nothing to show that it has a detailed evaluation and analysis of the offer made by the appellant and the reasons as to why their offer has not been accepted. The recording of reasons for rejection of the other tenders, namely, unsuccessful tenderers, is contained in Section 10(7) of the Act. Though it is stated that the such reasons should be sent to the Tender Bulletin Officer and the same has been published, we find that the said publication also calls for further introspection, of which we will

deal with later. At present, we find that the reasons for rejection of appellant's representations cannot be termed as reasons for rejection of the bid of the appellant. Bid is separate from the substance of the representations. The two need not be confused, one for the other. The requirement of recording of reasons is in-built in the provision of Section 10 of the TTIT Act. The reasons in support of rejection of representations are based on the direction given by the Court. The first respondent's plea is that reasons in the order rejecting the representation are good enough. We do not accept that proposition. The requirement of the Act is compliance of Section 10, i.e. to record reasons which the first respondent failed to do.

29.30. In our considered opinion, the argument of the learned Advocate General placing reliance on *M.Vasudevan case* that reasons as contemplated under Section 4(1)(d) of the RTI Act need not be given in contractual matters cannot be sustained. Moreover, in *M.Vasudevan case*, referred supra, the

decision of the Supreme Court in *Star Enterprises,* was not considered.

29.31. That apart, in *Hasbi Traders case*, referred supra, which relates to the erstwhile TNEB, the Division Bench of this Court held that TNEB is a public authority and even in contractual matters it cannot have an unfettered discretion. The argument that tender documents provide for rejecting the tender without assigning reasons was negatived in the said decision. This decision has been accepted by the TNEB.

29.32. In such view of the matter, we are of the considered opinion that reasons as contemplated in Section 10 of the TTIT Act are required to be spelt out and should have been communicated to the appellant. Non furnishing of the same runs counter to the decisions of the Supreme Court and this Court and is also contrary to the provisions of the TTIT Act. We, therefore, have no hesitation to hold that the decision making process is flawed and breach of statutory provisions.

(B) TENDER BULLETIN:

30.1. It is the contention of the learned Advocate General that as per Rule 30(3) of the TTIT Rules there is no requirement that the tender evaluation report should be sent to the Tender Bulletin Officer and all that is contemplated to be sent to the Tender Bulletin Officer is a statement of evaluation of tenders with a comparative statement of tenders received and decision therein for publication in the Tender Bulletin.

30.2. At the outset, it is to be noted that such publication in the Tender Bulletin was never produced before the learned Single Judge. However, the same was produced for the first time before us stating that the publication has been effected in the Tender Bulletin on 9.10.2014 in due compliance of Section 10(7) of the TTIT Act and Rule 30(3) of the TTIT Rules. For better clarity, we extract the relevant portion of the English translated version of the publication in the Tender Bulletin hereunder:

6- TAMILNADU GENERATION AND DISTRIBUTION CORPORATION LIMITED

1. Name of the Inviting Officer, Designation& Address: Tender: Chief Engineer/Civil/Projects & Environment, 3rd Floor, NPKRR Maaligai, 144, Anna Salai, Chennai-600 002

2. a) Name of the Project/Details of Purchase & Works: Establishment of coal based 2x660 MW Ennore SEZ Supercritical Thermal Power Project in the ash dyke of existing NCTPS under Single EPC cum Debt Finance basis.

   Vayalurvillage, Thiruvallur District, Tamil Nadu.

Sl. No.	Details	Tender Value	Decision on Tender
1.	M/s.Bharat Heavy Electricals Limited, BHEL House, Sirifort, New Delhi-110 049	7840.087 Crores & Lender: Power Finance Corporation Limited Rate of Interest: 12.25%	Out of four bids received for this work and among the qualified two bidders, negotiation was called for & held with the Lowest bidder viz M/s.BHEL. After negotiation, tender value - Rs 7788 Crores, Rate of Interest at 12.15% was accepted by the Chief Engineer/ Projects and order for acceptance of the tender issued vide this office Lr.No.CE/P/SE/M/EE-10/E/ File.2x660MW Ennore SEZ STPP/D.No.60/dt.27.09.2014
2.	Consortium of Central Southern China Electric Power Design – M/s.Trishe, 668, Minz Road, Ughan, China-430 071	9716.5974 Crores & Lender: Industrial & Commerce Bank of China Rate of Interest: 7.2% (USD @ Rs 59.26 at SBI Bill selling rate)	

> Finally, M/s BHEL/New Delhi offered bid for Rs 7788 Crores was accepted by the Chief Engineer/Projects/Chennai and order for acceptance of the tender was issued vide this office Lr.No.CE/P/SE/ M/EE-10/E/ File.2x660MW Ennore SEZ STPP/ D.No.60/ dt.27.09.2014."

30.3. For better understanding regarding what should be published in the Tender Bulletin, it would be apposite to refer to the relevant provisions. Section 6(1) of the TTIT Act reads as under:

> "On receipt of intimation relating to details of notice of invitation of Tender, from the Tender Inviting Authority, *information relating to* ***acceptance of tender together with a comparative analysis and reasons for acceptance of tenders from the Tender Accepting Authority***, the State or as the case may be, the *District Tender Bulletin Officer shall,* ***publish the same*** in the State or District Tender Bulletin, as the case may be within such time as may be prescribed."

Section 10(7) of the Act reads thus:

> "The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted

along ***with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers***."

Rule 30(3) of the TTIT Rules reads as under:

> "As soon as the tenderer qualified to perform the contract is identified, in accordance with section 10(6) of the Act, the Tender Accepting Authority shall pass orders accepting the tender and communicate the order of acceptance to the successful tenderer. ***The Tender Accepting Authority will also send to the Tender Bulletin Officer a statement of evaluation of the tenders with a comparative statement of tenders received and decision thereon for publication in the Tender Bulletin***."

30.4. The above said provisions should be read conjointly in order to further the object of the Act. The main object behind such publication is to communicate to the public at large the information received from the Tender Accepting Authority, which in turn is the object of the TTIT Act, namely to ensure greater transparency and greater accountability.

30.5. In the Tender Bulletin, extracted above, the reasons for acceptance of tender are absent. There is no statement of evaluation of tenders and there is no comparative statement of tenders received and decision thereon. This is certainly a clear violation of the requirements of the TTIT Act and the Rules. All that we can observe is that it is vague as vagueness can be. It also shows the arbitrariness in approach, besides being casual and perfunctory. It is stated that the EPC-cum-Debt Financing Project is an International Competitive Bid and a very big project. We find, the approach is very casual and therefore amenable to judicial review.

30.6. Even though the learned Advocate General taking support from the judgment of the learned Single Judge, more particularly, paragraph 37, pleaded that even if the procedure contemplated under Section 10(7) of the TTIT Act read with Rule 30(3) of the TTIT Rules is not complied with, it will not vitiate the tender process, as post finalization of tender only the said provisions come into play, this Court is not inclined to

accept such a plea, as it is well settled proposition of law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden (See Taylor v. Taylor, (1876) 1 Ch.D 426). When even after compliance of Section 10(7) and Rule 30(3), some more formalities need to be complied with by the parties and the contract has not been entered into between the parties, it cannot be claimed that such non compliance of post-decisional tasks cannot be assailed.

30.7. In such view of the matter, we hold that publication effected in Tender Bulletin is not in terms of Section 6(1) read with Section 10 of the TTIT Act and Rule 30(3) of the TTIT Rules.

30.8. With regard to the plea of the Advocate General by referring to Rule 7 of the TTIT Rules that the information contained in the Tender Bulletin regarding accepting a tender

will not create a legal right or liability, it would be apt to refer to Rule 7 of the TTIT Rules, which reads as under:

> "7. Tender bulletin to contain information only.-(1) The tender bulletin shall contain only information of the notice inviting tenders and the orders accepting a tender and does not in itself create a legal right or liability.
> (2) A notice inviting tender will not be invalidated merely on the grounds that the notice although published in newspapers has not been published in one or the other of the District Tender Bulletins or State Tender Bulletins or when published in the State Tender Bulletin could not be published in a District Tender Bulletin or vice versa."

30.8. In our considered opinion, there is no need for this Court to go into the said provision. On a plain reading of the said provision, it is evident that it is relatable to the presently successful bidder, namely, BHEL. That rule provides that the successful bidder does not have any right. We are not on that issue at present.

(C) (i) WHETHER INTEREST OFFERED BY APPELLANT IS VAGUE; AND

(ii) WHETHER THE REDUCTION OF INTEREST FROM 7.2% TO 6.2% SHOULD BE ACCEPTED.

31.1. We will first deal with the issue as to the vagueness of the rate of interest offered by the appellant.

31.2. With regard to interest rate, it is stated in the Term Sheet as under:

> "The Borrower will pay interest on the full Loan amount at a floating rate of 6 month LIBOR (The relevant Inter-bank Offered rate Bid Rate displayed on Reuters at or about 10.00am New York time on the commencement date for each interest period) plus 3.5-4.5% margin per annum, or at a fixed rate of 7.2~7.5% per annum. Both rates are estimated based on current market conditions. The final pricing is subject to the Lender's final discretion, and may be adjusted in future."

31.3. While it is the plea of the appellant that fixed rate of 7.2~7.5% per annum or LIBOR floating rate has been quoted by them, it is the case of the learned Advocate General that Clause 12.1 of the Instructions to Bidders stated that interest is to be quoted at fixed rate and it is not subject to change, and since the interest quoted is variable, it is not possible to evaluate the bid.

31.4. It is seen from the records, that subsequently, based on a query from the first respondent, the appellant had confirmed that it would be fixed rate of interest at 7.2%. The same was also confirmed in the Repayment Schedule and the same rate of interest was taken into consideration by the Consultant in his report dated 30.5.2014. He did not find fault with the rate of interest. It is to be noted that the Term Sheet was submitted during July, 2013 and tender was evaluated in the year 2014. The contention of vagueness in rate of interest does not appeal to us. When the Consultant's report dated 30.5.2014 is accepted by TANGEDCO for the purpose of evaluation, it has to be accepted for all purposes, though we have reservation on the Consultant's report dated 30.5.2014. There is, therefore, no vagueness in the rate of interest quoted at 7.2%.

31.5. The second issue relates to the reduction of rate of interest. It is not in dispute that various meetings were held between the appellant and the TANGEDCO. The learned Advocate General states that the Consultant was appointed

based on the 21st Board Meeting on 28.1.2012 and the Consultant participated in all pre-bid and post-bid meetings and minutes were signed by all parties, including BHEL and the appellant. He stated that the appellant was aware of the Consultant's appointment and his role. This only fortifies the fact that there have been series of consultation between both the bidders. The finding of the learned Single Judge that the appellant acted on inside information is demolished by the stand of the learned Advocate General as above. The insinuation has no basis.

31.6. Coming to the issue of reduction of rate of interest, taking into consideration the prevailing market rate, the appellant offered to reduce the rate of interest from 7.2% to 6.2% on 5.6.2014, even prior to any form of litigation. When such an offer was given by the appellant the tender was not accepted in terms of Section 10(6) of the Act. To recapitulate, what has happened earlier is that the writ petition in W.P.No.19247 of 2014 was filed on 17.7.2014, subsequent to the offer made on 5.6.2014. The first interim order was

passed on 18.7.2014. The second interim order was passed on 31.7.2014. The Division Bench passed an order on 19.8.2014. At that point of time, there was never a statement by the TANGEDCO that L1 was identified and discussion was going on. We have also clearly stated the statement of the Chairman-cum-Managing Director of TANGEDCO that the representations of the appellant will be duly considered by the Board of Directors while finalizing the tender and appropriate orders will be passed strictly in accordance with the tender specifications and by following the provisions of TTIT Act and TTIT Rules.

31.7. Therefore, the issue relating to reduction of rate of interest should have been considered. This reasoning of ours is also based on the fact that we have clearly held that the third respondent could not be ascertained as L1 on 2.6.2014 as per the statement of TANGEDCO or on 30.5.2014 as per the finding of the learned Single Judge. Once there is no identification of L1, TANGEDCO is bound to consider the reduction in rate of interest of both the appellant in their offer dated 5.6.2014 and that of the third respondent dated

27.6.2014, reducing the rate of interest from 12.25% to 12.15%.

31.8. Even otherwise, by virtue of the power under Clause 25.3 of the Instructions to bidders, which states that "The Purchaser reserves the right to *relax or waive any of the conditions* of this Specification in the *best interests of the TANGEDCO*", the TANGEDCO could have considered such reduced rate of interest offered by the appellant and the third respondent.

31.9. Moreover, when the present tender is for Engineering, Procurement, Construction and Debt Financing and Section 10(1) of the TTIT Act specifies that "*The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the tenders in accordance with the procedure and criteria specified in the tender document*", certainly in a debt financing contract, where loan is to be procured for the first respondent, the prevailing

market rate of interest, which was offered at 6.2% as against 7.2% by the appellant ought to have been considered by the TANGEDCO, while considering the offer of the third respondent for reduction of interest rate from 12.25% to 12.15%. The fact that this reduction would result in reduction of cost at about Rs.1300 Crores, is a very vital and relevant factor. What prevents the first respondent to accept such an offer is unfathomable, but certainly unpalatable.

31.10. Even in the letter of acceptance of the third respondent dated 27.9.2014, it is stated that negotiations were held on 27.6.2014 qua reduction of interest. On that day, the offer of the appellant to reduce interest rate from 7.2% to 6.2% was very much available, having been submitted on 5.6.2014. To avoid such an offer, the clock was set back and the date was reset to 2.6.2014 by the first respondent and 30.5.2014 by the learned Single Judge. These dates identifying BHEL as L1 are contrary to the provisions of TTIT Act.

31.11. In any event, invoking Clause 25.3, the TANGEDCO ought to have considered the reduced rate of the appellant in the best interests of TANGEDCO, as it would have resulted in a benefit of about Rs.1300 Crores. This valuable financial benefit cannot be frittered away by the first respondent on hyper-technical plea.

31.12. It is an admitted fact that the present tender is an International Competitive Bidding. The degree of care which is required to be taken and transparency in such bidding is greater and the same has been emphasized by the Supreme Court in *W.B. State Electricity Board v. Patel Engineering Co., (2001) 2 SCC 451*, wherein it was observed as under:

> "24. 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, Respondents 1 to 4 and Respondents

10 and 11 are all bound by the ITB which should be complied with scrupulously. *In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and 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 casualty.* ***Relaxation or waiver of a rule or condition, unless so provided under the 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 the ITB or rules is the best principle to be followed, which is also in the best public interest."

(emphasis supplied)

31.13. In the case on hand, *de hors* the factual misgiving relatable to the first respondent on the date when the appellant offered to reduce the rate of interest i.e., on 5.6.2014, the third respondent was not called for negotiation. The third respondent was called for negotiation on 27.6.2014. Clause 25.3 of Instructions to Bidders enables the respondents to relax or waive any of the conditions of the specification in the best interests of the TANGEDCO. When Rs.1300 Crores is the amount involved on account of the difference in the interest rate offered by the appellant and third respondent, certainly, in the best interest of the TANGEDCO, relaxation or waiver of the condition for consideration of the bid of the appellant is manifest. However, such indulgence was granted only to the third respondent, even though even as per the submission of the TANGEDCO, as on 27.6.2014, finalization of tender has not taken place. The same would certainly create justifiable doubts in the minds of other bidders and 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. We also keep in mind that the decision in W.B. State Electricity Board case, referred supra, will have a bearing as to how L1 should be determined, because the larger public interest in a project of this magnitude warrants not only timely implementation of the project, but also a cost effective measure. Substantial saving in the order of Rs.1300 Crores only on account of reduction in interest is by no means a small amount which could be ignored by the State instrumentality, especially when this amount will be a boon to the State for development of other infrastructure or for any other welfare measure. When the third respondent is clearly not L1 till 27.9.2014, there is no impediment in considering the reduction of interest, which is part of the representation/record/ document/letter submitted for consideration and which had the stamp of approval of the Court.

31.14. Moreover, the observation of the learned Single Judge that the appellant is a private limited company, whereas the third respondent is a Government of India Enterprise and

therefore the third respondent's case should be viewed with a lesser amount of suspicion than a decision in favour of the private players is, in our considered opinion, uncalled for, as the present tender is International Competitive Bidding, wherein tenders have been invited globally. Even though BHEL is a Government of India Enterprise, it should be placed on the same pedestal as any private player or else there is no necessity to invite tenders globally and conduct such a lengthy tender process.

31.15. We are of the firm view that the TANGEDCO, in its best interest, ought to have considered the offer made by the appellant for reduction of interest keeping in mind the vast difference of Rs.1300 Crores. The project cost will certainly come down. The cost factor will reduce to a great extent and consequently, the cost per unit of power produced for the benefit of the public at large will also be reduced. The first respondent will have to consider the most competitive bid and not play on technicalities.

(D) COMMITMENT FEE

32.1. According to the learned Advocate General, the Commitment Fee is part of Financing Charges specified in Clause 14.0 (d)(6) and the appellant cannot contend that the same should be excluded for the purpose of bid evaluation.

32.2. A reading of Clause 14.0 (d)(6) of the Instructions to Bidders, which is as under:

> "Financing Charges: All financing charges of any nomenclature relating to financing of the project including but not limited to Finders Fees, Commitment Fees, Arrangement Fees, Management Fees, Up Front Fees, Syndication Fees, Service Charges, Guarantee Charges, Other Fees and Taxes, if any should be clearly outlined in the Financing Term Sheet. No variation in Financing Charges is permitted during the tenor of loan."

makes it clear that the details of the Financing Charges should be clearly outlined in the Financing Term Sheet, and it is not stated that the same should be included in the price evaluation. As per the term sheet, as against the Column "Commitment Fee" it is stated as under:

> "The accrued commitment fee (1% per annum) is payable on the last day of each successive interest period which ends during the availability period, on the last day of the Availability Period and, if cancelled in full, on the cancelled amount of the relevant Lender's Commitment at the time the cancellation is effective."

It clearly states that Commitment Fee is only on the cancelled portion of the loan. That apart, even as per the Drawdown Schedule, the fee is to be paid only if the loan amount is not drawn by the 18th, 30th and 42nd month. Moreover, the appellant in the letters dated 13.6.2014, 16.6.2014 and 17.6.2014, clarified that Commitment Fee is only on the unused credit line and that there shall be no Commitment Fee if the loan amount is fully utilized as per the Drawdown Schedule. All these representations sent by the appellant were not considered by TANGEDCO, despite there being a specific direction by the Division Bench of this Court to consider the same. It is a clear case of arbitrariness in approach and intended to oust the appellant. This act of the TANGEDCO is nothing but a case of malafide in evaluation process to suit one and reject the other.

32.3. The proceedings of the first respondent is also hit by the Wednesbury's principles. The decision taken by the TANGEDCO is not only unreasonable but also irrational. They have taken into account matters which they ought not to have taken or conversely refused to take into account matters which they ought to have. In this connection, the observation of Mukharji,J. ***State of U.P. v. Renusagar Power Co.*** reported in ***(1988) 4 SCC 59,*** is apposite:

> "The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of the facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

The failure on the part of the TANGEDCO to take into consideration relevant materials and clarifications in the form of representations in support of the plea of no Commitment Fee, if loan is taken and no Interest during Construction, is an attempt to misread the documents, which an ordinary man in normal commercial parlance would clearly understand. This

would establish the case that relevant materials have been deliberately misread to load the cost on the appellant's bid. This action of the TANGEDCO, if tested on Wednesbury's principles, will fail.

32.4. While exercising the power of judicial review, in ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680****, Lord Green MR,* drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review. He summarised the principles as follows:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought

> to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them."

This principle was further amplified by Lord Diplock with a new name 'irrationality' in the case of ***Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 at 410***-

> "By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223).* It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Tested on these principles of law, the decision making process followed by TANGEDCO has to fail.

(E) INTEREST ON MANAGEMENT FEE & GUARANTEE FEE

33.1. It is the case of the appellant that the Term Sheet only mentions that a Management Fee is to be paid, but does not mention any interest on Management Fee or Guarantee Fee for the 36 month construction period.

33.2. If the TANGEDCO had any doubt on this issue, a clarification could have been taken from the appellant. Appellant has also sent clarifications on this issue on 13.6.2014, 16.6.2014 and 17.6.2014. That apart, in the representation sent by the appellant pursuant to the direction of the Division Bench of this Court in the earlier round of litigation, the appellant had clarified this issue. The same is also evident from the Supplementary Price Bid. This makes it clear that there was no doubt or vagueness on this issue. The learned Advocate General's argument that the department would only read in that manner is untenable. We find that the department has gone merely by the Consultant's report, who had no opportunity to consider the representations. This is a

clear breach of the order of the Division Bench and the undertaking given therein.

33.3. Even as per the Consultant's Report the difference between the bid of the appellant and the third respondent is around Rs.71 Crores. That being the case, if either the Commitment Fee of Rs.156.184 Crores or the interest on Management Fee and Guarantee Fee for the 36 month construction period is not loaded on the appellant, it will have a bearing on deciding which one of the two is the lowest bid. Assuming the Consultant's report is of any value, such report without considering the relevant material is of no use. The approach to add these figures without taking note of the representations and additional particulars/documents is, therefore, arbitrary and tainted in bias. This is in violation of the Division Bench judgment as well as the orders of the learned Single Judge in the first round of litigation.

33.4. In the course of arguments made on behalf of TANGEDCO, an attempt was made to say that the entire case

of the appellant is technical in nature dealing with financial jugglery and the interpretation which they want to make will only cause confusion and TANGEDCO should not be asked to go into these financial aspects to come to a conclusion and, therefore, they relied on the report of the Consultant. The learned Single Judge did not want to go into the financial aspect of the matter stating that it is not within the domain of judicial review. It is true that the scope of judicial review should not be concerned with a particular method of interpretation that is possible insofar as financial implication is concerned. But the fact remains that if the authority has simply overlooked a vital factor, which stares on the face of the record, it would be arbitrary approach to the matter.

33.5. There are two ways to look at a problem – One, to look at the financial issue as a complicated complex factor and refrain and the other is to simplify the issue and consider. According the learned Single Judge, it is a very complicated way of looking at the matter and, therefore, he would not embark upon that. But, we would like to approach this issue

by understanding the issue in a simple manner. The financial implication in respect of two tenderers has been specified by the Consultant. The issue is what factors mean and how it impacts the bid. We find that the Repayment Schedule submitted by the appellant with regard to interest on management fee and guarantee fee during IDC period is an accepted document by the Consultant. If nothing more is to be paid beyond that and that is clarified in the course of representation in clear terms, we fail to understand as to how this amount could be included in the cost when there is no implication. The Consultant, as we have held, did not have the benefit of considering the representation and other documents on the financial implications in this issue. His opinion is therefore not based on relevant document/representation. This we have held is not in conformity with the order of the learned Single Judge in the first round of litigation, which was confirmed by the Division Bench. Withholding such a factor and to obtain an evaluation from the Consultant loading the bid of the appellant is clearly a case of bias. It is an unreasonable

approach and an unfair gesture which crumbles the spirit of transparent tender.

33.6. We, therefore, have no hesitation to hold that the first respondent had erroneously added interest on Management Fee and Guarantee Fee when there is none and there is no ambiguity or vagueness. Once the appellant has indicated in the representation, in clear terms, as to how it should be treated, in the light of the order of the Division Bench, which TANGEDCO accepted to consider the bid of the appellant, the first respondent ought not to have loaded this amount on the basis of the Consultant's Report. In all fairness, the Tender Accepting Authority of the first respondent should have excluded this amount, if both the bidders are to be treated on the touchstone of fairness and on the doctrine of level-playing field. This becomes necessary because the entire tender is tested on the larger public interest, that is to say, the implementation of the project in a time bound manner where cost is another important factor to be considered in the decision making. In a Welfare State, public authority cannot

decide arbitrarily to throw away such an offer which they agreed to consider in the course of judicial proceedings, which we have referred to above. These factors, namely, adding interest on Management Fee and Guarantee Fee, have to be eschewed for the purpose of considering the bid of the appellant, otherwise, it will suffer from the vice of unreasonableness and irrationality.

(F) CONSULTANT'S REPORT

34. We have perused the Consultant's Report dated 30.5.2014, furnished by the TANGEDCO, which the learned Single Judge has relied upon with emphasis. In fact, it is a Price Evaluation Report for the said project. Consultant has loaded on the appellant an upfront fee (including interest) of Rs.801.180 Crores. If Commitment Fee and the Interest on Management Fee and Guarantee Fee are excluded and accordingly, the Moratorium Interest is reduced to Rs.17.875 Crores, the Consultant could have only loaded Rs.489.136 Crores. If the Consultant had any doubt as to the amount to be added on any of the heads, he should have sought for

clarification from the appellant, as was done for BHEL. However, without resorting to such exercise, the Consultant evaluated the bid of the appellant at Rs.9207.264 Crores, and added the above amount. The Consultant's report cannot supplement the role of the Tender Accepting Authority in terms of Section 10 of the TTIT Act. In any event, the Consultant should have been consulted post 30.5.2014 as per the directions of the Court. That would have clarified the issue. This has given the third respondent an unfair advantage on norms. The decision of the Supreme Court in *Reliance Energy Limited*, cited supra, answers the issue precisely.

Reliance Energy Limited Case:

> "***The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms***."
>
> (emphasis supplied)

The above said decision may be more appropriate in the present case insofar as Commitment Fee, Interest During

Construction is concerned because in the repayment schedule, what is payable has been clearly explained. This has been submitted to comply with the norms for repayment taking into consideration the entire project cost and the loan component. Any attempt to misread the same under the guise of vagueness is nothing but a self-serving attempt by the first respondent to load the cost against the appellant and to tilt the balance in favour of the third respondent.

(G) RIVAL CONTENTIONS ON PAST PERFORMANCE & VENDOR RATING:

35.1. The ability of the two tenderers to take up the project of this magnitude was not found fault with by the Consultant. The volume of work undertaken by the BHEL cannot be disputed. We cannot comment about the efficiency of BHEL insofar as power generation in the subcritical arena is concerned. The issue that we are now grappling with is whether in this supercritical EPC-cum-debt financing project the TANGEDCO has floated, as between the two tenderers, whether there is incapacity in either of them and whether the efficiency level of the two bidders can be tested.

35.2. We find that the Consultant, on whose report the learned Single Judge has relied upon in extenso, has not found the appellant or the BHEL incompetent. The Consultant has not found either of the parties to be technically unsound. There rests the matter. The extensive argument by either side is of no avail on the ability to take up such a project.

35.3. The argument on the side of the respondents that the appellant is a nascent company and the following points raised by the respondents on the misgivings of the appellant in executing the projects, viz., (i) that most of the projects undertaken by them are sub-critical projects; (ii) that the work involved in BTG (Boiler Turbine Generator) is only 40% of the total work involved in supercritical project; (iii) that the scheduled completion period in respect of one of the projects undertaken by the members of the appellant consortium was delayed for years, and (iv) that in yet another project the name of the appellant consortium is not found, are not the factors that weighed before the Consultant or the Tender Accepting Authority. Therefore, if the Consultant's report is

taken as a benchmark for evaluation of tenders, which has been accepted by the Tender Scrutiny Committee and the Board of TANGEDCO blindly, we hold that the analysis of the two tenderers on technical ability or capacity would be stretching the issues little far. But, we would like to add that both the tenderers may be technically sound, but when it comes to implementation some serious issues are raised insofar as BHEL is concerned. Few instances are as follows: (i) The letter from the Hon'ble Chief Minister dated 26.11.2013 addressed to the Hon'ble Prime Minister of India; (ii) The Counter Affidavit filed by Tamil Nadu Electricity Board in W.P.(MD) No.3730 of 2012 before the Madurai Bench of the Madras High Court; (iii) The report of Comptroller and Auditor General of India, New Delhi dated 17.2.2014; (iv) Order of the Central Electricity Regulatory Commission, New Delhi, dated 19.6.2014; and (v) various newspaper reports and the contents of the TANGEDCO website.

35.4. It is for the Tender Scrutiny Committee or the Tender Accepting Authority to weigh these issues and decide as

to whether such a time bound project should be given to BHEL based on their past performance. We find these are relevant issues which should have been considered because the State and its instrumentalities should keep in mind the effect of non-implementation of the project within the time specified and the cost overrun that it will entail.

35.5. It is one thing to say that delay can be penalized. We cannot accept the proposition that delay can be mitigated by penalty. As has been rightly pointed out by the learned Single Judge, in introspection, that delay has caused serious damage to the efficiency of the Government and other limbs of democracy. But we have to keep in mind that in our country there has been a tendency to accept delay, lethargy, inaction and supine indifference as facets of life and, therefore, this laid-back attitude has not pushed the country in the direction of economic growth that we find in other developing countries, despite the fact that India has large work force, intellectual capacity, effective management *gurus* and great leaders to guide the country, not to miss the vitriolic public platform

speakers who take us nowhere. It is just that one single factor that we accept inaction or inefficiency as part of life and delay with a remedial measure where one tends to overlook important projects set to time limit, with a thought of penalty on account of delay. This destroys the entire project. Public interest suffers. Can Courts be mute spectators? We think, not.

35.6. In fact, one should not lose sight of the fact that in large number of cases, arbitration clause is invoked for additional cost alleging delay on one or other party. Therefore, we have no hesitation to observe that time factor should be strictly adhered to and that is a relevant consideration. The first respondent should rate the rival bidders on efficiency – ability to take up the project is one thing, but, efficiency in completing the project is yet another factor. Both are relevant.

36.1. In the present case, the decision making process is arbitrary, irrational, illegal and procedurally improper. The first respondent has also abdicated its function by failure to take into consideration relevant factors and flawed its decision on

irrelevant and non-existent factors, merely based on Consultant report:

(A) It is the specific direction of the Division Bench on 19.8.2014 in W.A.No.1065 of 2014 to consider the representations of the appellant, which rests on the issues of (i) reduction of rate of interest; and (ii) past performance of BHEL. However, the same were not considered, more so when the award of tender in favour of BHEL was granted only on 27.9.2014.

(B) Even as per the records of TANGEDCO, BHEL was awarded tender only on 27.9.2014 and when prior to that negotiations were held with BHEL for reduction of interest rate, such an option should have also been given to the appellant as well.

(C) The reduction of rate of interest is a substantial saving to TANGEDCO in the EPC-cum-Debt Financing contract for setting up Supercritical Thermal Power Plant. The cost would be a decisive factor. Therefore, the offers made by both the parties should have been considered.

(D) Commitment Fee has been included on the basis of

the Consultant Report. It is merely advisory in nature. In any event, on this issue, clarification was given by the appellant on 13.6.2014 and that was not considered.

(E) No prudent man will understand the term "Commitment Fee" in the manner in which TANGEDCO wants. Interest is taken on the loan amount. If loan is availed as per the terms, then Commitment fees will be charged. That is how the document has been clarified. We fail to understand how TANGEDCO can merely quibble with words to give an illogical reasoning that commitment fee is payable even if loan is not availed. Any person in normal commercial transaction can perceive that if no loan is taken the commitment fee is not charged. If loan is availed, interest is payable.

(F) Interest on Management Fee and Guarantee Fee is not included by the appellant. They have said so in no uncertain terms. However, the Consultant has included it without reference to the representation. If we accept the plea of the TANGEDCO that this is how they would like to understand, then it would amount to arbitrary and irrational appraisal and evaluation. This will render the decision making

process vulnerable to judicial review. We have no hesitation to hold that the decision of TANGEDCO declaring BHEL as L1 is flawed for all the reasons that we have discussed earlier.

36.2. We, therefore, hold that the process adopted and the decision made by TANGEDCO is arbitrary, unfair, irrational, biased and mala fide. It is not in accordance with the provisions of the TTIT Act and TTIT Rules. Accordingly, based on *Jagdish Mandal case*, referred supra, M/s.TANGEDCO's decision to declare the third respondent – BHEL as L1 fails and has to be interfered with.

II TEST – PUBLIC INTEREST

37.1. The second test to be considered is the public interest involved in this case.

37.2. The Supreme Court in *Raunaq International Ltd. v. IVR Construction Ltd. and others, (1999) 1 SCC 492* has clearly laid down as to what are the elements of public interest

in commercial transactions like the award of contract. The relevant portion of the said decision is extracted hereunder:

> "10. ***What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer*****…..**"

37.3. In the case on hand, we have already held that the procedure followed by the TANGEDCO reeks of arbitrariness, unfair and unjust treatment to appellant, besides malafide and being unreasonable and irrational. As to how an authority awarding contract should have conducted itself, has been specifically stated by the Supreme Court in *LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482*, as under:

> "27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general

> public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."

37.4. When a writ petition is filed challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. On a challenge to the award of a contract or rejection of a tender, by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition.

37.5. In the case on hand, even as per the Consultant's Report the difference between the bid of the appellant and the third respondent is around Rs.71 Crores. The difference on

account of the reduction of the rate of interest from 7.2% to 6.2% as offered by the appellant would reduce the cost of the project by about Rs.1300 Crores. If either the Commitment Fee of Rs.156.184 Crores or the interest on Management Fee and Guarantee Fee for the 36 month construction period is not loaded, certainly the cost of project will come down even further. The said factors cannot be brushed aside by the TANGEDCO, as the above constitute overwhelming public interest, i.e., reduction of cost of the EPC-cum-Debt Financing project. The TANGEDCO in the larger public interest that it serves ought to have considered the bid submitted by the appellant and that of the third respondent in order to ensure a level-playing field between the tenderers and fruitfully gain the benefit of lowest cost in the 2x660 MW Supercritical Thermal Power Project based on all relevant parameters contained in the two bids.

37.6. In such view of the matter, we answer this issue also against TANGEDCO.

CONCLUSION

38. However, we are cognizant of the fact that the price offered may not always be the sole criterion for awarding a contract, and it is one among the relevant and important criteria. The quality of work executed, the past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the bidders, their market reputation, the cost factor and so on, play an important role in deciding, to whom the contract should be awarded. The decision making process should be transparent and open in finding the best bid considering all the relevant parameters and keeping in mind the public interest paramount. When all these relevant factors have not been considered in the right perspective but more in breach, as observed above, certainly Courts in exercise of power of judicial review can interfere and we are inclined to interfere with the proceedings impugned in the writ petitions.

39. Resultantly, we allow these appeals and set aside the common order passed by the learned Single Judge.

Consequently, the proceedings of the TANGEDCO impugned in the writ petitions are set aside. The TANGEDCO is directed to evaluate the appellant's price bid along with the bid of the third respondent, in the light of our findings as above and also taking into consideration all required parameters and the clarifications submitted by the appellant in its various representations, as directed by the Single Judge in the order dated 31.7.2014 and that of the Division Bench in its order dated 19.8.2014, afresh, at the earliest.

40. It is made clear that this Court has not expressed any opinion on whether or not the subject contract should be awarded to the appellant or the 3rd respondent, as it is for the TANGEDCO to decide which one of these two bidders, would subserve the larger public interest in executing the project by taking into consideration all relevant parameters including the representations/documents, etc. submitted. We, however, make it clear that, while undertaking this exercise, the TANGEDCO shall record detailed reasons for their decision and communicate the same to the appellant and the third

respondent so as to comply with the requirement of the provisions of the TTIT Act and TTIT Rules and the decisions of the Supreme Court, referred supra. No costs. Consequently, M.P.No.1 of 2015 in W.A.No.712 of 2015 and M.P.Nos.1 and 2 of 2015 in W.A.No.713 of 2015 are closed.

(R.S.J.) (K.B.K.V.J.)
7.9.2015

Index : Yes
Internet : Yes
sasi/gb/rsb

R.SUDHAKAR,J.
and
K.B.K.VASUKI,J.

(sasi)

Judgment in
W.A.Nos.712 and 713 of 2015

7.9.2015