2012 (2) GLR 1337

GUJARAT HIGH COURT

Hon'ble Judges:A.L.Dave and J.B.Pardiwala JJ.

Sudhir C.Shah Versus Gujarat Urja Vikas Nigam Limited Through Managing Director

Writ Petition No. 85 of 2011 ; *J.Date :- OCTOBER 20, 2011

- CONSTITUTION OF INDIA Article - 14 , 226

Constitution of India - Art. 14, 226 - judicial scrutiny of opening of tender etc. - held, when Court is not an expertise on the subject, terms of invitation to tender not open to judicial scrutiny experts can look into the matter.

Public Interest Litigation - when public interest litigation should be entertained - held, if credentials and bonafide of petitioners are doubtful PIL would not be maintainable - Courts should discourage and curb PIL moved for extraneous considerations - on facts, credentials and bonafides of petitioner found doubtful - petition dismissed with costs of Rs. 25,000/-.

Imp.Para: [10] [16] [17] [24]

Cases Referred To :

1. Association Of Registration Plates V/s. Union Of India And Others, AIR 2005 SC 469
2. Directorate Of Education And Others V/s. Educomp Datamatics Limited And Others, AIR 2004 SC 1962
3. Larsen And Toubro Limited And Another V/s. Gujarat State Petroleum Corporation Limited And Others, 2000 2 GLR 1814 : 2000 (4) GCD 2959 : 2000 GLHEL_HC 206778
4. Master Marine Services (P) Limited V/s. Metcalfe And Hodgkinson (P) Limited And Another, 2005 6 SCC 138
5. P.Seshadri V/s. S.Mangati Gopal Reddy And Ors., 2011 5 SCC 484
6. Shri Sachidanand Pandey V/s. State Of West Bengal, AIR 1987 SC 1109
7. State Of Uttaranchal V/s. Balwant Singh Chaufal And Ors., 2010 3 SCC 402

8. T.N.Godavarman Thirumulpad V/s. Union Of India And Others, 2006 5 SCC 28

9. Tata Cellular V/s. Union Of India, 1994 6 SCC 651

10. Tata Cellular V/s. Union Of India, AIR 1996 SC 11

Cited in :

1. (Relied on) :- Farook Shaikh Vs. State Of Gujarat, 2013 (3) GLH 288 : 2013 (3) GCD 2169 : 2013 (33) GHJ 276 : 2013 JX(Guj) 250 : 2013 AIJEL_HC 229482

Equivalent Citation(s):

2012 (2) GLR 1337 : 2011 JX(Guj) 1241

JUDGMENT :-

J.B.PARDIWALA, J.

1 This writ petition in the nature of a public interest litigation has been filed jointly by two petitioners. Petitioner nos.1 and 2 are the resident of Vadodara aged about 49 years and 65 years respectively.

2 In this petition, the following reliefs are prayed for :-

"(A) Issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other Writ, Order or Direction, quashing and setting aside Tender notices and subsequent amendments, and the advertisement inviting tenders for the purchase of Amorphous Transformers and CRGO Transformers in the concerned Discoms at Annexure-I.

(B) Be further pleased to direct the Respondent Discoms to issue fresh tenders based on established norms and values of the formula of cost of ownership.

(C) Any other and further reliefs as may be deemed fit and proper may kindly be granted in the interest of justice."

3 Facts relevant for the purpose of deciding this writ petition in the nature of public interest litigation can be summarised as under :-

The present petition has been preferred with an apprehension that a loss is to be suffered by the Government Exchequer, looking to the approach shown by the Discoms in acquiring distribution transformers i.e. Amorphous transformers as regards CRGO transformers.

The Gujarat Urja Vikas Nigam Limited, the holding company, vide its three subsidiary companies, namely, (1) Uttar Gujarat Vij Company Limited

(UGVCL), (2) Dakshin Gujarat Vij Company Limited (DGVCL) and (3) Paschim Gujarat Vij Company Limited (PGVCL), has floated tenders for purchase of distribution transformers.

It is brought to our notice that the advertisement would suggest that the Government of Gujarat through GUVNL has decided to purchase sizeable number of Amorphous transformers in comparison to CRGO transformers on the basis of a biased TCO formula under a pretext that Amorphous transformers have greater energy efficiency compare to CRGO transformers.

An attempt is sought to be made to convince the Court that the aforesaid decision of the GUVNL is scientifically faulty and will cause the Government Exchequer a huge loss in excess of Rs.120 crores against the said floated tenders. According to the petitioners, it can also be proved by statistics that the so-called Amorphous transformers are more costly than CRGO transformers and the energy saving is more or less equal to CRGO transformers and that their usage life and energy efficiency parameters are greatly reduced with repairs of any kind undertaken on them.

It is alleged that GUVNL has determined a capitalization formula for CRGO/Amorphous transformers in which the factor for calculating 'Total Owning Cost' has been drastically biased in favour of Amorphous transformers, thereby indirectly ensuring that the manufacturers of CRGO transformers are unable to compete in the bid for the tenders floated by GUVNL based on this discretionary formula.

4 Initially, notices were issued to the respondents and in response to the same, the respondents appeared and filed their reply to the petition.

5 In the affidavit-in-reply filed by the respondents, a preliminary objection as regards the maintainability of the present petition in the name of public interest litigation has been strongly raised including the bonafides of both the petitioners in filing the present petition.

6 The relevant part of the affidavit-in-reply in this regard is reproduced hereinbelow :-

"(3) Before adverting to the merits of the petition, I beg to raise certain preliminary objections as to maintainability of the petition.

(A) Firstly the petition purports to be filed as and by way of public interest litigation by the petitioners with averments that petitioners have no personal interest and that the petition is being filed in the interest of the tax payers of Gujarat. I submit that though apparently, it is sought to be projected that this is a public interest litigation in the interest of the tax payers of Gujarat, scrutiny of the averments made in the petition clearly goes to show that this

petition is at the instant of or for the benefit of such manufacturers/ suppliers of transformers, presumably of CRGO who want to eliminate competition which may require them to quote competitive price affecting their profits. It is further submitted that from the averments made in the petition, it is not possible to know the qualifications of the first petitioner or any expertise possessed by him to evaluate the concept of Total Owning Cost introduced as a term in the tender, that enables the purchaser to assess the real cost of his purchase which could be different from the initial purchase cost quoted by the tenderer or expertise or experience in the matter of assessment of various parameters which enter into the picture while assessing the merits and demerits of two types of transformers whose manufacturers and dealers have to compete amongst them in light of the adopting Total Owning Costs concept as a term and condition in the tender. That the first petitioner claims to be a social activist but if that may not equip him with required expertise or knowledge, in the matter of CRGO in which, I say knowing fully well that state of affairs Shri B.K.Vaidya who happens to be a retired Executive Engineer of Gujarat Energy Transmission Corporation Ltd. has been joined as second petitioner and make him file the supporting affidavit stating that what has been stated in para 1 to 9 of the petition is true to his knowledge.

It is submitted that the respondent no.2 as the Executive Engineer with Gujarat Energy Transmission Corporation Ltd. had never occasion and, therefore, experience or expertise in the matter of evaluation of tender conditions and it would be hazardous to base any conclusion on the aspects in controversy upon knowledge of such person. It is, therefore, submitted that this petition is not public interest litigation but private interest litigation and the petitioners are not competent to litigate this as PIL.

(B) Secondly this petition involves various disputed questions of facts and the extraordinary jurisdiction of Hon'ble Court could not be invoked to resolve the same and, therefore also, the petition deserves to be rejected summarily.

(C) Thirdly I submit that it is settled by catena of decisions of Apex Court that a Court would refrain from interfering with policy decision of authorities, since such decisions require inputs from various sources including scientific, technical, economical and administrative expertise. That a policy decision requires a delicate balancing and consideration of complex socio economic aspects. I say that while finalizing the tender conditions in the final tenders for which offers have been invited; in particular the tender condition to determine which bidders can be considered to be the lowest bidder upon evaluation of the tenders, to determine the rank amongst the bidders (L-1, L-2, L-3 and so on) i.e. who is truly lowest bidder upon

evaluation adopting Total Owning Cost concept, the respondent has taken a policy decision in respect of the tenders floated which are under challenge, after having inputs from various sources. The decision of floating the tenders in question with such clause of evaluating the tender to determine who truly is the lowest bidder has been taken at a high level meeting after matured deliberations at the said meeting which was held under the chairmanship of Managing Director of Gujarat Urja Vikas Nigam Ltd., and was attended by Managing Director of Paschim Gujarat Vij Company Ltd., Managing Director of Madhya Gujarat Vij Company Limited, i/c Managing Director of Dakshin Gujarat vij Company Limited, Director Technical of Gujarat Urja Vikas Nigam Ltd, as well as Executive Director (Finance) of Gujarat Urja Vikas Nigam Ltd. as also the Chief Engineer of Gujarat Urja Vikas Nigam Ltd. and Chief Engineer of Madhya Gujarat Vij Company Ltd., Paschim Gujarat Vij Company Ltd., and Additional Chief Engineer of Uttar Gujarat Vij Company Ltd., Dakshin Gujarat Vij Company Ltd., and Madhya Gujarat Vij Company Ltd. The purpose of the said meeting of all technical experts who were actively involved with the procurement of transformers from all DISCOMs was to have the benefit of expert view/comments from all of them in light of their past experience and technical knowledge so as to arrive at appropriate decision in procurement of transformer and capitalization cost, price variation and other issues. Attention in particular was directed on selection of appropriate figure in the components of TOC formula i.e. relating to life of transformers and numbers of hours of power supply. That a Court is not equipped to adjudicate upon such policy decisions where there could be different competing views and as such Hon'ble Court would not, it is respectfully submitted, entertain in the petition.

(D) Fourthly the terms of invitation to tender are in the realm of contract and as such not open to judicial scrutiny. The scope of judicial review is only to review the decision making process and does not extend to review the decision of the authority in determining terms an conditions of tender. The Court does not sit in appeal over the decision of the authority and that it's interference is warranted only if the decision is wholly arbitrary, discriminatory, malafide or actuated by malice, or the same is violating any constitutional or legal limits. Therefore also the petition deserves being rejected.

(E) Fifthly I submit that Divisional Bench of this Court has in a decision rendered by it in a matter pertaining to challenge to tender condition gone to the extent of holding that even if the Court finds that terms of any tender are arbitrary or discriminatory that finding itself may not be sufficient to strike down the terms of the tenders unless the arbitrariness and

discrimination are writ so large that the Court is in a position to come to the conclusion that the action of tendering authority in setting the terms of the tender is malicious and a misuse of its powers, which is not even the case of the petitioner, therefore also the petition does not deserve being admitted."

7 Public interest litigation is a very important branch. We have been observing over a period of time that in the name of being a public spirited persons, the litigants rush to file cases in profusion under this attractive name. Supreme Court has time and again reminded the High Courts that such persons must inspire confidence in courts and amongst the public. They must be above suspicion. The Court must encourage genuine and bonafide Public Interest Litigation and effectively discourage and curb the Public Interest Litigation filed for extraneous considerations. Courts should, prima facie, verify the credentials of the petitioner before entertaining a Public Interest Litigation.

8 During the course of hearing of this petition, we inquired with the learned senior counsel as to what are the two petitioners doing in life and how are they placed in the society. We found that the averments in the petition as regards their status in life and other details are not satisfactory. We, therefore, directed the learned counsel to ask both the petitioners to remain personally present before the Court. On the next date of hearing, both the petitioners remained present and we inquired with petitioner no.1 as to what he is doing in life and how he is interested in this litigation. Petitioner no.1 replied that he is a small time insurance agent. We asked him about his income-tax returns. The reply of petitioner no.1 was quite shocking. He replied that he has never filed income-tax return in his entire life time. We, thereafter, inquired with petitioner no.2 as to what he is doing in life. Petitioner no.2 replied that he is a retired Electrical Engineer. He retired from Gujarat Electricity Board in the year 1994 and is drawing a pension of about Rs.1,000=00. We asked him about his other source of income and the reply was that he draws some amount towards interest from a fixed deposit. Even he is not filing any return of income tax. However, he claimed that since he is an Electrical Engineer, he has some expertise on the subject.

9 The replies of both the petitioners left us aghast. We were left wondering as to how these two petitioners have been able to avail the services of one of the renowned law firms in the city of Ahmedabad or rather we would say in the State of Gujarat and further how they have been able to afford to take the services of one of the top-ranking designated senior counsels of the High Court. When we inquired with the petitioners in this regard, they had no reply and feebly stated that they have not paid the fees either to the law firm who has filed this petition or to the learned senior arguing counsel. We immediately realized that the petitioners are merely pawns in the hands of a

section of persons interested in CRGO transformers. We immediately realized that the preliminary objection raised by the respondents has a lot of force. Incidentally, it has to be placed on record that the petitioners have taken a different stand in their petition in respect of cost of the litigation and have stated thus :

"...That the petitioner is filing the present petition purely in Public Interest on his own and not at the instance of any other person or organization. The litigation cost, including the advocate's fees and the traveling expenses are being borne by the petitioner himself."

10 We have no doubt that the petition filed by the petitioners is far from being bonafide. They have been setup by others. In the words of the Supreme Court, they are nothing but name-lenders. We hold accordingly.

11 The question which we need to address is what should be the approach of the Court having realized that the bonafides of the petitioners are doubtful and that, prima facie, they have been setup by persons who are actually interested in the business of transformers. In this regard, we find that the Supreme Court, in the case of T.N.Godavarman Thirumulpad V/s. Union of India and others, reported in (2006)5 SCC 28, in so many words has observed as under :

"However genuine a cause brought before a court by a public interest litigant may be, the court has to decline its examination at the behest of a person who, in fact, is not a public interest litigant and whose bona fides and credentials are in doubt. In a given exceptional case where bona fides of a public interest litigant are in doubt, the court may still examine the issue having regard to serious nature of the public cause and likely public injury by appointing an Amicus Curiae to assist the court but under no circumstances with the assistance of a doubtful public interest litigant. No trust can be placed by court on a mala fide applicant in public interest litigation. These are basic issues which are required to be satisfied by every public interest litigation."

"On perusal of record, we have no doubt that the application filed by Deepak Agarwal is far from bona fide. He has been set up by others. We strongly deprecate the filing of an entirely misconceived and mala fide application in the garb of public interest litigation by Deepak Agarwal. He is nothing but a name lender."

12 Ordinarily, Court would allow litigation in public interest if it is found :

That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India and relief is sought for its enforcement;

That the action complained of is palpably illegal or mala fide and affects the group of persons who are not in a position to protect their own interest on account of poverty, incapacity or ignorance;

That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;

That such person or group of persons is not a busy body of meddlesome inter-loper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;

That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;

That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man in the institution of the judiciary and the democratic set up of the country;

That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;

Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;

That the person approaching the Court has come with clean hands, clean heart and clean objectives;

That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons or groups with mala fide objective of either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest.

13 In the case of Shri Sachidanand Pandey V/s. State of West Bengal, reported in AIR 1987 SC 1109, the Supreme Court observed as follows :-

"Today public spirited litigants rush to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion. Public Interest Litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without any rhyme or reason. It is therefore necessary to lay down, clear guidelines and to outline the correct

parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of Public Interest Litigation, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves Administrative and executive functions. This does not mean that traditional litigation should stay out. They have to be tackled by other effective methods, like decentralizing the judicial system and entrusting majority of traditional litigation to Village Courts and Lok Adalats without the usual populist stance and by a complete restructuring of the procedural law which is the villain in delaying disposal of cases....

It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basis human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially the Supreme court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the under-dog and the neglected. It is necessary to have some self-imposed restraint on Public Interest Litigants."

14 In a recent pronouncement of the Hon'ble Supreme Court in the case of State of Uttaranchal V/s. Balwant Singh Chaufal and Ors., reported in (2010) 3 SCC 402, in paragraphs 178, 179, 180 and 181, the Supreme Court laid down the following guidelines relating to Public Interest Litigation:-

"178. We must abundantly make it clear that we are not discouraging the Public Interest Litigation in any manner, what we are trying to curb is its misuse and abuse. According to us, this is a very important branch and, in a large number of PIL petitions, significant directions have been given by the Courts for improving ecology and environment, and the directions helped in preservation of forests, wildlife, marine life etc. It is the bounden duty and obligation of the Courts to encourage genuine bonafide PIL petitions and pass directions and orders in the public interest which are in consonance with the Constitution and the laws.

179. The Public Interest Litigation, which has been in existence in our country for more than four decades, has a glorious record. This Court and the High Courts by their judicial creativity and craftsmanship have passed a number of directions in the larger pubic interest in consonance with the inherent spirits of the Constitution. The conditions of marginalized and vulnerable section of society have significantly improved on account of Court's directions in PIL.

180. We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other Courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The Court must encourage genuine and bonafide PIL and effectively discourage and curb the PIL filed for extraneous consideration.

(2) Instead of every individual judge devising his own procedure for dealing with the Public Interest Litigation, it would be appropriate for each High Court to properly formulates rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to the Secretary General of this Court immediately thereafter.

(3) The Courts should prima-facie verify the credentials of the petitioner before entertaining a PIL.

(4) The Courts should be prima-facie satisfied regarding the correctness of the contents of the petition before entertaining petition.

(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the Public Interest Litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

15 In a much recent pronouncement of the Hon'ble Supreme Court in the case of P.Seshadri V/s. S.Mangati Gopal Reddy and Ors., reported in (2011) 5 SCC 484, has observed that :-

"Public Interest Litigation can only be entertained at the instance of bonafide litigants. It cannot be permitted to be used by unscrupulous litigants to disguise personal or individual grievances as Public Interest Litigations. The Supreme Court does not approve of an approach that would encourage petitions filed for achieving oblique motives on the basis of wild and reckless

allegations made by individuals i.e. busybodies, having little or not interest in the proceedings. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise the petition is liable to be dismissed at threshold."

16 Despite our conclusion that the bonafides and credentials of the petitioners are in doubt, we have examined the issue in question. We may only say that what could not have been agitated by persons interested in CRGO transformers is sought to be conveyed to the Court by way of a Public Interest Litigation through two petitioners as their mouth pieces. Essentially, what is being challenged in the present petition is a tender notice. Whether the respondents should go for Amorphous transformers or should go for CRGO transformers is not for this Court to decide by merely trying to show that in comparison to Amorphous transformers, CRGO transformers are much better.

17 Firstly, this Court does not have the expertise on the subject. It is for an expert body to look into all these aspects and we are satisfied on perusal of the record and the affidavit-in-reply that there has been substantial deliberations on this issue by an expert body constituted by the respondents in this regard. Not only this, but we have also noticed that the representation of manufacturers of CRGO transformers has also been considered.

18 We may quote with profit a judgment rendered by this High Court in the case of Larsen and Toubro Limited and another V/s. Gujarat State Petroleum Corporation Limited and others, reported in 2000(2) GLR 1814, wherein the learned Single Judge has very lucidly explained the position of law as under :-

"In the matter of particulars of the contract, such as what is actually required to be done, in what mode it is to be done, with what quality of material, in what time frame, subject to what type of supervision, as to what should be the standards to be observed and innumerable other aspects, which may have a bearing on the purposes for which the State authority invites the tenders, the Court will not ordinarily interfere with them nor require the authority to ask for a particular thing in a particular manner while inviting tenders. The consensual element in contract is as much present in the State authorities as in private individuals in the matter of fixation of the stipulations on the basis of which a contract is to be formed. What stipulations the authority should have fixed or ought to fix for the purpose underlying the subject contract has a bearing on the consensual aspect of the contract where the public authority should be free to determine its requirements like any private person. In short, the Court's

power of judicial review does not extend to fixing stipulations of the subject of the contract. It only extends to keeping the public authorities, that are "State" as defined by Article 12, within the limits of their authority to safeguard the fundamental rights guaranteed by Part-III of the Constitution. If the Courts were to postulate rules ostensibly related to limitations on administrative power, but in reality calculated to open the gate into the forbidden field of merits of its exercise, the functions of the Courts would be exceeded. But, when it comes to the matter of exceeding or abusing the authority to bring about a contractual transaction the judicial review is permissible to prevent arbitrariness in the manner in which the public authority functions while entering into a contract. That is, in reality, in the realm of judicial control over administrative power of the public authority to bring about a contractual relationship with a private individual and not an interference into the stipulations on the basis of which the contract is intended to be made by the authority."

"A host of factors go into the economic aspect of the returns from the power generation and that these are statutorily regulated. It will therefore be too naive to accept the oversimplified approach of the petitioners raised for the first time in the rejoinder wailing over huge revenue loss worked out (at page 560) on an assumption of 80 per cent plant load factor and other assumptions which may not be in reality warranted. In fact such dabbling of an outsider into estimating the possible revenue returns of a generating company that is shackled by several terms and conditions for fixation of tariff and has to keep in view 16 per cent return on equity is not permissible at the instance of the petitioners or of its own by the Court while examining whether there has been arbitrary denial of contract to the petitioner. No such exercise is at all warranted for a sort of `post-mortem' of the decision fixing the requirement for tenders. Fixing the plant capacity of a Generating Company which regulated by statutory provisions as to tariff is no one else business. The analysis of reasons that led to fixing the plant capacity required for the project is in no way Courts' concern. It is not for the Court to study whether the project was viable and then to infer arbitrariness or malafides. The decision making process with which the Court is concerned for ruling out arbitrariness or malafide exercise of power is the process of deciding whom to award the contract and not any anterior process of deciding as to what should be the requirements for inviting tenders."

"The Courts are not concerned with the wisdom or desirability of the terms on which a party is willing to contract. The Courts will not reconstitute or renegotiate the terms of contract. At the stage of negotiation of the terms of the proposed contract, there is everything to be said for allowing the parties to formulate the terms and conditions as per their respective contractual

intentions. The parties are free to determine for themselves what primary obligations they will accept. The preliminary negotiations leading upto the execution of a contract are to be distinguished from the contract itself. There is no meeting of minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce."

The aforesaid judgment rendered by the learned Single Judge was further confirmed by the Division Bench of this High Court reported in 2001(2) GLR 934, wherein the Division Bench observed as under :-

"It is settled principle of law that approach for judicial review is not an appeal against the administrative decision which is made here in consultation with experts. Judicial review is permissible only against decision-making process and not decision itself. This Court finds itself totally ill-equipped for want of knowledge of technical and financial intricacies in the matter of award of contract for setting up power plant, to come to a conclusion either way that the decision taken by the Managing Committee was erroneous or correct. We also do not find it to be against public interest. It is possible to project an opposite view on the financial and technical opinions formed by the experts and consequent decision taken by the Committee. But that can be no justification to upset their decision, as this Court finds the decision to have been taken objectively and bona fide. We have tried to understand the technical and financial information given to us by the parties before us, and we have tried to scrutinise the record. So far as we have understood, it is not possible for this Court with limited knowledge on the subject to come to a conclusion that the decision taken was either actuated by favouritism or was in utter disregard of public interest. We also find no force in the bald allegation that the R.F.P. was tailor-made to suit selection of A.B.B. Ltd."

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, consideration which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily."

"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 power under Art.226 with great caution and should exercise it only in furtherance

of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

We would also like to quote ruling of the Supreme Court in the case of Directorate of Education and others V/s. Educomp Datamatics Limited and others, reported in AIR 2004 SC 1962, wherein the Supreme Court, in paragraph 12, held as under :-

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

In the case of Association of Registration Plates V/s. Union of India and others, reported in AIR 2005 SC 469, the Supreme Court in paragraphs 37, 38 and 40 held as under :-

"37. It is not controverted that the technical 'know-how' for the manufacture of high security registration plates presently is available outside India. Technically and financially, competent indigenous manufacturers are mostly those who are in collaborations with foreign companies engaged in such manufacturing activities. The scheme contemplated under rule 50 of registration plates is a new experiment for India. In the initial stages of its implementation, tender conditions encouraging such manufacturers who are in foreign collaborations cannot be held to be discriminatory to indigenous manufacturers. Keeping in view the nature of the contract and job involved particularly its magnitude and the huge investment for infrastructure required, attempt to select such manufacturer - may be having collaboration with foreign companies and experience in foreign countries cannot be held to be a deliberate attempt on the part of the State authorities to eliminate indigenous manufacturers.

38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security

registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers. It is explained that on the date of formulation of scheme in rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said Article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain a data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population."

In the case of Master Marine Services (P) Limited V/s. Metcalfe and Hodgkinson (P) Limited and another, reported in (2005)6 SCC 138, the Supreme Court in paragraphs 11, 12 and 15 held as under :-

"11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender

and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular V/s. Union of India, AIR 1996 SC 11. It was observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the reports).

12. After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an Administrative Body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the reports, SCC para 94)."

After reviewing the entire case law on the subject the principles deduced in Tata Cellular V/s. Union of India, 1994(6) SCC 651, by the Supreme Court, for exercising judicial restraint in administrative action are :-

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

(2) The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be

substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decision are made qualitatively by experts.

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

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

For the reasons stated above, we hold that this writ petition in the nature of Public Interest Litigation is misconceived as the petitioners are lacking in bonafides and credentials. Even otherwise on merits also, we do not find any substance and, therefore, we have no other option but to reject this writ petition with cost. We quantify the cost at Rs.25,000=00 with consciousness that the petitioners are not paying tax but have acted only at the instance of persons who are not ready to come before the Court.

The writ petition is hereby rejected with cost of Rs.25,000=00 on each of the petitioners, to be paid to the Gujarat State Legal Services Authority within a period of four weeks from today.

Registry to report compliance of the order of imposition of cost.