(2016) 10 RAJ CK 0081

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11804 of 2016

Chhatisgarh Power & Coal Beneficiation Limited APPELLANT

Vs

State of Rajasthan RESPONDENT

Date of Decision : 04-10-2016

Acts Referred:

Citation : (2017) AIR(Raj) 25

Hon'ble Judges : Mr. Kanwaljit Singh Ahluwalia, J.

Bench : Single Bench

Advocate : Mr. P. Chidambaram, Senior Counsel assisted by Mr. Ankur Chawla, Mr. R.P. Singh, Senior Counsel assisted by Mr. Manvendra Singh, Mr. Anil Meena, Mr. Rahul Partap and Ms. Heena Khan, Advocates, for the Petitioners; Mr. Gopal Subramanium, Senior Counsel wit

Final Decision : Disposed Off

Judgement

Mr. Kanwaljit Singh Ahluwalia, J. - Chhabra Thermal Power Station is situated near Village Choki Motipura, Tehsil Chhabra, District Baran on Bina-Kota Line, West-Central Railway.

2. Rajasthan Vidhyut Utpadan Nigam Ltd. (hereinafter called as ''RVUN''), floated tender (Annexure-P/17) for supply of 2.0 Lac MT per month of Raw Coal and supply of washed coal to Chhabra Thermal Power Station. The scope of work included lifting/taking of delivery of raw coal from South Eastern Coalfields Limited (hereinafter called as ''SECL'') on behalf of RVUN, transportation of raw coal from mines to washery, washing of raw coal to obtain specified parameters, transportation of washed coal to nearest railway siding, loading into wagons for dispatch to the Chhabra Power Station on completing all documentation as required by coal company, Railways and RVUN.

3. In the tender document (Annexure-P/17), the contract period specified is for five years from the commencement of the work subject to ascertainment of satisfactory performance every year.

4. Annexed with the writ petition, is list (Annexure-P/5) of existing private washeries having permission from SECL to lift coal on behalf of FSA consumers. As per tender document, ''FSA'' means "Fuel Supply Agreement" executed by RVUN with SECL for supply of coal to the power stations of RVUN.

5. Since the thrust of the argument revolves around list of washeries permitted by SECL, it will be apposite here to reproduce Annexure-P/5, the list of washeries giving details of the location and annual capacity. Annexure-P/5 of the writ petition reads as under:-

"Name of Existing Private Washeries With Capacity And Location.

Having Permission From Secl to Lift Coal on behalf of Fsa Consumers

SI.No.

Name of Washery

Location

Capacity (Annual) (Lakh Te.)

1.

Aryan Coal Beneficiation Pvt. Ltd. Dipka

Dipka, PO Gevra Dist. Korba (C.G.)

120

2.

Spectrum Coal & Power Ltd. Ratija

Ratija, PO Katghora, Dist. Korba (C.G.)

110

3.

Aryan Coal Beneficiation Pvt. Ltd. Chakabura

Chakabura, PO, Jarwahi, Dist Korba (C.G.)

40

4.

Chattisgarh Power & Coal Beneficiation Pvt. Ltd.

Plot 60, Industrial Area, Dist. Bilaspur (C.G.)

12.5

5.

Hind Energy & Coal Beneficiation (India) Ltd.

Hindadih, Dist. Bilaspur (C.G.)

24

6.

Aryan Coal Beneficiation Pvt. Ltd.

Gevra, PO Gevra, Dist. Korba

50

7.

M/s. Mahavir Beneficiation Pvt. Ltd.

Dhrol, Patnakala, Dist Anuppur (M.P.)

10

8.

Rashmi Sponge Iron & Power Industries Ltd.

90, Industrial Growth Center, Phase-II, Siltara.

14.4

9.

Vihar Industries

Village Sondra, Near Industrial Area, Siltara, Raipur.

6

10.

KJSL Coal & Power Ltd.

Village Dalura, Dipka-Seepat Road, Haldi Bazar.

12

11.

Phil Minerals Beneficiation & Energy Pvt.Ltd.

Beltara, PO Ratnapur, Dist. Bilaspur (C.G.)

9.9

12.

Aryan Coal Beneficiation Pvt. Ltd. Binjhari

Binjhari Vill. Dipka PO Gevra, Dist. Korba (C.G.)

9.6

13.

Maruti Clean Coal & Power Pvt. Ltd.

Village Retija, PO Nonblra, Tehsil-Pali, Dist. Korba

33.3

14.

M/s. Swastik Power & Mineral Resources Pvt.

Village Kanbari, Tehsil Katghora, Dist. Korba (C.G.)

9

15.

M/s. Maheshwari Coal Benefication & Infrastructure

Sirgiti Industrial Area, Dist. Bilaspura (C.G.)

12

16.

S.V. Power Pvt. Ltd.

Village Renki, Murli Road, Tehsil Pali, Dist. Korba

25

17.

M/s. Mahavir Coal Washeries Pvt. Ltd.

Village Bhelai, PO Balada, Dist. Janjgir-Champa

9.5

TOTAL SECL

507.2

6. Another list Annexure-6 has been relied by the petitioners to contend that in the above list of seventeen washeries, Aryan Coal Beneficiation Pvt. Ltd. Dipka, Spectrum Coal & Power Ltd., Ratija, Aryan Coal Beneficiation Pvt. Ltd., Chakabura, Aryan Coal Beneficiation Pvt. Ltd. Gevra, Aryan Coal Beneficiation Pvt. Ltd. Binjhari, Maruti Clean Coal & Power Pvt. Ltd., Retija, M/s. Swastik Power & Mineral Resources Pvt. Kanbari, and S.V. Power Pvt. Ltd. Renki, at serial no. 1, 2, 3, 6, 12, 13, 14 and 16 of list Annexure-P/5 reproduced above belong to M/s. ACB (India) Ltd.

7. M/s. Hind Energy & Coal Beneficiation (India) Ltd. (hereinafter called as ''Hind Energy'') at Serial No.5, it is alleged by the petitioners has some kind of financial relationship or tie-up with M/s. ACB (India) Ltd. and to highlight and

demonstrate this fact, the learned counsel for the petitioner has placed reliance upon Annexure-P/2 to say that in M/s. Swastik Power & Mineral Resources Pvt. at Serial No.14 of the list reproduced above, M/s. ACB (India) Ltd. hold 26% of equity, whereas ''Hind Energy'' is having 14.29% of the share holding. Thus, it has been contended before this Court that out of seventeen washeries, nine are having some kind of financial arrangement or relationship to act as a cartel.

8. Having noticed the broad facts germane to understand the controversy raised, this Court shall revert to the brief facts necessary to unveil the controversy and arguments advanced by both the sides.

9. The present writ petition has been filed by Chhatisgarh Power & Coal Beneficiation Limited, which is at serial no.4 in the list of washeries (Annexure-P/5), as is evident, the petitioner company is having annual capacity of 1.25 Lac MT per annum to wash coal.

10. In the present writ petition filed under Article 226 of the Constitution of India, it has been prayed that qualification criteria as specified in clause 1.7 in the tender Notice No. RVUN - CE - Fuel - 07/2016-17 (Annexure-P/17) be quashed as the same is violative of Article 14, 19(1)(g) & 21 of the Constitution of India. It has been pleaded that the qualifying criteria laid in Clause 1.7 is onerous, inequitable and contain tailor made conditions, contrary to the principles of fair and free competition, to benefit a particular group by promoting cartelization amongst the existing washeries and contractors, in order to oust general bidders like the petitioners from the tender process.

11. It is averred that the petitioner company is registered under the Companies Act, 1956 and is having coal washery established in the year 2004 having raw coal washing capacity of 1.25 Lac MT per annum. It is further averred that the petitioner company is lifting coal from SECL, mines of Korba area and is engaged in lifting, washing and dispatch of coal to various cement plants and power plants against their linkages and coal procured through e-auction.

12. To highlight experience of the petitioner company, it has been stated that in the year 2014-15, the petitioner company had dispatched 141 Rakes from Dadhapara & Usalapur Goods Shed to cement, steal and power plants and in the year 2015-16, had dispatched 185 Rakes from Dadhapara & Usalpur Goods Shed.

13. A grievance has been made that for the tender floated in 2010-11 by RVUN for Chhabra Thermal Power Plant (hereinafter called as ''CTPP''), ''Hind Energy'' entered into consortium agreement with M/s. Swastik Power & Mineral Resources Pvt., in which another washery group M/s. ACB (India) Ltd. and ''Hind Energy'' are shareholders. According to the petitioner, this was done to rig the prices of the coal supplied. It has been further contended that company belonging to M/s. ACB (India) Ltd. group i.e. M/s. Spectrum and ''Hind Energy'' in response to tender invited in the year 2010-2011 had quoted same bid price and thus, by way of cartelization, consumers of the State of Rajasthan were made to suffer, as RVUN had paid higher price to the contractors engaged for supply of coal from

SECL to CTPP.

14. Under challenge before this Court is qualifying criteria spelt out in Clause 1.7 of the tender document (Annexure-P/17). Relevant portion of qualifying criteria as laid in Clause 1.7 is reproduced below:-

"1.7 Qualifying Criterion:-

1.7.1 The bidder can be a single tenderer bidding on his own; a Company, Registered under the Companies Act or a Joint Venture. A party cannot submit multiple bids, either as a single tenderer or on a joint venture basis by forming consortium. To qualify, each bidder shall satisfy the following minimum criteria:-

i. The bidder should have their own beneficiation plant (s)/washery (wet technology) of minimum 2 million tonnes capacity per annum undertaking the beneficiation of coal of Korba Coalfields of South Eastern Coalfields Limited (Emphasis supplied) and the bidders should submit undertaking that their washery (wet technology) complies with and is eligible for release of coal as per the ''New Standard Procedure for release of raw coal to FSA consumers through Private Washeries'' as notified by South Eastern Coal Fields Limited vide their notice dated SECL/BSP/S&M/679 dated 24.06.2015. The washery operator should furnish documents as mentioned in the notice for verification.

ii. The bidder should have own private railway siding or tie up with railways for use of the railway siding for dispatch of coal. The railway siding should be approved for coal dispatches. The railway approval for the siding for dispatch of coal shall be treated as approval for loading rakes with ''C'' priority.

(Emphasis supplied)"

iii. The bidder should have washed at least 1.2 million tonnes of Raw Coal per annum or 1.0 lac MT per month at leastone year during last three years for Govt. Power House (s)/NTPC or State Power Utilities or reputed private power utilities. However, out of the experience of washing 1.0 lac MT per month, a minimum of 50,000 MT per month should be for Govt. Power House (s)/NTPC or State Power Utilities and maximum 50,000 MT per month should be for reputed power utilities.

(Emphasis supplied)

iv. The bidder should have an average Annual turnover of Rs.25 Crores for last three years for which audited annual reports shall be furnished.

1.7.2. If a consortium (with maximum of two numbers) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The consortium leader shall itself fulfil technical qualification mentioned in clause no. i above (Emphasis supplied), and both consortium partners can jointly meet other PQR conditions and shall take joint and severally responsibility for the contract."

15. Mr. P. Chidambaram, the learned Senior Counsel appearing for the petitioners

has stated that in the qualifying criteria annual capacity of 2 lac million tonnes (wet technology) has been mentioned to favour ''Hind Energy'' as besides this company washeries belonging to M/s. ACB (India) Ltd. group, only are having capacity more than prescribed. It has been urged that the conditions which have been introduced in the tender for the year 2016-17, nowhere existed in the earlier tender.

16. It is canvassed that three peculiar conditions-firstly, bidder should have their own beneficiation plant(s)/washery (wet technology) of minimum 2 lac million tones capacity per annum; and if a consortium makes a bid, then the consortium leader itself should fulfil the technical qualification mentioned in above clause no. (i) i.e. he alone out of consortium should have capacity of 2 million tonnes, is highly unjust condition. It is stated that secondly, condition that the bidder should have washed at least 1.2 lac million tonnes of Raw Coal per annum or 1.0 lac MT per month at least one year during last three years for Govt. Power House(s)/NTPC or State Power Utilities or the reputed private power utilities and out of experience of washing 1.0 Lac MT per month 50,000 MT per month should be for Government Power Houses or State Power utilities, has been coined and inserted only to favour one group, who is able to steal march over the others. It is stated that not only the above two conditions but third condition that the bidder should have own private railway siding or tie-up with the railway for the use of railway siding for dispatch of coal and having approval of the Railways for loading rakes with Priority-C is to exclude all others, so that ''Hind Energy'' alone is able to meet standards laid along with ACB Group, as result thereof others existing washeries having permission from SECL are ousted by the respondent RVUN at the time of evaluation of technical bids.

17. Mr. Chidambaram, has vehemently canvassed that out of the three conditions assailed, condition no.1 that beneficiation plants should have washing capacity of minimum 2 million tonnes with further rider that if a consortium is formed, leader of consortium alone should have capacity so specified, has been introduced not only to give edge to a particular company but to ensure that, that particular company alone succeed at the time of appraisal of technical bids. It is contended that once the capacity is specified, there was no need to say that if the bid is given by the consortium then the leader alone should have the same capacity, as by doing so, the concept of consortium itself has been made redundant. Mr. Chidambaram urged that once consortium is permitted to bid then total capacity of consortium ought to have been taken into consideration.

18. It has also been submitted that there was no justification to say that out of 1.0 Lac MT coal per month, a minimum 50% of MT should have been supplied to Government Power House(s)/NTPC/State Power Utilities.

19. It is further contended that clause regarding supply to Government Power House(s) like NTPC has been inserted only to favour a particular bidder. According to Mr. P. Chidambaram, total capacity per month should have been taken into consideration, be it for supply to the reputed private sector companies

or Government Power House(s).

20. Similarly, the condition specified that a bidder should have individual railway siding with approval of Railway with Priority-C has been severely criticized. According to learned counsel for the petitioners, this condition was mentioned in ''NIT'' to tilt balance in favour of a particular bidder. It is contended that the petitioner company is also having an arrangement with Railways for supply of coal and in fact, the petitioner company due to arrangement with the Railways by ensuring fast movement of the coal, is supplying coal to Nabha Thermal Plant in State of Punjab, therefore, condition that bidder should have own siding will not promote interest of ''RVUN'' but of a particular bidder.

21. Thus, according to the petitioners, qualification criteria is in the teeth of "doctrine of level playing field" and officials of ''RVUN'' by abusing powers vested in them have introduced qualifying criteria to favour one particular group.

22. According to the petitioners, impugned qualifying criteria as provided in clause 1.7 of tender document dated 4.8.2016 fails to meet the "test of reasonableness" as the qualifying criteria so laid neither achieve any required purpose, nor is in the public interest.

23. To fortify above submissions, it has been contended that the respondents have been shifting goal-post since 2010-11, only to favour a particular company ''Hind Energy''. Thus, the principles of fair play have not been adhered to. To demolish fairness on the part of the respondents, reliance has been placed upon a Chart depicting past events to say that the respondents have been changing the qualifying criteria to suit a particular company i.e. ''Hind Energy''. The Chart relied by Mr. Chidambaram during the course of arguments is reproduced in verbatim:-

"The following table would show that the clauses have been introduced for reasons which are not bona fide:-

Qualifying criteria in 2010-11

Qualifying criteria in 2015-16

Qualifying criteria in 2016-17

1.6.1

1.7.1

1.7.1

(i) The Bidder should have their own beneficiation plants/washery of minimum 2.4 million tonnes capacity per annum and undertaking the beneficiation of coal of Korba Coalfields of South Eastern Coalfields Limited

(i) The bidder should have their own beneficiation plant(s)/washery (wet technology) of minimum 2 million tonnes capacity per annum undertaking the beneficiation of coal of Korba Coalfields of South Eastern Coalfields Limited.

(i) The bidder should have their own beneficiation plant(s)/washery (wet technology) of minimum 2 million tonnes capacity per annum undertaking the beneficiation of coal of Korba Coalfields of South Eastern Coalfields Limited....

(ii) The bidder should have washed at least 1.2 million tonnes of Raw Coal per annum or 1.0 lac MT per month in last year.

(iii) The bidder should have washed at least 1.2 million tonnes of Raw Coal per annum of 1.0 lac MT per month at least one year during last three years for Govt. Power House (s)/NTPC or State Power Utilities.

(iii) The bidder should have washed at least 1.2 million tonnes of Raw Coal per annum or 1.0 lac MT per month at least one year during last three years for Govt. Power House (s)/NTPC or State Power Utilities or reputed private power utilities. However, out of the experience of washing 1.0 lac MT per month, a minimum of 50,000 MT per month should be for Govt. Power House(s)/NTPC or State Power Utilities and maximum 50,000 MT per month should be for reputed power utilities.

(iv) The bidder should have Railway siding connectivity of their washery to rake loading

(ii) The bidder should have own private Railway siding or tie up with railway for use of railway siding for dispatch of coal to loading rake with ''C'' priority.

(ii)The bidder should have own private railway siding or tie up with railways for use of the railway siding for dispatch of coal. The railway siding should be approved for coal dispatches. The railway approval for the siding for dispatch of coal shall be treated as approval for loading rakes with ''C'' priority.

1.6.2.

1.7.2

1.7.2

If a consortium (with maximum of three members) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The leader of consortium shall take joint and severally responsibility for the contract.

If a consortium (with maximum of two members) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The leader shall itself fulfil technical qualification mentioned in above clause no.i and ii above and shall take joint and severally responsibility for the contract.

If a consortium (with maximum of two number) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The consortium leader shall itself fulfil technical qualification mentioned in clause no.i above and both consortium partners can jointly meet other PQR conditions and shall take joint and severally responsibility for the contract.

24. Relying upon above Chart, it is stated that in the tender floated by the respondents in the year 2010-11, ''Hind Energy'' did not have the wet technology and had not supplied a single tonne of coal to any public sector power undertaking. It was also not having private railway siding. It has been further contended that since in the year 2011, ''Hind Energy'' was not having a capacity of 2 MT, it was permitted to have an agreement that M/s. Swastik Power & Mineral Resources Pvt., who was part of consortium. It is contended that since at present ''Hind Energy'' is having more than 2 MT capacity, the condition has been changed and it has been said that leader of the consortium alone should meet technical qualification mentioned in Clause 1.7.1. It has been further submitted that in the year 2011, ''Hind Energy'' had not supplied coal to Government Power House(s)/NTPC or other power utilities, thus this condition never existed. Thus, according to the learned counsel for the petitioners, three conditions (i) specifying capacity of 2 MT that too for wet technology insisting that the said capacity should be of leader of consortium and not in totality of members of the consortium, (ii) Mandate that 50% of the supply should be to Government Power House(s) and remaining to reputed power utilities and not to reputed private sector companies engaged in manufacture of steal and cement and (iii) having of railway siding with C-Priority approval of Railways, de hors of the similar arrangement with the Railways, are conditions tailored to ensure that only ''Hind Energy'' or M/s. ACB (India) Ltd. group succeed at evaluation of technical bids so as to they form cartel and rig the prices. Hence, it has been urged that the above restrictions are arbitrary, unreasonable, irrational, illogical and they are actuated by mala fide. It has been urged that the aforesaid restrictions are not justifiable, they are discriminatory and fail to promote any policy.

25. It has been vehemently contended that due to imposition of the above conditions, there will be loss to the public exchequer to the tune of at least 400 crores rupees and resultantly consumers of the electricity i.e. general public shall be burdened. It is submitted that the conditions prescribed in the tender of the year 2010-11 have now been discarded. Thus it depicts malice on the part of the officers as adherence to the conditions now imposed was not necessary in the year 2010-11. According to the petitioner, the aforesaid three conditions are in violation of rule 28(b)(c) of Rajasthan Transparency in Public Procurement Rules, 2013. The said rule reads as under:-

"(b) To ensure effective competition, an adequate number, not being less than three, of potential bidders selected in a non-discriminatory manner shall be included in procurement process;

(c) an equal opportunity shall be given to all bidders to participate in the negotiations. Any requirement, guidelines, documents, clarifications or other information related to the negotiations that it communicated by the procuring entity to a bidder before or during the negotiations shall be communicated, subject to Section 49, at the same time and on an equal basis to all other bidders engaging in negotiations with the procuring entity related to the procurement, unless such information is specific or exclusive to that bidder."

26. To supplement the above arguments, reliance has also been placed on Annexure-P/8, true copy of the Tender Specification issued by Gujarat State Electricity Corporation Ltd. It is contended that a perusal of tender document issued by Gujarat State Electricity Corporation Ltd., reveal that in case of single bidder or in case of joint venture, at least one member should have washery in Korba area and ought to have executed the work of lifting and beneficiation of coal of at least 3 Lac MT of Raw Coal and supply of beneficiation coal in the last one year from the date of bid submission. It is contended that Gujarat State Electricity Corporation Ltd. has not specified in NIT relied that one member of the consortium should have washed minimum 2 MT of coal per annum. It is contended that Gujarat State Electricity Corporation Ltd. allowed small washeries to participate in the tender process in order to promote healthy competition.

27. It has been urged that the impugned conditions in the qualifying criteria virtually oust the bidders like petitioner thereby leading to monopoly and cartelization in the market, resulting into rigging of the prices.

28. Mr. P. Chidambaram has submitted that on 7.9.2016 fear and apprehensions expressed by the petitioner came true. As per list uploaded by the respondent no.3 on website only following four bidders in response to NIT have submitted their bids:-

1. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. (AS per Chart of SECL, it has a capacity of 1.2. Lac Million Tons-wet).

2. Hind Energy & Coal Beneficiation (India) Limited.(Capacity 2.4 lac million tonnes)

3. Mahavir Coal Washeries Pvt. Ltd. - (Consortium of Petitioner and Mahavir). (Capacity 9.5 + 12.5 lac million tonnes)

4. ACB India Ltd.(Aryan Coal Beneficiation Pvt. Ltd.). (Capacity 120 lac million tonnes)

29. It is urged that out of aforesaid four bidders, Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. for lack of specified capacity and Mahavir Coal Washeries Pvt. Ltd., consortium of petitioner and Mahavir for lack of individual capacity of consortium leader shall be disqualified and as pleaded in the writ petition, only ACB India group and ''Hind Energy'' would qualify. Thus, it is submitted that the subsequent conduct justify perception of the petitioner pleaded in the writ petition that eligibility criteria was devised by way of design to only favour two bidders.

30. Thus, it is urged that if broad spectrum of events is taken into consideration, a good case for judicial review in the matter of contract i.e. tenders is made out.

31. Mr. Gopal Subramanium, the learned Senior Counsel appearing for the respondents contended that evaluation of tender and contracts is essentially commercial function and the powers of the courts to exercise judicial review are limited. It is contended that the powers of judicial review cannot be invoked to protect private interest or decide contractual dispute.

32. In the reply filed, it is averred that certain pre-conditions and qualification in the tender have to be laid to ensure that the contractor has capacity, capability and resources to execute the work. It has been pleaded in the reply that the respondent RVUN cannot be made to compromise with the pre-conditions and qualifying criteria at the cost of greater public cause. In the reply it has been further stated that the petitioner company lack necessary expertise to achieve the respondent''s needs/requirement, which in the year 2015-16 is more than 400 racks. In the reply it is stated that the condition that leader should have its own private railway siding or tie-up with the Railways for use of railway siding for dispatch of coal with the prior approval of Railways for loading racks with C-Priority is for the valid reasons, to ensure efficient and timely dispatch of coal racks after beneficiation to the power plant. In the reply, it is stated that generation of electricity in Thermal Power Plant of the answering respondent requires regular and uninterrupted supply of coal. The condition has been laid for the purpose that there is timely dispatch and delivery of racks at the destination. It is imperative for the respondents to secure their interest by ruling out any risk of delay in the dispatch of coal. It is stated that a requirement of owning plant of 2 Lac MT in Clause 1.7.1. has been introduced for the reason that the contractor should have necessary capacity and capability of coal to be beneficiated as requirement of the thermal plant of the respondents is more than 2 MT in a year. The requirement of owning a washery of 2 MT has been validly introduced. It is stated that RVUN could not run any risk on account of short-fall of coal to its generation, hence, after due deliberations a Committee consisting of high level Officers with technical knowledge and full time Directors of respondent RVUN, have finalized qualifying criteria prescribed. During course of arguments it is contended that example of Gujarat State Electricity Corporation as set out in the writ petition could not achieve the desired object, hence, the modified condition in the tender was introduced by saying that lead member of consortium, alone should have prescribed capacity. It has been averred that a team of respondent RVUN''s officers was sent to Gujarat and they found that the order under tender of Gujarat State Electricity Corporation was terminated and in fact bank guarantee of Rs.3.43 crores was forfeited as no work was carried by the contractor against the work order. Mr. Subramanium in a very elucid manner referred to pre-bid meeting held by the respondents to urge that a Committee of the senior most officers of respondent dealt threadbare, the objections raised by the petitioner who had participated in the meeting of a pre-bid Committee. The minutes of meeting of committee constituted to deal with the objections has

been annexed with the reply as Annexure-R/2. It will be necessary to reproduce the minutes of the meeting wherein precondition laid in qualification criteria and objections thereof were considered by the Committee consisting of (1) Sh. K.L. Meena, ACE (Fuel), RVUN, Jaipur. (2) Sh. R.P. Singh, Dy. Chief Engineer (CTPP), RVUN, Chhabra. (3) Sh. Prakash Israni, Dy. Chief engineer (Fuel), RVUN, Jaipur. (4) Sh. Rajesh Khandelwal, Chief Accounts Officer (KaTPP), Kalisindh. (5) Sh. K.K. Sharma, Superintending Engineer (Fuel & Railways), Kota. And (6) Sh. P.S. Saxena, Superintending Engineer (Fuel), RVUN, Jaipur.

33. The Committee consisting of above officers responded to objections raised by the petitioner and other bidders as under:-

"Clause No.1.7.1.

The bidder can be a single tenderer bidding on his own; a Company, Registered under the Companies Act or a Joint Venture. A party cannot submit multiple bids, either as a single tenderer or on a joint venture basis by forming consortium. To qualify, each bidder shall satisfy the following minimum criteria:-

i. The bidder should have their own beneficiation plant(s)/washery (wet technology) of minimum 2 million tonnes capacity per annum undertaking the beneficiation of coal of Korba Coalfields of South Eastern Coalfields Limited.

ii. The bidder should have own private Railway siding/or tie up with railway for use of railway siding for dispatch of coal to loading rake with ''C'' priority.

Comments/observation/request of prospective bidder:

a. M/s. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. Bilaspur.

We would like to submit that our washery have Pvt Railway siding inside the Washery in the name of Washery itself as such we have added benefit for RVUNL as we are not dependent on Railway like any lease Railway siding. In our siding we have already received Coal rakes under C priority from SECL siding comes under Raipur Division as such availability of Rake for washed coal loading at our Washery siding is not a issue for loading like other Washery comes under Bilaspur Division where the loading of rakes takes lot of time due to long pendency.

b. M/s. Mahavir Coal Washeries Pvt. Ltd., Bilaspur

Need amendment as it was in tender no. RVUN/CE(PPC&F) TN/11 of 2010-11

c. M/s. Inspire Industries Pvt. Ltd., Bilaspur.

Need amendment as it was in tender no. RVUN/CE(PPC&F) TN/11 of 2010-11

d. M/s. Chhattisgarh Power & Coal Beneficiation Ltd., Bilaspur.

Please modify as per Last Tender 2010-11 clause no.1.6.1 ii:

"The bidder should have washed at least 1.2 million tons of Raw Coal per annum or 1.0 lac MT per month at last year."

Recommendation of the committee:

No Change Suggested. However, the committee recommends incorporating the following clarifications:

"Clarification on Clause no. 1.7.1.(i) of PQR:

The bidders should submit undertaking that their washery (wet technology) complied with and is eligible for release of coal as per the ''New Standard Procedure for release of raw coal to FSA consumers through Private Washeries'' as notified by South Eastern Coal Fields Limited vide their notice dated SECL/BSP/S&M/679 dated 24.06.2015. The washery operator should furnish documents as mentioned in the notice for verification.

As per railway Preferential Traffic Order for allotment of wagons w.e.f. 1st April, 2015, Coal traffic when sponsored and accepted by authorities when loaded from colliery siding or from washery siding is covered under Priority "C". Therefore, the following clarification on Clause no.1.7.1(ii) of PQR is suggested.

The bidder should have own private railway siding or tie up with railways for use of the railway siding for dispatch of coal. The railway siding should be approved for coal dispatches. The railway approval for the siding for despatch of coal shall be treated as approval for loading rakes with ''C'' priority."

Clause No.1.7.1

iii. The bidder should have washed at least 1.2 million tonnes of Raw Coal per annum or 1.0 lac MT per month at least one year during last three years for Govt. Power House(s)/NTPC or State Power Utilities.

Comments/observation/request of prospective bidders:-

a. M/s. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. Bilaspur.

We would like to submit that we were awarded above work order for washing of 1.00 lac MT coal per month based on our infrastructure, capability, credential and after completion of all verification by RVUNL. As such work order no. RVUN/CE (FUEL)SE/(Fuel-II)/F/D.2244, Dated:30/12/2014 issued from RVUNL Jaipur for beneficiation of 1.0 lac MT per month should be considered against above clause as this full filling the condition. Here we would like to reiterate that the work experience should be counted based on total work done by bidder irrespective of any Industries Further in case all Power Houses put such condition than only selective bidders will appear in Tender which is against the spirit of Govt. initiatives like "Make in India", "Start-up India" improving country growth rates.

b. M/s. Mahavir Coal Washeries Pvt. Ltd. Bilaspur.

Need amendment as it was in tender no. RVUN/CE(PPC&F) TN/11 of 2010-11

c. M/s. Inspire Industries Pvt. Ltd. Bilaspur.

Need amendment as it was in tender no. RVUN/CE(PPC&F) TN/11 of 2010-11.

d. M/s. Chhattisgarh Power & Coal Beneficiation Ltd., Bilaspur.

Please modify as per Last Tender 2010-11 clause no.1.6.1 ii.

"The bidder should have washed at least 1.2 million tons of Raw Coal per annum or 1.0 lac per month at last year."

Recommendation of the committee:

Committee examined the representation of M/s. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. in view of Work order no. D.2244 dated 30.12.2014 awarded to M/s. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. beneficiation/washing of 1.0 Lac MT raw coal (30000 MT during Dec,14, 70000 MT during Jan,15) with provision that the period of contract shall be to Feb''15. This order was not for one lac MT per month.

Committee also considered PQR and referred the following Tender Not provisions which were referred for finalization of this clause:-

a) NIT floated by Punjab State Power Corporation Limited (PSPCL) on date 04.12.2014 for beneficiation of 0.60 lac MT raw coal per month specification PQR that;

"The bidder should have experience for beneficiation of raw coal for utilities for at least one (1) million ton per year in the preceding year (April-13-March-14) for power utility."

b) Tender No. 07-03/FM/WASHEDCOAL/TS- 55/2768/2015 of the MPPGC for beneficiation 49.9 Lac MT raw coal per annum specified the PQR as;

"The Bidder should have executed the work for any State Electricity Boards its Generation Companies, NTPC, Reputed Private Power Utilities, State Central Undertakings, for the work of coal lifting, beneficiation (through we process), liasioning, and movement by road and railways of not less than 1.80 Million Tonnes per annum on an annual average basis in last three financial years, in SECL command area."

Considering the above, all the member of the committee opined that the condition of this NIT is liberal than that of MPPGCL where the required experience was for 3 years; whereas the experience required is for one year only in this case, as was in the case of PSPCL. However, MPPGCL and PSPCL has allowed the experience from orders of reputed private power utilities and RVUN has restricted the experience criteria to Government/Public sector only; but owing to the fact that this tender allows for consortium bidding which flexibility was not available in MPPGCL or PSPCL tenders, the committee opines that there is no restriction for capable bidders due to this qualifying requirement and hence no change in this clause of PQR is required.

Clause No.1.7.2

If a consortium (with maximum of two members) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The leader shall itself fulfil technical qualification mentioned in above clause no.i and ii above and shall take joint and severally responsibility for the contract.

Comments/observation/request of prospective bidders:

a. M/s. Maheshwari Coal Beneficiation & Infrastructure Pvt. Ltd. Bilaspur.

Needs amendment either as: If a consortium (with maximum of two numbers) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The consortium shall jointly fulfil the technical qualification mentioned in above clause no. i and ii, and the leader shall take joint and severally responsibility for the contract. Or it should be amended as it was in tender in RVUN/CE(PPC&F) TN/11 of 2010-11 clause 1.6.2.

b. M/s. Inspire Industries Pvt. Ltd., Bilaspur.

Needs amendment either as: If a consortium (with maximum of two number makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The consortium shall jointly fulfil the technical qualification mentioned in above clause no.i and ii, and the leader shall take joint and severally responsibility for the contract. Or it should be amended as it was in tender no. RVUN/CE(PPC&F) TN/11 of 2010-11 clause 1.6.2.

c. M/s. Chhattisgarh Power & Coal Beneficiation Ltd., Bilaspur.

Please modify it as per clause no.1.6.2. of Last Tender 2010-11. If a consortium (with maximum of three numbers) makes a bid, the consortium agreement shall be furnished clarifying the split up of scope between consortium partners & specifying the leader of consortium. The leader of consortium shall take joint and severally responsibility for the contract.

Recommendation of the committee:

The committee referred latest tender specification of MPPGCL & PSPCL floated in the 2014 & 2015 where no Consortium was allowed, considering which, a member of the committee recommends no change in this clause of PQR."

34. It is further stated that the Committee comprising of above senior officers on 3.5.2016 examined deviation proposed by the prospective bidders in the specifications to be laid. Before vetting the conditions assailed, Committee applied its mind to the objections received. The Committee of RVUN constituted on 3.5.2016, compared and referred to the conditions of ''NIT''s floated by Punjab State Power Generation Corporation and Madhya Pradesh Power

Generation Corporation, and noted that Notice Inviting Tender (NIT) floated on behalf of Punjab State Power Generation Corporation on 4.12.2014, was for beneficiation of 0.60 Lac MT Raw Coal per month, whereas tender inviting bids by Madhya Pradesh Power Generation Corporation was for beneficiation of 49.9 Lac MT of Raw Coal. It is stated that experts after noticing all objections came to conclusion that the conditions prescribed are necessary for successful operation of the Chhabra Thermal Power Plant. It was noted by the Committee that it has been experience of RVUN that in few contracts wherein participation of consortium was allowed with the permission that the consortium participants shall be jointly and severally responsible for execution of the contract, it was found that in fact during execution of the contract only lead member executed the contract and other consortium partners had not contributed anything as they lost interest to execute the contract.

35. Therefore, regarding Clause 1.7.2 in the meeting of experts convened by the respondents, it has been said as under:-

"There has been experience of RVUN in few contracts wherein participation of consortium were allowed with the provision that the consortium partners shall be jointly and severally responsible for execution of the contract, however during execution state only lead member executed the contract and other consortium partner did not contributed to the execution of the contract. Such contracts were related to execution of BoP contract of 160 MW Ramgarh Stage-III project on EPC basis executed by M/s. SPML and other consortium partner M/s. Techpro did not contribute. Similarly, for the existing coal washing contract of Chhabra Power Project, M/s. Hind Beneficiation & M/s. Swastik got qualified on the combined basis of M/s. Hind Beneficiation & M/s. Swastik but M/s. Swastik did not contribute and the contract is being executed by only M/s. Hind Beneficiation for last more than four & half years. In view of above, it is utmost necessary that lead member of the consortium partner should have total washing capacity as per requirement, however the condition of experience can be relaxed and to be combined of lead member & other consortium members. It is also because in such a long period contract, in the event the other consortium partners not contributing at any stage, then, lead partner having washing capacity for full requirement, supply of washed coal would not affect & RVUN will continue to get required quantity of washed coal. This will ensure operation of RVUN power stations on uninterrupted & sustainable basis." The recommendation of the committee and decision of the WTD is the basis for insertion of Clause 1.7.1 & 1.7.2. It is based on record."

36. Regarding Clause 1.7.1. (iii), it was stated that RVUN has restricted experience criteria to Government/Public sector to ascertain the performance of bidder for the reason that the said condition ensure receipt of desired quality and quantity of coal after washing. It has been further contended that as per Railway Preferential Contract Order, for allotment of wagons w.e.f. 1.4.2015, coal traffic loaded from colliery siding or from washery siding only is accepted and

sponsored and accorded Priority-C.

37. Mr. Gopal Subramanium, has submitted that the requirement of Chhabra Thermal Power Plant is 2.0 Lac MT per month of Raw Coal and this is the scope of work noticed under Part-A 2.1.1. of the ''NIT''. Therefore, it has been said in the qualifying criteria that a contractor should have beneficiation plant/washery (wet technology) of minimum 2 Lac MT capacity according to the need of the respondent. It has been further submitted that wet technology has been prescribed as it remove fly ash from the coal to be supplied.

38. Mr. Gopal Subramanium, during the course of arguments submitted that experience requirement was imposed with objective of providing proper delivery of requisite amount of coal. Therefore, according to counsel, it was utmost important that the bidder who is allotted tender is able to supply requisite amount of coal throughout the period of contract. It was contended that the contract for supply of private power utility in most cases are undertaken as a short-term contracts, whereas contract with Government Power Utilities is always for a longer duration, hence, experience of supply to a Government Power Utility would provide requisite assurance to the respondent qua the ability of bidder to fulfil the term of a tender through the duration.

39. Mr. Gopal Subramanium, referred to tender document pertaining to year 2015-16 and contended that experience of supply to the reputed power utilities, earlier was non-existent, it was only included after the petitioner made series of representations to the respondents seeking change in the qualification requirement and in pursuance thereof the respondents have set up a Committee to examine the representations made by the petitioner and other coal washeries. According to Mr. Gopal Subramanium, after taking into account all facts, the respondents relaxed the experience requirement and permitted the supply to private washeries subject to 50% limit towards experience. It was contended that the clause, in fact, implies that the bidder should have supplied at least 1.2. million tonnes of Raw Coal per annum or 1.0 Lac MT per month for at least one year during last three years. Out of the said requirement, only 50% can be fulfilled by supplying to the private power entities while remaining 50% must have been supplied to Government Power Generating entities. Defending the condition that the leader of consortium itself should fulfil technical qualification it is contended that condition was specified to ensure timely supply of coal to the power station.

40. As per Mr. Gopal Subramanium, the Committee set up to evaluate the objections raised to prescribe the terms of tender came to conclusion that in the past members of the consortium lagged behind and it became the sole responsibility of the leader of the consortium to supply the coal required. It is submitted that since the total demand for beneficiated coal under the tender is much more than 2 Lac MT, it was necessary that minimum ought to be the sole responsibility of the lead member itself.

41. Mr. Gopal Subramanium has also placed on record the Preferential Traffic Order, General Order No.89 (For Allotment of Wagons) issued by the Railway Board. It is stated that under the power conferred under Section 71 of the Railways Act, 1989, Central Government has directed the Railway Administration to give special facilities and a preferential treatment to the transport of goods/ class of goods at a station/siding by assigning priority/preference mentioned in the said order. A perusal of the above Preferential Traffic Order reveal that Priority-A has been assigned to Military Traffic, Priority-B is assigned to goods for emergency relief work for victims of natural calamities, like floods, drought, earth-quakes etc., Food-grains and levy sugar for Public Distribution System or other welfare schemes, Whereas, Priority-C has been assigned to coal traffic, where sponsoring authority for movement of coal traffic is public sector coal companies or private coal companies having mining captive blocks, washery accompanied by provision of railway siding.

42. Thus, according to the counsel for the respondent, all the three conditions, which have been assailed by the petitioners, have been imposed not to oust the petitioner, but to ensure proper continuous working of thermal plant of the respondents.

43. Having noted facts, rival arguments, now it is time to notice case law relied by counsel for the petitioners and the respondents.

44. On behalf of the petitioners, Wednesbury Principle of reasonableness, as recognised by the Supreme Court in Tata Cellular v. Union of India, reported in (1994) 6 SCC 651, has been pressed into service to say that even though Government has freedom in the matters of contract, it must ensure fair play in the functioning of administrative body. Thus, decision taken in any administrative sphere must be free from arbitrariness and it should not be affected by bias or actuated by mala fide.

45. Further, the judgment rendered by the Supreme Court in Union of India & Ors. v. Dinesh Engineering Corporation & Anr., reported in (2001) 8 SCC 491, has been cited to urge that the public authority even in contractual matters should not have unfettered discretion and even though in the matters of contract having commercial elements some extra discretion is to be conceded but such authorities are bound to follow the norms recognised by courts while dealing with public property. Thus, it is contended that the decision of the public authorities should be free from any unreasonableness and arbitrariness.

46. Sterling Computers Limited v. M/s. M&N Publications Limited and Ors., reported in (1993) 1 SCC 445 is another judgment relied. Highlighting Para-15 of the judgment, it has been canvassed that there is nothing paradoxical in imposing legal elements on such authorities by courts even in contractual matters because whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good.

47. Much emphasis has been laid on Jespar I Slong v. State of Meghalaya & Ors.,

reported in (2004) 11 SCC 485, to contend that any act of public authorities which excludes competition from any part of trade or commerce and permit formation of cartel should not be permitted by the courts.

48. The learned counsel for the petitioner has laid much stress upon the observation made by the Supreme Court in Reliance Energy Ltd. & Anr. v. Maharashtra State Road Development Corporation Ltd. & Ors., reported in (2007) 8 SCC 1, to contend that opportunity includes "Level playing field". Para 36 of the judgment reads as under:-

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "nondiscrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho v. State of Tamil Nadu (2007) 2 SCC 1, Article 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the afore stated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

49. The learned counsel for the petitioner has also cited Sumitomo Chemical India Pvt. Ltd. v. HLL Lifecare Ltd. & Ors., reported in para 32 of the said

judgment reads as under:-

"Discretion necessarily implies good faith in discharging the duty; there is always a perspective within which a discretion is intended to operate, and any clear departure from its lines or objects, in our opinion, would be just as objectionable as fraud or corruption."

50. Relying upon aforesaid judgment, it has been canvassed that one of the many objects to invite offers by publishing Notice Inviting Tenders is to have purity of players so that choice can be made amongst the competitive bidders.

"53. Of the many objects to invite offers by publishing Notice Inviting Tenders, one object is to have a plurality of players so that a choice can be made of the most competitive bidder. Thus, notwithstanding it not being unreasonable or irrational to have a single bidder, an endeavour ought to be made to settle the terms on which bids are invited, to ensure that a single bidder does not remain in the fray. The object of inviting offers i.e. having plurality of players should be attempted to be achieved. We caution. We do not intend to say : Must be achieved. Thus, of the many factors, one factor which has to be kept in mind while settling the terms of a Notice Inviting Tender is to try and ensure, insofar it is possible, that the conditions are not so stringent that a single bidder is left to compete. A single bidder competing would be anti thesis of competition.

54. In relation to a Qualifying Criteria which relates to the manufacturing capacity or the supplying capacity of the tenderer, if past performance principle is to be adopted, all relevant factors pertaining to past performance must be kept in view and must be accounted for and should find a reflection in the Qualifying Criteria, otherwise the same would foul the dictum: ''He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider in the opinion of Lord Greene M.R. in Wednesbury Corporation s case. Such a decision would run contrary to the public idea of fair dealing and good administration and to accept to the contrary would permit insidious decisions, masquerading as discretions, abusing power to settle tender conditions to exclude fair competition. It would be a case of colourable glosses and pretences and would be the crooked cord of private opinion, which the vulgar call discretion."

51. The above paras have been relied to say that in the present case also, qualifying criteria has been made to exclude all other players except ''Hind Energy'' and M/s. ACB (India) Ltd. and thus, respondents have not ensured "Level playing field".

52. A further reliance has been placed on another judgment of Delhi High Court rendered in Gharda Chemicals Limited v. Central Warehousing Corpn.. A further reliance has been placed on State of Jharkhand & Ors. v. M/s. CWE-SOMA Consortium, reported in 2016(6) Scale 743, to urge at the cost of repetition that principle of judicial review would apply to the exercise of contractual powers of Government bodies in order to prevent arbitrariness or favouritism.

53. To counter the case law relied by the counsel for the petitioner, Mr. Gopal Subramanium, appearing for the respondents has placed reliance upon Directorate of Education v. Educomp Datamatics Ltd., reported as (2004) 4 SCC 19, wherein it was 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."

54. It is contended that in the above judgment, the Supreme Court upheld the condition laid in Notice Inviting Tender that firm making bid ought to have turn-over of 20 crores in the last three years. The following portion of the judgment has been relied to defend the condition laid in the present case regarding capacity, capability and experience of the bidder. Para 25 of the judgments reads as under:-

"------The government introduced the criteria of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went upto Rs. 40-50 crores. The total cost of the project was more than 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice."

55. A further reliance has been placed upon Global Energy Ltd. v. Adani Exports Ltd., reported in (2005) 4 SCC 435, to urge that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender merely to make petitioner eligible at the stage of technical appraisal of the bids received.

56. To fortify above submissions, judgment rendered by Supreme Court in Association of Registration Plates v. Union of India & Ors., reported in (2005) 1 SCC 679, has also been cited.

57. Respondents, with all force have relied on Michigan Rubber (India) Ltd. v. State of Karnataka reported in (2012) 8 SCC 216, wherein entire law relating to power of the court to exercise judicial review in matters of contract and tender has been summed up as under:-

"23. From the above decisions, the following principles emerge:

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

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

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

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

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

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

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

(ii) Whether the public interest is affected? If the answers to the above questions are in negative, then there should be no interference under Article 226.

58. This Court has extensively noticed the facts as averred in the writ petition and reply thereof, and facts as unfolded during the course of submissions made by the learned counsel for the parties. The relevant judgments relied for and against to lend weightage to the arguments advanced, have also been reproduced above.

59. On the touch stone of the observation made by the Supreme Court, one has to find whether three conditions assailed and defended forming part of the Notice Inviting Tender, depict any mala fide intention on the part of the respondents ''RVUN'' or they have been included to ensure better working of the Thermal Plant. The court has to ponder whether conditions severely criticized and zealously defended have been included in the Notice Inviting Tender (Annexure-17) to favour someone or not. This Court has also to find whether the three conditions assailed are irrational and arbitrary and have been introduced only for some ulterior purpose; and Whether the three conditions which have been made subject matter of the writ petition are within the bounds of reasonableness or have been incorporated to promote monopoly or cartel.

60. The first condition, that a bidder should own beneficiation Plant/Washery (Wet Technology) of 2 million tonnes capacity per annum and if bid is made by consortium with a maximum of two numbers than the leader of the consortium itself should fulfil technical qualification mentioned in clause (ii) of 1.7.1, is justifiable or not?

61. A thoughtful consideration has been extended to the rival submissions advanced by the learned counsel for the parties. The respondents to unveil their decision making process have relied upon Annexure-R/2, minutes of meeting of the Committee held on 5th - 6th, May, 2016. The Committee consisted of six senior most officers of ''RVUN'' who are experts in their field. They considered threadbare submissions made by the prospective bidders in a pre-bid meeting held to examine eligibility criteria. The Committee was concerned with the scope of the tender. The experts of the respondents ''RVUN'', in the various meetings held in order to prescribe eligibility criteria, were swayed by the fact that the scope of work under the tender covers washing/beneficiation of 2 Lac MT per month of Raw Coal and supply thereof by the Washeries. Thus, taking into consideration per month requirement, the Committee prescribed that the bidders should have own beneficiation Plant/Washery (Wet Technology) of minimum 2 MT of capacity. The members of the Committee laid specific condition that the leader of the consortium alone, itself should fulfil technical qualification for the reason

that earlier attempt made by Gujarat State Electricity Corporation to include the capacity of members of the consortium had not paid the dividends. The experts constituted a team of two responsible officers and said officers visited the Gujarat State Electricity Corporation at Vadodara and Punjab State Power Corporation Limited (PSPCL). The engineers informed the Committee that the Gujarat State Electricity Corporation, Vadodara had to terminate the contract and encash bank guarantee of Rs. 3.43 crores and no work was carried against the order given to a consortium. The Committee to lay the eligibility criteria for determination of capability and capacity took two main factors i.e. duration of the contract mentioned in the document inviting tender and past experience of the bidder. As per the Committee, the period of contract for which the instant tender was to be floated was for five years. Thus, relying upon the past experience, the Committee came to conclusion that for such a long period members of the consortium may not be able to keep its commitment and thus, according to the Committee, it was advised that the leader of the consortium alone should have the required capacity. The stand of the Committee cannot be termed unreasonable or illogical. The members of the consortium can pool their resources, infrastructure, equipment, experience and man power for supply of coal, but so far capacity and capability is concerned, same should be of the leader of the consortium alone, because same is commensurate to the requirement of the Chhabra Thermal Power Plant. Scope of the contract as described in Notice Inviting Tender (Annexure-17) specifically state in clause 2.1.1 that requirement of Chhabra Thermal Power Plant is 2 Lac MT.

62. Mr. Gopal Subramanium, the learned Senior Counsel appearing for the respondents, during the course of arguments had laid much emphasis on the inputs received from the officers of RVUN to come to the conclusion that leader alone should have required capacity to serve the needs of the Thermal Plant. It was disclosed to the court that experts have observed that where tender is of long duration, members of the consortium create their own individual contractual obligations and therefore, they are unable to bind themselves to the bid made by the consortium and the leader alone is left to fend for himself.

63. The above arguments advanced by Mr. Gopal Subramanium cannot be discarded by this Court, as it has been specifically said that first condition assailed was prescribed only to ensure continuous uninterrupted supply of coal to Thermal Plant for long period of five years i.e. duration of the contract. Courts have neither expertise nor technical experience to reject the argument advanced by counsel for the respondents. To fortify the submission that leader of consortium should alone have the capacity and capability, example of Gujarat State Electricity Corporation has been pressed into service to say that where member of consortium were made jointly and severally liable that arrangement had not proved workable. Example of Gujarat State Electricity Corporation relied is sufficient for this Court to lend credence to the argument raised by the learned counsel for the respondent.

64. The condition to determine capacity and capability of the bidder cannot be appraised by this Court. The view formulated by experts of RVUN cannot be termed arbitrary or illogical. The view on basis of experience of officers can be termed reasonable and merely because another view, which court may suppose to be better cannot be insisted upon by the court while exercising powers of judicial review in the matters of contract. Hence, the condition no.(i) that bidder should have a capacity of minimum 2 million tonnes and the same should alone be the capacity and capability of the leader of consortium, is upheld by this Court. The example of conditions imposed in Notice Inviting Tender for year 2010-2011 shall also pale into insignificance, as neither petitioner nor respondent have brought to the notice of this Court that Chhabra Thermal Power Plant has increased its capacity to generate power in last five years. A perusal of Wikipedia on internet reveal that at stage 1, in October, 2009 installed capacity was 250 Megawatt. Another 250 Megawatt was added in May 2010, another addition of 250 Megawatt was made in December, 2013 followed by further increase of capacity of 250 Megawatt in July, 2014. Proposed addition of 660 x 2 Megawatt is likely to commence in year 2016. Multiple increase in capacity to generate power and introduction of energy saving technologies in changing times can be no ground to tie the respondents with tender floated in the past.

65. Tender floated in year 2010 - 2011 cannot be relied to bind respondents with their past requirement. Not only capacity of the plant of respondents to generate electricity has increased or will increase in future, but technology to wash coal by advent of time has also changed. Energy saving devices and technologies in past five years have also been introduced. Wet technology was introduced to reduce fly ash. Railways also kept pace with time and changed itself to accord priority to freight to be transported. Priority ''A'', ''B'' and ''C'' assigned to goods has been mentioned in earlier part of the judgment. Respondents cannot be asked by the court to remain static and not introduce dynamic approach with change of times.

66. Counter argument that this condition has been introduced for the reason that the petitioner and other members who are having less capacity shall be ousted to make bid and it shall deny fair competition at best is another view, but this Court cannot lower the bench mark prescribed for successful operation of Thermal Plant to make petitioner eligible to meet qualifying criteria. It is for the petitioner to raise their capacity and capability by striving high then to say lower the bench mark to make petitioner company eligible. That in itself will be unreasonable.

67. Having found no infirmity in the condition no.(i), the court has to consider the condition no. (ii) introduced regarding experience of the bidder, demanding that bidder should have washed at least 1.2 million tonnes of Raw Coal per annum or 1.0 lac MT per month at least one year during last three years for Govt. Power House (s)/NTPC or State Power Utilities or reputed private power utilities, insisting further that out of the experience of washing 1.0 lac MT per month, a minimum of 50,000 MT per month should be for Govt. Power House (s)/ NTPC or State Power Utilities.

68. This Court cannot ignore the deliberations of the Committee of experts of the respondents. The Committee considered Notice Inviting Tenders floated by Punjab State Power Corporation Limited (PSPCL) on 4.12.2014 for beneficiation of 0.60 Lac MT and also tender floated by Madhya Pradesh Power Generation Corporation. Madhya Pradesh Power Generation Corporation had floated tender for beneficiation of 49.9 Lac MT Raw Coal. They had inserted a condition that a bidder should have executed work for any State Electricity Board or its Generation companies/NTPC or reputed private power utilities, State or Central undertakings. The Committee noted that in case of Madhya Pradesh Power Generation required experience was of three years, whereas experience required by the respondent ''RVUN'' was for one year only. The Committee came to conclusion that the condition laid in the tender floated by ''RVUN'' is liberal. As per the Committee, the condition qua experience that the bidder should have supplied requisite minimum quantity to the Government Power House(s)/NTPC or State Power Utilities was introduced because of long duration of contract of five years.

69. The respondents have taken a stand that experience requirement was introduced with the object of providing assurance of proper continuous delivery of the requisite amount of coal. According to the respondents, it is utmost important that bidder who is allotted tender is able to supply requisite amount of coal throughout the period of contract, as the contract for supply of coal to private power utilities in most of cases is for short term.

70. This Court cannot discount the argument that the contract to Government Power Utilities is always for a long duration, hence, supply to private power utilities cannot be a yardstick to lay the criteria. It has not been specifically denied by the petitioner that contract entered with the private sectors are not for a short term duration. It is the stand of the respondents that experience of supply to Government Power Utility provide the requisite assurance regarding the ability of the bidder to fulfil the term of the tender throughout the duration of five years.

71. Since regarding the incorporation of above condition, counsel were at variance qua its interpretation, Mr. Kajod LaL Meena, Additional Chief Engineer (Fuel), Rajasthan Rajya Vidyut Utpadan Nigam Ltd., Jaipur filed an affidavit dated 16.9.2016 along with written submissions to clarify the stand of the respondents. In Para-10 of the additional affidavit, Mr. Kajod Lal Meena has stated as under:-

"That the clause in effect implies that a bidder should have supplied 1.2 Million MT per annum or 1 lakh MT per month for one year out of the previous three years. Out of the said requirement, the experience of supplying to reputed private power utilities shall be limited to 50,000 MT per month for evaluation purposes while the experience for supplying to government power houses/NTPC/ State power utilities shall be minimum 50,000 MT per month. When the experience is calculated on per annum basis, it shall be averaged for calculation on monthly basis and therefore out of 1.2 million MT per annum, at least 6 lakh has to be supplied to Govt. Power House (s)/NTPC or State Power Utilities, while the remaining may be aggregated by taking into account the supplies made to reputed private power entities."

72. Taking totality of circumstances, it cannot be said that the condition regarding experience was introduced to oust a particular bidder.

73. So far third condition that the bidder should have own private railway siding, or railway siding should be approved for coal dispatch with ''C''-Priority, is concerned, no fault can be found with the same also.

74. This Court perused the copy of Preferential Traffic Order, General Order No.89 (For Allotment of Wagons) issued by the Railway Board, which has been placed on record.

75. In the said order, accepting authority for grant of Priority-''C'' has been defined. For extending Priority-C, certain conditions have been specified. One of the condition as per general instructions, qualifying for grant of Priority-C is that Washery or goods shed should have siding workable round the clock. Since Priority-C is assigned to a Washery, who is having its own siding, the condition has been introduced by the respondents to ensure and promote timely delivery of coal so that the work of the Thermal Plant because of delay is not affected. It has been rightly said that a bidder should own a railway siding with railways approval then only it is granted Priority-C by the Railways for quick movement of wagons filled with coal to the destination. Thus, this Court is in agreement with learned counsel for the respondents that the condition no. (iii) has been specified not to oust the petitioner but to ensure quick timely uninterrupted supply of coal necessary for working of a Thermal Plant.

76. Having upheld the conditions laying the qualifying criteria, this Court has to consider whether because of introduction of three conditions, public interest is affected or not?

77. The petitioner Chhatisgarh Power & Coal Beneficiation Limited on 29.3.2016, addressed a letter (Annexure-P/11) to the respondents. In the said letter, it was stated as under:-

"1. Healthy competition among the bidders & nigam will get lower rates & there will be assures minimum saving of Rs.50.00 75.00 per mt on landed cost of coal therefore nigam can save rs. 1,50,00,00.00 Per month in other words Rs. 18,00,00,000.00 (Rs. Eighteen Crores) per year. The Tender term is 5 years and rvunl will incurring 100 crore more cost if the criteria is not changed." (Exact Reproduction)

In another letter Annexure-P/12 dated 2.4.2016, respondents said as under:-

"If RVUNL revises/modify Qualifying Criteria in the tender document is mentioned above there will be lot of washeries, qualify and there will be a healthy competition among the bidders. We commit you that you will get Rs.50.75 Per

MT cheaper prices as compared to existing rates paid by RVUNL. We offer to wash the coal more than Rs.50 cheaper than the existing price. The Tenor of the Washing Contract for Chhabra Power Station is 5 years. The RVUNL is likely to pay Rs. 100 Crores more in respect of Chhabra Power Station and if consider all Rajasthan Power Plants the amount will be more than 400 crores which is public money.

Apart from the above we are not able to understand that what are the compelling reasons to change the qualifying criteria to create the monopoly of existing contractors and loose Rs.400 crores as there was smooth supply of washed coal is continued by the contractors who were successful in 2010-11 tender." (Exact Reproduction)

78. In the written submissions filed before this Court, it has been stated ''the aforesaid restrictions do not advance the large public interest and in fact, would result into a loss to public exchequer to the tune of at least Rs.400 crores''.

79. The above assertion of the respondents put this Court on the guard and circumspect to ask following questions:-

1. Whether the petitioners have levelled wild allegations?

2. Whether petitioners for their own benefit to act spoilsport, created doubts to arouse suspicion of the court or not?

3. Because of suspicion raised whether respondents have exercised their discretion in good faith or not?

4. Whether suspicion raised, if proved true, shall result into fraud or corruption on the part of the officers of the respondents or not?

80. In the present day times, the scam and scandals are being noticed everyday. State of Rajasthan is no exception. Thus, there is an urgent need that the finances of the State should be guarded with utmost precision.

81. This Court while upholding the three conditions assailed, was more conscious of the fact that in the matter of formulating conditions of tender document and award of a contract, greater latitude is to be conceded to the State Authorities. Since this Court could not say with certainty that the tendering authority had laid conditions with malicious intent or have misused the powers, this Court during the course of arguments impressed upon the learned counsel for the respondents to ensure that no loss of revenue is caused to the Government and as result thereof consumers are not burdened with high cost of electricity.

82. This Court while doing appraisal of the conditions, has not crossed self imposed restrictions of judicial review by holding a conservative view that fixation of value of a tender is entirely within the purview of executive and if the Government act in conformity with standards and norms, the court should limit its interference.

83. To allay the apprehension of this Court qua the price, Mr. Kajod Lal Meena Additional Chief Engineer (Fuel) along with written submissions has filed affidavit dated 16.9.2016, Para-10 of which has been already reproduced above. In Para-4 to Para-8 of the affidavit, it has been stated as under:-

"4. That after the technical evaluation, the financial bids of only the technically qualified bidders shall be opened according to prevailing rules of e-procurement. However, if the Hon''ble Court directs to open the financial bids of the technically unqualified bidders (who offer wet technology) solely for reference of price, the said directions of the Hon''ble Court shall be acted upon and price justification will be demanded.

5. That after evaluation of technical bids, it is not possible to open the financial bids of the bidders rejected during technical evaluation, on the e-procurement portal, since there are no physical documents with the second Respondent. However in order to subserve public interest upon this Hon''ble Court accepting the undertaking given above at para 4, the second Respondent shall examine the financial bid of even the technically unqualified bidder solely for the purpose of reference of price and to promote price justification.

6. That after opening of the financial bids, ''Negotiations'' as detailed under Rule 69 of the Rajasthan Transparency in Public Procurement Rules, 2013 will be conducted.

7. That while negotiating, the price justification shall be based on the present prices in the ongoing washery contracts of RVUN and other available price contracts based on similar contracts awarded by adjacent state power utilities (like Gujarat, Punjab and/or Madhya Pradesh).

8. That while approving the price, consideration shall also be given to justification/feasibility of the quoted rates (for wet technology) vis-a-vis the cost incurred by the contractor to execute the work contract."

84. To secure best interest of the organization and of the consumers of the electricity, it is for the respondents to demand price justification.

85. To do appraisal of documents, to guide officers to negotiate, to supervise that best price of coal supplied is arrived at, this Court is of the view that respondent State of Rajasthan should constitute ''Guidance Committee'' of three senior most officers of the State. The Committee should be headed by Principal Secretary (Energy) having two senior most directors of RVUN as members.

86. In case State of Rajasthan as per recommendation of the court constitute ''Guidance Committee'' in that case committee so constituted in consonance with the affidavit filed by Mr. Kajod Lal Meena, Para-4 to Para-8 of which have been reproduced above, shall do appraisal of all the documents to secure best interest of the State. They may, if so advised, in their discretion may open the financial bids of technically unqualified bidders, who offer wet technology, in terms of Para 4 and 5 of affidavit reproduced above to negotiate and obtain supply of coal at

lowest price. The committee shall oversee that supply of coal is ensured at the lowest price in the available circumstances, and no loss is caused to the State, by allaying apprehension expressed before this court by the petitioners. It is for the committee to take ground realities into consideration i.e. at what price coal is supplied to thermal plants in nearby locations, what is difference in distance or freight expenses qua other thermal plants. The committee can also consider at what rate coal is being supplied to private sector power plants. Comparison of price of supply to other thermal plants can be resorted to. There can be many factors to determine price and same cannot be put by this court in the water tight jackets, however, this court shall trust the ''Guidance Committee'' so formulated that it shall act reasonably, fairly, in public interest to negotiate and arrive at best price for the supply of coal to be made by the successful bidder.

87. In the light of the observations made above, the present writ petition is disposed of without causing interference and by upholding qualifying criteria prescribed by the respondents in the tender notice

