

(2007) 06 BOM CK 0081
In the Bombay High Court
Case No : Writ Petition No. 39 of 2007

Reliance Energy Ltd.

APPELLANT

Vs

MSRDC Ltd. and Others

RESPONDENT

Date of Decision : 04-06-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2007) 4 ALLMR 566 : (2007) 4 BomCR 93 : (2007) 109 BOMLR 1042 : (2007) 5 MhLj 769

Hon'ble Judges : J.N. Patel, Acting C.J.; S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : Rafiq Dada, Shaunak Thakker, D.J. Kakalia, Bhavna Singh and Reshma Thakwani, instructed by Mulla and Mulla, for the Appellant; R.M. Kadam, General and P.P. Chavan, Little and Co. for respondent Nos. 1 and 2 and instructed by P.G. Sawant, A.G.P., for the Respondent

Judgement

This Judgment has been overruled by : Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, (2007) 4 BC 391 : (2007) 2 CTLJ 140 : (2007) 11 JT 1 : (2007) 11 SCALE 49 : (2007) 8 SCC 1 : (2008) 85 SCL 320 : (2007) 9 SCR 853

S.C. Dharmadhikari, J.—This petition under Article 226 of the Constitution of India challenges the decision of the Respondents excluding petitioners from participating as a Bidder for the Mumbai Trans Harbour Link Project. The decision is at Exh.V page 332 of the paperbook. Aggrieved by this action of respondents, the petitioners are praying thus:

(a) That this Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or other appropriate writ order or direction to the respondents to issue a request for proposal document for the MTHL Project to first petitioner's consortium to enable the first petitioners consortium to participate in the second stage of the bidding process and to consider the first petitioner consortium's request for proposal document for the MTHL Project

along with others in the second stage of bidding process on merits.

(b) That this Court be pleased to issue a writ of certiorari or other appropriate writ, order or direction calling for the records of the first petitioner consortium's case and after looking into the same to set aside and quash the actions, orders and decisions of the respondents in refusing to issue a request for proposal document to the petitioners.

(bb) That this Court be pleased to issue an appropriate writ, order or direction including a writ in the nature of certiorari, calling for the records relating to the communication dated 7/11/2006 Exh.V and after going through the same to quash and set aside the same. (bbb) That this Court be pleased to issue a writ of mandamus or any other appropriate writ restraining the respondents in any manner acting on the communication dated 7/11/2006 Exh.V hereto.

In substance, the reliefs prayed by the petitioners in this petition under Article 226 of the Constitution of India are that the request for qualifying them for the subject contract be granted and they be permitted to participate in the second phase/stage of the contract. Thus, their request for participation having been rejected at the threshold, the apprehension of petitioners is that their bid would not be processed any further. According to the petitioners, the participation would then be restricted to only those bidders whose request for qualifying them has been accepted. It is alleged that this would considerably prejudice the petitioners who are otherwise eligible and qualified so also capable to undertake the project in question.

2. The undisputed facts are that the respondents have proposed a sea link connecting Mumbai to the main land with a view to reduce the congestion on the Island city and providing impetus to development on mainland. The proposal was initially conceived in 1970 with two alternate routes.

(i) Colaba - Uran Sea Link (Southern alignment)

(ii) Sewri - Nhava Sheva (Northern Alignment)

The steering group appointed by Government of Maharashtra (GOM) in 1981 under the Chairmanship of late Shri JRD Tata conducted a feasibility study of the project and recommended implementation of Northern alignment (Sewri-Nhava). The approval to the alignment was communicated by Prime Minister's Office to GOM on January 25, 1984. Thereafter Mumbai Metropolitan Regional Development Authority (MMRDA) took up a study in 1997 through consultants M/s. Consulting Engineering Services (India) Ltd. (CES), to update the earlier feasibility study conducted in 1984 in terms of cost and new developments. Subsequently, the Government of Maharashtra transferred the project to Maharashtra State Road Development Corporation (MSRDC) (respondent No. 1 herein) for further action in 1997. MSRDC continued the study by M/s.CES (Consultants) and the final report comprising all updates was submitted to Ministry of Environment and Forest for Environment Clearance in May, 1998.

After replying to various queries and making presentation to a Expert Committee of Ministry of Environment and Forest, the Environment Clearance to the project was received on March 11, 2005. Further, MSRDC was appointed as Entrepreneur by Cabinet Committee for Infrastructure, Government of Maharashtra in its meeting held on March 22, 2005 and was directed to invite the bids on Build Operate and Transfer (BOT) basis.

3. The GOM vide its G.R.dated June 28, 2004 formed a High Power Committee (HPC) for this project under the Chairmanship of Chief Secretary, GOM. The High Power Committee in its meeting held on July 21, 2004 approved the following:

(i) Scope of work : 6 Lane Road bridge from Sewri to Nhava;

(ii) Methodology of inviting bids:

The Project be taken up by MSRDC by inviting BOT offers from the interested parties on BOT basis.

(iii) Toll structure;

The High Powered Committee also approved in principle, toll rates. The High Power Committee directed MSRDC to finalise detailed feasibility report and the eligibility criteria and prepare bid documents for inviting bids on BOT basis for pre-qualification of entrepreneurs.

4. In the first stage of the bidding process, the applicants were required to submit a "Request for Qualification Document (RFQ Document) in accordance with the Pre-qualification Document (PQ Document) issued by the Respondent No. 1.

5. Accordingly, the first respondent invited pre-qualification bids on behalf of respondent No. 3 for implementation of Mumbai Trans Harbour Link (MTHL) on Build Operate and Transfer (BOT) basis through Global Tender Notice in August 2004. Bidding process was in two stages. The first stage of bidding process was for the purpose of ascertaining as to which Bidder was financially and technically qualified to participate in the second stage. The bids could be submitted by individual companies or by the companies acting in consortium. The bidders were required to Design, Finance, Build and Operate the said Mumbai Trans Harbour Link which involves construction of about 22.5 km. long sea link comprising of a 6 lane road bridge dual carriage way from Sewri on the Mumbai side to Nhava Sheva on the Navi Mumbai side. The said project is to be completed within a period of 48 months and the estimated cost of the same is about Rs. 26000 millions (Rs. 2600 Crores).

6. The last date of submission of request for PQ document was 24th November 2004, which was subsequently extended upto 10th January 2005. Those of the tenderers/Bidders who satisfied various requirements of technical and financial capability and whose bids were not rejected by respondent No. 1 are entitled to participate in the second stage of bidding process.

7. The pre-qualification document laid down various conditions. Some of them are reproduced for ready reference:

3.1. The RFQs submitted by the Applicants will be evaluated on Technical and Financial capability as detailed in Sections 7.2 and 7.3 respectively. The applicants who satisfy the requirements of technical and financial capability (qualified bidders) will be issued the request for proposal document and would be eligible to participate in Stage II of this bidding process.

4.2. Application as a Consortium:- For the submission of request for qualification and for implementation of the project on selection a consortium may be formed. In case of a consortium, members of the consortium shall nominate one member as the Lead Member. The Lead Member would be required to hold a minimum of 26% of paid up and subscribed equity capital in the Project Company until completion of construction and thereafter for a period of two years from the date of commencement of operations.

5.3. All the communication and information provided in the application should be legible and wherever the information is given in figures, the same should also be mentioned in words. No change in, or supplementary information to, an application shall be accepted after its submission. However, MSRDC reserves the right to seek additional information from the applicants, if found necessary during the course of evaluation of the application. Non-submission, incomplete submission or delayed submission of such additional information or clarifications sought by MSRDC, may be a ground for rejecting the application.

7.1. Obligation of the Evaluation:

The objective of the evaluation is to pre-qualify Applicants with the requisite financial and technical capability to implement the proposed Mumbai Trans Harbour Link Project.

The Individual company or the consortium is required to possess all the qualifying criteria of financial and technical nature to be considered for the issue of the request for proposal (REP) document.

8. It is the case of respondents that the financial qualifications/criteria/requirement to be satisfied has been specified in Clause 7.2.2. According to respondents, considering large financial implications of the project which is BOT based, financial strength is most important. If the financial bench-mark as specified is not satisfied, then, selecting such party for second stage would have serious implications for the timely completion of the project. It is for this reason that RFQ provides that in a consortium the entity declared as "Lead Member" was required to hold 26% of paid up and subscribed equity share capital in the project company until completion of construction and thereafter for a period of two years from the date of commencement of operations to specify the requisite financial criteria. Members of the consortium are required to hold minimum of 5% of the paid up and subscribed equity share capital of the company until

completion of construction and, thereafter, for a period of two years from the date of commencement of operations. The aggregate of net cash profit and net worth of such members was to be considered for evaluation of Financial criteria of the consortium. Thus, while not prohibiting but rather permitting the consortium to bid for the project the respondents laid down a criteria whereby participation of Lead Member/Member of consortium in the project was ensured from the time of the request for qualification till the project is underway.

9. The twin criteria with regard to net-worth and net cash profit have also been defined. Net Worth Means the sum total of the paid share capital and reserves as reduced by accumulated losses, revaluation reserves and deferred revenue expenditure to the extent not written off, if any. In the case of Banks/Financial Institutions/Non Banking Finance Companies, Tier II Capital as defined by the Reserve bank of India, in the Prudential norms on Capital Adequacy would also be considered as a part of the Net Worth. As far as the figures stipulated in the terms and conditions are concerned, the Lead Member was required to have Net worth of Rs. 2000 million and the consortium was required to have Net worth of Rs. 10,000 million. The net capital of Lead Member was stipulated as Rs. 500 million and that of consortium was Rs. 2000 million.

10. Since the controversy in the present petition centres around the term Net Cash Profit as defined in the terms and conditions, it would be appropriate to reproduce the same at this stage itself.

11. "Net Cash Profit means the profit after tax as stated in the audited financial statement plus depreciation and amortisation in the form of cash transaction".

12. The same was to be calculated as the average of audited financial figures of the last three financial years" all twelve calendar months, with the latest not earlier than March 31, 2002.

13. Respondents received pre-qualification bids from following six consortiums:

(i) China Harbour Engineering Co.

(ii) Dywidag - Shapoorji Pallonji & Company Limited (SPCL) - Afcons J/V.

(iii) IIMC Consortium - IFFCO, M/s. Italian Thai Development Public Company Limited, M/s. MAEDA Corporation, SKANSKA.

(iv) Infrastructure Leasing and Financial Services Limited, SKIL Infrastructure, John Laing Construction;

(v) Larsen & Toubro, Gammon India Pvt. Ltd. M/s. Sistema Consortium;

(vi) Reliance Energy, M/s. Hyundai Engineering and Construction Co. Ltd. Korea.

14. Respondent No. 1 appointed M/s. Jean Muller International, BCEOM, STUPJV with M/s. Crisil and M/s. Kim Associates as sub-consultants to carry out evaluation of pre-qualification bids. It is respondent's case that the consultants were selected after floating a global tender.

15. The consultants sat down for evaluation and sought clarifications from the above parties on technical, financial and legal aspects. The draft of the clarifications were prepared. Letters were sent to the prospective bidders, their replies were received by July 18, 2005. Clarifications were further evaluated by consultants and they found that there were certain shortcomings in the information sought. The first respondent thereafter raised further queries. It is the case of respondent that bidders were given an opportunity to be heard in person to clarify all matters on 22nd August 2005. For the purposes of the submission of information pertaining to finances, a Form, F-5, in the pre-qualification document, was prescribed.

16. Petitioners had discussions and according to them, they gave necessary clarifications at a meeting held on 22nd August 2005. Petitioners gave further clarifications in writing pursuant to this meeting, which were forwarded on 23rd August 2005.

17. It appears that the first respondent requested petitioners to extend the validity of the B-2 bids for a period of six months as evaluation process was still under way. The validity was extended by the petitioners upto 6th April 2006.

18. Petitioners thereafter followed up the matter in February and March 2006. It appears that certain News reports appeared which contained information about alleged decision of the first respondent not to award the contract to first petitioner's consortium. Alarmed by such reports, petitioners addressed letters on March 2006 and 26th June 2006.

19. It is their case that in October 2006, they learnt that RFQ document has been issued to some bidders and, therefore, a letter was addressed by petitioners on 5th October 2006. Ultimately, on 18th October 2006 petitioners made an application under the Right to Information Act seeking information whether their consortium will be qualified to participate in the bidding process further and if they are not so permitted, then, the ground for rejection or refusal to do so. This was reiterated by two letters dated 26th October 2006.

20. Based upon the information which was supplied to the petitioners subsequently, the grievance is that the request for qualification was not supplied for the reason that the consortium partner M/s.Hyundai has not satisfied the criteria of Net Cash Profit for the requisite number of years.

21. It is this conclusion and decision which is subject matter of challenge in this petition.

22. Mr. Dada learned Senior Counsel appearing for petitioner submits that petitioner's consortium satisfies the Net Worth Financial Criteria and also the Net Cash Profit Financial criteria. Applying the relevant and applicable Accounting Standards only one view is possible. That view is that petitioners Consortium satisfies the twin criteria. However, from the list of dates and events, it is clear that:

a) The 1st petitioners consortium, particularly Hyundai fulfills the prescribed financial criteria relating to "Net Cash Profits" on the basis of documents submitted initially (i.e. excluding 2004 financial figures)

b) The Audited Annual Accounts and Auditors Reports were liable to be taken in to consideration for ascertaining "Net Cash Profit". The respondents and their consultants were not supposed to go further and put a value Judgment of their own on the Audited Accounts and Auditors Reports.

c) As per the definition of "Net Cash Profit" given in the PQ documents; Net Cash Profits = Profit After Tax + Depreciation + Amortisation not in the form of cash transaction.

23. Thus, it is contended that reasons which are assigned by the consultant appointed by the first respondent are absurd and perverse. It clearly over-looks the definition of the term "Net Cash Profit" in the pre-qualification document.

24. Mr. Dada has assailed the communication dated 6th August 2005 and also the stand of the first respondent in not adhering to the report of Peer Committee. He submits that the decision taken in not permitting petitioner's consortium to participate further, thus, cannot be sustained and is violative of mandate of Article 14 of Constitution of India. He submits that the decision ought to be fair and non discriminatory in such matters. Thus, if there is a difference of opinion, even within the first respondent's board and officials so also between the consultants and the Peer Committee, then, taking a over all view of the matter it was incumbent upon first respondent to have allowed petitioner's consortium to participate further in the process. There is no law that in the absence of unanimity between the officials and the consultants the decision of the Tendering Authority necessarily prevails. Assuming it prevails, then, if it ignores the Expert opinion on record but relies upon the Consultants view which is wholly no reasoned and unreasonable, it must be set aside. Thus, when the consultants of the 1st respondents ignore the opinion of the Peer Committee appointed by the 1st respondent, then, the decision is vitiated on account of arbitrariness, unfairness and unreasonableness. Article 14 mandates that the process must be fair, transparent and non arbitrary. These principles having not been complied with, the impugned decision is wholly unsustainable. He submits that there is no prejudice to the others inasmuch as nothing has been done beyond the request for qualification stage. Even if the petitioners are allowed to participate further, it is not as if the contract would be awarded to them. That is an independent stage. The matter is presently at a preliminary stage. In other words, just as other bidders, even the petitioners consortium would have to satisfy the further criteria before their bids can be accepted. In such circumstances, this petition deserves to be allowed.

25. In support of his contentions, Mr. Dada has relied upon the following decisions:

(i) (1994) 6 S.C.C. 651 (Tata Cellular v. Union of India)

(ii) Radhakrishna Agarwal and Others Vs. State of Bihar and Others,

(iii) Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, .

26. On the other hand, learned Advocate General appearing for respondents submits that in the instant case the petitioners have approached this Hon"ble Court under Article 226 of the Constitution of India a challenging their disqualification from the second stage of tender process. It is settled position by catena of Judicial Pronouncements that in case of administrative action the Court does not sit as a Court of appeal but only reviews the manner in which the decision is arrived at. The judicial review is concerned with reviewing not the merits of the decision in support of which application for judicial review is made but the decision making process itself. It is submitted that the consultants who were expert's in their field evaluated all the bids by applying the same criteria. The entire bidding process was fair and transperent, it was neither arbitrary nor is it alleged to be malafide. It is submitted that the decision to disqualify the petitioners consortium was proper and right. The Board of MSRDC also after due deliberations concurred with the opinion of the consultants.

27. It is submitted that assuming without admitting that the other view regarding petitioners consortiums disqualification is also possible, it is submitted that in case where two views are possible on the subject matter and if the decision making Authority accepts one view and rejects the other view then in a judicial review the Court would not interefere as the decision making Authority while exercising its discretion has accepted one of the two possible views.

28. It is submitted that the subject matter of the petition and the issue raised therein, concerns the financial strength and capacity of Hyundai to meet the eligibility criteria and its desire and ability to execute the contract. Hyundai alone can affirm its own financial position before this Hon"ble Court and substantiate its case by material. Strangely, Hyundai is neither a petitioner nor a respondent. Hyundai appears to have taken a conscious decision not to institute proceedings against its diqualification. After an objection on this count was taken by the respondent in paragraph 3 of the affidavit in reply, the respondents have produced a letter dated 20th November, 2006 from Hyundai at Annexure A to the affidavit of Surendra Khot claiming that Hyundai "fully supports the stand taken by REL". Thus even after this position was pointed out Hyundai has not joined as a co-petitioner and has not put its oath to the pleadings. Hence, it is unknown as to whether Hyundai is still interested in the contract or has moved out. Equally it will not be bound by any orders passed by the Hon"ble Court. On this ground alone the petition is liable to be and should be dismissed with costs.

29. In support of his submissions learned Advocate General has relied upon following decisions:

(i) State of Bihar and Others Vs. Kripalu Shankar and Others,

(ii) Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors,

(iii) Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others,

(iv) M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others,

(v) Ram Gajadhar Nishad v. State of U.P., (1990) 2 SCC 486

(vi) Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others,

(vii) W.P. 3663 of 2001 with 3637 of 2001 decided on 28th September 2001 (B.P. Singh, C.J. and Dr. D.Y. Chandrachud, J).

30. Parties have tendered before us further submissions. During the course of tendering the same, it is urged by Mr. Dada learned Senior Counsel for petitioners that the respondents cannot proceed on the basis that Accounting Standard (AS-26) are the applicable standards. This is not the undisputed position. Since, Accounting Standards in the opinion of some of the Experts makes reference to this standard, petitioners have made elaborate submissions on the same. However, petitioners' specific case is that the said standards have been brought in to effect from 1st April 2004. Thus, they are inapplicable and irrelevant to the issue at hand. Thus, the petitioners have modified their submissions and disputed Applicability of AS-26.

31. Learned Advocate General urged that once the case has proceeded on the basis that these standards are relevant and applicable, then, petitioners should not be permitted to urge otherwise.

32. In our view, in the light of the rival contentions three issues arise for our consideration;

(a) Extent of Judicial Review in cases where bidders are denied participation at the threshold;

(b) Maintainability of the petition in the absence of M/s. Hyundai being made party thereto;

(c) Whether the decision to deny participation to the petitioners at the threshold can be termed as arbitrary, irrational and unreasonable, so also violative of the mandate of Article 14 of the Constitution of India.

33. As far as first issue is concerned, the ambit and scope of powers of this Court under Article 226 of Constitution of India in Tender Matters is now well settled. In a recent decision which has been relied upon J.T. 2006 (10) S.C.C. 424 (Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India and Ors.) the Supreme Court has summarised the legal position once again thus:

66. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the

repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (see *State of U.P. and Ors. v. Renusagar Power Co. and Ors.*) At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work *Judicial Review of Administrative Action* 4th Edition at pages 285-287 states that the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires*.

67. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is illegality the second irrationality, and the third procedural impropriety. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (commonly known as *CCSU case*). If the power has been exercised on a non consideration or non application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated (See *Commissioner of Income Tax v. Mahindra and Mahindra Ltd.*). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book *Applications for judicial review, Law and Practice* thus:

There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

69. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

70. The famous case commonly known as "The *Wednesbury*'s case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

74. In other words, to characterise a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

34. After setting out these principles, the Supreme Court observed that ultimately the question would be whether in the process of selection, the Government has adopted a fair and transparent procedure. A rational approach is necessary. Ultimately, public law element is involved in all such matters. The well settled law of equality is that applicability of Article 14 of the Constitution of India is at both stages, viz., at the time when the contract is made and when it is being implemented. Public Bodies cannot avoid judicial scrutiny of their actions on the touch stone of the principles set out above. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, the Supreme Court observed thus:

20. Even apart from the premise that the "office" or "post" of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Article 14, we are also

clearly of the view that this power is available even without that element on the premise that after the initial appointment. the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts. which cannot co-exist.

21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social. economic and political; and Equality of status and opportunity. Every State action must be aimed at achieving 647 this goal. Part IV of the Constitution contains "Directives Principles of State Policy which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14--non-arbitrariness which is basic to rule of law--from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion. it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party, Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial

review in respect of disputes failing within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also fails within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition there- to. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

25. In Wade's Administrative Law, 6th Ed., after indicating that "the powers of public authorities are essentially different from those of private persons", it has been succinctly stated at p. 400-401 as under: The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Not is this principle an oddity of British or 649 American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law. For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere. (emphasis supplied) The view, we are taking is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable,

may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you. This is what men in power must remember, always.

35. We have to decide the issues by applying the above principles to the facts and circumstances of the present case.

36. On maintainability, we are of the view that mere absence of M/s. Hyundai as party to this petition is not fatal. The tender has been admittedly submitted by the petitioner No. 1 before us. It has been brought to our notice that petitioner No. 1 has been awarded prestigious Mumbai Metro Versova Andheri Ghatkopar Corridor Project through an International Bidding process. It is executing National Highway project worth Rs. 700 Crores. It has considerable experience in construction activity of large infrastructural projects, including Power projects and Transmission lines. M/s. Hyundai is a company incorporated under the laws in force in Korea and enjoys world wide reputation as specialists in construction of large infrastructural projects including construction of long and river crossing bridges, one of which has been constructed in India in Allahabad known as Allahabad Cable State Project, Uttar Pradesh, Jammu Bridge and Pinayang Sea Crossing State Bridge in Malaysia which is third highest in world. In the global tender that has been floated by the first respondent, it is categorically stated that the Consortium can bid and it is not in dispute that the terms in so far as bidding by Consortium are concerned have been satisfied by the petitioner and Hyundai in this case. In para 10 of the petition the agreement between petitioner No. 1 and M/s. Hyundai has been referred to. The bid was submitted after this Consortium Agreement and on behalf of the Consortium which is known as first petitioner's Consortium. Various letters referred to in the petition have been addressed by the petitioner No. 1 for and on behalf of Consortium comprising itself and M/s. Hyundai. The Consortium report has also been submitted. Though, it is true that financial criteria to be satisfied in this case is in the context of Accounts of M/s. Hyundai but considering the nature of the arrangement between parties, correspondence by M/s. Hyundai on record and no serious prejudice being pointed out by the respondents on account of Hyundai being not made party to this petition, it would not be permissible to throw out the same on this ground alone. There are larger issues raised involving Public Interest and when the first respondent is committed to complete transparency in making and execution of the contract so also it assuring all bidders that bidding process would be fair, transparent, efficient etc., then, accepting the technical objection of the learned Advocate General would not be just and proper.

37. Thus, so far as Issue No. (A) we hold that the action of the respondents is being scrutinised within the parameters laid down by the Supreme Court in various decisions brought to our notice and strictly in accordance with the same.

Issue No. (B) is answered by holding that the petition is maintainable and deserves to be decided on merits even in the absence of M/s. Hyundai as party petitioner or respondent.

38. As far as Issue No. (C) is concerned, it is not in dispute before us that Clause 5.3.7 of the Terms and Conditions has been complied with. There are provisions in the pre-qualification documents (P.Q. documents) for seeking clarifications from the applicants/bidders.

39. Clause 6 of this document provides for evaluation of applications. Once again, it is not in dispute that the application preferred by the petitioners Consortium is responsive.

40. Clause 6.3 of the same reads as under:

6.3:- To facilitate evaluation of Applications, MSRDC may, as its sole discretion, seek clarifications in writing from any applicant regarding its application. Notwithstanding anything contained in the pre-qualification/ project information document, MSRDC reserves the right to not take in to consideration any such clarifications sought by it for evaluation of the application.

41. Clause 7 deals with pre-qualification criteria. Therein, Clause 7.1 sets out the object of evaluation. The same is to pre-qualify applicants with requisite financial and technical capability to implement the project. The individual company or the consortium is required to possess all the qualifying criteria of financial and technical nature. It alone is to be considered for the issuance of request of proposal document. The format in which the information for evaluation of financial and technical capability is to be submitted by the applicant is contained in Section 8.5 and 8.6. Once again it is undisputed that the application submitted by the petitioners has not been summarily rejected. Thus, it is not incomplete.

42. However, the only argument advanced is that the financial criteria with regard to second part of Clause 7.2.1 has not been satisfied.

43. First part of 7.2.1. says that individual company submitting RFP shall commit to hold majority (55%) total paid up and subscribed equity share capital in the project company until completion of construction and, thereafter, for a period of 2 years from the date of commencing of operations.

44. However, evaluation of the applicant against financial criteria proposed in this section is with regard to Net worth and Net cash profit of the individual company and all subsidiary companies in which individual company holds minimum 51% equity stake. The financial evaluation criteria to be satisfied by the individual company is that its Net worth as per the latest audited balance sheet and not earlier than financial year ending 31st December 2002 should be Rs. 10,000 million or equivalent foreign currency. Once again it is not in dispute that M/s. Hyundai satisfies this criteria so also the petitioner No. 1. Thus, the individual company in the Consortium led by first petitioner satisfies this criteria.

45. However, it is urged that second criteria with regard to Net cash profit is not satisfied. Net cash profit is defined to mean profit after tax as stated in the audited financial statement plus depreciation and amortisation not in the form of a cash transaction. Both sides heavily relied upon the definition of the term "amortisation". We will advert to the same later. In the present case during the course of seeking clarification it has been pointed out that the time for P.Q. document submission was 9th January 2005. At that time, the Audited Accounts of financial year 2004 of Hyundai Engineering Construction Co. Ltd. were not readily available. The financial year of Hyundai is January to December. Hyundai submitted its financial figures for the year 2001, 2002 and 2003. By the communication dated 18th August 2005, the figures of 2004 and 2005 have also been submitted. Similarly, with regard to the Determination of Non Cash Expenses by Hyundai and the Criteria Applied for the year 2001, its Auditor submitted a certificate which, according to petitioners, clarifies the situation. It states that the items considered for Non Cash Expenses and treatment thereto is in conformity with the Accounting Standards generally accepted in Republic of Korea. We have been taken through this letter, a copy of which is at pages 132 and 133 of the paperbook.

46. As far as Indian Chartered Accountants are concerned, M/s. Dasgupta and Associates, C.As. New Delhi have addressed a letter to the Board of Directors of Hyundai and it is clarified that adjustments to Net Income is performed by removing the effects of Net Income (after tax & all non cash items, extra ordinary items and items of income appropriation account).

47. The undisputed position is that the Consortium partner Hyundai had, in the financial year ending 31st December 2001, not earned profits. The respondents urge that Hyundai showed a Net loss of \$610.507 in the year ending 31st December 2001. Therefore, the consultants have opined that the criteria of net cash profit has not been satisfied by M/s. Hyundai.

48. It is rather unfortunate that when the petitioners wrote to the respondents repeatedly, they were not informed of the various events leading to the letter of Consultants dated 28th October 2005. It is only when the petitioners took recourse to Right To Information Act that they received the requisite information. The requisite information reveals that the matter came up before the Board of First Respondent Corporation. The Board was informed that the evaluation process commenced some time in March 2005 and, thereafter, the Peer Committee was constituted on 23rd August 2005 and it met on 21st September 2005. Thereafter, two meetings of Senior Officials of first respondent were held on 31st December 2005 and 10th January 2006. It is revealed from the documents that the Consultants dis-qualified first petitioners Consortium as they were not satisfied with the information and clarification given by M/s. Hyundai. The Consultants were of the opinion that requisite criteria is not satisfied. The Peer Committee, however, was of the opinion that the criteria of Net Cash Profit is satisfied. The Constitution and Authority of Peer Committee was a matter of

debate before us but we do not wish to go into the same. Admittedly, Peer Committee was constituted by the first respondent. It is not as if the Peer Committee has only gone into the bid submitted by the petitioners. It has also scrutinised other bids. In fact one of the bids i.e. from L & T, Gammon and Systema, the Committee felt that the Consortium did not provide adequate information. The MSRDC decided to conditionally accept the RFQ of this Consortium.

49. As far as case of petitioners is concerned, Respondent No. 1 (MSRDC) differed with Peer Committee because in its view Peer Committee could not have taken into consideration the financial statement beyond January 2005. The S & F.A., M.S.R.D.C. differed from Consultants on the issue of their treatment of Cash Items and desired that the Consultants should have a re-look at their opinion. Letter was addressed to Consultants on 19th October 2005 by the MD & V.C. of MSRDC. In reply, Consultants confirmed their earlier opinion. The management concurred with the Consultants in view of their expertise in the matter. However, the difference of opinion was brought to the notice of the Board.

50. We have seen the file notings with the assistance and consent of learned Counsel for both sides. In the meeting held on 26th October 2005, the first respondent decided to direct the consultants to submit a final report after reviewing the report submitted by the Consultants M/s.Jean Muller. The opinion/report of the Consultants was sought on the basis that the information, clarification and additional information restricted to 10th January 2005 alone should be considered by the Consultants. When the matter was put up for approval on 7th October 2005, after final report was received, the findings are as under:

Reliance Energy - Hyundai Engg.Construction Company: (Financial Criteria - Net Cash Profit (NO) - Net Worth (YES). - Technical Criteria (YES) - Remarks (NOT QUALIFYING).

51. It is not in dispute that the Peer Committee took a view that the Consortium of the petitioners fulfils the prescribed financial criteria on the basis of the documents submitted INITIALLY.. The Peer Committee did not concur with the Accounting Interpretation done by the Consultants regarding financial position of Consortium in respect of Non Cash Profit in the year 2001. The Vice President (Development Process) opined that all that the Consortium needs to show is Financial Eligibility to issue a work order. However, the Joint M.D. (II) observed in his note that the entire position insofar as the Accounts of the year 2001 of Hyundai are concerned, would show that the company had earned contracts in Iraq. Due to the situation prevailing in Iraq at the relevant time, the company was not sure of getting returns for the work done. It, therefore, made provisions in the accounts. The Joint M.D., taking note of all this observed that whether the Net Cash Profit criteria, is satisfied or not must be gauged and verified by taking independent third party opinion from a Renowned firm of Auditors having international repute and practice. He records these remarks because of the

difference of opinion between Consultants and Peer Committee. Thereafter, the file notes show that the matter was placed before various officers of respondent No. 1, from time to time. The file note at page C-245, C-247 and C-249 demonstrates this fact.

52. Thereafter, a letter was issued to Crisil as suggested. The matter was placed after receipt of Crisil's report before the Senior Officers of first respondent and the file noting in this regard read thus:

CRISIL clarification on grounds for not allowing certain items claimed as non-cash item by RIL-Hyundai Consortium is noted in light of my observations on N/13-15 since Crisil's letter is emanating from it. It is regretted that CRISIL has not cited any specific accounting standard (AS) prevalent in India but have merely stated its position. Cash Flow Statements (as a part of annual audited reports) presented by Hyundai for year 2001 when seen with 2002 and 2003 clearly show heavy one off provisioning towards bad debts. Company's financial statement prepared as per laws of country in which it is incorporated treats these items as non cash items. We had stated that we will take figures as per the audited statements of the bidders (prepared as per laws of their respective countries).

We may finally place decision on whether to base qualification on basis of audited financial statement as stipulated in various bid papers/tender notice or adopt CRISIL enunciated judgement on quality of audit report, to final decision taking body. In my view, we should accept audited financial statements of the bidders, in accordance with stipulations in tender notice and bid papers, at the stage of "eligibility" to submit detailed bids.

53. These are file notings subsequent to the opinion of Crisil forwarded vide the letter/communication dated 28th October 2005. Thus, within the first respondent Corporation, the matter was discussed at several levels and it is not as if the conclusion drawn by Crisil that the first petitioner's Consortium does not meet the requisite financial criteria, is unanimously accepted. Not only within MSRDC but even in the Peer Committee appointed by it, different opinion has been expressed. The Financial criteria requirement is satisfied or not must be decided on the touchstone of Accounting Standards. However, applicability of such standards is a matter of debate before the Authority and us. There is no pre-set formula or Test. The Consortium states that the Accounting Standards in Korea are applicable. There is no unanimity about applicability of AS-26. Assuming there is Agreement on the same, the debate is about treatment of Non-Cash Expenses. The Experts and Officials seriously differ on this matter. Thus, this is a matter where amongst differing opinions one is accepted and preferred. The case is not of Total absence of material regarding applicable standards. Crisil does not refer to any specific Accounting Principle but Crisil is consistent in its view. Hence, the final decision. Thus, we are in agreement with the learned Advocate General that this Court in its Jurisdiction under Article 226 of the Constitution of India cannot interfere with the decision of the MSRDC as if it has powers to sit in

Judgement over the same on par with a Court of Appeal.

54. In this behalf, it is pertinent to note that the MSRDC's senior officials have recorded that Crisil have not cited any specific Accounting Standard in India but merely stated its position.". This is of considerable significance.

55. There has been considerable debate before us with regard to the Accounting Standards which can be applied. The specific case of petitioners is that there is only one view possible and this is not a case where two views are possible. They contend that Wednesbury Principle would squarely apply. They contend that the letter of Consultants dated 28th October 2005 would demonstrate that the view taken is not based upon relevant material and ignores basic Accounting Principles. A.S.26 according to the petitioners have become applicable on or after 2004. Therefore, the opinion of Crisil that, the expenses even though they may not involve direct cash out-flow in the year of incidence but it has impact on future date, is wholly unsustainable, is the submission.

56. It has been demonstrated to us that there has been no cash impact for subsequent years ending 31st December 2002 to 31st December 2003 and 31st December 2004. Thus, there is no uniformity with regard to the applicability of A.S.-26. It is well settled that in a case where there are different standards or Tests applied, then, element of choice by Experts or the Authorities is beyond Judicial review. That is a case of exercise of options or choices when several are available. However, when the Authorities are unable to substantiate their pleas or support their decision on any Test or Standard, then, it can safely be termed as arbitrary.

57. The Chairman of Peer Committee is a Retired Judge of this Court and the Committee was set up by the first respondent itself. After its report was forwarded there were discussions and deliberations within first respondent. However, the file notes perused by us clearly indicate that there was no unanimity and thereafter, the matter was referred to the Consultants (M/s. Crisil). Crisil's report as forwarded to the first respondent, shows that it stated that the treatment of Non Cash Expenses of Hyundai for evaluating Net Cash Profit criteria have been taken into account. Provisions on account of loss of valuation on Inventories, Investment securities and disposition of assets and impairment of assets have cash impact either in the past, present or future. Thus, in para 2 of this letter/opinion, M/s. Crisil presented their rationale for treatment of Non Cash Expenses. They stated that on preliminary evaluation of Form 5 submitted by Hyundai, it was observed that substantial Non-Cash Expenses were reported. They were \$686 million, 201 million, 200 million for the financial year ending 2001, 2002 and 2003 respectively. It has referred to the clarification which has been furnished by Hyundai. It appears that M/s. Crisil had reservations about Sr. Nos. 1, 2 and 3 viz., Bad Debts expenses, other Bad Debts Expenses and Depreciation. It opined that specific details of this bad debt expenses were not provided and, therefore, they could not be treated as one time event.

58. M/s. Crisil have also undertaken an additional exercise and according to them, Audited bad debts expenses for each year are necessary to arrive at net cash profit of HEC. According to them in spite of such a treatment, the Consortium could not satisfy the criteria of Net Cash Profit. In the opinion of Crisil, Depreciation and Amortisation are Revenue expenses related to capital expenditure and such expenditure is financed out of long term resources. It is not financed out of revenue or operating income. Therefore, depreciation and amortisation which occurred in the normal course of business are treated as Non Cash Expenses and they are spread over a number of years. Hence, depreciation expenses have been treated as non cash expenses and added back to arrive at net cash profit.

59. When these comments/views of Crisil were placed before the senior officers of M.S.R.D.C., the file note dated 28th November 2005 clearly shows that the officials of M.S.R.D.C. were of the opinion that Crisil has not cited any specific Accounting Standard prevalent in India but has merely stated its position. In the opinion of M.S.R.D.C.'s senior officials, bad debts, with whatever details provided by Hyundai, show One-off expenses.

60. The Expert Mukund Chitale's opinion has been relied upon by the petitioner and the petitioner themselves at several places have referred to Accounting Standard 26. That apart, in the opinion of Chitale, Accounting Standards have been mentioned. There is considerable argument before us with regard to interpretation of the term "Amortisation". We have been taken through various Dictionary meanings as also opinions of Experts and Accounting Principles and some decisions rendered in the context of Taxing Statutes. However, we are of the opinion that with regard to the interpretation of these terms, the matter has been gone into by Experts and ultimately final decision has been taken by first respondent. The difference of opinion amongst the Experts with regard to the Accounting Standards does not mean that the case of petitioners has been scrutinised on the basis of absolutely no standards. This is not a case of total absence of standards. The argument proceeds on the basis that Indian Standards of Accounting or even International Standards of Accounting being applicable, the treatment to the items in question (Non Cash Expenses) differs from one Expert to another. First respondent, therefore, took a conscious decision and referred the matter to the Peer Committee. The Peer Committee's opinion was placed before the first respondent and during the course of discussions and deliberations, its senior officials not being able to agree on the final step, a decision was taken to refer the matter to M/s. Crisil. As observed above, M/s. Crisil have been consistent in their views having perused their opinion, so also the final decision taken by the first respondent, we do not find that this is a fit case where we should interfere in our Writ Jurisdiction. These are matters where there is bonafide difference of opinion amongst experts in the field. Petitioners, while assailing the decision as arbitrary, unjustified, wrongful and contrary to the terms of the documents, have not been able to demonstrate as to how the same is vitiated. Merely urging that the PQ document does not specify any Accounting

Standard does not mean that the petitioners were unaware of the applicable Accounting Standards. When they themselves seek opinion on the basis that A.S-26 is the applicable standard and press into service, interpretation of several Expert bodies in support of their case, means that they were aware of the fact that the Korean standards of Accounting are definitely not going to be made applicable. As to what other standards have been applied and are indeed applicable, the matter has been discussed threadbare. Opinion of two expert bodies was sought by the first respondent and based upon their opinion, the final decision has been taken. There are no malafides alleged nor is the case of the petitioners that opportunity was not given to them to clarify the matter or Answer the queries raised.

61. We are not an Appellate Authority who can sit in judgement over the authority of the experts as also Crisil. Petitioners were aware that Crisil is a body/ agency chosen and its opinion would be taken into consideration just as the Peer Committee. Merely because the report of Peer Committee has not found favour with the first respondent so also it has not gone by the views and opinions expressed and rendered by its own officials, does not mean that the decision is arbitrary or unreasonable. It cannot be termed irrational either. In such circumstances, we are of the opinion that in writ jurisdiction no directions can be issued. This is a case where authorities who are to work out a mega project, have taken a final decision, taking into account all pros and cons and the responsibility and burden that the Agency or person implementing the same will have to share. Therefore, if it chooses to be cautious at the threshold itself does not mean that the decision is liable to be set aside. M/s. Crisil's views were placed before the decision making authority. It is an Authority, consisting of a High Powered Official. It takes into account the divergent views and arrives at a conscious decision not to accept the petitioner's Bid. No malafides are attributed to it. Under the Tender Conditions, it was fully empowered to take the Final Decision. If it is of a bonafide opinion that it would not be safe to allow the petitioners to participate further then, in Judicial Review, we would not substitute our views. In this behalf, the observations of the Supreme Court in the decision reported in 2006(10) J.T.424 (Supra) are very pertinent. It observes thus:

84. It is to be noted that though emphasis was led that the constitution of Committees of non technical persons could not have thrown much light on the ultimate decision, yet it is to be noted that all the three Committees were part of the Government machinery. The issue was to assess correctness of the ECs decision.

85. Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review.

91. It is pointed out by learned Counsel for the respondents that parameters for

judicial review are different in the matters of contract for normal case of tenders. In case of commercial contracts the normal contractual matters are excluded. It is pointed out that there is no overwhelming public interest involving such matters. GETE had only touched the fallacious approach of EC to make the process transparent. The view taken is a possible view supported by reasons and there should not be any interference.

92. In the ultimate, the question would be whether in the process of selection the Government had adopted transparent and fair process.

93. While balancing several claims a rational approach is necessary and that is to be formed in line with the scope of judicial interference." (Also see B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, - paras 57 and 70).

62. We are, therefore, of the view that same same standards of Judicial Review are applicable at the threshold. In making a contract as well as its implementation, the same principles and same tests have been applied by the Supreme Court. It does not mean that at the threshold no bidder can be thrown out. Once the Terms and Conditions are accepted by parties, then, merely because the bid has not been processed further cannot be a grievance. Issue No. (A) is Answered Accordingly. In the above circumstances, Issue No. (C) is answered in favour of the first respondent and against petitioners.

63. We have also noted the rival contentions and perused the opinions rendered by experts on accounting standards so also on the concept of Depreciation and Amortisation. Mr. Dada took us through the definitions and meaning of these terms and relied upon several aspects of the matter. He referred to views of Noted Authors and Experts in the field. Mr. Kadam, learned Advocate General on the other hand, presented contrary material. We are not experts in the field. We have no authority to lay down any Accounting Standards nor comment upon the practice followed by Accountants and Experts in the field. Suffice it to note that even on Interpretation of the terms, there are divergent views. The treatment to the Items is different at the hands of the officials and outside Experts. Once the divergent views have been noted by the Tendering Authority and it took the final decision after due consideration of the same, we are nobody to substitute their views with ours and thereafter alter their ultimate decision. That is not permissible and would be beyond the parameters of Judicial Review. We feel that it is not necessary to enter into any larger controversy.

64. In the peculiar facts of this case petitioners do not deserve any opportunity to have their Consortium bid considered further. In the light of the above, the petition fails. Rule is accordingly discharged. No costs. Ad-interim order stands vacated.

65. At this stage Mr. Dada, the learned Senior Counsel, appearing for the petitioner prays that ad-interim order passed by this Court on December 12, 2006 be continued for a period of six weeks to enable the petitioner to take appropriate steps.

66. This request is opposed by the learned Advocate General on the ground that the bids have been kept alive by the remaining bidders and nearly six months have elapsed from the date of the ad-interim order. Any continuation would prejudice their rights as well as public interest.

67. Taking an overall view of the matter, in our view, interest of justice would be subserved if the ad-interim order dated 12.12.2006 is continued for a period of two weeks from today.