
(2010) 05 AHC CK 0170
In the Allahabad High Court

Mrig Trading Pvt. Ltd. and two others	APPELLANT
Vs	
UCM Coal Company Ltd.	RESPONDENT

Date of Decision : 28-05-2010

Acts Referred:

Citation : (2010) 05 AHC CK 0170

Hon'ble Judges : Pradeep Kant, J and Ritu Raj Awasthi, J

Final Decision : Allowed

Judgement

Pradeep Kant, J.—Heard Sri Rakesh Dwivedi, learned Senior Advocate assisted by Sri Akhilesh Kalra and Sri Altaf Mansoor, Advocates, for the petitioners and Sri J.N. Mathur, learned Senior Advocate, assisted by Sri Anil Saran, for the respondent.

2. Since affidavits have been exchanged, with the consent of the parties' counsel, we have proceeded to decide the writ petition finally.

3. The petitioners have filed this writ petition challenging the action of the respondents summarily rejecting the Request for Qualification Project (RFQ) proposal of the petitioner no. 3 consortium submitted in pursuance of the notice inviting tender for Development and Operation of Chendipada Coal Block I and II, Orrisa on the grounds given in the impugned order.

4. The petitioner no. 1, M/s Mrig Trading Pvt. Ltd., a Company incorporated on 3.2.03 under the provisions of the Companies Act, 1956 is, inter alia, engaged in the business of import, export, distribution, merchant, traders and stockist. The petitioner no. 1 is a 100% wholly owned subsidiary of M/s Ruchi Soya Industries Ltd., (hereinafter referred to as RSIL) which is, inter alia, engaged in the business of trading and manufacture of edible oils. The petitioner no. 2, M/s Sainik Minig & Allied Services Ltd. (hereinafter referred to as SMASL), is engaged in the business of contract mining and logistics for Coal India subsidiaries and is one of the largest contract mining and logistics company in India.

5. The petitioner no. 3, a consortium of two companies, namely, petitioner no. 1

Mrig Trading Pvt. Ltd. (hereinafter referred to as MTPL) as the lead member and petitioner no. 2, M/s Sainik Mining and Allied Services Ltd. (hereinafter referred to as SMASL), has been formed for the purposes of the subject tender and should the tender be awarded, the joint venture Company would be incorporated.

6. The petitioner no. 4 is the Director of MTPL, and the lead member of the petitioner no. 3 consortium and is a citizen of India.

7. The facts which are relevant for the purpose, are the respondent is a joint venture company, namely, comprising UPRVUNL, CMDC Ltd. and MAHAGENCO. The respondent was incorporated on 16.10.08. While UPRVUNL (a wholly owned corporation of Government of Uttar Pradesh) holds 50% of the shareholding in the respondent company, CMDC Ltd. (a wholly owned Corporation of the Government of Chhattisgarh) holds 31.25% of the shareholding in the respondent company and MAHAGENCO (a corporation wholly owned by Government of Maharashtra) holds 18.75% shareholding.

8. The primary object of the respondent as recorded in its Memorandum of Association is that it shall primarily be in the business of joint venture project between UPRVUNL, CMDC Ltd. and MAHAGENCO for the purpose of exploitation and sharing the output from the blocks of coal mines allotted by the Government of India.

9. The constitution of the respondent company, its shareholding being held by wholly owned State Government Corporations is a "State" within the reach and ambit of Article 12 of the Constitution of India and the respondent performs public functions.

10. The respondent company has been incorporated with an object of ensuring reliable supply of coal as per specified quantity and quality of the preidentified users. The respondent is in the process of obtaining the mining lease for the Chendipada Coal Block located in the State of Orrisa. The key objective of the respondent as disclosed in the Request for Qualification (RFQ) is to develop and operate the Chendipada Coal Block in a most cost effective manner while ensuring reliability in coal production (both in quantitative and qualitative terms) and ensuring full compliance with prevailing Coal Mining Regulations including those related to environment and safety.

11. The respondent company in order to appoint the mine operator for the development and operation of the Chendipada Coal Block issued the bid document dated 27.9.09 containing RFQ inviting prospective bidders to submit their Proposal for Qualification for development and operation of Chendipara Coal Block for an annual production of 40 million tonnes of coal production, which includes Chandipada and ChendiparaII coal block situated in the State of Orrisa.

12. The object of the bid document is to appoint mine operators for development and operation of Chendipada Coal Block in terms of the mining contract and mining laws. The scope of work has been described in Clause 5.1 of the bid

document. After holding the prebidding conference on 15.9.09, the respondent had issued a corrigendum dated 27.9.09. In all five companies/consortium submitted their Proposal for Qualification (PFQ). The petitioner no. 3, which is a consortium of two Companies, namely, petitioner no. 1 and 2, submitted its PFQ on 6.10.09. The PFQ was rejected by the respondent by the impugned order dated 28.1.2010.

13. The stages of the bidding process were outlined in Clause 6 of the bid document.

14. Clause 6.1 thereof mentions the stage of the bidding process which inter alia, stipulates that pursuant to the submission of RFQ, Request for Proposal (RFP) would be issued from the prequalified bidders which would include Technocommercial Proposal and the Price Proposal. The bidding process thus, as per Clause 6.2 has been divided into two stages, namely, the RFQ stage and the second step pertaining to RFP. Clause 6.3 gives the time schedule for conducting the bidding process.

15. The stages of bidding process have been given in Clause 6.1 and onwards. Clause 6.1 reads as under:

"6.1 Stages of the Bidding Process

As part of the bid process for selection of the Mine Operator, UCMCCL is issuing this Bid Document containing the Request for Qualification inviting prospective Bidders to submit their Proposal for Qualification. Subsequently, the Request for Proposal would be issued which would invite TechnoCommercial Proposal and the Price Proposal from the pre qualified bidders. Accordingly, the selection process for Mine Operator shall consist of the following stages:

I.Issue of Request for Qualification Document,

II.Submission of Proposal for Qualification

III.Evaluation of Proposal for Qualification

IV.Issue of request for Proposal Document containing the Mining Contract.

V.Bidder's Site Visit

VI.Clarifications pertaining to Request for Proposal

VII. Issue of Corrigendum, if required

VIII. Submission of Project ProposalTechnocommercial and Price Proposal

IX. Evaluation of Project Proposals

X.. Opening of Price Proposal."

16. The bid process is now at the stage of submission of the Project ProposalTechno Commercial and Price Proposal (Stage VIII) of clause 6.1.

17. As per clause 6.2.1 of the RFQ, the request for proposal would be issued only to the qualified short listed bidders.

18. Clause 7.3.2 stipulates that in case the bidder is a bidding consortium, a legal enforceable Consortium Agreement should be furnished by the Members of the Consortium in accordance with Exhibit 8 of Volume II, whereas Clause 8.5.1 of the RFQ requires the bidder to submit an Earnest Money Deposit (EMD) for an amount of Rs. 400,000,000/ (Rs. Four Hundred Million Only) in the form of a demand draft or an irrevocable Bank Guarantee. The term bidder is defined in Clause 3.1 to mean the bidding company or the bidding consortium.

19. Clause 10.1 defines responsiveness of the proposal and under the said clause, a proposal is deemed nonresponsive in the following cases:

"10.1 (a)

(i) It is not received by the last date and time specified for submission of Project Proposal as per Clause 6.3(a); or

(ii) It does not include sufficient information for it to be evaluated objectively; or

(iii) Prima facie there are significant inconsistencies between the information submitted and the supporting documents; or

(iv) It is not signed and/or sealed in the manner and to the extent indicated in the bid document; or

(v) Project Proposal submitted by a bidder does not include the Joint Operating Agreement, wherever applicable; or

(vi) Project Proposal submitted by the Bidder does not include the EMD."

20. The petitioner no. 3 consortium submitted its request for qualification (PFQ) on 9.10.09. The project proposal, as per Clause 7.2.2 of the bid document, was submitted by MTPL and SMASL under the name of RSILSMASL consortium (petitioner no. 3). MTPL is a 100% subsidiary company of M/s Ruchi Soya Industries Ltd. (RSIL) and was to act as the lead member of the bidding consortium. At the time of submission of the project proposal, a Bank Guarantee amounting to Rs. 400 million issued by the ICICI Bank Ltd., SCO 1819, Second Floor, HUDA Shopping Centre, Sector 14, Gurgaon, Haryana, was also submitted by the petitioner no. 3 consortium as EMD in terms of Clause 8.5.1(a) of the bid document.

21. It is the further case of the petitioners that the project proposal of the petitioner no. 3 consortium was also accompanied by information regarding technical qualifying requirement submitted by MSASL as well as information about financial qualifying requirement by MTPL, in terms of Clause 7.2.2. of the bid document. The financial documents of RSIL, being parent company of MTPL were attached with the bid for financial qualification.

22. Their further plea is that the Joint Operating Agreement as well as the

Consortium Agreement in terms of Clause 7.3 of the bid document were also submitted by the petitioner consortium to the respondent.

23. Clause 7.3.1 of the bid document stipulates that the bidding company who is seeking qualification based on the strength/experience of its promoter/parent company shall furnish a legally enforceable Joint Operating Agreement executed between the bidding company and its promoter/parent company extending experience/strength to the bidding company.

24. Since in pursuance of the submission of PFQ on 9.10.09, the petitioner consortium was not given any response nor the respondent did seek any clarification at any point of time, the petitioner no. 3 addressed a letter to the respondent on 16.1.2010 seeking confirmation of status of their proposal and the date of submission of TechnoCommercial Proposal.

25. It was thereafter that on 28.1.2010, an intimation was received by the petitioner consortium informing that their PFQ project proposal has been rejected.

26. It is this rejection of the proposal, holding it to be nonresponsive, which disqualifies the petitioner consortium to participate further in the bidding process, is the subject matter of challenge in the present writ petition.

27. The two grounds on which the PFQ of the petitioner consortium was rejected, as contained in the impugned intimation dated 28.1.2010 can be summarised as under:

(i) That the consortium Agreement read with the Covering Letter is a clean departure from the format prescribed, as in the Consortium Agreement RSIL has been described as the Lead Member of the Consortium while in the Covering Letter MTPL has been described as the Lead Member of the Consortium. Though MTPL would act as the Lead Member, all the obligations and responsibilities of the Lead Member have been shifted to RSIL through the Consortium Agreement. Further, as per the RFQ even as per the Consortium Agreement read with the Covering Letter it appears that there are 3 (Three) Members in the Consortium. Agreement between MTPL and SMASL can not be an Agreement where by the responsibilities and Obligations can be conferred upon a third party. Therefore, there is a clear departure from the conditions of Qualification as prescribed under the RFQ and accordingly the said document is non responsive under Clause 10.1 of the RFQ.

(ii) The EMD had to be submitted by the Consortium Partners either jointly or severally in the ratio of their holdings in the Consortium. Thus, the Bank Guarantee submitted only on behalf of SMASL can neither be considered as submitted jointly on behalf of MTPL and SMASL nor severally by both the partners in the proportion of their holdings in the Consortium. In the present case, the purpose of the EMD, which has been called for at the stage of the RFQ, as reflected through Clause 8.5.1 of the RFQ, is not only to ensure the commencement of the work by the Bidders but also mainly to determine the

financial strength of both the partners of the Consortium as well as their seriousness and commitment to the successful completion of the Project. Even though, MTPL is a partner on whose financial strength the Consortium seeks qualification, it has not contributed to the EMD either jointly or severally. This reflects MTPL's lack of commitment towards the project and hence is a departure from the format of EMD as prescribed under the RFQ and is non responsive under Clause 10.1 of the RFQ."

28. The petitioners contend that the respondent has interpreted the consortium agreement alongwith the contents of the covering letter in an absolutely unreasonable manner, which had led to a wholly incorrect approach and understanding of the consortium agreement.

29. Submission is that if the covering letter as well as the consortium agreement is read as a whole, that would leave no doubt that the MTPL was the lead member and that there were only two members in the consortium and not three, as suggested in the impugned intimation.

30. Further argument is that if because of the inadvertent mistake having occurred in Para 2 of the consortium agreement mentioning RSIL as the lead member, any confusion had arisen, it was obligatory upon the respondent to seek clarification from the petitioners but without doing so, the bid document could not have been held to be nonresponsive as per Clause 10.1 of the bid document.

31. In response, the respondent submitted that the bid document was to be furnished strictly in accordance with the requirement and having failed to do so, the petitioners cannot claim that their bid document has been illegally rejected.

32. Argument further is that a bare reading of the covering letter attached with the consortium agreement, shows that there was discrepancy in the description of the lead member of the consortium, as mentioned in the covering letter, as against the one mentioned in the consortium agreement.

33. In support of this argument, the respondent placed reliance upon Para 2 of the consortium agreement, where RSIL has been mentioned as the lead member and in the covering letter MTPL has been addressed as such. The letter head also has the name of RSILSMASL Consortium with the following description in brackets (A consortium of Ruchi Soya Industries Ltd. and Sainik Mining And Allied Services Ltd), whereas consortium agreement names the two members, namely, (i) MTPL and (ii) SMASL. Thus, the plea of the petitioners that it was simply a typographical mistake in the consortium agreement cannot be accepted. Since the document in question did not comply with the terms prescribed, there was no obligation upon the respondent to seek any clarification.

34. For delving upon the said pleas, it would be necessary to have a look over the covering letter as well as the consortium agreement. The letter head mentions at the top RSILSMASL Consortium, wherein below the name aforesaid, it has been mentioned in brackets that it is a consortium of Ruchi Soya Industries

Ltd. and Sainink Mining and Allied Services Ltd.

35. The consortium partners are MTPL and SMASL, which is evident from paragraph 2 of the covering letter, which specifically says that the proposal is being submitted by M/s Mrig Trading Pvt. Ltd. and M/s Sainik Mining and Allied Services Ltd. through a consortium i.e. RSILSMASL Consortium in accordance with the conditions stipulated in the bid document and that M/s Mrig Trading Pvt. Ltd. will act as a Lead Member.

36. In paragraph 3 of the covering letter, it has been said as follows:

"We, RSILSMASI CONSORTIUM have examined in detail and understood the conditions stipulated in the Bid Document and confirm that our Project Proposal is in full conformity with the Bid Document."

37. There is no dispute that the name of consortium, having petitioners no. 1 and 2 as its members, is RSILSMASL consortium. Simply because at the top of the letter head, it has been printed as RSILSMASL Consortium, mentioning (A Consortium of Ruchi Soya Industries Ltd. and Sainik Minind And Allied Services Ltd.) underneath, it would not mean that the consortium consists of three members, including RSIL. The covering letter alongwith the consortium agreement, was to be read as a whole which could not have been interpreted solely on the strength of the bracketed portion in paragraph 2.

38. In paragraph 6 of the covering letter, it was made clear that in terms of Clause 8.3 of Volume I: Information to Bidders, Mr. Chandra Dutt was designated as an authorised representative of the consortium, who was authorised to represent the consortium in all matters pertaining to the proposal. The original Power of Attorney duly notarised was enclosed with the covering letter and the project proposal was duly signed by the authorised representative and sealed in the manner and to the extent indicated in the bid document.

39. In Para 11 of the covering letter, it was confirmed that there were no actions, suits, claims, proceedings or investigations pending or, to the best of their knowledge, threatened in writing against M/s Mrig Trading Pvt. Ltd. & M/s Sainik Mining and Allied Services Ltd. at law, in equity or otherwise, and whether civil or criminal nature, before or by, any court, commission, arbitrator or governmental agency or authority and that there are no outstanding judgements, decrees or orders of any such courts, commission, arbitrator or governmental agencies or authorities, which materially adversely affect our ability to execute the Project or to comply with its obligations under the Mining Contract.

40. The covering letter thus, but for, at the top of the letter head, where consortium was shown of RSILSMASL mentioning in brackets as follows, (A Consortium of Ruchi Soya Industries Ltd. and Sainik Minind And Allied Services Ltd.), in the text and body unequivocally stated that RSILSMASL was a consortium of MTPL and SMASL, which was printed at the top of the letter head, in brackets, could not have been taken as the contents of the letter.

41. It also clarified and specifically recited that the proposal is being submitted by the duly designated authorised representative by the consortium and that MTPL and SMASL, who were the members of the consortium, were having no actions, suits, claims, proceedings or investigations pending against them. The aforesaid clause in the covering letter explicitly explained that it is a consortium of two partners, namely, MTPL and SMASL and did not mention RSIL at all as a partner or otherwise.

42. In case the aforesaid clarification and assurance with respect to the status of the members of the consortium regarding pending suits, claims, proceedings or investigations etc., was required to be given and had the RSIL being the member of the consortium, its name would have found place in Para 11 of the covering letter. Nonmention of its name itself shows that there was no confusion in the covering letter aforesaid with respect to two members, who constituted the consortium and who had completed the formalities and submitted the bid document through their authorised representative.

43. The confusion appears to have occurred because in Para 2 of the consortium agreement, the name of RSIL was shown in brackets as partner1, who was to act as lead member.

44. Sri Rakesh Dwivedi, learned counsel for the petitioners, during the course of arguments, submitted that, of course, it was a mistake, which was not more than a typographical error in the said paragraph but if that be so, it not being a mistake, which flatly goes against the terms of the bid document or the manner in which the PFQ was to be submitted, therefore, before holding the bid document as nonresponsive on the aforesaid ground, a clarification ought to have been asked for, from the petitioners, if on the basis of the documents furnished, the respondent was under any misgiving that the consortium has not been found, as required.

45. A perusal of the consortium agreement further shows that the agreement was executed between MTPL, who was called as partner1 and SMASL was named in the agreement as partner2.

46. This necessarily means and establishes that the consortium agreement was entered into between the two partners, namely, partner1 and 2, who were MTPL and SMASL and they were to be described as such in the consortium agreement and collectively as "partners".

47. The agreement obviously and provenly was not entered into with RSIL nor it was made partner in the agreement.

48. In Clause 2 of the consortium agreement, the following has been described:

"2. In consideration of the Letter of Intent by UCMCCL to the Bidding Consortium, we the Members of the Bidding Consortium and Partners to the Consortium Agreement do hereby irrevocably agree that Partner 1 (M/s Ruchi Soya Industries Limited) shall act as Lead Member as defined in the Volume 1:

Information to Bidders of the Bid Document for itself and as an agent for and behalf of Partner 2."

49. In fact, the name of MTPL was to be written in the brackets after the words partner1 but by mistake, the name of RSIL was shown in the bracket. Partner1 was also the lead member. The agreement itself unequivocally shows that partner1 was MTPL and not RSIL. If the RSIL was not a partner at all, much less partner1 as described in the agreement and partner1 was shown to act as lead member, it is very clear that it is not RSIL who was to act as lead member, as partner1 in the consortium agreement was MTPL, who was to act as lead member. Simple typographical error in bracket, while mentioning the name of partner1 could not have been taken to be a grave departure from the requirement of the bid document, so as to make the whole document nonresponsive.

50. Before rejecting the document on the aforesaid ground, the respondent ought to have considered as to who is partner1 in the consortium agreement, and had it been considered, there would have been no two opinions that partner1 was MTPL and that RSIL was not a partner in the agreement at all.

51. In para 2 aforesaid, description was partner1 (RSIL). It could not be explained by the respondent that why partner1 of the consortium agreement was not taken to be the lead member, while considering the said document and for what reason RSIL, whose name has been shown in brackets, was taken to be the lead member.

52. If two separate words or names were mentioned in the aforesaid Clause 2 of the agreement, describing the same person viz. partner1 to the agreement, it was incumbent upon the respondent to find out, who was partner1, irrespective of the fact that within brackets, the name of RSIL was mentioned as it is the partner1, who was to act as the lead member, and had it been done, there was no reason to say that the said document shows that RSIL will be the lead member.

53. If the entire agreement had been seen including para 6 of the agreement, it would have created no doubt as to who are the members of the consortium and that they have been named as partner1 and partner2.

54. Clause 6 of the consortium agreement, which reads as under, very specifically and categorically mentions the names of the two partners of the consortium with the percentage of their share, namely, MTPL, partner1 having 51% share and SMASL, partner2, having 49% share Total 100%.

"6. Subject to the terms of the Mining Services Contract, the share of each Partner in the issued equity share capital of the Project Company (if formed) or interest in the Consortium Agreement is/shall be in the following proportion.

Name

Percentage

M/s Mrig Trading Private Ltd.

(Partner 1)

51.00%

M/s Sainik Mining And Allied Services Ltd.

(Partner 2)

49.00%

Total

100.00%"

55. It is worthwhile to reiterate here that RSIL has not been shown as partner of the consortium nor its share has been shown in the said para6.

56. Likewise in Clause 7, it has been assured that the partners shall not in any manner alter their respective share in the issued capital of the Project Company stated in Clause 6 above, except with the prior written consent of UCMCCL provided that such consent shall not be unreasonably withheld by UCMCCL.

57. The clause aforesaid again emphasizes and makes clear the partners of the consortium and assures, that they shall not in any manner alter their respective share in the issued capital of the Project Company stated in Clause 6, except with the prior written consent of UCMCCL.

58. The name of RSIL is not found in any of the said clauses.

59. Further, clause 7.3 of the bid document requires furnishing of Joint Operating Agreement & Consortium Agreement, where a member of the consortium is seeking qualification based on the strength/experience of its Promoter/Parent Company.

60. Exhibit4B (I) which is a confirmation from MTPL addressed to the Managing Director of the respondent, also shows that the Joint Operating Agreement has been executed between petitioner no. 1 as the bidder and RSIL as the operating partner and promoter/parent company of the bidder MTPL and the MTPL is a wholly owned subsidiary of the promoter/parent company.

61. The covering letter of RSILSMASL consortium, submitted by the petitioner also indicates that the petitioners no. 1 and 2 are the members of the consortium and PFQ is being submitted by them through a consortium known as RSILSMASLin accordance with the conditions stipulated in the bid document and MTPL will act as a lead member.

62. This document also appears not to have been considered by the respondent while recording the first reason for holding the bid document as nonresponsive.

63. The consortium agreement is signed by Sri Tapan Chakraborty on behalf of MTPL and by Ex. Capt. K.S. Solanki on behalf of partner2, SMASL. There is no signature of RSIL or on its behalf by any person either authorised or nonauthorised.

64. The consortium agreement is a mutual agreement between two companies or partners, which creates contractual obligations. There is no law prescribed but for the law of contract, that in what manner consortium agreement would be entered into. It is the will and voluntary desire of two companies/partners to enter into a consortium for any valid purpose and to undertake the work as a joint venture.

65. The respondent was only to see that there is a consortium of not more than two members and the consortium agreement, as required, has been entered into between such members/partners and has been submitted alongwith bid document.

66. While interpreting and understanding the meaning of a document, namely, consortium agreement in the present case, if reliance was to be placed upon the contents of the covering letter, then merely what the letter head at the top prints, could not have been taken as a final determination about the membership of the consortium nor it would be taken as a confusion or departure from prescribed rule/form, unless, of course, it was not intelligible, readable and understandable otherwise.

67. We also take notice of the fact that there is a provision in the bid document, namely, Clause 6.2.5 subclause (c), which reserves the right to conduct post bid discussions with any or all Bidders in order to obtain clarifications or confirmations on any part of the Project Proposals so submitted. This is under the subheading "Evaluation of Project Proposals" and reads as under:

"6.2.5. Evaluation of Project Proposals

(a).....

(b).....

(c) UCMCCL reserves the right to conduct post bid discussions with any or all Bidders in order to obtain clarifications or confirmations on any part of the Project Proposals so submitted."

68. The aforesaid clause, which gives right to the respondent to obtain clarification or confirmations on any part of the Project Proposals, in fact, lays a corresponding duty upon the respondent in case of any confusion, to seek clarification and not to reject the bid document on mere hypertechnicalities or alleged anomaly or confusion.

69. If the aforesaid right of clarification is taken to be the sole discretion of the respondent, it would defeat the very purpose, for which the said clause has been consciously incorporated as in the absence of such clarification being sought for,

by the respondent in respect of any bidder, the prejudice would not only to the bidder, who would stand ousted from bidding but also that of the respondent, as it will reduce the number of eligible tenderers, so as to have competitive rates.

70. This clause appears to have been put in, only for the reason that for some hypertechnical reason or some typographical error or any such mistake in furnishing the bid document, which does not touch the mandatory requirement, an opportunity be given to such prospective bidder to explain and rectify the mistake, if it does not materially change the bid document.

71. Reference can also be made to Clause 8.4 subclause (c) of the bid document, which also provides for seeking clarification and says that no material change in the substance of the Proposal shall be permitted after opening of the Proposal. UCMCCL may at its discretion contact the Bidder for seeking clarification, if any, during the course of evaluation of the Proposal. The request for such clarification and the Bidder's response thereto shall be in writing. Nonsubmission, incomplete or partial submission or delayed submission may result in rejection of the Proposal.

72. This also supports the stand of the petitioners that if there was any such confusion, the respondent was under a legal obligation to seek such clarification before holding the bid document as nonresponsive.

73. It is to be kept in mind that the project in question is a project of a very large magnitude and as informed by the learned counsel for the parties, amounting to rupees seven to eight thousand crores, which is to be executed by taking various steps at various stages and, therefore, also it was necessary for the respondent not to oust a prospective bidder on such a hypertechnical ground, which otherwise also on a wholesome reading of the consortium agreement and the covering letter, could not have been arrived at.

74. Further, while considering the bid document, rest of the documents including the Joint Operating Agreement, which was furnished as per Clause 7.3 also ought to have been considered alongwith the consortium agreement, so as to remove any doubt about the number of members and which partner was to act as the lead member.

75. In the counter affidavit filed by the respondent, the evaluation report of CRISIL Risk and Infrastructure Solutions Limited has been brought on record. The CRISIL says that the covering letter has been submitted on the letter head of RSILSMASL consortium. The letter mentions different consortiums partner at different places. RSIL and MTPL has been indicated as consortium partner at different places in the letter creating confusion. It further says that the bidding consortium has submitted consortium agreement executed between MTPL and SMASL dated 7.10.09. However, two different entities viz. MTPL and RSIL has been mentioned as Partner1 leading not only to confusion about the lead member but also making the agreement in the current form unacceptable as per clause 7.3 of RFQ.

76. In regard to the aforesaid observations in the report, suffice would be to mention that in the covering letter but for the bracketed portion at the top of the letter head, where RSILSMASL consortium has been printed, there is no confusion with respect to consortium partners in the entire letter.

77. The observation, therefore, that the letter mentions different consortium partners at different places is not borne out from the covering letter. According to the aforesaid report, there was confusion in this regard, that being so, it was all the more reason, to seek clarification from the petitioners, so as to get the confusion cleared.

78. In our opinion had the respondent taken into consideration the consortium agreement as a whole and had gone through its different clauses, it would have admitted no uncertainty or ambiguity that the agreement was entered into between the two partners, namely, petitioner1 and 2 and the petitioner1 was to act as lead member. Even in Clause2 of consortium agreement, the bracketed name RSIL is preceded by partner1 and partner1 under the agreement is the MTPL and not RSIL. There is no shifting of obligations and responsibilities to RSIL except that the lead member is entitled to rely upon the strength of the RSIL as per clause 7.2 of the bid document.

79. Thus, we find that the reason no. 1 for holding the bid document nonresponsive, cannot be sustained, nor the same falls within any of the clauses of clause 10.1 of the bid document.

80. The second reason for which the bid document of the petitioner consortium has been taken to be nonresponsive is that the Bank Guarantee submitted by the consortium was only on behalf of SMASL, which can neither be taken to have been submitted jointly on behalf of MTPL and SMASL nor severally by both the partners in the proportion of their holdings in the consortium.

81. The allegation is that the Earnest Money Deposit (EMD) had to be submitted by the consortium partners either jointly or severally by both the partners in proportion of their holdings in the consortium but the petitioners have submitted the Bank Guarantee only on behalf of SMASL. Further the purpose of bank guarantee as per clause 8.5.1 is not only to ensure the commencement of the work by the bidders but also mainly to determine the financial strength of both the partners of the consortium as well as their seriousness and commitment to the successful completion of the project.

82. Sri Rakesh Dwivedi, Senior Advocate, appearing for the petitioners, relying upon the definition of EMD i.e. Earnest Money Deposit, as given in clause 3.1 of the bid document, submitted that it means the bid security to be provided by bidders to the respondent as per Clause 8.5.1, which in no way, would mean that it is for judging the financial qualifying requirement (Financial QR), or for determining the financial strength, which stage has not yet arrived.

83. His further submission is that the bidders were required to provide EMD as

per Clause 8.5.1, which permits furnishing of EMD for Rs. 400 million, valid for a period of 30 days beyond the validity period mentioned in clause 3.6 either in the form of a demand draft or an irrevocable bank guarantee. The petitioners had submitted an irrevocable bank guarantee issued by ICICI Bank Ltd. as mentioned in Appendix 1 of bid document. The bank guarantee is for the required amount and the validity period is correctly mentioned. The bank guarantee is in favour of respondent and it has been submitted on behalf of RSILSMASL consortium duly signed by the authorised representative Sri Chandra Dutt, who was appointed as such by petitioners no. 1 and 2, as provided in clause 8.3 of the bid document. The supplementary affidavit contains a copy of the notarized Power of Attorney and the Board Resolution of petitioners no. 1 and 2. Thus, in all material respects the bank guarantee furnished by the petitioners fully secures the interest of the respondent and is an adequate bid security.

84. It is being alleged that bank guarantee has been submitted alongwith PFQ with a covering letter signed by Sri Chandra Dutt, authorised representative of petitioners no. 1 and 2 on behalf of consortium, therefore, the bank guarantee was submitted on behalf of consortium jointly, as per the agreement under the bid document, which submission did not violate any of the terms and conditions of the clause 8.5.1 of the bid document.

85. Sri J.N. Mathur, Senior Advocate, for the respondent, emphasizing upon the need of submitting the bank guarantee (EMD) jointly by both the partners of the consortium to the extent of their share holding, submitted that the Government of India has allotted land in Chendipada in Orissa to three States, namely, Uttar Pradesh, Chhattisgarh and Maharashtra for the purpose of jointly establishing coal mines in the area so that coal is readily available for thermal electricity generation in the three States. The respondent is a consortium of three State controlled entities and the respondent is to appoint a mine operator by resorting to the tender method. The job of mine developer and operator and provided under the bid document is to fully develop the Chendipara Coal Block of Orissa; the mine operator is to do the job from the excavation of the mine to the drawal of coal from it; a coal washery has to be established by the mine operator; further it has to also establish a thermal power generation project. The mine developer and operator have also to ensure that coal is delivered to all the three States, forming part of the respondent company. It is to also establish a railway line to about 40 kms. away from the Coal Block and to ensure that the coal reaches the respective power projects of the three States, viz., Uttar Pradesh, Chhattisgarh and Maharashtra. The total investment of this entire project would be between 7000 to 8000 crores and the period of the project would be of about 30 years.

86. He submitted that for executing such a large and mega project the respondent wishes to ensure that the tenderers who bid for this mega project are companies with impeccable credentials and even before considering their bids, the respondent wants to be sure that the company or the consortium of

companies who are bidding are sincere about the bid. The tender conditions have been structured in a manner that in the case of a bidder being a consortium, the members of the consortium should both be equally committed to the bid. Thus, in the case of a consortium the respondent has to be satisfied about the identity of the members of the consortium and also that both the members of the consortium have offered the earnest money.

87. A further plea has been taken in supplementary counter affidavit, though not mentioned in the order/intimation impugned, that the petitioners alongwith the balance sheet of RSIL, submitted a statement under Section 212 of the Companies Act, 1956 but in the aforesaid statement the name of MTPL was not mentioned as a subsidiary company of RSIL and that in view of the aforesaid fact, the identity of the consortium of the petitioners is not clear and thus, the petitioners could not instil any degree of confidence in the respondent and, therefore, the respondent declared the proposal of the petitioners as nonresponsive.

88. It has been further pleaded that in the instant case though the petitioners no. 1 is the lead partner but the EMD has been solely deposited by only one partner, namely, SMASL and, therefore, the same is in violation of clause 8.5.1 (a) of RFQ.

89. Clause 8.5 is regarding deposits and guarantees to be provided by bidders.

90. Clause 8.5.1 (a) reads as under:

"8.5.1 Earnest Money Deposit (EMD)

(a) The bidder shall furnish, along with its Proposal for Qualification an EMD for an amount of Rs. 400,000,000/ (Indian Rupees Four hundred million only) valid for a period of 30 days beyond the validity period as detailed in clause 8.6 in a separate sealed envelope in the form of a demand draft or an irrevocable bank guarantee. Such demand draft shall be drawn in favour of "UCM Coal Company Limited" on any bank, as specified in Appendix1 payable at Lucknow. The bank guarantee for EMD shall be as per the format enclosed at Exhibit 9 of Volume II Project Proposal Forms. In case of foreign Bidders (Bidders having their registered office outside India), the bank guarantee can be from any other bank also in addition to the banks specified at Appendix 1. However, in such a case, the bank guarantee shall be confirmed by one of the banks specified in Appendix I. The EMD shall be submitted by the Consortium partners jointly or severally in the ratio of their holding/interest as proposed in the Consortium Agreement Exhibit 7 Clause 6."

91. It is said that there is nonadherence to the last three lines (underlined by us) of the aforesaid clause, which says that EMD shall be submitted by the consortium partners jointly or severally in the ratio of their holding/interest as proposed in the consortium agreement Exhibit 7 Clause 6.

92. The meaning of the aforesaid clause is in dispute.

93. According to the petitioners, EMD is to be submitted by the consortium partners jointly, in case they decide not to furnish it severally and if the consortium partners decide to submit the EMD jointly, there was no requirement that it should be done by making deposit by both the partners in the ratio of their holding/interest as proposed in consortium agreement. But in case the partners of the consortium had decided to furnish bank guarantee/EMD severally, only in that case the necessity would be to do the same in accordance with their holding/interest as proposed in the consortium agreement.

94. The respondent, on the other hand, for the reasons as argued by Sri J.N. Mathur, submits that in a project of the like nature, the commitment of the partners to the consortium should be clear, specific and loud. Not contributing the EMD/bank guarantee by one of the partners, makes the credential of such a partner doubtful and its sincerity and commitment towards the project smacks of suspicion and so to say, does not inspire confidence.

95. The question is whether in a case where EMD/bank guarantee was submitted jointly by the consortium partners, it will require that such bank guarantee must be submitted by both the partners in the ratio of their holding/interest as proposed in the consortium agreement or such a condition would apply only in case two partners decide to furnish EMD/bank guarantee severally.

96. The plea of the respondent that noncontribution of one of the partners to the consortium in the submission of bank guarantee would be fatal for the prospective bidders, has to be tested in the light of the relevant clauses of the bid document.

97. Before addressing on the said issue, it would be pertinent to mention specifically the reason in the impugned order, which persuaded to hold that the EMD/bank guarantee can neither be treated to be submitted by both the partners jointly nor severally by both the partners in the ratio of their holding/interest as proposed in the consortium agreement and, therefore, the bid document is nonresponsive; which is as follows.

98. The reason given therein is that the purpose of EMD in the present case, which has been called for, at the stage of the RFQ, as reflected through Clause 8.5.1 of the RFQ, is not only to ensure the commencement of the work by the bidders but also mainly to determine the financial strength of both the partners of the Consortium as well as their seriousness and commitment to the successful completion of the Project. Even though, MTPL is a partner on whose financial strength the consortium seeks qualification, it has not contributed to the EMD either jointly or severally. This reflects MTPL's lack of commitment towards the project and hence is a departure from the format of EMD as prescribed under the RFQ and is non responsive under Clause 10.1 of the RFQ.

99. The next question for consideration is whether EMD, which has been defined as bid security under definition clause of bid document, was also to be considered for determination of the financial strength of both the partners to the

consortium as well as their seriousness and commitment towards the successful completion of the project.

100. The EMD which means bid security is for the purpose of assuring that the bid would remain secured and the bidder or consortium, as the case may be, would not resile or draw back during the bid validity period and/or that after acceptance performance security is furnished and the agreement is signed, whereas determination of financial strength for carrying of the project, is to be done in terms of the clauses, which deal with Financial Qualification Requirement (Financial QR).

101. Clause 7.2 is the flexibility provided to the bidder in which subclause (a) deals with bidding company and says that in case of a bidding company, the bidder shall be allowed to draw strength from its promoter or Parent Company provided the bidding company is a Wholly Owned Subsidiary of its Promoter/Parent Company.

102. Clause 7.2.2 is about bidding by consortium and subclause (a) thereof says that the maximum number of members in the Bidding Consortium shall be limited to two (2) and the Lead Member of the Consortium shall be allowed to draw strength from its Promoter or Parent Company provided the Lead member Company is a wholly owned Subsidiary of their respective Promoter/Parent Companies from whom they are drawing strength. Further Financial Qualifying Criteria shall be met by Lead Member only and the Technical Qualification Criteria shall be met by any one member. Further, the Member of the Consortium other than the Lead Member would be able to draw strength from the respective Promoter/Parent Company only if its stake in the Bidding Consortium is 25% or more, whereas clause 7.3.1 deals with bidders where the company is bidder and clause 7.3.2 is for the bidder who is a consortium.

103. Clause 8.1 is regarding participation by a company in the bidding process and says that a company shall participate in the bidding either individually as a Bidding Company or as a Member of the Bidding Consortium. Also, only the Promoter/Parent Company can lend its strength to a Bidding Company or the Lead Member of the Bidding Consortium, whereas clause 8.3 speaks about authorised representative and signatory of the proposal, wherein subclause (a) says that a Bidder shall designate atleast one person and a maximum of two person ("Authorised Representative") authorised to represent the Bidder in all matters pertaining to its Proposal and lastly says that in the case of Consortium the Authorised Representative should have the authorization from both the members of the consortium. Further, the authorization either in the case of Bidding Company or Consortium shall be by way of a Power of Attorney of the respective Companies.

104. Clause 8.5.1 subclause (b) says that proposal for qualification not accompanied by the EMD or Proposal for Qualification submitted with inadequate EMD shall be rejected by UCMCCL as being Nonresponsive and returned to the

Bidder without being opened.

105. The plea of the respondent is that the bank guarantee which has been furnished mentions SMASL as bidder and the extension of the guarantee is to be given on instructions from SMASL and it shows that only SMASL has contributed for the issuance of the bank guarantee.

106. The bank guarantee has been submitted alongwith PFQ with a covering letter which is signed by Sri Chandra Dutt, Authorized Representative of petitioners no. 1 and 2 on behalf of consortium. The bank guarantee thus, has been furnished on behalf of the consortium jointly.

107. The Joint Operating Agreement is a clear statement in the prescribed format Exhibit 6 that RSIL is an operating partner and promoter/parent company of the bidder MTPL and MTPL is the wholly owned subsidiary of the promoter/parent company. Therefore, when the bank guarantee was submitted by Sri Chandra Dutt, authorised representative, it was obviously on behalf of consortium comprising petitioners no. 1 and 2 and the consortium merely carries the name of RSILSMASL.

108. Clause 8.5.1 also says that the EMD/bank guarantee is to be submitted by the bidder and if the bidder is consortium, then jointly or severally by the consortium partners in the ratio of their holdings/interest, as proposed in the consortium agreement.

109. The partners of the consortium were thus, at liberty to furnish the bank guarantee "jointly", which does not mean that a "joint" bank guarantee was to be submitted by the partners of the consortium. However, when the partners decide to submit the bank guarantee severally, then they must do so in the ratio of their holdings/interest as proposed in the consortium agreement.

110. There is also no requirement in the bid document, that both the partners of the consortium must contribute in obtaining the bank guarantee. Emphasis is that the bank guarantee was to be submitted "jointly" and not that the bank guarantee should be in the names of both the partners of the consortium.

111. This clause also does not require any investigation about the fact, as to who has contributed the margin money to the bank for obtaining the bank guarantee, namely, both the partners or only one partner and that the requirement is only with respect to "submission" of EMD and bank guarantee, jointly and severally. The PFQ of petitioners clearly indicates that the bank guarantee for EMD was submitted jointly on behalf of consortium by the authorised representative.

112. In the case of National Highways Authority of India v. Ganga Enterprises and another, (2003) 7 SCC 410, the apex court, while considering the matter of bid security, observed that the bid security of Rs. 50 lakhs was not for performance of the contract. It was in essence an earnest to be given to ensure that the bidder did not withdraw his bid during the period of bid validity and/or that after acceptance the performance security is furnished and the agreement is

signed. The other terms pertained to the anticipated contract for collection of toll. It must be mentioned that the bid validity period was 120 days.

113. The Court further held that such earnest/security is given and taken to ensure that a contract comes into existence.

114. The format of the bank guarantee also requires the bank guarantee to be issued with respect to the request for qualification/proposal as was given by the respondent and as per clause 4.6, bid document is solely for the benefit of bidders to whom it has been issued and it cannot be transferred/assigned to third party. The bank guarantee issued by ICICI Bank refers to the invitation for Request for Qualification/Proposal issued by the respondent. It is significant to mention here that in the case of consortium being bidder, both the member companies of the consortium are bidders, therefore, the amount of margin money can be provided to the bank by any partners of the consortium.

115. The financial strength is to be decided at a different stage of the bidding process, and while doing so, it would be seen, whether the consortium is in such a financial position to carry out the project successfully within time, for which clause 7.2.2 is of relevance. This clause permits the lead member to the consortium to draw strength from its promoter or parent company provided the lead member company is a wholly owned subsidiary of their respective Promoter/Parent companies from whom they are drawing strength. Further Financial qualifying criteria shall be met by lead member only and the technical qualification criteria shall be met by any one member.

116. The stage for considering the financial strength of the consortium could not reach but before that bid document of the petitioners has been declared to be nonresponsive and while doing so, the respondent found that calling of EMD at the stage of RFQ is not only to ensure commencement of the work by the bidders but also mainly to determine the financial strength of both the partners of the consortium as well as their seriousness and commitment to the successful completion of the project.

117. Sri J.N. Mathur for the respondent, during the course of argument, fairly stated, that the stage of assessing the financial strength of the bidder, has not yet arrived.

118. We fail to appreciate that when the stage of determining and assessing the financial strength, has not yet reached under the bidding process, as per the bid document, then how petitioners' proposal could have been held to be nonresponsive on this ground.

119. The interpretation given to clause 8.5.1 by the respondent does not even otherwise, at all flow from the aforesaid clause, dealing with Earnest Money Deposit.

120. Clause 8.5.1 subclause (c) says that the bidder shall ensure that the EMD remains valid for a period of 30 days immediately following the validity period of

Proposal as per clause 8.6. Subject to 8.5.1 (e), the EMD of all bidders shall be returned by the UCMCCL within 30 days following signing of the mining contract and furnishing of the requisite Contract Performance Guarantee by the selected bidder or the extended period as provided in clause 8.6(b).

121. Sub clause (i) of the aforesaid clause 8.5.1.(e) says that if the bidders withdraws or modifies its proposal partially or fully, during the validity period after submission of the price proposal, then without prejudice to any other rights available to it under applicable laws, UCMCCL reserves the right to forfeit EMD of the bidder without any notice of proof or damages to the bidder.

122. The period of validity of the EMD has thus, been prescribed under the aforesaid clause, which extends its validity for 30 days following signing of the mining contract and furnishing of the requisite Contract Performance Guarantee by the Selected Bidder or the extended period as provided in clause 8.6(b) and if the bidder withdraws or modifies its proposal partially or fully during the validity period after submission of the price proposal, the same can be forfeited without any notice.

123. Clause 8.5.1 subclause (c), makes it clear, that the EMD is a guarantee for bid security, for the period prescribed therein, i.e. for a limited period and the same shall be returned within the specified time (30 days) following signing of the mining contract and furnishing of the requisite Contract Performance Guarantee by the selected bidder. Once the EMD is to be returned within the given time, on fulfilment of the conditions prescribed, it cannot be argued, that the EMD was to reflect the financial strength of the bidder.

124. As per the the definition of EMD, the EMD/bank guarantee would be required only for bid security and not for determining the financial strength of the partners to the consortium. This is the next stage after the RFQ stage is over and the matter has to be considered at the RFP stage.

125. The financial strength, therefore, was to be considered not at the stage of submission of EMD, nor such a reason can be said to be relevant or germane for holding the project proposal as nonresponsive.

126. The requirement under the bid document was regarding the submission of bank guarantee jointly by the partners of the consortium and not obtaining a joint bank guarantee in the name of both the partners.

127. The plea of the respondent that the bid lacked seriousness in commitment of the partners to the consortium as bank guarantee was in the sole name of one of the partners, also does not appear to be relevant. It was the seriousness and commitment of the consortium (petitioner no. 3), which was to be seen and not that of partners individually. The partners of the consortium were conscious and very well knew that if they act against the terms of the bid document, they would be the losers. Even otherwise, the EMD, as observed earlier, was only for bid security and not for any other purpose.

128. Assuming that the entire margin money for securing the bank guarantee has been contributed by only one partner of the petitioner consortium i.e. SMSAL, the total risk would be of the consortium, including SMASL, if MTPL resiles or withdraws from the bidding process, as the bank guarantee shall stand forfeited in terms of sub clause (i) of clause 8.5.1.(e). But the respondent will not be affected, for the reason that, either the petitioner consortium shall continue with the bidding process till the bid is finalised, or shall withdraw at any stage. If the petitioner withdraws, it will loose the earnest money, which will not have any effect upon the respondent company, who will continue with the bidding process, with the remaining bidders. And should the contract be awarded to the petitioner consortium, the bank guarantee will be returned as per subclause (c) of clause 8.5.1 of the bid document.

129. Rejection of PFQ of the petitioners holding it to be nonresponsive for the aforesaid reason thus, cannot be supported by the requirement of the bid document for furnishing EMD/bank guarantee. The contribution of margin money by both the partners of the consortium, if they furnish the bank guarantee jointly cannot be said to be the requirement of clause 8.5.1, though in cases where bank guarantee is furnished severally, of course, the said requirement has to be fulfilled.

130. Sri J.N. Mathur, in response, to the alternative argument of Sri Rakesh Dwivedi, that in case there was any such ambiguity or requirement of furnishing bank guarantee with the contribution of both the partners to the extent of the ratio of their respective share holding, the respondent ought to have sought clarification and ought to have given an opportunity to furnish the bank guarantee in view of the general conditions of Clause 8.4. subclause (c), submitted that there were five tenderers and out of them all four have furnished the bank guarantee in accordance with their ratio of holding/interest, as proposed in the consortium agreement, therefore, it cannot be said that there was any ambiguity in the bid document.

131. Rebutting the aforesaid plea, the petitioners have submitted that the partners of rest of the consortiums, have furnished the bank guarantee severally and, therefore, they were bound to comply with the requirement of furnishing bank guarantee in the ratio of their holding/interest, as proposed in the consortium agreement.

132. The case of other consortiums, where the partners decided to submit separate bank guarantee and submitted it in required proportion, cannot be taken at par with the case of the petitioners, who did furnish the bank guarantee jointly.

133. Clause 8.5.1 uses the following phraseology:

"The EMD shall be submitted by the Consortium Partners jointly or severally in the ratio of their holding/interest as proposed in the Consortium Agreement Exhibit 7 Clause 6."

134. The words jointly and severally are disjuncted by the word "or" and there is no, (comma) after severally. This means that the words following the word "severally" viz. "in ratio of their holding/interest as proposed in the Consortium Agreement", are to be read only alongwith the word "severally" and not with the word "jointly".

135. It thus, cannot be said with certainty that there was no vagueness, in the language used, therefore, the petitioners could have been asked to submit the bank guarantee in proportion to the shareholding of the partners of the consortium. In any case, such a hypertechnical view ought not have been taken.

136. The contribution of margin money by both the partners of the consortium does not appear to be a requirement under the aforesaid clause, as it does not say anything about contribution of margin money and there is nothing on record to show that the petitioner no. 1 had not contributed the margin money. Even otherwise, the contribution of margin money by both the partners of the consortium is a matter between the two partners and the bank guarantee format also does not require mention of the fact as to who is contributing how much money.

137. Even assuming that there was such a requirement in clause 8.5.1, the said clause was obviously ambiguous and vague and, therefore, if interpreted in the manner as has been done by the respondent, it would violate the requirement of providing a level playing field and would amount to breach of Article 14 of the Constitution.

138. In the case of Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others, (2007) 8 SCC, the Supreme Court observed that "when tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. The "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

139. In the case of Poddar Steel Corporation v. Ganesh Engineering Works and others, (1991) 3 SCC 273, the apex court, while considering little deviation from the tender conditions, observed that since the cheque was issued by Union Bank of India and not by the State Bank of India, the tender could not have been rejected for noncompliance of the conditions of tender notice.

140. Their Lordships held as under:

"It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said noncompliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous

detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary of subsidiary with the main object to be achieved by the condition."

141. In the case of *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others*, (2006) 11 SCC 548, the Supreme Court observed that if there are essential conditions, the same must be adhered to; if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully and that when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

142. In the case of *Bibhu Bhushan Chaudhury v. Union of India and others*, AIR 2000 Gauhati 192, the Gauhati High Court considered the petitioner's plea that his tender was going to be rejected on the pretext that the his earnest money was wrongly shown in favour of Dy. FA and CAO/Construction N.F. Railway, Maligaon instead of FA and CAO Construction N.F. Rly. Maligaon, in spite of his letter in writing dated 27.9.99 sent to the Bank authority admitting the clerical mistake.

143. The Court found that the F.D.R. represented the earnest money that was required to be submitted by a tenderer. Giving an earnest or earnest money is a mode of signifying assent to a contract by giving the offeror a sum as a token that the party is earnest to perform his contract. The Railway Authority could have exercised its discretion in favour of the petitioner by making a little disagression from the NIT. In the event authority would have exercised its discretion in favour of the petitioner, it might not have amounted to unlawful or arbitrary exercise of discretion. In the case in hand the Railway authority gave more emphasis to the cold letter of NIT. As pointed out by Mr. Dutta, the learned counsel for the petitioner that the authority was in a position to accept the tender lawfully rather than taking a too technical view on the subject.

144. The Court further observed as under:

".....Earnest money is a guarantee that the contract will be fulfilled. In the present case the earnest money was no doubt deposited but according to the respondents it was in the name of a wrong person which was subsequently clarified by the bank itself which stood as the guarantor. The dispute was more on the form not on the substance. If there was any doubt in the mind of respondents authorities, it was open for it to ask for further assurance from the Bank and the party. The defect indicated by the Railway authority is/was curable in nature which did not affect the substance of the tender."

145. In the case of Reliance Airport Developers (P) Ltd. v. Airports Authority of India, (2006) 10 SCC 1, the apex court held that in matters of judicial review the basic test is to see whether there is any infirmity in the decisionmaking process and not in the decision itself. This means that the decisionmaker must understand correctly the law that regulates his decisionmaking power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decisionmaker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors.

146. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of rule of law.

147. In the case in hand, while taking a decision against the petitioners and holding their bid document to be nonresponsive, the respondent not only reached the conclusion both regard to reason no. 1 and reason no. 2, without going into the process of clarifications as given in the bid document but also without going through the entire documents annexed with PFQ. In regard to reason no. 1, the decision was arrived at, without considering the consortium agreement as a whole, and also the covering letter and the Joint Venture Agreement nor any clarification was asked for, from the petitioners with respect to alleged discrepancy, which occurred in clause 2 of consortium agreement.

148. Similarly, with respect to reason no. 2, while considering the validity of the bank guarantee furnished by the petitioners as EMD, reliance was placed upon last lines of clause 8.5.1, though without taking into account that there was no such clear requirement under the said clause for the petitioner consortium to indicate the contribution towards margin money of the two partners, each of the consortium in securing the bank guarantee, or that the bank guarantee need be joint bank guarantee.

149. The respondent also did not take into account that a clause, as it stands and has been framed, could have been interpreted both ways, namely, in case of submission of bank guarantee by the consortium jointly, the requirement would be to furnish the bank guarantee jointly and not to have a "joint" bank guarantee. This requirement would stand fulfilled, if bank guarantee is submitted

jointly i.e. on the authorisation of the partners of the consortium by their authorised representative, though margin money might have been paid by one of the partners.

150. The requirement of furnishing bank guarantee by the two partners of the consortium in accordance with their ratio of holding/interest as proposed in the consortium agreement, would arise only when they furnish bank guarantee severally i.e. separately.

151. The respondent's plea, to the contrary, is that the aforesaid clause has to be interpreted otherwise, namely, the bank guarantee/EMD was to be submitted either jointly or severally but in both the conditions the two partners must have contributed the margin money in the ratio of their holding/interest as proposed in consortium agreement, or in other words, it should have been a joint bank guarantee.

152. If the said clause can be interpreted in two ways, namely, the interpretation as given by the petitioners and the other by the respondent, the benefit of the aforesaid uncertainty would extend to the petitioners and the bid document could not have been rejected, being nonresponsive.

153. On considering the relevant clauses of the bid document, reference of which has been made earlier and the documents on record and the arguments raised, we are of the considered opinion, that the consortium having decided to submit the bank guarantee jointly, there was no requirement to secure a joint bank guarantee in the name of both the partners of the consortium, as submission of the bank guarantee jointly, though the duly appointed authorised representative of the consortium, will discharge the obligation under clause 8.5.1. of submitting it jointly.

154. It is only when the partners of the consortium had decided to submit bank guarantee severally, it was to be submitted in the ratio of their holding/interest as proposed in the consortium agreement.

155. In regard to the plea of the respondent that the certificate of voting securities (AnnexureCA8) certified by petitioner no. 1 and enclosed with PFQ, is a self serving instrument and the petitioners have not filed any resolution of RSIL or a certificate from the Company Secretary of RSIL to show that MTPL is a wholly owned subsidiary and, therefore, there is no corroborative material to establish this fact and even the balance sheets submitted by the petitioners in relation to RSIL, relate to the financial years 200707, 200708 and 200809 and the certification as per Section 212 of the Indian Companies Act does not mention the fact that MTPL is a wholly owned subsidiary of RSIL, the learned counsel for the petitioners submitted that the aforesaid pleas can neither be raised for the first time in the counter affidavit, nor have any relevance, besides being incorrect.

156. Submission is that in the counter affidavit, the respondent has tried to add

additional reasons for rejection of PFQ, which is not permissible nor can be seen for testing the validity of the order impugned. He places reliance upon the case of Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405 and on the case of Welfare Thrift and Multipurpose Cooperative Society Ltd. and another v. State of Orissa and others, AIR 2000 Orrisa 1234.

157. The argument is that the reasons which have been given in the order cannot be supplemented by filing affidavits and by making additional ground for defending the order.

158. Further, it is incorrect to say that any of the certificates as required by the bid document was not submitted and that so far the promoter/parent company is concerned, the only requirement is to give a certificate of voting security in format Exhibit5, which admittedly has been done.

159. Learned counsel for the petitioners submitted that all supporting documentary evidence, as was required in this regard, as per clause 7.4 (f), was furnished. Clause 7.4 (f) requires that a certificate should be submitted from the Company Secretary under the Companies seal of the bidding company regarding the voting securities in accordance with Exhibit5, which has been incorrectly mentioned as Exhibit6 in the bid document. The certificate thus, was to be given by the bidding company and not by the parent company. The MTPL is the lead bidding company and it has submitted a certificate in Exhibit5 (CA1), which conforms to the format prescribed.

160. The respondent having prescribed Exhibit5, the certificate of voting securities by bidding company as the relevant supporting document, it would not be open for it to take a different stand in the counter affidavit.

161. The petitioners, therefore, have submitted that since the bid document did not require any other supporting document in relation to RSIL or the certificate of Company Secretary of RSIL, the petitioner did not attach such documents and had they made known that such was the requirement, they would have certainly furnished the same also.

162. The petitioners have submitted that they understand the importance of the job of mine developer and operator and the petitioners are fully qualified to carry out the project and they possess the technical skills and financial strength to do it.

163. The petitioners further submitted that so far as the sincerity of the petitioners is concerned, the same is established by the fact that a bank guarantee/EMD for the required amount of Rs. 400 millions has been submitted and the requirement of bid period is fully met. The EMD is given by ICICI bank which finds mention in Appendix to the bid document. The bank guarantee is unconditional and irrevocable and in the name of the respondent. The EMD is simply a bid security. The EMD has been submitted by the authorised

representative of the consortium, which fully establishes that both the petitioners no. 1 and 2 stand committed to the bid. Further, when EMD is submitted by the consortium members jointly, it would follow that the same has been furnished by both the members. There is nothing on record to doubt the identity of petitioners no. 1 and 2.

164. In respect of the plea that the name of MTPL has not been shown as a wholly owned subsidiary of RSIL in the balance sheets submitted by the petitioners in relation to RSIL for the financial years 200707, 200708 and 200808, it has been submitted in the rejoinder affidavit that the RSIL had purchased all the shares of MTPL on 1.10.09 and, therefore, the balance sheet which would be submitted for the financial year 200910 would contain the mention of the fact that MTPL is the wholly owned subsidiary of RSIL. The aforesaid balance sheets submitted by the petitioners with PFQ are obviously of a period prior to April, 2009 and, therefore, the name of MTPL as a wholly owned subsidiary of RSIL was not found to be there.

165. It is further argued that the aforementioned balance sheets were filed only for the purposes of relying on the financial strength of RSIL as clause 7 of the RFQ permits the lead member to rely on the financial strength of the parent company. CRISIL has examined these balance sheets and has not found any fault.

166. The petitioners also say that the CRISIL report also found that the petitioners fulfil the technical qualification requirement on the basis of the technical strength of SMASL and also that the petitioners have submitted audited financial statements of 200607, 200708 and 200809 based on which the petitioners qualify financially.

167. In view of the settled position of law that an order has to be tested in the light of the reasons and circumstances given therein, we do not find any justifiable cause for the respondent to bring additional reasons in the affidavit, though the petitioners rebut them on factual basis also. The impugned order thus, cannot be, defended on the plea of additional reasons, not mentioned therein.

168. The decision to hold the bid document of the petitioners to be nonresponsive thus, has been taken arbitrarily and without taking into consideration the relevant clauses of the bid document and the documents furnished. The reasons for holding the bid nonresponsive also do not fall in line with the requirement given in the bid document issued by the respondent itself, nor the bid could have been declared nonresponsive under clause 10.1(a) of the RFQ as none of the conditions or grounds, on which such a decision has been made, can be said to be in existence in the case of the petitioners.

169. Under the circumstances, the proposal of petitioner no. 3 consortium cannot be treated to be nonresponsive on the aforesaid grounds.

170. For the reasons stated above, the order dated 28.1.2010 passed by the

respondent, summarily rejecting the project proposal of the petitioner consortium, is quashed and consequently, the respondent is directed to proceed further in accordance with the bid document in respect of petitioner no. 3 consortium alongwith other bidders. We, however, further provide, that if any clarification is still needed, the same can be asked for, by the respondent.

171. The writ petition is allowed with no order as to costs.