
(2019) 11 CAL CK 0003

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 16227 (W) Of 2018

Smartchem Technologies Limited & Another

APPELLANT

Vs

Indian Oil Corporation Limited & Another

RESPONDENT

Date of Decision : 01-11-2019

Acts Referred:

Indian Contract Act, 1872 — Section 29
Constitution Of India, 1950 — Article 12, 14, 226

Citation : (2019) 11 CAL CK 0003

Hon'ble Judges : Protik Prakash Banerjee, J

Bench : Single Bench

Advocate : Aniruddha Chatterjee, Kushal Chatterjee, Iftekar Munshi,, Arunava Ghosh, Suddha Sattya Banerjee, A. K. Dhar, Sharmistha Ghosh, S. Bhattacharyya, Victor Chatterjee

Final Decision : Dismissed

Judgement

Protik Prakash Banerjee, J

1. A continuing story of an alleged arbitrariness in the conditions of an open tender has been narrated in WP No. 3722 (W) of 2018 and WP No. 16227 (W) of 2018 which have been instituted under Article 226 of the Constitution of India before this Court. The purported arbitrariness was alleged to be connected with the notices inviting e-tenders for the 3rd and 4th Quarter of 2017-2018 and 1st Quarter of 2018-19 by the respondent no.1, reliefs for which have been sought in WP No. 3722 (W) of 2018 and on the same issues in connection with the notice inviting tender for the 2nd Quarter of 2018-2019 narrated in WP No. 16227 (W) of 2018. The prayers made in the two writ petitions are set out hereinbelow: -

Prayers made in WP No. 3722 (W) of 2018:-

A] A writ of and / or writs in the nature of Mandamus directing the respondent authorities forthwith rescind/withdraw/revoke the said changed evaluation criteria so incorporated from the 3rd and 4th Quarter 2017-18 and 1st Quarter

2018 -19 in the e-tenders as mentioned in paragraph no. 16 of the instant writ petition so as to enable your petition company to participate in the said e-tenders for procurement of HDAN and

B] A writ and/or writs in the nature of Mandamus directing the respondent authorities to immediately disclose the methodology of the distribution of the tender quantities of HDAN so as to enable petitioner to participate in the said e-tender for procurement of HDAN; AND

C] A writ and/or writs in the nature of Mandamus directing the respondent authorities immediately disclosed the name of the Independent External Monitors so as to enable the petitioner to ventilate their grievance in case there is a violation of the tender terms and conditions: AND

D] A writ of and/or writs in the nature Certiorari directing the respondent authorities concerned to forthwith transmit the records of the instant case, before this Hon'ble Court so that conscionable justice can be done; AND

E] A writ in the nature of prohibition be issued restraining the respondent authorities from giving effect to the changed evaluation Criteria so incorporated from the 3rd and 4th Quarter 2017- 18 and 1st Quarter 2018-19 in the e-tenders as mentioned in paragraph no. 16 of the instant writ petition so as to enable your petitioner company to participate in the e-tenders for procurement of HDAN till disposal of the instant writ petition; AND

F] An Ad Interim Order directing the respondent authorities to immediately disclose the methodology of the distribution of the awarded quantities and HDAN and/or disclose the minimum quantity of the HDAN to be mandatorily be procured from the lowest bidders so as to enable the petitioner company to participate in the e-tenders for procurement of HDAN; AND

G] An Ad Interim Order of injunction be issued upon the respondent authorities thereby restraining them from giving effect to the said changed evaluation Criteria so incorporated from the 3rd and 4th Quarter 2017-18 and 1st Quarter 2018-19 in the e-tenders as mentioned in paragraph no. 16 of the instant writ petition so as to enable your petitioner company to participate in the e-tenders for procurement of HDAN till disposal of the instant writ petition; AND

H]An Ad Interim Order of injunction be issued upon the respondent thereby restraining them from giving an opportunity of distribution of tender quantity to a non-bidder, i.e., who had not participated in the tender and not complied with the tender condition. AND

I] Rule NISI in terms of prayers [A], [B], [C] & [D], [E], [F], [G], [H] & [I] made hereinabove; AND

I] Interim Order in terms of prayer [A], [B], [c] & [d], [E], [F], [G], [H] & [I] made hereinabove; AND

J] Pass such other Order or Orders and/or direction and/or directions, as Your

Lordships would deem fit and proper.

Prayers made in WP No. 16227 (W) of 2018:-

A] A writ of and / or writs in the nature of Mandamus directing the respondent authorities forthwith rescind/withdraw/revoke the said changed evaluation criteria so incorporated in e-Tender No. BGE/HDAN/18-19/Q2 dated 08.06.2018 for the second quarter of the year 208-19 so as to enable your petitioner company to participate in the said e-tenders for procurement of HDAN; AND

B] A writ and/or writs in the nature of Mandamus directing the respondent authorities to immediately disclose the methodology of the distribution of the tender quantities of HDAN so as to enable petitioner to participate in the said e-tender for procurement of HDAN; AND

C] A writ in the nature of Mandamus be issued not to incorporate the said changed evaluation Criteria so incorporated in the e-Tender No. BGE/HDAN/18-19/Q2 dated

08.06.2018 for the second quarter of the year 2018-19 in the upcoming years to be issued by the respondent authorities for procurement of HDAN; AND

D] A writ of and/or writs in the nature Certiorari directing the respondent authorities concerned to forthwith transmit the records of the instant case, before this Hon'ble Court so that conscionable justice can be done; AND

E] A writ in the nature of prohibition be issued restraining the respondent authorities from giving effect to the changed evaluation Criteria in e-Tender No. BGE/HDAN/18-19/Q2 dated 08.06.2018 for the second quarter of the year 2018-19 and in upcoming tenders to be issued by the respondent authorities for procurement of HDAN so as to enable your petitioner company to participate in the e-tender for procurement of HDAN till disposal of the instant writ petition; AND

F] An Ad Interim Order directing the respondent authorities to immediately disclose the methodology of the distribution of the awarded quantities and HDAN and/or disclose the minimum quantity of the HDAN to be mandatorily be procured from the lowest bidders so as to enable the petitioner company to participate in the e-tenders for procurement of HDAN; AND

G] An Ad Interim Order of injunction be issued upon the respondent authorities thereby restraining them from giving effect to the said changed evaluation Criteria so incorporated from the 3rd and 4th Quarter 2017-18 and 1st Quarter 2018-19 and in second Quarter 2018-19 in the e- tenders and in future tenders so as to enable your petitioner company to participate in the e-tenders for procurement of HDAN till disposal of the instant writ petition; AND

H] An Ad Interim Order of injunction be issued upon the respondent thereby restraining them from giving an opportunity of distribution of tender quantity to a non-bidder, i.e., who had not participated in the tender and not complied with the

tender condition; AND

I] Rule NISI in terms of prayers [A], [B], [C] & [D], [E], [F], [G], [H] & [I] made hereinabove;

AND

I] Interim Order in terms of prayer [A], [B], [c]& [d], [E], [F], [G], [H] & [I] made hereinabove;

AND

J] Pass such other Order or Orders and/or direction and/or directions, as Your Lordships would deem fit and proper.

2. The facts of the two cases are rather convoluted. The complications are not as much of the facts as the manner in which they have been drafted. After going through the chronological confusion of the pleadings, I have been able to discern the facts which I have restated hereinafter. The petitioner is a manufacturer of Technical Ammonium Nitrate (referred to hereinafter as "TAN"). The petitioner claims to be the largest manufacturer of the same in India and its 4th largest manufacturer in the world. The said TAN includes High Density Ammonium Nitrate (HDAN) and Low Density Ammonium Nitrate (LDAN) and Ammonium Nitrate melt. The petitioner company also admittedly supplies TAN, including HDAN and LDAN to Government Organization and Public Sector Units including the respondent Indian Oil Corporation Limited. These are the only purchasers of the said supplies on a bulk scale, and are ingredients of explosives required, inter alia, for the purposes of mining and extraction of crude oil and coal. The petitioner claims to have participated in all tenders floated by the respondent no. 1 for TAN in the last 30 years including in the e-tender for the 1st Quarter in the year 2017-18 and without prejudice to its rights and contentions in the 2nd Quarter of the year 2018-19. The petitioner's grievance is that though the e-tender was stated to be an open tender, from the 3rd Quarter of 2016-17 onwards, the respondent no. 1 went back on the terms and conditions of the tender by not awarding 100 per cent of the quantity for the respective locations to the lowest bidder while awarding the bulk of the amounts at a lower price to Public Sector Units which had neither participated in the tender nor bid for the tender. The petitioner submits that even though it did not participate in the tenders of the 2nd, 3rd and 4th Quarters of 2017-18 according to the evaluation criteria in all these tenders the respondent authorities were bound to procure the tender quantity of HDAN from the lowest bidders in the respective locations but the 3rd and 4th Quarter of 2016-17 and the 1st Quarter of 2017-18 saw the respondent no. 1 procuring less than the full tender quantities of HDAN from the lowest bidder contrary to the evaluation criteria. It is the petitioner's case that it asked for the clarification by amendment of the tender conditions, that those who had not participated in the tender process could still be allotted the quantity of tender amount if they match the price of the lowest bidder so long as these outsiders were Public Sector Units so that the petitioner could take legal steps.

Since this clarification was not made in the tender for the 2nd quarter of 2017-18, the petitioner could not participate in the tender and when meetings were held with the respondent no. 1 the respondent no. 1 made it clear that it was procuring the balance quantities of HDAN from Government or Public Sector Undertakings.

3. Thereafter, the tender for the 3rd Quarter of 2017-18 was floated in which the evaluation criteria was changed and the changed criteria was as follows:

"Bidders acknowledged that IOCL as an existing arrangement for supply of HDAN from the Government/PUS sources. In the event that the price of HDAN from these sources are lesser than the quoted L1 rates of bidder against this tender, IOCL may, at its absolute discretion allocate any quantity, including up to 100 per cent of the tender quantity, to the said Government/PSU sources to ensure economical procurement of the material. In such case, if IOCL decides to procure any quantity of HDAN under this tender, then the tender quantity would be deemed to mean such remaining quantity, and IOCL may at its discretion place order on the L1 bidder for such remaining quantity in accordance with the terms and conditions of the tender and the bid. If, however, no quantity of HDAN remains to be procured, then IOCL may cancel the tender process without incurring any liability towards the bidders."

4. The sum and substance of the submissions of the petitioner can be summarized as uncertainty in the essential condition of evaluation in tender amounting to arbitrariness. It is the case of the petitioner that the above condition which says that the respondent no. 1 may at its discretion allocate any quantity including up to 100 per cent of the tender quantity to the Government or Public Sector Units sources which have quoted less than the rates quoted by the lowest bidder against the tender and that only where the respondent no. 1 decides to procure any quantity of High Density Ammonium Nitrate under the tender beyond the quantity allocated to the Government or Public Sector Units sources then the respondent no. 1 may at its discretion place order for the remaining quantity on the lowest bidder is an un-canalized exercise of discretion which by its nature is arbitrary. If the lower rate of the Government or the Public Sector Units were notified to the bidders or even the lowest bidders before the decision was taken to allocate any quantity to the said Government or Public Sector Units then there would have been no arbitrariness since the bidders/lowest bidder could have matched those rates; similarly if the percentage of the quantity what would be allocated to non-tendering Government or Public Sector Units was disclosed along with the tender or in this condition itself discretion would have been canalized and not arbitrary. There is a subsidiary challenge that an open tender cannot be one where a non-tendering entity can be allocated any quantity.

5. WP No. 3722 (W) of 2018 was instituted by the Petitioner No.1 challenging the said amended evaluation criteria as mentioned in Para 3 of this Judgment which was incorporated in all the tenders floated by the Respondent No.1 starting from

the third quarter of 2017-18 , and appearing in the fourth quarter of 2017-18 and subsequently in the first quarter of 2018-19 which prevented the petitioners from participating in the tenders floated in the said tenders floated by the said notices inviting tenders. The petitioners alleged that the said condition as stated in paragraph 3 above was arbitrary and such a decision to incorporate the said condition was a whimsical one on the part of the respondent authority and the same is continuously destroying the environment of fair play in the open tender system. This writ petition was admitted and directions given for filing affidavits, but during the course of its hearing the respondent no. 1 had disclosed that it was about to issue a fresh tender for the 2nd Quarter of 2018-19 containing the same changed evaluation criterion which had been challenged in that writ petition. The petitioners' Advocates objected to the same in Court and further submitted that if the petitioners participate in the new tenders so floated, the same should not be construed as an acceptance of the said evaluation criterion as challenged.

6. It is the case of the writ petitioners that in the said fresh tender for the 2nd Quarter of 2018-19 the writ petitioner had participated in both techno-commercial and price bid and was declared as the lowest bidder in six locations and though total quantity of HDAN, required to be supplied in the said locations as tendered, is 17050 MT the respondent no. 1 only awarded 1581 metric tons out of 17050 metric tons to the petitioners, and that too in only two out of the six locations where the petitioners had been declared the lowest bidder, on the basis of the said changed evaluation criterion whereby non-tendering Government or Public Sector Units were awarded the rest of the Quantity on the basis of an alleged lower rate which was not disclosed to the petitioner. However, the petitioners had by their letter dated June 28, 2018 stated that their participation in the new tender as stated above shall not be construed as an admission of the challenged terms and conditions and/or evaluation criterion in the said writ petition which was received by the respondent no. 1 on July 02, 2018. Thereafter, the writ petitioners had filed WP No. 16227 (W) of 2018 which was affirmed on August 22, 2018. The writ petitioners and the respondents have exchanged the Affidavit-in-Opposition and reply and supplementary affidavits galore and counter affidavits thereto and replies thereto and it is on the basis of the said pleadings that the writ petitioners have come here before me. Since the subject matter of both the writ petitions are similar and similar questions of law and facts have arisen, I chose to hear both the writ petitions together with the consent of the parties.

7. Before going into the provisions of law applicable and the decision on which the petitioners have relied upon in support of their submission, I think, I should put on record the objections that the respondents have raised including those impeaching the maintainability or entertainability of the writ petition. Mr. Arunava Ghosh, learned Senior Counsel, ably assisted by Mr. Suddha Sattya Banerjee submitted the following preliminary objections:

- a. The petitioners have suppressed material facts and therefore they have acted inequitably and thus are not entitled to any relief before this Court under Article 226 of the Constitution of India.
- b. The change in the conditions of the tender as amended and as quoted by me at paragraph 3 of this judgment amounts to implementation of a policy decision by the respondent no. 1, and the policy decision not having been challenged, the notices inviting tenders cannot be challenged.
- c. The decision to regulate procurement on the "least cost basis" which allowed the respondents to procure whatever quantity of the same quality of materiel as was supplied by any government/public sector unit at a cost lower than the price bid by the lowest bidder is alleged to be a policy decision which was disclosed to the petitioners at the very latest in the affidavit-in-opposition to the first writ petition. Even then, this was not challenged and thus, according to the respondents, since the tender incorporates a policy decision and the policy itself has not been challenged whether by amendment of the first writ petition or in the second writ petition itself, the writ petitions cannot be entertained.
- d. The petitioners are not entitled to maintain the WP No. 3722 (W) of 2018 because they did not participate in the tenders, the notices inviting which, contained the amended condition impugned therein. If the challenge to the said tenders with the quoted evaluation criterion goes, then as a consequence the 2nd writ petition also goes since the writ petitioner has not challenged in terms even in the 2nd writ petition the grant of any quantity to a non-bidder for which any final order has been prayed for though Rule NISI has been prayed for an Ad Interim order in terms of prayer [H] restraining the procurement of such quantity to a non-bidder.
- e. Any challenge to the conditions of a notice inviting tender on the basis of evaluation of the bids must be subject to the self-imposed rule of discipline by the writ court, about interfering in contractual matters which is purely in the realm of commercial wisdom and where some fair play in the joints has been enjoined by the Hon'ble Supreme Court in various decisions and the scope of interference is very limited, being arbitrariness as would amount to denial of any fundamental right of the petitioners, which is not the case made out here.
- f. Both the writ petitions seek to have the terms and conditions of the notice-inviting tender reviewed by the Court under Article 226 of the Constitution of India seeking in one case re-writing the conditions of the tender and adjustment of contractual disputes arising out of a tender in the second case which are not proper use of the said jurisdiction which can be more effectively decided in an alternative forum and strictly speaking no fundamental right of the petitioner has been violated.
- g. If at all the writ petitioners have been affected that is by way of suffering loss and damages for which there can only be a relief of unliquidated damages which can only be granted by a Civil Court on examination of evidence.

h. Even on a deeper scrutiny of the petitioner's claim, it will appear that the petitioner is aggrieved by the deprivation of the economy of scale which it legitimately expected when bidding for the tender since the lower quantity allotted to it would mean that it was quoting a price for a larger quantity while calculating its profits for a larger quantity expected by it to be supplied; this is not sufficient standing to maintain the writ petition.

i. The scope of examination under Article 226 of the Constitution of India in contractual or tender matters, even at the threshold, is limited to the decision-making process and if it is found that the said process was free of unreasonableness whether in terms of the Wednesbury principles or the deeper scrutiny principle, the public interest and saving of money of public exchequer must prevail over the private interest of private entrepreneurs.

j. On merits, and this is not a preliminary objection but was made to show that the respondents had a case to argue apart from technicalities, the respondents have submitted that the commercial wisdom of the respondents to allot any quantity to a Government or Public Sector Units at a lower price and only tender such quantity of the tender to a lowest bidder as the final award to it, on accepting its offer as the lowest bid, as would save money of the public exchequer, is of overwhelming public interest. Such public interest is so overwhelming that the commercial wisdom being exercised by the respondents to do so, and save the money of the public exchequer while granting the largesse of the State ought not to be interfered with by way of judicial review, even if it affects the profits expected to be made by the lowest bidder. The petitioners were not forced to participate in the tender process initiated by the notices inviting tender - they could have chosen not to participate.

k. On facts, the respondent no. 1 has also disputed that the petitioner can say that it had no notice of the change in the tender condition for the tenders floated from the 2nd quarter of 2017-2018 in view of the meetings held by the parties and the correspondence exchanged by them. In fact, the respondents go so far as to contend, that it was the petitioners who had objected to a condition being imposed in the tender after the tender had been floated and that is why the condition quoted in paragraph 3 of this judgment had been incorporated after discussion with the representatives of the petitioner no. 1 and on the basis of their input. So, further submission of the respondent no. 1 is that the petitioners are estopped from challenging the said tender on such ground, before any such forum.

8. Whether or not any material fact has been suppressed in the writ petition would require me to go into the merits of the case and therefore, a decision on the point raised at paragraph 7a above, must, of necessity, be postponed till I have ruled on the preliminary objections relating to the entertainability and maintainability of the writ petition.

9. The preliminary objections are pertinent. I will decide them, since they raise

questions which go to the root of the jurisdiction I am exercising. Yet each of them depends upon a finding that no right of the petitioner guaranteed by Part III of the Constitution of India has been violated. The petitioners have alleged that the condition quoted at paragraph 3 of this judgment incorporated in the tender is arbitrary. If that is so, as the judgments relied upon by the petitioner show, to which I shall advert to at the appropriate place in this judgment, alternative remedy is not a bar to the exercise of my jurisdiction. If on the other hand, I find that it can be shown from the first principles that the respondents are entitled to have such a condition in their notice-inviting tender as quoted by me in paragraph 3 above and that it is, in the context, not arbitrary as contended by the petitioners, then the question of arbitrariness could not arise and the preliminary objections raised by the respondents as to the entertainability of the petitioners would prevail and at the same time, the questions of law would be answered for good and on merits.

10. I, therefore, proceed to first deal with the legal effect of the changed evaluation criterion as quoted by me above at paragraph 3 of this judgment, and deal with the preliminary objections on the basis of the result of whether or not there was any arbitrariness amounting to violation of any fundamental right of the petitioners, including Article 14 of the Constitution of India.

11. There is no dispute that the petitioners are aggrieved with a condition incorporated for the first time in the notice inviting tender for the third quarter of the 2017-2018. Their case may well be that in the notice inviting the tender for the second quarter, in the absence of such condition hundred percent of allocation for an area was not given to the lowest bidder, but a percentage was given to a government/public sector unit, but that tender is not under challenge before me.

12. Therefore, it will be profitable to examine what is a notice inviting tender. The Hon'ble Supreme Court has been pleased to quote with approval, in the decision of *Bank of India and Others-v-O.P. Swarnakar and Others* reported in AIR 2003 SC 858, as follows: -

"49. In *Anson's Law of Contract*, 26th Edn. at p. 25 it is stated:

"Offers and Invitations to Treat: It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to result in any binding obligation from offers which admit of acceptance, and so become binding promises. A person advertises goods for sale in a newspaper, or announces that he will sell them by tender or by auction; a shopkeeper displays goods in a shop window at a certain price; or a bus company advertises that it will carry passengers from A to Z and will reach Z and other intermediate stops at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and do business. An invitation of this nature, if it is not intended to be binding, is known as an 'invitation to treat.'"

50. Chitty on Contract states that law thus:

"Tenders ...A statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the tender may involve very considerable expense. The offer comes from the person who submits the tender and there is no contract until the person asking for the tenders accepts one of them. These rules, may, however, be excluded by evidence of contrary intention : e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy (or as the case may be, the lowest offer to sell or to provide the specified services). In such cases, the invitation for tenders may be regarded either as itself an offer or as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated..."

13. The respondents have also relied upon the decision in Tata Cellular-v- Union of India reported in (1994) 6 SCC 651, inter alia at paragraphs 69 and 70, for the following proposition where the Hon'ble Supreme Court has been pleased to hold as follows: -

"1. Scope of Judicial Review

69. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:

1. It must be unconditional.
2. Must be made at the proper place.
3. Must conform to the terms of obligation.
4. Must be made at the proper time.
5. Must be made in the proper form.
6. The person by whom the tender is made must be able and willing to perform his obligations.
7. There must be reasonable opportunity for inspection.
8. Tender must be made to the proper person.
9. It must be of full amount.

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are

inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

14. Thus, it is clear that the law is well settled that an invitation to offer, being an invitation to submit a tender, is not an offer itself. The conditions given in it may be palatable to the tenderer, and may not be. If the same are not to the liking of the prospective tenderer, he may choose not to participate in it. If he participates in a process of invitation to tender, it is he who makes an offer. After the offer is made, if he is found eligible in terms of the conditions of the notice inviting tender, his offer is evaluated on the basis stated in the notice inviting the tender or the general terms and conditions incorporated in the notice inviting tender if they are applicable. In the instant case, the process of evaluation was followed by a further condition. The financial and technical bids were considered, and the petitioner no.1 was found to be the lowest bidder for six regions in the notice inviting tender for the 2nd quarter of 2018-19, and the petitioner no.1 did not participate in the notice inviting tender for the third quarter of 2017-18 therefore the question of evaluation in that case did not arise. Yet, in case of this notice inviting tenders, the issuance of a purchase order was not the necessary consequence of being accepted as the lowest bidder. The condition of the tender quoted by me in paragraph 3 of this judgment and impeached by the petitioners in case of both the notices inviting tender for the 3rd and the 4th quarters, clearly shows that there was one more step, before the respondent no. 1 accepted any tender. This step was ascertaining whether any Government or Public Sector unit, could supply the same materiel at a price lower than the price bid by the lowest bidder. If it was so found, then the respondent no. 1 could, according to the arrangement of which every tenderer had actual notice, from the conditions of the notice inviting tender, allot any quantity including 100% of the quantity for which the notice inviting tender had been issued, to such government/public sector unit and only offer the remaining or balance quantity, if any, for a location, to the lowest bidder. The purchase order/work order of allotment thus issued was therefore not an unconditional acceptance of the tender submitted by the lowest bidder in the open tender, but a qualified proposal to purchase a lower quantity of materiel at the said price quoted by the lowest bidder. This could only be construed as a counter proposal or a counter offer by the respondent no. 1.

15. The law of contract as enforced in India, permits this to be done. It has been best explained by Sir William Anson in his *Anson's Law of Contracts*, (with J. Beatson, Andrew S. Burrows and John Cartwright), Oxford University Press, as

follows: -

"A purported acceptance of an offer may introduce terms at variance with or not comprised in the offer. Although exceptionally in such a situation the response may be regarded as an acceptance with an offer to enter a further contract, generally, in such cases no contract is made, for the offeree in effect rejects the offer and makes a counter offer." (emphasis supplied by me).

16. I have already indicated that the Hon'ble Supreme Court has, inter alia in O.P. Swarnakar (supra) as quoted above, approved the exposition of the law of contract in the opera cited above.

17. This therefore, would be a counter-offer by the respondent no. 1, and not an acceptance by the respondent no. 1 by changing the terms of conditions of the tender or the rules of the game after the game had started. Since it was a counter offer, in response to the offer made by the petitioner no.1, it was open to the petitioner no. 1, to either accept it unconditionally, or reject it.

18. Looked at from this angle - which in fact, is in the only angle from which it can be looked at, without straining the eyes through forensic lenses - I find that there is nothing arbitrary in the said condition of the notice inviting tender. What the petitioner no.1 has argued, that at least it had the right to be told what is the lower price that the government/public sector unit was offering, before any quantity was offered to it, so that the petitioner no.1 could match it, would mean that the petitioner no.1 was not bound by its lowest bid, and any other bidder could therefore also claim that such a disclosure be made to it, so that it too could match such price, which would mean a further round of bidding. If on the other hand, this lower price was disclosed only to the lowest bidder, it would be discriminatory to the other bidders, who could, arguably, have also matched the said price. In fact, this is one of the factors that the Hon'ble Supreme Court has said must be considered before interfering with any condition of a notice inviting tender in the case of Tata Cellular (supra).

19. The other limb on which the petitioners had contended arbitrariness, is that the quoted condition of the notice inviting tender as in paragraph 3 was vague and uncertain, because at the time of bidding no one knew what price the government/public sector unit would quote, and what quantity would be given to it, if it was lower than the lowest bid. I think I have answered this question of vagueness by holding that what the respondent no. 1 did was not evaluate the offer made by the petitioner or other bidders on the basis of that future, lower bid from a non-participating government/public sector unit, but make a counter offer, because it had obtained a better price from its own agency - I am consciously holding here, that the respondent no. 1, as "State" under Article 12 of the Constitution of India is entitled to find the best person or the best price since it is the guardian of the finances of the State and the financial interests of the State. I am also holding that the Respondent no. 1 as a "State" within the meaning of Article 12 as aforesaid is to be held to be of the same nature and/or

of the same essence, id est, homoousios¹ (sic in Greek) as a government/public
1 I refer to the ontology of The Christ Jesus, as adopted in the Council of Nicaea in CE 325 and not the pre-Nicene Gnostic usage of being generated from something.

sector unit. If the respondent no. 1 chooses to allot any quantity to a non-participating government/public sector unit, the effect is that the said quantity is removed from the tender, and a counter offer is made for supply of a lower quantity at the price bid by the lowest bidder which that lowest bidder may choose, once it is made, to either accept it unconditionally or reject it.

20. The precedents on which the petitioners have relied upon for the contention that the said condition as in paragraph 3 of this judgment is arbitrary, due to vagueness or for violating the principles of Wednesbury fairness or of fair play thus constituting a violation of Article 14 of the Constitution of India, which is a fundamental right, therefore, do not apply to the present case. The petitioners have relied upon the following judgments, in this regard: -

i. Delhi Development Authority and Another-v-Joint Action Committee, Allottee of SFS Flats and Others, reported in (2008) 2 SCC 672: Reliance was placed upon paragraphs 80 and 81 of this judgment. It was held in that decision, inter alia, as follows: -

"80. A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Indian Contract Act reads as under:

Section 29 - Agreements void for uncertainty

Agreements, the meaning of which is not certain, or capable of being made certain, are void. A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot thrust upon a contracting party.

81. It is well settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative"

This judgment is not an authority for the proposition that a condition such as the one at paragraph 3 of this judgment as quoted by me, is arbitrary for being vague and uncertain. Rather, it says that where the price is not capable of being certain, there can be no binding agreement. Here, the price at which the petitioner was required to supply the materiel is certain, being the lowest bid made by it, as accepted by the respondent no. 1. What is not certain is the quantity which the petitioner would be required to supply at such rate, which again, according to the said term of tender, be made certain when the counter

offer was made. Besides, the said case was for allotment of flats on the basis of the conditions contained in the brochure where no advance notice was given of the possibility of the Delhi Development Authority adding to the price of the flats after allotment was made by a letter. This judgment is therefore not applicable and the condition of tender as aforesaid cannot be said to be uncertain for that reason.

ii. State of Uttar Pradesh-v-Shiv Charan Sharma and Others reported in 1981 (Supp) SCC 85 which inter alia relied upon an earlier judgment of a Constitutional Bench Hon'ble Supreme Court, being Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others-v-Union of India and Others, reported in (1981)ILLJ193SC, to the effect that to get the best price, a sale of public property ought to be by public auction which gives the public satisfaction that the government has put all its cards on the table, and that a public auction with open participation and a reserved price guarantees public interest being fully subserved.

iii. For much the same reason, the petitioners have also relied upon the decision in the case of Ram and Shyam Company-v-State of Haryana and Others, reported in (1985) 3 SCC 267, particularly at paragraphs 13 and 14. Paragraphs 12 and 13 are restatements of the ratio of the judgment in the case of Ramana Dayaram Shetty-v-International Airport Authority of India reported in (1979) 3 SCC 489, to which I shall refer hereinafter. Paragraph 14 of Ram and Shyam Company (supra), inter alia holds as follows:

"A unilateral offer, secretly made, not correlated to any reserved price made by the fourth respondent after making false statement in the letter was accepted without giving any opportunity to the appellant either to raise the bid or to point out the falsity of the allegations made by the fourth respondent in the letter as also the inadequacy of his bid. The appellant suffered an unfair treatment by the State in discharging its administrative functions thereby violating the fundamental principle of fairplay in action. When he gave the highest bid, he could not have been expected to raise his own bid in the absence of a competitor. Any expectation to the contrary betrays a woeful lack of knowledge of auction process."

I will deal with Shiv Charan Sharma (supra) and Ram and Shyam Company (supra) here.

In Ram and Shyam Company (supra) a participant in the auction had made a unilateral secret offer on some allegations which ousted the highest bidder for a mineral concession where the highest bidder contended that it had not been given any right to raise his bid or point out the falsity of the allegations and hence the action of the State was held to be unfair to an extent that a writ petition was held to be maintainable. The highest bidder did not have prior notice that any other person's bid could be considered after his bid had been admitted to be the highest. This is where that case parts company with the facts in this

case. In the instant case, the lowest bidder for making supplies, had full notice that after his bid was considered as the lowest, the government would ascertain if it got any lower price from its own agencies (government/public sector unit) and if there was such a price, then it would place orders on its own agencies for supplying some materiel, and if anything was left to procure, the lowest bidder would be asked, by way of counter offer, to supply the same at the same price bid by him. No allegation was made against the lowest bidder/petitioner no.1 which he would have to deal with and nor was he asked to match a lower bid - he was asked to supply at the same price he had quoted but the State decided to take less than it had advertised. This was a counter offer and the petitioners had notice that this would be made, as is clear from what I have held at paragraphs 13, 16, 17 and 18 of this judgment. Therefore, this judgment is not applicable to render the action of the respondents unfair or make it contrary to fair play in action.

Shiv Charan Sharma (supra) which reiterates the constitution bench judgment that the State must put all its cards on the table, on its face does not make the actions complained of in these writ petitions arbitrary, since the impugned condition in the tender as quoted by me in paragraph 3 of this judgment sufficiently puts the cards on the table. Therefore, even while I respectfully agree with the above judgments of the Hon'ble Supreme Court, they do not help the petitioners.

iv. Ramana Dayaram Shetty-v-International Airport Authority of India reported in (1979) 3 SCC 489, where reliance was placed on the following paragraphs: -

"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award to jobs, contracts, quotas, licences etc., must, be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

That the Government must act in public interest, it cannot act arbitrarily or without reason and if it does so, its action would be liable to be invalidated. It was further observed that the object of holding the auction is generally to raise the highest revenue. The Government is entitled to reject the highest bid if it thought that the price offered was inadequate. But after rejecting the offer, it is obligatory upon the Government to act fairly and at any rate it cannot act arbitrarily. Following this line of thought, in Kasturi Lal Lakshmi Reddy v. State of

Jammu & Kashmir and Anr. MANU/SC/0079/1980 : [1980]3SCR1338 while upholding the order of the Government of Jammu & Kashmir dated April 27, 1979 allotting to the second respondent 10 to 12 lacs blades annually for extraction of resin from the inaccessible chir forests in Poonch, Reasi and Ramban Divisions of the State for a period of 10 years on the terms and conditions set out in the order, observed as under :

Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so.

That the Government is not free like an ordinary individual, in selecting recipient for its largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-settled that the Government need not deal with anyone, but if it does so, it must do so fairly and without discretion and without unfair procedure. Let it be made distinctly clear that respondent No. 4 was not selected for any special purpose or to satisfy any Directive Principles of State Policy. He surreptitiously ingratiated himself by a back-door entry giving a minor raise in the bid and in the process usurped the most undeserved benefit which was exposed to the hilt in the court. Only a blind can refuse to perceive it."

v. While fully and respectfully agreeing with the above principle of law laid down by the Hon'ble Supreme Court, I must also point out that on the facts of this case, it cannot be said that the State has acted arbitrarily or unreasonably or that its decision to choose its own agency being a government/public sector unit, to supply a quantity at a rate lower than the lowest bid is not informed by public interest or any directive principle of State policy. If it had not given fair notice of the possibility of it doing so, in the terms and conditions of the tender as it has done by way of the condition as in paragraph 3 of this judgment, it could have been alleged to have been surreptitious - but as matters stand, the State has acted very fairly and with fair notice which the petitioners had and in fact, have both sought that such condition be incorporated in the tender and also challenged it. Therefore, Ramana Dayaram Shetty (supra) does not help the petitioners.

vi. The celebrated case of Kumari Shrilekha Vidyarthi and Others-v- State of U.P. and Others reported in (1991) 1 SCC 212 where the Hon'ble Supreme Court was pleased, among other things, to hold as follows: -

"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"

There can be no quarrel with this proposition or anything else which Shrilekha Vidyarthi (supra) has laid down. The only problem with this judgment in case of the petitioners is that to rely upon it, they have to show that the State has acted in a manner which is arbitrary in the given facts of the case. As I have held and painfully attempted to demonstrate in paragraphs 13, 16, 17 and 18 of this judgment, the impugned condition of the notice inviting tender quoted at paragraph 3 of this judgment cannot be said to be arbitrary but is in fact, a notice that the respondent no. 1 can make a counter offer to the lowest bidder.

vii. The last judgment that the petitioners have relied upon to allege that the said condition in the tender was arbitrary due to unreasonableness, is the celebrated case of Associated Provincial Picture Houses Limited-v- Wednesbury Corporation reported in (1947) 2 AER 680, where the Court of Appeal was pleased to hold as follows: -

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority"

I am afraid that I cannot hold that the condition of the notice inviting tender as in paragraph 3 of this judgment is so absurd that no reasonable man could think it was in his power to award any amount to a government/public sector unit

instead of allotting the entire quantity to the lowest bidder; that a price lower than the lowest bid is available from an agency of the State is, I hold, a relevant factor in the decision making process. The policy decision to source the same quality of materiel from a government/public sector unit, at a price which is lower than the lowest bidder who is a private entrepreneur, and for the quantity which the said government/public sector unit can manufacture since it does not have the capacity of the private entrepreneur and its economy of scale and only make a counter offer for the balance to the private entrepreneur who is the lowest bidder, also does not appear to me to be hit by the principles of Wednesbury unreasonableness. Therefore, the said judgment cannot help the petitioners.

viii. If it is contended that the favour shown to a government/public sector unit is denial of equality of treatment to the petitioners in the eye of law or before the law, I must point out that the petitioners, being private entrepreneurs form a class separate and distinct from government/public sector units and therefore this is not a case where equals are being treated unequally, but rather permissible classification is being made between those whose business will benefit the public exchequer and those whose business will not. It must be remembered, that discrimination by itself is not barred by the Constitution of India - only hostile discrimination is barred, and here there is sufficient reasonable nexus with the object of such classification to give benefits to the government/public sector units and rational differentia to take it out of the ambit of hostile discrimination.

ix. In fact, this aspect of the matter is dealt with at great length in a judgment cited by the petitioners, of all persons, being the judgment in the case of Shimnit Utsch India Private Limited and Another-v-West Bengal Transport Infrastructure Development Limited and Others, reported in (2010) 6 SCC 303. In this judgment, after referring to and summarizing with approval the law laid down in the matter of policy decisions behind tenders and judicial review of the tenders on the basis of the conditions of tender much in line with inter alia Tata Cellular (supra), and Monarch Infrastructure (P) Ltd-v-Commissioner, Ulhasnagar Municipal Corporation and Others, reported in (2000) 5 SCC 287 was pleased to hold as follows: -

"Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined

with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

x. Since I have held that making such a departure with due notice in the terms and conditions of the tender for a government/public sector unit which is prepared to supply the same standard of materiel at a cost which is lower than that bid by the lowest bidder, the State is subserving the interests of the country, this judgment cited by the petitioners in fact goes against them looking at the matter holistically.

xi. In fine, therefore, the contention of the writ petitioners that the said condition as in paragraph 3 of this judgment is arbitrary, on any of the grounds raised by them, fails. Therefore, no violation of any right under Article 14 of the Constitution of India has been made out.

xii. Most of the judgments relied upon by the petitioners are on facts which are different from the facts of the case at hand as rightly pointed out by the respondents. It is trite that a decision is an authority for what it actually decides and not what can logically be deduced from it. A little difference in facts makes a lot of difference in the value of a decision as a precedent. In this regard, I rely upon the judgment in the case of *Quinn-v-Leathem* reported in (1901) AC 495 and followed by the Hon'ble Supreme Court, inter alia in the case of *Bhavnagar Municipality-v-Palitana Sugar Mill (P) Ltd* reported in (2003) 2 SCC 111.

21. Let me first deal with the objections as in paragraphs 7b and 7c of this judgment relating to the objection to the petitions as being directed against policy decisions. The respondents have relied upon the judgments in the cases of *The State of U.P. and Others-v-Vijay Bahadur and Others* reported in (1982) 2 SCC 365 and *Shimnit Utsch (supra)*. While these decisions rest the responsibility of making a policy decision on the appropriate government, before the final acceptance on part of the bidder, and shows a reluctance to intervene in the grey areas of policy decisions when the "State" is treated to be the best guardian of the public exchequer and public interest, and undoubtedly seeing that public sector units thrive is in the public interest, the said decisions are, however, qualified by the decision in *Delhi Development Authority (supra)* which I have referred to in paragraph 19, which specifies the circumstances when a policy decision may be interfered with by way of judicial review. Yet, this does not answer the question as to whether without challenging the policy decision, which was made known to the petitioner either at the meeting of October 16, 2017 or in the affidavit-in-opposition to WP No.3722 (W) of 2018, the tenders containing an implementation of the policy decision could be challenged.

22. This question as in paragraphs 7b and 7c have two parts. The first part as was argued before me, is that it was a policy decision which was not challenged despite the petitioners having knowledge thereof. The second is that the notice

inviting tender incorporating the policy decision is not maintainable without such challenge to the policy decision itself. What the respondents carefully did not point out, as is evident from the face of the said policy decision starting from page 31 of the affidavit-in-opposition to WP No.3722 (W) of 2018 at page 32 thereof, is that the policy decision mentioned therein is not the identical to the condition mentioned in the notice inviting tender which I have quoted at paragraph 3 of the judgment and which is under challenge.

23. For better appreciation of this question, I am setting out the relevant extracts from the policy decision at pages 31-32 of the said affidavit-in-opposition to WP No.3722 (W) of 2018, hereinbelow: -

"The proposal for procurement of High Density Ammonium Nitrate (HDAN) on ex-factory basic price ruling on the date of supply on nomination basis under single offer from PSU/Govt. parties viz. Rashtriya Chemicals & Fertilisers Limited (RCFL), National Fertilisers Limited (NFL) and Gujarat Narmada Valley Fertilisers Company Limited (GNFC). HDAN is a major raw material for manufacturing of bulk explosives and constitutes about 70% of the total formulations. The estimated requirement of HDAN for 2009-10 is about 40000 MT.

The IBP Division has experienced problems for procurement of HDAN against firm price since the price of the product is dependent on movement of process inputs viz. naphtha, natural gas, LSHS and the demand and supply position. It is, therefore, proposed to finalise procurement of 30% of the annual requirement of HDAN from PSU/Government parties on nomination basis on the prevailing price on the date of the supply and finalise procurement of the balance 70% quantity of HDAN through open tender. It is also proposed to regulate procurement based on the least cost/logistic exigency/product availability and in case open tender rate is higher than prevailing market rate of PSU/Government parties, upliftment from PSU/Government parties on nomination basis would be increased upto 100% subject to availability/logistics."

24. While there is no doubt that the above was the proposal before the Board of the respondent no. 1, this is not what was approved or resolved by the Board of the respondent no. 1 as appears from page 32, a continuation of the minutes, which I set out hereinbelow.

"With the above, Contracts Committee of the Board approved the item and passed the following resolutions: -

RESOLVED THAT approval of the Contracts Committee of the Board be and is hereby accorded to authorize Director-in-Charge, IBP Division to finalise the terms of procurement of High Density

Ammonium Nitrate (HDAN) from three PSU/Government parties viz. Rashtriya Chemicals & Fertilisers Limited, National Fertilisers Limited and Gujarat Narmada Valley Fertilisers Company Limited on nomination basis.

RESOLVED FURTHER THAT approval of the Contracts Committee of the Board be

and is hereby accorded to authorize Head of Business (Explosives), IBP Division to regulate procurement of HDAN on Least Costs Basis to the extent possible taking into consideration the availability/logistics and details of the actual procurement would be submitted to the Contracts Committee for ratification on an annual basis. (emphasis supplied by me)."

25. The two resolutions set out in paragraph 24 above amount to a policy decision. A bare comparison of these two resolutions with the condition in the notice inviting tender set out by me in paragraph 3 of this judgment will show that they are not identical or same. The tender condition cannot even be said to be an implementation of the said policy decision because there is an important departure in the implementation of the policy decision in the notice inviting tender. The policy decision required the details of the actual procurement to be submitted to the contracts committee of the Board of the respondent no. 1 for ratification on an annual basis before being finalized. The condition in the notice inviting tender was not to take only 30% from the public sector units/named government parties as proposed in the first part of the minutes but upto 100%, without any requirement for ratification by the contracts committee, whether on annual basis or tender to tender basis. Therefore, the policy decision required a further step to be taken by the contracts committee for implementation of the decision and it to be final. The condition in the tender did not have this requirement.

26. In view of what I have stated in paragraphs 21, 22, 23, 24 and 25, it is clear that the respondents themselves gave a go by to their policy decision and the condition quoted in paragraph 3 of my judgment, in the notices inviting tender, was not an implementation of their policy decision. Therefore, the question of first challenging the policy decision as in paragraph 24 or at all challenging it, before challenging the condition as in paragraph 3 of the notice inviting tender, does not and cannot arise. The preliminary objection in paragraphs 7b and 7c is therefore overruled.

27. So far as the fourth objection is concerned, as in in paragraph 7d of this judgment, I hold that the participation of the petitioners in the tender for the 2nd quarter of 2018-2019 was conditional, and without prejudice to its rights and contentions about the said impugned condition in the tender, which they had also impeached in their first writ petition against the self-same condition in the tender for the 3rd quarter and 4th quarter of 2017-2018 and the 1st quarter of 2018-2019, for much the same causes. Such conditional and qualified participation does not rob them of the locus to file the second writ petition or even take away their right to get the first writ petition decided. So far as the other aspect of this objection is concerned, that the writ petitioners were not entitled to challenge the tender for the third quarter and fourth quarters of 2017-2018 and the first quarter of 2018-2019 without having participated in it, since it is the case of the petitioners that the said impugned condition was the reason why it could not participate, at least a case has been made out for

examination of the said clause which gives them sufficient locus to maintain the writ petition. For this reason, I overrule the preliminary objection in paragraph 7d.

28. However, the preliminary objections in paragraphs 7e, 7f and 7g are of more moment, particularly in view of my findings as in paragraphs 14, 15, 17, 18 and 19 read with paragraph 20 of this judgment, which clearly lead to the conclusion that there is no violation of any right of the petitioners under Article 14 of the Constitution of India made out. No other fundamental right has been shown to have been violated by the petitioners. In such view of the matter, while the power to exercise judicial review in a purely contractual matter at the threshold of the contract is well settled, there is no reason to exercise such jurisdiction where there is no violation of any fundamental right or act without jurisdiction, in a case where there is a clear alternative remedy of the petitioners to go to a civil court for obtaining damages. Whether in view of the finding on the question of law formulated by me that remedy will be efficacious is of course a different question, but since both the parties have addressed me on the merits of the case, I had to decide that question of law as I have recorded at paragraph 9 above. The preliminary objections at paragraphs 7e, 7f and 7g are therefore upheld subject to the finding of the nature of the said condition of the tender as in paragraph 3 of this judgment as a counter offer, as in paragraphs 14 and 17 hereof. Ordinarily, on the basis of this finding, the petitioners would have been entitled to approach the appropriate civil court for damages, but in view of my finding that there is no injury to the petitioner which can be complained of, and that what the respondents have done by the notice inviting tender and its impugned condition as in paragraph 3 above is give a lawful notice of there being a possibility of a counter offer, as was made, I do not think that any action would lie for damages, when there is no injury in the eye of law.

29. The objection in paragraph 7h relating to the lack of locus of the petitioners for deprivation of profits do not appear to be well founded since no person would bid in a tender intending to do the State a favour at a loss to himself. Making of profit is a legitimate expectation and the distribution of the largesse of the State naturally raises such expectation amongst the participants and/or those eligible for competing for such largesse. Anything that would deprive the petitioners of their expected profits without reasonable notice, actual or constructive, would give them sufficient standing or cause of action. That in the instant case there was sufficient notice and what they thought was a deplorable vagueness was only a notice of a possibility of counter offer, is truly speaking a matter of the merits of the case and not locus. So, this point is decided against the respondents.

30. This brings us to the objection raised by the respondents which I have summarized at paragraph 7i of this judgment. At paragraph 20(viii) above of this judgment, I have already held it cannot be said that the condition of the notice inviting tender as in paragraph 3 of this judgment is so absurd that no reasonable man could think it was in his power to award any amount to a

government/public sector unit instead of allotting the entire quantity to the lowest bidder; that a price lower than the lowest bid is available from an agency of the State is, I hold, a relevant factor in the decision making process. The policy decision to source the same quality of materiel from a government/public sector unit, at a price which is lower than the lowest bidder who is a private entrepreneur, and for the quantity which the said government/public sector unit can manufacture since it does not have the capacity of the private entrepreneur and its economy of scale and only make a counter offer for the balance to the private entrepreneur who is the lowest bidder, also does not appear to me to be hit by the principles of *Wednesbury* unreasonableness. I agree with the respondents that in contractual matters, the scope of inquiry under Article 226 of the Constitution of India must be restricted to examine whether a condition suffers from unreasonableness, both under the *Wednesbury* principles as also those of deep scrutiny, and on both these counts, since the writ petitioners have failed to make out a case, I am afraid that I agree that there is no scope of interference under Article 226 of the Constitution of India with the condition of the notice inviting tender as I have extracted at paragraph 3 of my judgment, above.

31. I come now to the objection on merits raised by the respondent no. 1 as summarized in paragraph 7j of this judgment. I am inclined to agree that the judgments cited by the respondents as also the petitioners, including *Tata*

Cellular (supra), *Delhi Development Authority* (supra) and *Shimnit Utsch India Private Limited* (supra) would go to show that the commercial wisdom of the State in awarding contracts ought not to be lightly interfered with by the Court in judicial review, particularly if a case of overwhelming public interest of saving money of the public exchequer on the one hand is set up against the legitimate expectation of a private entrepreneur to make profit. If the petitioners thought that they were not in a position to accept such a condition of the notice inviting tender, they could always have chosen not to participate in it, as they did in case of the tender of the third quarter of 2017-2018, without challenging it. If on the other hand, I intervene in the matter and direct that it was not open to the respondents to make the counter offer to the petitioners in terms of the said condition of the notice inviting tender, despite my findings to the contrary, it would amount to rewriting the conditions of the tender, and relaxation of the conditions of procurement and entering into a contract, after the last date of submission of the bids, without notice to other persons, who may, without that condition, have been encouraged to bid in the tender. This would clearly be in violation of the principles laid down in *Ramana Dayaram Shetty* (supra) and also the recent judgment of the Hon'ble Supreme Court in the case of *Durgawati Devi v-Union of India*, through its Secretary, Ministry and Others, SLP (Civil) No.3479/2016 decided on October 4, 2019. Therefore, I uphold the contention of the respondents in paragraph 7j of this judgment.

32. Finally. I come to the rather thorny question of estoppel raised by the facts

pleaded by the respondents summarized by me at paragraph 7k of this judgment. The respondents have raised a question of estoppel against the petitioners in respect of challenging the notice inviting tender, referring to the meetings they had with the petitioners and/or the high level representatives of the petitioner no. 1 and the consequence of the said meetings, leading to the inclusion of the said condition in the notice inviting tender as in paragraph 3 of this judgment, as summarized at paragraph 7k of this judgment, on merits. For deciding this question, examination is needed of three documents, disclosed as Annexures R/3, R/4 and R/5 to the affidavit-in-opposition to WP No.3722 (W) of 2018, by the respondents, which the petitioners have admitted to have been respectively sent to and by them.

33. Annexure R/3 is a minute dated October 16, 2017 of the meeting held on October 16, 2017 between the representatives of the respondent no. 1 and the petitioner no. 1. It records that the petitioner no. 1 was unable to participate in the tender (third quarter of 2017-2018) due to the uncertainty of not getting the orders for the tendered quantity despite being the lowest bidder in the open tenders. The minutes recorded that the respondent no. 1 clarified that this occurred due to the price quoted by the petitioner no. 1 being higher than the market price and further that the respondent no. 1 had an arrangement with Government/PSU sources where if the price is lower than the Lowest Bidder's Price (L1 price) against the open tender, maximum procurement is done from the said other sources. Since the petitioner no. 1 requested the clearing of the issue in the open tender, the respondent no. 1 was proposing the following text to be inserted in the evaluation/ranking of tenders subject to approval from the competent authority, and on this basis the query of the petitioner no. 1 on distribution of quantities against open tenders for HDAN floated by the respondent no. 1 stood cleared. What was proposed at the meeting of the petitioner no. 1 and the respondent no. 1 on October 16, 2017 was as follows: -

"IOCL has an existing arrangement for supply of HDAN from Govt/PSU sources. In the event the price of HDAN from these sources are lesser than the quoted L1 rates of bidders against this Tender, IOCL may consider allocation of maximum possible quantity to the said Govt./PSU sources to ensure economical procurement of the material."

This was a minute signed on behalf of both the respondent no. 1 and the petitioner no. 1. One Arup De and one S.P. Jana signed on behalf of the petitioner no.1.

34. Therefore, this was a proposal made by the respondent no. 1 at the instance of the petitioner to include in the conditions of the notice inviting the tender, the possibility of procurement from someone other than those who had submitted bids in the open tender.

35. However, Annexure R/4 is an electronic mail sent from the electronic mail address of one of the signatories on behalf of the respondent no. 1 of the minute

dated October 16, 2017 to the electronic address of the said Arup De, representing the petitioner no. 1. It is datelined October 25, 2017 with the timeline 11:56. It is stated to be on the subject of the minutes of meeting on "16.10.2017".

36. This restates the conclusion reached in the meeting dated October 16, 2017, as follows: -

"Further to our Minutes of the Meeting held at our Office on 16/10/2017, this is to inform you that the relevant text of the Evaluation/Ranking of Tenders in our Tender Document for HDAN would be as follows, replacing what is mentioned in the Minutes :

Quote:

Bidders acknowledge that IOCL has an existing arrangement for supply of HDAN FROM Govt./PSU sources. In the event that the prices of HDAN from these sources are lesser than the quoted L1 rates of the bidder against this Tender, IOCL may, at its absolute discretion, allocate any quantity, including up to 100% of the tender quantity, to the said Govt./PSU sources to ensure economical procurement of the material. In such case, if IOCL decides to procure any quantity of HDAN under this Tender, then the tender quantity would be deemed to mean such remaining quantity, and IOCL may at its discretion place order on the L1 bidder for such remaining quantity in accordance with the terms and conditions of the Tender and the bid. If however no quantity of HDAN remains to be procured, then IOCL may cancel the tender process without incurring any liability towards the bidders.

Unquote:"

37. What the petitioner no.1 wrote, in response to the above electronic mail, is at Annexure R/5 to the said affidavit-in-opposition to WP No.3722 (W) of 2018, and this bears close scrutiny for the purpose of deciding whether there is any estoppel as contended by the respondents or not. This is by way of an electronic mail sent from the electronic mail address of the other signatory for the petitioner no. 1 who had signed the original minutes of October 16, 2017. It is quoted hereinbelow: -

Dear Mr. KO Samuel

This has reference to your following mail dated 25th October 2017 regarding the minutes of meeting held on 16th October 2017.

This scheduled meeting which was held on 16th October 2017 to provide clarification regarding our queries for distribution of tender quantity related to open e-tender for procurement of HDAN particularly for the quarter Q3 & Q4 of 2016 -17 and Q1 of 2017-18. During the above meeting on 16th October 2017, we were informed that IOCL has an arrangement with Govt./PSU sources for supply of HDAN. Although we were L1 in most of the location for open e-tender

for the period Q3 and Q4 and Q1 2017-18, but the prices of the of said Govt/PSU are lower than L1 prices of open e-tender and thus no order was issued to us. Thereafter, we signed a minutes of the meeting on 16th October 2017 for the record purpose. Now, we have received your mail for modification of the minutes of meeting signed by us on 16th October 2017.

We find that the clarification given in the below mail does not reflect the clear intent, therefore, we are modifying the same. Please see the needed correction

"Bidders acknowledge that IOCL has an existing arrangement for supply of HDAN from Govt/PSU sources. In the event that the prices of HDAN from these source are lesser than the quoted L1 rates of the Bidder against this Tender, IOCL may, at its absolute discretion, allocate any quantity, including up to 100% of the Tender quantity, to the said Govt/PSU sources to ensure economical procurement of the material.

In case, if IOCL decides to procure any quantity of HDAN under this Tender beyond the supply quantity made by Govt/PSU then IOCL may at its discretion place order on the L-1 bidder for such remaining quantity in accordance with the terms and conditions of the Tender and the bid. If however no quantity of HDAN remains to be procured, then IOCL may cancel the tender process without incurring any liability towards the bidders."

Once the above correction is accepted, we can sign the modified minutes of the meeting.

We have shared the discussion which we had with you on 16th October 2017 with our management. Our queries for distribution of tender quantity for HDAN for Q2 and Q3 and Q1 2017-18 was answered partially i.e only the methodology of distribution of tender quantity for past 3 tenders. But our major queries were not answered i.e in spite of being L1 in most of the location in all 3 tenders, we have received very small quantity from a few locations. Our management will seek further clarification regarding the distribution of tender quantity in each locations for past 3 tenders including the location wise L1 price vis-à-vis the prices of said Govt/PSU with which IOCL has an arrangement for supply of HDAN. This will help us to understand our competitive position as well as to take appropriate decision in future tender. You will appreciate that we are responsible supplier of HDAN to IOCL and have been associated with IOCL for more than a decade for supply of HDAN/LDAN. Therefore, as a natural justice, we request you to clarify our queries to take suitable decisions for future tenders. In absence of above clarifications, it will be difficult for us to participate in future tender for supply of HDAN.

Thanking you

Yours faithfully

For Smartchem Technologies Limited

SP JANA."

38. If I compare the portion of Annexure R/5 in bold with the condition in the notice inviting tender as in paragraph 3 of this judgment, it will be found that they are identical, and expect for the fact that the petitioner no.1 has divided the condition into two paragraphs, and the condition as printed in the tender combines both the paragraphs into one, there is no material difference. Therefore, it can be said, that regardless of reserving the right to seek further clarifications in respect of what price was quoted by the government/public sector units in respect of the locations in the last three years, it was at the instance of the writ petitioners, that the said condition as in paragraph 3 of this judgment was included in the tenders from the 3rd quarter of 2017-2018 and even till the 2nd quarter of 2018-2019, and this was included on the representation made by the petitioners that without this condition, there was no clarity and the petitioners would not be able to participate in the tender. Once the respondent authorities had altered their position by including the said condition in the tender, it appears to me to be inequitable to allow the petitioners to challenge the said condition in any of the subsequent tenders where the said condition was included. True it is, that the respondent authorities have not made out any question of material prejudice suffered by them by including the said condition, and so promissory estoppel, strictly speaking, cannot arise. Yet equity demands that the petitioners are not allowed to blow hot and cold at the same time, and not be allowed to challenge that which was included or made a condition of the notice inviting tender at their instance and on their representation. This has been the position of law which has been administered by this Court from its inception. If any authority is needed, I will rely upon the cases of *Bhaja Choudhury-v-Chuni Lal* reported in (1906) 11 C.W.N. 284, and also *Dwijendra Narain Roy-v-Joges Chandra De and Others*, reported in AIR 1924 Cal 600 equivalent to 79 Indian Cases 520 to cite only two of the authorities of classical antiquity.

More recently The Hon'ble Supreme Court was pleased to hold in *R.N. Gosain v. Yashpal Dhir*, reported in AIR 1993 SC 352, as under:-

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

39. Therefore, while answering the question on merits raised as in paragraph 7k of this judgment, I hold that while it would have been a preliminary objection had the respondents been able to show that they had suffered any material prejudice by acting on the said representations of the petitioners as in Annexure R/5 to WP No.3722 (W) of 2018, since they have not been able to establish the same, at best it is an argument that the writ petitions were filed inequitably

which is an objection on merits. This was suppressed by the writ petitioners in their writ petitions as rightly pointed out by the respondents when they objected to the entertaining of the writ petitions as summarized by me in paragraph 7a above. Thus, on merits, in view of my finding as in paragraph 38 above, I hold that the respondents have a good point and hold that the writ petitioners acted inequitably in challenging the notice inviting tender on the basis of the condition as in paragraph 3 of this judgment, which was included by the respondents on the express prayer and representations of the petitioner no. 1 and furthermore came to the writ court with unclean hands, after suppressing the material fact, that the impugned condition in the notice inviting tender, had been incorporated at the instance of the writ petitioners.

40. As a result, and in view of what I have held at paragraphs 13, 16, 17, 18, 19 and 21 and 35, both the writ petitions fail and are dismissed, with the observations made at paragraph 28 of this judgment. I record my appreciation for the forensic skills shown by Mr. Aniruddha Chatterjee and Mr. Kushal Chatterjee, learned Advocates, for the petitioners, and Mr. Arunabha Ghosh and Mr. Suddha Sattya Banerjee, the learned Advocates for the respondent no. 1, and the sterling assistance that they were of, to this Court, on behalf of their respective lay-clients. There shall be no order as to costs.

Protik Prakash Banerjee, J

Later: Photostat certified copy of this order, if applied for, be furnished expeditiously.