

Reserved on : 20.06.2017

Delivered on : 04.07.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2017

CORAM

THE HON'BLE Mr. JUSTICE M.DURAISWAMY

W.P.No.12315 of 2017 and
W.M.P.Nos.13085 & 13086 of 2017

Mantra Industries Ltd.,
rep by its General Manager,
Having Registered Office at
No.17, Shivaganga Apartment,
S.L.Road, Mulund (W),
Mumbai - 400 080.

... Petitioner

Vs.

1. The State of Tamil Nadu,
rep by Principal Secretary to Government
Information & Technology,
Fort St.George, Chennai - 600 009.

2. Electronics Corporation of Tamil Nadu Ltd.,
rep by its Managing Director,
MHU Complex, II Floor,
692, Anna Salai, Nandanam,
Chennai - 600 035.

3. M/s.Lenovo (India) Pvt. Ltd.,
Ferrns Icon Level 2, सत्यमेव जयते
Doddenakunti Village,
Marathhali Outer Ring Road,
Bengaluru - 500 037.

4. M/s.Hewellet Packard India Sales Pvt Ltd.,
Prestige Palladium, Bayan No.129-140,
Fourth Floor, Greams Road,
Chennai - 600 006.

... Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of mandamus directing the 2nd respondent to reject the bids submitted by/cancel tender awarded to, persons who submitted technical bids solely on the basis of

AMD PRO A4-3350B APU processor or any other laptop processor which does not qualify the "Qualifying Benchmark" stipulated under Clause 4.1.1 of the Tender Document in Tender Reference:ELCOT/PID/ICB/LTC/PVI/2016-17 and accept the bids submitted by persons whose technical bid fulfills the qualifying criteria under the Tender Document.

For Petitioner : Mr.A.L.Somiyaji, Senior Counsel
for Mr.Adithya Reddy

For Respondents: Mr.A.N.Thambidurai,
Special Government Pleader (R1)

Mr.M.Vijayan,
for M/s.King and Patridge (R2)

Mr.T.V.Ramanujam, Senior Counsel
for Mr.J.R.Jayant, M/s.Kochhar & Co. (R3)

Mr.Sathish Parasaran, Senior Counsel
for Mr.Madhan Babu (R4)

O R D E R

The petitioner has filed the above Writ Petition to issue a writ of mandamus directing the 2nd respondent to reject the bids submitted by/cancel tender awarded to, persons who submitted technical bids solely on the basis of AMD PRO A4-3350B APU processor or any other laptop processor which does not qualify the "Qualifying Benchmark" stipulated under Clause 4.1.1 of the Tender Document and accept the bids submitted by persons whose Technical Bid fulfills the qualifying criteria under the Tender Document.

2.The brief case of the petitioner is as follows:

(i)According to the petitioner, it is involved in the business of manufacturing and trading of electrical and electronic appliances. The 2nd respondent, as Procurement Agency of the State Government's free laptop distribution scheme, floated a tender for supply and commission of five lakhs laptop computers to be distributed to the students in the State of Tamil Nadu for the year 2016-17. In terms of the said tender, an advertisement dated 01.11.2016 called for the bids from the prospective bidders to submit the bids on 06.01.2017 before 04.00 pm. The Tender Document contained the terms and conditions, which includes the eligibility criteria for the bidders.

(ii) As per Clause-3.11, the bid should comprise two parts viz., Technical Bid (Envelope A) and Price Bid (Envelope B). As per Clause-4.1.1, the sample laptop to be submitted should meet all the technical specification mentioned in the said Clause. The processor of the laptop should either be Intel Pentium Dual Core or equivalent AMD processor with processor speed 2.0 GHz or higher. The Qualifying Benchmark for the laptop is Bapco Sysmark 2007 overall score of minimum 120 or higher with Window 7 Professional and 4GB memory. Annexure - 3 of the Tender Document provides the Format in which the test report contemplated under Clause-3.10.4 should be obtained to certify that the laptop fulfills the tender specification. In the said Format, the manner in which the memory of the laptop is to be tested and certified is clearly mentioned. As mentioned in the said format and to satisfy the need of detection of 4GB under the Bapco Sysmark 2007 test, as requested in Qualifying Benchmark requirements, the platform needs to have dual memory slots and processor recommended by the processor supplier should have the specification to support the dual memory channel.

(iii) Further according to the petitioner, there is a difference between the laptop having 4GB physical memory and the 4GB memory capacity detected in the Bapco Sysmark 2007 benchmark results. As per the tender specification, it has been very evident that the sample laptop should, not only have 4GB physical memory, but also 4GB to be detected under the Qualifying Benchmark test report of the sample laptop. To achieve the detection of 4GB in the Qualifying Benchmark test, the laptop has to be equipped with dual channel memory slot and the processor fixed to the laptop has to support the dual channel memory for achieving the required specification. It is for this reason, the Tender Document, in its technical specification, prescribes the requirement of 4GB for both physical memory and 4GB under the Qualifying Benchmark Bapco Sysmark 2007 Benchmark under Windows 2007 Professional.

(iv) Further according to the petitioner, the tender submission dates were postponed by the Procurement Agency ELCOT for two times from 06.01.2017 to 27.01.2017. Then again postponed from 27.01.2017 and finally it was called to submit the tender on 03.02.2017. The petitioner has stated that they submitted two sample laptop models with Intel Processor Intel (R) Pentium (R) CPU A1020 ("Intel Processor") and the other with AMD Processor AMD PRO A4-3350B APU ("AMD Processor").

(v) The petitioner has also stated that as far as the Intel Processor is concerned, the test report of the Electronics Test and Development Centre/ Lab (a Central Government Institute specified in the Tender Document) clearly showed that the said processor matched the technical specification of the Tender

Document. The test report revealed that the laptop with Intel Processor had 4GB memory under two different memory channels as required under the Tender Document. In the detailed FDR (Factual Disclosure Report) enclosed in the test report, it is clear that the AMD Processor does not detect 4GB memory since it has only one memory channel.

(vi) After the opening of the Technical Bid on 03.02.2017, all the bidders were invited for a demonstration of their respective laptop models in the 2nd respondent's office. At the said meeting, the petitioner was surprised to know that the respondents 3 & 4, who have now been selected as L1 and L2, had submitted a sample laptop which do not have the dual channel memory required to meet the Qualifying Benchmark of 4GB memory under the Bapco Sysmark 2007, required for the product to be qualified to meet the technical requirements. Subsequently, the Price Bid of the bidders, including the respondents 3 & 4, were also opened.

(vii) Thereafter, the petitioner approached the 2nd respondent and brought it to the attention of the officials that the laptop with AMD processor submitted by the bidders such as respondents 3 & 4 do not meet the Qualifying Benchmark criteria of 4GB memory under the Qualifying Benchmark Bapco Sysmark 2007 and therefore, does not qualify technically for the tender. The officials assured the petitioner that the matter will be looked into and action will be taken.

(viii) In the meanwhile, the representatives of the Intel Corporation, who supplied processors for the petitioner's laptop, themselves wrote directly to the laboratory asking them as to how they certified that the laptop with AMD PRO A4-3350B APU Processor complies with the technical specification, when it does not possess the capacity to support the dual channel memory to detect 4GB memory under Bapco Sysmark 2007, which is the Qualifying Benchmark for the product to be qualified. After repeated follow up, the lab gave an amended report dated 25.04.2017 certifying that the memory capacity of the laptop with AMD PRO A4-3350B APU Processor is 2047 MB (2GB) as opposed to 4GB as required under the Qualifying Benchmark test report and therefore, the model does not comply with the requirements of the tender.

(ix) Immediately upon receipt of such report, the officials of Intel Corporation met the Information and Technology Secretary of the State Government on 26.04.2017 and explained to him the fact that the laptop equipped with AMD Processor AMD PRO A4-3350B APU does not qualify the technical requirements of the tender as specified in the tender specification, hence the product has to be disqualified and the bidders, who submitted

the bids on the basis of such processor should be disqualified. The Secretary assured that necessary action will be taken on this.

(x)The petitioner wrote a letter to the 2nd respondent, through its counsel, pointing out the amended report issued by the Electronic Test and Development Centre (Lab) and also pointing out that as a result of the same, all the bidders with AMD PRO A4-3350B APU Processor do not qualify for the tender as the product does not meet the tender Qualifying Benchmark criteria. However, the 2nd respondent had processed the tender and finalized the bid and awarded the "Letter of Acceptance" to the respondents 3 & 4, declaring them to be L1 and L2 bidders. In these circumstances, the petitioner has filed the present Writ Petition.

3. The brief case of the 2nd respondent is as follows:

(i)According to the 2nd respondent, the Government of Tamil Nadu decided to implement the scheme of distribution of laptop computers, free of cost, to students studying in Government Schools, Government Aided Schools and Government Colleges. The Government of Tamil Nadu, by G.O.Ms.No.1, dated 03.06.2011, entrusted the task of procuring laptop computers to ELCOT. The laptop computers would be procured through competitive bidding process following the procedures stipulated in the Tamil Nadu Transparency in Tenders Act, 1998 and Rules thereon. Accordingly, ELCOT invited bids through international competitive bidding process to select contractors for supplying and commissioning of five lakhs laptop computers satisfying the technical specification given in the Tender Document during the year 2016-17. The tender eligibility criteria has been provided elaborately in the tender.

(ii)As per the technical specification provided in Clause-4.1 of the tender conditions, the memory should be 4GB DDR3 SDRAM @ 1330 MHz or higher. The Qualifying Benchmark would be Bapco Sysmark 2007 overall score of minimum 120 or higher higher with Windows 7 Professional and 4GB memory.

(iii)In order to be eligible in the Technical Bid, the bidders are requested to get sample laptop computers tested as per the specification and furnish the test report along with the Technical Bid. As per Clause-3.10.1, the bidder should test the computer in anyone of the Testing Centres of Government of India Testing Agencies or State Government Agencies. Apart from the test report, one sample laptop computer should be submitted to ELCOT on or before the due date and time of opening of the tender.

(iv) In response to the tender, 6 bidders, including the petitioner and respondents 3 & 4 submitted the bids. Out of the 6 bidders, 3 bidders, viz., the 3rd respondent, the 4th respondent and Acer India Private Limited, got certification from ETDC, Chennai and the other 3 bidders viz., the petitioner, Balaji Machine Works Private Limited and Arunnachala Impex Private Limited, got certification from ETDC, Bangalore.

(v) As per the test report submitted by the bidders, the Testing Centres certified that the sample laptop computer is in accordance with the technical specification. Based upon the report and considering the technical aspects, the Tender Scrutiny Committee evaluated the bids. The Board of ELCOT, which is the Tender Accepting Authority took the decision on 20.03.2017 that all the bidders were qualified in the Technical Bid stage. Accordingly, the Price Bids of all the bidders were opened on 22.03.2017. On the basis of the price quoted by the bidders, they were ranked as below:

- L1 - Lenovo (India) Private Limited
- L2 - HP India Sales Private Limited
- L3 - Balaji Machine Works Private Limited
- L4 - Mantra Industries Limited
- L5 - Arunnachala Impex Private Limited
- L6 - Acer India Private Limited

(vi) Having come to know that the petitioner was ranked as L4, it has caused a notice through its counsel on 30.03.2017 and also a representation was submitted. If the points raised by the petitioner is fair and reasonable, it should be raised on or before the technical evaluation stage. To consider the same, the Technical Committee meeting was held on 12.04.2017. One of the members of the Committee is a Professor of Anna University, another member is a Professor in IIT, Madras, the 3rd member is an Associate Professor in IIT, Madras, the 4th member is a Technical Director of National Informatics Centre, Chennai and the other 3 members are Officers of Electronics Corporation of Tamil Nadu Limited. The Committee also took into consideration the objections of the petitioner and ultimately, found that the AMD Processor A4 Pro 3350B computer meets Bapco Sysmark 2007 Benchmark of 120 or higher. The Committee also took into consideration the certificate furnished by ETDC conforming that the AMD Processor meets the technical specification. Ultimately, the Technical Committee reached the opinion that the objections raised by the petitioner are not substantiated.

(vii) All the 6 bidders, including the petitioner, submitted the certificate from the Testing Centres duly certifying that the sample laptop is in accordance with the tender specification. The petitioner now cannot turn around and dispute

the correctness of the certificate. The tender conditions do not specify that the laptop computer has to be equipped with dual channel memory and dual channel slot. According to the 2nd respondent, ELCOT is entitled to change the submission date and for changing the submission date, no motive can be attributed. The last date for submission of tender was 03.02.2017 and the petitioner submitted its bid on that date. According to the 2nd respondent, the dual channel memory is not a tender specification. Since the dual channel memory is not a technical requirement and the respondents 3 & 4 submitted the test report, they cannot be disqualified in the technical scrutiny stage.

(viii) The petitioner has submitted a certificate from ETDC, Bangalore, certifying that the sample laptop computers with Intel Processor and AMD Processor is in accordance with the tender specification. Based upon the said report, the petitioner was qualified in the technical specification stage. After having come to know that the respondents 3 & 4 are L1 and L2 and have offered laptop computer with AMD Processor, with the intention of disqualifying them, the petitioner submitted another report certifying that the laptop computer submitted by the petitioner does not qualify. The ETDC, Chennai, certified that the laptop computer submitted by the respondents 3 & 4 qualifies the benchmark and the Technical Committee also concurred with it. The selection of the respondents 3 & 4 are in accordance with the tender specification. The petitioner is having an Appeal remedy under Section 11 of the Tamil Nadu Transparency in Tenders Act. The selection of respondents 3 & 4 are as per the tender specification and strictly in accordance with the Tamil Nadu Transparency in Tenders Act and Rules thereon. The 2nd respondent has further submitted that the procurement and distribution of the laptop computers is a time bound programme and any delay will lead to irreparable loss to the Government as well as to the beneficiaries, who are the students. The petitioner was ranked as L4 and the Letter of Acceptance was issued to L1 and L2. In such circumstances, the Writ Petition is liable to be dismissed. सत्यमेव जयते

4. The brief case of the 3rd respondent is as follows:

(i) According to the 3rd respondent, the Writ Petition is not maintainable for the reason that the petitioner has an effective alternative remedy of Appeal before the Appellate Authority viz., the State Government under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998. The 2nd respondent has validly acted as per the tender conditions in full compliance and has awarded the tender to the 3rd respondent. There is no illegality or procedural irregularity and everything has been done after following due process.

(ii) The 3rd respondent has fulfilled the technical specification such as Bapco Sysmark 2007 overall score of minimum 120 or higher with Windows 7 Professional and 4GB memory. The 3rd respondent is the largest personal computer vendor in the world and is a very reputed brand in the IT industry with excellent track record in successfully supplying and executing similar projects in India. The 3rd respondent has distributed over 3,60,000 laptops during the 1st phase of the ELCOT project and over 90,000 laptops during the 3rd phase of the said project and over 6,60,000 laptops during the 4th & 5th phases to the school students in Tamil Nadu.

(iii) The 3rd respondent has duly completed the supply of the laptops under the aforesaid tender and the laptops so supplied are functioning very well to the satisfaction of the users. The test report dated 23.01.2017 conducted by the Electronics Test and Development Centre (ETDC) clearly states that with regard to memory, the 3rd respondent's laptop contains 4GB memory DDR3 1600 MHz and has passed the requirement of the tender (i.e.) 4GB DDR3 SDRAM @ 1333 MHz or higher. Further, in the report, it has been clearly stated that even upon physical inspection, the 3rd respondent's laptop contained 4 GB memory. The said report also states that the 3rd respondent has satisfied the Qualifying Benchmark Bapco Sysmark 2007 overall score of minimum 120 or higher with Windows 7 Professional and 4GB memory and has successfully obtained a score of 125 on the Bapco Sysmark 2007. The said test report dated 23.01.2017 approved and issued by two Scientists of the ETDC sufficiently prove the 3rd respondent had suitably complied with all the technical specification as required. Hence, the 3rd respondent was successful in its bid and consequently, awarded the tender vide Letter of Acceptance dated 02.05.2017.

(iv) The petitioner is making a baseless interpretation to suit their own convenience. The alleged amended report dated 25.04.2017 conducted a test on a laptop with the make M/s. Haier Information Technology (Suzhou) Co. Ltd. containing AMD Processor and observed that the memory capacity indicated at test summary is 2047 MB against 4GB. The said laptop did not belong to the 3rd respondent and merely because the processor had similar configuration, the petitioner has alleged that the 3rd respondent did not comply with the technical specification. The Technical Committee also considered the contentions of the petitioner and rejected them and found that the 3rd respondent had complied with all the technical specification as enumerated under Clause-4.1.1 of the tender conditions. The laptop supply scheme is a social welfare scheme of Tamil Nadu Government, which will have huge impact on the academic lives of lakhs of poor students across Tamil Nadu. In these circumstances, the 3rd respondent prays for dismissal of the Writ Petition.

5.The brief case of the 4th respondent is as follows:

According to the 4th respondent, they have fulfilled all the specification stated in Clause-4.1.1 of the tender conditions. Even as per the test report, though the test report generated by the computer indicated that the memory capacity was 2047 MB, the actual physical verification revealed that the memory capacity was infact 4GB as per the technical specification. After taking into consideration the test report and also the findings of the Technical Committee, the 2nd respondent concluded the tender and also issued the Letter of Acceptance on 02.05.2017 and the 2nd respondent had already executed the Agreement in respect of the supply of computers under the tender along with the Bank Guarantee for a sum of Rs.7.44 crores on 09.05.2017 and the same as also received by the 2nd respondent on 10.05.2017. Since the entire tender process, including execution of Agreement and furnishing of Bank Guarantee have been completed, stalling of the supply of laptops would affect the ultimate beneficiaries, who are the students. In these circumstances, the 4th respondent prays for dismissal of the Writ Petition.

6.Mr.A.L.Somiyaji, learned senior counsel appearing for the petitioner submitted that as per the report dated 25.04.2017 of the ETDC, the sample laptop submitted by the respondents 3 & 4 do not satisfy the requirement and that they do not have the prescribed dual memory channel to process the 4GB data and despite bringing this fact to the attention of the 2nd respondent, it has proceeded to award the Letter of Acceptance to the respondents 3 & 4 in violation of the express stipulation of the Tender Document. Further, the learned senior counsel submitted that the 2nd respondent ought not to have accepted the bids submitted by the respondents 3 & 4, whose laptops are not technically qualified under Clause-4.1.1 of the Tender Document.

7.In support of his contentions, the learned senior counsel relied upon the following judgments:

(i) (1979) 3 Supreme Court Cases 489 [Ramana Dayaram Shetty Vs. International Airport Authority of India and others] wherein

the Hon'ble Supreme Court held as follows:

"...

It is clear from the affidavits and indeed there was no dispute about it that different grades are given by the Bombay City Municipal Corporation to hotels and restaurants and, therefore, there may be a registered IInd Class Hotel but no such grades are given to persons running hotels and restaurants and hence it would be inappropriate to speak of a person

as a registered 11nd Class hotelier. But on that account would it be right to reject the expression "registered 11nd Class hotelier" as meaningless and deprive para (1) of the notice of any meaning and effect. We do not think such a view would be justified by any canon of construction. It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce silence any part of the document and make it altogether inapplicable."

(ii) (1990) 3 Supreme Court Cases 280 [M/s. Star Enterprises and others Vs. City and Industrial Development Corporation of Maharashtra Ltd., and others] wherein the Apex Court held as follows:

"...

10. 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. 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."

(iii) An unreported judgment of this Court dated 16.11.2009 made in W.P.(MD).Nos.2314 and 7447 of 2009 [M.Krishnakumar Vs. 1.The Chief Engineer, PWD Water Resources Organisation, Madurai Region, Madurai - 2 and 2 others] wherein this Court held as follows:

"...

34. In terms of Rule 25, the evaluation can be done only by the Tender Accepting Authority. Thus, going by the statement made in the counter affidavit, it is clear that the first respondent has not evaluated the tender submitted by the petitioner independently, applying his mind to the issue in accordance with the Rules. Rather, the first respondent appears to have been solely guided by the report/endorsement of the second respondent, which, even assuming has been submitted as a report is without jurisdiction."

8. Countering the submissions made by the learned senior counsel for the petitioner, Mr.A.N.Thambidurai, learned Special Government Pleader appearing for the 1st respondent submitted that the tender has been called for in accordance with law and following the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the learned Special Government Pleader also submitted that the Writ Petition is liable to be dismissed since the petitioner has got remedy by way of an Appeal to the State Government under Section 11 of the Act.

9. Mr.M.Vijayan, learned counsel appearing for the 2nd respondent submitted that the 2nd respondent has awarded the tender in favour of the respondents 3 & 4 only after evaluating the technical specification as stated in Clause-4.1.1 of the tender conditions and also following the procedures laid down in the Tamil Nadu Transparency in Tenders Act, 1998. Further, the learned counsel submitted that the petitioner has got remedy by way of an Appeal before the State Government and therefore, the Writ Petition is liable to be dismissed on the ground of availability of alternative remedy under Section 11 of the Act.

10. In support of his contention, the learned counsel relied upon a judgment reported in (2008) 16 Supreme Court Cases 215 [Siemens Public Communication Networks Private Limited and another Vs. Union of India and others] wherein the Apex Court held as follows:

"...

11. According to appellants, since Respondent 2 was not announcing the name of L1 tenderer, they wrote to the respondents on 16-2-2007 inter alia stating that though the price bid had been opened more than three weeks back the name of L1 had not yet been announced. On the basis of read-out price of all the three bidders on 23-1-2007, the Appellant 1 had emerged as the lowest bidder and was, therefore, entitled to be intimated the results of the tender. Grievance was made that they did not get any response from the Respondent 2 and, therefore, they sent a reminder on 22-2-2007. Finally, by letter dated 23-2-2007 a response was received from Respondent 2 acknowledging their representation but the outcome of the tender was not intimated. Therefore, the writ petition was filed. The prayers, as set out in the writ petition have been noted above. In essence the appellants wanted Respondent 2 to award the tender in their favour being the lowest bidder. Counter-affidavits were filed. During the course of the hearing of the writ petition, a preliminary objection was raised regarding non-impleadment of two other bidders and they were impleaded on the oral request of the appellants.

...

13. It was further stated that conditions of the tender were not violated and all the guidelines as per CVC were followed scrupulously while arriving at a package price considering the complete requirement of RFP and there is no genuine grievance of the writ petitioners giving rise to any cause of action in their favour. The writ petitioner has indulged in deliberate distortion and contortion of facts and misrepresented the settled law in this regard.

14. The appellants disputed the above position and it was stated that the Appellant 1's bid was the lowest of the three technically qualified bidders whose commercial bids were opened and Appellant 1 was being ousted by adding an imaginary price of EU 11 billion to its bid, which the appellants never quoted and addition to its bid was unwarranted and amounted to artificially loading the bid. It was in essence stated that so far as Item 11 is concerned, a wrong view was taken on the basis of absurd reasoning. The addition of EU 11 billion to the bid of the appellants on account of Item 11 has resulted in increasing its total bid to EU 28 billion which, on the face of it, is absurd.

...
20. In Master Marine Services (P) Ltd. Vs. Hodgkinson (P) Ltd. (2005) 6 SCC, 138, it was observed as follows:

"11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular Vs. Union of India (1994) 6 SCC, 651. It was observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised of that power will be struck down.

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. 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 principles of reasonableness but must be free

from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

13. In *Sterling Computers Ltd. Vs. M&N Publications Ltd.* (1993) 1 SCC 445, it was held as under:

"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision-making process." ... By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time ... the Courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract."

14. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* (1999) 1 SCC 492, it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specification and whether the person tendering is of ability to deliver the goods or services as per specification.

15. The law relating to award of contract by State and public sector corporations was discussed 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."

21. In *B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd.* (2006) 11 SCC 548 : AIR 2007 SC 437, while summarizing the scope of judicial review and the interference of superior Courts in the award of contracts, it was observed as under:

"65. We are not oblivious of the expansive role of the superior courts on judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

i) If there are essential conditions, the same must be adhered to;

ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is

possible for all the parties to comply with all such conditions fully;

iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

v) When a decision is taken by the appropriate authority upon due consideration of the Tender Document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint."

22. In *Reliance Airport Developers (P) Ltd. V. Airports Authority of India*, (2006) 10 SCC 1, it was observed as follows:

"56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be

referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that 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 (see *State of U.P. v. Renuagar Power Co.*, (1988) 4 SCC 59 : AIR 1988 SC 1737. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work *Judicial Review of Administrative Action* 4th Edition at pp. 285-87 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from

judicial review to those class of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality', the second 'irrationality', and the third 'procedural impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service 1985 AC 374 : (1984) 3 WLR 1174 : (1984) (3) All ER 935 (HL), (commonly known as CCSU Case). If the power has been exercised on a 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 facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See CIT v. Mahindra and Mahindra Ltd., (1983) 4 SCC 392 : AIR 1984 SC 1182). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice thus:

'There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service 1985 AC 374 : (1984) 3 WLR 1174 : (1984) (3) All ER 935 (HL) this is doubtful.

Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.'

77.Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision-making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review."

While arriving at the aforesaid conclusions, this Court took note of the illustrious case of Tata Cellular Vs. Union of India (1994) 6 SCC 651 wherein at paras 77 and 94, it was noted as follows:

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

1.Whether a decision-making authority exceeded its powers?

2.Committed an error of law,

3.committed a breach of the rules of natural justice,

4.reached a decision which no reasonable tribunal would have reached or,

5.abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

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

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secy. of State for the Home Department, ex p Brind, (1991) 1 AC 696 : (1991) 1 All ER 720 : (1991) 2 WLR 588 (HL) Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'.

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible. (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

...

26. In Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517 : (2006) 14 Scale 224, the scope of limited power of judicial review in tender and award of contracts was also lucidly stated in paragraph 19 as follows:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to

make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. 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.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

...

32.Looking at it from another angle, had the Respondent 2 proceeded on the basis of the rate furnished by the appellants in the composite price schedule in the column, "Total Price Euro", then nothing could have precluded them from turning around later on, and seeking to bind Respondent 2 down to the rates as offered by it for a single unit in the original Bill of Materials, the same being a part of the original Tender Documents. Thus, Respondent 2 cannot be faulted for strictly adhering to the rates furnished by appellant No. 1 in its original bid documents.

33.The plea of Petitioner 1 that the software at Item 11 had no connection or relationship with Vehicular Mobile Stations as specified in Items 4.1 and 7 is also not acceptable inasmuch as for the

Vehicular Mobile Stations to be operational and functional, they have to be attached to PC with software to enable a sending/receiving party to send/receive any speech/image, to/from another vehicular mobile. Thus all the three items mentioned at Items 4, 7 and 11 were interconnected and interrelated and only upon being integrated they (sic could) be used for the DRTS. In any case, nothing material would turn on this for the reason that originally, prices were quoted by all the three bidders for Item 11 on a unit rate basis. The figure of 1200 cropped up much later. It is the common case of all the parties that commercial offers were to be made by all the bidders for quantities of 80 systems as per the Bill of Materials enclosed with the RFA. As no quantity was disclosed for Item 11 in the bill of materials, none of the bidders quoted rates for any specific quantity, but did so only for a single unit. Thus the unit rate quote remained the deciding factor for the Committee, while finally analyzing the bids.

34. The contention of the appellants that they had a license for the software under which one software unit would serve 100 units of Vehicular Mobile Terminals and as a result, the total requirement of software unit was only 12 ($12 \times 100 = 1200$) and not 1200 ($1 \times 1200 = 1200$), is misconceived and without any basis for the reason that a perusal of Item 11 of the bill of materials submitted by the appellants does not show that any such remarks were made therefor. In fact, the remarks column in the said bill of materials was left blank. Had such been the intention of Appellant 1, nothing prevented it from indicating so in the remarks column. This conclusion is further fortified by the fact that remarks were specifically given by Appellant 1 in the remarks column of the Bill of Materials in respect of other items, wherein it made observations to indicate wherever the price of a particular item was included in another item or where the price quoted in respect of an item was exclusive of certain other items. Thus, if Appellant 1 wanted to offer the price of one unit which as per its contention, was good to serve 100 users, then the same should have been so indicated in the Bill of Materials. There being no such indication in the original bid documents, Respondent 2 could not have been expected to assume on its own that Appellant 1 possessed a license which permitted to use the software mentioned at Item 11 for serving 100 units. Nor can Respondent 2 be blamed for

using the multiplying factor of 1200 to arrive at the total price of units required under Item 11."

11.Mr.T.V.Ramanujam, learned senior counsel appearing for the 3rd respondent submitted that the 3rd respondent had fulfilled the technical specification criteria mentioned in Clause-4.1.1 of the Tender Document and the 2nd respondent, only after evaluating the technical specification of the 3rd respondent's laptop, had awarded the tender in their favour. Further, the learned senior counsel submitted that the stand of the petitioner that the 3rd respondent was not qualified in the Technical Bid has not been substantiated by any means.

12.In support of his contentions, the learned senior counsel relied upon the following judgments:

(i)2009-5-L.W. 858 [Consolidated Construction Consortium Ltd. Vs. Tidel Park Coimbatore Ltd.] wherein this Court held as follows:

"...

10.Mr.T.V.Ramanujam, learned senior counsel appearing for the plaintiff submitted that the invocation of TTIT Act is unwarranted and the Act does not contemplate resolving disputes between a public sector undertaking floating a tender and the Offeror not agreeing to execute the agreement to be decided by an appellate authority. The intention of the Act is to provide for transparency in the acceptance of the tenders and the appellate authority can only resolve the inter-se dispute between the different tenderers and not between the tenderer and the company floating tenders.

...

19.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.

20. 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 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."

(ii) An un-reported judgment of this Court dated 20.10.2016 made in W.P. (MD). Nos. 14295, 15223 to 15225 of 2016 [R. Kanagavel Vs. The Secretary to Government, Public Works Department, Secretariat and

Ors.] wherein this Court held as follows:

"...

15. In *Tata Cellular v. Union of India* [MANU/SC/0002/1996 : (1994) 6 SCC 651], the Hon'ble Supreme Court has observed as under:

- "94. (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ...
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

16. The Hon'ble Supreme Court in *Michigan Rubber (India) Ltd., v. The State of Karnataka and Others* [MANU/SC/0662/2012 : (2012) 8 SCC 216] held as follows: "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.

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 negative, then there should be no interference under Article 226."

17. Keeping the above principles in mind, the points arise for consideration in the present writ petitions are to be examined."

(iii) (1994) 6 SCC 651 [Tata Cellular Vs Union of India] wherein the Apex Court held as follows:

"...

60. It is submitted that the reasonableness in administrative law means to distinguish between proper use or improper use of power. The test is not the court's own standard of reasonableness. This Court has reiterated this proposition in A.B. Mahajan v. Jalgaon Municipal Council MANU/S/C/0284/1991 : AIR 1991 SC 1153. There is a possibility of fallibility inherent in all fact-findings. To insist upon a strict compliance with each and every Tender Document is not the law. This Court upheld the waiver of technical, literal compliance of the tender conditions in Poddar Steel Corporation v. Ganesh Engineering Works MANU/SC/0363/1991 : [1991] 2 SCR 696. In the present case, the shortlisting, at the first stage, the allotment of cities at the second stage and the selection of franchisees qua cities at the third stage were after evaluating the financial bid by a collectivity of persons at different level. Therefore, possibility of elimination of arbitrariness is conceived in the system itself. Further, the High Court has analysed properly and come to the proper conclusion. That being so, this Court will not interfere by exercising its powers under Article 136 of the Constitution of India. The argument about hidden criteria would not affect or benefit this respondent directly or indirectly. Even otherwise, the hidden criteria cannot be impugned. There is no mention of any particular criterion on the basis of which the selection was to be made. At the second stage what was required to be kept in mind were the

parameters mentioned in paragraph 2.4. The criteria for selection to each of the four cities had to be provided inter alia because the tenderers did not tender for one city alone but for more than one. The allegation of bias on the part of Mr Nair is without substance. It is submitted, whenever disqualification on the ground of personal involvement is alleged :

(i) the person involved (for example related) must be the decision-maker;

(ii) there must be sufficient nexus between the decision-maker and the party complaining in order to justify the real likelihood of bias.

...

91. In *Chief Constable of the North Wales Police v. Evans* [1992] 3 ALL ER 141 Lord Brightman said :

Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC Ord 53 in the following terms;

This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160).

R.V. Panel on take-overs and Mergers, ex p Datafin plc, Sir John Donaldson, MR commented: 'an application for judicial review is not an appeal'.

In *Ionrho plc v. Secretary of State for Trade and Industry*, Lord Keith said; Judicial review is a protection and not a weapon. It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In *Re Amin*, Lord Fraser observed that :

Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. (1) Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

...

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

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

94. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case, shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

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

(ii) Irrationality, namely, *Wednesbury* unreasonableness, (iii) Procedural impropriety.

95. The above are only the broad grounds but it does not rule out addition of further grounds in courts of time. As a matter of fact, in *R v. Secretary of State for the Home Department, ex parte Blundell* [1991] 1 SC 696 Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of nature and degree which requires its intervention".

(iv) (2012) 8 SCC 216 [*Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Ors.*] wherein the Apex Court held as follows:

"...

13. In *Jespar I. Slong V. State of Meghalaya and Ors.* MANU/SC/0466/2044 : (2004) 11 SCC 485, this Court, in paragraph-17, held as under:

"17. ... fixing 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 for unreasonable..."

(v) (2007) 14 SCC 517 [*Jagdish Mandal Vs. State of Orissa and Ors.*] wherein the Hon'ble Supreme Court held as follows:

"...

19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always

seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. 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.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(vi) 2016-3-CDR-1462 Raj [Geo Miller & Co. Pvt .Limited Vs. The State of Rajasthan and Ors.] wherein the Rajasthan High Court held as follows:

"...

17. The argument that the High court must interfere under writ jurisdiction in contractual matters in case the state has acted fairly or arbitrarily does have merit but the court has to be first satisfied that the State has acted in such a manner. In a judgment reported as Jagdish Mandal vs. State Of Orissa Appeal (civil) 5699 of 2006 decided on 11 of December 2006 and it has been held that :-

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or

decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. 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.'

18. Similar view has been taken in judgments rendered in Tata Cellular vs. Union of India (1994) 6 SCC 651, Sri Ram Builders vs. State Of M.P. MANU/S/C/0383/2014 : (2014) 4 SCC 746 from where the ratio culled out is that the courts can interfere if satisfied that there is infirmity in process of taking a decision, decision is irrational, there is procedural impropriety. In the present case the categorical finding of this court is that the petitioner filed this petition without disclosing the fact that it stood blacklisted, did not give full particulars as required in the bid documents, and the decision taken that the

bid documents is non-responsive is not borne out of malafides nor there is any infirmity in the decision making process for this court to interfere."

(vii) An un-reported judgment of the Hon'ble Supreme Court dated 09.05.2017 made in Civil Appeal Nos.1353 of 2017 [Consortium of Titagarh Firema Adler, S.P.A., Titagarh Weapons Ltd. through Authorized Signatory, West Bengal Vs. Nagpur Metro Rail Corporation Ltd., through its General Manager (Procurement) and Ors.] Wherein the Hon'ble Supreme Court held as follows:

"...

27. Before we proceed to deal with the concept of single entity and the discretion used by the 1st respondent, we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the Court. In Montecarlo Ltd. (supra), the Court referred to TATA Cellular (supra) wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the Court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. The two-Judge Bench took note of the fact that in Jagdish Mandal (supra) it has been held that, if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The decisions in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. And Anr. MANU/SC/0300/2005 : (2005) 6 SCC 138, B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors. MANU/SC/8598/2006 : (2006) 11 SCC 548 and Michigan Rubber (India) Ltd. (supra) have been referred to. The Court quoted a passage from Afcons Infrastructure Ltd. (supra) wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in

understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given. After referring to the said authority, it has been ruled thus:

"24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting

and appreciating Tender Documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

(viii) (2016) 8 SCC 622 [Central Coalfields Limited and Ors. Vs. SLL-SML (Joint Venture Consortium) and Ors.] wherein the Apex Court held as follows:

"...

47. The result of this decision is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be a judicial restraint in interfering with administrative action, ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber."

(ix) (2017) 4 SCC 318 [Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) and Ors. Vs. CSEPD- Trishe Consortium and Ors.] wherein the Hon'ble Supreme Court held as follows:

"...

36. From the aforesaid, it is vivid that the Consultant has analysed the offers regard being had to the tender conditions. Be it ingeminated that the analysis and determination made by the financial consultant has been carried out before receipt of any additional document from either side. The documents were called for by the owner from both the qualifying bidders in a transparent manner and the same have been considered at the time of evaluation by the Consultant. Submission of Mr. Sibal is that the evaluation is ex facie defective inasmuch as the Consultant has loaded certain charges as a consequence of which the price has gone up. Mr. Rohatgi, learned Attorney General appearing for BHEL and Mr. Prasad, learned senior counsel appearing for the Corporation would submit that the evaluation is founded on definitives leaving nothing to any kind of contingency. They have referred to the Term

Sheet and what is put up by Industrial and Commercial Bank of China Limited. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd."

13.Mr.Sathish Parasaran, learned senior counsel appearing for the 4th respondent submitted that the 2nd respondent had rightly evaluated the technical specification as mentioned in Clause-4.1.1 of the Tender Document and awarded the tender in favour of the 4th respondent, who is L2 in the tender process. Further, the learned senior counsel submitted that the petitioner has not substantiated that the 4th respondent is disqualified in the Technical Bid and failed to fulfill the technical specification mentioned in the Tender Document. Further, the learned senior counsel submitted that this Court does not sit as a Court of appeal, but merely reviews the manner in which the decision was made. The learned senior counsel submitted that the 4th respondent not only submitted the test report in respect of their laptop, but the same was also assessed by the Technical Committee comprising of experts in the field.

14.In support of his contentions, the learned senior counsel relied upon the following judgments:

(i) (1999) 1 SCC 492 [Raunaq International Ltd. Vs. I.V.R. Construction Ltd and others] wherein the Hon'ble Supreme Court held 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.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes, and the court is satisfied on the material before it, that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

...

18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.

19. A somewhat different approach may be required in the cases of award of a contract by the Government for the purchase of times for its use. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the Wednesbury variety. Balance of convenience would play a major role in moulding interim relief.

...

21. It is unfortunate that despite repeated observations of this court in a number of cases, such petitions are being readily entertained by the High Courts without weighing the consequences. In the case of Fertiliser Corpn. Kamgar Union (Regd.) v. Union of India (1981) 1 SCC 568, this court observed that if the Government acts fairly, though falters in wisdom, the court should not interfere. The Court observed:

"35. A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangement ... emerges. ... The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never

exceeded. If the Directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration.''

...

25. Therefore, when such a Stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counterproductive."

(ii) An un-reported judgment of this Court dated 10.03.2016 made in W.P.No.922, 1211, 2009 and 1759 of 2016 [M/s.Divya Impex, No.1 & 2, Aavalahalli Main Road, Off Mysore Road, Bengaluru - 560 053, Karnataka rep by its Authorized Signatory Vs. The State of Tamil Nadu rep by the Secretary, Home, Prohibition and Excise Department, Secretariat, St.George Fort, Chennai and others] wherein it has been held as follows:

...

24. The Court does not have the expertise to correct the administrative decision. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. Such decisions are made by experts. In view of the nature of the work, the qualifications or eligibility criteria prescribed by the 2nd respondent cannot be said to be unreasonable or discriminatory."

15. On a careful consideration of the materials available on record and the submissions made by the learned senior counsel on

either side, the submissions made by the learned Special Government Pleader and also the judgments relied upon by the learned senior counsels on either side, it could be seen that the petitioner, the respondents 3 & 4 and 3 others participated in the tender for supplying and commissioning of 5 lakhs laptop computers satisfying the technical specification given in the Tender Document during the year 2016-2017. The Government of Tamil Nadu in order to implement the scheme of distribution of laptop computers, free of cost, to students studying in Government Schools, Government Aided Schools and Government Colleges by G.O.Ms.No.1, Special Programme Implementation Department, dated 03.06.2011, entrusted the task of procuring laptop computers to the 2nd respondent (ELCOT). The laptop computers would be procured in a transparent manner through competitive bidding process following the procedures stipulated in the Tamil Nadu Transparency in Tenders Act, 1998 and Rules thereon. The selected suppliers would be required to set up the service and repair centres. Accordingly, ELCOT invited bids through international competitive bidding process to select contractors for supplying and commissioning of 5 lakhs laptop computers satisfying the technical specification given in the Tender Document during the year 2016-2017. The tender eligibility criteria has been provided elaborately in the Tender Document. Since the only grievance of the petitioner is with regard to the laptop computer's specification, it is relevant to extract Clause-4.1.1 of the Tender Document, which is extracted as follows:

4.1 Technical Specification

4.1.1 Laptop Computer Specification

Construction and Externals	Metal/Alloy/reinforced hinges for Display. The casting is ABS of black or Grey colour
Processor (Minimum)	Intel Pentium Dual Core or Equivalent AMD Processor with processor speed of 2.0 GHz or higher
Memory	4GB DDR3 SDRAM @ 1330 MHz or Higher
Display	14 Inch display
Display resolution	1024x768 or Higher
Hard Disk Drive	Minimum of 500 GB SATA with 5400 rpm or Higher
Ports	Minimum 3 USB, Headphone/ speaker out, RJ-45, AC power, in built speaker, VGA/HDMI, Microphone jack
Connectivity	10/100 LAN or Higher
Web Camera	Required

Graphics	Integrated Graphics supporting 128 MB VRAM or Higher
Wireless	Wireless 802.11 b/g/n
Keyboard	Standard keyboard with English & Tamil letters with rupee symbol with integrated touch pad (Tamil layout as approved by Tamil Virtual Academy)
AC Power Adapter	Input 100V - 240V, 50 Hz AC power Adapter
Operation Temperature	0 - 55 Degree Centigrade
Battery Type	Standard Rechargeable 6 cell Li-Ion (45 WHr) with minimum 3 hours backup
Certifications	RoHS and any other certificates
Operating System	a)Windows 10 Pro National Academic Edition or latest should be preloaded b)Antivirus software with atleast one year support shall be preloaded c)BOSS Linux from Centre for Development of Advanced Computing (CDAC) will be sourced by ELCOT and the same shall be preloaded
Standard accessories	Power cable with three pin socket and plug, Power adapter and charger, User manual, Laptop Backpack
Warranty	1 year comprehensive warranty including battery
Qualifying Benchmark	Bapco Sysmark 2007 overall score of minimum 120 or higher with Windows 7 Professional and 4GB memory.
Contents	a)Tamil Unicode font with keyboard interface for typing in Word, Spreadsheet and Presentation will be sourced from Tamil Virtual Academy by ELCOT and will be provided to the Supplier for pre-loading. b)Any other free Educational contents will be sourced from Education Department by ELCOT and will be provided to the Supplier for pre-loading.

Note:

a) The Bidders are requested to get the sample laptop computers tested as per the above specification and

- furnish the test report along with the Technical Bid.
- b) Apart from the above, one sample laptop computer as per the above specification shall be submitted to ELCOT on or before the due date and time of opening of the Tender.
- c) Technical specification will be tested as per the provisions of the Tamil Nadu Transparency in Tenders Act 1998 and the Tamil Nadu Transparency in Tenders Rules 2000 (Chapter IV, Section 13).

16.As per the tender conditions, the memory should be 4GB DDR3 SDRAM @ 1330MHz or higher. The Qualifying Benchmark would be Bapco Sysmark 2007 overall score of minimum 120 or higher with Windows 7 Professional and 4GB memory. In order to be eligible in Technical Bid, the bidders were requested to get sample laptop computers tested as per the specification and furnish the test report along with the Technical Bid. The specimen of sample laptop computer test report has been provided in Annexure - 3 of the Tender Document and the report should be as per the said Format. Under Clause-3.10.1, the bidder should arrange for testing of their sample laptop models by any one of the Testing Centres of Government of India Testing Agencies or State Government Agencies as given below:

- a)Standardisation, Testing and Quality Control (STQC)
- b)Electronics Testing and Development Centre (ETDC)
- c)Electronics Regional Testing Laboratory (ERTL)
- d)Any such equivalent Testing Agencies approved by ELCOT such as IIT, Anna University.

17.Apart from the test report, one sample laptop computer should be submitted to ELCOT on or before the due date and time of opening the tender. In terms of the tender advertisement dated 01.11.2016, the prospective bidders were to submit their bids on or before 06.01.2017 before 04.00 pm at the office of the 2nd respondent. However, the tender submission dates were postponed by ELCOT for two times (i.e.) from 06.01.2017 to 27.01.2017 and again postponed from 27.01.2017 and finally it was called to submit the tender on 03.02.2017. In response to the tender, the following bidders submitted their bids:

- (i) Lenovo (India) Private Limited - 3rd respondent - L1
- (ii)HP India Sales Private Limited - 4th respondent - L2
- (iii)Acer India Private Limited
- (iv)Balaji Machine Works Private Limited
- (v) Mantra Industries Limited - Petitioner - L4
- (vi)Arunnachala Impex Private Limited

18. Out of the above 6 bidders, 3 bidders, viz., 3rd respondent, 4th respondent and Acer India Private Limited, got certification from ETDC, Chennai and the other 3 bidders viz., the petitioner, Balaji Machine Works Private Limited and Arunnachala Impex Private Limited, got certification from ETDC, Bangalore. As per the test report submitted by the bidders, the Testing Centres certified that the sample laptop computers are in accordance with the technical specification mentioned in Clause-4.1.1 of the Tender Document. As per Clause-3.11, the bid should comprise two parts viz., Technical Bid (Envelope A) and Price Bid (Envelope B). Under Clause-3.18, the 2nd respondent shall have the right to reject the bid, if any information mentioned in the bid document is found to be misrepresented or suppressed. As per Clause-4.1.1, the sample laptop computer to be submitted should meet all the technical specification mentioned under the said Clause. Based upon the report and considering the technical aspects, the Tender Scrutiny Committee evaluated the bids and the Board of ELCOT, which is the Tender Accepting Authority took the decision on 20.03.2017 that all the bidders were qualified in the Technical Bid stage. Accordingly, the Price Bids of all the bidders were opened on 22.03.2017. On the basis of the price quoted by the bidders, they were ranked as below:

- L1 - Lenovo (India) Private Limited - 3rd respondent
- L2 - HP India Sales Private Limited - 4th respondent
- L3 - Balaji Machine Works Private Limited
- L4 - Mantra Industries Limited - Petitioner
- L5 - Arunnachala Impex Private Limited
- L6 - Acer India Private Limited

19. On 30.03.2017, the petitioner, who was ranked as L4, sent a legal notice to the 2nd respondent and also gave a representation, raising dispute with regard to the acceptance of the Technical Bid of the respondents 3 & 4. It is pertinent to note that the petitioner has not raised any objections immediately after the acceptance of the Technical Bid of the 6 bidders. The petitioner waited till the opening of the Price Bid on 22.03.2017 and thereafter, sent a legal notice and also gave a representation to the 2nd respondent. After receiving the legal notice dated 30.03.2017 and the representation sent by the petitioner, a Technical Committee Meeting was held on 12.04.2017. One of the member of the Committee is a Professor of Anna University, another member is a Professor in IIT, Madras, the 3rd member is an Associate Professor in IIT, Madras, the 4th member is a Technical Director of National Informatics Centre, Chennai and the other 3 members are Officers of Electronics Corporation of Tamil Nadu Limited. The Committee took into consideration the objections of the petitioner and ultimately found that the AMD Processor A4 Pro 3350B computer meets Bapco Sysmark 2007 Benchmark of 120 or higher. The Committee also took

into consideration the certificate furnished by ETDC conforming that the AMD Processor meets the technical specification. Ultimately, the Technical Committee reached the opinion that the objections raised by the petitioner are not substantiated.

20. It is also pertinent to note that all the 6 bidders, including the petitioner, submitted the certificate from the Testing Centres duly certifying that the sample laptop computer is in accordance with the tender specification. But, after the opening of the Price Bid on 22.03.2017, the petitioner took a "U" turn and disputed the correctness of the certificate. It is also pertinent to note that the tender conditions did not specify that the laptop computer has to be equipped with dual channel memory and dual channel slot. The petitioner has obtained a certificate from ETDC, Bangalore, certifying that the sample laptop computer with Intel Processor and AMD Processor is in accordance with the tender specification. Based upon the test report, the petitioner was qualified in the technical specification stage. After coming to know that the respondents 3 & 4 are L1 and L2 and have offered laptop computer with AMD Processor, with the intention of disqualifying them, the petitioner submitted another amended report certifying that the laptop computer submitted by the petitioner does not comply with the technical specification. However, ETDC, Chennai, certified that the laptop computer submitted by the respondents 3 & 4 qualifies the benchmark and the Technical Committee also concurred with it. When the petitioner themselves have stated that their computer does not comply with the technical requirement, necessarily, the petitioner should be disqualified from participating in the tender process. Merely because the petitioner's laptop computer does not comply with the technical requirements, that does not mean that the laptop computers of the respondents 3 & 4 also do not qualify with the technical requirements. The petitioner themselves have conceded that their computer does not comply with the technical requirements. Therefore, the admission made by the petitioner should be accepted. In order to establish that the laptop computers of the respondents 3 & 4 do not comply with the technical requirement, the petitioner should have substantiated the same by producing all evidences. However, the stand taken by the petitioner is that since their computer does not comply with the technical requirement and therefore, the computers of respondents 3 & 4 also do not comply with the technical requirement, cannot be accepted.

21. 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. If the respondents 1 & 2 act reasonably, fairly and in public interest in awarding the contract, the interference by the Court is very

restrictive since no person can claim a fundamental right to carry on business with the Government. A Court before interfering in tender or contractual matters in exercise of power under judicial review, should satisfy itself whether the process adopted or decision made by the Authority is malafide or intended to favour some one or whether the process adopted or decision made is so arbitrary or irrational that the Court can say that the decision is such that no responsible authority action reasonably and in accordance with relevant law could have reached and whether the public interest is affected. If the answer to these questions are in the negative, then there should be no interference under Article 226 of the Constitution of India.

22.The Court does not have the expertise to correct the administrative decision. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. Such decisions are made by experts. In view of the nature of the work, the qualifications or eligibility criteria prescribed by the 2nd respondent cannot be said to be unreasonable or discriminatory.

23.When the Technical Committee, consisting of the experts in the field, reached the opinion that the objections raised by the petitioner are not substantiated and found that as per the reports given by ETDC, all the laptop computers with AMD PRO A4-3350B APU processor have passed the test and conformed the requirement as specified in the tender, no malafide can be attributed to the Technical Committee and the same should be accepted. The 2nd respondent has validly acted as per the tender conditions in full compliance and awarded the tender to the respondents 3 & 4. There is no illegality or procedural irregularity and everything has been done after following due process.

24.The respondents 3 & 4 have satisfied all the eligibility conditions laid down in the Tender Document and in particular, have satisfied all the technical specification pertaining to the Qualifying Benchmark Bapco Sysmark 2007 overall score of minimum 120 or higher with Window 7 Professional and 4GB memory. After the opening of the Price Bid on 22.03.2017 and after obtaining the Technical Committee's report dated 12.04.2017, the Letter of Acceptance were issued to the respondents 3 & 4 on 02.05.2017. Apart from the reasons stated above, the petitioner has also

filed the Writ Petition raising disputed question of fact in the Writ Petition filed under Article 226 of the Constitution without exhausting the effective alternative remedy of approaching the Appellate Authority viz., the State Government under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998. When the effective alternative remedy by way of an appeal is provided under the Act, the petitioner should have exhausted the said remedy before the Appellate Authority.

25.For the reasons stated above, the judgments relied upon by the learned senior counsel appearing for the petitioner are not applicable to the present case.

26.The instant tender pertains to a major social welfare scheme of the Government of Tamil Nadu and is intended to benefit lakhs of students by way of supply of laptops. Any delay in supplying of laptops would affect the future of the students. The petitioner has filed the Writ Petition in its own vested interest and they cannot be allowed to hold the interest of lakhs of students to ransom in this manner.

27.In these circumstances, the Writ Petition deserves to be rejected. Accordingly, the Writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

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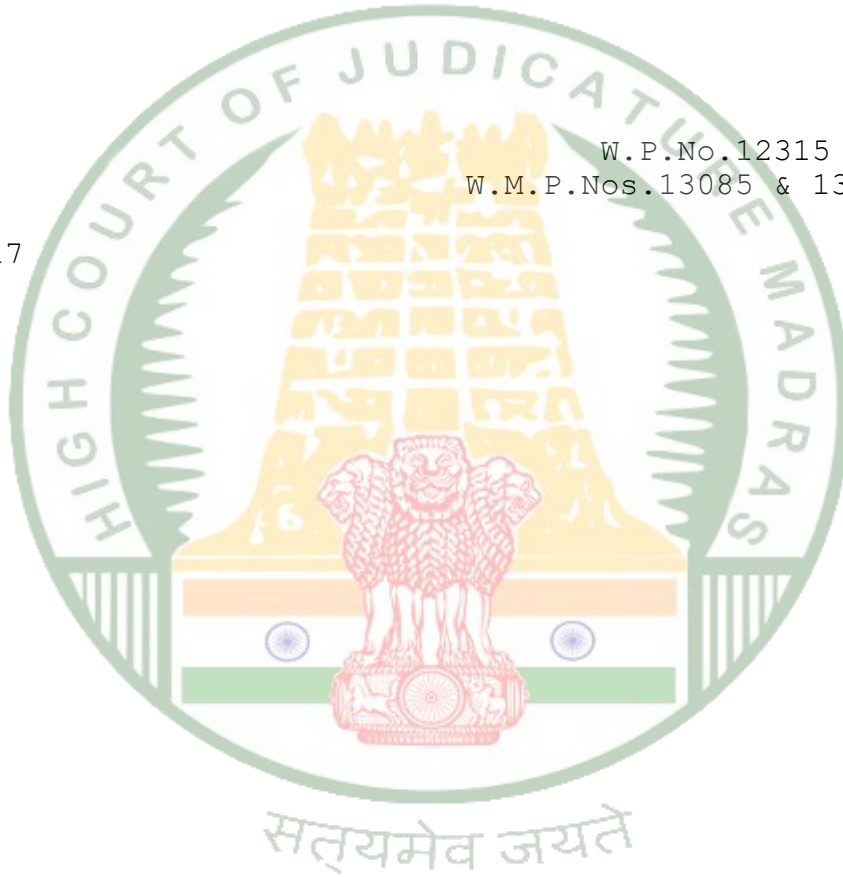
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W.P.No.12315 of 2017 and
W.M.P.Nos.13085 & 13086 of 2017

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