

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On 17.11.2017

Delivered On 07.12.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.9592 of 2015

CSEPDI-TRISHE CONSORTIUM,
Rep. by its Managing Director,
Mr.Sanjay K.Pillai,
No.6, Kasturi Rangan Road,
Alwarpet, Chennai 600 018. ... Petitioner

Vs.

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

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

3.The Chief Engineer/Projects,
TANGEDCO, Fifth floor, Western Wing,
NPKRR Maaligai,
144, Anna Salai, Chennai 600 002.

4.Bharat Heavy Electricals Limited (BHEL)
Rep. by its Chairman,
BHEL House, Siri Fort,
New Delhi 110 049.

(R4 is impleaded as per order dated 16.06.2015
by MSNJ in M.P.No.3/2015 in W.P.No.9592/2015) ... Respondents

PRAYER: Writ petition filed under Article 226 of the
Constitution of India praying for issuance of Writ of
certiorarified mandamus to call for the records of the Board of
the first respondent culminating in its impugned proceedings
dated 13.03.2015 recording the decision to close/lodge the
tender bearing SPEC No.SE/C/UP/EE1/OT No.1/2013-14 in respect of
the 2 X 660 MW Udangudi Supercritical Thermal Power Project,

published in the State Tender Bulletin dated 26.03.2015, quash the same and direct the respondents to award the Tender to the petitioner in terms of the Tender/Bid document bearing SPEC No.SE/C/UP/EE1/OT No.1/2013-14 taking into account the petitioner's bid which has been evaluated as the Lowest Bid (L1).

For Petitioner: Mr.M.Ravindran
Senior Counsel
for M/s.M.Balaji

For Respondents: Mr.C.Manishankar for R1 to R3
Additional Advocate General
Assisted by Mr.Abdul Saleem
for Ms.Vandana Parasuram
Mr.A.L.Somayaji for R4
Senior Counsel
for M/s.S.Ramasubramaniam

O R D E R

This writ petition is filed challenging the proceedings of the first respondent dated 13.03.2015, closing/lodging the tender bearing SPEC No.SE/C/UP/EE1/OT No.1/2013-14 in respect of the 2 X 660 MW Udangudi Supercritical Thermal Power Project, published in the State Tender Bulletin dated 26.03.2015, quash the same and consequently seeking for a direction to the respondents to award the Tender to the petitioner in terms of the Tender/Bid document bearing SPEC No.SE/C/UP/EE1/OT No.1/2013-14, taking into account the petitioner's bid, which has been evaluated as the Lowest Bid (L1).

2. The case of the petitioner is as follows:

a) The petitioner is a Consortium of Trishe Energy Infrastructure Services Private Limited, a Company registered under the Indian Companies Act and Central Southern China Electric Power Design Institute (CSEPD), which is the Lead Partner of the petitioner Consortium, a Chinese State-owned company established in 1954. The Said company is one of the largest enterprises in China for electric power survey and design and general engineering contracting. The petitioner's financial partner is Industrial and Commercial Bank of China (ICBC).

b) The first respondent, through the second respondent, issued tender/bid document bearing SPEC No.SE/C/UP/EE1/OT No.1/2013-14 for setting up 2X 660 MW Udangudi Supercritical Thermal Power Project. Originally, the first respondent entered into a joint venture with the fourth respondent herein and however, as there was no progress, the Government of Tamilnadu

disassociated itself from the fourth respondent and the joint venture was called off. Thus, the first respondent called for the above global tender. The tender notification was issued on 07.04.2013. The first respondent floated identical tenders for Ennore and Udangudi Thermal Power Projects on a Debt-cum-EPC basis putting the onus of arranging the lowest interest rate debt for the first respondent on the bidders. The bid was evaluated in two stages, viz., a) Techno-Commercial Evaluation-Stage I, b) Financial Evaluation-Stage II.

c) The petitioner participated in both the tenders. The first respondent by adopting a partisan, illegal, malafide and flawed evaluation, awarded the Ennore project to the fourth respondent. The petitioner filed W.P.No.26762 of 2014, challenging such award of the Ennore project in favour of the fourth respondent. The said writ petition was dismissed by the learned Single Judge on 07.04.2015, against which, the petitioner preferred writ appeal. The Division Bench of this Court allowed the appeals and directed the Corporation to evaluate the price bid of the petitioner and record detailed reasons for the decision and communicate the same to the petitioner. The said decision of the Division Bench was challenged before the Hon'ble Supreme Court by the TANGEDCO. By an order dated 18.10.2016 reported in 2017(4) SCC 381, the Hon'ble Supreme Court allowed the appeal and set aside the order of the Division Bench. However, the present dispute is with regard to Udangudi project.

d) In respect of the subject matter tender (Udangudi project), the pre bid meeting was held on 23.05.2013 and 25.05.2013. On 19.07.2013, four bidders including the petitioner and the fourth respondent submitted their bids. The petitioner paid a sum of Rs.5 crores towards EMD. During the preliminary examination, two of the bidders were disqualified, since they did not meet the Bid Qualification Requirements. The petitioner and the fourth respondent were found qualified and thus, they were considered for technical evaluation.

e) 13.11.2013, the first respondent invited the petitioner to attend the Techno-Commercial Meeting. Clarifications sought for by the respondents 1 and 2 were given in the post bid clarification meeting held between 18.11.2013 and 24.12.2013. Thus, the Techno-Commercial evaluation was completed in January 2014. After 9 months, the third respondent issued a letter dated 13.10.2014, calling upon the petitioner to submit a Supplementary Price Bid. Accordingly, the petitioner submitted its Supplementary Price Bid on 18.10.2014. Thereafter, the price bid submitted by the petitioner and the fourth respondent were opened in their presence. The petitioner had quoted a lumpsum price of Rs.8,025.3843 crores enclosing a discount cover

of 0.30% on the rupee portion of the offer as allowed under the tender document. As against the petitioner's bid offering a loan amount equivalent to 85% of the EPC cost with interest at the rate of 7.2% p.a., the fourth respondent offered a loan amount equivalent to 75% of the EPC cost at an interest rate of 12.25%. Thus, the petitioner has emerged as the lowest bidder (L1) by about Rs.137 crores and lower cash outflow of Rs.1400 crores.

f) At the request of the third respondent acting on behalf of the first respondent, the validity of the bids along with validity of the term sheet was extended from time to time from 2014. Again on 09.01.2015, the bidders were requested to extend the validity of the price bids. Accordingly, the petitioner extended the same till 16.02.2015. Once again on 09.02.2015, similar request was made and the petitioner extended the validity till 31.03.2015.

g) When the petitioner was waiting to receive the intimation on the results of the price bid opening, they were shocked to read reports in the newspapers, about the decision of the first respondent to reject the bids for Udangudi project because of the technical deficiencies in the bids and to scrap the said tender. The petitioner filed a writ petition in W.P.No.8088 of 2015 for a mandamus directing the first respondent herein to furnish the order/proceedings of the board of the first respondent rejecting all the bids and scrapping the tender. When the matter was taken up on 26.03.2015, the State Tender Bulletin dated 26.03.2015 containing the reasons for rejecting the bids and closing/lodging the tender was produced. The petitioner was not served with the said bulletin and only a photocopy of pages 81, 82 and 83 were handed over.

h) Newspaper reports disclosed that the Consultant in its report has stated that the petitioner has emerged as L1 and that there are deficiencies in both the bids and acceptance of these bids was the decision to be taken by the first respondent. The decision to reject the bids and lodge the tender is against public interest, suffers from non application of mind, bereft of reasons, arbitrary, unfair, irrational, illegal, discriminatory and malafide.

i) The reasons stated in pages 81, 82 and 83 of the State Tender Bulletin dated 26.03.2015, for rejecting the petitioner's bid and lodging the tender are unsustainable. The defects/deficiencies pointed out and the petitioner's response to the same are stated in detail at paragraph No.23 of the affidavit.

j) From the above response of the petitioner, none of the reasons stated by the Board of the first respondent for rejecting the petitioner bid and lodging the tender are legal and sustainable.

3. The respondents 1 to 3 filed their counter affidavit, wherein it is stated as follows:

a) The writ petition is not maintainable either in law or on facts. The respondents have floated the tenders, but that was merely an invitation to offer, which under any circumstances, cannot be construed as an assurance that the offer made by the tenderer would be accepted, regardless of how flawed the offer might be or how counter-productive it would be to the respondents' business interest. No binding obligations can arise between the parties unless an agreement is executed between them after due acceptance of the bid. In this case, it has not been done. Therefore, this Court would not direct the respondents to enter into a contract, merely because the petitioner has presented a bid. The petitioner's bid is a defective bid to say the least. Clause 7.3 and 11.11(g), Section-1, Volume-1 of the Tender Specification make it very clear that the rejection of a bid is the sole discretion of the respondents and the bidders would not have any cause of action for challenging such action. Thus, the petitioner is estopped from maintaining the present writ petition, since they have accepted the said clause and submitted their tender. Even otherwise, as per Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998, an appellate remedy is available to the petitioner before the Government. Without invoking the same, the petitioner cannot maintain the present writ petition. The petitioner has misconceived the relief. They have blatantly manipulated the tender process. The price bid evaluation will be based on the petitioner's financial bid showing clearly and unequivocally how much the liability of the respondents would be for the total project. However, the petitioner has withheld its financial bid to be submitted in Cover-B of the bidding process. It is only after knowing the values of the bid submitted by the other tenderer, viz., the fourth respondent, the petitioner made its financial bid at the supplementary stage, thereby securing an unfair and undue advantage over the other bidder. This is contrary to what the tender documents mandate. The bidders cannot submit substantive aspects of the financial price of the project at the supplementary stage. Even here, the petitioner has not clearly and unconditionally provided the exact financial cost of the project which would fall to the respondents.

b) The validity of the bid of the petitioner had expired on 31.03.2015 itself. Therefore, the petitioner's bid has lapsed by efflux of time and the question of accepting the

petitioner's bid does not arise at this point of time. Thus, nothing survives in this writ petition and the same is liable to be dismissed as infructuous.

c) The bid submitted by the petitioner suffers from a fatal flaw inasmuch as the value of the Interest During Construction (IDC), financing charges/costs, drawdown schedule and the financial workings for IDC and loan repayment were included in the calculation sheet of the supplementary bid only. Further, even in the supplementary bid, the rate of interest was not quoted by the lender as per bid requirement. As per the bid conditions, the bidder should have submitted all these details in the original Price bid (Cover B) and not in the Supplementary Price bid.

d) There had been a separate tender for Ennore SEZ project, which after due evaluation and consideration, had been awarded to the fourth respondent. The petitioner herein challenged the award of the said project to the fourth respondent in W.P.No.26762 and 27529 of 2014, raising almost the same grounds as raised herein and on the same grievances as narrated in the present writ petition. All these issues were already duly considered by this Court in its order dated 07.04.2015 and rejected.

e) In this case, the bidders of the subject matter bid submitted the Techno Commercial Bid (Cover A) as well as the price bid (Cover B) at the same time. The petitioner had submitted both Cover-A and Cover B on 19.07.2013. The Cover-A was opened on 19.07.2013. The Cover-B was not opened but kept in safe custody. The loading on performance values of the petitioner as well as the fourth respondent which are contained in the Cover-A were read out during the tender opening stage. The total value of loading of the fourth respondent was Rs.4,64,64,100 and that the total loading value of the petitioner is Rs.1263,54,35,217.90. In other words, the loading on performance for the petitioner's system would be far more than the fourth respondent's system, making the petitioner's system so much more inefficient than the fourth respondent's system.

f) The third respondent requested the petitioner on 13.10.2014 to submit Supplementary Price Bid for withdrawing deviations in 6 items viz., oil pumps, tubes, steam coils, etc., Therefore, it was open to the petitioner to submit the price only in respect of those items, which have been specifically indicated by the third respondent in the Annexure II in letter dated 13.10.2014. The petitioner was not permitted to revise or alter the price in respect of the original price bid. Therefore,

the nature of the Supplementary Price Bid is in fact extremely limited and the petitioner cannot alter the scope of the original price bid, which had already been submitted on 19.07.2013. It is pertinent to state that the petitioner has not submitted the financial bid in the original price bid in Cover B. The petitioner submitted its Supplementary Bid on 18.10.2014.

g) The price bid as well as the supplementary bids of the petitioner and the fourth respondent were opened on 18.10.2014. Upon opening the price bids and supplementary price bids, the respondents have read out the price quoted by the fourth respondent and the terms of the finance, interest rate, etc., However, when the respondents opened the petitioner's price bid, it was found that the Cover-B did not contain the financial terms of the project. Thus, it was discovered that the petitioner's bid suffered from fatal flaws inasmuch as the value of the IDC, financing charges/costs/drawdown schedule and the financial workings for IDC and loan repayment were not included in the original Cover-B. These values were included only in the calculation sheet of the supplementary bid submitted on 18.10.2014. As per the bid conditions viz., Clause 11, the bidder should have submitted all these details in the original price bid (Cover-B) and not in the supplementary price bid. This is significant because when the petitioner has submitted the financing terms and other aspects of the project, the petitioner had already known the loading on performance of the fourth respondent, which was read out during the opening of the techno-commercial bid. All these aspects had enabled the petitioner to manipulate the financial terms to gain an undue advantage over the other bidder to the project.

h) As per Clause 11.4 of the tender conditions, Cover-B should contain the price schedule and the complete term sheet including the rate of interest and quantum of debt. Admittedly, the petitioner did not provide these values in the Cover-B. However, the petitioner had given these highly significant and crucial values only in the Supplementary Price Bid in response to the letter of the third respondent requiring the petitioner to submit the price for withdrawing deviations as described in the letter for tubes, steams coils and the like.

i) The Consultant, appointed to evaluate the tenders, had specifically referred in his report the fact that the petitioner had submitted drawdown schedule and financial charges only in the Supplementary Price Bid, which is questionable. At this stage, the loading on performance was already known to the petitioner on the date of opening of Cover-A, which gave the petitioner an undue advantage to offset the loading on performance. It is because the petitioner has manipulated the

bidding process so flagrantly, the respondents have decided to reject its bid.

j) The petitioner had not submitted any terms of finance either in original bid or in the supplementary bid from the associated lender i.e., ICBC. Thus, it is established that the finance proposal from the lender was not enclosed in the original as well as in the supplementary bid. As per clause 32 of the tender specification, price bid evaluation is based on the drawdown schedule and the interest rate is to be quoted only by the lender. But in the petitioner's Cover B, such drawdown schedule and the interest rate quoted by ICBC were not there and therefore, the petitioner's bid cannot be evaluated.

k) The Consultant in their report stated that on the examination of the bids, it was observed that both the bids suffered from one or other deficiency, both in terms of data and the procedure followed for undertaking a detailed bid evaluation.

l) Mere extension of validity of the bid does not, by itself, give any right or cause of action to the petitioner to demand that the bid be accepted and that the contract be awarded. Every decision in the Meeting of the Board of Directors was taken after due consideration and deliberations. The Board of Directors, after deliberating all the issues in detail, decided to lodge the tender.

m) The statement of the petitioner that it has quoted the interest rate as 7.2%, which was permitted by the lender, is an indirect admission that the petitioner has not followed the Specification Clause 17 of the Section 1 Volume 1 of the bid documents. The Consultant also indicated that no confirmation by the lender ICBC (Industrial and Commercial Bank of China) on the correct interest rate to be adopted was available for evaluation. The petitioner itself has accepted that there is no declaration by the ICBC on the issue of interest on interest. There must be a specific statement by the lender that no such interest would be levied.

n) The price bid must be unconditional and unambiguous. Any condition, the bidder wants to be imposed, can be done only in Techno Commercial Bid and not in the price bid. But in the price bid (Cover B) SI.No.3 of price schedule provides that "Reinforce and retrofitting fees for heavy cargo transportation by road" would not be covered by the price bid. However, the head providing for the exclusion of the price in the techno commercial bid is not the same as the head provided in the price bid. This condition provided in the price bid was not included in the Exclusions discussed in the techno commercial bid meetings held on 19.11.2013 and 20.11.2013. Thus, there are

justifications and reasons on the part of the respondents in concluding that the price bid is not full and complete and an unconditional one. In other words, the petitioner was seeking to saddle the respondents with hidden costs.

o) The petitioner's contention that it is the lowest evaluated bidder is false. The Consultant has not declared either BHEL or the petitioner as the successful bidder. No status of L1 was declared by the TANGEDCO to the petitioner at any point of time. The respondents have acted in a fair manner in rejecting both the bids without showing any partiality to either bidder, as both the bids were found to be defective.

p) The petitioner has merely furnished EMD of Rs.5 crores to the Udangudi tender process. Apart from this, the petitioner has not incurred any other incidental expenses during the tender process. The TANGEDCO, a public sector undertaking cannot be directed to award the tender to the petitioner, when the petitioner's bid is highly defective. Public interest would not suffer, if the petitioner is not awarded the contract. On the contrary, awarding the contract to the petitioner is highly prejudicial to the public interest.

q) The State is entitled to free play in the contractual matters. There is no legal right vested on the petitioner to demand that the respondents should enter into a contract with them merely upon the submission of an offer by them.

4) The respondents 1 to 3 filed an additional affidavit dated 09.10.2017, wherein it is stated as follows:

The Board in its meeting held on 13.03.2015 decided to reject both the bids and go for fresh tender without Debt Financing. The said decision was published in the State Tender Bulletin on 26.03.2015. The TANGEDCO floated fresh tender for the establishment of Udangudi Thermal Power Project Stage-I under EPC Contract without Debt Financing, under Phased Manufacturing Program system with Manufacturing Facility in India. Pre-bid meeting for the fresh tender was conducted on 16.06.2015 and more than 10 participants attended the meeting. The opening of the Techno-Commercial bid was fixed on 02.07.2015. Whiles, this Court by order dated 17.06.2015 directed TANGEDCO not to open the bids of the new Tender until passing orders in the present writ petition. In compliance with the direction of this Court, the TANGEDCO decided to postpone the receipt of the bids to 17.07.2015. Aggrieved against the above interim order, TANGEDCO filed W.A.No.943/2015 and by order dated 30.10.2015, the Division Bench modified the interim order by permitting the TANGEDCO to proceed to process the bids received pursuant to the fresh tender notification dated

21.04.2015 and however by stating that the award of the contract to any successful bidder should await further orders to be passed in the Stay Petition in those writ appeals. Pursuant to the order dated 30.10.2015, the TANGEDCO opened the Techno - Commercial Bid received from the only bidder namely M/s. BHEL on 15.12.2015. The post bid meetings were conducted on 28.6.2016, 29.06.2016 and 30.06.2016. Further meetings were conducted on 12.07.2016 and 13.07.2016. Pursuant to the above meetings price bid was opened on 08.08.2016. The petitioner did not participate in the bid floated on 21.04.2015. After the 3rd round of negotiation held on 12.01.2017, M/s. BHEL offered to complete the work at an estimate of Rs.7,762.00 crores. The further negotiation was held on 06.02.2017 wherein M/s. BHEL offered to complete the project at the cost of Rs.7,359 crores. The above negotiated price has been accepted by TANGEDCO as the final price and the same was accepted by the Board of TANGEDCO in its 69th Board meeting dated 28.03.2017 and the Board directed to issue the Letter of Intend to M/s.BHEL after getting the clearance from this Court. Subsequently, the Division Bench, by order dated 13.09.2017 disposed of the Writ Appeal No.943 of 2015 by directing the writ petition to be taken up for final disposal and pending disposal of the writ petition, the interim order dated 30.10.2015 passed in the writ appeal was continued to operate. It was also observed that in case, the writ petitioner has to fail in the writ petition, the single Judge will work out the equities and issue appropriate direction including direction to award compensatory costs. Pursuant to the order dated 30.10.2015, the TANGEDCO proceeded with the tender process and successfully completed the price negotiations with the successful bidder and as such the process of tender is complete except the award of contract to the successful bidder. Since the entire project is of great public importance, the present writ petition is liable to be dismissed as devoid of merits. The scope of tender issued on 21.04.2015 is entirely different from the earlier tender issued on 07.04.2013. The tender issuing authority has every right to cancel the tender and call for fresh tender. The fresh tender issued on 21.04.2015 has not been challenged by the petitioner.

5) The writ petitioner filed an additional affidavit dated 11.11.2017, wherein it is stated as follows:

The petitioner has the required expertise and experience to handle projects whereas the 4th respondent has to deploy external consultants to manage and execute the project. The petitioner has spent valuable money, time and resources with the legitimate expectation that it would be treated fairly and equally. If the bid of the 4th respondent could be acceptable for the Ennore project, then the petitioner's bid also should have been accepted in the present Udangudi project. The

respondents issued fresh tender when the case was pending before this Court. This shows the malice and pre-conceived plan to award the tender to the 4th respondent. There is no provision for lodging of the tender, especially after the opening of the financial bids. The first respondent is not really sitting on a pile of cash for it to fund its own project, it is having a deficit of over Rs.9,000 crores for the recently ended financial year. There is no possibility for the first respondent to get debt at 7.2% - 7.5% interest that too for such a huge amount in India. Hence, the petitioner being L-1 has offered the most feasible and beneficial project cost to the first respondent.

6) A memo dated 11.11.2017 is filed by the counsel for the petitioner wherein it is stated that the question of awarding the compensatory costs will arise only if this Court gives a finding that the delay was caused by the petitioner and that the petitioner is not responsible for the delay in this proceedings.

7) The 4th respondent filed a counter affidavit dated 15.11.2017, wherein it is stated as follows:

According to the petitioner, CSEPD I is only a Design Institute and all its purported achievements are in the realm of Design. Infact, Petitioner does not have the technology for a Supercritical Thermal Power Project. At the time of opening of Techno-Commercial Bid COVER A, it was noticed that the petitioner has submitted Deed of Joint Undertaking with M/s. Harbin who is the Original equipment manufacturer (OEM) for boiler, Turbine and Generator for their participation in the tender. The 4th respondent on the other hand is fully vested with the know-how, expertise and technology to execute Supercritical projects, having acquired and indigenized the same and also set up state of the art manufacturing facilities in India. The petitioner is put to strict proof of its claim of having executed projects at Sasan, Chattisgarh, Orissa, Manhan, Salaya and Ballia. The petitioner has not filed even a single scrap of paper to prove its involvement in these projects. It is submitted that projects such as those mentioned by the petitioner involve different contractors executing several packages of works. Even assuming that the petitioner has executed such packages, the same cannot be equated to execution of the subject-matter Tender, which is more comprehensive and of wider scope. The 1st respondent has rejected the bids of both the petitioner and the 4th respondent. The petitioner had withheld the Debt Financing Proposal details (interest rate, draw Down Schedule etc.) submission as part of COVER-B (Original price bid) submitted on 19.03.2013 and not submitted the same at the appropriate juncture as per the tender conditions, and only

submitted it along with its Supplementary bid which is a flagrant violation of the tender conditions. As a result, the Loading of Performance was known to the petitioner at the time of opening of the Techno-Commercial bid COVER-A on 19.07.2013 and the Petitioner thus gained an undue advantage over the 4th respondent. This fact has been pointed out by the Consultant in its Report. The disputes relating to the Ennore tender and all of the Petitioner's objections were finally decided by the Hon'ble Apex Court in its Judgment in 2016(14) SCC 318, after perusing the Consultant's Report therein as well as all relevant documents. The petitioner is drawing a false equivalency between the present Tender and the Ennore Tender. The two Tenders were issued without reference to one another and the bids submitted under the same were not identical. The Tenders and the bid submitted are completely independent and cannot be said as related to one another in any manner. The Tender itself contains several provisions, including Clauses 7.3, 11.11(g) and 29(xvii) wherein bids may be rejected by the 1st respondent and also for cancellation of the tender itself. The petitioner deliberately withheld its Debt Financing Proposal details (interest rate, Draw down Schedule etc.) submission as part of COVER-B (Original price bid) submitted on 19.07.2013 and submitted them along with the Supplementary Bid, despite being aware that doing so would result in a violation of the Tender conditions and result in rejection of its bid. As a result, when the Techno-Commercial bid COVER-A was opened on 19.07.2013, the Petitioner was made aware of the loading on performance of the 4th Respondent which was about Rs.1,200 Crores. With this knowledge, the petitioner then submitted its Supplementary Bid on 18.10.2014 containing the critical details of the Debt Financing Proposal like interest rate, Draw Down Schedule etc. It is submitted that the Petitioner has gained a clear undue advantage by its actions, which are also ex-facie contrary to the Tender conditions. It is pertinent to note that the consultant in its Report has noticed this aspect and observed that the same is "questionable as the loading on performance is known to the bidder on the date of opening of Cover A and this gives the bidder an undue advantage of offset the loading on performance". The petitioner has not been identified as L1 and its bid was rejected and thus the petitioner cannot claim any right to negotiate with the 1st respondent. In the fresh (new) Tender, negotiations were held only after acceptance of the 4th Respondent's bid and identification of the same as L1 for the purpose of reduction of price, which is in line with section 10 (3) of the Tamil Nadu Transparency in Tenders Act, 1998 and also the general practise adopted in tenders of this nature. The petitioner is liable to pay compensatory costs to the 4th Respondent in the light of the damages and loss caused by it. The Writ petitioner having permitted the processing of the fresh tender, without challenging the order dated 30.10.2015, is

liable to pay compensatory costs to the 4th respondent for the loss/damages suffered by it on account of the huge delay caused by the petitioner.

8) The respondents 1 to 3 filed a reply affidavit dated 16.11.2016, wherein it is stated as follows:

The petitioner is trying to confuse this Honourable Court by raising the issue of Ennore Tender which has attained finality pursuant to the decision of the Honourable Supreme Court on 18.10.2016. It is significant to point out that Clause 11.11(g) of the Tender Conditions specifically state that TANGEDCO reserves the right to reject any or all of the bids without assigning any reason. Also, Clause 25.1 states that it is not binding on TANGEDCO to accept the lowest tender or any tender at all. In any case, the Petitioner was fully aware that after the earlier tender was lodged, TANGEDCO floated a new tender. Despite having knowledge, the Petitioner failed to challenge the same. Hence, what the petitioner cannot achieve directly, is being tried to be achieved indirectly in this writ petition, which cannot be permitted.

9) Mr.M.Ravindran, learned Senior Counsel appeared and argued for the petitioner. A written submission is also filed by the learned counsel for the petitioner. The sum and substance of the submissions made on behalf of the petitioner are as follows:

The petitioner is expertised in executing supercritical thermal power project, over the past 60 decades. The petitioner has designed and executed six projects in India itself. On the other hand, the fourth respondent has to deploy external consultants in order to manage and execute the project. When the price bid was opened, the petitioner had clearly emerged as the lowest bidder. The petitioner had placed before the first respondent a financial bid for a loan sanction of 80% of the project cost, which was higher than what was specified in the tender document. The petitioner had offered a lower rate of interest of 7.5%, compared to the fourth respondent's 12.25%. The respondents 1 to 3 were working in order to favour the fourth respondent and thus, it shows institutional malice. After the evaluation was done by the Consultant on 18.10.2014, the petitioner had emerged as the L1 and the Consultant had not expressed any difficulty in carrying out the evaluations on account of any alleged defects, deficiencies or insufficient data. Therefore, rejecting the petitioner's bid was to only favour the fourth respondent. The reasons stated by the first respondent in the impugned order are flimsy unsubstantiated. The petitioner and the fourth respondent had submitted their bids in an identical manner in respect of Ennore Power Project

and the tender conditions and bid documents were identical to the present Udangudi project. Ennore bids were found to be responsive, though they allegedly suffered the same deficiencies as are being cited now malafidely. If the bid of the fourth respondent could be accepted for Ennore project, then the petitioner's bid would also be acceptable in the present Udangudi project. The Consultant had only recommended to obtain certain clarifications from both the bidders and not for lodging the tender. There is no provision for lodging the tender especially, after opening of the financial bids. If all the bids submitted by the shortlisted bidders were not responsive, they would have been rejected at the threshold itself. The first respondent has contradicted itself wherein they relied on the Consultant's report in respect of the Ennore project, to reject the bid of the petitioner herein. If the same treatment had been given as has been given to the fourth respondent for negotiations to arrive at a lower price, the petitioner would have reduced the price further. The petitioner has not given any undue advantage as alleged by the first respondent, which is baseless and a misconception. Memo dated 11.11.2017 filed by the petitioner giving out the list of dates and events would show that the petitioner is not responsible for delay in the proceedings. The respondent will be bound by the principle of promissory estoppel, having declared the petitioner as L1. In this aspect, the decision of the Apex Court made in the case of M/s.Motilal Padampat Sugar Mills Co. (P) Ltd., vs. State of Uttar Pradesh, reported in 1979 SCC (2) 409, can be referred to. Further, the findings rendered by the Apex Court in Ennore project case reported in 2017(4) SCC 318, Tamilnadu Generation and Distribution Corpn. Ltd vs. CSEPDIL-TRISHE Consortium, more particularly, at paragraph 36 will also support the case of the petitioner.

10) Mr.C.Manishankar, learned Additional Advocate General appeared for the respondents 1 to 3 and made his submissions. A written submission is also filed by the learned Standing counsel for the respondents 1 to 3. The sum and substance of the submissions made on behalf of the respondents 1 to 3 are as follows:

a) The writ petition is not maintainable, since the TANGEDCO cancelled the entire tender process, which is under challenge and issued a fresh tender by notification dated 21.04.2015, which has also been acted upon and completed except for awarding the tender to the successful tenderer i.e., the fourth respondent. Interference of this court in the matter of tenders is very limited to the extent on decision making process and not the decision itself.

b) The present writ petition has become infructuous, as the writ petitioner has not participated in the subsequent tender and therefore, he cannot challenge the same in the present writ petition, as it has not been prayed for. The tender notification issued on 07.04.2013, is only an invitation to offer and not an assurance that any offer made will be acceptable. Even otherwise, the writ petition is not maintainable, as there is an appeal provision under Section 11 of the Tamilnadu Transparency in Tenders Act, 1998, before the Government.

c) On 07.04.2013, tenders were floated. On 19.07.2013, tenders were opened wherein four tenderers participated in the bid and only 2 viz., the petitioner and the fourth respondent were found qualified for further evaluation. On 18.10.2014, price bids were opened and independent consultant was appointed to evaluate the bids. The Consultant, after detailed scrutiny of the bids, submitted a report highlighting the defects in the tenders submitted by the petitioner and the fourth respondent. Considering the infirmities/defects in the tender submitted by both parties, the TANGEDCO decided to reject both the bids and to call for a fresh tender.

d) As per clause 11.1 of the tender documents, bids were divided into two parts and should be submitted in two separate sealed covers viz., Cover A and Cover B. Clause 11.3 stipulates that Cover A should not contain any price bid, rate of interest and quantum of debt and installment repayment amounts and other values. Clause 11.4 stipulates that Cover B should contain the price schedules and the complete term sheet including the rate of interest and quantum of debt. Thus, it mandates that only Cover B should contain the price bid whereas the petitioner herein submitted incomplete datas. The petitioner had knowledge about the values mentioned in Cover A of the fourth respondent viz., Financing Term Sheet, submitted its supplementary bid quoting substantive aspects of the financial price of the project at the supplementary stage. Such act of non submission of the Cover B as required in the tender and submitting the substantive aspects of the financial price of the project at the supplementary stage is a clear violation of the conditions mentioned in the tender. The Consultant has brought to the notice of the TANGEDCO about such violation. A constructive reading of the entire report of the Consultant would reveal that the bids submitted by the petitioner and the fourth respondent suffered from discrepancies/deficiencies and therefore, they were rightly rejected by the TANGEDCO. The acceptance of any bid, even if the same is found to be lowest, lies with the TANGEDCO and the petitioner is not entitled to state that their bid ought to have been accepted.

e) The fresh tender was floated with certain substantial change in specifications. The TANGEDCO being the procurer, has every right to cancel the tender and float fresh tender on revised terms. In the absence of any substantial/documentary evidence, the claim of malafide is liable to be rejected.

f) The subject project is very important to meet the power requirement of the State and is of great public importance. Therefore, the TANGEDCO must be permitted to award the contract to the fourth respondent herein, in pursuance of the fresh tender and commence the project.

11) In support of the above contentions, the learned Additional Advocate General relied on the following decisions:

- i) (2015) 15 SCC 545, South Delhi Municipal Corporation vs. Ravinder Kumar;
- ii) (2014) 3 SCC 760, Maa Binda Express Carrier vs. North-East Frontier Railway;
- iii) (2012) 8 SCC 216, Michigan Rubber Ltd. vs State of Karnataka;
- iv) (2017) 4 SCC 318, TANGEDCO vs SCEPDI-TRISHE Consortium;
- v) (2016) 14 SCC 172, State of Jharkhand vs SWE-SOMA Consortium;
- vi) (2000) 5 SCC 630, Prabodh Sagar vs Punjab State Electricity Board;
- vii) (2016) 16 SCC 818, Afcons Infrastructure Ltd., vs. Nagpur Metro Rail Corporation Ltd.,

12) Mr.A.L.Somayaji, learned Senior Counsel appeared for the fourth respondent and made his submissions. The learned counsel for the fourth respondent has also filed a written submission. The sum and substance of the submissions made on behalf of the fourth respondent are as follows:

a) The scope of judicial review under Article 226 of the Constitution of India is very narrow and no case has been made out by the writ petitioner to specify the requirements for such judicial review. In this aspect, the following decisions are relied on:

- i) (2016) 14 SCC 172, State of Jharkhand and Others Vs. CWE-SOMA Consortium;
- ii) (2017) 4 SCC 318, TANGEDCO Vs. CSEPDI-Trishe Consortium;
- iii) (2015) 15 SCC 545, South Delhi Municipal Corporation Vs. Ravinder Kumar and Others;

b) The petitioner has chosen to level a vague allegation of institutional malafide, which is a concept unknown in law.

c) The tender process of the first respondent has been fair, transparent and reasonable and that the first respondent has provided detailed, cogent and valid reasons for rejection of the bids of both the petitioner and the fourth respondent. The failure of the petitioner to submit its financial proposal in accordance with the provisions of the tender has resulted in it being rejected as per clause 29 (xvii) of the Commercial and General Conditions of the contract. The petitioner has chosen to submit its financial proposal along with the supplementary bid. Only the supplementary price bid commensurate with addition/deletion as agreed during the bid clarification meeting and that no revised price bid will be entertained. By not submitting its financial proposal along with cover B and doing so only with its supplementary bid, the petitioner has gained an undue advantage over the other bidder viz., the fourth respondent.

d) The Consultant's report has not identified the petitioner as L1, as falsely claimed by the petitioner. The Consultant has pointed out serious deficiencies in its bid and made it clear that acceptability of the bids shall be decided by the TANGEDCO.

e) In view of the subsequent events including the floating of a fresh tender with different terms and conditions and the failure of the petitioner to participate in the same or challenge such tender, the petitioner is not entitled to the relief sought for in the present writ petition.

f) The objection raised by the writ petitioner as to the alleged past performance of the fourth respondent are baseless, irrelevant and utterly devoid of merits. The fourth respondent's track record as a premier, blue-chip Public Sector Undertaking would show the allegations of the petitioner are baseless. The allegation made by the learned senior counsel for the writ petitioner that no progress has been made in the Ennore project awarded to the fourth respondent, is also not factually correct and the project is going on and the same is scheduled for completion in November 2019.

g) The petitioner is liable to pay compensatory cost to the second respondent, since enormous delay has been caused on account of actions of the writ petitioner, resultantly enormous loss to the fourth respondent as well.

13) Heard both sides. Pleadings of the respective parties were perused. Submissions made by them were given careful consideration. The case laws cited by them were looked into.

14) The petitioner is a Chinese Company and its lead partner is Central Southern China Electric Power Designed

Institute, a Chinese state owned company. The petitioners financial partner is again a Bank at China called Industrial and Commercial Bank of China.

15) The Tamilnadu General and Distribution Corporation Limited herein after called as TANGEDCO, invited tender on 09.04.2013, by way of open tender under International Competitive Bidding, for the establishment of coal based 2X 660MW Supercritical Thermal Power Project at Udangudi, Thoothukudi District, Tamilnadu, India.

16) The tender documents of the bids are divided into two parts and the bidder should submit the bid in two separate sealed covers containing Part I - Cover-A and Part II - Cover-B. The Part I - Cover-A is the Techno Commercial bid which should contain the following details:

1] Sealed Cover-PART I:Cover A

The Techno-commercial Bid (i.e.)

EPC Proposal:

Qualifying data for the works,
Technical proposal, Commercial
terms & conditions and Financial
Statements.

Financing Proposal:

Qualifying data of the Lender such
as Financial statements, MOU with
complete unpriced Financing Term
Sheet with all Terms and Conditions.
Values against items such as
Quantum of Loan, Interest Rate,
Quarterly Installments etc., should
be left blank.

17) The Sealed Cover-Part II - Cover B is the Price Bid, which should contain the following details:

II]Sealed Cover-PART II Cover B

The Price Bid.

Complete Financing Term Sheet duly
filled including all Terms and
Conditions, including values
against Quantum of Loan, Interest
Rate, Quarterly Installments etc.,
should be filled.

18) The above details are referred to in Clause 11.01 of the Volume I of the Commercial and General Conditions of the Contract, wherein Section 1 deals with Instructions to Bidders.

19) Clauses 11.2 to 11.5 deal of Section 1 deal with in detail as to how the Cover A and Cover B should be submitted and also the details and informations to be furnished therein separately in two sealed covers. It reads as follows:

11.2 Sealed Cover Part I (Cover-A)

This Techno-Commercial Bid shall contain the following:

- i) Data/Document regarding Bid Qualification Requirements.
- ii) Data/Document regarding Lender.
- iii) Technical specification, design details, deviations from specifications and other technical details/proposals.
- iv) The Commercial terms and conditions including payment terms, liquidated damages, guarantees, financial statements and other commercial matters.
- v) Any other information called for in the specification other than price.
- vi) Earnest Money Deposit (EMD)
- vii) MOU between Bidder and Lender with values left blank.
- viii) Financing Term Sheet from the Lender.

The above particulars shall be furnished in the above order in a separate cover super scribing the headings as below:
"TECHNO COMMERCIAL BID: PART-I" FOR TANGEDCO - ESTABLISHMENT OF 2x660 MW UDANGUDI SUPERCRITICAL THERMAL POWER PROJECT AT UDANGUDI UNDER SINGLE EPC CUM DEBT FINANCING BASIS AGAINST TENDER SPECIFICATION No. Spec. No. SE/C/UP/EE1/OT No.01/2013-14.

11.3 Cover- A: Should not contain any price bid, rate of interest and quantum of debt and installment repayment amounts and any other values.

11.4 Sealed Cover - Part II (Cover-B): should contain the price schedules and the complete term sheet including the rate of interest and quantum of debt.

11.5 The Price Bid (as per schedules in Volume I) must be submitted in a double sealed cover super scribed as under and should be addressed to Purchaser.

"PRICE BID: PART II" FOR TANGEDCO-ESTABLISHMENT OF 2x660 MW UDANGUDI SUPERCRITICAL THERMAL POWER PROJECT AT UDANGUDI UNDER SINGLE EPC CUM DEBT FINANCING BASIS AGAINST TENDER SPECIFICATION No. Spec. No. SE/C/UP/EE1/OT No.01/2013-14.

20) Clause 7.3 contemplates that the bidder shall bear all costs associated with the preparation and submission of the bid and that the owner viz., TANGEDCO may elect to withdraw the invitation to bid and is always at liberty to reject or accept any bid or bids at its sole discretion and the bidder shall have no cause of action against the TANGEDCO for rejection of its bid. It also contemplates that the TANGEDCO is not bound to give any reason for the rejection of bid. Clause 7.3 reads as follows:

"7.3 The bidder shall bear all costs associated with the preparation and submission of the bid. The submission of any bid, along with the related documents and specification, shall constitute an agreement that the Bidder shall have no cause of action or claim against the Owner for rejection of its bid or if the Owner may elect to withdraw the invitation to bid. The Owner shall always be at liberty to reject or accept any bid or bids at its sole discretion and any such action shall not be called into question and the Bidder shall have no claim in that regard against the Owner. The Owner is not bound to give any reasons for the rejection of the bid."

21) Clause 11.11 deals with Special Conditions, wherein sub clause (g) once again reiterates that TANGEDCO reserves the rights to reject any or all the bids without assigning any reason thereof. It reads as follows:

"11.11(g) TANGEDCO reserves the rights to reject any or all the bids without assigning any reason thereof."

22) Clause 25 deals with policy for bids under consideration, wherein clause 25.1 specifically contemplates that the TANGEDCO is not bound to accept the lowest or any tender and it reserves its right to place orders with different tenderers. It reads as follows:

"25.1 Please note that it is not binding on the Purchaser to accept the lowest or any tender. The Purchaser reserves the right to place orders with different Tenderers and for revising the quantities at the time of placing the order and/or ordering more materials during the pendency of the order at the accepted rates."

23) Clause 25.3 vest the right on the TANGEDCO to relax or waive any of the conditions of this specification in the best interests of the TANGEDCO. The said clause reads as follows:

"25.3 The Purchaser reserves the right to relax or waive any of the conditions of this specification in the best interests of the TANGEDCO."

24) Clause 29 deals with rejection of bids and it reads as follows:

"29.0 REJECTION OF BIDS

The tender shall be rejected if it is:

- i. Not in the prescribed form.
- ii. Not accompanied by the requisite Earnest Money Deposit.
- iii. Not properly signed by the tenderer/members of Consortium.
- iv. From any black listed Firm or Contractor.
- v. Received after the expiry of the due date and time,
- vi. Received by telex or telegram or fax or e-mail,
- vii. Not in conformity with TANGEDCO's technical specification,
- viii. From the tenderer whose past performance/Vendor rating is not satisfactory
- ix. Lesser validity period
- x. Not accompanied by past performance report in the prescribed format, financial details, erection details
- xi. Without the details regarding Potentially Sick Industrial Company/Sick Industrial Company, as per terms of Section 23 or Section 15 of the Sick Industrial Companies (Special Provisions) Act 1985.
- xii. If at any time before acceptance of tender, the tender accepting authority receives information that a tenderer who has submitted tender has been banned by any procuring entity; his tender shall not be accepted even if it may be the lowest tender.
- xiii. Attempt by any tenderer to bring extraneous pressures on the tender accepting authority shall be sufficient reason to disqualify the tenderer.
- xiv. The bidder who does not quote for the entire scope of work mentioned in the specification.
- xv. The bidders who do not agree for the delivery schedule/payment terms mentioned in the specification.
- xvi. Not accompanied by an MOU between Bidder and Lender in prescribed format.
- xvii. Not accompanied by a valid and qualified Financing Term Sheet.

25) Clause 6.1 contemplates that time is essence of the contract. Clause 31 deals with the evaluation of technical bids, wherein sub clause (5) contemplates that bidders shall be asked to submit only supplementary price bids commensurate with

addition/deletion as agreed during the bid clarification meeting and that no revised price bid will be entertained. It reads as follows:

"31.5 After the qualification criteria has been satisfied, the technical bid of the qualified bidders would be analysed and wherever essential, technical clarifications and confirmations would be sought from them so as to clarify for fulfilling the requirements of the Specification to the satisfaction of the Purchaser. If due to such clarifications and confirmation, there is repercussions on price bids already submitted by qualified bidders, they shall indicate such repercussions in the clarification meeting, clearly indicating such changes with their original price bids, falling which such clarifications/confirmations shall be deemed to have no price repercussions. Bidders shall be asked to submit only supplementary price bids commensurate with addition/deletion as agreed during the bid clarification meeting. No revised price bid will be entertained."

26) Accepting the above terms and conditions and without questioning any of such conditions at any point of time, the petitioner, the fourth respondent herein and two other tenderers participated in the bid. On 19.07.2013, tenders were opened and the petitioner and the fourth respondent were found qualified for further evaluation. On 18.10.2014, price bids were opened. The TANGEDCO appointed an independent Consultant to evaluate the bids of the petitioner and the fourth respondent. The independent Consultant filed a detailed evaluation report. In its report, the Consultant pointed out that both the bids submitted by the petitioner and the fourth respondent suffered from one or other deficiencies both in terms of data and procedure followed, for undertaking a detailed bid evaluation. The Consultant had summarised in detail, the key issues which caused difficulty in the bid evaluation. The Consultant referred to the deficiencies in respect of the fourth respondent at paragraph 3.1.0 and in respect of the petitioner at paragraph 3.2.0. They read as follows:

3.0.0 BID SCRUTINY

The Price cum Debt Financing Bids of the two bidders were scrutinized for completeness and adequacy and have enlisted the various detailed observations in Annexure III-Comparison of Price Bid Documents of this report.

On examination of the bids, it is observed that both the bids suffer from one or other deficiency, both in terms of data and the procedure followed, for undertaking a detailed bid evaluation. The key issues which have caused difficulty in the bid evaluation are summarized below:

3.1.0 Bidder:BHEL

The tender calls for "lumpsum firm price" for EPC part including Interest During Construction (IDC) and financing charges on a "firm price basis". Bidder is expected to provide firm values for EPC price, IDC and financing charges. Bidder is also required to provide the calculations for quarterly installment of loan repayment.

The major deficiencies of the bid are as follows:

- BHEL have provided a firm value for EPC price but firm value for IDC and financial charges are not indicated by the bidder.
- The drawdown schedule of BHEL is provided as % of EPC price and qualified as "Indicative".
- The drawdown schedule is provided on a quarterly basis while the payment required as per drawdown schedule is on monthly basis. A monthly drawdown schedule is not provided by BHEL.
- The drawdown schedule for financial charges/costs is not mentioned by BHEL other than the upfront fee/commitment charges. Further the decision to adopt upfront fee/commitment charges is left to the choice of TANGEDCO.
- The financial charges/costs are not firm and subject to variation as per Term Sheet and are not fully quantified to arrive at a firm value.

3.2.0 Bidder:CSEPD/TRISHE

As per Tender, the Price Bid-Cover B shall be complete with Financing Term Sheet duly filled including all Terms and Conditions, including values against Quantum of Loan, Interest Rate, Quarterly Installments, etc.

Original Price Bid:

The bidder had submitted only the EPC price as part of Original Price Bid (Cover B). The Term Sheet was however included as part of Cover A-The Techno Commercial Bid. Original Price Bid (Cover B) did not include the value of IDC and the value of Financial Charges/Costs which are required for bid evaluation.

Supplementary Price Bid:

The value of IDC, financing charges/Costs, drawdown schedule and the financial workings for IDC & loan repayment were included by bidder in their supplementary Price Bid. As per bid conditions, bidder shall submit supplementary price bid only commensurate with addition/deletion as agreed during the bid clarification meeting. However, Bidder has provided the Drawdown Schedule, Financial Charges and the financial workings only in the Supplementary Price Bid and not in the Original Price Bid (Cover B). Therefore, the submission of drawdown schedule and financial charges only in the Supplementary Price Bid is questionable as the loading on performance is known to the bidder on the date of opening of Cover A and this gives the bidder an undue advantage to offset the loading on performance.

Further, the following deficiencies are noted:

- The value of IDC as per the proposal is not on firm basis as the drawdown schedule itself is "indicative" only and subject to variation based on actual date of Financial Closure/Agreement. Further the drawdown is subject to mutual agreement up to approval of billing break-up and signing of Agreement.
- The Term Sheet provides the interest rate as 7.2% ~7.5% while the bidder has considered the interest rate as 7.2% in their calculation. No confirmation by the Lender (ICBC) on the correct interest rate to be adopted for the project is available.
- Commitment fee is applicable as per Term Sheet. However there is a quantification of Commitment fee as 'Zero' with a rider in the financial workings.
- As per financial workings, there is no "interest on interest" to be factored for accrued draws during construction period of 36 months. But this is not covered in the Lender's Term Sheet as claimed by the bidder."

27) In its conclusion and recommendation, the Consultant had stated that there are deficiencies in both the bids and acceptance of the same is a decision to be taken by the TANGEDCO. It is also stated in paragraph 4.0.0 that the Consultant evaluated the bids based on the available information in the bids and making suitable assumptions wherever necessary, notwithstanding the deficiencies of the bids. Consequent upon the above report submitted by the independent Consultant, the

TANGEDCO in its Board Meeting held on 13.03.2015, rejected both the bids due to the above infirmities and published the said decision in the State Tender Bulletin on 26.03.2015. The defects/infirmities pointed out by the TANGEDCO in respect of the petitioner are as follows:

As per clause 14(d), section-1, Volume-1. The term sheet should be full and complete with all material terms of financing including but not limited to loan amount, currency of loan, tenure of the loan, Rate of interest financing charges. As per clause 11.1 (ii) sealed cover-Part II cover -B the Price bid to contain complete financing term sheet duly filled all terms and conditions, including values against quantum of loan, interest rate, Quarterly installment to be filled.

As per clause 17.0 the financing term sheet will form integral part of the bid and duly signed by the authorized officer of the lender with the authority to issue financing term sheet.

(i) CSEPDI-TRISHE consortium have not submitted the financial proposal as discussed in the precious paragraph. Hence their bid to be rejected as per clause 29 (xvii), Section-1 Volume-I of the specification.

(ii) As per clause-31.5, Section-1, volume-1 of specification CSEPDI-TRISHE consortium are to be submit only supplementary price bids commensurate with additions/deletion as agreed during bid clarification meeting and as requested in CE/project Lr .No. SE/C/UP/EE1/OT/2013-14, D-169/Dtd 13-10-2014.No revised bid will be entertained and violation of this condition will not be accepted and the offer is liable for rejection.

Thus in the supplementary price bid only the changes that are required for accepted deviation with price implication are to be submitted . But CSEPDI-TRISHE violated the above condition by submitting financial proposal in the supplemental price bid without submitting in the original price bid in the Cover-B.

The consultant also stated in their report that submission of draw down schedule only in the supplementary price bid is questionable as the loading on performance is known to the bidder on opening of cover-A and this gives the bidder undue advantage to offset the loading on performance.

(iii) Even the financial Calculation sheet submitted in the supplementary price schedules, CSEPDI-Trishe consortium have themselves adopted interest rate at 7.2% without authentication from the lender ICBC thus violated clause 17 of the section-1, volume-1. "The financial term sheet will form integral part of the bid and will be signed duly authorized officer of the Lender with the authority to issue such a financing term sheet." Thus they have not submitted term sheet from ICBC in supplementary price bid.

(iv) CSEPDI-TRISHE have indicated in the supplementary price bid that as per ICBC term sheet dated 09-07-2013 submitted on 19-07-2013 along with bid documents there is "no interest -on interest" to be calculated for accrued drawal during construction period of 36 months. In other words there will be no compounding interest factor to the accrued drawl in the workings of the supplementary bid. TANGEDCO verified the term sheet dated 09-07-2013 of the lender submitted along with the bid on 19-07-2013 in Cover -A there is not such declaration by the lender.

(v) Even in the draw -down schedule submitted in the supplementary price bids they have indicated the following conditions

(a) Drawal is from 7th month from the zero date of the LOI (or) financial Closure and date of agreement.

(b) The above schedule is only indicative based on time schedule furnished in their bid proposal.

(c) It is subject to modification based on mutual agreement arrived at the time of billing breakup and signing of contract agreement thus their draw down schedule is conditional draw down schedule and not firm.

As per clause 7.5.1 the price should be inclusive of all including reinforcement and retrofitting of bridges, roads if necessary for transporting heavy equipment. But CSEPDI-TRISHE have indicated a list of expenses of expenses which are not included in the quotation, in which item no.3 speaks about Reinforcement and retrofitting fees for heavy cargo transportation road. Thus their price bid is not full and complete, hence the same is no acceptable.

28) The defects/infirmities pointed out against the fourth respondent are as follows:

BHEL:

(1) REC has mentioned loan amount-75% of EPC cost+ 100 IDC and financing cost and they have not given the value of the same.

(2) In the term sheet of REC values of financial charges have not been indicated and hence the term sheet is incomplete and not in line with clause-14d, section-1, Volume-1 of the specification the tender shall be rejected if it is not accompanied by a valid and qualified financing term sheet."

29) Perusal of the defects/infirmities pointed out against the petitioner and the fourth respondent though would show that they are less in number insofar as the fourth respondent is concerned and more in number insofar as the petitioner is concerned, the TANGEDCO, however, after deliberating the defects/infirmities in both the bids in its Board Meeting, decided to reject both the bids and to close/lodge the tender.

30) Challenging the above decision of the TANGEDCO, the petitioner has filed the present writ petition, also by seeking for a consequential direction to the respondents 1 to 3 to award the tender to the petitioner by claiming that their bid has been evaluated as the lowest one (L1).

31) Before considering and deciding on the merits of the claim made by the petitioner, it is better to understand as to what is the stage at which present lis is brought before this court in a matter of commercial contract.

32) It is true that the TANGEDCO issued the advertisement and invited tenders for the Udangudi supercritical Thermal Power Project by way of open tender under International Competitive Bidding. As rightly pointed out by the respondents 1 to 3, it is only an invitation made by the TANGEDCO to the competitive/eligible party to make their offer by way of their tender. In other words, the advertisement issued calling for submission of tenders itself is not an offer made by the TANGEDCO in respect of the proposed contract and on the other hand, it is only an invitation for submitting the offer by the willing party. The act of extending the invitation itself is not an offer. On the other hand, it is an act of opening the play field for participating in the process of reaching the goal viz., concluded contract. Thus, the willing party has to commence to set the ball in motion by making the offer and indicate that he is willing to take part in the game and compete with other players. The inviter who also plays the role of referee would ultimately decide the winner. Such decision is an "acceptance" of offer. Then only the game would come to an end and the parties are said to have reached the stage of concluded contract. Thus, the commencement of performing the initial obligation of the contract, has to begin from the side of the willing party by submitting their offer through the tender document. The basic element of contract is that the offer so

made by the offeror, only when accepted by the invitee, such invitee can be said to have altered his status as an offeree, so as to presume that a contract between the parties has thus been concluded and gone to the next stage of performing their respective obligations. Only when such stage is reached viz., making an offer and accepting the same, any of the party, if aggrieved by non performance of any of the obligations by other party, can approach the court or by way of arbitration, if so provided under the terms of the contract, for redressal of their grievance. In my considered view, in this case, such stage has not at all reached.

33) At this juncture, it is relevant to note certain provisions under the Indian Contract Act, 1872. Section 2 of the said Act dealing with interpretation clause reads as follows:

In this Act, the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

(a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) the persons making the proposal is called the 'promisor', and the person accepting the proposal is called the 'promisee';

(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) promises which form the consideration or part of the consideration for each other, are called reciprocal promises;

(g) an agreement not enforceable by law is said to be void;

(h) an agreement enforceable by law is a contract;

(i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

34) Section 10 stipulates as to what agreements are contracts, which reads as follows:

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

35) Section 13 defines the word "Consent", which reads as follows:

Two or more persons are said to consent when they agree upon the same thing in the same sense.

36) The above provisions of law make it abundantly clear that the dealings between the parties have not reached the stage of concluded contract, since the offer made by the petitioner has not been accepted by the TANDEGCO and therefore, though the petitioner can be called as the "promisor", in the absence of acceptance of such promise, the TANDEGCO does not convert itself to the status of "promisee". In other words, in this case, the parties have not reached the stage as required under Section 2(b) of the Contract Act. At the best, it can be construed reasonably that though the petitioner has assumed the role of "promisor", the first respondent however continued to retain the status of "invitee" only, without further moving into the next stage to assume the role of "promisee/offeree".

37) Further, Section 10 of the above said Act makes it abundantly clear that the agreement becomes contract, only when they are made by free consent of parties. Section 13 makes it further clear that "consent" means two or more persons agree upon the same thing in the same sense. Therefore, it is to be seen that in order to constitute a contract, there must be a consent to the agreement by both parties. In the absence of

consent by any one of the parties, there is no agreement between them and consequently, no contract much less concluded contract takes place between such parties.

38) The petitioner and the fourth respondent alone have made their offer and such offer was not accepted by the TANGEDCO and consequently, both the offers were rejected, also by lodging the subject matter tender. Consequent upon such rejection of both the offers, the TANGEDCO decided to lodge the tender, which means that the invitation made by the TANGEDCO, followed by the submission of tenders by the petitioner and the fourth respondent, is put to rest. On the other hand, if anyone of the offers was accepted by rejecting the other, certainly the aggrieved party may have a cause of action to question such rejection and the acceptance. If the owner viz., the TANGEDCO, who invited the offer, has decided to reject all the offers based on certain technical defects/deficiencies found by the independent Expert/Consultant followed by the decision taken in the Board Meeting, in my considered view, none of the party will have any vested right or any cause of action to maintain a litigation against the TANGEDCO, that too, to seek for a direction to accept such tender submitted by such party and to award the contract only to such party. In effect, what is sought for in the present writ petition, is nothing but a positive direction to the TANGEDCO to accept the offer made by the petitioner and conclude the contract. I do not think that such relief, as sought for in this writ petition, is maintainable, as it opposes to the very basic element of principles of contract, as no one can compel the owner/invitee to accept a particular offer, as it is always open for such person, who invited such offers, either to accept or to reject, based on the reasons, which according to such owner, cannot make the contract viable or successful, in view of deficiencies or defects in the offer. The reasons set out for taking such decision may be, according to the offeror, irrelevant or negligible or not fatal. Yet, if the invitee has chosen to reject not only a particular offer but all the offers made by the parties and decide to go for fresh invitation, the parties, whose offers were rejected cannot claim to be aggrieved parties, as no event of pick and choose has taken place. Needless to say that an agreement for sale is totally different and distinguishable from an invitation to make offer. While, in the former case, a vested right is conferred on the respective parties based on such agreement to seek for specific performance of their respective obligation under such agreement, in the latter case, it is not so.

39) If the owner has made the offeror to believe that he will be compensated for the loss sustained, if any, in the event

of rejection of his bid and such belief is also reduced into writing under the terms and conditions of the tender document, the person, whose offer was rejected, can, at the best, file a suit for damages based on such terms and conditions protecting his interest. In this case, I have pointed out earlier that clause 7.3 of the terms and conditions clearly stipulates that the bidder shall bear all costs associated with the preparation and submission of the bid and they shall have no cause of action or claim against the TANGEDCO for rejection of its bid and the owner viz., TANGEDCO is not not bound to give any reasons for the rejection of the bid. At the risk of repetition, clause 7.3 is again extracted hereunder:

"7.3 The bidder shall bear all costs associated with the preparation and submission of the bid. The submission of any bid, along with the related documents and specification, shall constitute an agreement that the Bidder shall have no cause of action or claim against the Owner for rejection of its bid or if the Owner may elect to withdraw the invitation to bid. The Owner shall always be at liberty to reject or accept any bid or bids at its sole discretion and any such action shall not be called into question and the Bidder shall have no claim in that regard against the Owner. The Owner is not bound to give any reasons for the rejection of the bid."

40) The petitioner participated in the tender upon knowing and accepting the above said terms and conditions. Therefore, they cannot claim now that the rejection of their bid is not correct and they should be awarded the contract. If the TANGEDCO has chosen to give the contract to the fourth respondent based on the subject matter tender arising out of the advertisement/invitation dated 09.04.2013, this Court can appreciate that the petitioner is having a cause of action to maintain the present writ petition and consequently, this Court can also go into the merits of the reasons set out for rejection of the petitioner's offer, to find out as to whether such reasonings are justifiable or not. It is not so in this case. Therefore, in my considered view, the filing of the present writ petition is totally misconceived, as it opposes to the very basic principles of contract.

41) No doubt, the above said project viz., Udangudi Thermal Power Project, has been subsequently awarded in favour of the fourth respondent, after initiating a fresh tender process by inviting tenders from the willing participants, in pursuant to a notification issued on 21.04.2015. Admittedly, the petitioner did not participate in the subsequent tender nor they have chosen to challenge the same before any court of law or forum.

It is not that the petitioner is not aware of floating of the fresh tender. In fact, such subsequent tender was floated during the pendency of the present writ petition. But at the same time, it should be borne in mind that this court while keeping the present writ petition pending, has not passed any positive interim order preventing the TANGEDCO from floating the subsequent tender.

42) The learned Senior Counsel for the petitioner sought to contend that the learned Senior Standing Counsel for the TANGEDCO, at the relevant date of hearing submitted before this Court that no steps have been taken to float the fresh tenders. Therefore, he submitted that having said so, the respondents are not justified in floating the fresh tender thereafter.

43) A careful perusal of the order passed in M.P.No.2 of 2015 in this writ petition on 01.07.2015, granting injunction restraining the respondents 1 to 3 from proceeding further with the tender notification dated 26.03.2015, would go to show that what stated by the learned Standing counsel on 07.04.2015 before this Court was that as on that date, no steps had been taken to float the fresh tender. Certainly that does not mean that the TANGEDCO has informed this Court or indicated their mind as though they are not going to issue fresh tender for ever. At this juncture, it is to be noted that the project is a major power project involving a larger public interest and exchequer and therefore, the TANGEDCO has to certainly act without any undue delay in bringing the project to live at the earliest possible time. Therefore, I find that such stand taken by the TANGEDCO as on 07.04.2015 cannot be put against them to contend as though they have acted against the interest of the petitioner with malice.

44) Needless to say that there was absolutely no bar for the petitioner to participate in the subsequent tender, which they miserably failed. It is stated by the learned Senior counsel for the petitioner that since this writ petition was already filed and the same is pending, there is no need for the petitioner to take part in the subsequent tender. I do not think that such contention is appreciable, since the very present writ petition itself is in respect of the previous tender and when such tender was lodged by rejecting both the tenders, nothing could arise from such lodged tender to give a cause of action for the petitioner to seek for its revival. A participant in the tender process has no right to seek for its revival, once the owner found that continuance of the same is not viable or feasible based on certain facts and circumstances including the deficiencies/defects on the part of all the participants.

45) The order passed by the learned Single Judge granting injunction in M.P.No.2 of 2015 was put to challenge by the TANGEDCO in W.A.No.943 of 2015. While considering the interim application for stay in M.P.No.1 of 2015 in W.A.No.943 of 2015, the Division Bench, by passing an elaborate order, observed at paragraph Nos.32 to 34 as follows:

32.It was contended by Mr.Sriram Panchu, learned senior counsel for the first respondent that if the appellant proceeds with the finalisation of the tenders under the new notification, third party interests will creep in. But we do not think that any third party will acquire any right unless and until the contract is awarded. Even if someone is found to be L-1, after the finalisation of the present process, he would not acquire any right to claim that the contract should be awarded to him. In any case, such a person cannot defeat the rights, if any, of the first respondent herein, in his writ petition, which relates to the previous tender.

33. Therefore, we are of the considered view that the appellant should be allowed to process the tenders pursuant to the fresh notification. This will not in any way prejudice the case of the first respondent in their writ petition. This will not also make their writ petition infructuous. As a matter of fact, the learned Advocate General submitted that there are two stages, first relating to technical matters and the next relating to financial matters. According to the learned Advocate General, the entire process will take about four months, before the successful bidder is identified and a contract is awarded.

34. Therefore, in view of the above, we pass the following interim order, in modification of the interim injunction granted by the learned Judge:

(i) The appellant may proceed to process the bids received pursuant to the fresh tender notification dated 21.4.2015.

(ii) The award of the contract to any successful bidder alone shall await further orders to be passed in this petition for stay.

(iii) The first respondent may file a counter within two weeks.

(iv) The Registry is directed to post the Miscellaneous Petition for further hearing on 16.11.2015."

46) Thereafter, the very writ petition itself was taken up and disposed of by the Division Bench on 13.09.2017 by passing the following order:

"9. Given these circumstances, we are of the view that, at this juncture, the only possible directions which can be issued are as follows:

(i) The Writ Appeal is disposed of with a request to the learned Single Judge to take up the writ petition for hearing and final disposal.

(ii) Pending disposal of the writ petition, the interim order dated 30.10.2015 passed in the instant appeal will continue to operate.

(iii) In case, respondent No.1 were to fail in the writ petition, the learned Single Judge, will workout the equities and issue appropriate directions including direction to award compensatory costs if thought fit in favour of the respondent No.1 and/or respondent No.2. It is made clear, however, that before such a direction is issued, parties would be heard on this aspect of the matter as well.

47) Consequent upon the said order passed in the writ appeal, the present writ petition is taken up and heard for final disposal. Perusal of the interim order passed in the writ appeal dated 30.10.2015, which was allowed to continue to operate, in the final order passed in the writ appeal, it is evident that there was no impediment for the TANGEDCO to go ahead with the subsequent tender process as the awarding of the contract in favour of the successful bidder alone was directed to be deferred. Accordingly, it is stated that the fourth respondent herein, who participated once again in the subsequent tender, was chosen as the successful bidder and awarding of the contract in their favour alone is postponed. Therefore, I find that the petitioner is not entitled to canvas the correctness or otherwise of the subsequent tender process in the present writ petition itself, without even participating in the same, especially when both tenders are not standing on the same footing.

48) It is not the case of the petitioner that they are either prevented from participating in the new tender or blacklisted or disqualified to take part therein. Therefore, it is evident that there was no legal impediment for the petitioner to take part in the subsequent tender. If the petitioner was really interested in doing this project, they could have very well participated in the subsequent tender, notwithstanding the fact that their challenge against the earlier tender is pending before this Court, especially, when the floating of subsequent tender with different terms and conditions and was within the knowledge of the petitioner. The petitioner has not done so. Therefore, it is evident that the petitioner has, in fact, abandoned its interest in doing the project, more particularly, when the new tender is with different policy with regard to the financing of the project, as could be seen herein below.

49) There is no dispute to the fact that in the old tender, presently in dispute, the bidder has to make the financial requirement through their banker and the TANGEDCO will have to pay only the interest for such financing. Therefore, the burden is on the bidder to make such arrangement to the satisfaction of the TANGEDCO. Such debt financing requirement is not there in the new tender as the Government had changed its policy to go ahead with the project by its own funds. Therefore, there is no requirement for the bidder to make the financial arrangement. In other words, when the earlier tender was EPC cum Bid Financing and the latter is only EPC tender, the petitioner failed to utilise such opportunity by participating in the new tender. When the new tender was floated with further bid qualification requirement namely that the bidder must establish manufacturing facility in India whereas a foreign company could participate by submitting bank guarantee towards meeting the phased manufacturing programme requirement, nothing prevented the petitioner from participating in the subsequent tender. Therefore, I find that the present fight in this writ petition lacks any bonafide, apart from the other findings rendered supra on other aspects of the matter.

50) It is further to be noted that the petitioner's bid submitted in respect of the tender in dispute was found to be lacking with deficiencies and defects. The independent consultant specifically pointed out that both the bids submitted by the petitioner and 4th respondent suffered from one or other deficiencies, both in terms of data and the procedure followed. Such view of the technical expert was taken into consideration by the TANGEDCO and after making deliberation and discussion in its Board meeting, the TANGEDCO has taken a decision to reject both the tenders and lodged the tender process, in order to do the project by inviting fresh tender. It is not the case of the TANGEDCO that it has abandoned the project once for all. Therefore, the TANGEDCO being the owner, after inviting the willing participants to make their offer, has every right to reject the tender and lodge the same based on the technical deficiencies/defects, with which, this Court while exercising its discretionary jurisdiction under Article 226 of the Constitution of India, cannot interfere, as it is a pure administration decision in respect of commercial contract. At this juncture, the recent decision of the Honourable Apex Court reported in 2017(4) SCC 318 (TANGEDCO v. CSEPDI-TRISHE Consortium) arising between the same parties herein in respect of Ennore Power Project, can be safely and usefully referred to, wherein it has been observed at paragraph Nos. 36 to 38 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.

(emphasis supplied)

51) Further in another decision reported in 2016(16) SCC 233, Shobikaa Impex (P) Ltd. v. Central Medical Services Society, the Apex Court, after referring various earlier decisions made by it, pointed out that when a public interest is involved, it cannot succumb to private interest. Paragraph Nos.20,21,22,23,24 reads as follows:

"20. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. (2005) 6 SCC 138, it has been held that (SCCp.148, para 15) the State 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 has been 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.

21. In Jagadish Mandal v. State of Orissa, (2007) 14 SCC 517, it has been ruled that: (SCC p.531, para 22)

"22.....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."

22. In Union of India v. International Trading Co., (2003) 5 SCC 437, it has been held that: (SCC p.445, para 15)

"15.....The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose".

It has been further opined that : (SCCp.445, para 15)

"15.....The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.

23. In Jespar I. Song v. State of Meghalaya, (2004) 11 SCC 485, this Court stated that: (SCC p.494, para 17)

"17.....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."

24....The tender was floated for purchase which is needed for the nation. The first respondent along with Respondents 2 and 3 were taking immense precaution. In such a circumstance, needless to emphasise, public interest is involved. It cannot succumb to private interest. The action on the part of Respondents 1 to 3 cannot be regarded as arbitrary or unreasonable. By no stretch of imagination it can be construed to be an act which is not bona fide or to have been done to favour the fourth respondent."

(emphasis supplied)

52) In 2015(15) SCC 545 (South Delhi Municipal Corporation v. Ravinder Kumar), the Honourable Apex Court has held at paragraph 18.6 as follows:

18.6 Further, the High Court has failed to consider another important fact that the Government being guardian of public finance it has right to refuse the lowest or any other tender bid or bids submitted by the bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of the Constitution of India. The appellant-Corporation's decision in cancelling its earlier tender is not in violation of Article 14 of the Constitution of India, as the High Court did not find any malafide intention on the part of the appellant-Corporation to favour someone in taking such decision. The appellant-Corporation's decision in cancelling the earlier tender notice vide corrigendum dated 30.11.2012 and then issuing a subsequent tender notice dated 13.12.2012 inviting fresh bids from eligible persons for the same works was with a bonafide intention to get better and reasonable rates from the bidders for the execution of the works and not to show favouritism in favour of any bidder.

53) In 2014(3) SCC 760 (Maa Binda Express carrier v. North-East Frontier Railway), the Hon'ble Apex Court has observed at paragraph Nos. 8 to 12 as follows:

8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to

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

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

10. The scope of judicial review in contractual matters was further examined by this Court in Tata Cellular v. Union of India (1994) 6 SCC 651, Raunaq International Ltd.'s case (supra) and in Jagdish Mandal v. State of Orissa and Ors (2007) 14 SCC 517 besides several other decisions to which we need not refer.

11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 the

legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

"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.

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

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

(emphasis supplied)

12. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition.

54) From the above decisions of the Apex Court, it is

evident that the scope for interference in contractual matters, more particularly, having a larger public interest, is very limited for this Court to exercise its judicial review unless it gets satisfied that arbitrariness or unreasonableness or malafide or colourable exercise of power exists in a given case which, if allowed to continue, would defeat the larger public interest. A commercial transaction by the State, when ends up in a commercial decision not to proceed further based on the facts and circumstances prevailed at that point of time, cannot be questioned, that too by compelling the owner/State to review its decision.

55) In 2016 (14) SCC 172 (State of Jharkhand v. CWE-SOMA Consortium) the Hon'ble Apex Court has observed at paragraph Nos.13, 14, 20 and 23 as follows:

13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant and Ors. vs. Satyawani and Ors. (1996) 4 SCC 208 Rajasthan Housing Board and Anr. vs. G.S. Investments and Anr. (2007) 1 SCC 477 and Uttar Pradesh Awas Evam Vikash Parishad and Ors. v. Om Prakash Sharma (2013 5 SCC 182)).

14. The appellant State was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-

"Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof."

Clause 32.1 of SBD: "...the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action."

In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.

20. Admittedly, in the pre-bid meeting held on 24.03.2014, ten tenderers have participated. After conclusion of the pre-bid meeting on 24.03.2014, as a result of stringent conditions prescribed in clause 4.5(A)(a) and 4.5(A)(c), only three tenderers could participate in the bidding process and submit their bids. As noticed earlier, upon scrutiny two were found non-responsive. In our considered view, High Court erred in presuming that there was adequate competition. In order to make the tender more competitive, tender committee in its collective wisdom has taken the decision to cancel and re-invite tenders in the light of SBD norms. As noticed earlier, the same was reiterated in a subsequent meeting held on 09.07.2014. While so, the High Court was not justified to sit in judgment over the decision of tender Committee and substitute its opinion on the cancellation of tender. Decision of the state issuing tender notice to cancel the tender and invite fresh tenders could not have been interfered with by the High Court unless found to be mala fide or arbitrary. When the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh tenders, it cannot be said that there is any mala fide or want of bona fide in such decision. While exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by mala fide, unreasonableness or arbitrariness.

23. The right to refuse the lowest or any other tender is always available to the government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the

decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.

56) Therefore, the petitioner is not entitled to contend that their bid being the L-1, the TANGEDCO ought to have accepted the same and awarded the contract. I have already pointed out the relevant clause in the agreement empowering the TANGEDCO to reject the bid, even though it is L-1.

57) No doubt, the petitioner has elaborately pointed out that the petitioner's response made to the defect and deficiencies pointed out by the respondents 1 to 3 would satisfy that their tender was not liable to be rejected and on the other hand, it ought to have been accepted. I do not think that the petitioner is entitled to succeed on this ground, assuming that their explanation/remarks are having some justification, for the simple reason that the TANGEDCO has not selected any other tender, while rejecting the tender of the petitioner. On the other hand, the TANGEDCO has also rejected the other tender of the fourth respondent, when, admittedly, these parties alone had reached the evaluation stage. When such being the case, the petitioner cannot plead that the TANGEDCO should have accepted their tender and that

the rejection is arbitrary. In my considered view, the question of arbitrariness or unreasonableness or colourable exercise of power may be pressed into service, only when both the element of rejection of one party and selection of another party exist in a given case. On the other hand, if the owner decides to reject all the tenders and go for fresh process, that too, with new change in policy with regard to the financial commitment of the project, no participant in the earlier process can question such decision, how so ever they are meritorious in the earlier process. Certainly, there is no prohibition or bar against anyone including the petitioner and the fourth respondent from taking part in the subsequent tender process. Without utilising such opportunity, the petitioner is not entitled to plead arbitrariness or malafide in the action of the respondents 1 to 3.

58) It is prerogative of the owner either to accept or reject the offer. If the rejection is not made for favouring somebody in the very same process, such rejection cannot be questioned, even though the reasons for rejection are not tenable. After all, the owner is the right person, who should be left free to take a decision in his best interest. Much

emphasis was made by the learned Senior Counsel for the petitioner that the impugned action of the respondents 1 to 3 was only to favour the fourth respondent. I do not find any force in the submission both legally and factually. Admittedly, the tender of the fourth respondent was also rejected. I have already pointed out that the defects or the deficiencies pointed out on the side of the fourth respondent were minimal. If at all the TANGEDCO wanted to favour the fourth respondent, they would have very well accepted the tender of the fourth respondent, more particularly, at that time, the financial obligation was heavily on the tenderer. By rejecting the fourth respondent as well, the TANGEDCO exhibited their intention and decision to go for fresh tender, in the interest of the TANGEDCO, as the Government itself subsequently has decided to fund the project.

59) Even otherwise, the independent Consultant has specifically pointed out that the petitioner had submitted only the EPC price as part of original price bid (Cover B), when, as per the tender conditions, the price bid cover B should be complete with Financing Term Sheet duly filled including all terms and conditions, including values against Quantum of Loan, Interest Rate, Quarterly Installments, etc. Thus, the Consultant has specifically pointed out that the original price bid cover B of the petitioner did not include the value of IDC and the value of the financial charges/costs, which are required for bid evaluation.

60) No doubt, the petitioner has furnished the above informations in the supplementary price bid. As it could be seen from the terms and conditions of the tender document and rightly pointed out by the Consultant, that supplementary price bid, if submitted can only commensurate with addition/deletion as agreed during the bid clarification meeting and not by way of introducing the drawdown schedule, financial charges and the financial workings, as the first time, which ought to have been given in the original price bid (Cover B) itself. The Consultant, thus by pointing out the above defect also observed that the drawdown schedule and financial charges shown first time in the supplementary price bid of the petitioner is questionable, as they were in a position to know the loading on performance on the date of opening of Cover A. Thus, the Consultant has categorically observed that the petitioner was in an undue advantageous position to offset the loading on performance.

61) From the above findings/observations given by the Consultant, accepted by the TANGEDCO, it is evident that the petitioner has not conducted themselves fairly and strictly in accordance with the terms and conditions of the tender more

particularly, by not complying with furnishing of mandatory requirements/details in Cover B. Instead, it is evident that the petitioner had furnished vital information only by way of supplementary bid after opening of the Cover A of both parties. Therefore, this Court finds that the petitioner has certainly played an unfair game with hidden agenda, which are not in consonance with the terms and conditions of the tender. On the other hand, it is evident that the petitioner wanted to know the other side story first before ever they could tell their story, so as to enable them to alter their story in order to suit the requirement of the TANGEDCO. Therefore, I find that the decision to reject the petitioner's tender was rightly taken by the respondent Corporation with which, I find no malafide, illegality, arbitrariness or unreasonableness, as claimed by the petitioner.

62) The learned senior counsel appearing for the petitioner contended that the respondents 1 to 3 will be bound by the principles of promissory estoppel by claiming that the petitioner was declared as L-1. I do not think that such contention is either tenable or appreciable in view of the above stated facts and circumstances and the findings rendered by this Court. Assuming that the petitioner was found to be L-1, it is not necessary that they should be given the contract, as the terms and conditions of the contract, as extracted supra, make it very clear that the TANGEDCO is not bound to accept the lowest tender. It is stated in clear and categorical terms in clause 25.1 of the tender conditions that the lowest or any tender is not binding on the purchaser to accept the same. No doubt, if other man's tender is accepted by rejecting the petitioner's tender, assuming to be the L-1, then the petitioner can have a say that such rejection and acceptance are either bad in law or on facts. Admittedly, both the petitioner and the 4th respondent were shown the door. When such being the position, neither the principles of promissory estoppel nor the principles of legitimate expectation will come into play under the present facts and circumstances of the case. Therefore, the decision relied on by the learned counsel in the case of Motiala Mohn.. Sugar Mills vs. State of Uttar Pradesh, which are factually distinguishable, will not apply to the present case. The other decision relied on by the learned senior counsel for the petitioner is the recent decision of the Hon'ble Apex Court made in between the same parties regarding Ennore project, which I have already referred supra. I wonder as to how the said decision would help the petitioner in any manner, as in my considered view, the finding rendered therein in paragraph No.36 as extracted supra, would only support the case of the respondents 1 to 3.

63) 2000(5) SCC 630 (Prabodh sagar v. Punjab State Electricity Board) and 2016(15) SCC 818 (Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited) are relied on to contend that the allegation of malafides is to be supported by facts. Therefore, it is contended by the learned Additional Advocate General that in the absence of any malafide, more particularly, without any supporting materials or facts, the same has to be rejected. I have already pointed out that a careful consideration of the facts and circumstances and the allegation made by the petitioner do not disclose any malafide on the part of the respondents 1 to 3. In Afcons Infrastructure Limited case, the Honourable Apex Court has held at paragraph Nos. 13 & 15 as follows:

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of malafides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

...

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. 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.

64) Finally, this Court has to decide as to whether the respondents should be awarded with compensatory costs, since the petitioner has to fail in this writ petition.

65) It is seen that the impugned decision was made on 13.03.2015 and published in the State Tender Bulletin on 26.03.2015. Immediately, the petitioner filed the present writ petition on 30.03.2015. Though the first respondent floated fresh tender on 21.04.2015, however only by virtue of interim

order passed by this court on 17.06.2015, the respondents 1 to 3 were not in a position to open the bids of the new tender. Subsequently, on 01.07.2015, an interim injunction was granted by this court restraining the respondents 1 to 3 from proceeding further with tender notification published on 26.03.2015. The respondents filed a Writ Appeal in W.A.No.943 of 2015, challenging the said interim order, wherein the Division Bench by its interim order dated 30.10.2015, though allowed the TANGEDCO to proceed to process the bids received pursuant to the fresh tender notification dated 21.04.2015, had however directed them to await further orders to award the contract to any successful bidder. Thereafter, on 13.09.2017, the writ appeal itself came to be disposed of with a direction to the writ court to take up the main writ petition and dispose the same on merits, also by continuing the interim order already passed on 30.10.2015. Therefore, it is evident that the petitioner has approached this Court and filed the present writ petition immediately after the impugned decision and only by virtue of the interim orders granted by this court, both in the writ petition as well as in the writ appeal, the respondents 1 to 3 were not in a position to award the contract in favour of the fourth respondent, being the successful bidder. No doubt, the petitioner has miserably failed to succeed in this writ petition. But at the same time, in my considered view, the question of awarding compensatory costs does not arise in this case, especially, when the facts and circumstances as narrated supra, do not warrant awarding such compensatory costs, more particularly when the TANGEDCO's decision itself was to lodge the subject matter tender.

66) Considering all the above facts and circumstances, this Court is of the firm view that the petitioner has to fail. Accordingly, the writ petition is dismissed. Consequently, the respondents 1 to 3 are at liberty to award the contract to the successful bidder as per the decision taken already in pursuant to the subsequent tender. No costs.

Registry is directed to return the original records to the respondents 1 to 3 forthwith.

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Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vri/vsi

To

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

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

3.The Chief Engineer/Projects,
TANGEDCO, Fifth floor, Western Wing,
NPKRR Maaligai,
144, Anna Salai, Chennai 600 002.

4.Bharat Heavy Electricals Limited (BHEL)
Rep. by its Chairman,
BHEL House, Siri Fort,
New Delhi 110 049.

5. The Registrar(Judicial),
High Court, Madras.

+ 1 cc to M/s. Abdul Saleem, Advocate Sr.87012
+ 1 cc to Mr. S. Ramasubramaniam, Advocate 87266
+ 1 cc to Mr. M. Balaji, Advocate SR.87738

RK(CO)
EU(22/12/2017)

W.P.No.No.9592 of 2015

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