CONSTITUTIONAL WRIT

Present : The Hon'ble Justice Dipankar Datta

Judgment on : 16.06.2010

W.P. No. 4004 (W) of 2010

Sidwal Refrigeration Industries Ltd. & anr.

…Petitioners

Versus

Union of India & anr.

…Respondents

POINTS

Tender – Tender issued by Article 12 Authority – Challenge to the Tender Notification – The condition relating to the eligibility of the tenderer alleged to have been inserted to eliminate Indian Companies – Authority challenges the Locous standi of the petitioner ompany – Writ Petition , if maintainable for breach of Article 14 of the Constitution Of India in contractual field – Public policy when can be inferred with by the Court – Objective Consideration vis a vis Subjective Satisfaction – Constitution of India Article 12.

FACTS

Tender floated in connection with the East West Metro Corridor project by Kolkata Metro Railway Corporation Ltd a joint venture company of Govt. of India and govt. of West Bengal. The petitioner which is a reputed manufacturer of Air Conditioning units of railway coaches in India filed the present writ petition alleging that clauses I 1(dd) and 19(1) stipulate certain conditions which was deliberately inserted to eliminate Indian Companies and therefore was bad and violative of the constitutional Gurantees . The Respondents Kolkata Metro Railway Corporation contested the writ petition contending Inter alia that Writ petitioner had no locus standi and was not maintainable in the contractual field .

HELD

Having regard to the terms and conditions mentioned in the tender documents, inclusion of the name of the company in the tender by an interested party is fraught with the risk of deletion of its name for not having fulfilled the proven design criteria and hence the company is indeed a person aggrieved having *locus standi* to maintain the petition.

Para 32

Notwithstanding existence of inherent limitations, even in the contractual field if action of an Article 12 authority is questioned on the ground of breach of Article 14 of the Constitution by filing a writ petition, it cannot be held **not** maintainable. Whether or not the Court would entertain it or not must necessarily depend on the facts and circumstances of each case and it is for the Court to exercise discretion according to well established principles. If the Court decides to entertain the plea, the scrutiny of the Court would be more intrusive if the challenge is at the threshold of a contract as distinguished from a breach of contract. It must be remembered that an Article 12 authority cannot act unfairly or arbitrarily or unreasonably even while discharging contractual obligations and in appropriate cases, depending on the nature of violation and the remedies available to the aggrieved party, the Court of Writ may interfere to set things right.

Para 34

The Court ought not to interfere merely because a particular policy adopted by the tender issuing authority, in the Court's opinion, is not wise. The Court must confine its scrutiny only to reasonableness of the action complained of and whether it violates the constitutional guarantees or not.

Para 44

The test, therefore, should be to ascertain whether the particular policy decision is based on lawful and relevant grounds of public interest or not. Objective consideration of different options available, taking into account the interest of the State and the public, must be preferred to subjective satisfaction while formulating terms and conditions of a tender of like nature. Options available to KMRCL do not appear to have been searched in the proper perspective keeping in mind rights guaranteed by Part III of the

Constitution, leading to a situation where, by reason of the impugned condition, Indian companies are excluded from consideration of their credentials. If Indian companies have the potential to manufacture quality products, there is no reason to shut them out at the threshold. The net result of Clause 1.1 (dd) is creation of monopoly in favour of certain foreign companies at the behest of an Article 12 authority, which is clearly opposed to the preambular promise of securing social as well as economic justice to the people of India. Para 46

None can possibly dispute that the factor of experience in providing services or manufactured products to foreign countries has a direct nexus with the quality of such services or products. It is reasonable to assume that better the quality of the services or the products, the more it would be availed of by the parties interested. As noticed earlier, the criterion of 'Proven Design' has been inserted in the tender terms and conditions primarily with the view to engage the best from among manufacturers or service providers of foreign countries. However, the condition of specified number of services utilized/products in use in countries other than the country of manufacture ought not, in my view, be given priority over quality of the products manufactured or the services provided. Para 47

Prime concern, therefore, should be the quality of the products manufactured by an Indian company and not whether the products are in use in foreign countries. Non-use of the products manufactured by an Indian company in different foreign countries may not in all cases be determinative of its quality. Objective tests are to be applied for determining quality of a product. If the company fails to satisfy the criterion of producing quality products, it may not be considered but merely because its products are not in use in foreign countries ought not to be considered relevant for excluding it altogether from the zone of consideration.

Para 48

Right of consideration is a fundamental right which seems to have been breached here by inserting the impugned condition.

Para 49

CASES CITED

1.(1997) 1 SCC 738 (Asia Foundation & Construction Ltd. v Trafalgar House Construction (I) Ltd.), Para 18

2.(2004) 4 SCC 19 (Directorate of Education v Educomp Datamatics Ltd.), Para 18

3.(2000) 5 SCC 287 [Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation], Para 18

4.AIR 1999 Gauhati 90 (Thermax Ltd. Pune, vs. N.E. Electric Power Corporation Ltd., Shillong),Para 18

5. (2009) 6 SCC 171 (Meerut Development Authority v Association of Management Studies)
AIR 1993 Delhi 252 (Thomson-CSF vs. National Airport Authority of India). Para 18

6. (2005) 1 SCC 679 (Association of Registration Plates vs. Union of India & ors. Para 20

7. (1961) 2 All ER 504 (Attorney General of Gambia vs. N'Jie). Para 25

8. AIR 1966 SC 828 (Gadde Venkateswara Rao vs. Govt. of Andhra Pradesh). Para 26

9. (1976) 1 SCC 671 (Jasbhai Motibhai Desai vs. Roshan Kumar). Para 27

10. (1993) 1 SCC 445**,** Sterling Computers Ltd. v. M & N Publications Ltd. Para 45

For the petitioners : Mr. Ashok Kumar Banerjee
Mr. Debnath Ghosh
Mr. H. Pillai
Ms. S. Unni
Mr. R. Upadhyay
For the respondent 1 : None

For the respondent 2 : Mr. Kishore Datta
Ms. Sumita Shaw

THE COURT.1)The first petitioner is a company registered under the Companies Act, 1956 (hereafter the company). The second petitioner is the managing director of the company.

2)It is claimed in the petition that the company, more than three decades old and ISO-9001-2008 certified, is the largest manufacturer of air-conditioning units for railway coaches in India. It claims credit for supplying more than 6000 air-conditioners for leading trains, like Rajdhani Express and the Shatabdi Express apart from five 'Palace on Wheel' trains for different States in India. It is further claimed that the company has been selected by the Delhi Metro Rail Corporation (hereafter the DMRC) for manufacturing air-conditioners for the coaches (EMUs) in Phases - I and II of the Delhi Metro Project. As on date, it has delivered 574 units including 42 air-conditioned driver cabins to the DMRC and is continuing to supply units regularly.

3)Construction of East-West Metro Corridor Project from Howrah Maidan to Salt Lake, Sector V, Kolkata for the present with scope for future extension from Dasnagar to other neighbouring areas of Howrah was approved by a study cabinet in its meeting held on 14.6.2007 pursuant whereto the Kolkata Metro Railway Project (hereafter the project) was conceived with target date of completion being October, 2014. The project cost would be borne by the Japan International Corporation Agency (hereafter JICA), the Central Government and the State Government of West Bengal in the ratio of 45:25:30 respectively.

4)Kolkata Metro Railway Corporation Ltd. (hereafter KMRCL), being a joint venture company of the Government of India and the Government of West Bengal, formed for implementation of the East-West Metro Corridor Project at Kolkata, had issued Pre-qualification Tender Notification

(Revised) dated 25.3.2009 (hereafter the notification) with a view to shortlist "Passenger Rolling Stock Design & Manufacturing Companies" through a pre-qualification process for the design, manufacture, supply, testing and commissioning of electric multiple units and training of personnel. The notification provided thathe KMRCL would appoint 'General Consultant' for assisting it in evaluating the tenders. Indian as well as international companies, either by themselves or as a joint venture/consortium were invited to complete the pre-qualification enquiry documents in pro-forma format. The applicants were required to have a good financial standing and performance record, requisite experience and capacity in the fields for which the notification was issued.

5)The notification envisaged a three-tier process. Those applicants succeeding in the pre-qualification stage would be entitled to have the tender documents for submission of technical bid and financial bid.

6)In this writ petition, the petitioners seek to challenge a particular condition incorporated by KMRCL. The condition which the petitioners say is malafide, arbitrary and unreasonable and, therefore, would have the effect of prejudicially affecting the right of the company finds place in the general conditions of the contract.

7)Mr. Banerjee, learned senior advocate appearing for the petitioners, while contending that the tender terms and conditions encouraged the interested parties to prepare a list of sub-contractors for such items as may be procured from them invited my attention to various conditions in the tender documents for proper appreciation of the petitioners' grievance.

8)I shall presently refer to the contents of the tender documents to which my attention was invited.

9)The definition of various terms appearing in the 'General Conditions of Contract' under *'A. Contract and Interpretation'* read as follows:

"1. Definitions

1.1The following words and expressions shall have the meanings hereby assigned to them:

(g) 'Contractor' means the person(s) whose bid to perform the Contract has been accepted by the Employer and is named as such in the Contract Agreement and SCC, and includes the legal successors or permitted assigns of the Contractor.

(n) 'Employer' means the person named as such in the SCC and includes the legal successors or permitted assigns of the employer.

(x) 'SCC' means special conditions of the contract.

(z) 'Subcontractor,' means any person to whom execution of any part of the Facilities, including preparation of any design or supply of any Plant and Equipment, is subcontracted directly or indirectly by the Contractor, and includes its legal successors or permitted assigns.

(dd) 'Proven Design' means the design of the Electrical Multiple Units and the associated equipments,/assemblies system which have been in service for 200 car sets during the preceding 10 years and at the time of submitting the above design to the Engineer, at least 50% of the above 200 car sets of which should have been in service for 5 years in a country other than the country of manufacture."

In so far as sub-contracting is concerned, clause 19 of the general terms and conditions of contract, contained in volume 2, provides as follows:
"19.1 The Contractor shall not sub-contract the whole of the Works. Unless otherwise stated in the Special Conditions of Contract:

(a)main equipment (propulsion control system, bogies, car body) cannot be sub-contracted. All subcontractors for supply/manufacture of important equipment and assemblies must comply with the Proven Design criteria. Approval of such subcontractors will be given by the Engineer within 21 days of the proposal;

b) the prior consent of the Engineer shall be obtained for other proposed Sub-contractors;

c) not less than 28 days before the intended date of each Sub-contractor commencing work, the Contractor shall notify the Engineer of such intention; and

d) the Contractor shall give fair and reasonable opportunity for contractors in India to be appointed as Sub-contractors. The Contractor shall be responsible for observance by all Sub-contractors of all the provisions of the Contract. The Contractor shall be responsible for the acts or defaults of any Sub-contractor, his representatives or employees, as fully as if they were the acts or defaults of the Contractor, his representatives or employees and nothing contained in Sub-clause (a) of clause 19.1 shall constitute a waiver of the Contractor's obligations under this contract. The Contractor shall provide to the Engineer of sub contracts upon request of the Engineer. The Contractor shall endeavour to resolve all
matters and payments amicably and speedily with the sub-contractors. 19.2 The corresponding Appendix (List of Approved Subcontractors) to the Contract Agreement specifies major items of supply or services and a list of approved Subcontractors against each item, including vendors except those specified in GCC 19.1. Insofar as no Subcontractors are listed against any such item, the Contractor shall prepare a list of Subcontractors for such item for inclusion in such list. The Contractor may from time to time propose any addition to or deletion from any such list. The Contractor shall submit any such list or any modification thereto to the Employer for its approval in sufficient time so as not to impede the progress of work on the Facilities. Such approval by the Employer for any of the Subcontractors shall no relieve the Contractor from any of its obligations, duties or responsibilities under the Contract. 19.3 The Contractor shall select and employ its Subcontractors for such major items from those listed in the lists referred to in GCC Sub-Clause 19.2
*19.4.*****"*
Clause 5.7.2 of the pre-qualification documents provides as follows:
"5.7.2 The Tenderers are advised to survey manufacturing facilities already existing in India and make use of the same, if considered useful by them. To facilitate ease in maintenance and easy availability of spares, KMRCL is keen on standardization and expects contractor to make efforts to source maximum number of equipments and materials from India. KMRCL has also identified the items given in Table below, which can be indigenized and sourced from India to meet the required performance requirements and quality standards.
Items for Indigenization
Sl. No. Description of Items
* *
* *

* *

9. Saloon Air-conditioner

*****”.

10)According to Mr. Banerjee, a conjoint reading of clause 1.1 (dd) and 19.1 (a) supra would reveal that a prospective Indian company to be eligible for supply of equipment of assembly systems should have not only supplied 200 running car sets in the last 10 years but 100 of them must be operational outside India. This condition, he contends, has been deliberately inserted in the tender terms and conditions to eliminate Indian companies and, therefore, is malafide.

11)He referred to the fact that the Delhi Metro is the only fully functional metro project in the country operating with air-conditioned units apart from the underground Calcutta Metro service from Dum Dum to Garia, which does not have air-conditioned cars. The Delhi Metro is yet to be a decade old. Though, the company has supplied more than 200 running car sets to the DMRC, it does not fulfil the requirement of supplying 100 such car sets to foreign countries and, therefore, would stand excluded from the entire project if the impugned condition is rigidly adhered to. Such a condition, he further contended, is absolutely arbitrary and unreasonable being opposed to national interest and, therefore, liable to judicial interdiction by the Court of Writ.

12) In course of hearing, Mr. Banerjee brought to my notice that though the company in view of the terms and conditions in the tender documents was not qualified to be engaged as sub-contractor by any party interested to be selected as the contractor for the project, 2 (two) of the 5 (five) short-listed companies have expressed interest to engage the company as sub-contractor.

13)He, accordingly, prayed for declaring the impugned condition [concluding part of 1.1 (dd)] as void being contrary to Articles 14 and 19 of the Constitution as well as opposed to public policy and to direct KMRCL to proceed in the matter in accordance with law.

14)The petition has been resisted by Mr. Datta, learned advocate for KMRCL.

15)It was first contended by him that in the present case, the terms and conditions set by KMRCL for selecting a contractor for implementing the project have been challenged by a party who at best could have been engaged as a sub- contractor on fulfillment of conditions mentioned therein and as such the company has no *locus standi* to challenge the terms and conditions for selection of a contractor particularly when none of the interested parties who have submitted bids to become the main contractor have challenged the same.

16)He next contended that tender being an offer and in the realm of contract, the Court ought to be circumspect in exercising its power of judicial review. According to him, stringent eligibility conditions have been inserted in the tender terms and conditions in view of the fact that safety and security of the public have been viewed to be of paramount importance by KMRCL. A project of this magnitude would require highest standard of excellence and that would be possible only if agencies having wide experience in the field are chosen for implementation of the project. He contended that in inserting the impugned clause of supply of at least 100 (hundred) car units to countries other than the country of manufacture, no right of the company has been infringed. KMRCL has, therefore, not resorted to an unprincipled approach.

17)It is his further contention that no party can claim a fundamental right to enter into a contract with an agency or instrumentality of the State and, therefore, challenge to the impugned condition must be eschewed.

18)In support of his submissions, Mr. Datta placed reliance on the decisions reported in (1997) 1 SCC 738 (Asia Foundation & Construction Ltd. v Trafalgar House Construction (I) Ltd.), (2004) 4 SCC 19 (Directorate of Education v Educomp Datamatics Ltd.), (2000) 5 SCC 287 [Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation], and AIR 1999 Gauhati 90 (Thermax Ltd. Pune, vs. N.E. Electric Power Corporation Ltd., Shillong), (2009) 6 SCC 171 (Meerut Development Authority v Association of Management Studies) and AIR 1993 Delhi 252 (Thomson-CSF vs. National Airport Authority of India).

19)On merits, it was submitted that the conditions imposed in the tender documents are the end result of deliberations and discussions between people who are considered experts in the field of running of railway systems forming the 'General Consultant'. The terms and conditions have been fixed keeping in view passenger safety as well as operational methods. The Court of Writ, according to him, must confine its review to the process of decision making and not the ultimate decision and the process itself not being infected with any of the vices attracting judicial review, interference is not called for.

20)He referred to the decision reported in (2005) 1 SCC 679 (Association of Registration Plates vs. Union of India & ors.) to contend that stringent conditions similar to the ones inserted in the tender with which I am concerned were upheld by a three judge bench of the Supreme Court on a difference of opinion between two learned Judges, thereby reversing the view of the learned Judge who had proposed interference. He urged me to follow the same course and thereby to dismiss the writ petition.

21)In reply, Mr. Banerjee submitted that the petitioners do have the *locus standi* to challenge the impugned condition since the same would have the effect of prejudicially affecting their interest to be engaged as sub-contractor by the contractor who is ultimately selected. By referring to clause 19 of the tender terms and conditions, he sought to contend that the Court has been given an erroneous picture of the stage at which the names of sub-contractors are to be proposed by the interested parties. Names of the sub-contractors, according to him, in terms of the tender terms and conditions are to be proposed along with the tender, prior to opening of the technical and financial bids. The claim of KMRCL that the stage has not yet arrived for the interested parties to furnish the list of sub-contractors has been described to be a flagrant attempt on its part to present an incorrect picture before the Court deserving strict condemnation.

22)I have heard the parties and perused the materials on record. The first question that arises for determination is whether the writ petition at the instance of the company is maintainable or not. In the event the answer to this question is in favour of the company, the further question that would arise for determination is whether the impugned condition is liable to be

interfered with by the Court of Writ on the grounds urged on the behalf of the petitioners.

23)For deciding the issue of *locus standi*, I consider it proper to briefly refer to the authorities on *locus standi* to maintain a writ petition under Article 226 of the Constitution relevant for guiding me to hold in favour of one and against the other.

24)I shall first refer to Prof. de Smith on 'Judicial Review of Administrative Action'. The learned author has observed in relation to an application praying for Certiorari that though it is a discretionary remedy, the Court may extend discretion by permitting an application to be made by any member of the public. A person aggrieved i.e. one whose legal rights had been infringed or who had any other substantial interest in impugning an order, might be awarded a certiorari ex debito justitiae, if he could establish any of the recognized grounds for
quashing but the Court would retain discretion to refuse his application if his conduct was such as to disentitle him to relief.

25)Nearly half a century back, in the decision reported in (1961) 2 All ER 504 (Attorney General of Gambia vs. N'Jie), the Privy Council was considering whether the Attorney General who had represented the Crown as a guardian of the public interest could be regarded as a person aggrieved having *locus standi* to appeal against a decision reversing a finding that a barrister and solicitor was guilty of professional misconduct. Lord Denning observed:
"……the words 'person aggrieved' are of wide import and should not be subject to a restrictive interpretation. They do not include of course a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

26)Then came the decision reported in AIR 1966 SC 828 (Gadde Venkateswara Rao vs. Govt. of Andhra Pradesh). The Supreme Court was considering whether the appellant had the *locus standi* to maintain a writ petition challenging the decision of the Government to shift a running primary health centre at Dharmajigudem village to a permanent location in Lingapalem village. The appellant was representing Dharmajigudem village in all its dealings with the block development committee and the panchayat samithi in the matter of location of the primary health centre at

Dharmajigudem and was the representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. The writ petition filed by the appellant was dismissed by a learned single Judge of the High Court and the writ appeal filed thereagainst was also dismissed. While considering the question of *locus standi* of the appellant to file writ petition under Article 226, it was ruled by the Supreme Court as follows:

*"8.*****We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Article 226 of the Constitution. This Court held in the decision cited supra that '"ordinarily" the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Article 226 of the Constitution at his instance is, therefore, maintainable."*

27)The next decision relevant for deciding the question of *locus standi* is the one reported in (1976) 1 SCC 671 (Jasbhai Motibhai Desai vs. Roshan Kumar). While considering who an aggrieved person is having *locus standi* to maintain a writ petition, the Supreme Court held as follows :

*"13. *****This takes us to the further question: Who is an "aggrieved person" and what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him.*****"*

28)In the same decision, in course of consideration of the legal position that the Supreme Court in a number of previous decisions had declared that in order to have the *locus standi* to invoke the extraordinary jurisdiction under

Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application, relaxation or modification in respect of writs like habeas corpus or quo warranto excepted, the Court proceeded to hold what 'ordinarily' indicates by observing that:

*"35.*****The expression "ordinarily" indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the subject-matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. The principles enunciated in the English cases noticed above, are not inconsistent with it."*

The Court, thereafter, proceeded to lay down tests for determining *locus standi* in the following words:

"37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer circle the

bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved'.

39. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose
legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person 'against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something?' Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words 'person aggrieved' is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

29)Although the Court did not expressly refer to N'Jie (supra), it noticed the subsequent decision authored by Lord Denning reported in (1972) 2 QB 299, Regina v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association, wherein the view taken in N'Jie (supra) was reiterated.

30)The objection of *locus standi* has to be decided keeping in mind the aforementioned principles.

31)Mr. Dutta is not right in his contention that the names of sub-contractors have to be proposed once the contractor is selected for implementing the project. Volume I of the tender documents requires each interested party to

submit with its tender certain attachments of which sub-clause (e) of Clause 9 relating to
"Documents Comprising the Tender" under the head *"C. Preparation of Tenders"* is
relevant. It reads as follows :
"(e) Attachment 5 : Subcontractors Proposed by the Tender
The Tenderer shall include in its tender details of all major items of supply or services specified in the TDS that it proposes to purchase or sublet, and shall give details of the name and nationality of the proposed Subcontractor, including vendors, for each of those items. Tenderers are free to list more than one Subcontractor against each item of the facilities. Quoted rates and prices will be deemed to apply to whichever Subcontractor is appointed, and no adjustment of the rates and prices will be permitted unless otherwise
quoted by the Tenderer. The Tenderer shall be responsible for ensuring that any Subcontractor proposed complies with the requirements of ITT Sub-Clause 2.1, and that any plant, equipment or services to be provided by the Subcontractor
complies with the requirements of ITT Clause 3 and ITT Sub-Clause 9.3(c) and proven design criteria.. The Employer reserves the right to delete any proposed Subcontractor from
the list prior to award of contract, and after discussion between the Employer and the Tenderer, the corresponding Appendix to the form of Contract Agreement shall be completed, listing the approved Subcontractors for each item concerned."

32)It is, therefore, clear that the name of the sub-contractor has to be proposed in the tender itself by the interested party desiring to obtain the contract for implementing the project. If the interested party proposes that any work is to be performed or any material is to be supplied by a sub-contractor but such sub-contractor does not fulfil the criteria of proven design, the employer would be having the right to delete such sub-contractor not being eligible to be proposed as such. It is immaterial that the sub-contractor itself (read the company) is not bidding for award of the contract for implementing the project. Having regard to the terms and conditions mentioned in the tender documents, inclusion of the name of the company in the tender by an interested party is fraught with the risk of deletion of its name for not having fulfilled the proven design criteria and hence the company is indeed a person aggrieved having *locus standi* to maintain the petition.

33)I have no hesitation to hold that the objection regarding *locus standi* is without substance. The preliminary objection is, accordingly, overruled.

34)The other objection raised by Mr. Datta, as noticed above, is equally without merit. Notwithstanding existence of inherent limitations, even in the contractual field if action of an Article 12 authority is questioned on the ground of breach of Article 14 of the Constitution by filing a writ petition, it cannot be held not maintainable. Whether or not the Court would entertain it or not must necessarily depend on the facts and circumstances of each case and it is for the Court to exercise discretion according to well established principles. If the Court decides to entertain the plea, the scrutiny of the Court would be more intrusive if the challenge is at the threshold of a contract as distinguished from a breach of contract. It must be remembered that an Article 12 authority cannot act unfairly or arbitrarily or unreasonably even while discharging contractual obligations and in appropriate cases, depending on the nature of violation and the remedies available to the aggrieved party, the Court of Writ may interfere to set things right. In the present case the challenge is at the threshold and the petitioners have complained of unfair, unreasonable and arbitrary treatment. I, therefore,
find no reason to decline the petitioners' claim to review the process of decision making leading to formulation of the impugned condition based on the contention raised by Mr. Dutta .

35)Now comes the question as to whether the impugned condition is sustainable in law or not.

36)In its counter affidavit, the stand of KMRCL is as follows:

"i) It may be worthwhile to mention here that metro cars of similar design i.e. Standard Gauge or Broad Gauge with air-conditioning coaches are new to India and therefore, the proven design technology may not be available in India. The clause takes care of multinationals who are working overseas and have adequate and proven experience of design and manufacture of rolling stock complete which include various important assemblies etc. It is the responsibility of these car builders to explore Indian Market and find out suitable vendors for supply of assemblies without sacrificing the quality.
j) Adequate care has been taken in the pre-qualification tender document to see that Indian manufacturers who have capability are given opportunity (Clause 5.7.2 of pre-qualification document. However, selection of such

vendors will be with the Main Contractor without compromising with the safety and reliability of the cars/equipments.
k) From a reading of the tender conditions, it would be evident that Indian companies are not debarred from participating as provided under Clause 5.7.2 of the pre-qualification document. However, Clause 19.1 (d) refers to the Indian manufacturers. This is essentially to safe guard against spurious and inexperience manufacture of equipments and assemblies. Moreover, passenger safety of EMU cars are of paramount importance. Unproven equipment may cause failure and fire in train.
l) Keeping in mind the passenger safety of metro cars against derailment and fire, the criteria 1.1 (dd) has been kept for selection of vendors. The proposed metro cars will run on underground section and on elevated section in Kolkata unlike main line railways where the service is mostly at grade. Any fire incident in metro cars can be disastrous. The reliability of EMU metro cars are also very important. Any failure or breakdown of train in the tunnel section/mid-section will cause enormous difficulty to the passengers. Any fire on any of the equipments can cause injury to the passengers including death. In view of this, selection criteria of vendors for supply of assemblies and sub-assemblies of such HVAC etc. have been kept in "proven design".
(underlining for emphasis by me)

37)Mr. Banerjee is right in his contention that KMRCL did not undertake any exercise to find out whether any Indian company is engaged or not in the manufacture of *"saloon air conditioners"* and this is evident from the extract underlined above.

38)Since the counter affidavit of KMRCL provided little light worthy of assistance in relation to deliberations immediately prior to fixation of the impugned condition, in course of hearing I had called upon Mr. Dutta to produce the relevant records containing recording of deliberations by the experts whose collective wisdom had been instrumental in formulation of the terms and conditions of the tender, both mandatory and desirable.

39)Regrettably, the records were not produced on the specious ground advanced by Mr. Dutta that the same are voluminous and KMRCL failed to comprehend which particular document would be of assistance to the Court. Instead, Mr. Dutta placed a list of dates pertaining to relevant events leading to fixation of last date for submission of technical and financial bids.

40)I consider it proper to reproduce below the said list of dates, as furnished by Mr. Dutta, in its entirety. The same reads thus: Date Particulars *28.11.2008 Managing Director, Kolkata Metro Railway Corporation Limited (KMRCL) informed the Chief Representative, Japan*
International Corporation Agency (JICA) that Pre-Qualification Tenders would be invited by KMRCL but evaluation would be done by G.C.
28.11.2008 Proposed PQ Tender document forwarded to JICA for approval inter alia stating that Bangalore Metro Pattern was followed in preparing the tender document. 6.01.2009 Queries raised by JICA in respect of the draft PQ documents and 7.01.2009 were discussed in details at Kolkata. 7.01.2009 Modified PQ Tender document was forwarded to the Senior Development Specialist JICA for approval. 20.01.2009 PQ Tender published by KMRCL for Short Listing Passenger Rolling Stock Design & Manufacturing Co. through a Pre-
Qualification Process for design, manufacture, supply, testing and commissioning of electrical, Multiple Units. 21.01.2009 PT Tender document issued. 09.02.2009 Corrigendum No.1 to the PQ Tender document inter alia to the effect that clarifications on PQ Tender conditions would be entertained only if asked in writing. 02.03.2009 Last date fixed in the PQ Tender document inter alia to the effect that clarifications on PQ Tender conditions would be entertained only if asked in writing. 09.03.2009 Pre bid meeting for PQ Tender held at Kolkata. 14 tenderers attended. Queries raised were discussed. One week extension was given for raising further queires. 16.03.2009 Queries made by tenderers following the discussion on 9.3.2009 was received till 16.3.2009. 18.03.2009 General Consultant replied to all the queries. 18.03.2009 Taking into account the queries and replies some amendments were made in the PQ Tender conditions. Copy
sent to Chief Representative, JICA for concurrence. 25.03.2009 JICA communicated its 'No Objection' to the clarification and amendments in the PQ Tender documents to KMRCL..
25.03.2009 Corrigendum No.2 to the PQ Tender document issued. 25.03.2009 Revised pre-bid notification issued by the KMRCL. 07.04.2009 Last date for submitting documents by the intending bidders. 07.04.2009 Date fixed for opening the offers. 14.05.2009 General Consultant short listed 5 tenderers. 14.05.2009 The list of short listed bidders was placed before the Chief Engineer Level Committee of KMRCL.. 14.05.2009 The Chief Engineer Level Committee of KMRCL approved the list of short listed bidders. 15.05.2009 List of bidders placed before JICA.. 25.05.2009 JICA raised objection as regard eligibility of the 5th short list consortium viz. M/s.

Alstom India and France. 29.05.2009 Objection of JICA was considered by General Consultant and the name of Alstom India and France was struck out. 29.05.2009 The observation of G.C. dated 29.5.2009 was placed before the Chief Engineer Level Committee of KMRCL which approved such recommendation. 03.06.2009 Approval of the Chief Engineer Level Committee of KMRCL placed before the Board Level Committee of KMRCL which approved the recommendation. 14.06.2009 Richard Trabucco, Member G.C., through an e-mail message informed Sri Arun Kumar Chattopadhyay, C.E. Electrical, KMRCL that he would prepare the discussion point and sent them to Sri Arun Kumar Chattopadhyay. He proposed that focus should be on (a) what the car builder can provide as an Off-The-Shelf Design, (b) dimensional and performance aspect of the Kolkata System, (c) the variations in the Off- The-Shelf Design which the system can tolerate without having to redesign and retest the car shell and system/equipment and (d) latest technology that can be incorporated into the new car design to reduce operating cost and maintenance cost. 14.06.2009 Richard Trabucco, Member, G.C. through an e-mail forwarded a combined question list for the car. He proposed that list should be sent in advance to the car builder for their presentation. Question No.2 of the combined question list was "Proven in service requirement for certain items are essential, it must be supported with documents, to prove the type/model [with latest version] for equipment manufactured and supplied for quantity not less than 200 coach set at least 100 of which must be to a country other than country of origin."

Question no.7 of the combined question list reads as follows :

"Describe the car builder plan to utilize local labour and supplier to the extent possible."

16.06.2009 Approval of Board Level Committee of KMRCL dated 3.6.2009 was placed before JICA which approved the same. 29.06.2009 The approval of JICA dated 16.6.2009 was placed before the Chairman of KMRCL who approved the same. 03.07.2009 Through an e-mail Sri Arun Kumar Chattopadhyay, Member, General Consultant Committee informed Richard Trabucco, another member of General Consultant Committee that there were some other points which are required to be mentioned and taken care of in the tender document. 03.07.2009 Richard Trabucco through an e-mail gave his suggestions in regard to measures that are to be taken to prevent faults in the pneumatic brakes and to prevent failure of the auxiliary converter and air compressor and sought for the opinion of Sri Arun Kumar Chattopadhyay. 03.07.2009 Sri Arun Kumar Chattopadhyay through an e-mail informed Richard Trabucco that he

agreed with the suggestions on pneumatic bricks and auxiliary converter. He opined that for air compressor importance should be attached to the working of complete brake system, traction system and wiper system requirement with other compressor/compressors. 03.07.2009 Richard Trabucco through an e-mail proposed to Sri Arun Kumar Chattopadhyay that a clause regarding pneumatic brick in the form of Clause 12.3.1 should be added in the tender documents.. 03.07.2009 Sri Arun Kumar Chattopadhyay through an e-mail to Richard Trabuccosuggested regarding some item of diesel loco. 09.07.2009 Richard Trabucco through an e-mail informed Sri Arun Kumar Chattopadhyay that some changes should be made in section 20 of the Tender documents. 14.07.2009 Representative of one of the car builders through an e-mail provided his comments on the draft rolling stock specification and requested that a meeting be arranged on 23.7.2009. Arther Wessling, Member, General Consultant through an email informed David Blackwood Doglous, Member, General Consultants that certain areas highlighted in the attachments were required to be considered. Copy forwarded to Sri Arun Kumar Chattopadhyay. 17.07.2009 Richard Trabucco through an e-mail informed Sri Arun Kumar Chattopadhyay that another meeting with the car builders was required for providing better specification which would benefit KMRCL. 30.07.2009 Presentation meeting held when bidders gave their respective suggestions. 11.08.2009 Sri Anjan Datta of Mitsubishi Corporation through an e-mail forwarded to Sri Arun Kumar Chattopadhyay the replies of MELCO on Standard ANSI/ATA 878.1. 24.08.2009 Richard Trabucco through an e-mail to Arther Wessling gave some suggestions in regard to building the car shells. He suggested that the specification in the Chenni Tender was not to be put in until further research by him. He gave his suggestions on the specification on the car body. 25.08.2009 Arther Wessling through an e-mail informed Sri Arun Kumar Chattopadhyay that the Proven Design requirements should be changed if it was considered that there was a risk in it. 27.08.2009 The pre-bid process was over. 27.08.2009 Approval of chairman of KMRCL dated 29.6.2009 was placed before the Board of Directors of KMRCL who approved the same. 09.09.2009 Notice Inviting Tender sent to the Short Listed Bidders. 03.02.2010 Last date fixed for submission of technical bid and financial bid by the short listed bidders. However it was extended till 10.2.2010.

41)A bare perusal of the above particulars would not reveal that any empirical study had been undertaken to ascertain whether any Indian company is engaged in the business of supplying air conditioned units for metro rail services or not and, if so engaged, whether its performance has

been satisfactory or not. The claim of the company that it is the largest manufacturer of saloon airconditioners in the country has not been seriously disputed by KMRCL. It has also not been shown that the company's claim of supplying units to the DMRC which have been functional without any complaint is exaggerated. Credentials of the company, therefore, seem to have been overlooked by the experts engaged by KMRCL while formulating the terms and conditions of the tender.

42)I do not for a moment doubt that safety and security of the general public ought to be of prime concern for KMRCL and all those connected with the project. Failure to ensure adequate safety measures might entail loss of valuable lives consequent to occurrence of any accident. In case of an accident possibility of those at the helm of the affairs of KMRCL being hauled up for criminal negligence cannot be ruled out. To avoid such an eventuality, if KMRCL has inserted stringent terms and conditions for compliance by contractors and subcontractors alike, the same cannot be ascribed to be malafide, as contended by Mr. Banerjee. The counter affidavit clearly reflects that clause 1.1 (dd) was inserted by KMRCL being of the impression that Indian manufacturers are not available and, therefore, the foreign manufacturers of products as detailed in Clause 5.7.2 of the pre-qualification documents and intended to be engaged as sub-contractors must fulfil the additional condition of its products of specified number being in use in countries other than the country of manufacture before engagement as sub-contractors for the project. It is indeed a welcome step, if no Indian company is engaged in manufacture of materials or for supplying the required services. The charge of malafide, thus, leaves me unimpressed.

43)But, the impugned condition does not stand the test of scrutiny regard being had to the other contention of Mr. Banerjee that the same is unreasonable and violates the guarantees provided in Articles 14 and 19.

44)I am conscious of the power of the Court of Writ to interfere in disputes of the present nature. The Court ought not to interfere merely because a particular policy adopted by the tender issuing authority, in the Court's opinion, is not wise. The Court must confine its scrutiny only to reasonableness of the action complained of and whether it violates the constitutional guarantees or not.

45)I may usefully refer to the decision reported in (1993) 1 SCC 445**,** Sterling Computers Ltd. v. M & N Publications Ltd. in this regard. It has been ruled there as follows:

"17. It is true that by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book Administrative Law, Prof. Wade has said:

'The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.' But in the same book Prof. Wade has also said:

'The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void.'

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

procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

46)The test, therefore, should be to ascertain whether the particular policy decision is based on lawful and relevant grounds of public interest or not. Objective consideration of different options available, taking into account the interest of the State and the public, must be preferred to subjective satisfaction while formulating terms and conditions of a tender of like nature. Options available to KMRCL do not appear to have been searched in the proper perspective keeping in mind rights guaranteed by Part III of the Constitution, leading to a situation where, by reason of the impugned condition, Indian companies are excluded from consideration of their credentials. If Indian companies have the potential to manufacture quality products, there is no reason to shut them out at the threshold. The net result of Clause 1.1 (dd) is creation of monopoly in favour of certain foreign companies at the behest of an Article 12 authority, which is clearly opposed to the preambular promise of securing social as well as economic justice to the people of India.

47)None can possibly dispute that the factor of experience in providing services or manufactured products to foreign countries has a direct nexus with the quality of such services or products. It is reasonable to assume that better the quality of the services or the products, the more it would be availed of by the parties interested. As noticed earlier, the criterion of 'Proven Design' has been inserted in the tender terms and conditions primarily with the view to engage the best from among manufacturers or service providers of foreign countries. However, the condition of specified number of services utilized/products in use in countries other than the country of manufacture ought not, in my view, be given priority over quality of the products manufactured or the services provided.

48)The stipulation in respect of providing minimum number of units to countries other than the country of manufacture, as specified, insofar as Indian companies are concerned, hardly appears to be based on rationality. Science and technology in India have been rapidly developing. Products manufactured in India largely can match products manufactured abroad.

Instances of products manufactured in India being sold by foreign companies under their brand name are not uncommon. Foreign countries may not have engaged the company for supplying products manufactured by it presumably because air-conditioned saloons manufactured in India for engagement in metro services are of recent origin. If on a comparative analysis between products manufactured by an Indian company not being in use in foreign countries and products manufactured by foreign companies having experience in supplying the same to other foreign countries it is found that the Indian products are superior in quality and even cheaper in respect of price, the impugned condition would debar consideration of credentials of Indian companies. That can never be termed reasonable and hence the impugned condition ought not to be pressed into service for depriving the company to have its credentials, for being appointed as sub-contractor, considered along with other parties. Prime concern, therefore, should be the quality of the products manufactured by an Indian company and not whether the products are in use in foreign countries. Non-use of the products manufactured by an Indian company in different foreign countries may not in all cases be determinative of its quality. Objective tests are to be applied for determining quality of a product. If the company fails to satisfy the criterion of producing quality products, it may not be considered but merely because its products are not in use in foreign countries ought not to be considered relevant for excluding it altogether from the zone of consideration. The terms and conditions have been so formulated that Indian manufacturers of required products like the company stand ousted from the zone of consideration and even if the saloon air conditioners manufactured by the company are technically superior in quality and are even cheaper in price than those developed abroad, the same would not be entitled to consideration. This aspect appears to have been completely ignored while formulating the terms and conditions of the tender.

49)It has also not been seriously disputed before me by Mr. Dutta that engagement of foreign contractors or foreign sub-contractors would be a sure guarantee against mishaps and casualty. Thus, it cannot be contended with any degree of conviction that by mere consideration of the claim of sub-contractors like the company, safety and security would be compromised. Right of consideration is a fundamental right which seems to have been breached here by inserting the impugned condition.

50)That apart, the list of dates reproduced above does not reflect any suggestion of the members of the 'General Consultant' that the stipulation regarding supply of minimum number of products in countries other than the country of manufacture would necessarily be a mandatory requirement for Indian companies. Saloon air-conditioners in the country are in use presently in New Delhi only. Understandably the manufacturers are short on experience. But Clause 5.7.2, as noticed above, encourages the parties interested to be engaged as contractor to survey manufacturing facilities already existing in India and to make use of the same, if considered useful by them. If Clause 1.1(dd) in respect of 'Proven Design' is to be considered mandatory and strictly followed, Clause 5.7.2 would be inconsistent therewith and stand frustrated. I place on record, Mr. Dutta has not demonstrated before me that any Indian company has fulfilled the criterion of 'Proven Design' in respect of products mentioned in Clause 5.7.2.

51)I, accordingly, hold the impugned condition to be unreasonable, not being based on objective considerations, inconsistent with other conditions of the tender and in conflict with the guarantees enshrined in Articles 14 and 19 of the Constitution apart from being opposed to public policy.

52)The decisions cited by Mr. Dutta have been considered. His contention relying on Asia Foundation (supra) that since funds are being provided by a foreign agency, viz. JICA and, therefore, insistence that the loans must be utilized in accordance with the specification within the scheduled time by appointing the agencies qualified therefor has failed to impress me. No doubt, funds have been released by JICA but utilization thereof in the manner specified is in the hands of KMRCL, a State within the meaning of Article 12 of the Constitution. In utilizing foreign funds, KMRCL is not authorized in law to ignore or give a go-bye to the constitutional provisions and to act unreasonably or by abusing its powers. No law has been laid down in the cited decision to the effect that an Article 12 authority, on receipt of funds from a foreign agency, would be bound by the dictates of such agency and its actions need not conform to the guarantees enshrined in Part III of the Constitution.

53)The decisions in Directorate of Education (supra), Monarch Infrastructure (supra), Meerut Development Authority (supra), Thermax Ltd. (supra) and Thomson (supra) are also of no assistance to Mr. Dutta. While it

is true that the tender issuing authority must have a free hand in setting the terms of tender, the cited decisions reiterate the settled position of law that an administrative policy decision could be interfered with if the same is arbitrary, discriminatory, malafide or actuated by bias. I have found, for reasons mentioned above, that the action of the KMRCL impugned herein suffers from unreasonableness and is in flagrant disregard of the constitutional provisions and, therefore, I have proposed to interfere.

54)The decision in Association of Registration Plates (supra) is clearly distinguishable on facts. Paragraph 42 of the decision reveals that the terms of the notice inviting tenders were formulated after joint deliberations of Central and State authorities and the available manufacturers in the field. The Court proceeded to observe that it was *"difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State Authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position tosatisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory."* In the present case, while formulating the tender terms and conditions the company did not take part in any prior deliberation and, therefore, the cited decision is of no relevance here.

55)In the result, I hold that the condition impugned herein is unreasonable, and insofar as it purports to debar the short-listed parties interested to be selected as contractor to propose the name of the company as sub-contractor, it ought not to be acted upon to defeat the company's claim. In the event the company's name has been proposed as sub-contractor by any party, since shortlisted by KMRCL, the company's name shall not be deleted based on the impugned condition. KMRCL shall proceed to consider the bid of the short-listed party in accordance with law uninfluenced by the fact that the company may not have provided 100 (hundred) units to countries other than the country of manufacture. If the company fulfills other requirements in accordance with the specifications laid down by KMRCL, proposal of the short-listed party to engage the company as sub-contractor shall be given due consideration, also in accordance with law. If at all any decision has been taken during the pendency of the present petition to delete the name of the company for being appointed as sub-contractor, as proposed by two short-listed parties, such decision shall not be operative any further.

56)The writ petition stands allowed. There shall be no order as to costs.

57)Urgent photostat certified copy of this judgment and order, if applied for, shall be given to the applicant as early as possible.

(DIPANKAR DATTA, J.)