

(2010) 07 GAU CK 0013

In the Gauhati High Court

Case No : WP (C) No's. 487, 711, 3374 and 5336 of 2009 & Writ Petition (C) No. 487 of 2009

Mega Kleen

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-07-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226

Citation : (2011) 4 GLR 296 : (2010) 4 GLT 652

Hon'ble Judges : I.A. Anasari, J

Bench : Single Bench

Advocate : K.N. Choudhury, R. Dubey, J. Patowary, M. Mahanta, D. Baruah, R.P. Kakati and R. Deka, for the Appellant; A.K. Goswami, S. Sarma and S. Kakati, for the Respondent

Judgement

I.A. Ansari, J.—By this common judgment and order, I propose to dispose of all these four writ petitions inasmuch as all these four writ petitions are inseverably connected with each other and have raised substantially same questions of law and involve certain common facts. These writ petitions are, in fact, offshoots of two previous writ petitions, namely, W.P.(C) 2779/2006 and 6578/2007, which involved the parties to the present proceedings.

2. In order to correctly appreciate the background in which the present writ petitions have come to be filed and call for this Court's decision, a careful analysis of the events of the past, which had given rise to the previous writ petitions, is imperative.

BACKGROUND FACTS:

(i) Having noticed that the Railways had been adopting different terms and conditions, while giving contracts for washing of bedroll items and no standard terms and conditions of tenders had been formulated, Railway Board, constituted under the Indian Railway Board Act, 1905, issued the Commercial Circular No.

3/03, on 24.01.03, laying down the terms and conditions in respect of award of contracts for washing and cleaning of bedrolls, etc. By the said Circular, the Railway Board has laid down the tender procedure, which contains two bid system, for awarding contracts, namely, technical-cum-commercial bid and price bid. It has also laid down the eligibility conditions, which read as follows:

1. Eligibility Conditions: The following eligibility conditions should be included in the tender conditions:

(a)(i) The firm should be well established in the field of professional Washing and cleaning services of linen.

(ii) Only experienced and qualified firms having proven credentials of problem is hed performance in reputed major establishments for similar work should apply along with supporting documents.

(iii) The tenderer must have completed at least one work of similar nature, valuing not less than one-third the estimated cost of this work in any period of 12 calender months in last 3 years. Alternatively the aggregate value of works of similar nature executed in a period of 12 calendar months in last 3 years should not be less than 50% the estimated cost of this work. This evaluation should be done on the basis of payments received for the corresponding period in respect of work/works of similar nature. For this purpose the tenderers are required to furnish the necessary details duly attested by the concerned office/department.

(iv) The firm should have sound financial capability. The firm shall submit a solvency certificate from a Nationalised or Scheduled Bank for an amount not less than 1/4th of the estimated cost of this work.

(v) The annual Turnover: The annual turnover of the tendering firm in last 3 years shall not be less than one and a half time the estimated cost of this work as per ITCC to be submitted along with this tender.

(vi) The tenderers will submit with the tender details of machinery/plant and other credentials as per Annexure-2 enclosed. Railway Administration, if so feels shall inspect the infrastructure and facilities available with the firm so as to assess the capability of the firm toexecute the work successfully.

(b) The tenderer must give all the required documents as per tender notice. Eligibility of the firm must be attached along with the tender documents. If the tenderer does not fulfill the eligibility conditions mentioned above, the offer would be summarily rejected.

(ii) Basing on the representations, which were received from various Railways regarding difficulties being faced by them, due to local conditions and infrastructural deficiencies, in implementing the instructions contained in the Railway Board's said Circular, dated 24.01.2003, the Railway Board, having thought it fit that some modification to its earlier Commercial Circular No. 3/03, dated 24.01.03, were necessary in respect of the terms and conditions of the

contracts for linen washing/cleaning of bedroll, etc, issued a modified Circular, dated 09.09.03, relaxing, to some extent, the Clause Nos. C-1(a)(iii), Clause-1(a)(iv) and Clause-1(a)(v) of its earlier Circular, dated 24.01.2003, and allowing thereby, in some individual cases, further modification/ downgrading of eligibility criteria as stipulated in Sub-clause C-1 (a)(i) to (vi), with stipulation that reasons, for such modification/downgrading, shall be recorded and dilution, in the criteria, shall remain limited to the minimum extent as may be required and that such modification/downgrading may be made, with concurrence of the FA and CAO and personal approval of the General Manager, after testing the market. The relevant modifications, made by the Railway Board by its later Circular, dated 09.09.03, are, for the sake of convenience, reproduced below:

Clause 1(a)(iii)The tenderer should have completed in last three financial years (i.e. current year and three previous financial years) at least one similar work for a minimum value of 35% of advertised tender value.

Clause 1(a)(iv) The firm should have sound financial capability. The firms should submit Solvency Certificate from a Nationalised or Scheduled Bank for an amount not less than 1/4th of the advertised tender values of the work.

Clause 1(a)(v) Total contract amount received during the last three financial years and in the current financial years should be a minimum of 150% of advertised tender value. Tender Committee would satisfy themselves about the authenticity of the certificates produced by the tenderer (s) to this effect which may be an attested certificate from the employer/client, audited balance sheet duly certified by the Chartered Accountant etc. The details about the certificate to be accepted in regard to the turnover may, however, be notified along with the minimum eligibility criteria while advertising/issuing the tender notice by the competent authority.

(iii) Though me Railway Board's Circular, dated 24.01.2003, stood modified, as mentioned above, by the Circular, dated 09.09.2003, permitting modification/ downgrading of eligibility criteria in some individual cases, the Chief Commercial Manager, North East Frontier Railways, commonly known as "NF Railways", issued, in the month of October, 2003, an NIT, in terms of the unamended Railway Board's Circular, dated 24.01.2003, for the purpose of steam-cleaning cum mechanized washing, disinfecting and ironing of linens and dry cleaning of blankets, bedrolls, etc., at Guwahati railway station.

(iv) The Petitioner, which is a registered partnership firm (hereinafter referred to as the "Petitioner firm"), having been found the lone responsive bidder fulfilling the requirements of the NIT, was awarded the contract. The Petitioner firm continued with the contract agreement upto 04.07.06 without there being any competition whatsoever inasmuch as there was no bidder having a mechanized washing plant, at a suitable location, at Guwahati, which was one of the conditions in the NIT.

(v) A notice inviting tender (NIT) was, thereafter, issued by the authorities of the

NF Railways, on 19.05.06, inviting sealed tenders from reputed and financially sound business parties/washing firms for the work of steam cleaning/mechanized washing, disinfecting and ironing of linens, dry cleaning of blankets for bedrolls in trains, public retiring rooms, etc., at Guwahati Railway Station, with the eligibility condition that the concerned party should be well established in the field of professional washing and cleaning, should be financially sound, should submit a solvency certificate from a nationalized bank for an amount not less than 1/4th of the estimated cost of the work and should be experienced and having proven credentials of performing similar type of works in reputed/major establishments and should be having the specified plant, equipment and assets in Guwahati area. The NIT also stipulated that the contract amount received by the tenderer, during the last three financial years and in the current financial year, should be a minimum of 50% of the annualized advertised tender value. The relevant terms and conditions, stipulated in the said NTT, read thus:

i) The firm shall have a sound financial health and proven track record in any field of business activity. This should be supported by published annual financial statement for last three years;

ii) The firm shall produce a solvency certificate from any nationalized scheduled bank for the full amount of advertised tender value; and

iii) A brief project report for setting up a mechanized laundry as per tender specifications should be given along with the tender. It was further stipulated in the said NIT that if the administration decides to award a trial order, the selected tender shall be given 6-9 months to set up the plants/requirements from the date of giving Letter of Intent (L.O.I).

(vi) However, a "Note" was appended to the above eligibility conditions, stipulated in the NIT, stating to the effect that any party, who does not fulfill any or all of the eligibility conditions specified, may still bid for development or trial order for a part quantity (maximum 20% of the tender quantity in the first year, which can increase up to 50% of daily offered quantity during the rest of the contract period) subject to the further stipulation that if the administration decides to award a contract on development or trial basis, the selected tenderer would be given 6/9 months" time, with effect from the date of giving LOI, to set up the plants and meet other requirements. The "Note" read as follows:

Any party, who does not fulfill any or all of the eligibility conditions, specified above, may still bid for a developmental/trial order for a part quantity (maximum 20% of the tender quantity, in the 1st year, which can increase upto 50% of daily offered quantity during the rest of the contract period) subject to the following.

The firm shall have a sound financial health and proven track record in any field of business activity. This should be supported by published Annual Financial Statement for last three years.

(vii) As per the records, the decision to split up the contract work into two parts

as indicated above and to award 80% of the work on regular basis and 20% of the work, on development/trial basis, was taken by the Zonal Railways after considering the local conditions in the sense that a "Note", the records reveal, was put up by the CCM of the NF Railways, on 15.05.06, proposing relaxation of the eligibility conditions and splitting up of the work and for awarding the same on development/trial basis with a view to generating competition, amongst more than one source, for the purpose of making an effort to improve the quality of work as the Petitioner firm, according to the said note, was found to be the lone eligible firm for the work on earlier occasion, which was creating monopoly and likely to continue in future.

(viii) For better understanding, the said "Note", dated 15.5.06, is reproduced below:

(1) The present contract is going to expire on 4.7.06.

(2) The present contractor engaged in washing at Guwahati has been working since 1999. This firm was the only eligible firm found during the last 02 occasions when open tenders were floated. It appears that there is no other eligible firm in Guwahati area to undertake the work. This also means that the present firm is likely to qualify as the only eligible firm for the job during next tender and the monopoly is likely to continue. Since bed roll is very important and sensitive passenger amenity item, we should ensure very good quality of washing. Railway Board has also emphasized from time to time quality of bedroll to be supplied to passengers. During routine inspection of bedrolls it has been observed that the quality of washing is not entirely satisfactory and leaves room for improvement.

(3) It is, therefore, felt necessary that some competitions amongst more than one source are introduced in an effort to improve quality. For this, it is necessary to relax some criteria as laid down in Rly. Bd's extant circular at SN-14 and also incorporate in the tender conditions some scope for trial order to develop alternative source so that the job can be thrown open to the wider market for competition.

(4) Bd's Circular at SN-13 empowers the Zones to modify/dilute the criteria as laid down in Rly. Bd's extant circular at SN-14 with finance concurrence and GM's approval.

(5) Therefore, it is proposed that para-Clause I(a)(III)(V) of SN-13 should be relaxed as shown in the draft tender notice (SN-26) and for trial order as stated in "note" portion at (SN-26).

(6) May kindly vet and concur the tender papers as well as the proposed relaxation. Sd/-15.5 CCM FA Aandcao.

(ix) As per the records, the FA and CAO, keeping in view the Railway Board's emphasis on providing better facilities to the commuting public and also for encouraging competition and putting an end to the monopoly created by the Petitioner firm, agreed to the said proposal of the CCM. The Note, submitted by

the FA and CAO to the General Manager, is reproduced below:

the case has been discussed with CCM. It is learnt that a few small mechanized laundries have since come up on Guwahati area, but no confirmed information could be collected. It however, such parties do exist, they will not qualify on undiluted financial criteria of one works of at least 35%, and three years cumulative turnover of 150%, of the tendered annual value. This is because Guwahati area does not offer such big laundry business opportunity as to provide orders of this magnitude, other than NF Railway.

Accordingly, it is necessary to substantially dilute these criteria, and the proposed limit of 15% for a single works and cumulative turnover last three year of 50% of annualized tendered value is acceptable.

Due to lack of sufficient business opportunities as of now," it is also considered unlikely that any established parties from other areas are likely to set up business of this nature and accordingly, we cannot depend entirely on this option. In order to encourage parties from this area to invest in a mechanized laundry on assurance of adequate business opportunity, the proposal for development order is also acceptable.

As Board's emphasis this year is on service with a smile, and specially on "touch and feel" items, it is imperative for us to explore various options and opportunities to provide improved service. Increased competition is one of the better ways of improving quality.

In view of the circumstances, the proposal to modify the eligibility criteria as proposed by CCM is concerned us.

GM may kindly approve.

Sd/- Illegible 17/05.

(x) Pursuant to the approval of the General Manager, NF Railways, an NIT, dated 19.05.06, which was based on the concept of development/trial order, was issued.

(xi) The Petitioner firm, who had a contract for washing of bed-rolls, linen, etc., with the Railways, challenged the NIT, dated 19.05.2006, by a writ petition, which gave rise to W.P.(C) No. 2779/2006, wherein an interim order was passed, on 07.06.2006, whereby the Court, while allowing the Railway administration to proceed with the NIT, directed the NF Railways not to pass any final order, pursuant to the said NIT, with an observation that no order was necessary as regards the Petitioner firm's participation in the said tender process. Thereafter, the Petitioner firm participated in the tender process, initiated by the NIT, dated 19.05.2006 aforementioned.

(xii) By its said writ petition, namely, W.P.(C) 2779/2006 (hereinafter referred to as the "first writ petition"), the Petitioner firm put to challenge the stipulation, under the "Note" aforementioned, that 20% of the work would be awarded on developmental/trial basis, the ground of challenge being that the said 20% work,

described as developmental/trial work, is arbitrary in the sense that the Railway administration, for the purpose of awarding the contract to the extent of the said 20%, had not stipulated any eligibility condition at all inasmuch as anyone, who may not satisfy any of the eligibility criteria, mentioned in the NIT, can still be awarded 20% of the work, purportedly on trial basis, by describing the same as developmental/trial order. In short, what the Petitioner firm contended, in the first writ petition, was that for such developmental/trial order, no criterion, condition or basis was stipulated at all.

(xiii) To put it a little differently, the "Note", appended to the NIT, was, according to the "first writ petition", arbitrary in the sense that it would allow, if permitted, a person, to receive the contract for 20% of the work, though he might be, otherwise, wholly ineligible to even participate in the tender process inasmuch as no condition of eligibility had been specified in the said "Note". An interim order was, as indicated above, passed by the Court directing the Railway administration not to finalise the contract pursuant to the said NIT, dated 19.05.2006, and also to allow the Petitioner firm to participate in the said tender process. Thereafter, the said writ petition was permitted by the Court, on 21.02.2007, to be withdrawn by the Petitioner firm with liberty to file afresh, if so advised.

(xiv) In the tender process, which was initiated by the NIT, dated 19.05.2006, apart from the Petitioner firm, Respondent No. 5 herein (who does not have a mechanized plant, in Guwahati area, though it was one of the essential eligibility criteria under the NIT, dated 19.05.06), submitted tender for the regular work. The Respondent No. 5 also submitted tender for allotment of contract for 20% of the work on development/trial basis as stood stipulated in the "Note" appended to the said NIT.

Upon withdrawal of the "first writ petition", a conditional order, dated 28.02.2007, was issued by the Railway administration, awarding the contract for regular work i.e., 80% of the total work of steam cleaning/mechanical washing, disinfecting of linen, dry cleaning of blankets and their transportation, supply of bedrolls in trains and in retiring rooms at Guwahati Railway Station, in favour of the Petitioner firm, for a period of two years, with effect from 23.02.2007 to 22.02.2009, with the condition stipulated therein that the contract for washing/cleaning of bedroll items was awarded to the Petitioner firm for a period of two years. The said conditional order further stipulated that subject to satisfactory performance, the work may be renewed maximum for Anr. period of one year if mutually agreed to. In the said order awarding the contract for regular work, the Petitioner firm was made known that it would undertake all works and continue to do so for about 6 to 9 months till finalisation of awarding the contract and completion of other allied works by the selected tenderer on trial and development basis and that after selection of such tenderer, 20% of the total works would be given to such selected tenderer, for the first year, with intimation, in due course, to the Petitioner firm and the same may be increased

upto 50% of the daily offered quantity during the rest period of the contract. The said conditional award of contract further stipulated that the Railways reserve the right to increase or decrease the contractual quantity by 50% during the currency of the contract. For a better appreciation, the conditional order, awarding the contract in favour of the Petitioner firm, is quoted below:

No. C . "no. C/a-35/bed Roll (Mechanised)/ pa/2003/pt. I. Dated 28th February, 2007.

To

M/s Mega Kleen Chilarai Nagar Path, Bhangagarh, Guwahati-5. Dear Sir,

Sub: Award of contract for washing of Bed Rolls and linens.

Ref: 1. Your letter No. Nil Dt. 23.2.2007.

2. This office Letter of even No. dt. 23.02. 2007.

Your offer regarding the subject noted contract against N.F. Railways Tender Notice No. 1/wbm/2006 dt . 19.5.2006 and tender documents has been accepted by the competent authority.

Please note that at present you will undertake all works and continue to do so for about 6/9 months till finalisation of awarding contract and completion of other allied work by the selected tenderer under trial and development basis (20%) as per Press Notification and terms and conditions. In this connection it may be mentioned that 6/9 months time from the date of loi will be given to set up the plants/requirements for 20% works under trial and development basis by the selected tender and after satisfactory completion of the aforesaid works by the selected tenderer, 20% of the total works will be given to him (selected tenderer) for 1st year with intimation to you in due course and the same may increase up to 50% of the daily offered quantity during the rest of the contract period. As such please note that the Railways reserve the right to increase or decrease the contractual quantity by 50% during the currency of the contract.

In view of the above you are requested to start providing services subject to conditions contained in Para 2 above and as per terms and conditions of the tender Notice No. 1/wbm/2006 dt. 19.5.2006 with effect from 23.02.2007. The contract is valid for 2(two) years from 23.2.2007 to 22.2.2009 subject to renewal for maximum Anr. one year if mutually agreed to by NF Railway and the contractor on satisfactory performance of the work with same rate, terms and conditions.

1. Terms and conditions indicated in the original contract as well as in its subsequent agreements/orders will be modified as per the requirement of the Railway Adminstration/irctc and the authority shall reserve the right to terminate the contract subject to operational exigencies as well as public interest.

2. You will have to give an undertaking in the format attached with this letter

which may kindly be returned to the undersigned for processing the case.

As per Boards policy, since IRCTC is programmed to take over the washing contracts in future, you will have to execute a Tripartite Assignment Deed which will be signed by NF railway, IRCTC and M/s Mega Kleen.

The Contract Agreement is being finalized and you will be intimated in due course.

This has got the approval of the competent authority.

Enclo: One (As above).

A.B. Das) Senior Commercial Manager/G For Chief Commercial Manager.

(xvi) The Petitioner firm, thereafter, having accepted the said conditional order, awarding the contract, filed an undertaking before the Railway administration that it accepts all the terms and conditions of the contract as well as the Railway's subsequent communications unconditionally and shall abide by the same. The undertaking, filed by the Petitioner firm, is quoted below:

M/s Mega Kleen Chilarai Nagar Path, Bhangagarh, Guwahati-5 Date: 02.03.07

To

The Chief Commercial Manager N.F. Railway Maligaon Guwahati-11.

Sub: Undertaking.

Sir,

I, on behalf of the M/s Mega Kleen do hereby accept all the terms conditions of the contract as well as in its subsequent communication unconditionally and undertake to abide by the same

Sd/- (Ramen Deka) M/s Mega Kleen Chilarai Nagar Path, Bhangagarh, Guwahati-5.

(xvii) Pursuant to the acceptance of the said conditional order by the Petitioner firm as mentioned above, the Petitioner firm executed an agreement, on 16.07.2007, with the Railway administration in respect of the conditional work awarded in its favour. The said agreement also stipulated,

... at present, the contractor will undertake all works and continue to do so for about 6/9 months till finalisation of awarding contract and completion of other allied works by selected tenderer under trial and development basis (20%) as per press Notification and terms and conditions. In this connection it may be mentioned that 6/9 months time from the date of LOI will be given to set up the plants/requirements for 20% works under trial and development basis by the selected tenderer and after satisfactory completion of the aforesaid works by the selected tenderer, 20% of total works will be given to him (selected tenderer) for first year with intimation to the contractor in due course and the same may

increase upto 50% of the daily offered quantity during the rest of the contract period. Railway reserves the right to increase or decrease the contractual quantity by 50% during the currency of the contract.

(xviii) Following the agreement, dated, 16.07.2007, aforementioned, which had been entered into between the Petitioner firm, on the one hand, and the NF Railways, on the other, when, however, the Railways awarded 20% of the work to the Respondent No. 5 on developmental/trial basis, the Petitioner firm challenged, by way of Anr. writ petition, the award of the contract, though the Petitioner was not a tenderer in respect of allotment of the said developmental/trial work as stipulated in the NIT, dated 19.05.2006. The writ petition gave rise to W.P.(C) No. 6578/2007 (which is hereinafter referred to as "second writ petition").

(xix) In the "second writ petition", the Petitioner firm put to challenge, once again the said NIT, dated 19.05.2006, whereby eligibility criteria of the tenderers had been relaxed and splitting up of the contract work had been stipulated. The Petitioner firm also challenged, in the second writ petition, the order, dated 08.05.07, issued by the Railway administration, requesting the Respondent No. 5 to develop its (Respondent No. 5's) infrastructure for washing of bedroll linens at the place mentioned in its tender papers and to complete the work within 6/9 months so that 20% work of bedroll washing, etc, can be allotted to it in the first year, which could be increased up to 50% of daily offered quantity on satisfactory performance during the subsequent contractual period. It may also be noted here that the Respondent No. 5 also mentioned, in his tender papers, which he submitted pursuant to the NIT, dated 19.05.06, that he owns a mechanized washing plant, at Shillong, for performing the regular works, apart from the development/trial works, which was, however, not in conformity with the conditions of the NIT, dated 19.05.06, which stipulated that the tenderer should have such a plant, as stipulated in the said NIT, in the Guwahati area.

(xx) In the second writ petition too, the Petitioner firm put to challenge, once again, as indicated above, the NIT, dated 19.05.06, and the award of the contract work of 20% on development/trial basis, in favour of Respondent No. 5, basically, on the ground of violation of the Railway Board's Circular, dated 24.01.03, and also on the ground that the actions of the North Frontier Railway suffer from colourable exercise of power, arbitrariness and mala fide.

(xxi) Several issues had arisen for determination, in W.P. (C) No. 6578/2007 (which is being referred to as the "second writ petition"). Broadly speaking, the issues were pertaining to the questions as to (i) whether the NIT, dated 19.05.06 (which had also formed the subject-matter of challenge in the first writ petition) was in violation of the Railway Board's Circular, dated, 24.01.03, read with its modification, as embodied in the Circular, dated 09.09.03, and (ii) whether the award of the contract was arbitrary, in colourable exercise of powers and motivated favouring thereby Respondent No. 5.

(xxii) The present Respondents, who were also the Respondents in the second writ petition, resisted the second writ petition, by endeavouring to justify the relaxation of the eligibility criteria by appending the said "Note" to NIT, dated 19.05.2006. The present Respondents also contended therein (i.e., in the "second writ petition") that the Petitioner firm, having accepted the conditional award of contract, in terms of the agreement, dated 16.07.2007 (which had been entered into by the parties concerned) cannot turn back and challenge the award of the contract, which had been made pursuant to the NIT, dated 19.05.2006, in favour of Respondent No. 5.

(xxiii) In short, what the Respondents contended, in the second writ petition, was that the Petitioner firm is estopped from challenging the award of contract to the Respondent No. 5, because of the doctrine of approbation and reprobation. In this regard, the Respondents contended that if a person, on his own accord, accepts a contract, he cannot be allowed to adhere to, and abide by, some of the terms of the contract, which are advantageous to him, and repudiate other terms and conditions of the contract, which may be disadvantageous to him. By its order, dated 14.08.2006, the Court dismissed the second writ petition, wherein the Court held that the concept of development/trial work had been taken in the interest of the general public and, referring to the decision, in *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, the Court pointed out that a party to an instrument or transaction cannot take advantage of one part of the document or transaction and reject the rest. The relevant observations, made in this regard, by the Court, which appear at para 41, read as under:

(41) In the instant case also it appears from the facts narrated above that the Petitioner being aware of the "note" appended to the NIT dated 19.5.06 submitted his tender papers and thereafter though he filed the W.P.(C) No. 2779/06 before this Court challenging such condition of the NIT the same was subsequently dismissed on withdrawal on the basis of the Misc. Case filed by it. The Petitioner also accepted the conditional order awarding the contract dated 28.2.07 and given an undertaking in writing to the Railway administration on 2.3.07 that he will abide by all the conditions of the contract and thereafter executed the agreement with the Railway on 16.7.07 which also has the stipulation of awarding initial 20% of the work to other tenderers on trial/development basis. In fact, the Petitioner has accepted such conditional order awarding the contract in its favour with its eyes open and having accepted the same and also having not challenging the same and also the agreement, has waived its right to challenge such a decision of the Railway administration, which is impugned in the present writ petition. The Petitioner by its conduct is estopped from challenging the impugned decision of the Railways in that regard. The Petitioner cannot take advantage of the part of the order and refused to comply with other part, that too, after accepting it and without challenging the same and cannot be allowed to challenge the said decision of the Railway administration on the ground of violation of Article 14 of the Constitution of India, having accepted such conditional order of contract issued in its favour. It is no doubt true that

there cannot be any estoppel or waiver against the enforcement of the fundamental right of a citizen, but the principle of approbation and reprobation is different from the doctrine of estoppel and waiver, therefore, the Petitioner is debarred from challenging such decision of the Railway administration. The principles of approbation and reprobation prohibits a party to a transaction from approbating a part of its condition and reprobating the rest.

3. Bearing in mind the facts leading to the filing of the earlier two writ petitions, as indicated above, and the decisions therein, I may, now, point out as to what the subject-matter of each of the present four writ petitions is. Let me, therefore, first take note of the subject-matter of controversy and the challenge posed in each of these four writ petitions.

W.P.(C) No. 487 of 2009

4. Notwithstanding the dismissal of the "second writ petition", namely, W.P. (C) 6578/2007, when the NF Railways issued an NIT, dated 15.01.2009, inviting tender for allotting the works of steam-cleaning, mechanized washing, disinfecting and ironing of linens and dry leaning of blankets for bedrolls for trains, public retiring rooms, etc., at Guwahati Railway Station, the Petitioner firm, once again, and, as before, came with a writ petition, which gave rise to W.P.(C) 487/2009, and is, hereinafter, referred to as the "third writ petition".

5. In the "third writ petition" too, the Petitioner firm has put to challenge the scheme of selection embodied in the NIT, dated 15.01.2009, by dividing the entire work into two groups, namely, regular work (which constitutes 80% of the total work) and development/trial order (which constitutes 20% of the total work). This apart, even the NIT, dated 15.01.2009, contains the "Note", embodying the same scheme of doing away with all the eligibility criteria in the name of encouraging competition and improving thereby the quality of the work, which stood embodied in the first NIT, dated 19.05.2006, and formed the subject-matter of challenge in the "second writ petition", namely, W.P.(C) 6578/2007, and stands, as already mentioned above, dismissed.

6. Putting to challenge the NIT, dated 15.01.2009 (which is, hereinafter, referred to as the "second NIT"), the Petitioner firm reiterated its earlier stand that by resorting to the "Note", appended to the NIT, what the Railway authorities had done was that, even when a party, who does not fulfil any or all of the eligibility conditions, specified in the NTT, may still be awarded 20% of the contract work by describing the same as development/ trial order and since, for the purpose of awarding development/trial order, no basis and/or criterion stood prescribed, the same left room for arbitrariness and motivated allotment of contract in the sense that the allottee of the development/trial order can be chosen or selected by applying any such criterion, or criteria, which the Railways might adopt; whereas no allotment of contract, in the public domain, is possible by the public authority without inviting tenders prescribing therein the eligibility criterion, or criteria, for making selection of the tenderer for the purpose of awarding contract. In other

words, the Petitioner firm further contended that the "Note" has given complete arbitrary power to the Railway authorities as far as the selection of the contractor for 20% of the total work, in the name of development/trial order, was concerned.

7. The Petitioner firm also points out, in the "third writ petition", that it had challenged similar NIT in the earlier two rounds of litigation and that the dismissal of its "second writ petition" by the Court was on arriving at a finding that the Petitioner firm, having accepted the terms and conditions of the conditional award of contract, contained in the Railway's letter, dated 28.02.2007, and having entered into the agreement, dated 16.07.2007, in this regard, and also being aware of the existence of the "Note", could not have challenged the NIT, dated 19.05.2006 (i.e. the first NIT) and/or the work order, dated 08.05.2007, made in favour of the private Respondent, because the Petitioner firm cannot, in the facts and attending circumstances of the case, probate and reprobate. The Petitioner firm also points out, in the "third writ petition", that while dismissing its "second writ petition", the Court had not taken into consideration the fact that the NIT, dated 19.05.2006 (i.e., the first NIT), was arbitrary and in violation of the Railway Board's Commercial Circular, dated 09.09.2003, inasmuch as the words, "modify/downgrade", as contained in the Circular, dated 09.09.2003, do not empower the NF Railways to embody such terms and conditions in an NIT for allotment of work, which would amount to completely obliterating the eligibility criteria, contained in the Circular, which the Railway Board, in order to create some kind of uniformity in selection of tenderer, except with minimum deviation, depending upon local conditions, had issued.

8. The Petitioner firm also contends, in the "third writ petition", that the Circular, dated 24.01.2003, read in the light of its modification by the Circular, dated 09.09.2003, does not permit the NF Railways to split the entire quantity of work in the manner, as has been done, in the present case, into two parts, namely (i) regular work and (ii) development/ trial order. It is also the case of the Petitioner firm that steam/mechanized washing is a very specialized job, which requires not only experience and expertise, but also mechanised plant and machinery and, therefore, stringent conditions had been laid down by the Railway Board, in this regard, for maintaining the standard of work, but the impugned action of the NF Railway authorities have done away with all these requirements and it allows anybody without any experience, in the field, without having the facility of the required plant and machinery, to do mechanized washing, which not only dilutes but completely throws away the avowed policy of the Railway Board with regard to steam/mechanized washing of bedroll items, particularly, when no criterion has been fixed as to what factor(s) would govern the process of making selection of the tenderers for allotment of development/trial order. This gives, according to the Petitioner firm, unlimited discretionary power to the NF Railway authorities, which is antithesis of tender system. The scheme of selection of tenderer and award of contract is, thus, according to the Petitioner firm, in violation of Article 14 and 19 of the Constitution of India inasmuch as the action of the Railway authority amounts to treating the unequals as equals.

9. The case of the private Respondent, in the "third writ petition", is that the Petitioner firm was the only bidder for the last few years in respect of the said work and the Petitioner firm, having the necessary infrastructure, has created some sort of monopoly in the field of mechanized washing of bedroll items and, as such, with a view to generating competition, amongst more than one source, for the purpose of improving the quality of the work, the railway administration had split the total quantity of work and modified some of the eligibility criteria. This action of the railway administration ensures fairness and equality of treatment in the tender process, more so, when it has been taken to further public interest. The private Respondent further contends that though steam/mechanized washing is a specialized job, it was within the competence of the railway administration to modify or fix any terms and conditions for allotting such contracts, particularly, when there has been only one qualified bidder for such a contract for the last several years and there was absolutely no competition. That apart, the impugned scheme, as envisaged by the "Note", appended to the second NIT, dated 15.01.2009, would ensure improvement in the quality of work.

10. While issuing notice of motion, the Court passed, on 06.02.2009, an interim order for a period of ten days restraining the Respondents from making any order of allotment of the work, in question, on the basis of development/trial order, as perceived by the impugned NIT, dated 15.01.2009. This interim direction has, however, continued, because some developments have been taking place in the matter of selection of tenderer and allotment of work, in question

W.P.(C) No. 711 of 2009

11. Though the Petitioner firm had challenged the scheme of allotment of contract, as perceived by the second NIT, dated 15.01.2009, so far as the same related to 20% of the work, described as development/trial order, the Petitioner firm as well as the private Respondent participated in the tender process for allotment of the regular work (i.e., 80% of the total quantities of work). However, on 10.02.2009, on opening of the technical bids, the private Respondent's bid, according to the Petitioner firm, was found to be non-responsive and the Petitioner firm was found to be the only technically qualified bidder. The partners of the Petitioner firm, who were present at the time of opening of the tenders, having noticed that the technical bid, offered by the private Respondent, suffered from various defects and was non-responsive, submitted, according to the Petitioner firm, representation, on 16.02.2009, to the competent authority requesting the authority not only to reject the bid of the private Respondent, but also to open the financial bid of the Petitioner firm. The Railway authorities did not, however, respond to the representation, so submitted.

12. Coupled with the above, the Petitioner firm contends that though the private Respondent had not qualified in the tender process, so far as the regular work was concerned, yet the Railway authorities, according to the Petitioner firm, decided to grant extension of the period of contract, in respect of the development/trial order, in favour of the private Respondent, while denying the

same benefit of extension to the Petitioner firm, in respect of the regular work, though the agreement, between the Petitioner firm and the railway authorities, did make provision for extension of the period of contract allotted to the Petitioner firm. Assailing the concept of development/trial order, the Petitioner firm contends that when no criterion has been fixed for selection of tenderer for the development/trial order, there is nothing for anyone to know as to what factor(s) would govern the selection of the tenderer in respect of the development/trial order and, hence, the scheme of development/trial order in the manner as has been introduced, is untenable in law.

13. By way of its "fourth writ petition", which gave rise to W.P.(C) No. 711/2009, the Petitioner firm has put to challenge the NF Railway's decision to grant extension of the period of contract, in favour of the private Respondent. In the "fourth writ petition", the Petitioner firm has sought for setting aside and quashing the decision, taken by the NF Railway authorities, to grant extension of the period of contract, made in favour of the private Respondent, and for further direction to the Railway authorities to extend the existing period of contract, in respect of the regular work (i.e., 80% of the total work), till finalization of the tender process relating to the regular work. On the other hand, Railways authorities have filed a miscellaneous application seeking alteration/modification, etc. of the interim order, dated 06-02-2009, passed in W.P.(C) No. 487/2009 (i.e., the "the third writ petition").

14. In the "fourth writ petition", the Petitioner firm has contended that while making their miscellaneous application, seeking to get the interim direction, contained in the order, dated 06.02.2009, modified/ altered/vacated, the Respondents have not assigned any reason as to why the Railway authorities have not finalised the allotment of contract in respect of the "regular work" when the existing term of the contract, allotted to the Petitioner firm was going to expire on 22.02.2009. In the "fourth writ petition", the Petitioner firm made specific allegation of mala fide, as against Respondent No. 8, namely, Senior Divisional Commercial Manager, NF Railway, Lumding, by pointing out that the decision for granting extension of time of the contract, for a further period of four months, in favour of the private Respondent, had been taken in respect of the development/trial order and, that too, in respect of 50% of the total work, whereas no such extension had been considered in favour of the Petitioner firm. The Petitioner firm also pointed out, in the "fourth writ petition", that though allegations have been made that the Petitioner firm's performance had not been satisfactory and notices were issued to the Petitioner, on 18.09.2008, seeking to terminate the contract, the fact remains that the Petitioner firm submitted its reply, on 12.11.2008, in response to the show cause notice, dated 18.09.2008, aforementioned, and the contract, allotted to the Petitioner firm, has, thereafter, not been terminated.

15. The Petitioner firm has contended that though, in the "fourth writ petition", the Court, while issuing notice of motion, on 20.02.2009, restrained the

Respondents from making allotment of contract in favour of ineligible tenderer, it made clear that there was no embargo as far as the processing and settlement of tender, as regards the "regular work" was concerned, yet the Railway authorities were proceeding to allot, by way of ad hoc arrangement, almost the entire work in favour of the private Respondent. The Court, therefore, passed an interim order, on 20.02.2009, wherein the relevant observations made, in this regard, by the Court, read as under:

....It is already noticed that interim order passed by this Court on 06.02.2009 does not place any embargo on the Railway Authorities to finalize the contract and issue work order for 80% work, which were to be given on merit basis only to eligible contractors and under such circumstances, this Court is unable to comprehend as to why the Respondent authorities are not finalizing the work order for 80% of the tender work, while at the same time, making arrangement to give 100% of the work to Respondent No. 10 by claiming this to be an ad-hoc arrangement.

In view of the above discussion, let notice returnable in 2 weeks be issued. Pending return of notice, it is made clear that if the Railways are required to make any ad-hoc arrangement for mechanical washing of bedrolls/linens, the same shall be done, in terms of the work orders issued in the year 2007, in the same proportion as existing between the Petitioner and the Respondent No. 10, without showing any discrimination in favour of either of them.

(Emphasis is added)

16. In short, the Petitioner firm has put to challenge, in the "fourth writ petition", the decision of the Railway authorities to extend the period of contract of the development/trial order, which was granted in favour of the private Respondent pursuant to the first NIT, dated 19.05.2006, and the Railway authorities' reluctance to grant any extension, in respect of the regular work, awarded in favour of the Petitioner firm, though the agreement, executed between the Petitioner firm and the Railway authorities, perceive of extension of the period of contract subject to, however, satisfactory performance by the Petitioner firm. The Petitioner firm has further contended that though the Respondents resisted the writ petition by contending that the Petitioner firm's performance was not very satisfactory, the Railway authorities could not, despite being pointed out by the Petitioner, satisfactorily explain as to why the Railway authorities did not disqualify the Petitioner firm from participating in the tender process, when it had issued a notice, on 18.09.2008, to the Petitioner firm, directing the later to show cause and the Petitioner firm did reply thereto by its letter, dated 12.11.2008.

17. By order, dated 20.02.2009, the Court, in the "fourth writ petition", restrained the NF Railways from extending the period of contract in favour of the private Respondent alone and observed that if the Railway authorities were required to make any ad hoc arrangement, in respect of the work, in question, the same shall be done in equal proportion, in terms of the work order, which

had been issued to the Petitioner firm as well as the private Respondent. While passing this direction, on 20.02.2009, the Court also noted that the interim order, dated 06.02.2009, passed earlier, in W.P. (C) 487/2009, did not put any embargo on the Railway authorities to proceed to finalise the contract in respect of the regular work, but the Railway authorities had assigned no reason as to why they had not proceeded to finalise the contract, in respect of the regular work, and, instead, gone to extend not only the period of contract in respect of the development/trial order, in respect of the private Respondent, but also enlarged the quantity of work of contract by raising the same from 20% to 50% of the total work.

W.P. (C) No. 3374 of 2009

18. While the controversy, as had been raised by the "third" and "fourth writ petitions", were pending to be resolved by this Court, the NF Railways issued a communication, dated 18.06.2009, to the effect that the competent authority had decided to discharge the second NIT, dated 15.01.2009, inasmuch as the Petitioner firm as well as the private Respondent, who had submitted their bids for allotment of regular work, pursuant to the second NIT, dated 15.01.2009, were, according to the Railways, found to be unsuccessful tenderers and the earnest money, submitted by the bidders, were accordingly being returned. The communication, dated 18.06.2009, aforementioned was followed by as many as five NIT, issued on 27.06.2009 and 28.07.2009. The NITs, which were so issued on 27.07.2009 and 28.07.2009, are hereinafter collectively referred to as the "third NIT".

19. Challenging the issuance of the "third NIT", the Petitioner firm has filed yet Anr. writ petition, namely, W.P.(C) No. 3374/2009, which is hereinafter, referred to as the "fifth writ petition", wherein the Petitioner firm has pointed out that since there was no stay order, barring the Railway authorities to finalize the tender process in respect of the regular work, the NF Railways could have finalized the same by keeping in view the fact that the period of contract, in respect of the said regular work, was going to expire on 22.02.2009, but the Railway authorities decided not to finalize the tender, though the Petitioner firm was the only technically qualified bidder and the private Respondent's technical bid was found to be non-responsive. The Petitioner firm also pointed out, in the "fifth writ petition", that the private Respondent had not submitted its bid for development/trial order and, consequently, when the private Respondent was not a bidder for development/trial order and was bidder for only in respect of the regular work, no work could have been allotted to the private Respondent by the Railway authorities either (i) in respect of "regular work" inasmuch as the private Respondent's tender for "regular work" had already been found to be technically non-responsive, or (ii) in respect of the development/trial order inasmuch as the private Respondent was not a bidder in respect of the development/trial order and, therefore, the Railway authorities have, now, abandoned completely its sacrosanct policy of development/trial order by deleting the "Note" altogether

from the "third NIT" issued on 27.06.2009 and 28.07.2009. As regards the Railway authorities' decision to discharge the "second NIT", dated 15.01.2009, on the ground that none of the bidders was found to be qualified, the Petitioner firm has pointed out, and insisted, that the decision to discharge the tender, on the said ground, is based on a "non-existent" ground inasmuch as the Petitioner firm was not an unsuccessful bidder.

20. The Petitioner firm also contends, in the "fifth writ petition", that splitting of the contract work, covered by the "second NIT", dated 15.01.2009, into five different groups, is in derogation of the Railway Board's guidelines, contained in the Commercial Circular, dated 24.01.2003, as modified by the Circular, dated 09.09.2003, and that the splitting of the contract work into five parts, as indicated by the "third NIT", was guided by mala fide, suffered from arbitrariness apart from the fact that the same was, in the light of the Railway Board's Circulars aforementioned, beyond the powers of the Railway authorities. It has also been pointed out by the Petitioner firm, in the "fifth writ petition", that while the "third NTT" (wherein the "regular work" stands divided into five parts) was floated as early as on 27.06.2009, the approval of the General Manager, for such splitting of the regular work and for issuance of the "the third NIT", was obtained as late as on 21.07.2009, which shows that the decision to split the work was taken and acted upon without obtaining the approval of the General Manager, though the Railway Board's Circular, dated 09.09.2003, makes it clear that no modification to the Commercial Circular, dated 24.01.2003, would be possible without the approval of the General Manager, NF Railways.

21. The Petitioner firm has further contended, in the "fifth writ petition", that the discharge of the "second NIT", dated 15.01.2009, was mala fide with the sole purpose of enabling the ineligible contractor, like the private Respondent, to take part in the process of selection, by bidding, for the split-up works. It has been asserted, on behalf of the Petitioner firm, that since the Petitioner firm was the only eligible tenderer, in all respect, award of the regular work, subject to the outcome of the W.P. (C) No. 487/2009 (i.e., the "third writ petition"), ought to have been made in favour of the Petitioner firm, but the Railway authorities have, without any valid and cogent reason, termed the Petitioner firm an unsuccessful bidder.

22. The Petitioner firm has contended that the impugned actions of the Railway authorities, in splitting the contract work into five groups, was aimed at overreaching the restraint, which the Court had put by its interim orders, passed in W.P. (C) 487/09 ("third writ petition") and W.P. (C) No. 711/09 ("fourth writ petition"). The Petitioner firm has also contended that by their act of splitting up of the contract work into five groups, the Railway authorities were trying to indirectly achieve what they could not achieve directly in the sense that the Railway authorities have deliberately lowered the eligibility criteria for participation in the tender process, which has been set into motion by the "the third NIT", issued on 27.06.2009 and 28.07.2009, to accommodate contractors

of their choice and these acts of the Railway authorities have tinkered with the sanctity of the tender process.

23. The Petitioner firm points out that the Railway Board's decision to split the contract work into five parts was in violation of the Railway Board's policy guidelines, as reflected by; the Commercial Circular, dated 24.01.2003, read with the modified Circular, dated 09.09.2003, to have uniform process of selection subject to least possible modification/relaxation and that the impugned decision to modify the terms and conditions of eligibility criteria has been taken with the sole aim of benefiting the contractor of their choice.

24. By filing the "fifth writ petition", the Petitioner firm has not only challenged the legality of the Railway authorities' decision to discharge the NIT, dated 15.01.2009, and returning the Petitioner firm's earnest money on the ground that the Petitioner firm was not qualified, but has also sought for setting aside and quashing the impugned "third NITs". By order, dated 14.08.2009, the Court, while issuing notice of motion, directed, in the interim, that the tenders, received pursuant to the impugned NITs, shall not be opened without leave of the Court.

25. An interim order was passed, on 14.08.2009, in W.P.(C) No. 3374/2009 (i.e., the "fifth writ petition"), wherein the court directed that while the Railway authorities may receive tenders pursuant to the impugned NITs, dated 27.06.2009 and 28.07.2009, the tenders shall not be opened without leave of the Court.

W.P.(C) No. 5336/2009

26. While the three writ petitions, namely, W.P.(C) No. 487/2009, W.P.(C) No. 711/ 2009 and W.P.(C) No. 3374/2009, (which had been referred as the third writ petition, fourth writ petition and fifth writ petition, respectively), were still pending with the restraint order on the opening of the tenders pursuant to the "third NIT", dated 27.06.2009 and 28.07.2009, the NF Railway issued as many as seven NITs, all dated 12.12.2009, whereby the entire contract, pertaining to the work of mechanized cleaning/washing of the bedroll linens for the trains, originating from Guwahati, to different directions, has been split up into seven different groups.

27. By its last writ petition, namely, W.P.(C) No. 5336/2009, which is hereinafter referred to as the "sixth writ petition", the Petitioner firm has impugned the NITs, dated 12.12.2009, aforementioned, which are hereinafter collectively referred to as the "fourth NIT", on the same grounds as were agitated in its "fifth writ petition", namely, W.P.(C) 3374/2009, with further submission that the Railway authorities, before abandoning the tender process, which had been set into motion by the "third NIT", dated 27.06.2009 and 28.07.2009, and initiating a fresh tender process, i.e., the "fourth NIT", ought to have obtained leave of the Court. The Railway authorities, according to the Petitioner firm, have made an attempt to overreach the interim directions, passed by the Court in the earlier writ petitions, by trying to frustrate the same with the issuance of the "fourth

NIT".

28. The Petitioner firm contends that the Railway authorities have completely violated the conditions, embodied in the Circular, dated 24.01.2003, by not only diluting the eligibility criteria, as had been laid down therein, but also by not insisting upon, and dispensing with, the requirement of having plant and machinery for the work. The Petitioner firm also contends that person, who does not have necessary plant and machinery for executing the entire work, if taken on a cumulative basis, can take the work on the basis of split up into seven parts. Thus, the impugned "forth NIT" contends the Petitioner firm, is wholly illegal, arbitrary, mala fide and against public interest. The Petitioner firm has accordingly sought to get the "fourth NIT" aforementioned set aside and quashed.

29. By their affidavit-in-opposition, filed in the "sixth writ petition", the Railway authorities have contended to the effect that the performance of the Petitioner firm has not been satisfactory. This allegation has, however, been denied and disputed by the Petitioner firm.

30. Be that as it may, the fact remains that on a pointed query, made by this Court, it has been clearly submitted by Mr. S. Sarma, learned Standing Counsel for the Railways, that the NF Railway has not disqualified the Petitioner firm from participating in the tender process and that the Petitioner firm is eligible to participate in the tender process and that award of the contract work would be on competitive merit.

31. We have to, therefore, proceed on the basis that the Petitioner firm, according to the Railways, has not been blacklisted and is eligible to participate in the instant tender process.

32. I have heard Mr. K.N. Choudhury, learned Senior counsel, appearing on behalf of the Petitioner, and Mr. A.K. Goswami, learned Senior Counsel, appearing on behalf of the Respondent-Railways. I have also heard Mr. S. Kataki, appearing on behalf of the private Respondent.

33. It is not in dispute, as already indicated above, that the NIT, dated 15.01.2009, stands challenged in the "third writ petition", namely, W.P.(C) 487/2009. The grounds of challenge of the Petitioner firm are, in substance, not different from the ones, which the Petitioner firm had taken in its first as well as the "second writ petition".

34. The principal plank of the Petitioner firm's case, as rightly put by Mr. Choudhury, and not contested, on behalf of the Respondents, has been that a "Note", which stood inserted in the NIT, dated 19.05.2006, was beyond the powers of the NF Railway authorities inasmuch as the Commercial Circular, dated 09.09.2003, which modified/downgraded, to some extent, the Commercial Circular, dated 24.01.2003, had not given unlimited, unguided and uncontrolled power to the NF Railway authorities to determine the terms and conditions,

subject to which the contract, in question, would be awarded, for, as the Railway Board's Circular, dated 24.01.2003, was aimed at having a uniform policy for selection of persons for allotment of contract of the work of mechanised cleaning/washing, disinfecting of linens, etc., for bedrolls in trains and public retiring rooms, so that different zones of the Railways do not invite tenders and/or allot contracts by incorporating such terms and conditions, which are not uniform in nature. This apart, as mentioned in the Circular itself, the Railway Board's Circular aimed at standardising the tendering procedure and inclusion of certain essential and special conditions in the contract of "mechanized cleaning/washing of bedroll items".

35. But the Railway Board, having received representations from various Railway Zones, bringing it to the notice of the Railway Board, that they were facing difficulties in adhering to the conditions, in terms of the Circular, dated 24.01.2003, subject to which awarding of contract for the work of "mechanized cleaning/washing of bedroll items" could be made, the Railway Board modified and downgraded the essential criteria of selection by its Circular, dated 09.09.2003, giving the different Zonal Railways the power, in specific cases, to modify/downgrade the criteria of eligibility, which stood incorporated in Sub-Clause C-1 (a)(i) to (vi), if it was found that the same were not practicable to be adhered to on account of local conditions, subject to, however, the condition that such dilution in the criteria remains limited to the minimum extent as may be required.

36. However, what the NF Railway authorities have done, contended the Petitioner firm in the first two rounds of litigation between the parties concerned, was that it had, by means of the "Note", appended to the NIT, dated 19.05.2006, completely done away with the modified and downgraded eligibility criteria embodied in the modified Circular, dated 09.09.2003, inasmuch as the NF Railway authorities, in order to purportedly bring in competition in the field of the work of "mechanised cleaning/washing of bedroll items, etc.", and thereby improve the quality of work, introduced the concept of development/trial order, which allowed every person, whatever may be his financial status, experience, expertise and knowledge, to participate in the tender process for the purpose of receiving the award of the development/trial order and, as the NF Railway had not laid down any essential criterion for choosing a tenderer for the purpose of making development/trial order in his favour, which was to the extent of 20% of the total work in the first year, with the provision of extension up to 50% of the total work, the Railway authorities could select anyone for awarding the said work. Such uncontrolled, unguided and unlimited discretion, in a selection process, was, according to the Petitioner firm, nothing but arbitrary. This act of the Railway authorities, contended the Petitioner firm in its earlier two rounds of litigations, as indicated hereinbefore, not only violated the modified Circular, dated 09.09.2003, but also vested, in the NF Railway authorities, arbitrary exercise of discretion.

37. It has been the further case of the Petitioner firm that the concept of the development/trial order was not in public interest, that the same had been introduced mala fide inasmuch as the NIT aimed at removing the Petitioner firm from the scene by bringing in person(s) of their choice on the basis of system and criteria, which were not sustainable in law.

38. The "first writ petition" was withdrawn by the Petitioner firm with liberty to file a fresh writ petition. Before the "second writ petition" was filed in this Court, the Petitioner firm had already accepted a conditional order, which, while awarding the "regular work" (i.e., 80% of the total work) in favour of the Petitioner firm, obliged him to continue to execute the remaining 20% of the total work, which were to be allotted on development/trial basis, limiting, however, execution of the remaining 20% of the total work for a period of 6 to 9 months. When, however, the NF Railways decided to award the contract, termed as development/trial order, in favour of the private Respondent, the Petitioner firm came back to this Court with the "second writ petition", challenging the action of the Railway authorities and the legality of the NIT, dated 19.05.2006. By a judgment and order, dated 14.08.2008, the "second writ petition" was dismissed.

39. The NF Railway contends, in the present set of writ petitions, that the Petitioner firm, having already challenged, in the "second writ petition", the legality of the NIT, dated 19.05.2006, and the "second writ petition", having been dismissed, the decision, given therein, had attained finality, the issue, pertaining to the terms and conditions, subject to which development/trial order was stipulated in the "Note", appended to the NTT, has been finally concluded between the parties by the decision, rendered in the "second writ petition", and, hence, the issue, which involves the same subject-matter of controversy, could not have been raised by filing Anr. set of writ petitions inasmuch as the issue stands barred from being raised by the doctrine of resjudicata.

40. While considering the question as to whether the doctrine of res judicata is applicable to the facts of the case at hand, it needs to be borne in mind that the doctrine of resjudicata rests on three maxims, (i) Nemo debet lis oexari oro una et eadem causa (no man should be vexed twice for the same cause); (ii) interest republicae ut sit finis litium (it is in the interest of the State that there should be an end to a litigation); and (iii) resjudicata pro veritate occipitur (A judicial decision must be excepted as correct)

41. The principle of resjudicata is founded on justice, equity and good conscience. Its purpose has been explained, in Satyadhyam Ghosal and Others Vs. Sm. Deorajin Debi and Another, in the following words:

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter-whether on a question of fact or a question of law-has been decided

between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed, in a future suit or proceeding, between the same parties to canvass the matter again.

42. Two of the important tests, for application of the doctrine of resjudicata, are:-
(i) The matter, directly and substantially, in issue, in the subsequent suit, must have been, directly and substantially, in issue, in the former suit either actually or constructively. (ii) The matter, directly and substantially, in issue, in the subsequent suit, must have been heard and finally decided by the Court in the former suit. See *Sheodan Singh Vs. Smt. Daryao Kunwar*, , *Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others*, and in *Jaswant Singh and Another Vs. Custodian of Evacuee Property, New Delhi*, Unless, therefore, any issue, which was directly and substantially raised, had been heard and decided in the earlier proceeding, the same issue can be raised in the subsequent proceeding.

43. Bearing in mind what has been indicated above with regard to the application of doctrine of resjudicata, it may, now, be noted that in the "second writ petition", as indicated above, the issues raised were, amongst Ors. : (i) whether the provisions, made by appending the "Note" to the NIT, dated 19.05.2006, was in violation of the Railway Board's Circular, dated 09.09.2003, (ii) whether the object, with which the "Note" had been appended, would or would not serve any public interest, (iii) whether the "Note" gave arbitrary power to the authorities concerned to allot contract in favour of person(s) of their choice without being limited and bound by any conditions or criteria of eligibility and (iv) whether the Petitioner firm, having received the conditional order of allotment of contract, as indicated above, was barred by the principle of approbation and reprobation from challenging the Railway authority's decision to allot development/trial order in favour of the private Respondent.

44. Did the Court, in the decision rendered, on 14.08.2008, in the "second writ petition", discussed and decided each of these issues? It may be noted, in this regard, that the Court, having considered the various submissions, which had been made on behalf of the parties concerned, and the events, leading to the appending of the "Note" to the NIT, dated 19.05.2006 (which is being referred to as "the first NIT"), observed, at para 39, thus:

39. In view of the aforesaid position, the question, which requires consideration first is whether the Petitioner should be allowed to challenge the impugned condition in the NIT dated 19.5.06 as well as the selection of the Respondent No. 5 for trial/development order, for which the Petitioner has not participated and having accepted the conditional order awarding the contract in its favour dated 28.2.07 and executing the undertaking dated 2.3.07 and also entering into the agreement dated 16.6.07.

45. From a bare reading of para 39, what transpires is that the Court decided,

before proceeding to deal with the other issues, which had been raised in the "second writ petition", to answer the question as to whether the Petitioner firm should be allowed to challenge the terms and conditions, incorporated in the NIT, dated 19.05.2006, by way of appending a "Note" thereto, as well as the selection of the private Respondent for development/trial order. The Court, primarily, noted, in this regard, that the Petitioner firm had not even participated in the tender process for allotment of development/trial order and, secondly, the Petitioner firm, having accepted the conditional order awarding contract, in its favour, and having given an undertaking of not going into further litigation and also having executed an agreement, on 16.06.2007, in this regard, should not be allowed to challenge the impugned condition in the NIT.

46. Having discussed the submissions, made by the rival parties, with regard to the above and taking into consideration the materials on record, the Court concluded that by its conduct itself, the Petitioner firm stood barred from challenging the decision of the Railway authorities and, further, the Petitioner firm was stopped from impugning the NTT by the application of the principle of approbation and reprobation. The Court further observed, in this regard, that the principle of approbation and reprobation is distinctly different from the doctrine of estoppel and waiver, and that though the doctrine of waiver may not stop a person from seeking enforcement of his fundamental right, the principle of approbation and reprobation does not suffer from any such limitation and that the principle of approbation and reprobation was applicable to the facts of the case at hand inasmuch as the Petitioner firm cannot take advantage of that part of the order, which is in its favour, and, at the same time, refuse to comply with the other parts of the order, which are disadvantageous to its interest, particularly, when the Petitioner firm had already accepted the terms and conditions subject to which the contract had been awarded to the Petitioner firm. The relevant observations, made in para 42 of the judgment and order, read as under:

42. In the instant case also it appears from the facts narrated above that the Petitioner being aware of the "Note" appended to the NIT dated 19.5.06 submitted his tender papers and thereafter though he filed the W.P.(C) No. 2779/ before this Court challenging such condition of the NIT the same was subsequently dismissed on withdrawal on the basis of the Misc Case filed by it. The Petitioner also accepted the conditional order awarding the contract dated 28.2.07 and given an undertaking in writing to the Railway administration on 2.3. that he will abide by all the conditions of the contract and thereafter executed the agreement with the Railway on 16.7.07 which also has the stipulation of awarding initial 20% of the work to other tenders on trial/development basis. In fact, the Petitioner has accepted such conditional order awarding the contract in its favour with its eyes open and having accepted the same and also having not challenging the same and also the agreement, has waived its right to challenge such a decision of the Railway administration, which is impugned in the present writ petition. The Petitioner by its conduct is estopped from challenging the

impugned decision of the Railways in that regard. The Petitioner cannot take advantage of the part of the order and refuse to comply with other part, that too, after accepting it and without challenging the same and cannot be allowed to challenge the said decision of the Railway administration on the ground of violation of Article 14 of the Constitution of India, having accepted such conditional order of contract issued in its favour. It is no doubt that there cannot be any estoppel or waiver against the enforcement of the fundamental right of a citizen, but the principle of approbation and reprobation is different from the doctrine of estoppel and waiver, therefore, the Petitioner is debarred from challenging such decision of the Railway administration. The principles of approbation and reprobation prohibit a party to a transaction from approbating a part of its condition and reprobating the rest.

(Emphasis is added)

47. As regards the Petitioner firm's grievance that it had to accept the allotment of contract with the terms and conditions, as had been imposed by the Railway authorities, because of the fact that it did not have equal "bargaining power" to deal with the Railway authorities, the Court took the view that having taken advantage of the favourable part of the terms and conditions of the conditional order, the Petitioner cannot complain of lack of "bargaining power". The relevant observations made by the Court, as appearing at para 43, read as under:

43. The contention of the Petitioner that as the action on the part of the Respondent Railway in introducing the "Note" in the NIT dated 19.5.06 and splitting up of the work and the decision to award part of the contract on trial/development basis is unreasonable, unfair and irrational and the Petitioner being a weaker party cannot bargain, having no equal bargaining power and was either bound to accept the unreasonable or unfair term incorporated in the NIT and submit its tender papers or forego the contract for ever and hence its submission of tender pursuant to the said NIT dated 19.5.07 by itself would not disentitle it to challenge the action on the part of the Respondent Railway on the ground of violation of Article 14 of the Constitution, cannot also be accepted. It is true that, as observed by the Supreme Court in *LICI (supra)*, that if a contract or clause is found to be unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. The Supreme Court keeping in view the facts involved in the said case has further observed that in dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power and he has either to accept or to leave the services or goods in terms of the dotted line contract and his option would be either to accept unreasonable or unfair terms or forego the service for ever and there would be no option left to him but to sign the said contract. But, in the instant case, as discussed above, the Petitioner not only participated in the tender process initiated vide NIT dated 19.5.07 well aware of the "Note" contained therein but also has accepted the conditional offer of the work made by the Railway on 28.2.07 and also given an undertaking that he will abide by all

the conditions and also executed an agreement on 16.7.07 as noticed above. The Petitioner, therefore, cannot turn around and challenge the decision of the Railway authority of splitting up of the work and awarding part of the work on trial/development basis, having accepted the conditional contract awarded in its favour and executed the agreement as well as the undertaking, on the ground that such action on the part of the Railway administration is violative of Article 14 of the Constitution. The Petitioner being a prudent businessman and performing the work in question for a quite number of years is not expected to accept the conditional award if it is not agreeable to the same.

(Emphasis is added)

48. The emphasised portions of the observations noted above clearly indicate that the Court concluded that the Petitioner firm, having accepted the conditional award of contract, in its favour, and having executed the agreement as well as undertaking, cannot turn around and challenge the decision of the Railway authorities of splitting up the total contract work into two parts, namely, "regular work" and "developmental/trial order". The Petitioner, being a prudent businessman, cannot be expected to accept the conditional award of contract, if it was not agreeable to the Petitioner firm, and, therefore, the award of contract, in question, to the Petitioner firm, did not suffer from lack of "bargaining power". The observations, so made, clearly show that it is because of the fact that the Petitioner firm had already accepted and acted upon the conditional award of contract that the Court concluded that the Petitioner firm, having accepted the conditional award of the contract allotted to it, is barred, by the doctrine of approbation and reprobation, from challenging the conditions, incorporated, in the impugned NIT, dated 19.05.2006, by way of the "Note" appended thereto.

49. Coupled with the above, it needs to be pointed out that the Court, in its decision, in the "second writ petition", did consider, it transpires, the "Note", which stands appended to the second NIT, dated 15.01.2009, and took the view that the decision for allotment of development/trial order had been taken by the Railway authorities keeping in view the greater interest of the commuting public at large, whereas the Petitioner firm, having accepted the terms and conditions of the NIT and, particularly, when the Petitioner firm had, once, having challenged the said conditions by way of a writ petition (i.e., the "first writ petition"), had subsequently withdrawn, cannot be allowed to challenge the conditions, incorporated in the NIT, dated 15.01.2009. The observations, made by the Court, in this regard, at para 44, read as under:

44. That apart, it appears from the "Note" put up to the General Manager of the Respondent Railway, which has already been reproduced above, that the decision to split up the work and to award part of such work on trial and development basis was taken keeping in view the interest of the commuting public in general i.e. in public interest and also with a view to encourage the competition and to discourage the monopoly. The Supreme Court in *Air India* (supra) has observed that even when some defect is found in the decision making process, the Court

must exercise its discretionary power under Article 226 of the Constitution with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. It has further been observed that the Court should also keep the larger public interest in mind in deciding whether its intervention is called for or not and when it comes to the conclusion that the overwhelming public interest requires interference, the Court should interfere. When there is conflict between the public interest and the interest of the individual, the public interest must prevail. In the instant case, the decision has been taken by the Railway authority, as discussed above, keeping in view the greater interest of the commuting public at large. On the other hand, the Petitioner having accepted the terms and conditions of the NIT and having once challenged the same by filing a writ petition which was subsequently withdrawn and accepting the conditional order awarding the contract in its favour and giving an undertaking and also by executing the agreement, in the present writ petition wants to challenge the conditions in the NIT as well as the Railway authority's decision of splitting up of the work and awarding the contract to the Respondent No. 5 on trial and development basis, in furtherance of his personal interest, which cannot be allowed in view of the facts and circumstances of this case and the public interest involved.

(Emphasis is added)

50. From the above observations, what becomes clear is that the Court took the view, in the "second writ petition", that the decision to introduce development/trial order was taken in "public interest" and that "public interest" must be allowed to prevail, when the same comes into conflict with the individual interest of the Petitioner firm. Moreover, the Court reiterated that the Petitioner firm cannot challenge the decision of the Railway authorities to allot the contract in favour of the private Respondent, because of the application of the principle of approbation and reprobation, particularly, when the Petitioner firm had already accepted conditional award of contract and acted thereupon.

51. Eventually, the Court dismissed the writ petition making it clear that the "other points", which had been raised by the contesting parties, need not be gone into, because of its above findings, namely, that the decision to introduce development/trial order was taken in larger "public interest" and that the Petitioner firm cannot challenge either the conditions, incorporated in the NIT, or the decision to allot the development/trial order, in favour of the private Respondent, because of the application of the principle of approbation and reprobation. This becomes abundantly clear from the observations made, the conclusions reached and the decision taken by the Court, at para 47 and 48, which read as under:

47. In view of the findings recorded above, I am of the view that the other points which have been raised by the contesting parties need not be gone into. The various decisions of the Supreme Court as well as of this Court relating to those questions raised, have, therefore, not been discussed in this judgment.

48. I am, therefore, of the considered opinion that the Petitioner is not entitled to any relief in the present petition and hence the same is dismissed. However, keeping in view the facts and circumstances of the case, I make no order as to costs.

(Emphasis is added)

52. From what have been indicated above, it becomes clear that that the principal plank of the Petitioner firm's case, that the "Note", appended to the "first NIT", dated 19.05.2006, was in violation of the Railway Board's Circular, dated 24.01.2003, which stood modified by the subsequent Circular, dated 09.09.2003, as well as the issue as to whether the NIT vested, in the NF Railway, arbitrary exercise of discretion, remained, and till date have remained, unresolved.

53. Despite the dexterity, which Mr. Goswami, learned Senior Counsel, commands, nothing could be pointed out, from this Court's decision, dated 14.08.2008, in the "second writ petition", that the Court had decided the question, which had been raised in the "second writ petition", namely, as to whether the NIT, dated 19.05.2006, in the light of the conditions, as stood incorporated in the "Note", appended to the NIT, was, or was not, in violation of the Railway Board's Circular, dated 24.01.2003, read with its subsequent Circular, dated 09.09.2003. Mr. Goswami could not also show that this Court has answered the issue as to whether the "Note" vested, in the Railway authorities, such discretion, which had no parameters and could be arbitrarily exercised with impunity. What the Court, thus, decided, at best, in the "second writ petition", was that the decision to adopt the policy of development/trial order had been taken in "public interest".

54. It, therefore, no longer remains open for challenge as to whether the decision to adopt the policy of development/trial order is or is not sustainable in law. What can, indeed, be questioned is this: In order to translate the policy, so adopted, whether sustainable criteria had or had not been determined by the Railway authorities before publication of the NIT so as to inform the tenderers the eligibility criteria for selection and factors, which would be taken into account, for the purpose of making selection of the tenderer for awarding to him the development/trial order.

55. The questions, thus, which have remained open, for determination, are: (i) Whether the "Note" has been in violation of the Railway Board's Circular, dated 24.01.2003, read with the modified Circular, dated 09.09.2003, and (ii) Whether the "Note" gave the Railway authorities such power and discretion, which were wholly arbitrarily and cannot, therefore, be sustained. Consequently, the doctrine of resjudicata does not bar, in the present set of writ proceedings, an inquiry into the questions aforementioned by this Court.

56. I have already clarified, in the foregoing paragraphs, that the Petitioner firm's challenge, in substance, in both the rounds of its earlier litigations, had

been, to the "Note", appended to the NIT, dated 19.05.2006, and the Petitioner firm's contention, in this regard, have had been that the said "Note" was in violation of the Railway Board's Circular, dated 24.01.2003, read with the modified Circular, dated 09.09.2003, and the same was, therefore, not sustainable in law. I have also clarified that in none of the earlier two rounds of litigation, the said question, though raised, has been decided.

57. Consequently, the disposal of the "first writ petition", namely, W.P.(C) No. 2779/ 2006, did not create any legal impediment, on the part of the Petitioner firm, to challenge again, the legality and/or the validity of the said "Note" inasmuch the "first writ petition" was disposed of on being withdrawn by the Petitioner firm with, however, liberty given by the Court, to the Petitioner firm, to approach the Court afresh by appropriate application.

58. In fact, even though the "second writ petition", namely, W.P.(C) No. 6578/2007, has been dismissed, there is no observation in the judgment and order, passed in the "second writ petition", indicating therein that the disposal of the earlier writ petition, on being withdrawn in the manner, as described hereinbefore, had created any legal bar to the posing of challenge by the Petitioner firm as far as the incorporation of the "Note" aforementioned was concerned.

59. In the "second writ petition", the principal ground, on which the Court refused, to interfere with the said "Note" appending of to the first NIT, dated 19.05.2006, is that the Petitioner firm, having accepted the conditional allotment of the contract and having taken the benefit thereunder, could not have turned back and challenged the decision of the NF Railways to allot, to the private Respondent, 20% of the work, in terms of the conditions subject to which the work had been allotted in favour of the Petitioner firm, because the Petitioner firm, in the facts and attending circumstances of the said case, was, according this Court, barred by the principle of approbation and reprobation. This apart, the Court held, in the "second writ petition," that the decision to introduce development/trial order was adopted by the Railway authorities in larger "public interest". The Court did not, however, decide if the "Note" had given to the authorities concerned wholly unguided and uncontrolled power to take arbitrary decision as to who shall be the beneficiary of such development/trial order and based on what factors, such development/trial order shall be awarded and whether such an uncontrolled discretion, in selecting awardee of a contract, in public domain, is sustainable in law?

60. The question, therefore, which this Court is, now, required to determine is as to whether the conditions of relaxation, as embodied in the second NIT, dated 15.01.2009, which forms the subject-matter of challenge in W.P.(C) 487/2009 (i.e. the "third writ petition") is, or is not, in violation of the Railway Board's Circular, dated 24.01.2003, read with the modified Circular, dated 09.09.2003, aforementioned, for, this question was not decided and answered in the "second writ petition". There is, therefore, no legal impediment, on the part of this Court

to consider and decide the said question, when it is not in dispute that the "Note", appended to the second NIT, dated 15.01.2009, is substantially same as the "Note", which stood appended to the first NIT, dated 19.05.2006, and became a subject-matter of challenge in the second writ petition.

61. In order to answer the question, posed in the "third writ petition", namely, W.P.(C) 487/2009, as to whether the said "Note" is, or is not, in violation of the Railway Board's Circulars aforementioned, let me look back and recapitulate as to why the Commercial Circular, dated 24.01.2003, was issued, what was contained therein, why the said Circular came to be modified by the later Circular, dated 09.09.2003, and what were the modified conditions/criteria incorporated in the modified Circular as regards allotment of contract.

62. While considering the questions posed above, it may be borne in mind that in the Railways, there was no standard terms and conditions for allotment of contract, for washing of bedroll items, and zonal Railways used to make allotment of contracts on the basis of different, and at times, conflicting criteria. In order to standardise the terms and condition of allotment of contract and the tender process, the Railway Board issued the commercial circular, dated 21.01.2003. In fact, it is not in dispute that the Commercial Circular, dated 24.01.2003, was issued by the Railway Board taking into consideration the fact that different Zonal Railways had been fixing different terms and conditions of eligibility, while allotting contract for the same nature of work, i.e., "mechanised cleaning/ washing of bedroll items, etc.", in trains and public retiring rooms and that no standard terms and conditions of tendering procedure had been formulated. The Railway Board, in such circumstances, with the avowed objective of introducing uniform terms and conditions of eligibility criteria for the same nature of work, issued the first Circular, dated 24.01.2003, laying down therein the terms and conditions and eligibility criteria for awarding of contracts as regards the "mechanised cleaning/washing of bedroll items, etc."

63. As a matter of fact, it is not in dispute, before this Court, that the Circular, dated 24.01.2003, was issued not only for standardising the tendering procedure, but also for inclusion of such special conditions (in the terms and conditions, meant for allotment of contract for the work of cleaning/washing of bedroll items, etc.), which the Railway Board considered to be essential. This becomes transparent from the very introductory portion of the Circular, dated 24.01.2003, which reads as under:

....A Committee, constituted in the Board's office to look into the tender conditions, has, in its report, recommended:

(a) Standardisation of tendering procedure.

(b) Inclusion of certain essential special conditions in the contract.

The recommendations of the Committee have been accepted by Board and the following instructions are issued...

***** (Emphasis added)

64. It may be pointed out here that the terms and conditions of the tender for the work of mechanised cleaning/washing of the bedroll items, etc., which the Railway Board incorporated in the Circular, dated 24.01.2003, were not only special, but also essential, because washing and cleaning of bedroll items, as observed by the Railway Board itself, was a sensitive and essential passenger amenity. One of the special conditions, which clearly prevailed on the Railway Board, while issuing the Circular, dated 24.01.2003, was the necessity to go for "mechanised washing and cleaning of the bedroll items."

65. No wonder, therefore, that one of the eligibility conditions for the "technical bid", which the Circular, dated 24.01.2003, incorporated therein, was that the tenderer was required to submit not only the details of the plant, factory and other credentials, as per the prescribed proforma, but also the documents, mentioned in the said proforma, so that the technical capability of the plant/machinery, can be ascertained, apart from, of course, assessment of the experience, etc., of the tenderer inasmuch as the Railway Board's Circular, dated 24.01.2003, further required that the tenderer must be one, who is experienced and qualified having proven credentials of unblemished performance in field of "similar work", it must have completed, at least, one work of "similar nature", valuing not less than one-third of the estimated cost of the tendered work. In fact, as indicated hereinbefore, the eligibility conditions included that the tenderer shall submit the details of plant and machinery apart from their credentials and, unless it felt otherwise, the Railway authority was required to inspect the infrastructure and facilities available with the tenderer so as to assess the capacity of the tenderer to execute the work successfully.

66. However, as the strict adherence to the conditions of eligibility, which stood incorporated in the Circular, dated 24.01.2003, had created problems for those areas, where infrastructure, in this regard, were not fully developed, representations were made by various Railway Zones and, considering these difficulties, the Railway Board came out with its modified Circular, dated 09.09.2003, which allowed some modifications and downgrading of the conditions incorporated in the earlier Circular, dated 21.04.2003, depending upon the local conditions and infrastructural deficiencies. The relevant portion of the modified Circular, if we revisit the same, read as under:

1... Representations have been received from various railways regarding difficulties being faced by them in respect of implementing the said instructions due to prevailing local conditions and infrastructure facilities.

*** 2. The matter has been reviewed by Board in consultation with legal Adviser and Finance Directorate and following modifications have been made in specific clauses of Commercial Circular No. 3 of 2003.

Clause No. Modified as under

Clause 1(a)(iii) the tenderer should have completed in last three financial years (i.e., current year and three previous financial years) at least one similar work for a minimum value of 35% of advertised tender value.

Clause 1(a)(iv) The firm should have sound financial capability. The firms should submit Solvency Certificate from a Nationalised or Scheduled Bank for an amount not less than 1/4th of the advertised tender values of the work.

Clause 1(a)(v) Total contract amount received during the last three financial years and in the current financial years should be a minimum of 150% of advertised tender value.....

67. Having modified the terms and conditions in the manner, as indicated above, the Railway Board allowed further modification and downgrading in, of course, some individual cases by incorporating in the said modified Circular, dated 09.09.2003, which read as under:

*** ** 2.2. The eligibility criteria as stipulated in Sub-Clause C-1(a) to (vi) may be suitably modified/downgraded in some individual case if it is found that the same is not practicable to be adhered to on account of local conditions. The reasons for the same should be recorded and dilution in criteria to minimum extent required may be made with concurrence of the FA and CAO and personal approval of General Manager after testing the market. In such cases, also, efforts should be made to upgrade the norms in subsequent cycle.

(Emphasis added)

68. What Clause 2.2. makes clear is that the Zonal Railways, with the concurrence of the FA and CAO and personal approval of the General Manager, could have, after justifying the modification, suitably modify or downgrade the conditions of eligibility in some individual cases if it was found that the same was not practicable to be adhered to on account of local conditions; but, while doing so, the Railway authority was not only required to record the reasons for such modifications, but that the dilution, in the credentials, was permitted only to the minimum extent required. Thus, leaving none in doubt, the Railway Board's modified Circular made it clear that though it is possible, in a given case, to further modify or downgrade the eligibility condition, incorporated in Sub-Clause C-1 (a)(i) to (vi), such modification or downgrading cannot be limitless, cannot be completely done away with and must remain confined to the minimum extent as may be required. The anxiety of Railway Board to adhere to the prescribed norms can be gauged by the fact that though dilution in criteria to minimum extent was made possible, the Board clearly emphasised that even in such cases (i.e., the cases, wherein dilution in criteria is allowed), efforts should be on to upgrade the norms in the subsequent cycle.

69. When, what is incorporated in Sub-Clause 2.2. is read in the light of the object, with which the Railway Board's Circular, dated 24.01.2003 was issued, it becomes clear that the Railway Board has not authorised the zonal Railway

authorities to completely do away with the conditions of eligibility, which have been stipulated in Sub-Clause 2.2. There can, therefore, be, in the light of the said Circular, no such terms and conditions, in a tender process for washing/cleaning of bedroll items etc., which completely ignore the conditions stipulated in Sub-Clause 2.2, or completely do away with the eligibility criteria stipulated in Sub-Clause 2.2.

77. Before proceeding further, it may be noted that during the course of hearing, an attempt- I must say, an attempt feeble in nature- was sought to be made, on behalf of the NF Railway, to show that the Railway Board's Circulars, being non-statutory in nature, were devoid of any force and were not binding on the Railway authorities. However, on being questioned the correctness of this stand, Mr. A.K. Goswami, learned Senior Counsel, in no uncertain terms, conceded before this Court, on instructions received by him from the NF Railway, to the effect that the Railway Board's Circulars have binding force and that it must be adhered to by the Railway authorities. Moreover, it is correctly submitted by Mr. K.N. Choudhury, learned Senior Counsel, that it is even the understanding of the Railway administration that the Railway Board's Circulars aforementioned govern the field and it was for this reason that, while splitting up the contract work and relaxing the eligibility criteria for selection of the tenderer by incorporating the "Note" aforementioned, approval of the General Manager had been obtained.

71. Bearing in mind what is indicated above, it, now, needs to be noted that the impugned NIT, dated 15.01.2009, prescribed as under:

- i) The firm shall have a sound financial health and proven track record in any field of business actively. This should be supported by published annual financial statement for last three years;
- ii) The firm shall produce a solvency certificate from any nationalized scheduled bank for the full amount of advertised tender value; and
- iii) A brief project report for setting up a mechanized laundry as per tender specifications should be given along with the tender. It was further stipulated in the said NIT that if the administration decides to award a trial order, the selected tender shall be given 6-9 months to set up the plants/requirements from the date of giving Letter of Intent (L.O.I).

72. However, a "Note" was appended to the above eligibility conditions, stipulated in the NIT, which read as follows:

Any party, who does not fulfil any or all of the eligibility conditions, specified above, may still bid for a developmental/ trial order for a part quantity (maximum 20% of the tender quantity, in the 1st year, which can increase up to 50% of daily offered quantity during the rest of the contract period) subject to the following.

The firm shall have a sound financial health and proven track record in any field of business activity. This should be supported by published Annual Financial

Statement for last three years.

73. As per the records, the decision to split up the contract work into two parts as indicated above and to award 80% of the work on regular basis and 20% of the work, on development/trial basis, was taken by the Zonal Railways after considering the local conditions in the sense that a "Note" (the records reveal) was put up by the CCM of the NF Railways, on 15.05.06, proposing relaxation of the eligibility conditions and splitting up of the work and for awarding the same on development/trial basis with a view to generating competition, amongst more than one source, for the purpose of making an effort to improve the quality of work inasmuch as the Petitioner firm, according to the said "Note", was found to be the lone eligible firm for the work on earlier occasion, which was creating monopoly and likely to continue in future.

74. For better understanding, the said "Note", dated 15.5.06, is reproduced below:

(1) The present contract is going to expire on 4.7.06.

(2) The present contractor engaged in washing at Guwahati has been working since 1999. This firm was the only eligible firm found during the last 02 occasions when open tenders were floated. It appears that there is no other eligible firm in Guwahati area to undertake the work. This also means that the preset firm is likely to qualify as the only eligible firm for the job during next tender and the monopoly is likely to continue. Since bed roll is very important and sensitive passenger amenity item, we should ensure very good quality of washing. Railway Board has also emphasized from time to time quality of bedroll to be supplied to passengers. During routine inspection of bedrolls it has been observed that the quality of washing is not entirely satisfactory and leaves room for improvement.

(3) It is, therefore, felt necessary that some competitions amongst more than one source are introduced in an effort to improve quality. For this, it is necessary to relax some criteria as laid down in Rly. Bd's extant circular at SN-14 and also incorporate in the tender conditions some scope for trial order to develop alternative source so that the job can be thrown open to the wider market for competition.

(4) Bd's Circular at SN-13 empowers the Zones to modify/dilute the criteria as laid down in Rly. Bd's extant circular at SN-14 with finance concurrence and GM's approval.

(5) Therefore, it is proposed that para-C (I)(a) (III- (V) of SN-13 should be relaxed as shown in the draft tender notice (SN-26) and for trial order as stated in "Note" portion at (SN-26).

(6) May kindly vet and concur the tender papers as well as the proposed relaxation.

Sd/- 15.5 CCM FA and CAO.

75. As per the records, the FA and CAO, keeping in view the Railway Board's emphasis on providing better facilities to the commuting public and also for encouraging competition and putting an end to the monopoly created by the Petitioner firm, agreed to the said proposal of the CCM. The "Note", submitted by the FA and CAO to the General Manager, is reproduced below:

the case has been discussed with CCM. It is learnt that a few small mechanized laundries have since come up on Guwahati area, but no confirmed information could be collected. It however, such parties do exist, they will not qualify on undiluted financial criteria of one works of at least 35%, and three years cumulative turnover of 150%, of the tendered annual value. This is because Guwahati area does not offer such big laundry business opportunity as to provide orders of this magnitude, other than NF Railway.

Accordingly, it is necessary to substantially dilute these criteria, and the proposed limit of 15% for a single works and cumulative turnover last three year of 50% of annualized tendered value is acceptable.

Due to lack of sufficient business opportunities as of now, it is also considered unlikely that any established parties from other areas are likely to set up business of this nature and accordingly, we cannot depend entirely on this option. In order to encourage parties from this area to invest in a mechanized laundry on assurance of adequate business opportunity, the proposal for development order is also acceptable.

As Board's emphasis this year is on service with a smile, and specially on "touch and feel" items, it is imperative for us to explore various options and opportunities to provide improved service. Increased competition is one of the better ways of improving quality.

In view of the circumstances, the proposal to modify the eligibility criteria as proposed by CCM is concerned us.

GM may kindly approve.

Sd/- Illegible 17/05.

76. Pursuant to the approval of the General Manager, NF Railways, NIT, dated 19.05.06 (i.e., "first NIT"), which was based on the concept of development/trial order, was issued.

77. Bearing in mind that this Court, in its decision, dated 14.08.2008, in the "second writ petition", namely, W.P.(C) No. 6578/2007, has already held that the decision to introduce development/trial order is in public interest, when we revert to the "third writ petition", namely, W.P.(C) No. 6578/2007, what cannot be ignored, and must be noted and pointed out is that the "Note" allowed anyone, even who had not satisfied the eligibility criteria, which the NIT had embodied, to apply for the development/trial order for allotment of work. In other words, with the "Note" appended to the NIT, there was virtually no eligibility criteria left for

selection of tenderer for the development/trial order.

78. It becomes, therefore, glaringly noticeable that the said "Note" has completely done away, as rightly contended by Mr. Choudhury, with the Commercial Circular, dated 24.01.2003, as well as the modified Circular, dated 09.09.2003, even when the Circular, strictly speaking, had made it clear that the modification, towards downgrading of the eligibility criteria, can be done only to the minimum extent meaning thereby that the terms and conditions incorporated therein cannot be completely done away with. This apart, what the NF Railway had done by incorporating the "Note" is that it prescribed no eligibility criterion at all for choosing or selecting persons for allotment of contract as much as 20% of the total work in the first year of the contract period with a further stipulation that 20% of the total work may be increased to 50% of the total work and termed such allotment of contract work, beginning with 20% of the total work and ending with 50% of the total work, as development/trial order. This is not only negation of a tender process, but distribution of the State's largess arbitrarily.

79. In the face of what have been pointed out above, there can be no escape from the conclusion, and this Court does conclude, that the "Note", appended to the second NIT, dated 15.01.2009, does not only mutilate and defy the Railway Board's Circular, dated 24.01.2003, read with the modified Circular, dated 09.09.2003, but also has the effect of throwing the same away to the wind.

80. Coupled with the above, as the "Note" incorporates no basis for selection of a tenderer for allotment of development/trial order, one cannot but regard the said "Note" as embodiment of arbitrariness inasmuch as the said "Note" has given the NF Railway not only unlimited, uncontrolled and unguided power in making selection of the person for allotment of development/trial order, but also vested in the NF Railway such discretion, which, being wholly unguided, could be exercised arbitrarily.

81. The incorporation of the "Note" to the "second NIT", dated 15.01.2009, thus, suffered from the vice of arbitrariness and is glaringly against the sanctity of a tender process. A public largess cannot be arbitrarily distributed in the manner as was sought to be done. The administrator must inform an intended tenderer as to what would be the criteria of selection for allotment of a contract. No tender can be invited asking the tenderers to simply make application for allotment of contract without specifying any condition of eligibility whatsoever leaving it entirely to the discretion of the authority concerned to pick and choose any person for allotment of work. No such unlimited power has been conferred on the NF Railway by the Railway Board's Circulars aforementioned and in the face of the Constitutional guarantee of equality of treatment and non-arbitrariness, as incorporated in Article 14, such a tender process cannot be permitted.

82. The principle- that the terms and conditions, embodied in a notice inviting

tenders, for allotment of a of contract, can be judicially reviewed and interfered with if they are found to be suffering from the vice of arbitrariness - has been reiterated by this Court, in *Sumeet Enterprises (M/s) v. Union of India*, reported in (2005) 4 GLT 227. The relevant observations made by the Court, in this regard, read as under:

(94) While dealing with the above aspect of the matter, it needs to be noted that the possibility of abuse of a legislation or of any governmental scheme relating to selection process is one of the grounds, which, at times has attracted the powers of judicial review in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, the Constitution Bench, while considering a writ petition challenging the validity of admissions to the regional engineering College, Srinagar; wherein the authorities concerned had kept out of the total 150 marks, 50 marks for interview, observed that reserving as much as 50 marks for interview out of the total 150 marks was plainly arbitrary and unreasonable". In no uncertain words, the Constitution Bench, in *Ajay Hasia* (supra) expressed itself thus, "we must, therefore, regard the allocation of as high a percentage as 33.33 of the total marks for the oral interview as infecting the admission procedure with the vice of arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained". The reason for expressing such an opinion by the Supreme Court is obvious and the reason is that if as much as 50 marks are fixed for interview out of total marks of 150, there exists the possibility of abuse of manipulating the marks for the interview to the extent of 50 marks and frustrate or defeat thereby the very purpose of a due selection process.

(95) Taking note of the conclusions reached by the Supreme Court in *Ajay Hasia* (supra) as quoted above, the Supreme Court in, "*Mohinder Sain Garg v. State of Punjab and Ors.* reported in 1991 (1) 662, at para 33 observed, "there could be no gainsaying that viva voce test cannot be totally dispensed with, but taking note of the situation and conditions prevailing in our country, it would not be reasonable to have the percentage of viva voce marks more than 15 per cent of the total marks in the selection of candidates fresh from college/school for public employment by direct recruitment where the rules provided for a composite process of selection namely written examination and interview". These observations clearly indicate that though viva voce test cannot be dispensed with, yet on account of the "situation and conditions prevailing in the country", fixing of more than 15% of total marks for the purpose of viva voce would be, in the opinion of the Court, unreasonable. The primary consideration for fixing 15% for viva voce out of the total marks was clearly to avoid the possibility of abuse in the selection process.

(96) In *Chintaman Rao Vs. The State of Madhya Pradesh*, the supreme Court, while striking down the law, which was under challenge, observed thus.

"so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void".

(97) From the decisions given in *Ajay Hasia (supra)*, *Mohinder Sain Gard (supra)* and *Chintaman Rao (supra)*, it is abundantly clear that the possibility of misuse of power in any selection process or vesting of unguided discretion in any authority, entrusted with the responsibility of making selection, is a factor, which cannot be ignored and in a given case, if the possibility of misuse of such a power or discretion becomes higher, such a provision cannot be sustained.

(98) In view of what has been laid down in *Ajay Hasia (supra)*, *Mohinder Sain Garg (supra)* and *Chintaman Rao (supra)*, it is abundantly clear that when the Respondents have not given the bid sequence and have not been able to submit as to who would be the final authority to decide the winning bidder and/or on what parameters the winning bidder would be decided, there can be no escape from the conclusion that the terms and conditions under which the E-auction is sought to be held gives arbitrary power to the authorities concerned and cannot be sustained.

83. In view of what have been observed above, in *Sumeet Enterprises (supra)*, it becomes abundantly clear that the possibility of misuse of power in any selection process or vesting of unguided discretion in any authority, entrusted with the responsibility of making selection, is a factor, which cannot be ignored and if, in a given case, the possibility of misuse of such a power or discretion becomes higher, such a provision cannot be sustained. A reference may be made, in this regard, to the case of *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, too, wherein the Court has observed thus:

a public authority, even in contractual matters, should not have unfettered discretion and in contracts, having commercial element, even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms, recognised by courts, while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbowroom available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.

(Emphasis added)

84. In the present case, the "Note", appended to the "second NIT", dated 15.01.2009, having laid no selection criterion, did, as a matter of fact, vest in the Respondents/authorities concerned, wholly arbitrary power, which was impermissible in law and, no selection, on the basis of such a "Note", could have been legally made.

85. What logically follows from the above discussion is that while the Railway authorities could have awarded development/trial order for the purpose of bringing in competition to improve the quality of washing of bedroll items, the selection criteria having not been specified and having not been finalised, the process of selection suffers from vice of arbitrariness and cannot be sustained.

86. In the result, while there can be no objection to the adoption of the policy of development/trial order, the NF Railway ought to have specified and informed the tenderers the selection criteria or factors, which would govern selection of a tenderer for awarding the contract under the concept of development/trial order.

87. What surfaces from the above discussion is that having not done what the NF Railway ought to have done , as held above, the second NIT, dated 15.01.2009, issued by the NF Railway, could not have been sustained and ought to have failed, but for the reason that the process of selection, which had been initiated by means of the second NIT, dated 15.01.2009, stands scrapped by the NF Railways.

W.P. (C) 711/2009

88. Under the conditional agreement, which the Petitioner firm had entered into with the NF Railway and which agreement had become the principal ground for dismissal of the Petitioner firm's" second writ petition", the Petitioner firm's contract was valid up to 20.02.2009. In the meantime, pursuant to the second NIT, dated 15.01.2009, the Petitioner firm and the private Respondent participated in the tender process for the "regular work" [80% of the total work] and, as already discussed above, on opening of the "technical bids", on 10.02.2009, the private Respondent's tender was found to be non-responsive, but the Petitioner firm's "technical bid", as contended by the Petitioner firm and which has remained unassailed by the Respondents, was found responsive, yet the NF Railway sought to extend the period of contract of the private Respondent until finalisation of the process of awarding of the contract works, pursuant to the NIT, dated 15.01.2009; whereas the NF Railway refused to extend such favour in favour of the Petitioner firm. This has become the subject of challenge in the "fourth writ petition", namely, W.P.(C) 711/2009.

89. By its order, dated 20.02.2009, passed in the "fourth writ petition", the Court restrained the NF Railways from extending the period of contract, which had been granted to the Respondent No. 7, making it clear that if the Railway authorities were required to made ad hoc arrangement, in respect of the work, in question, the same shall be done in the same proportion in which the work was being done before the second NIT, dated 15.01.2009, was issued. The Court also made it clear that by its order, dated 06.02.2009, it had not placed any embargo on the NF Railway to finalize the contract and issue work order for "regular work". The NF Railway, however, did not finalize the contract for the "regular work" pursuant to the second NIT, dated 15.01.2009, and the reason assigned by it, as would be discussed hereinafter, is not at all convincing, because, it has really not been able to assign any convincing reason whatsoever for scraping of the tender process, initiated by the second NIT, dated 15.01.2009.

W.P.(C) 3374/2009

90. The subject-matter of challenge, in this writ petition, as already indicated above, is the decision of the NF Railway to discharge the "second NIT", dated

15.01.2009, and the issuance of the five NI Ts, dated 27.06.2009 and 28.07.2009, which are being referred to collectively as the "third NIT".

91. What is, now, important to note is that the "second NIT", dated 15.01.2009, had invited tenders for both, "regular work" (80% of the total work) and also for allotment of development/trial order (20% of the total work). The Petitioner firm was a tenderer for the "regular work". The only other person, who had participated in the tender process seeking allotment of contract for the "regular work", was the private the Respondent. It is also extremely important to note that the private Respondent was not a bidder for the development/trial order. In such a situation, the NF Railway was required to process the tender papers for allotment of the "regular work". The manner, in which the Railway authorities have dealt with the allotment of the "regular work", pursuant to their second NIT, dated 15.01.2009, is beyond any explanation and, that is why, the explanation, which the Railway authorities have offered, in this regard, and which would, now, be discussed, is not at all rational and could not, therefore, be convincingly brought home on their behalf.

92. The noticeable facts, with regard to the above, if I may reiterate, are that for allotment of regular work", there were only two tenderers, namely, the Petitioner firm and the private Respondent. The tender procedure involved, in terms of the Railway Board's Circular, dated 24.01.2003, two bids system, namely, "technical bid" and "financial bid". On opening of the "technical bid", the private Respondent's tender papers were found, admittedly, to be non-responsive. The private Respondent's case could not have, therefore, been even considered and its "price bid" could not have been opened and was rightly not opened. But, thereafter, the "price bid" of the Petitioner firm ought to have been opened, which, however, admittedly, was not done. The NF Railway's contention for not opening of the "price bid" of the Petitioner firm is that the Tender Committee found the Petitioner firm too an unsuccessful bidder. On being disputed by the Petitioner firm, the NF Railway came out with a reply, in paragraph 29 of their affidavit, filed in the "sixth writ petition", namely, W.P. (C) 5336/2009, wherein they claim that the Railway authorities have never termed the Petitioner firm as unsuccessful bidder.

93. Since the NF Railway has not adhered to its initial stand that the Petitioner firm too could not qualify in the tender process, which was set into motion by the NIT, dated 15.01.2009 and, when the NF Railways further admit that it has never termed the Petitioner firm as unsuccessful bidder, the conclusion to be arrived at, in this regard, is that the Petitioner firm has been found to be technically qualified.

94. Ordinarily, therefore, the "price bid" of the Petitioner firm ought to have been opened. The reason, assigned by the Railway authorities for not opening the "price bid" of the Petitioner firm, is that the Tender Committee recommended discharge of the NIT. What is curious to note is that the NF Railway has not assigned any reason as to why the Tender Committee recommended scraping of

the tender process. In the absence of any reason assigned by the Railway authorities and in the absence of any explanation discernible, in this regard, from the materials on record, one cannot but hold and conclude that the decision not to open the "price bid" of the Petitioner firm was arbitrary and no reason could have been assigned and no reason has, therefore, been assigned and the explanation, which had been offered assigning reason for abandoning the tender process (which had been set into motion by the "second NIT", dated 15.01.2009), was palpably untrue and unacceptable.

95. In the backdrop of the facts, which emerge from the above discussion, it needs to be borne in mind that the subject-matter of challenge, in W.P.(C) 711/2009, which is being referred to, in this decision, as the "fourth writ petition", is that notwithstanding the fact that the private Respondent was found technically unqualified, the Railway authorities decided to extend the period of contract for development/trial order, earlier granted, in favour of the private Respondent. Apart from challenging the decision of the NF Railway to extend the period of contract to the private Respondent, the Petitioner firm has also contended that it was being dealt with unfairly and it was being discriminated inasmuch as similar treatment was not being extended in its favour on the ground that its performance was not satisfactory. Suffice it to point out, in this regard, that if the Petitioner firm's performance was not found to be satisfactory and this became the ground for non-selection of the Petitioner firm for awarding the contract and/or non-extension of its contract period, then, the Railway authorities ought not to have allowed the Petitioner firm to participate in the tender process inasmuch as a person cannot be accused of unsatisfactory performance and is, at the same time, not disqualified from participating in the tender process, for, if such a procedure is allowed, it would mean that such a person, who is allowed to participate in the tender process, is supposed to accept one condition, from the very beginning, and the condition is that he would not be selected if anyone is found suitable.

96. No wonder, therefore, that this Court, speaking through H. Roy, J, in the order, dated 20.02.2009, passed in the "fourth writ petition", namely, W.P.(C) 711/2009, observed thus:

....this Court is unable to comprehend as to why the Respondent authorities are not finalizing the work order for 80% of the tender work, while at the same time, making arrangement to 100% of the work to Respondent No. 10 by claiming this to be an ad-hoc arrangement.

97. Even at the time of final hearing, the Railway authorities could not come out with any convincing answer as to why it has chosen not to finalize the contract by opening the "price bid" of the Petitioner firm, when the Petitioner firm's tender, submitted pursuant to the second NIT, dated 15.01.2009, was not found to be non-responsive. When no reason has been assigned, in this regard, except saying that the Tender Committee had recommended scraping of the process, initiated by the NIT, dated 15.01.2009, one cannot help but conclude, if I may

reiterate, that the decision to abandon the tender process, initiated by the second NIT, dated 15.01.2009, was nothing but arbitrary, particularly, when it is not the case of the NF Railway that they scraped the process, initiated by the "second NIT", dated 15.01.2009, on account of the fact that a decision was taken to split the contract work into five different parts.

98. As a matter of fact, the "Note", which has been placed on record by the Railway authorities, shows that the proposal for splitting up the contract work into four parts was given by the CCM(PM), NF Railway, on 20.07.2009, and the said proposal was approved on 22.07.2009; whereas the recommendation of the Tender Committee for scraping the tender was received as far back as on 19.06.2009. However, at one place, and, to be more precise, in paragraph 25 of the affidavit-in-opposition, filed on 10.12.209, the Respondents have contended to the effect that the "second tender", floated on 15.01.2009, was discharged on 19.06.2003 as none of the tenderers was found to be fulfilling the eligibility criteria, without, however, assigning any reason as to why the Petitioner firm was found to be ineligible, when the Respondents have themselves admitted, in their affidavit, that they did not term the Petitioner firm as unsuccessful tenderer. In short, if I may repeat, the Railway authorities have not been able to explain as to why the further process of the tender was not continued by opening the Petitioner firm's "price bid", when the private Respondent's tender was found to be technically non-responsive, particularly, when the Petitioner firm was the only bidder, whose "technical bid" was, admittedly, found responsive.

99. The Railway authorities have contended that since the supply of bedroll linens, in trains, is an essential passenger amenity, required on daily basis, and the existing firms could not come up with complete credentials, it was felt necessary to invite tenders of smaller value by dividing the work into several parts, on zonal basis, so that all interested eligible parties can participate in the tender process leading to, ultimately, standard quality of work with competitive motivation. No indication has, however, been given as to why the Petitioner firm is claimed to have not come out with complete credential. If it is the case of the Railway authorities that the quality of the work of the Petitioner firm was not satisfactory and it was for this reason that the tender papers of the Petitioner firm, received in response to the second NIT, dated 15.01.2009, were not accepted, then, this would amount to permanently disqualifying the Petitioner firm without blacklisting it and without giving it any opportunity to have its say in the matter, because, if, what Respondents have done is accepted, then, the consequence would be that in every tender process, which may take place in future, the Petitioner firm would be treated ineligible on the alleged ground that the Petitioner firm's performance, in the contract of similar nature, had been unsatisfactory, though, at the same time and in the same breath, the railway authorities would, as they are claiming now, claim that the Petitioner firm has never been considered by them as ineligible or unworthy of receiving the contract works, in question. In fact, to a pointed query, made in this regard, Mr. S. Sarma, learned Standing Counsel for the Railways, has not been able to

convincingly explain as to how, while not explicitly disqualifying the Petitioner from participating in the tender process, the selection procedure can be said to be fair if the decision to eliminate the Petitioner firm, as a matter of course, has already been taken by the Railway authorities.

100. What emerges from the above discussion is that the Railway authorities have miserably failed to give any convincing answer for discharging the "second NIT", dated 15.01.2009, and they have also not been able to offer any convincing explanation to the question as to how they happened to issue five NITs, dated 27.06.2009 and 28.07.2009, splitting the work into five parts without necessary approval of the General Manager, NF Railway, for, as per the records, as already indicated above, the proposal to split up the contract work into four parts was placed by the CCM(PM), NF Railway, on 20.07.2009, and the same was approved by the General Manager, NF Railway, on 22.07.2009.

101. Hence, the notices were issued, on 27.06.2009, without even any decision to approve the formal proposal to divide the contract into five parts was taken by the CCM(PM), far less by the General Manager on 22.07.2009. On whose decision, the NF Railway invited tenders by floating the five NITs, on 27.06.2009, has remained unanswered by the NF Railways. This apart, Mr. Choudhury has considerable force in his submission that the discharge of the "second NIT", dated 15.01.2009, by branding the Petitioner firm as unsuccessful tenderer, is based on non-existent ground and, hence, the same cannot but be regarded as malice in law. When an authority has power, but exercises the power, on non-existent ground, it cannot but be termed as malice in law.

102. Mr. Choudhury points out that the approval of the General Manager for relaxation of the eligibility criteria "and not for splitting up of the contract work" was obtained on 21.07.2009, whereas the NIT was issued, on 27.06.2009. Mr. Choudhury further contends that the approval of the General Manager was sought for, amongst Ors. , splitting up of the entire contract work of mechanised washing and cleaning of bed-roll items. However, the General Manager, according to Mr. Choudhury, granted approval only in respect of relaxation of eligibility criteria. This would clearly go to show, contends Mr. Choudhury, that the Lumding Division of N.F. Railway was conscious of the fact that by itself, it was not competent to split the work without approval of the General Manager. The General Manager having concurred only to relaxation of eligibility criteria and not to split the work, it is, submits Mr. Choudhury, not only difficult but impossible to infer and recognize any power, at the hands of the Divisional Manager, N.F. Railway, to issue the impugned "third NITs" as have been done.

103. By filing their affidavit-in-opposition, the NF Railway has contested the claim of the Petitioner firm and has sought to contend that the decision to discharge the "second NIT", dated 15.01.2009, and their further decision to issue five notices, dated 27.06.2009 and 28.07.2009, is in accordance with the Railway Board's Circulars mentioned above and no prejudice has been caused to the Petitioner firm by these acts of theirs inasmuch as the Petitioner firm can still bid

in the tender, in question. What is required to be noted, in this regard, is that, in the face of the materials on record, these assertions of the NF Railway are, as already discussed above, hollow, wholly baseless, untrue and mala fide.

104. Reverting, however, to Mr. Choudhury's contention that the "Note", which becomes the basis for issuance of the five notices, as indicated above, is not sustainable in law, because the General Manager had only approved the downgrading of the eligibility criteria but not the division of the contract work into five parts, it is imperative to point out, at this stage, that the proposal, submitted to the General Manager, by the CCM(PM), on 20.07.2009, was for downgrading or modifying the conditions of eligibility, as contained in Clause (i) and (ii) of the said "Note", and also to divide the contract only into four parts inasmuch as the "Note", dated 20.07.2009, clearly shows that what was put up to the General Manager was that the LMG Division had proposed to split the tender work into four parts.

105. In the absence of anything showing to the contrary, it cannot be inferred that the General Manager did not read the whole "Note" or approved the downgrading or modification of the eligibility criteria without taking into consideration the fact that the eligibility criteria, indicated by the "Note," would become the basis of splitting up of the contract work and initiation of a new tender process provided he agreed to divide the contract work into four parts.

106. Necessarily, therefore, this Court has to hold, and it does hold, that notwithstanding what Mr. Choudhury contends, the General Manager had, indeed, approved, on the basis of the said "Note", not only the splitting up of the contract work, but also downgrading of the eligibility criteria as were indicated by the "Note" aforementioned. In such circumstances, the question, which stares at us is: whether the splitting of the contract work, in the manner as has been done in the present case, is sustainable in law?

107. I have already indicated above that the discharge of the second NIT, dated 15.01.2009, suffers from malice in law. What is, now, of paramount importance to "Note" is that the "Note", dated 20.07.2009, which was put up by the CCM(PM) and approved by the General Manager, indicates that under the said "Note", not only a decision was taken to split up the contract work into four parts, but also to downgrade the eligibility criteria as mentioned in Clauses (i) and (ii) of the said "Note".

108. What is, now, of great significance to note, while considering the above aspect of the case, is that the "Note" stated,

Since the value of tender is very high, it has been proposed by LMG division to split the tender of GHY into four parts, viz. East bound trains, north bound trains, south bound trains and west bound trains. Since the present bedroll washing is not satisfactory, the division proposes to allot the work to new upcoming firms. Since they will not be able to fulfil the eligibility criteria, the same is required to be relaxed so that new firms can come up and take the work of bedroll washing at

GHY station...

(Emphasis added)

109. A bare reading of the above "Note" makes it more than abundantly clear that, according to the NF Railway, since the value of the tendered work of mechanised cleaning/washing of bedroll items was very high, the NF Railway authorities proposed to divide the work into four parts. The matter did not rest at that. The "Note" further indicates that since bedroll washing by the Petitioner firm was not satisfactory, the LMG Division proposed to allot the work to new upcoming firms. This shows that a decision had already been taken to allot the work to new upcoming firms and, for this purpose, proposal was made to divide the work into four parts, because the value of the tender was so high that the new firms would not have been able to take part in the tender process. It was also proposed that the eligibility criteria be relaxed so that new firms could take the work of bedroll washing.

110. The Petitioner firm, thus, effectively stands excluded from the process of selection, though the Railway authorities pretend that the Petitioner firm is still eligible to participate in the tender process.

111. The question, therefore, which is, now, required to be answered is: whether the "third NIT", which stands impugned in the "fifth writ petition", could have been interfered with by this Court in exercise of its powers under Article 226, when the terms of contract are, ordinarily, not judicially reviewable.

112. While considering the above aspect of the case, it may be pointed out that in *Tata Cellular Vs. Union of India*, and *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, the Supreme Court has held that the terms of the invitation to tender are not open to judicial review, for, the invitation to tender is in the realm of contract and, hence, it is not, accordingly, open to a person to challenge the terms and conditions under which tenders for awarding a contract work is invited. However, what will happen, when the terms of the invitation to tender are in themselves arbitrary, discriminatory, irrational or mala fide ? Whether denial to exercise the power of judicial review, in such cases, would set at naught the very object with which, Article 226 stands enshrined in our Constitution?

113. It is pertinent to note that after examining the extent of judicial review permissible in contractual matters, the Supreme court, in *Tata Cellular (supra)*, while deducing the principles governing the parameters of the powers of judicial review in contractual matters, observed, inter alia, as follows:

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

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

114. The Supreme Court, in *Educomp datamatics* (supra), placing reliance on the above observations made in *Tata Cellular* (supra), held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in setting the terms of contracts.

115. The question, therefore, is this: whether the terms of the invitation to tender are entirely outside the power of judicial review? While considering this question, what needs to be noted is that in a commercial contract, when tenders are floated, there are two stages, where the final decisions are taken. The first stage covers the period, when the terms and conditions of the contract are settled and decided by the authorities concerned. In the process of setting up of the terms and conditions of tender, many factors are taken into account. The decision as to what terms shall be included in the tender is really a policy decision, for, it is the authority issuing the invitation for tender, who is the best judge to determine as to what terms and conditions would be required for successful completion of the work or project concerned.

116. Thus, it is, primarily, for the authority issuing the NIT to decide what particular terms and conditions should be incorporated in the NIT. Since the power to impose conditions, in a notice inviting tender, is within the realm of freedom to contract, requisite freedom must be allowed to the authorities to set up the terms and conditions in the notice inviting tender. However, when the invitation to tender is floated, the second stage, which consists of the process of selection of the person for awarding the contract, commences and this process comes to an end, when a decision either awarding the contract or cancelling the entire tender process is taken. The decision to award the contract is not open to judicial review, but the decision making process, which leads to the ultimate decision is, even according to the law laid down in *Tata Cellular* (supra), open to judicial review.

117. To put it differently, while setting the terms to be incorporated in the invitation to tender, the authorities concerned must have complete freedom, for, the terms of the tender are in the realm of contract and it is for the authorities concerned to decide as to what would be the terms of the contract. Thus, the government must have a free hand in setting the terms of the tender. It must have reasonable play in the joints as a necessary concomitant for an administrative body in administrative sphere.

118. The question, therefore, which, now, arises for consideration is this: If any

of the terms and conditions embodied in an NIT is arbitrary, discriminatory, mala fide, irrational, whimsical, capricious or actuated by bias, whether the hands of the High Court would be tied and the High Court would refuse to interfere with the terms and conditions of the NIT, in exercise of the powers of judicial review, howsoever arbitrary, discriminatory, mala fide, whimsical, capricious or biased the terms and conditions may be?

119. The answer to the above question is not very far to seek. Assuming, in a given case, the terms embodied in an invitation to tender makes persons with moustache only eligible for participation. Will, in such a case, the High court refuse to exercise its power of judicial review, though such a term ex facie is irrational, capricious and whimsical? Suppose, in a given case, the authorities concerned make only male persons eligible to participate in the selection process for construction of an airport building and a female person, who has already completed successfully construction of buildings at several international airports, approach the Court with the grievance that the terms, so set, are discriminatory; would the Court refuse to interfere? Let us also assume a case in which the authorities concerned for construction of an airport building, at Bangalore, make only people from Lucknow eligible to participate in the tender process. Amongst Ors. , one of the terms on which the terms of the tender is challenged is that the Government is trying to favour a particular individual from Lucknow and the Petitioner, who so approaches the Court, also places before the Court documents/papers to show that this clause has been entered for the purpose of, eventually, awarding the contract to a particular individual from Lucknow. Will the Court be able to set aside such a term of contract as mala fide? The answer to all these questions can be found given in *Educomp Datamatics* (supra), wherein, while following the view in *Tata Cellular* (supra), that "terms of the invitation to tender cannot be opened to judicial scrutiny", the Court further held,

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.

(Emphasis added)

120. When the Supreme Court, after considering its earlier decisions including the decision rendered by a larger Bench, explains its earlier decision or interprets its earlier decision of even its larger bench, such an interpretation of the earlier decision given by the Supreme Court, in its subsequent decision, will be binding on the High Courts.

121. What follows from the above discussions is that when the Supreme Court, in *Educomp Datamatics* (supra), after relying upon the decisions "in *Tata Cellular*

(supra), and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, has laid down as to when even the terms of the invitation to tender can be interfered with, this Court cannot hold that under no circumstances, particularly, when the terms of an invitation to bid are in themselves arbitrary, irrational, mala fide, discriminatory, contrary to statute or actuated by bias, the High Court can not, in exercise of its powers under Article 226, interfere.

122. From the observations made in Educomp Datamatics (supra), it is, in fact, clear that though the courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism, there are inherent limitations on the exercise of the powers of judicial review in such matters. One of the limitations is that since the setting of the terms for invitation to tender is in the realm of contract and it is the Government, which knows as to what are the requirements for execution of a particular work, the Government is the best judge of the situation and, hence, the Government must be given a fair play in the joints and the Courts would not interfere. However, if the terms and conditions incorporated in the NIT are not ex facie relatable to the interest of the work or on the very face of it are arbitrary, discriminatory, mala fide or based on extraneous considerations or collateral purpose, reluctance, on the part of the Court to interfere would set at naught the purpose for which Article 226 stands enshrined in the Constitution. Though it is not for the Court to say as to what terms and conditions for a particular tender would be fairer, wiser or logical, yet the Courts can, indeed, interfere under Article 226 if the policy decision taken to incorporate a particular term or condition in a tender process is, in the light of the observations made in Educomp Datamatics (supra), found to be arbitrary, discriminatory, mala fide, irrational, whimsical, capricious or biased.

123. In short, the merits of a particular term or condition incorporated in a notification/invitation to tender is not open to judicial review; but constitutionality or very legality of such a term is not entirely beyond the scope of judicial review.

124. In the backdrop of the fact that it has clearly emerged that a decision has already been taken by the NF Rail way to eliminate the Petitioner firm from the process of selection, whether such a tender process, as the present one, is sustainable in law?

125. While considering the above aspect of the case, it needs to be noted that the "Note", which became the foundation for splitting up of the contract and initiation of the "third NIT", speaks loud and clear that the motive behind splitting up of the works, as aforesaid, and downgrading of the eligibility criteria was not aimed at bringing in competition, but to eliminate the Petitioner firm from the process of selection. This is wholly impermissible in law inasmuch as the Petitioner firm gets effectively disqualified from participating in the tender process without even receiving any notice or information that it (Petitioner firm) has been disqualified from participating in the tender process. There is no

purpose in allowing the Petitioner firm to participate in the tender process if the very intention of splitting up of the work into "four" parts or "five" parts was to give the contract work to new upcoming firms and not to the Petitioner firm.

126. The intention of the Railway authorities to allot the work to new upcoming firms and not to the Petitioner firm is fortified by the further observations, made in the "Note", when the CCM(PM) says,

Since they will not be able to fulfil the eligibility criteria, the same is required to be relaxed so that new firms can come up and take the work of bedroll washing at GHY station....

(Emphasis is added)

127. Thus, downgrading of the eligibility criteria, as embodied in Clauses (i) and (ii) of the said "Note", was meant to make prospective tenderer, such as, the private Respondent (who was, otherwise, ineligible in "technical bid") to become eligible and, at the same time, to oust the Petitioner firm from the scene completely. The splitting up of the contract work and issuing of the new tender notice was, thus, actuated by mala fide and was not as bona fide exercise of power as the NF Railway has been trying to project. The "Note" speaks for itself as to what the intention of the NF Railway is in splitting up the work and in issuing the "five notices", collectively referred to as the "third NIT".

128. Though the authority of the NF Railway to split the contract work into different parts has been challenged by the Petitioner firm as violative of the Railway Board's Circular, the NF Railway, attempting to sustain their act of issuing the five notices, dated 27.06.2009 and 28.07.2009, has pleaded, at para 27 of their affidavit-in-opposition, filed in W.P. (C) 5336/2009 (i.e., the "sixth writ petition"), as under:

28. That with regard to the statements made in Para 32 the deponent while denying the contention made therein begs to state that Clause 2.2. of Commercial Circular No. 3/03 permits such splitting.

129. I may pause, at this stage, to point out, that the eligibility criteria, as stood embodied in the Commercial Circular, dated 24.01.2003, and modified by the subsequent Circular, dated 09.09.2003, clearly show that dilution of the eligibility criteria has to be to the minimum level, it must have the conscious concurrence of FA and CAO and also have approval of the General Manager. If the approval of the General Manager was necessary, the same was obtained, as the record reveals, as late as on 22.07.2009. In fact, even the "Note", seeking approval was put up by the CCM(PM) as late as on 20.07.2009; whereas the impugned notices, inviting tenders, were published, as early as on 27.06.2009, meaning thereby that the decision to split the contract work had already been taken and acted upon by someone, who was not competent to do so, without the approval of the General Manager. From its very inception, thus, the issuance of the "third NIT" suffered from violation of the Railway Board's Circulars aforementioned and

was actuated by mala fide.

W.P.(C) 5336/2009

130. Turning to the "sixth writ petition", namely, W.P. (C) No. 5336/2009, it needs to be noted that the Divisional Manager, Lumding Division, has issued NTT afresh, on 12.11.2009 (hereinafter referred to as the "fourthNIT"), splitting up the work, covered by the "second NIT", dated 15.01.2009, into, now, seven groups. There is nothing on the record to show that the splitting up of the work into seven groups has the approval of the General Manager. Noticeably, as rightly contended by Mr. Choudhury, neither in the NI Ts, which were the subject-matter of challenge in W.P. (C) 3374/2009 (i.e., "fifth writ petition") nor in the present NIT, dated 12.11.2009, aforementioned, the "Note", which was envisaged as development/trial order, has been appended/incorporated. No reason has been assigned, and no reason could be assigned, when raised by the Petitioner firm, for exclusion of the said "Note" from the subsequent NI Ts aforementioned.

131. Situated thus, this Court finds it well-nigh impossible to ignore Mr. Choudhury's contention to the effect that the "Note", which was the subject-matter of challenge in the first three rounds of litigation, has been, suddenly, omitted and since no reason has been assigned therefor, this action of the Railway authorities may well be taken as an indication of the acknowledge of the fact that the Railway authorities have realized that the said "Note" was not sustainable in law. In the absence of any explanation offered, in this regard, by the NF Railway and/or no explanation being discernible from the materials on record, in this regard, it cannot, but be held that the said "Note" was, from its very inception, beyond the authority of the NF Railway, contrary to all solemnity of tendering process, and abuse of the State's power to enter into contract with individuals at its sweet will, which has been seriously deprecated in Dayaram Rammanna Shetty (supra), and reiterated in Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., Referring to the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Supreme Court, in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, has laid down thus:

The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D. Shetty v. International Airport Authority of India that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual,

deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance.

This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14....

132. Considering the fact that the NF Railway has not been able to convincingly explain as to why the process, initiated by the "second NIT", dated 15.01.2009, has been abandoned and as to why the work was divided into five parts and, then, further split up into seven parts, considering the facts and circumstances of the cases as well as the facts discernible from the materials on record, considering the rival submissions, as pleaded in each of the cases, and also considering the sustainability of the pleadings in the light of the law relevant thereto, as discussed above, this Court finds that the discharge of the "second NIT", dated 15.01.2009, was nothing but arbitrary and guided by malice in law as well as malice in fact. Consequently, this Court is of the view that the "third writ petition", namely, W.P.(C) No. 487/2009 deserves to be allowed and, in consequence thereof, the NITs, issued subsequent to the filing of the "third writ petition", have to be set aside and quashed.

133. The sequence of events are also very disturbing and does not appear to be very innocent. The said "Note" was appended to the second NIT, dated 15.01.2009, and, with the help of the "Note", the private Respondent came on the scene. When the private Respondent failed to qualify in the "technical bid", the whole process was abandoned and, to achieve the same objective, five NITs were issued hastily, on 27.06.2009, without even obtaining approval of the General Manager. In their haste, the Divisional Manager, Lumding Division, did not even obtain the approval of the General Manager and the approval was obtained, on 21.07.2009, to affaitaccomply.

134. It is also worth noticing, as already indicated above, that the Railway Board's avowed object, in issuing the Commercial Circular, dated 24.01.2003, was to standardise and bring uniformity in the tendering process for the work of cleaning and washing of bedroll items, etc., and also for inclusion of certain essential and special conditions in the terms and conditions of such contract. The scheme, as envisaged even under the modified Circular of the Railway Board, prescribes only downgrading or modification of the eligibility criteria of the tenderers, but not splitting up of the contract work by the Zonal Railways. This apart, I have already pointed out above, that even the modified Circular does not give a licence to do away with the eligibility criteria.

135. In the present case, what the NF Railway could not, perhaps, achieve by downgrading the eligibility criteria and appending the "Note" to the "second NIT", they are trying to achieve the same object by splitting the work. What

cannot be permitted to be done directly can also not be permitted to be done indirectly. See Firm of Pratapchand Nopaji Vs. Firm of Kotrike Venkata Setty and Sons and Others,

136. The example, therefore, cited by Mr. Choudhury, is difficult to avoid. The example reads,

... if a contract worth Rs. One Crore is split into 100 parts then the value of each work would come down to Rs. One lakh. Now, according to the relaxed criteria, the person, who is to bid needs to have a turnover of Rs. 15,000/- (say 15%) only in the last 12 calendar months instead of Rs. 15 Lakhs in case of work of Rs. 1 Crore. A bidder whose turnover is Rs. 15,000/- certainly cannot possess plants, machinery and other credentials. The above illustration goes to show that the Zonal Railways sought to achieve indirectly, which it could not have achieved directly.

137. The decision to oust the Petitioner firm from the whole work, in question, is clearly evident, as submitted by Mr. Choudhury, from the "Note" annexed to the affidavit-in-opposition, filed by the Railway authorities, in W.P.(C) 5336/2009 (i.e., the sixth writ petition). With this objective of bringing in smaller firms, which run contrary to the Railway Board's scheme, envisaged in the Circulars aforementioned, the splitting up of the contract has been done.

138. The value of the contract work, as published under the "second NIT", dated 15.01.2009, was Rs. 5.4 Crore; 80% of this work was "regular work" and 20% of the work was development/trial order. The whole work, now, stands split up into seven parts. Thus, the value of each part of the contract work gets reduced to less than one Crore. Interestingly enough, apart from reducing the value of the contract work by splitting the same into seven parts, even the eligibility criteria have been downgraded inasmuch as the "Note", dated 20.07.2009, reveals that it was proposed to the General Manager by the CCM(PM) that the conditions of eligibility, which required that the tenderer should have completed, in the last three financial years, at least, one similar work for a minimum value of 35% of the advertised tender value, be reduced to 15% of the advertised value, and Anr. condition of eligibility, which required that the total amount, received by the firm (tenderer), during the last three financial years and in the current financial year, should be a minimum of 150% of the tender value, be reduced to 50% of the tender value. The proposal was accordingly approved.

139. Thus, with the granting of approval by the General Manager to the "Note" aforementioned, the Railway Board's Circular stands, as already indicated above, completely mutilated and left beyond recognition. Such an action is not permissible in law and, taking into account the manner, in which it has been done, and, particularly, when it has not been done bona fide, but is actuated by mala fide such NITs, as the ones, which stand impugned in the fifth and sixth writ petition, namely, W.P.(C) 3374/2009 and W.P. (C) 5336/2009, respectively, cannot and must not be allowed to stand good on record.

140. Because of what have been discussed and pointed out above, the NITs, which stand impugned in the "fifth" and "sixth writ petition", namely, W.P.(C) 3374/2009 and W.P.(C) 5336/2009, respectively, shall stand set aside and quashed. This apart, as the decision of the Railway authorities to extend the period of contract of the private Respondent could not be validly justified by the Respondents, the decision, taken by the Railway authorities, to grant extension of the period of contract, in favour of the private Respondent and which forms the subject-matter of challenge in W.P. (C) No. 711/2009, is also hereby set aside and quashed. For the reasons already discussed, the NTT, dated 15.01.2009, which forms the subject-matter of challenge in W.P.(C) No. 487/2009, is hereby set aside and quashed. The Railway authorities are hereby directed to proceed further with the matters in accordance with law bearing in mind the observations made in the preceding paragraphs of this common judgment and order.

141. No order as to costs.