

(2012) 04 UK CK 0062

In the Uttarakhand High Court

Case No : Special Appeal No's. 12 and 14 of 2011

M/s Reliance Infrastructure Ltd.

APPELLANT

Vs

State of Uttarakhand and others
 M/s GVK L and T
Consortium and another Vs M/s Reliance Infrastructure Ltd.
and others

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2012) 04 UK CK 0062

Hon'ble Judges : Barin Ghosh, C.J; Umesh Chandra Dhyani, J

Bench : Division Bench

Advocate : Ajay Kumar Gupta and Mr. Rajendra Dobhal, s with Mr. Shishir Prakash and Mr. G.D. Joshi for Special Appeal No. 12 of 2011 Mr. M.L. Lahoty and Mr. Ravi Kiran Jain, s with Mr. D.S. Patni, for Special Appeal No. 14 of 2011, for the Appellant; Vinay Kumar for the State of Uttarakhand / respondent Nos. 1 to 3, Mr. M.L. Lahoty and Mr. Ravi Kiran Jain s with Mr. D.S. Patni, Advocate for respondent Nos. 4 and 6 and Mr. Muneesh Malhotra and Mr. Vikram Minas, Advocates for respondent No. 5 for Special Appeal No. 12 of 2011 Mr. Ajay Kumar Gupta and Mr. Rajendra Dobhal s with Mr. Shishir Prakash and Mr. G.D. Joshi, Advocates for respondent No. 1, Mr. Vinay Kumar for the State of Uttarakhand / respondent Nos. 2 to 4 and Mr. Muneesh Malhotra and Mr. Vikram Minas, Advocates for respondent No. 5 for Special Appeal No. 14 of 2011, for the Respondent

Judgement

Barin Ghosh, C. J.

1. These two appeals have been filed challenging a common judgment and order dated 8th November, 2010 passed by a learned Single Judge, whereby the writ petition filed by Reliance Infrastructure Ltd. (hereinafter referred to as "Reliance") has been partly allowed and, thereby, the order passed by the State of Uttarakhand (hereinafter referred to as the "State") in awarding Hydro Electric Power Project, Mapang Bogudiyar, in favour of the consortium of GVK Industries Ltd. (hereinafter referred to as "GVK") and Larsen & Tubro Ltd. (hereinafter

referred to as "L&T"), has been quashed and the prayer of Reliance for quashing the order passed by the State in awarding Hydro Electric Power Project, Bogudiyar Sirkari Bhyol, in favour of the said consortium, has been rejected. In the appeal preferred by GVK, where L&T is a respondent, quashing of the order passed by the State in awarding Hydro Electric Power Project, Mapang Bogudiyar, has been challenged. In the appeal preferred by Reliance, in addition to challenging the refusal to quash the order passed by the State in awarding Hydro Electric Power Project, Bogudiyar Sirkari Bhyol, Reliance has challenged the refusal to issue a mandamus upon the State to award Hydro Electric Power Project, Mapang Bogudiyar, in favour of Reliance.

2. Facts to which there appears to be no dispute are as follows:-

i. The State identified hydro power potential of about 15,000 MW. Of the said potential, generating capacities of about 1100 MW have already been established. Projects totaling a capacity of about 7900 MW are in the pipeline. In order to harness hydro power potential to the maximum and in the shortest possible time, the State came up with a policy on 19th October, 2002. The said policy envisaged private sector investment in hydro projects ranging from 0 to 100 MW. To attract private investment for development of projects of the capacity larger than 100 MW, the State announced yet another policy also on 19th October, 2002. The salient features of the said policy, for the purpose of the present appeals, are as follows:

. a. The State will invite proposals from private sector investors for development of identified sites.

b. For each identified site, which will be notified by the State from time to time, there shall be a pre-qualification selection of the bidders based on their past experience and financial and technical capacity. The applicants qualifying in the pre-qualification selection will be eligible for competitive bidding. Each attribute set for pre-qualification will be evaluated. Guidelines for evaluation and the passing score on attribute required for pre-qualification shall be specified at the time of inviting proposal for pre-qualification.

c. Project identified by the State shall be advertised for inviting international bids.

d. Project will be allotted to the highest bidder.

e. After the allotment, the allottee shall have to sign a project development agreement with the State within the period fixed by the State (three months) for preparation of Detailed Project Report (DPR) within a prescribed timeframe. After the DPR is accepted / approved by the State, the allottee shall have to sign an implementation agreement with the State, which shall inter alia include time schedule for getting necessary legal / administrative / technical approvals, financial closure, construction / commissioning etc. of the project.

f. In the event of inability of preparing a viable DPR or getting legal / administrative / technical approvals after the completion of the above-mentioned

fixed period, the project will revert back to the State and the allotment shall be treated cancelled automatically, in which case, no compensation will be payable to the allottee and the amount paid by the allottee shall vest in the State.

ii. Subsequent thereto, the State identified potentials of the following projects under the said policy dated 19th October, 2002 having capacity larger than 100 MW:

a.

Kalika Dantu

230 MW

b.

Mapang Bogudiyar

200 MW

c.

Bogudiyar Sirkari Bhyol

170 MW

d.

Urthing Sobla

340 MW

e.

Badrinath (Alkananda)

140 MW

iii. The State, thereupon, appointed Uttaranchal Jal Vidyut Nigam Ltd. (hereinafter referred to as "UJVNL") as the nodal agency to receive and process offers in respect of the aforementioned five projects.

iv. In February, 2004, UJVNL issued an international notice inviting Request for Qualification (hereinafter referred to as "RFQ"). The salient features of the said notice, for our purpose, are as follows:

a. Selection process is envisaged with Stage I comprising pre-qualification and Stage II comprising submission of financial bid.

b. Qualification will be based on the applicant's ability to meet the requirements including experience, technical capabilities and financial standing as demonstrated in RFQ submitted by the applicant. Only eligible qualified bidders under the said procedure will be invited to participate in the Stage II of the selection process.

c. Interested bidders may obtain a copy of the RFQ document during 1st March, 2004 and 31st March, 2004.

v. RFQ document, while incorporated the aforementioned policy, provided, amongst others, as follows:

a. Invitations to bid are sought from private sector investors, which include a company or a consortium of companies or a corporation, and of Indian or foreign origin, or joint venture of such entities, who may individually or jointly commit to implement the projects.

b. Selection procedure is comprised of two stages, the first stage is the pre-qualification stage consisting of submission of application in response to RFQ for projects by the bidding firm / consortium and evaluation of the same; in the second stage, Request for Proposal (hereinafter referred to as "RFP") document for each project would be issued to pre-qualified bidders, who would submit their financial bids in response to the RFP document. Those bids will be evaluated to select the preferred bidder for development of the specific project.

c. Allotment of the project shall be as per the policy as above.

d. A project briefing meeting will be held with the interested parties in April, 2004 to answer their queries relating to the projects.

e. Applicants, in order to be eligible bidders, should comply with, amongst others, the stipulation that an individual applicant or a member of a particular consortium cannot be a member of any other consortium applying for the same project and would be required to nominate one of the members of the consortium as the lead partner and that the lead partner shall not have less than 26 per cent equity in the proposed generating company and also that the members of a consortium shall enter into a Memorandum of Understanding for the purpose of the application, which shall be valid till the allotment of the project.

f. At any time, prior to the deadline for submission of the application, UJVNL may, for any reason whether at its volition or in response to clarifications requested by applicants, modify the RFQ document by issuance of an addendum and any addendum, thus issued, will be sent in writing to all parties, who have purchased the RFQ document.

g. A substantial bid is one, which conforms to all the terms and conditions and specifications of the bidding document, without material deviation or reservation, and a material deviation or reservation is one, which affects, in any substantial way, the scope of the qualification criteria; contains details, which are inconsistent with the requirements of the bidding document; or the rectification of which would affect unfairly the position of other bidders presenting substantially responsive bids.

h. If a bid is not substantially responsive, it will be rejected and may not

subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.

i. Evaluation would be made on the basis of technical strength, project development experience and financial strength. Financial strength will be based on assessment of the bidders regarding their ability to raise equity and debt for the project and their experience in arranging equity / loans either internally or from capital markets and the financial institutions / banks.

j. The bids for technical strength and project development experience parameters would be evaluated only if the hurdle criteria for financial strength, as detailed in Section VI (Clause 6.4.3) is cleared.

k. The bidder shall be required to secure a minimum threshold of 50 per cent points in aggregate, in technical strength and project development experience, for qualifying.

l. Any change in the composition of a consortium may be permitted only till the last date of submission of RFQ documents and no change is permitted till the allotment of the project(s).

m. An individual applicant or member of a consortium, if is also a member of any other consortium applying for the same project, will be disqualified.

n. RFQ due date is 1600 hours of 15th May, 2004 and opening of RFQ bids is 1100 hours of 17th May, 2004.

o. To assess the financial strength of the bidder / consortium member(s), bidders shall submit details in format IV-A and full names and addresses of all bankers and financial institutions with whom bidder / consortium member(s) deal should be enclosed as per format IV-B and, at the same time, bidder / consortium member(s) should fill the questionnaire regarding financial strength as per format IV-C.

p. The evaluation of bids shall be done in two stages, first stage comprising of responsiveness and the second stage comprising of qualification - technical, project development experience and financial.

q. Bids for technical strength and project development experience parameters would be evaluated only if the hurdle criterion for financial strength, as detailed in Clause 6.4.3 (of RFQ) is cleared.

r. Bidders shall be evaluated on a point system comprising of a total of 100 points, of which, 25 points have been assigned to technical strength, 25 points to project development experience and 50 points to financial strength.

s. In case of consortium, the technical and project development capability shall be judged on the basis of arithmetic sum of all the proposed partners; whereas the financial capability shall be judged on the basis of arithmetic sum of all the proposed partners provided their individual equity in the consortium is more than

10 per cent and the net worth and aggregate net cash accrual of the lead partner should not be less than 26 per cent of the net worth and aggregate net cash accrual of the consortium.

t. Clause 6.4.3 of RFQ is as under:

"6.4.3 The Bidders are required to meet the following minimum criteria for financial strength in respect of each project / combination of projects for further evaluation as mentioned in Clause 6.1.3 above:

(Rs. in million)

Sl. No.

Project Description

Net Worth of the bidder/consortium for 2002-03

Aggregate* Net Cash Accruals of the bidder / consortium

1

Kalika Dantu

3450

1725

2

Mapang Bogudiyar

3000

1500

3

Bogudiyar Sirkari Bhyol

2550

1275

4

Urthing Sobla

5100

2550

5

Alaknanda

2100

1050

6

All the projects

16200

8100

* Aggregate means the sum of net cash accruals for the previous three financial years. For the purpose of evaluation for a Consortium, the Net Worth and the Aggregate Net Cash Accruals would be taken as the aggregate of all the Consortium partners having a minimum stake equivalent to 10% of the total equity of the Consortium."

u. Format I-B was the proforma letter of participation from each member of a group as furnished with RFQ and the same is as follows:

"FORMAT I-B

Proforma Letter of Participation from each Member of a Group

(On each Firm's Letter Head)

To

General Manager (I&P)

Uttaranchal Jal Vidyut Nigam Ltd.,

Ganga Bhawan, Yamuna Colony,

Dehradun - 248001 India.

(Applicant to provide date and reference)

Re: Application for Request For Qualification for Project(s) Kalika Dantu or / and Mapang Bogudiyar or / and Bogudiyar Sirkari Bhyol or / and Urthing Sobla or / and Alaknanda (strike out whichever is not applicable) in the category "100 MW & above" for the Work of Development and Operation of Hydro Power Projects.

We wish to confirm that our company / firm (delete as appropriate) has formed / intends to form (delete as appropriate) a group with (insert names of all other members of the group) for purposes associated with Project(s) Kalika Dantu or / and Mapang Bogudiyar or / and Bogudiyar Sirkari Bhyol or / and Urthing Sobla or / and Alaknanda (strikeout whichever is not applicable)

(Members who are not the lead member of the group should add the following paragraph).

The group is led by (insert name of lead member) whom we hereby authorise to act on our behalf for the purposes of applying for qualification.

(member being the lead member of the group should add the following paragraph)

In this group we act as lead member and, for the purposes of applying for qualification, represent the group.

In the event of our group being qualified and invited to Bid for, we agree to be jointly with (names of other members of the group) and severally liable to UJVN Ltd., its successors and assigns, for all obligations, duties and responsibilities arising from or imposed by any contract subsequently entered into between UJVN Ltd. and our group.

Yours faithfully,

(Signature).....

(Designation of authorised Signatory).....

(Capacity of Signatory)....."

vi. Reliance as well as the consortium of GVK and L&T, along with seven others, gave their respective bids in response to the RFQ.

vii. UJVNL appointed ICRA Advisory Services, a division of ICRA Ltd., to assist UJVNL in evaluation of the bids based on the qualification criteria specified in the RFQ document. ICRA Advisory Services, thereupon, submitted a report. From the report, it appears that Reliance applied for all the projects; consortium of Malana Power Company Ltd., HEG Ltd. and Rajasthan Spinning and Weaving Mills Ltd. applied for Alaknanda and Bogudiyar Sirkari Bhyol projects; consortium of VBC Ferro Alloys Ltd., Sree Rayalseema Alkalies & Allied Chemicals Ltd. and Sree Rayalseema Hi Strength Hypo Ltd. applied for Kalika Dantu project; consortium of GVK and L&T applied for all the projects; GMR Energy Ltd. applied for Alaknanda project; consortium of Nagarjuna Construction Company Ltd., Unity Infraprojects Ltd., Himsun Power Pvt. Ltd. and United Shippers Ltd. applied for Alaknanda project; consortium of Lanco Kondapalli Power Private Ltd., SMEC International Pty Ltd. and Lanco Green Power Private Ltd. applied for Bogudiyar Sirkari Bhyol and Alaknanda projects; consortium of Nuziveedu Seeds Ltd., Vijai Electricals Ltd. and Deepak Cables (India) Ltd. applied for Alaknanda project; and consortium of Gammon India Ltd., Himsun Power Pvt. Ltd., SREI International Finance Pvt. Ltd. and Gammon Infrastructure Projects Ltd. applied for Bogudiyar Sirkari Bhyol project. Considering the financial hurdle criteria, the consortium led by VBC Ferro Alloys Ltd. and the consortium led by Nagarjuna Construction Company Ltd. were declared not qualified. Their technical strength and project development experience were not evaluated. It was reported that the net worth and the aggregate net cash accrual of the lead member of the consortium of Malana Power Company Ltd. and others is 14% and 9% respectively of the net worth and aggregate net cash accrual of the consortium. It was held out that, if a consortium consists of members belonging to the same group, entire group of companies would have an interest in the project, which

would ensure its completion, and thus, the criteria of lead member having net worth and aggregate net cash accruals more than 26% of the net worth and aggregate net cash accruals of the consortium has not been considered for rejection of the bids at qualification stage. Thus, consortium of Malana Power Company Ltd. and others was qualified. It was also held out that GMR Energy Ltd. has cleared financial hurdle criteria for Alaknanda project and it has also cleared the criteria of technical strength and project development experience and has scored a total of 74.69 points out of 100 points. It was also reported that the net worth and aggregate net cash accrual of the consortium led by Lanco Kondapalli Power Private Ltd. is less than the total net worth and aggregate net cash accrual for Bogudiyar Sirkari Bhyol and Alaknanda projects, but the net worth of the consortium is more than the net worth of each of the said projects. The said consortium was recommended for being considered qualified with overall points of 76.38 for anyone of the projects, i.e. Bogudiyar Sirkari Bhyol project or Alaknanda project. The consortium of Nuziveedu Seeds Ltd. and others was reported qualified for Alaknanda project having secured 58.87 points out of 100 points. Though the consortium of Gammon India Ltd. and others satisfied the financial hurdle criteria and also technical strength criteria, but it was reported that it does not have any project development experience and, accordingly, it has not scored any point earmarked for project development experience and, as a result, has not secured any point on that account resulting in it securing 49.50 points out of 100 points. In the report, ICRA Advisory Services reported that Reliance has applied for all the projects and that it has qualified with overall 93.50 points, of which, it received 22.50 points out of 25 points on account of technical strength, 22.50 points out of 25 points on account of project development experience and 48.50 points out of 50 points on account of financial strength. In relation to the consortium of GVK and L&T, ICRA Advisory Services reported that the consortium applied for all the projects and that it secured 93.50 points out of total points of 100, of which, 22.50 points were obtained out of 25 points on account of technical strength, 22.50 points out of 25 points on account of project development experience and 48.50 points out of 50 points on account of financial strength. It certified that the consortium has qualified on financial criteria. It, however, reported that the criteria of lead partner's financials to consortium financials is not satisfied, as financials of the lead partner are less than 26 per cent of the consortium. It also reported that the consortium does not have overall qualification due to the condition of lead member having 26 per cent of financials of the consortium. ICRA Advisory Services, then, concluded as follows:

"Conclusion

Though the consortium has scored substantial marks in both the technical and financial the evaluation criteria, they are not qualifying under the criteria of ratio of lead members financials to the consortium financials. This is in spite of the fact that the lead member on its own could have qualified for any one of the projects bid out except Urthing Sobla project under the financial criteria.

Considering the fact that this is the only second consortium, which has bid for all the projects, in order to ensure a fair competition in some of the projects where there are no other bids, the committee could consider qualifying this consortium under following circumstances for all the projects:

? L&T being agreeable to lead the consortium, or

? Both the partners taking joint and several responsibility of developing and implementing the project, if allotted to them.

Otherwise the committee may also consider qualifying the consortium to bid for any one of the 4 projects except Urthing Sobla project, by considering and giving weightage to the financials of GVK only."

viii. The aforementioned report of ICRA Advisory Services was considered on 28th September, 2004 by the Evaluation and RFQ Recommendation Committee constituted by the State. The Committee accepted all the recommendations of ICRA Advisory Services and, accordingly, approved Reliance for qualification for the issue of RFP for submitting the financial bid for the applied projects. The Committee approved the consortium led by Lanco Kondapalli Power Private Ltd. for either Bogudiyar Sirkari Bhyol project or Alkananda project. In relation to the consortium of GVK and L&T and the consortium of Malana Power Company Ltd. and others, the Committee, however, decided as follows:

"8.0 GVK Industries - L&T Consortium (GVK-L&T). The Committee noted that GVK-L&T has bid for all the 5 projects and as per the Evaluation report of ICRA the consortium has satisfied the Financial and Technical Hurdle Criteria and has scored 93.50 marks. The consortium does not meet the Criteria of lead partner's Financials to Consortium financials. The Net Worth of lead member viz. GVK is 11% of the Net Worth of the consortium (as against requirement of 26% as per RFQ) and the aggregate Net Cash Accrual of the lead member is 14% of the consortium's Net Cash Accrual (as against requirement of 26% as per RFQ). The Committee took note of the observation of ICRA that the Consortium has scored substantial marks in both technical and financial evaluation criteria but are not meeting the Criteria of lead partner's Financials to Consortium financials. The lead member of its own could have qualified for any one of the projects bid out except Urthing Sobla project under the financial criteria. The Consortium has bid for all the 5 projects and there needs to be a fair competition. The committee accepted the recommendations of ICRA for qualifying the consortium for all the projects subject to both the partners taking joint and several responsibility of developing and implementing the project, if allotted to them and accordingly approved the case of GVK-L&T for qualification for the issue of Request for Proposal for submitting the financial bid for the applied projects subject to the condition as stated above.

The Committee also decided that the condition of all the consortium members taking joint and several responsibility of developing and implementing the project, if allotted to the consortium shall also be applied in case of Malana

Power Company Limited."

ix. Financial bids for Mapang Bogudiyar, Urthing Sobla and Alaknanda were given by Reliance; whereas Financial bids for Mapang Bogudiyar, Urthing Sobla and Bogudiyar Sirkari Bhyol were given by the consortium of GVK and L&T. It appears to be the contention of the State that there was no bid for Kalika Dantu project.

x. While Alkananda Hydro Electric Project was awarded to GMR Energy Ltd., Urthing Sobla project was awarded to Reliance. In respect of Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects, two identically worded letters were written to the consortium of GVK and L&T on 7th May, 2005. The letter written to the said consortium in relation to Mapang Bogudiyar project is as follows:

" No. 2117/I/2005-04(8)-12/2003

From,

N. Ravi Shanker,

Secretary,

Govt. of Uttaranchal.

To,

Consortium of M/s GVK Industries and M/s L&T Ltd.,

Paigah House, 156-159,

Sardar Patel Road,

Secundrabad - 500 003,

Andhra Pradesh.

(Fax:- 040-27902665)

Department of Energy

Dated: Dehradun: 07 May, 2005

Subject:- Development, Implementation and Operation of Mapang Boghudiyar Hydro Power Project on BOOT basis - Letter of Award.

Dear Sir,

With reference to your proposal dated 4th April, 2005 under cover of your letter no. GVK/UJVNL/2005/5 dated 4th April, 2005 submitted in response to the Request for Proposal (RFP) sent to you for the captioned project issued by Uttaranchal Jal Vidyut Nigam Ltd. (UJVNL) vide letter no. 439/ED(B&C)/GM(Com.)/UJVNL/2005 dated 21st February, 2005 and letter no. 491/ED(B&C)/UJVNL/2005 dated 15th March, 2005 vide which the date of submission of the financial proposal was extended from 15th March, 2005 to 5th April, 2005, I am to convey the acceptance of your proposal with the project premium quote of Rs.

6,05,00,000/- (Indian Rupees Six Crore and Five Lakh only) by the Competent Authority.

2. This Letter of Award is subject to:

(i) Your depositing the above-mentioned project premium within 45 days from the date of this Letter of Award. 50% of the project premium above threshold premium of Rs. 5,00,00,000/- (Indian Rupees Five Crore) can be provided in the form of an acceptable Bank Guarantee which shall be valid up to the term of the Project Development Agreement. The Bank Guarantee shall be extended further up to the time of Financial Closure, after you satisfy yourself about the Techno-Economic Viability of the Project and propose to take up the implementation of the Project. The Bank Guarantee shall be encashable at the time of Scheduled Financial Closure (18 months from the signing of Implementation Agreement) or the Actual Financial Closure of the project, whichever is earlier.

(ii) Your entering into a Project Development Agreement with Government of Uttaranchal within 90 days from the date of this Letter of Award.

3. The Consortium partners shall be taking joint and several responsibility of developing and implementing the project.

4. As provided in the RFP, your failure to comply with the above requirements shall constitute sufficient grounds for annulment of this award and forfeiture of the Bid Security.

5. Please convey your unconditional acceptance of the conditions and acknowledge the receipt of this letter immediately.

Sincerely Yours,

(N. Ravi Shanker)

Secretary

No. 2117/I/2005-04(8)-12/2003/of date

Copy to:- CMD, Uttaranchal Jal Vidyut Nigam Ltd., Dehradun for information.

(N. Ravi Shanker)

Secretary"

xi. On 22nd October, 2005, two identical contracts were entered into between the State and GVK, and not between the State and the consortium of GVK and L&T, in respect of Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects. The salient features of the said agreements were that the same shall remain in force for a period of 37 months from the date of the agreements unless terminated earlier, however, the period of the agreements may be extended for such period as may be deemed necessary by mutual consent of the parties. By the agreements, the State permitted GVK to carry out the requisite studies and investigations for

preparation of DPR in respect of the said projects to satisfy itself about the techno-economic viability of the projects before taking up the implementation of the projects.

3. In the background of the facts as above, on 3rd June, 2009, Reliance filed a writ petition, registered as Civil Writ Petition No. 790 of 2009. In the writ petition, as aforesaid, Reliance prayed for quashing of awarding of Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects in favour of the consortium of GVK and L&T and for awarding of the said projects in favour of Reliance. In the writ petition, it was contended that, from newspaper, Reliance came to learn about institution of a Public Interest Litigation regarding award of the said projects in favour of the consortium of GVK and L&T, whereupon, Reliance wrote a letter to Sri Dilip Singh for complete set of papers and obtained the same. After going through such papers, Reliance came to learn that the State and UJVNL admitted in their counter affidavits that there has been deviation from the norms prescribed for the projects in question and that terms and conditions of RFQ have been violated after the advertisement was issued. A copy of the counter affidavit, filed by the State in the Public Interest Litigation, was annexed to the said writ petition, in paragraph 7 whereof, after setting out clause 6.1.6 of RFQ imposing the condition that the net worth and aggregate net cash accrual of the lead partner should not be less than 26% of the net worth and aggregate net cash accrual of the consortium, it was stated as follows:

"Lead member criterion was relaxed only for those bidders, which qualified all financial and technical hurdles except the lead member criterion."

In paragraph 8 of the said counter affidavit, it was stated that relaxation regarding lead member criterion was given to developers, i.e. Malana Power Company, GVK-L&T and Lanco Kondapalli Power Pvt. Ltd. by the committee (Evaluation Committee), otherwise a condition would have arisen, where only a single party would have existed for submitting the financial bid for three projects, i.e. Kalika Dantu, Mapang Bogudiyar and Urthing Sobla and, as a result, the whole of the tendering process would have had to be repeated. The fact remains that the said Public Interest Litigation is still pending.

4. The said writ petition was contested by UJVNL, who filed a counter affidavit. In the said counter affidavit, the stand of the State, as was depicted in its counter affidavit filed to the said Public Interest Litigation, was repeated. In paragraph 25 of the said counter affidavit, it was stated "The Bogudiyar Sirkari Bhyol Hydro Electric Project was awarded to respondent No. 6 being the sole bidder for the project".

5. The State, too, contested the said writ petition by filing a counter affidavit, where it repeated its earlier stand, as noted above. In addition to that, it was stated that Reliance did not submit financial bid for Bogudiyar Sirkari Bhyol project and, so far as Mapang Bogudiyar project is concerned, the same was given to the highest bidder.

6. GVK also contested the said writ petition by filing a counter affidavit. The deponent of the said counter affidavit held out that he has been authorised by GVK and the consortium of GVK and L&T to affirm the said counter affidavit. In that, it was contended, amongst others, that contracts have been executed and those have been acted upon and given effect to and, accordingly, no relief can be granted. The writ petition suffers from delay and laches. It relied upon the reasons for relaxation of lead member criterion as given by UJVNL and the State. It was contended that the Public Interest Litigation was engineered by Reliance. It was contended that having been a successful bidder for one of the projects, Reliance is estopped from challenging the tendering process having participated in the same.

7. L&T also filed a counter affidavit and, thereby, contested the writ petition. By the said counter affidavit, L&T adapted the counter affidavit filed on behalf of GVK and consortium of GVK and L&T. It was contended that the consortium of GVK and L&T has entered into agreements and, accordingly, there is an executed contract between the parties, which has been acted upon and given effect to. It was also contended that the relaxation, as was granted, was a reasonable exercise of power and was given in consideration of fair competition and to avoid a monopoly situation. It was, then, stated as follows:

"However, this came with a condition that L&T (consortium partner) was agreeable to lead the consortium and both partners took joint and several responsibility in the project. Answering respondent was agreeable to the same."

8. Rejoinder affidavits to those counter affidavits were filed by Reliance, whereupon, supplementary affidavits were filed by GVK on its behalf as well as purportedly on behalf of the consortium of GVK and L&T. To that, supplementary affidavits were filed by Reliance.

9. Considering the facts and circumstances as above and the issues raised on the pleadings, a learned Single Judge of this Court passed the judgment and order under appeal.

10. When the appeal was considered on 19th September, 2011, no one appeared on behalf of L&T. Noticing that there is no document on record of the case, which would show that L&T has undertaken joint and several responsibility of completing the projects, this Court, at the request of the counsel appearing on behalf of GVK, granted two weeks' time to GVK to produce the same. Subsequent thereto, on 21st November, 2011, the learned counsel engaged by L&T appeared and filed an affidavit. In paragraph 4 of the said affidavit, it was stated that, till now, there is no resolution of the Board of Directors of L&T taking up the joint and several responsibilities of developing and implementing the said projects along with GVK. It was also stated that the reason is that the stage of taking up the responsibility of developing and implementing the said projects has not yet reached. It was stated that, along with the bid document, MOUs dated 21st June, 2004 and 22nd June, 2004; internal agreement dated 22nd June,

2004 and Power of Attorney dated 25th June, 2004 given by L&T in favour of GVK to represent the consortium in connection with the project until culmination of process of bidding and, thereafter, till concession agreement is entered into; and also a letter dated 25th June, 2004 giving an undertaking that, in the event of being qualified, "we agree to be jointly with GVK and severally liable to UJVNL, its successors and assigns for all obligations, duties and responsibilities arising from or imposed by any contract subsequently entered into between the UJVNL and our group"; were filed. A copy of the said letter dated 25th June, 2004 was annexed with the said affidavit. The said letter is extracted as under:

"Ref.: LTCD/DPBU/UTHP-IB

June 25, 2004

The General Manager (I&P)

Uttaranchal Jal Vidyut Nigam Ltd.,

Ganga Bhawan, Yamuna Colony,

Dehradun - 248001.

Re: Application for Request For Qualification for Project(s) Kalika Dantu or/and Mapang Bogudiyar or/and Bogudiyar Sirkari Bhyol or/and Urthing Sobla or/and Alaknanda in the category "100 MV & above" for the Work of Development and Operation of Hydro Power Projects.

We wish to confirm that our company has formed a group with GVK Industries Limited for purposes associated with Project(s) Kalika Dantu or/and Mapang Bogudiyar or/and Bogudiyar Sirkari Bhyol or/and Urthing Sobla or/and Alaknanda.

The group is led by GVK Industries Limited whom we hereby authorise to act on our behalf for the purposes of applying for qualification.

In the event of our group being qualified and invited to bid for Project(s) Kalika Dantu or/and Mapang Bogudiyar or/and Bogudiyar Sirkari Bhyol or/and Urthing Sobla or/and Alaknanda in the category "100 MV & above, we agree to be jointly with GVK Industries Limited and severally liable to UJVNL Ltd., its successors and assigns, for all obligations, duties and responsibilities arising from or imposed by any contract subsequently entered into between UJVNL Ltd. and our Group.

Yours faithfully,

For LARSEN & TOUBRO LIMITED

(K. VENKATESH)

VICE PRESIDENT - DEVELOPMENT PROJECTS

ECC DIVISION."

It was also stated in the said affidavit that the consortium partner, i.e. GVK and

L&T, accepted the Letter of Award subject to conditions mentioned therein. It was stated that the project has been allotted to the consortium partners subject to condition No. 4.6 of RFQ document, namely that implementation agreement will be signed only after DPR is accepted. It was stated that GVK has executed project development agreement on its behalf and on behalf of L&T. It was stated that GVK was authorised by the Power of Attorney to do, on behalf of the consortium, all or any acts till the concession agreement is entered into.

11. Since in the agreements it was not stated that, as authorised by L&T, GVK is entering into the agreements apart from its own behalf, also on behalf of L&T, this Court felt that it is not satisfied that, in terms of the Letter of Intent dated 7th May, 2005, L&T has taken joint and several responsibility of developing and implementing the said projects and, accordingly, by an order dated 21st November, 2011, directed L&T to file an affidavit enclosing the Board's resolution passed by L&T taking up joint and several responsibility of developing and implementing the said projects along with GVK.

12. In response to the said direction, an affidavit was filed by L&T on 27th December, 2011, where it stated that the letter of L&T dated 25th June, 2004 authorised GVK to act on behalf of L&T for the purpose of applying for qualification, where it has been stated that L&T will remain responsible for all obligations, duties and responsibilities arising from or imposed by any contract subsequently entered between UJVNL and "our group", i.e. the group comprising of GVK and L&T. In paragraph 4 of the said affidavit, it was stated that, till now, there is no resolution of the Board of L&T taking up joint and several responsibilities of developing and implementing the said projects along with GVK. The reason is that the stage of taking up responsibility of developing and implementing the said projects has not yet reached. It was stated that, after the international notice inviting RFQ was published, the Board of L&T resolved to submit bid document for qualification along with GVK as its consortium partner and submitted the application jointly. In paragraph 7 of the said affidavit, it was stated that, along with bid document, MOU dated 21st June, 2004; MOU dated 22nd June, 2004; internal agreement dated 22nd June, 2004; and Power of Attorney dated 25th June, 2004 given by L&T in favour of GVK to represent the consortium in connection with the projects "until the culmination of the process of bidding and thereafter till concession agreement is entered into with UJVNL", were filed along with letter dated 25th June, 2004. It was stated in paragraph 9 of the said affidavit that consortium partner, i.e. GVK and L&T, accepted the Letter of Award subject to the conditions mentioned therein and that means that the consortium partners shall be taking joint and several responsibility of developing and implementing the projects. It was stated that GVK has executed the agreements on its behalf and on behalf of L&T under the power given to it in the Power of Attorney dated 25th June, 2004. In paragraph 12, it was mentioned that the Power of Attorney provided "to do on behalf of the consortium, all or any of the acts, deeds in connection with the project until the culmination of the process of bidding and thereafter till the concession agreement is entered into

with UJVNL". It was stated in paragraph 16 that the stage of entering into the concession agreement has not yet reached. It was also stated that concession agreement will be entered into only when the projects are techno-economically viable.

13. Subsequent thereto, yet another affidavit was filed by L&T, which was affirmed on 27th February, 2012 before Notary Public. In that, it was stated that, by a Board resolution dated 24th January, 1992, Mr. A. Ramakrishna was authorised by L&T to enter into contracts on behalf of L&T and also to sub-delegate such power. Sri A. Ramakrishna had issued a Power of Attorney in favour of Sri K. Venkatesh, who has been authorised to sign and deliver tenders and to sign and enter into contracts on behalf of L&T. It was stated that, since such powers of Sri K. Venkatesh are still valid, it was felt that there was no necessity of further passing a Board's resolution. It was, then, stated that consequent upon creation of independent companies, an independent company was specifically created for the infrastructure business, which is named as "Infra IC". It was stated that it is proposed to pass resolution in the "Infra IC Board" for the purpose of undertaking joint and several responsibility of developing and implementing the said projects and the same shall be placed before this Court.

14. Subsequently, yet another affidavit was filed on 28th March, 2012 by L&T. With the said affidavit, true copy of resolution passed by the Board of "Infra IC" of L&T Ltd. "the Company" by circulation was annexed, whereby it was resolved that the company has and shall have joint and several responsibility, along with GVK, towards the employer for the development and execution of the said projects. It was also resolved to confirm, ratify and affirm all acts, deeds and things done by the company through the Power of Attorney holder on behalf of the company in connection with the consortium arrangement with GVK for the said projects.

15. In an affidavit filed by the State before this Court, the State stated that L&T has not submitted any document, whereby L&T has undertaken to take up joint and several responsibility of completing the 5 projects being the subject matter of the tender. It was also stated that no DPR has yet been submitted in respect of Mapang Bogudiyar project and that DPR was submitted on 13th April, 2010 in respect of Bogudiyar Sirkari Bhyol project.

16. In one of the affidavits filed before this Court, GVK held out that Goriganga Hydro Power Pvt. Ltd., the special purpose vehicle created for implementation of the said projects, spent an amount of approximately Rs. 47 crores towards investigation and preparation of DPR. The details thereof were also furnished. In that, it was shown that Rs. 13 crores 34 lacs approximately were spent on legal and professional charge. In an affidavit filed by Reliance, it was contended that, in the said special purpose vehicle, L&T has no stake, the same is a wholly owned subsidiary of GVK. This assertion has not been denied by GVK or by L&T.

17. In the appeal preferred by Reliance, its contention is that the learned Single

Judge committed an error by not awarding Mapang Bogudiyar project to the next qualified and second highest financial bidder, i.e. Reliance. It contended that the learned Single Judge also erred in not setting aside the award of Bogudiyar Sirkari Bhyol project in favour of the consortium of GVK and L&T, even after concluding that the said consortium did not meet the mandatory qualifying requirement. It was also contended that it was an error of record in not setting aside the award of Bogudiyar Sirkari Bhyol project, granted in favour of the consortium of GVK and L&T, solely on the ground that the appellant did not submit financial bid for the said project. In course of submissions, the learned Senior Counsel, appearing on behalf of Reliance, submitted that it is now an undisputed fact that L&T is no longer a part of the consortium of GVK and L&T. It was submitted that, though financial bid for Bogudiyar Sirkari Bhyol project was not given by Reliance, but, having regard to the fact that award of the said project in favour of the consortium of GVK and L&T was in breach of an essential condition, Bogudiyar Sirkari Bhyol project should have been directed to be re-advertised for bidding. It was submitted that, in such event, not only Reliance but others, who are otherwise eligible, can bid for the same. However, at the end of submissions, the learned Senior Counsel, appearing on behalf of Reliance, submitted that his client is ready to pay 50% of the cost incurred by GVK, less legal and professional charges. By reason of such submission, it appeared to us that Reliance is really aggrieved for not awarding Mapang Bogudiyar project in its favour.

18. In the appeal filed by GVK, it was contended that the learned Single Judge erred by entertaining the writ petition of Reliance without considering the question of maintainability, as to locus standi of Reliance, delay, laches and acquiescence. It was contended, at the best, Reliance had only right of being allowed to participate and being considered, which was done and, accordingly, there was no question of infringement of Article 14 of the Constitution of India. It was contended that GVK invested huge amounts to discharge its contractual obligations and the same was not considered while allowing the writ petition of Reliance partly. It was also contended that in contracts, having commercial element, more discretion has to be considered to be with the public authority giving them more leeway and liberty to assess the overall situation benefiting the public at large, which was not taken into consideration by the learned Single Judge. No motive could be imputed on the State, as the State has made a conscious decision to get some capable investors to bid for the project, which was as per the policy and in larger public interest, namely, avoiding monopoly of any one of the bidders. The State exercised the power of relaxation for bona fide reasons and in public interest. It was contended that the courts can interfere only on the grounds of unfairness and the conduct of the State could not be said to be unfair, as the same was motivated by larger public interest. In course of submissions, the learned Senior Counsel, appearing on behalf of GVK, submitted that GVK and L&T are group companies, because, in association with each other, they have implemented and are in the process of implementing many projects.

Accordingly, they could be treated as one and the same. We rejected the said contention outright and informed the learned counsel accordingly, inasmuch as, there is a vast difference between group companies and companies acting in collaboration with each other. The learned counsel did not attempt to persuade us to take a different view. It was also submitted that the State was entering into a commercial contract and, accordingly, while scrutinising the actions of the State, the Court is required to see whether there was any mala fide on the part of the State. It was contended that from the records, as produced before the Court, no prudent person could come to the conclusion that there was any mala fide on the part of the State in awarding the projects in question in favour of the consortium of GVK and L&T.

19. Before we deal with the respective contentions of the parties, it would be appropriate on our part to point out three salient factors, which have not been dealt with in any of the pleadings filed by the parties or in the grounds of appeals or in course of submissions, namely:

(i) what was the reason for incorporating a condition in the RFQ that the net worth and aggregate net cash accrual of the lead partner should not be less than 26% of the net worth and aggregate net cash accrual of the consortium;

(ii) when and how the offer letters of the State dated 7th May, 2005, addressed to the consortium of GVK and L&T but made over to the office of GVK, were brought to the notice of L&T; and

(iii) how the State satisfied itself that the consortium partners, namely GVK as well as L&T, took joint and several responsibility of developing and implementing the said two projects?

Neither GVK, nor the State or UJVNL, has brought on record unconditional acceptance of the conditions of the said offer letters dated 7th May, 2005.

20. It is true that the State desired to enter into commercial transactions with private sector participants and, for that matter, proposed to enter into agreements. Those agreements, no doubt, are commercial agreements. When, however, State enters into agreements, which are though commercial, but not entered into in discharge of its day-to-day affairs, and, by the agreements, parts with State largesse; it cannot behave like an ordinary businessman, whose only motive is to achieve the maximum commercial success, and is bound to act fairly, reasonably and impartially.

21. Mala fides are of two kinds, namely legal mala fide and factual mala fide. An action on the part of the State, howsoever sincere and honest the same may be, will be deemed to be a malice in law if the same is contrary to law. When it is established from the facts proved that an action on the part of the State is irrational, unreasonable and partial, or without authority of law, the same will tantamount to malice on facts. While it is possible to establish in the writ jurisdiction that the action complained of is contrary to law, or without authority

of law, it is not possible to establish in the said jurisdiction that the action complained of is otherwise a malice on facts, inasmuch as, there is no scope in the writ jurisdiction to prove a fact by evidence. In writ jurisdiction, a malice on facts can only be established when the action on the part of the State complained of is irrational, unreasonable and partial on the face of the records, i.e. when no fact is required to be proved as those are admitted facts.

22. Except the policy as above, it cannot be said that the actions complained of are in breach of any law as accepted in common parlance. However, law is nothing but a set of rules governing a particular subject made by the authority, who has accepted authority or command to set down such rules. The purpose of preparing the RFQ as guidelines for evaluation was for evaluation of the applicants in terms of the said policy. The guidelines, thus furnished, should, in the circumstances, be treated to be the law governing the subject.

23. The policy envisaged that international bids shall be invited from private sector investors for each identified project and the applicants responding to such invitation will be eligible for competitive bidding only when they are qualified in the pre qualification selection, whereafter, the project will be allotted to the highest bidder. The policy mandated that each attribute, set for pre qualification, will be evaluated and guidelines for evaluation shall be specified at the time of inviting proposal for pre qualification. In that background, the RFQ was made. In the RFQ, there was no concept of treating group companies as one. RFQ made it clear that technical strength and project development experience parameters would be evaluated only if the criteria for financial strength, as detailed in Clause 6.4.3 (of RFQ), is cleared. In Clause 6.4.3, it was not mentioned that the net worth and aggregate net cash accrual of the lead partner should not be less than 26% of the net worth and aggregate net cash accrual of the consortium, but the said term was inserted in the RFQ by using the word "should". The RFQ will show that, while one could individually respond, so more than one individual could also respond jointly. While more than one individual is responding jointly, RFQ held out that one of them should be nominated as the lead partner and that the net worth and aggregate net cash accrual of the lead partner should not be less than 26% of the net worth and aggregate net cash accrual of the consortium. The RFQ, therefore, while specifying guidelines for evaluation of the applicants, made it clear that when two or more individuals or entities, as consortium partners, are applying, the nominated lead partner must be of substance and such substance can only be demonstrated when it is shown that the net worth and aggregate net cash accrual of the lead partner is not less than 26% of the net worth and aggregate net cash accrual of the consortium. That was a conscious decision. That decision had the force of law. The same could not be breached in order even to achieve an honest and sincere object. In the event, the said requirement was not put forth, it may be possible that many more could respond to the RFQ. The fact remains, as has come on record, that the advertisement published by UJVNL was responded by 13 people, who purchased RFQ, but only 9 gave bid. It is not known how many of those respondees did not respond for the lead partner did

not have the afore-mentioned requirement. In the circumstances, the fact that there was malice in law stands established. The learned Single Judge, while dealing with the writ petition, gave more emphasis thereon.

24. Further, the guidelines, in the form of RFQ, were made to guide the applicants as well as the employer and everyone assisting the employer for evaluation of the applications. The contents of the RFQ were, therefore, equally binding on the applicants as well as the employer and anyone assisting the employer in the process of evaluation of applications. All of them were, accordingly, required to comply with the conditions, thus, imposed in the RFQ. The RFQ authorised UJVNL to modify the terms of the RFQ, but made it clear that such discretion can be exercised by UJVNL at any time prior to the deadline for submission of applications in response to RFQ. UJVNL, therefore, could only exercise its discretion to alter the terms of the RFQ until before the deadline for submission of the applications in response to the RFQ, which expired at 1600 hours of 15th May, 2004. The fact remains that UJVNL did not do so. Law is settled that, if it is devised to do a thing in a particular manner, the same must be done in that manner or should not be done at all. The circumstances of the case, as depicted above, therefore, squarely fall within the parameters of malice in law.

25. The question is whether, on the facts admitted, it is also established that there was malice on facts. RFQ required applicants to supply required informations by filling-up several formats annexed to the RFQ. The consortium of GVK and L&T supplied such informations by filling-up those formats. Those formats were considered by ICRA Advisory Services while evaluating the financial criteria specified in the RFQ. Upon such consideration, ICRA Advisory Services opined that the net worth and aggregate net cash accrual of the lead partner, GVK, is less than 26% of the net worth and aggregate net cash accrual of the consortium of GVK and L&T. This finding has not been challenged either by GVK or by L&T. The logical conclusion, therefore, would be that, while submitting the formats, it was well within the knowledge of GVK as well as L&T that one of the conditions of RFQ, namely that the net worth and aggregate net cash accrual of the lead partner should not be less than 26% of the net worth and aggregate net cash accrual of the consortium, was not being met, but despite that, they submitted the informations as were required to be submitted by filling-up the formats annexed to the RFQ.

26. ICRA Advisory Services were engaged to assist UJVNL to evaluate qualification criteria specified in the RFQ. At that stage, no financial bid was given by any of the applicants. ICRA Advisory Services was, therefore, concerned with the only question whether the applicants have qualified on the basis of the parameters set forth in the RFQ so as to entitle them to give financial bid. Having regard to the scope of engagement of ICRA Advisory Services, their opinion as regards the evaluation of qualification criteria had some force. Even then, the same was neither binding on UJVNL or on the State. Having had completed

evaluation of the qualification criteria, ICRA Advisory Services submitted a report containing its opinions pertaining to qualification of the applicants and, while doing so, expressed certain views based on certain parameters not provided in the policy or RFQ. Neither the report, nor the opinion contained therein, was binding on the State.

27. Although the policy as well as the RFQ did not say a word about a consortium consisting of members belonging to the same group, ICRA Advisory Services, in its report, opined that, if a consortium consists of members belonging to the same group, the entire group of companies would have an interest in the projects, which would ensure its completion and, thus, the criteria of lead member having net worth and aggregate net cash accrual more than 26% of the net worth and aggregate net cash accrual of the consortium is not required to be considered for rejection of the bids at qualification stage. On that premise, the consortium led by Malana Power Company Ltd. was reported to be qualified. It opined that the consortium led by Lanco Kondapalli Power Private Ltd. does not have net worth and aggregate net cash accrual for Bogudiyar Sirkari Bhyol and Alkananda projects for which it had applied, but it has net worth in respect of each of the said projects and, accordingly, recommended that the said consortium may be considered qualified for either Bogudiyar Sirkari Bhyol project or Alkananda project. It clearly held out that the consortium of GVK and L&T does not have overall qualification as the lead member does not have 26% of financials of the consortium. Despite that and noting that a condition of RFQ is lacking, in respect of the said consortium, it gave two opinions, namely, (i) that since GVK, on its own, could have qualified for any one of the projects, except Urthing Sobla project, under the financial criteria, the consortium of GVK and L&T may be considered qualified for any one of the projects, except Urthing Sobla project, by considering and giving weightage to the financials of GVK only; and (ii) in order to ensure a fair competition in some of the projects, where there are no bids, the consortium of GVK and L&T may be considered qualified, provided L&T agreeing to lead the consortium, or GVK and L&T taking joint and several responsibility of developing and implementing the project, if allotted to them.

28. Subsequent thereto, the report of ICRA Advisory Services was considered by the Evaluation and RFQ Recommendation Committee, when it accepted all the recommendations of ICRA Advisory Services in respect of all the applicants, including the consortium led by Lanco Kondapalli Power Private Ltd., but except in respect of the consortium of GVK and L&T and the consortium led by Malana Power Company Ltd. Having had noted that GVK, on its own, could have qualified for any one of the projects except Urthing Sobla project under the financial criteria, the Committee did not qualify the consortium of GVK and L&T for any one of the projects except Urthing Sobla project, but qualified the consortium of GVK and L&T for all the projects subject to both GVK and L&T taking joint and several responsibility and, while doing so, did not restrict the qualification in respect of projects, where there are no bids as was opined by ICRA Advisory

Services. Similarly, the Committee qualified the consortium led by Malana Power Company Ltd. on the condition that all the consortium members should take joint and several responsibility of developing and implementing the project. While doing so, it did not occur to the Committee that the same is not permissible in terms of the conditions imposed in the RFQ and that there is no power of relaxation by which the terms of the RFQ could be altered or relaxed at the time when the Committee was considering the report of ICRA Advisory Services.

29. The State, thereupon, considered the recommendations made by the Committee. While it accepted the recommendations of the Committee, how it acted in respect of the consortiums led by Malana Power Company Ltd. and Lanco Kondapalli Power Private Ltd., is not known, inasmuch as, no papers in connection therewith are available on records. But, how it acted in respect of the consortium of GVK and L&T, is known. On the basis of the recommendation of the Committee, it issued two offer letters in relation to Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects, where it categorically stated that the consortium partners shall be taking joint and several responsibility of developing and implementing the projects and, failure to comply with the same, shall cause sufficient grounds for annulment of the said letters of award. Though the said offer letters were addressed to the consortium of GVK and L&T, but the same was not made available to GVK and L&T independently.

30. While exercising power of judicial review, court is not concerned with the decision, but is concerned with the decision making process. In the instant case, the Court was and still is concerned with the process adopted to evaluate pre qualification of the applicants. The court, while exercising such power of judicial review, is not concerned with what the authority concerned could do, but with what the authority concerned did. If, what the authority concerned has done, is permissible, i.e. authorised by the law governing the subject; judicial review court has hardly any say in the matter. It cannot say that the things could be done in a better way or in a different way. Therefore, the principal question is, what ICRA Advisory Services, the Committee and the State did in the instant case while evaluating the application of the consortium of GVK and L&T, they were entitled to do what they did? The answer to the question will be an emphatic "No", for they did what they were not permitted to do either by the policy or by the RFQ. Therefore, mala fide on facts writ large on the face of admitted records.

31. It was held out by ICRA Advisory Services that what they have done was aimed at encouraging competition. The Committee proceeded on that basis. The State must have also proceeded on that basis. It was felt that, if what has been done was not done, the same would require re-advertisement and re-evaluation of qualification of applicants, resulting in loss of time. Neither the policy envisaged, nor the RFQ provided, that, if for the projects or for any project there is not more than one applicant, the process initiated to award projects will be cancelled and fresh steps will be taken. Further, when, after evaluation process

was completed in the manner as above and financial bids were given, it transpired that there is only one bidder in respect of Bogudiyar Sirkari Bhyol project. There was no competition in respect of the said project and, at the same time, no attempt was made to ward off monopoly in respect of the said project. Despite that, no step was taken to re-initiate process of settlement of the said project. Therefore, a reasonable man, in the circumstances, will have no other option but to conclude that the purported stand taken for enlarging competition, restricting monopoly, etc., was nothing but a bogey. It was not exercise of power mala fide, but it was a mala fide action.

32. Despite having had not sent copies of the offer letters dated 7th May, 2005 to L&T, the State did not insist upon either GVK or the consortium of GVK and L&T to convey unconditional acceptance of the conditions contained in the said offer letters, as were specifically mentioned therein. Instead, the State entered into contracts on 22nd October, 2005 with GVK alone, and not with GVK and L&T or with consortium of GVK and L&T, in respect of Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects. That action on the part of the State smacks on the ground of irrationality, unreasonableness and extreme partiality and, accordingly, proved mala fide on facts.

33. It must be deemed that ICRA Advisory Services, the Committee and the State must have gone through each and every information supplied by the applicants, along with their applications, and, accordingly, it must also be deemed that each one of them was aware of the letter of L&T dated 25th June, 2004, which was submitted along with the application of the consortium of GVK and L&T in discharge of its obligation to submit Format I-B annexed to the RFQ. If, by that letter, L&T had already taken up joint and several responsibility of developing and implementing the projects, then, what was the reason for ICRA Advisory Services and the Committee to insist upon GVK and L&T to take joint and several responsibility of developing and implementing the projects and the State insisting in the offer letters to unconditionally accept that GVK and L&T shall take joint and several responsibility of developing and implementing the projects? The reason is that, in the Format I-B, it was insisted that the members of the group shall indicate that they are jointly and severally liable for all obligations, duties and responsibilities arising from or imposed by any contract subsequently entered and not for developing and implementing the projects. The fact remains that L&T refused to take joint and several responsibility of developing and implementing the projects and the same was condoned, as aforesaid, by entering into the contracts dated 22nd October, 2005. Can it be said that the said action was either rational or reasonable or impartial? The answer thereto would be emphatic "No".

34. It was contended that there was unreasonable delay, laches, negligence and acquiescence on the part of Reliance. No attempt was made to establish that Reliance had knowledge of what was done by ICRA Advisory Services, the Committee and the State in relation to Mapang Bogudiyar and Bogudiyar Sirkari

Bhyol projects any time prior to the time Reliance came to learn about the same, as was stated in the writ petition. Accordingly, there was no acquiescence on the part of Reliance. It is nobody's case that, from the time of such knowledge, there was any delay or laches on the part of Reliance to take legal remedy. No attempt was made to establish that the Public Interest Litigation was instituted at the behest of Reliance. Merely because Reliance participated in the process of evaluation and, subsequently, in the bidding process, Reliance cannot be estopped from contending that, while evaluating the qualification of the applicants and accepting the bids, things, ought not to have had been done, were done.

35. An executed contract is one where the parties to the contract have discharged their obligations to the full, within and in terms of the contract. In the instant case, there is no assertion that any of the obligations, pertaining to the contract in relation to Mapang Bogudiyar project, has been discharged. GVK even has not bothered to indicate what step it has taken in relation thereto and what expenses it has incurred therefor. At one stage, a proposal was given by GVK to the State to integrate both the said projects. The State agreed to the said proposal. Later, GVK backed out on some pretext or the other. Subsequently, insofar as Bogudiyar Sirkari Bhyol project is concerned, a DPR has been prepared and the same has also been submitted beyond the time stipulated in the contract and without obtaining an extension. In such circumstances, it cannot be said that the contract stands executed.

36. In the instant case, from the facts as above which have been culled out from the admitted records, the only conclusion to a prudent person would be that GVK, well in advance, was aware that its financials will permit GVK to bid for any one of the projects, except Urthing Sobla project. It could offer to be evaluated for one of those projects. Having had done so, it could take a chance to try to get any other project in consortium with L&T. It did not do so, though the same was permissible and as Himsun Power Pvt. Ltd. did by associating with different partners for different projects. At the same time, it could not persuade L&T to lead the consortium of GVK and L&T. In the normal circumstances, GVK could not represent in the application filed by the consortium of GVK and L&T that the said consortium led by GVK is applying for all the projects, unless it was sure that disqualification of GVK would be ignored. The confidence of GVK that its disqualification would be ignored is established from the opinions of ICRA Advisory Services as well as of the Committee. GVK was sure that the State will ignore the opinions of ICRA Advisory Services and of the Committee that GVK and L&T would only be qualified on the condition that GVK and L&T taking joint and several responsibility of developing and implementing the projects and, accordingly, while the State held out so in the offer letters dated 7th May, 2005 and called upon acceptance of the condition that the consortium partners shall be taking joint and several responsibility of developing and implementing the projects, the agreements dated 22nd October, 2005 were entered by the State with GVK alone. Without being so assured, no prudent person would have acted

in the manner GVK has acted in the instant case. The whole action, therefore, smacks on the ground of mala fide on facts.

37. Normally, courts will not interfere with in a case of this nature when public money has been spent to implement a contract and, particularly when, upon spending such money, the work has progressed to a great extent, but not otherwise. In the instant case, no public money has been spent to implement the contract. There is no progress at all in respect of one of the projects. In respect of the other, the work has progressed, but result thereof was shown beyond the time stipulated in the contract and without obtaining extension. If, in such circumstances, the court is thought to be bereft of power to interfere, then, the same would tantamount to deny the court of its obligation to restore legal right of a litigant before it.

38. The facts, as have been brought on record, suggest that L&T disappeared from the scenario after submission of the application by the consortium of GVK and L&T. There is not a single whisper from L&T, until such time the writ petition of Reliance was filed. When the court insisted for production of a Board's resolution of L&T, suggesting that it has accepted unconditionally the terms and conditions of the letters of award; in an affidavit filed, it was contended that L&T has been restructured and an independent company was specifically created for infrastructure business with the name "Infra IC". It has not been brought on record when the company, named "Infra IC", was incorporated. It has also not been brought on record, upon incorporation of "Infra IC", what rights, privileges, assets, obligations and the liabilities of L&T vested in it. It has also not been stated when the company "Infra IC" was incorporated. A purported Board's resolution of the company "Infra IC" has been produced to suggest that "Infra IC" has resolved to take joint and several responsibility for the development and execution of the said projects and also to confirm, ratify and affirm all acts, deeds and things done by the Power of Attorney holder in connection with the consortium arrangement with GVK for the said projects. The said state of affair clearly suggests that L&T is no longer in the picture and, instead, some other company known as "Infra IC" has stepped in. While, in terms of RFQ, change in composition of a consortium was permitted only till the last date of submission of RFQ, i.e. till 15th May, 2004, neither GVK nor the company known as "Infra IC" ever even thought of conveying to the State that "Infra IC" has stepped into the shoes of L&T.

39. Having had, thus, held that awarding of Mapang Bogudiyar and Bogudiyar Sirkari Bhyol projects in favour of GVK, as has been done in the instant case, was utterly mala fide, we have no other option but to hold that financial bids given by GVK in respect of the said projects are to be ignored for the same have no value at all in the eyes of law. As a result, it was obligatory on the part of the State to award Mapang Bogudiyar project to Reliance, it being the highest bidder for the said project. There was no just reason for the learned Single Judge, while rendering the judgment and order under appeals, not to issue a mandamus upon

the State to award the said project to Reliance. While, however, doing so, it was obligatory in public interest to ensure that Reliance matched the offer given by GVK in respect of the said project.

40. In the circumstances, there is no scope of interference with the judgment and order under appeal in the appeal filed by GVK, which is, accordingly, dismissed.

41. Therefore, while allowing the appeal of Reliance, we direct the State to award Mapang Bogudiyar project to Reliance on such financial consideration at which the same was awarded to GVK. In relation to Bogudiyar Sirkari Bhyol project, we leave the matter with the State. It may cancel the contract in respect of the said project with GVK and take recourse to fresh exercise for awarding the said project and, thereby, establish that, in the matter of dealing with the people, it acts rationally, reasonably and impartially; but, if not, to record reasons in support thereof, which can only be in public interest, and to communicate the same to Reliance, GVK and L&T.

42. We also direct the State to refund whatever it has received from GVK after receiving the financial consideration from Reliance in respect of Mapang Bogudiyar project. It goes without saying that, in the event, the State decides to cancel award of Bogudiyar Sirkari Bhyol project in favour of GVK, State will refund moneys that it has received from GVK on account of the said project.

43. The State will offer Mapang Bogudiyar project to Reliance, on the condition as above, within a period of 30 days from today and discharge all other obligations, in terms of the directions as above, within 60 days from today.

44. In view of the concession given by the learned Senior Counsel appearing on behalf of Reliance in course of submissions, we direct Reliance to pay a sum of Rs. 16.83 crores (Rs. 47 crores minus Rs. 13.34 crores divided by 2) to GVK within 30 days from the date of receipt by Reliance of a letter of request from GVK asking for the said payment, but only after the State has awarded Mapang Bogudiyar project to Reliance. The appeals are, thus, disposed of.