

(2005) 04 GAU CK 0050

In the Gauhati High Court

Case No : Writ Petition (C) No's. 393, 399, 417, 418, 442, 958 and 1020 of 2005

Sumeet Enterprises

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 08-04-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 17, 18
Sales of Goods Act, 1930 — Section 64

Citation : (2005) 4 GLT 227

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

Bench : Single Bench

Advocate : N. Dutta, M.M. Kataki, A. Saran, S. Kataki, A.M.B. Baruah, R.K. Pradhan and A.B. Choudhury, for the Appellant; A. Saran, A.K. Singha, K.P. Pathak, P.K. Musahari, M.Z. Ahmed and A.K. Bora, for the Respondent

Judgement

I.A. Ansari, J.—We are all living in an information age, where business and ideas are being made and exchanged not only between human beings, but also between giant computers and data processing machines. Internet, by connecting the producer of goods with the ultimate consumers, has totally changed the method in which business is done. Concepts like e-banking, e-commerce and e-education have not only revolutionized the system of doing business, but have also widened its ambit considerably. The world, today, has virtually shrunk to a global village.

2. Changes did take place even in the past; but the pace was relatively slow and man had time to adjust himself to the new conditions. In recent years, however, the pace of change has been amazingly swift and it has been difficult for many of us to adjust ourselves to this ever-changing situation. The result is reflected in the shape of unique and virgin problems cropping up almost everyday in various spheres-political, economic and legal.

3. Same, as civilization, economics is a movement and not a condition; it is a voyage and not a harbour. One must, however, bear in mind that economics,

same as, civilization, begins with order, grows with liberty and dies in chaos.

4. Science, as Pandit Jawaharlal Nehru said, has two faces like Janus-destructive, on the one hand, and constructive as well as creative, on the other. Though both have gone on side by side and both still go on, no one knows, who will, ultimately, triumph. The use of science and technology may bring peace and prosperity for people; but mindless use of science and technology may lead to disorder and destruction of the society. While befriending science and adopting scientifically advanced technology, State or its instrumentality cannot act in an arbitrary manner and uninformed of reasons. Computer, as the American Library Association, defines, is only a fast idiot, it has no imagination; it cannot originate action. It is, and will remain, only a tool to man. It is clear that "computer" is, ultimately, a tool in the hands of men and it is for the men to decide how to use such a tool. Misuse of computer, like any other tool, may not bear the fruit, which the tool is expected to yield.

5. It is but natural for the State to keep pace with time and change its economic policy in tune with the global developments in the field of economics. It is also but natural that the State takes advantage of modern and scientifically developed technology for better economic growth. While changing its economic policy or making use of science and technology, though the State must have freedom, its policy cannot go wholly against the well-being of the people, in general, nor can the State, in order to protect or make one of its instrumentalities, such as Coal India Ltd, survive, refuse to consider or keep its eyes closed from the necessity to secure the well-being of the people at large. State must strike a balance between the need to develop and the duty to protect and ensure well-being of the people. The people, in the north-east, largely suffer from a feeling of neglect by the Central Government. This feeling may or may not be well- founded, but the existence of such a psyche cannot be disputed, ignored or disregarded, for, doing so would lead to greater sense of neglect, alienation and frustration. The preamble to the Constitution guarantees to all of us development and equality of treatment in matters of even economic policies.

6. The object of a policy, be commercial or otherwise, may be very laudable; but the manner and method, which is adopted, for formulating the policy must withstand the tests under Article 14. Even though the State and its instrumentality, while evolving an economic policy, must be given free hand and the State and its instrumentality must be given, in the method of "trial and error", free play in the joints, the process of "trial and error", in the realm of commercial policy or transaction, cannot be actuated by bias, mala fide, irrationality, capriciousness or arbitrariness.

7. Created as a company by the Government of India with the avowed object of making efficient arrangements for marketing and supply of coal so as to make coal and other similar derivatives "available to consumers throughout the country conveniently and at a reasonable price", the Coal India Limited, typically known as the "CIL", which is the largest company in the world in terms of coal

production and makes a turnover of around Rs. 2.62 billion, faces, in the present set of writ Petitions, a challenge to the introduction of its policy to take recourse to the medium of electronic auction, popularly known as E-auction, as the sole and permanent mode of sale of the coal produced by it. The challenge to the said policy has been posed by some of the traders as well as consumers of coal located in the north-eastern States of India.

8. North Eastern Coalfields Limited (known as the "NEC"), which is a unit of the CIL, used to sell coal under a scheme called Open Sale Scheme, which was popularly known as the "OSS". Under the OSS, the coal, which used to be sold to the general consumers and traders, were not connected with the sale of coal by the CIL or the NEC to the core and other priority sectors and the linked-up consumers.

9. When a notice, dated 29-12-2004, was published by the NEC inviting bidders to register themselves with Metal Scrap Trading Corporation (in short, MSTC), a Government of India enterprise, for sale of coal by E-auction, three different sets of writ petitions were filed in this High Court. Whereas WP(C) Nos. 399/05, 416/05, 417/05, 442/05 and 1020/2005 form one set, WP(C) Nos. 393/ 05 and 958/2005 are two independent writ petitions. By interim orders, passed in some of these writ petitions, the operation of the impugned notice, dated 29-12-2004, was suspended. Later on, in accordance with the directions contained in the order, dated 03-03-2005, passed by the Hon"ble Supreme Court in SLP Nos. 2060/05,2207/05,2210/ 05 and 2295 of 2005, E-auctions, in terms of the notice aforementioned, have already been held.

10. By this common judgment and order, I propose to dispose of all the writ petitions enlisted hereinabove, for, all these writ petitions have raised several common questions for determination, the facts are almost identical, all the writ petitions have been heard together and are capable of being disposed of together.

11. I have heard Mr. N. Dutta, learned Senior Counsel for the Petitioners in WP(C) Nos. 399/05,416/05,417/05,442/05,1020/ 2005, and 393/2005, and Mr. AB Choudhury, learned Senior Counsel appearing on behalf of the Petitioners in WP(C) No. 958/2005. I have also heard, initially, Mr. GK Bhattacharjee, learned Senior Counsel, and Mr. N Ahmed, learned Counsel appearing on behalf of the CIL and the NEC. I have further heard Mr. A Sharan, learned Additional Solicitor General, and Mr. K.P. Pathak, learned Additional Solicitor General, appearing on behalf of the CIL and the NEC. Mr. P.N. Choudhury, learned Additional CGSC, has been heard on behalf of the Union of India and the MSTC.

CASE OF THE PETITIONERS

WP(C) Nos. 399/05.416/05. 417/05. 442/05 and 1020/2005

12. Put in a narrow compass, the case of the Petitioners, in the four writ petitions, namely, WP(C) Nos. 399/05,416/05,417/ 05,442/05 and 1020/2005, is as follows:

(i) The Petitioners are in the business of purchase and sale of coal. The Petitioners came across the notice, dated 29-12-2004, aforementioned issued by the NEC, the notice having notified, inter alia, that the NEC had offered for sale of Grade-A coal (UHV-7000-7099 K.cal/kg.) up to 250 mm ROM coal and Grade A (UHV-6200-6299 K.cal/ kg.) up to 250 mm ROM coal through E-auction; the MSTC Limited would conduct E-auction on 14 January, 2005, for sale of 20 rakes (10 rakes of each grade) and on 21 January, 2005, for sale of 20 rakes (10 rakes of each grade) on behalf of the NEC, each rake would consist of 41 wagons weighing approximately 2470 M.T, the sale would be open to both consumers as well as non-consumers irrespective of the fact whether the consumer or non-consumer has any linkage with the NEC or not. This notice also clarified that parties willing to participate in the E-auction would have to register themselves with the MSTC web-site and only those persons, who get themselves registered and deposit the requisite earnest money in terms of the said notice, would be allowed to participate in the auction.

(ii) The Petitioners have purchased coal in the past under the said Open Sale Scheme. E-auction is the modern concept for conducting auction through internet. In such a procedure, it is essential that the participants in the auction have their own computers or obtain the help of computers in any cyber cafe. At the time, when the auction process is on, the individual computer of the participants are required to be linked up with the Central Computer of the MSTC through internet and after being so linked up, the participants may make their bids through the computers. Despite the fact that the adoption of the E-auction widens the base of the participants and the persons, who are interested in the auction, may offer their bids without proceeding to the place of auction, the resort to E-auction has several inherent disadvantages in the context of the north eastern region of India. While issuing the impugned notice, the Respondents/ authorities concerned failed to consider the disadvantages that would be faced by the participants of the north eastern region including the Petitioners. Most of the prospective participants from the north-eastern region do not know how to handle or operate computers. In fact, many of the persons involved in auction-sale of coal in the north-eastern States do not have their own computers nor do they know the complicated procedure of operating computers in order to enable them to participate effectively in E-auction. The supply of electricity, in most of the places of the north eastern region, is irregular and, at times, there is no electricity for days together. All the interested participants do not have equal access to computer and internet system. In most places of the North Eastern Region, even if the computers and internet facilities are available, the required electricity may not be available at the appropriate time, when the E-auction is conducted. If at the relevant period, i.e., between the opening and closing of E-auction, there is no electricity, the businessmen, such as the Petitioners, would not be able to participate in the E-auction. As most of the participants do not have their own computers, they would be required to hire the computers from the public internet cafe and in such an event, the participants would be exposed

to the risk that any of their adversaries would be able to manipulate their bids.

(iii) Unless the businessmen, such as the Petitioners, are capable of participating in E-auction, they would not be able to participate in the same and would, therefore, be left out of the race. Even if the businessmen, such as the Petitioners, participate in the E-auction, they are likely to commit mistakes, which would result in rejection of their bids. The open public auction has its own advantages, for, it would be less expensive to bid and the decision on the bids offered is open and transparent. In the case of auction, the bidder has the option, in terms of Section 64 of the Sale of Goods Act, to withdraw his bid; but in E-auction, as proposed by the Respondents, the bid, once offered, cannot be withdrawn. E-auction, in the form in which it has been resorted to, is open to manipulation by the auctioneers. The system is not clear and transparent. The result of the E-auction, as per the terms and conditions offered by the MSTC, would not be available to the participants, but the same would be intimated to the winner alone by communication to be made by the MSTC. This would deny to the bidders the scope and opportunity to know if there has been any manipulation of the bids by the authorities conducting the E-auction. This would, in turn, give wider scope for corruption. The persons, who may not be genuine coal merchants, can also participate in the E-auction. This would lead to a situation, where the registered bidders of the MSTC would participate for speculative purposes only. Such a speculator may win the auction and would sell, subsequently, its coal to needy and genuine consumers and traders at prohibitive prices.

(iv) The process of E-auction, which needs access to internet, has inherent disadvantages inasmuch as access to a particular website in the internet can be jammed or prevented by using certain methods. In such an event, an unscrupulous bidder can increase his bid at the last moment before the closing time and prevent the other bidders from increasing their bids. Again, power failure, at the relevant time, at a particular place, can temporarily prevent a bidder from making his bid during the relevant period. The E-auction is a new concept. As the present Petitioners and the other coal merchants in the north east are not fully conversant with the procedure of E-auction, some kind of pre-bidding training course ought to have been conducted to train the participants, particularly, when the E-auction has been resorted to by the CIL as the only mode of sale of coal for all further sales of coal. The method of imparting pre-bidding training has been adopted by all the Government departments and institutions, who have opted to adopt the E-auction/E-tender methods. The process of adopting such high technology methods should be done gradually and not suddenly and certainly not without any notice or warning to the prospective bidders. Adoption of such a high technology method suddenly and without preparing the basic infrastructure is, by itself, arbitrary.

(v) Upon enquiry, the Petitioners could learn that in respect of sale of coal available in other parts of India, the Respondent authorities have not adopted

the E-auction method inasmuch as the sale of coal is done at other places through the traditional method and not E-auction. As a result, the interested participants from the north eastern region have to face grave inconvenience if they desire to participate in such auction/sale, for, they have to travel a long distance in order to remain physically present at the site of auction/sale, whereas, because of the introduction of E-auction method, participants from other parts of the country can participate in the E-auction without physically traveling to the site of auction/sale. There is a growing tendency to introduce the E-action method in respect of the goods available in the north eastern region like coal, scrap metals, etc; but in respect of these very goods available in other parts of the country, the traditional method of sale is still adhered to. This shows that there is a region-wise discrimination against the north eastern region in the matter of introduction of E-tender/E-auction. Such discrimination is more noticeable in the background of the fact that the basic infrastructure required for conducting an E-tender/E- auction is not as developed in the north eastern States as in other parts of India, yet E-auction is more resorted to for sale of coal, etc., in the north eastern States than in other parts of the country. The terms and conditions under which the E-auction would be held are wholly irrational, arbitrary, whimsical and capricious inasmuch as the mode for holding E-auction adopted by the MSTC leaves room for manipulation of the bids and thereby gives more scope for corruption.

(vi) The Petitioners appreciate the introduction of E-auction system by the respondents as the same involves utilization of modern technology; but at the same time, it is also necessary that the adoption of such modern mode of auction does not put a particular class of participants at a disadvantageous position and they should not be discriminated vis-a-vis the bigger businessmen from outside the north eastern region.

(vii) The introduction of the E-auction system would be more appropriate and justified if the same is made after imparting due training to the participants. Without familiarizing the prospective buyers of coal from the north eastern States if E-auction is held, it would have the effect of excluding and disabling a large section of the prospective buyers of coal of the north eastern region from participating in E-auctions. Such a situation would result in discrimination against such prospective buyers.

(viii). Having not taken into account the difficulties, which would be faced by genuine traders of coal in the north-eastern region, the policy of E-auction resorted to by the Respondents and the issuance of the impugned notice of E-auction suffer from non-application of mind, it is discriminatory, arbitrary and exclusionary by implication. E-auction, as envisaged under the terms and conditions offered by the MSTC, would lead to arbitrariness and would not result into free, fair and transparent auction.

THE CASE OF THE RESPONDENTS

13. In this set of writ Petitions, the Union of India has not filed any affidavit. However, the CIL, the NEC and the MSTC have filed their affidavits.

The case of the CIL and the NEC may, in brief, be stated as follows:

(i) A large numbers of complaints were received with regard to the sale process carried out by open auction. It also came to light that the actual consumers of coal did not/could not participate in the open auction and as a result thereof, the CIL and its subsidiaries had to sell their coal at a much lower rate and the same was re-sold at much higher rates. The Chairman of the CIL, after considering the entire matter and with the approval of the Secretary (Coal), Government of India, took a policy decision to conduct, henceforth, the sale of coal through E-auction. This decision of the Chairman was communicated by letter No. CIL/CH.11.553, dated 18.12.04, to the NEC and in pursuance of this policy decision, the notice of sale of coal, through E-auction, was issued.

(ii) The concept of E-auction is a modern one and it has been very successfully adopted by various Government agencies. Initially, the concept of E-auction was introduced in the Bharat Cooking Coal Ltd., a subsidiary of the CIL. The CIL has entrusted Metal Scrap Trading Corporation Ltd. (MSTC), a Government of India enterprise, to conduct the auction. The inherent disadvantages in conducting E-auction, pointed out by the writ Petitioners, are imaginary and baseless. In the present modern world, the intending purchasers must have necessary resources and know-how to get access to the internet. The concept of E-auction has been accepted as successful and it has the added advantage of the customers being able to remain at his own place and do the bidding without coming to the place of bidding. Allowing those, who may not be directly dealing with coal and coal products to participate in the E-auction, would lead to greater participation in the E-auction. The accusation that E-auction of coal would become speculative in nature is unfounded. The method of E-auction introduced by the MSTC is a very simplified one. Anyone can go for bidding by having access to the website of the MSTC. The access to internet is very simple and internet cafes are available everywhere. The terms and conditions subject to which the E-auction of coal would be held is not contrary to Section 64 of the Sale of Goods Act. No special training for participating in E-auction is necessary. A large number of E-auction has been conducted by the MSTC and no complaint has been received so far; rather, the system has been greatly appreciated at all levels. Even if there is failure of electricity, a computer can be operated for more than half an hour through UPS connection. Pursuant to the impugned notice, dated 29-12-2004, aforementioned, as many as 103 customers have already registered themselves with the MSTC. As a huge stock of about 2 lakh metric ton of coal are lying uncovered, it is creating a lot of problems including law and order and if the same is not sold out, it may endanger lives and properties.

14. As far as the MSTC is concerned, its case, in these four writ petitions,

namely, WP(C) Nos. 399/05,416/05,417/05,442/ 05 and 1020/2005 is as follows:

(i) By a circular, dated 18-12-2003, the Central Vigilance Commission had advised all Ministries and Departments of the Government of India and the public sector undertakings to make efforts to switch over to the process of E-auction for procurement and sale, wherever it is found to be feasible and practicable. The resort to E-auction is aimed at reaping the benefit of advancement of science and technology. The grievance of the Petitioners as regards holding of E-auction are completely unfounded, fanciful and imaginative. Cyber cafes have come up in almost every nook and corner of even mufasil areas. This has enabled the public, at large, to have access to internet as well as computers and the economic activities, covered by the internet, have become order of the day. If the writ Petitioners have any doubt with regard to the procedure to be followed, the same can be removed by making queries at the website of the MSTC. The E-auction may bring in any person, who may not be dealing with coal or coal products to participate in E-auction. Participation in E-auction by such persons would give rise to more competition. The State would be benefited if higher prices are fetched by the State for its products. "The North-East of India, besides being the grateful beneficiary of the various and myriad Development Programs and Grants under aegis of the North-Eastern Council and DONER (a Central Govt. Ministry specifically for the North-East), has also been benefited further by the 10th Five-Year Plan, which has also additionally introduced the availability and concept of Inter-Net Cafes in the rural areas of N.E, thereby propelling the N.E even further into the realm of 21st Century E-Commerce, which is the Business Mantra of this Century".

(ii) An auctioneer can set his own terms and conditions for holding an auction and if he does so, then, the terms and conditions will govern the rights of the parties concerned. In the present case, since the Petitioners have not deposited the earnest money for the E-auction, they have no right to challenge the terms and conditions under which the E-auction would be held. The MSTC has no branch office in the north east India and so far as its business operation for the north east segment of the country is concerned, it is done through the MSTC's registered office at Kolkata, which means that the E-auction is the best solution for the MSTC as far as its out reach is concerned. If a person is allowed to retract his bid at any point of time, it would result into a never ending process. The question of retracting of a bid can logically be associated with the highest bidder and, ironically, that cannot be ascertained till such time the E-auction is over and the bid is finalized.

(iii) For participating in E-auction, a bidder need not even have a computer, for, the interested bidder can go to any cyber cafe. In their own interest, bidders shall make themselves acquainted with the procedure of -auction. Normally, auction remains open for two days including nights. It is unlikely that the Petitioners would face power failure for 24 hours a day. The supply of electricity in the north eastern region is made by the States. The numerous computers

operating in the north eastern region have had little or no complaints on account of failure of electricity. It has to be presumed that all participants have equal access to computer and internet facilities.

(iv) The training of the bidders are conducted from time to time. It is the responsibility of the bidders to take part in such training programmes to familiarize themselves with the new technology and if the Petitioners are not satisfied with the level and quality of the training imparted by the Respondents, they may conduct their own training in E-technology at their own cost if they so desire.

(v) The E-auction does not give any undue favour or advantage to a particular bidder or class of bidders. In fact, the E-auction system is blind to class, regional imbalances and disparities. Regional disparities or backwardness cannot be pleaded as a ground of violation of Article 14, 16 and 19 of the Constitution of India. The E-auction cannot differentiate between a big businessman and a small businessman. In fact, the very purpose of introduction of E-auction is to do away with possible discrimination, if any, between big bidders and small bidders. The E-auction process, having definite advantages over physical auction, cannot be faulted on the ground of alleged backwardness of the people of a particular region. Failure of the Petitioners, due to reasons, personal or otherwise, cannot be allowed to be agitated as a ground to find fault with a system of trading like E-auction, which, by now, has come to be universally recognized/accepted as part of E-trade/E-commerce.

15. Briefly stated, the case of the writ Petitioners in this writ petition is as follows:

(i) All the Petitioners are traders and suppliers of coal from the State of Assam. For the purposes of their business, the Petitioners had been purchasing coal from the NEC under the Open Sale Scheme (OSS) and supply and sell the same to different places in India. Pursuant to a Notice, dated 29-11-2004, issued by the NEC inviting applications for sale of coal under Open Sale Scheme (OSS), the Petitioners submitted their application, dated 14-12-2004, along with detailed pay order consisting of Demand Drafts for more than Rs. 54 lakhs, the same being the value of 1 rake (41 wagons) of coal. As per the said Notice, fifteen rakes of coal of Grade-A (UHV-7000-7099 K; cal/Kg) were offered for sale and the price of the coal was fixed at Rs. 2,289/- per ton. The notice also made it clear that the booking of order would be accepted on the basis of "first come, first served" principle. Pursuant to the said notice, altogether 15 applications were submitted including that of the Petitioners. On the basis of the "first come, first served" principle, all the 15 applicants ought to have been given the fifteen rakes of coal; but only one of the applicants, namely, M/S Mahaluxmi Pvt. Ltd, was given the order for purchase and accordingly, he obtained possession of one rake of coal. On 17-12-2004, two other applicants were issued indents for rakes. Subsequent thereto, another Notice, dated 04-12-2004, was issued inviting applications for sale of coal under the OSS in respect of forty rakes, each consisting of 41 wagons. The coal offered was Grade-A (UHV, 6200-6299K cal /

Kg) and the same was priced at Rs. 1,675.60 per ton. Pursuant to this Notice also, the Petitioners and others had made all the arrangements, including preparation of Bank Drafts, etc, for submitting their respective applications. Thereafter, by another Notice, dated 17-12-2004, the said Notice, dated 04-12-2004, aforementioned was put in abeyance until further orders without stating any reasons therefor. Thereafter, by yet another Notice, dated 29-12-2004, the sale of coal through E-auction has been notified. The Notice, dated 29-12-2004, aforementioned issued in respect of E-auction is already under challenge in WP(C) Nos. 399/05, 416/05, 417/05, 442/05 and 1020/2005. The writ Petitioners in the present writ petitions, namely WP(C) No. 393/05, challenge the said notice, dated 29-12-2004, on the similar grounds as have been done in WP(C) Nos. 399/05, 416/05, 417/05, 442/05 and 1020/ 2005 aforementioned. By letter, dated 01-01-2005, the NEC has unilaterally and arbitrarily cancelled the issuance of purchase/ allotment order in respect of coal covered by the advertisement, dated 29-11-2004. However, the further case of these writ Petitioners is as follows;

(ii) Pursuant to the notice, dated 29-11-2004, aforementioned, three persons, as mentioned hereinabove, have been issued the necessary purchase orders; but two of them have not been allowed to load the coal. The Petitioners apprehend that the coal covered for sale under Open Sale Scheme by the Notice, dated 29-11-2004, aforementioned is also going to be covered under the Notice, dated 29-12-2004, whereby sale of coal by E-auction has been announced. If the E-auction in respect of coal, which was covered by the Notice, dated 29-11-2004, is allowed to take place, the Petitioners would suffer irreparable loss, for, the Petitioners have already deposited as much as Rs. 54 lakhs for the purchase of one rake of coal pursuant to the Notice, dated 29-12-2004, three of the persons, similarly situated, have already been given purchase orders by the Respondents and one of such persons have already been allowed to load the coal. The act of not granting of such purchase order in favour of the Petitioners is discriminatory and arbitrary. The Petitioners also have legitimate expectation to receive the purchase order and as they have already made commitments to buyers of coal out side the State of Assam, their reputation as suppliers of coal would be irreparably damaged if they are made disabled from keeping their commitments to their buyers. This apart, the Petitioners, having, already made necessary preparations for making application for allotment of coal under the Open Sale Scheme in pursuance of the notice, dated 04-12-2004, aforementioned are also entitled to receive the purchase order. The Respondents, particularly, the NEC, therefore, need to be directed to allot necessary purchase orders in favour of the Petitioners in pursuance of the notice, dated 04-12-2004, too. By issuing the notice, dated 29-12-2004, notifying that the sale of coal would, now, take place through E-auction, the rights, which the Petitioners had acquired under the notice, dated 29-11-2004, aforementioned have been seriously affected and suitable directions need to be given, in this regard, to the Respondents.

THE CASE OF THE RESPONDENTS

16. As already indicated hereinabove, the writ Petitioners, in this case, have challenged the legality of the denial by the CIL and the NEC to issue purchase orders of coal under the OSS in terms of Notice, dated 29-11-2004, and also refusal by the Respondents to accept any application for allotment of purchase order pursuant to the Notice, dated 14-12-2004, aforementioned. Apart from these two challenges posed in this writ petition, the writ Petitioners have also challenged the introduction of E-auction. However, the challenge to the introduction of E-auction is almost on the same grounds as in the Writ petition Nos. 399/05,416/05,417/05,442/ 05 and 1020/2005.

17. In this writ petition too, the Government of India has not filed any affidavit. Though the CE,, NEC and MSTC have not filed their affidavits in this writ petitions, they rely on the affidavits filed by them in WP(C)Nos. 399/05,416/05,417/05,442/05 and 1020/2005 aforementioned.

18. The case of the writ Petitioners in this writ petition may, in brief, be stated as follows:

(i) The Petitioner No. 1 is a registered Association of the SSI Units, which manufacture Coal Coke, the SSI Units being registered with the Directorate of Industries and Commerce in Assam. All these SSI Units have been manufacturing Coal Coke by using ROM (Run of Mines) (Spl) Coal as raw material for the last 25 to 30 years on the basis of supply of coal by the NEC. The Petitioner No. 2 is the president of the said Association.

(ii) In September, 1982, when the supply of ROM Coal had been stopped and quota of each member had been curtailed from 40 MT to 20 MT of ROM Coal per Unit, the said Association represented their grievances to the Director of Industries, Assam, the Director of Industries, Assam, by his letter, dated 22-10-1982, took up the matter with the NEC on the ground that the intake capacity of the Units was more than 40 MT per month and that under the revised Industrial Policy of the State, the Coal Coke Manufacturing units heeded to be given the facility of requisite raw materials. Reacting to the letter, dated 22-10-1982, aforementioned of the Director of Industries, supply of ROM Coal was resumed by the NEC. In the year 1983, when the supply of ROM Coal to the SSI Units became, again, insufficient and irregular, the General Manager, District Industrial Centre, Dibrugarh, by his letter, dated 15-7-1983, submitted a comprehensive statement to the NEC recommending the requirements of coal for the registered Coke manufacturing Units with a view to saving the Units from being closed. As the coal allotted to the SSI Units was found to be neither sufficient nor of good quality, the matter was, once again, taken up by the General Manager, District Industries Centre, and by his letter, dated 14-11-1984, the General Manager, District Industries Centre, requested the CIL to regularly supply good quality of ROM Coal to the SSI Units at the approved rates.

(iii) However, even the irregular and insufficient supply and allotment of ROM

(Spl) Coal to the registered SSI Coke manufacturing Units has been, all of a sudden, completely stopped since 22-12-2004. In fact, a Notice, dated 22-12-2004, was displayed at the notice board of the Sales Manager, NEC, informing all concerned that due to circumstances beyond their control and as per directives received, sale of coal under the OSS would be kept in abeyance. Because of the abrupt stopping of sale of coal to the members of the Petitioner Association, manufacturing operations in the said Units of the Petitioner Association has come to a grinding halt. The Petitioners, on 23-12-2004, submitted a representation to the NEC, with copies to others concerned, wherein they stated, inter alia, that they had been manufacturing Coke Coal under the licenses issued by District Industries Centres of different districts for more than 25 to 30 years and to run their Units, they had been purchasing Coal as raw material from the NEC, the Coke Coal, so manufactured, was mainly used for domestic purposes and that hundreds of persons were employed in these small-scale industries and their familymembers were totally dependent on the income of such industries. It was pointed out in this regard that thousands of consumers of Coke Coal have no access to other means of fuel for cooking and are completely dependant upon Coke Coal, the SSI Units concerned have spent all their resources in these industries and, hence, the sudden stoppage of supply of coal has deprived them of their livelihood, their family members along with those of their employees are facing starvation and that the consumers, who use Coke as fuel, are also facing tremendous difficulties. The Director of Industries and Commerce, Assam, on receipt of the said representation, dated 23-12-2004, of the Petitioner Association, addressed a letter, dated 19-1-2005, to the General Manager, North East-em Coalfields, informing him that due to restrictions imposed on the despatch of coal by road, a lot of small Coke manufacturing Units had been thrown towards closure thereby leading to unemployment of hundreds of local entrepreneurs and labourers. The Director of Industries requested for immediate lifting of ban so that small Coke manufacturers could run their Units smoothly. The Director of Industries repeated his request by his letter, dated 02-02-2005, for supply of coal to the said SSI Units; but no remedial action has yet been taken by the CIL and/or the NEC in this regard.

(iv) The Directorate of Industries and Commerce, Government of Assam, by Notification, dated 26-9-2003, had published "Industrial Policy of Assam 2003" for the period from 1st October, 2003, to 30th September, 2008. The aims and objectives of this policy include the object to generate more employment opportunities in the State and to create avenues for sustained growth and development of the Small Scale and tiny sectors. The thrust area of sectors of industrial activities, as identified and described in Col 1.3 Chapter-I of the said Notification, includes industries based on locally available minerals. A number of fiscal incentives and subsidies have been declared in the said Notification. The declared and avowed policy of the State and the Central Governments is to generate more employment opportunities and to create avenues for sustained growth and development of small scale industries, which are based on locally

available minerals. There is, thus, a public duty cast on the CIL and the NEC to restart sale and supply of ROM Coal to these SSI Units and the act of putting complete ban or keeping the supply of coal in abeyance for indefinite period is wholly unfair, arbitrary and violative of Article 14 and 21 of the Constitution of India. The SSI Units of the Petitioner Association, being financially weak, are not in a position to purchase Coal for their Units from unscrupulous buyers, who would, now, monopolies the market leading to fast death of all the SSI Units unless the CIL and the NEC are directed to resume supply of the agreed quantity of 20 Mt of coal per month at the approved rates. The acts of the CIL and the NEC in stopping the sale and supply of ROM Coal to the SSI registered Units and offering their entire production of coal for sale through E-auction would lead to the closure of the registered SSI Units of the Petitioner Association. By this time, almost all Units have come to a grinding halt. Therefore, livelihood of persons employed, who are as many as 25,000 in numbers, and their family members are facing starvation. The resultant non-supply of Coke to domestic consumers is also against the public interest.

THE CASE OF THE RESPONDENTS

WP(C) No. 393/2005

19. In this writ petition, neither the Government of India nor the MSTC has filed any affidavit. However, during the fag end of the hearing of the writ petitions, the CIL and the NEC have filed a joint affidavit in this writ petition, their case being, in brief, thus:

(i) The NEC is a unit of the Coal India Limited and is not an independent company. The basic aim of the CIL, while selling coal, are three fold, namely, (a) to obtain the best available price for coal that belongs to the people of this country, (b) to minimize and if possible to make extinct the role of middle-man/local mafia's/cartel formed by the rich and big consumers at the expense of poor consumers and (c) to protect the interest of the SSI Units and small consumers. In order to give effect to these objectives, necessary local factors have to be considered. Earlier, the policy was to make sale of coal through the OSS with the linkage holders, State sponsored consumers being given preference. These preferences were quashed by the Calcutta High Court in WP(C) No. 1199/2000 and APOT-469/01. (Poddar v. CIL and Ors.). The CIL moved the Supreme Court in Civil Appeal No. 5547/2004 and a stay order was granted to the Appellant company on the assurance given by the Counsel for the Appellant company. In a meeting of CMDs of different subsidiaries, known as CMDs meet, a decision was taken that E-auction would be held in BCCL and NEC for large consumers of superior grade coal on trial basis. After the trial period is over, a proper new policy would be framed on the basis of experience gained in the trial of E-auction. In the trial run of E-auction in BCCL, the overall average price at which the coal was sold was about 30% higher and resulted in additional income of about Rs. 130 crores.

(ii) The BCCL does not have any retail outlets for protecting the interest of small consumers of coal. The CIL has a policy decision, for the last many years, to allot two millions tones of coal to the National Consumer Co-operative Federation, (NCCF), a Government of India controlled undertaking, for retail sale of coal to small consumers, who need coal for their hearts and homes. The NCCF has outlets at various places in the North Eastern States and so far, no complaint has been received from the consumers that coal has not been received by them. It has always been a practice with the NEC to give coal to small consumers, who take one/two trucks per month by road straight away without asking them to participate in any auction scheme or sponsorship or linkage.

(iii) Considering the special position of the north-eastern States, where the infrastructural developments at present is far below that of the other parts of the country and also the fact that in other coal companies, 80-90% coal is sold to core sectors, whereas in the NEC, 90% of the production is sold to non-core sectors and the process of E-auction is limited to non-core sector only, a policy decision has been taken to continue with the old practice of supplying coal up to a maximum of two trucks per month for small scale consumers/traders; but this would be subject to availability of coal with the NEC and also subject to appropriate verification and an undertaking to be given by the buyer that the coal, so bought, would be consumed solely in the north eastern States.

(iv) The market price of coal is higher than the price at which the NEC is supplying coal today. Cost of production of coal in the NEC is approximately 2,100 rupees per ton, whereas the cost of sale of coal per ton, on an average, is Rs. 1,478/-. The accumulated loss of the CIL has gone up to more than Rs. 450 crore. This situation requires urgent remedy and unless revenue is increased, even the existence of the company would be jeopardised resulting in greater loss to the North-eastern States in terms of employment generation and economic activities.

(v) The policy decision of E-auction adopted by the CIL is confined to the sale of coal by the NEC only, for, the circumstances in other parts of the country is different.

(vi) Under Article 33(2)(a) of the Memo-randum and Articles of Association of Coal India Limited, the Chairman shall be appointed by the President and under Article 33(c), the Chairman is vested with the powers and discretion in relation to the affairs of the Company as may be delegated by the Board of Directors. In the meeting of Board of Directors, it was resolved to delegate the power to the Chairman and/or Marketing Director to take the policy decision in respect of sale.

20. In the present set of writ Petitions, the Petitioners have challenged the impugned notice, dated 29.12.2004, for E-auction as well as the policy decision of the Respondents to sell coal by E-auction.

21. In view of the fact that the E-auctions have already been held, pursuant to the notice, dated 29.12.2004 aforementioned, both sides agree that the

challenge to the impugned notice, dated 29.12.2004, aforementioned has become partially infructuous, but the terms and conditions under which the said auction took place as well as the policy decision of the Respondents to resort to E-auction for sale of its coal are still under challenge in the present set of writ petitions. I will, therefore, keep myself confined to the legality or otherwise of the policy decision of the Respondents to sell coal by E-auction except if a reference to, and discussion of, the impugned notice, dated 29.12.2004, aforementioned and/or the terms and conditions subject to which the auctions were to be held become indispensable for the purpose of effective disposal of these writ petitions.

22. The moot questions, which have fallen for determination in the present set of writ petitions, are as follows:

(i) Whether the Petitioners have locus standi to challenge the impugned notice, dated 29.12.2004, aforementioned and/or the policy of E-auction for sale of coal adopted by the Respondents and whether the writ petitions in their present form are maintainable in law?

(ii) Is there a policy decision of the Respondents to sell their coal by no mode other than E-auction? If so, with what object(s) the policy decision of E-auction as the only mode of sale of coal by the Respondents was taken and whether this decision was taken by a person competent to take?

(iii) Whether the terms and conditions under which the E-auction has been decided to be held are constitutionally and legally sustainable?

(iv) Whether the resort to E-auction in the manner as has been done withstand the tests underlined under Article 14 of the Constitution of India?

(v) To what reliefs the parties are entitled?

QUESTION No. (i)

23. Since the writ petitions have been resisted, at its very threshold, on the question of locus standi of the Petitioners and also on the question of the maintainability of the petitions, I must deal with this aspect of the matter first, for, should this Court conclude that the writ Petitioners have no locus standi and/or that the writ petitions are not maintainable in their present form, then, discussion on other aspects of the challenge posed to the impugned notice, dated 29.12.2004, aforementioned and the policy decision of E-auction need not be entered into.

24. Challenging the maintainability of the writ petitions, Mr. Sharan, learned Addl. So licitor General, has submitted that the pleadings in the present case lack material details inasmuch as the Petitioners have not given particulars of purchase of coal by them in the past and in such a situation, it is not possible to say that they were bona fide buyers of coal under the Open Sale Scheme (OSS) and/or that any of their rights would be adversely affected if E-auction in respect

of coal is resorted to. In their writ petitions, most of the Petitioners, points out Mr. Saran, described themselves as poor men, but the sale-proceeds of the E-auction held in the past by Bharat Coal Company Ltd. (BCCL) shows that to buy one rake of A grade coal would require as much as rupees one crore and when the Petitioners described themselves as poor men, they are not financially capable of participating in the E-auction of coal. A careful reading of the various writ petitions, which are being heard, shows, further points out Mr. Saran, that the Petitioners have alleged that the north eastern States suffer from infrastructural deficiencies, particularly, in respect of supply of electricity and access to the internet system. These grievances, according to Mr. Saran, are in the form of a PEL and since these writ petitions are not being treated and heard as PIL, such vague grounds and pleadings do not warrant interference by the High Court in exercise of its powers under Article 226.

25. Mr. Sharan submits that none of the writ Petitioners have registered themselves with the MSTC for the purpose of participating in the E-auction and without having registered themselves with the MSTC, the writ Petitioners cannot be said to have acquired any right as prospective buyers and, in such a situation, the Petitioners have no locus standi to challenge the decision of the Respondents to hold E-auction in respect of coal or the terms and conditions under which such auction would be conducted.

26. Controverting the submissions made on behalf of the Respondents aforementioned, Mr. N. Dutta, learned Senior Counsel, appearing for the Petitioners in all the writ Petitions except WP(C) 958/2005, submits that since the Respondents concerned have not taken any specific plea in their affidavits-in-opposition that the writ Petitioners are not financially capable of buying one rake of Grade A coal and/or that they have no locus standi to impugn the notice, dated 29.12.2004, aforementioned and/or the policy decision of E-auction, it cannot, now, be agitated, on behalf of the Respondents, that the Petitioners are not financially capable of buying one rake of coal. This apart, the Petitioners, according to Mr. Dutta, have been purchasers of coal in the past, but many a times, as the materials on record disclose, Petitioners purchased coal under the OSS by forming a small group and in such a situation, particularly, when the Respondents have not produced any material to show that the Petitioners had never purchased coal in the past under the OSS, it cannot be agitated by the Respondents concerned that the Petitioners are not bona fide buyers of coal.

27. Lending support to the above submissions of Mr. Dutta, Mr. A.B. Choudhury, learned Senior Counsel, appearing for the Petitioners in WP(C) 958/2005, submits that so far as the Petitioners in WP(C) 958/2005 are concerned, they are, admittedly, owners of various Small Scale Industrial Units (SSI Units), which have been established under various industrial policies and schemes of the Government of Assam, which have been supported by the Central Government only and the NEC had been supplying to these Petitioners, in the past, coal at the rate of 40 metric tons per month and, sometimes, even more in terms of the

requirements of the Petitioners. According to Mr. Choudhury, in the face of these admitted facts, it cannot, now, be submitted, on behalf of the Respondents, that these Petitioners are not genuine buyers and/ or consumers of coal. While resorting to E-auction as the only mode of sale of coal, the Respondents concerned have, according to Mr. Choudhury, not taken into account at all the plight of the SSI Units if the E-auction is resorted to as the sole mode of sale of coal. Mr. Choudhury also submits that the policy of E-auction in the manner as the same has been introduced and which is under challenge, in these writ Petitions, would kill these SSI Units and ruin not only the Petitioners, but the entire workforce engaged in their Units and such kind of mindless approach of the Respondents would help extremism, which has plagued the entire North East for the last, at least, four decades.

28. Reacting to the above submissions made on behalf of the Petitioners, the NEC has filed an affidavit and Mr. Sharan, on the strength of the affidavit, so filed, has, at the later stage of his arguments, submitted that taking into account what infrastructural deficiencies are faced by the consumers of coal in the north east, the NEC will continue to supply 20 metric tons of coal to the SSI Units even if E-auction is resorted to as the only mode of sale by the Respondents concerned.

29. To a pointed query made by this Court, Mr. N. Ahmed, learned Counsel appearing on behalf of the NEC, concedes that apart from the Petitioners in WP(C) 958/2005 aforementioned, who are purchasers and consumers of coal, some of the Petitioners, who have challenged E-auction including the petitioners in WP(C) No. 393/2005 aforementioned, have, indeed, purchased coal in the past from the NEC.

30. In the face of the above admission made by the NEC, I am firmly of the view that the writ petitions cannot be thrown away on the mere ground that some of the writ Petitioners had not, in the past, according to the Respondents concerned, purchased coal in their name directly from the NEC. The Petitioners cannot, therefore, be said to have no locus standi to challenge the impugned notice, dated 29.12.2004, aforementioned and/ or the policy decision taken by the Respondents concerned to resort to E-auction as the sole mode of sale of coal.

31. As regards Mr. Sharan's submission that some portions of the writ petitions are in the form of PIL, it is worth noticing that in matters of economic policies or commercial transactions, when the State and its instrumentalities are involved, or when the State and its instrumentalities, as the case may be, come forward to sell any State largess, a person cannot challenge such policy or transaction unless public interest is involved. In no uncertain words, laid down the Apex Court in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, thus:

When a writ petition is filed in the High Court challenging the award of a contract

by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition.

...Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the Court should intervene.

It is, therefore, clear that when an individual cannot challenge introduction of an economic policy or commercial transaction entered into by the State or its instrumentalities unless an element of public interest is involved, it logically follows that when a person raises not only an individual grievance but inextricably involved with his individual grievances are some elements of public interest, such a person's grievances cannot be brushed aside on the ground that the person has no right to agitate, on behalf of the people in general. Such an approach would be contrary to the law laid down in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*,

32. Imperative, therefore, it was, in the present case, that the Petitioners, in order to make their petitions sustainable, show that their grievances are not mere individual grievances, but that an element of public interest of grave importance is involved in their grievances. Hence, on the basis of their own grievances, which have some elements of public interest present, when the Petitioners have challenged the impugned notice, dated 29.12.2004, aforementioned as well as the policy of E-auction, the doors of this Court cannot be shut on the face of these Petitioners, for, doing so will be an unjust refusal, on the part of the Court to even look into the grievances of the Petitioners in exercise of its power under Article 226 of the Constitution.

33. While dealing with the above aspect of the matter, one may recall that pointing out the subtle, but marked distinction between the maintainability of a writ petition and locus standi of a Petitioner, the Supreme Court had the occasion to observe thus:

But we feel concerned to point out that the maintainability of a writ petition, which is correlated to the existence and violation of a fundamental right, is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those, who run them, are accountable to the people" The

accountability of the public sector to the Parliament is ineffective, because the parliamentary control of public enterprises is "diffused and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide.

34. Had the Petitioners approached this Court with individual grievances, one could have been tempted to accede to the approach, as suggested by Mr. Sharan, and reject these writ Petitions; but when these writ petitions have not only raised individual grievances, but also grievances of grave public interest and when the very survival of some of the Petitioners, as indicated hereinabove, rests on the supply of coal by the NEC, these writ petitions cannot be abruptly closed, for, such a course may ruin the Petitioners and persons similarly situated and shake thereby the confidence of the people, in general, in the ability of the Courts to give reliefs in matters of such momentous public issues without even caring to hear them.

35. Situated thus, this Court is firmly of the view that the present petitions cannot be closed and rejected outright on the ground that the Petitioners have no locus standi and/ or that the petitions are not maintainable in their present form.

36. No doubt, it is true, as submitted by Mr. Sharan, that according to the present terms and conditions of E-auction, one has to register with the MSTC by making payment of rupees ten thousand. If it is insisted that the registration with the MSTC is a condition precedent for challenging the legality and/or constitutionality of the policy of E-auction and/or the notice, dated 29.12.2004, aforementioned, logical conclusion will be that a person, for the purpose of even challenging the very issuance of the impugned notice and/ or the introduction of the policy of E-auction, has to subject himself or herself to the process of E-auction. In other words, the approach, as suggested by Mr. Sharan, if accorded to, it would mean that one can reach this Court only by subjecting himself, first, to the alleged unconstitutional, illegal and arbitrary terms and conditions of the policy of E-auction. By making payment of rupees ten thousand to the MSTC, one will be only improving the financial condition of the MSTC, but this will, in no way, further the cause of justice. When the Petitioners challenge the very introduction of the policy of E-auction and also the very terms and conditions subject to which the E-auction has been announced to take place, it would be against the constitutional safeguards provided by Article 14 to insist that a person must, first, register himself with the MSTC in order to challenge the introduction of E-auction as the sole mode of sale of coal by the NEC and/or the terms and conditions subject to which the E-auction would be conducted.

37. If any particular term(s) and/or condition(s) subject to which an auction is proposed to be held by the State or its instrumentalities, such as, the MSTC, can be shown by a person to be violative of Article 14, such a person is entitled to resist the very policy decision or the very introduction of such term(s) and/or condition(s) without subjecting himself to, or making himself bound by, such

term(s) and/or condition(s). In order, therefore, to examine whether the term(s) subject to which the auction is sought to be held are or are not violative of Article 14, it cannot be treated as a condition precedent that the person, who alleges violation of Article 14, must register himself with the auctioneer. In short, without subjecting himself to such term(s) and condition(s), a person, who shows that he is interested in the subject-matter of auction and that the subject-matter has a bearing on public interest can, indeed, challenge such term(s) and conditions) on the ground of violation of Article 14, but on the mere ground that the person challenging the term(s) and conditions) has not registered, the writ petition cannot be dismissed and not maintainable. The maintainability of the writ petition will really depend upon the fact as to whether the policy of E-auction, in the form and manner in which the same has been introduced, is sustainable. If the very policy is not sustainable, dismissing of the writ petition holding the same as not maintainable, on the basis of locus, will defeat the purpose with which Article 226 has been held as forming part of the basic structure of the Constitution.

38. What crystallises from the above discussion is that the writ petitions, under consideration, cannot be dismissed as not maintainable on the ground of locus or on the ground of the form in which the writ petitions had been presented.

39. Because of what have been quoted above, I answer the question No. (i) in the affirmative.

QUESTION No. (ii).

40. Coming to the above question, namely, as to whether there is a policy decision of the Respondents to sell their coal by no mode other than E-auction and, if so, with what object(s) the policy decision of E-auction as the only mode of sale of coal by the Respondents was taken and/or whether these decisions have been taken by a person competent to take such policy decision, it is pertinent to note that the case of Respondents has undergone a dramatic change between what were, originally, pleaded by them, particularly, the CIL and the NEC, on 28.01.2005, when they filed their affidavit in these writ petitions and what they, eventually, submitted, orally and in writing, during the course of hearing of these writ petitions. Initially pleaded case of the CIL and the NEC was that a large number of complaints had been received by these Respondents with regard to sale of coal carried out by these Respondents through the medium of open auction and it had also come to light that the actual number of consumers of coal had not participated or could not participate in the open auction and, hence, the Respondent company had to sell their coal at a lower rate and the same coal being re-sold at much higher rates by the purchasers of such coal. In short, what, according to these Respondents, led to the introduction of E-auction as the sole mode of sale of coal was, as Mr. Saran puts, the muscle power used by coal mafia and the consequential failure of the Respondents to obtain the price, which their coal should have had fetched, had all consumers of coal been able to participate in the open auction of coal. In these circumstances,

according to the Respondents, the Chairman of the Company, i.e., the CIL took, on considering the entire matter and with the approval of the Ministry of Coal, Government of India, a policy decision to conduct the sale of coal through E-auction and pursuant to this policy decision, the impugned notice of sale through E-auction was issued on 29-12-2004. The said decision of the Chairman of the CIL was communicated to the NEC by a letter, dated 18-12-2004. The relevant portions of this letter reads as follows:

Sub: A review of sale of coal through OSS at NEC.

Ref. Letter No. CIL/VIG/VD. No. 1973/1737, dated 15.12.2004 From CVO, CIL to CGM, NEC. This is to reaffirm the advice given to you yesterday (17.12.04) to suspend sale of coal under OSS at NEC with immediate effect. A confirmation may please be sent.

As of now, you have only 7 consumers, who are liked with you, namely, (i) M/S. Assam Coal Products Pvt. Ltd., (ii) M/S Mahabir Coal Industries, (iii) M/S Oriental Ceramic and Refractories (P) Ltd., (iv) M/S. Somal Pipes Pvt. Ltd. (v) M/S. CCI, Bokajan. Out of these, M/S Hindustan Paper Corporation and M/S CCI, Bojajan, are a Government of India undertaking and also a core sector consumer.

Other than the above, there is no confirmed consumer of coal in NEC. Some coal roughly about 3.8 lakh tones has been moving to brick kiln sector of Punjab and Haryana on the basis of sponsorships issued by the aforesaid State Governments. Such movement of coal to the brick kiln owners of Punjab and Haryana is also largely suspended, because of lack of adequate sponsorship issued by respective States. The NEC needs to dispatch about 9.5 lakh tones of coal annually to maintain its production level. Although it had suffered from certain set-backs of the market in the past, because of scarcity of coal and mismatch between demand and supply, and rise in price in the international market, a very favourable market condition has developed and NEC coal is now in great demand. The matter has therefore, been reviewed and it has now been decided that except for whatever dispatch takes place to core sector, there will be no sale of coal at NEC, save through the Electronic-auction as it presently in vague at BCCL in respect of non-core sector consumers. Since there are not many confirmed consumers of NEC coal, sale of coal through E-auction shall be opened to non-consumers too....

... It need to discuss the matter with CGM(S and M), BCCL, who has laid down procedures for sale of coal under E-auction to non-core sector consumers. Besides, the common public will have to be adequately informed through appropriate advertisement in the leading dailies of the decision of the Management. Services of M/S Metal Scrap Trading Corporation Limited (hereinafter referred to as "the MSTC"), a Government of India Undertaking -who are managing this job for BCCL, will have to be contracted. All these mean that NEC Management has to act fast to ensure a smooth implementation of the decision of E-auction for sale of coal.

I had an occasion to discuss this issue with CMD, MSTC this morning, who had indicated that a time frame of 20 days would be good enough to start implementation of this decision. You are requested to get in touch with CMD, MSTC at the earliest so that there is no further delay in the matter.

I had an occasion to discuss this issue with Secretary (Coal) also today (18.12.04) and it has his approval.

(Emphasis is supplied)

41. In the light of what have been quoted above, it is abundantly clear that this Court is, now, required to decide as to what the object of the policy decision for E-auction was. In other words, the object of this policy decision has to be discerned from the contents of the letter, dated 18-12-2004, aforementioned, which the Respondents themselves rely upon.

42. A microscopic reading of the letter, dated 18-12-2004, aforementioned clearly shows that the only reason for taking resort to E-auction was the "favourable market condition", that is to say, since the CIL and its subsidiaries had, in the past, suffered certain set backs in the market, not because of any muscle power used in the open auction for sale, but due to "scarcity of coal and mismatch between demand and supply" and since there was "rise in price in the international market", "favourable market condition" had developed and the NEC coal came to acquire a "great demand", E-auction was adopted as the mode of sale of coal by the CIL. In other words, in the past, the NEC's coal did not fetch actual market price, which the NEC wanted, not because of muscle power used in the open auction for sale of the NEC's coal; rather, it was on account of inadequate quantity of coal, which the NEC had produced, and the "mismatch between the demand and supply", that the price of coal remained low. However, with the "rise in price in the international market", when a "favourable market condition" developed and the NEC coal came to acquire "great demand", the E-auction was chosen as the mode of sale of the coal by the CIL.

43. In short, thus, the plea taken by the Respondents that it was in order to eliminate the use of muscle power that the E-auction was chosen by them is not the real reason for resorting to E-auction. This letter also, in no uncertain words, states, "except for whatever dispatch takes place to core sector, there will be no sale of coal at NEC, save through the E-auction as is presently in vogue at BCCL in respect of non core sector consumers". This letter is definitive in words and character and leaves no room for doubt that at least, on the day, when the letter, dated 18-12-2004, aforementioned was issued to the Chief General Manager, NEC, by the Chairman, CIL, the policy decision of the CIL was that the coal would be sold by the NEC by no mode other than E-auction and this decision was reached, according to the letter, dated 18-12-2004, aforementioned in order to encash the favourable market condition and not for the purpose of removal of coal mafia as is pleaded in the writ petitions.

44. The Respondents, particularly, the Union of India, the CIL and/or the NEC

have not, despite repeated directions given by this Court, produced any material other than the letter, dated 18-12-2004, aforementioned to show as to who had taken the final decision to resort to E-auction as the sole and only medium of sale of coal at the NEC. Thus, the only material, which the Respondents have placed before this Court - as regards the person/authority, who, finally, took the policy decision to resort to E-auction and/or as regards the reason, which led to the taking of such a policy decision - is the letter, dated 18-12-2004, aforementioned. No wonder, therefore, that when the CIL and the NEC filed their affidavit-in-opposition in the writ petitions on 28-01-2005, they relied entirely on the letter, dated 18-12-2004, aforementioned of the Chairman, CIL, for sustaining the introduction of the policy of E-auction as the sole mode of sale of coal at the NEC. The fact that the Respondents had decided, on the basis of the letter, dated 18-12-2004, to sell the coal of the NEC by the process of E-auction alone is also quite clearly discernible from the contents of the note sheet, dated 28-12-2004, of the NEC, given by the Salas Manager, NEC, to the Chief General Manager, NEC, for approval. This note, in no uncertain words, states that "sell of NEC coal to all non core sector buyers will, now, take place only through E-auction and the process of E-auction is to be expedited for timely disposal of stock".

45. Coupled with the above, what is, now, of great significance to note is that according to the letter, dated 18-12-2004, aforementioned, the policy with regard to sale of coal had been "reviewed" and it was on such "review" that the decision was taken that except for whatever dispatch of coal takes place to the core sector, there would be no sale of coal, at NEC, save through the E-auction. Not even a sheet of paper has been produced by the CIL and/or the NEC to show as to who had "reviewed" the policy of the OSS and decided to substitute the same by E-auction as the sole and only mode of sale of coal at the NEC. What the letter, dated 18-12-2004, aforementioned, however, reveals is that the Chairman of the CIL claimed to have taken approval of the Secretary, Ministry of Coal, Government of India, for introducing E-auction as the sole mode of sale of coal at the NEC. Though the Union of India, Respondent No. 1, represented by the Secretary, Ministry of Coal, was repeatedly directed by this Court and by the Hon"ble Supreme Court vide order, dated 03-03-2005, passed in SLP Nos. 2060/05, 2207/05, 2210/05 and 2295/05, to submit all relevant papers to this Court, no record and no material was ever produced by the Respondent No. 1, namely, the Union of India. In fact, the Union of India has not even cared to file any affidavit in this case. There is, thus, not even an iota of material on record to indicate that the Government of India undertook any exercise with regard to the question as to whether E-auction shall be adopted as the sole and only mode of sale of coal by the CIL and/or the NEC. There can, therefore, be no escape from the conclusion that as far as the Union of India is concerned, it has not done any exercise to determine if E-auction shall be resorted to as the only medium of sale of coal by the CIL and/or the NEC.

46. I may, at this stage, point out that the CIL and the NEC have placed on

record a letter, dated 01-10-2004, addressed to the Chairman, CIL, by the Director, Ministry of Coal and Mines, Government of India. This letter, however, relates to "trial run" of E-auction at BCCL. What this letter reflects is that the proposal for holding of trial run of E-auction in respect of 1.64 metric ton of BCCL coal had been approved by the Government of India. This letter, by no stretch of imagination, can be read to mean that the Government of India had approved that none other than E-auction would be the mode of sale of coal at the NEC.

47. I may also pause here to point out that the letter, dated 01-10-2004, aforementioned indicates that even to hold a "trial run" of E-auction of coal at BCCL of a quantity as small as 1.64 metric ton, the approval of the Government of India had to be obtained, in writing, before the "trial run" was held. In the case at hand, however, for making such a major policy shift from the Open Sale Scheme to sale of coal by E-auction alone, no approval, in writing, of the Government of India has been obtained nor does the Government of India claim to have agreed to such a policy decision.

48. Be that as it may, the question, which stares at our face is as to whether the decision to resort to E-auction as the sole mode of sale at the NEC was taken by a competent authority. The Memorandum of Association of the CIL shows that the business of the CIL shall be managed by the Board of Directors and, amongst others, the Chairman of the CIL shall exercise such powers and discretion in relation to affairs of the Company as maybe directed by the Board of Directors. There is absolutely no material on record to show that the Board of Directors of the CIL authorized the Chairman to take a policy decision as regards the mode of sale of coal. Had the case been that the earlier process of Open Sale Scheme as well as the E-auction process would continue, the situation would have, perhaps, been a little different; but a policy decision as to what shall be the sole mode of sale is a decision, which relates to the affairs of the Company, and no such decision, unless delegated by the Board, can be taken by the Chairman alone.

49. From a reading of the Memorandum of Association, it becomes abundantly clear that the Board is the authority to take policy decisions and not the Chairman alone. In the case at hand, however, the Chairman is merely an acting Chairman and not even a permanent Chairman. Nothing exists on record to show that the Board of Directors ever delegated its authority to the Chairman of the CIL to take policy decision on behalf of the CIL. The Memorandum of Association reveals delegation of general powers as per set of guidelines. No copy of any guidelines has, however, been produced by the Respondents concerned. It is, therefore, impossible to hold that the Chairman of the CIL has the authority to take a policy decision on behalf of the Company concerned. The Respondents concerned have also produced the delegation of powers by the Board to the Chairman and Directors of the Company concerned. A close reading of the delegation of powers to the Chairman of the CIL gives absolutely no indication that the Board of Directors delegated its power and/or authorized the Chairman, CIL, to take policy decisions. To the pointed query made by this Court, neither

Mr. Saran, learned Addl. Solicitor General, nor Mr. K.P. Pathak, learned Addl. Solicitor General, could show from the Memorandum of Association that the Chairman, CIL, is the competent authority to take policy decision with regard to mode of sale.

50. The impression that the Chairman alone is not authorised to take final decision in the matter, under discussion, gains strength from the fact, (as already pointed out at paragraph No. 40) that even for holding a "trial run" of E-auction at the BCCL of a quantity as small as 1.64 MT of coal, the Government of India's approval had to be obtained, in writing, by the CIL. Hence, the question of taking resort to E-auction as the only mode of sale of coal at the NEC, "in the form of policy decision", by the Chairman, CIL, alone could not have arisen at all.

51. In the light of what have been discussed and pointed out above, it is impossible to hold that any competent authority has taken the policy decision to sell coal by E-auction as the only mode of sale of coal. Perhaps, confronted with the reality of the situation, Mr. Sharan and Mr. Pathak have submitted that the sales of coal, which would take place pursuant to the impugned notice, dated 18-12-2004, would be a "trial runs" of E-auction. If the impugned notice for sale was meant to be a "trial run", there were absolutely no reason as to why the Chairman of the CIL had to write to the Chief General Manager of the NEC, on 18-12-2004, that after having "reviewed" the matter, it had been decided that "except for whatever dispatch takes place to core sector, there will be no sale of coal at NEC, save through the E-auction as is presently in vogue at BCCL in respect of non core sector consumers". Secondly, if the impugned notice were meant to have "trial run" of coal, there was no reason as to why sale in terms of the applications, which had been received by the NEC, pursuant to its own advertisement for sale of coal under the OSS was, suddenly, stopped after allowing one of the applicants to lift the coal and after giving purchase orders to two more applicants, in this regard. Thirdly, if the impugned notice were meant to have trial runs of coal, there was no reason as to why the note sheet, dated 28.12.2004, aforementioned (as discussed at paragraph 37) given by the Sales Manager, NEC, to the Chief General Manager, NEC, for approval stated that "sell of NEC coal to all non core sector buyers will, now, take place only through E-auction and the process of E-auction is to be expedite for timely disposal of stock".

52. The impression that after having taken a decision to resort to E-auction as the only mode of sale of coal at the NEC, the Chairman, CIL, had to retrace his steps and convert his permanent and firm policy to trial runs is further clear from what I shall, now, point out.

53. For sustaining their case that there is a policy decision by competent authority to take resort to E-auction, the CIL and the NEC also rely on the minutes of the proceedings of the 37th meeting of the Chairman-cum-Managing Directors of various subsidiaries of the CIL held on 07-02-2005. The relevant portions of the minutes of the proceedings of this meeting read as follows:

Introduction of E-auction scheme as a sales policy measure - preparation therefore:

(a) At the outset, it was reiterated that as a part of our SLP in Supreme Court against the impugned judgment and final order dated 13.05.04, in APOT No. 469/2001, AOP No. 313/2001 and WP No. 1199/2000 passed by the Hon'ble High Court of Kolkata, we were committed to "evolve a transparent and equitable policy of coal distribution to all non-core sector consumers, making use of sale in different companies. Based on the feedback of such trial sales and input received from IIM, Kolkata who are concurrently making a study of the system, a proper policy will be evolved.

(b) Thereafter, Chairman briefed the CMs about the latest status of E-auction proposal for sale of coal at NEC, which has become subjudice and was to come up for hearing at the Supreme Court on date. CMD, WCL and ECL were requested to brief their state of preparedness for introduction of E-auction in Feb 05 as promised earlier. CMD, ECL stated that ECL Board has approved the proposal objective of trial had been explained no further clearance might be needed for E-auction on trial basis. CMD, WCL expressed that there were oppositions in the local press towards introduction of E-auction in WCL. He was advised to make road-shows for the trial run of E-auction. It was also indicated that CMD, WCL could take help of CMD, BCCL as trial run had already been done at BCCL successfully. CMD, BCCL drew the attention of Chairman towards the statement made in the agenda not at Page 54, in which it is mentioned that the trial runs in the coal companies and including NEC have been kept on hold as per Supreme Court's hearing on the SLP on 02.02.05. It was clarified that SLP relates to introduction of E-auction only in NEC and other coal companies can go ahead with their programme.

54. From a careful reading of the minutes of the above proceedings, it clearly transpires that the pursuant to the order, dated 13-05-2004, passed by the Calcutta High Court, the Respondents concerned took a stand in the SLP before the Hon'ble Supreme Court that it would have "trial runs" of E-auction in different companies and depending upon the feed back of such "trial runs" and also on the basis of the inputs to be received by the Respondents concerned from the IIM, Kolkata, which was making study of the system, the Respondents would "evolve a transparent and equitable policy of coal distribution to all non-core sector consumers, making use of modern technology through an E-Auction route". It also follows from the minutes of the proceedings aforementioned that though the Respondents, in general, and the CIL, in particular, had committed to "evolve a transparent and equitable policy of coal distribution to all non-core sector consumers, making use of modern technology through an E-Auction route", on the basis of the feed back of the trial runs of E-auction to be held in different companies and also the inputs, which were to be received from the DM, Kolkata, the Chairman, CIL, on 18-12-2004, suddenly, on the basis of the verbal discussion, which he claims to have had with the Secretary, Ministry of Coal,

Government of India, decided (contrary to the stand, which the CIL had taken in the said SLP) to resort to E-auction as the only mode of sale of coal of the NEC to the consumers of non-core sectors.

55. In the face of omission, on the part of the Union of India, to come forward and present before this Court any material in tune with the claim made by the Chairman, CIL in his letter, dated 18-12-2004, aforementioned that the Union of India had approved the decision of the CIL to adopt E-auction as the sole mode of sale of coal at the NEC, one can have no escape from the conclusion that there was no "approval" or clearance from the Union of India, on 18-12-2004, to adopt E-auction as the permanent and lone mode of sale of coal of the NEC for consumers of non-core sectors and/or traders. The impression that there was no such policy decision adopted by the Union of India or by the Board of Directors of the CIL also gets strengthened from the fact that as late as on 07-02-2005, in the meeting of CM Ds, no claim was made by the Chairman, CIL, that on the basis of the feed back received from the "trial run" of E-auction and/or on the basis of the inputs received from the HM, Kolkata, the CIL had adopted, with the approval of the Government of India, a transparent and equitable policy of coal distribution to all non-core sector consumers by making use of modern technology. It is also clear that till 07-02-2005 (as the minutes of 37th meeting of the CMDs reflect) neither the Union of India nor the CIL had taken any final policy decision to introduce E-auction as the sole mode of sale of coal at the NEC.

56. Situated thus, one has no option but to conclude that the Chairman, CIL, was wholly incompetent, in the facts and circumstances of the case, to announce a final policy decision, on 18-12-2004, that E-auction would be the permanent and lone mode of sale of coal for consumers in the non-core sectors at the NEC.

57. The stand, now, taken by the Respondents before this Court and also before the Hon'ble Supreme Court is that the impugned notice, dated 29-12-2004, aforementioned was meant for trial runs of E-auction. In the face of this stand and the admission of the Respondents themselves, it is more than abundantly clear that the Chairman, CIL, wrongly contended, on 08-12-2004, in his letter and also before this Court, when the CIL and the NEC had filed their affidavit on 28-01-2005, that there was a policy decision taken by the competent Respondents/authorities concerned to adopt E-auction as the sole and permanent mode of sale of coal at NEC.

58. In view of the fact that the Respondents themselves, now, claim that the E-auctions, which the impugned notice, dated 18-12-2004, spoke about, were merely "trial runs", it logically follows, in the face of the discussions held above, that the decision announced by the Chairman, CIL, that E-auction would be resorted to henceforth as the only mode of sale of coal was in a state of unpreparedness, without having relevant data or feed back from the result of trial runs of E-auction and/or from the inputs of the study, which the IIM, Kolkata, was conducting in this regard.

59. To be fair to Mr. Sharan, learned Addl. Solicitor General of India, appearing on behalf of the CIL, I must point out that during the course of hearing of the writ petitions, the CIL and the NEC, on being directed by this Court, produced their records to show that there was a policy decision consciously taken by the CIL, approved by the Union of India, to sell its coal through the medium of E-auction only and not under the Open Sale Scheme. After production of the records, when the CIL and the NEC, during the course of hearing of these writ petitions, relied, in support of their cases, on the minutes of the 37th meeting of CM Ds held on 07.02.2005, Mr. N. Dutta, learned Senior Counsel for the Petitioners, pointed out that contrary to what had so far been claimed by the CIL and the NEC, the minutes of these proceedings show that the CIL had, in fact, no permanent and definite policy for sale of coal by E-auction as the sole medium of sale for its coal and that according to what the Chairman, CIL, had presented before the CMDs in this meeting is that the CIL was merely holding trial runs of E-auction and based upon the feedback of these trial runs, a policy with regard to the question as to whether the CIL would resort to E-auction or not would be taken. To be fair to Mr. Sharan, learned Addl. Solicitor General, I must place on record that it was, at this stage, that Mr. Sharan entered appearance on behalf of the CIL and the NEC and submitted that the impugned notice, dated 29.12.2004, aforementioned, whereby the invitations for people to register for E-auction was issued, is basically for holding of trial runs of E-auction.

60. What is, thus, imperative to note is that the stand taken by the Respondents concerned with regard to holding of E-auction completely changed during the course of the hearing. As I have already indicated hereinabove, the letter, dated 18.12.2004, aforementioned clearly shows that the Chairman's declaration to the NEC that the policy of Open Sale Scheme had been "reviewed" and it had been decided to substitute the same by E-auction as the sole and only mode of sale of coal at the NEC, was, factually incorrect. Similarly, the stand taken by the CEL and the NEC before this Court on 28.01.2005 that there is a policy decision by the competent authority to resort to E-auction for sale of coal at the NEC was also factually incorrect. In short, the minutes of the 37 meeting of the CM Ds, which the CIL itself relies upon, clearly indicates that there was no such policy decision and what the Chairman, CIL, had projected to the NEC and before this Court as the approved policy of the Union of India is, to say the least, wholly incorrect.

61. What also cannot escape attention of this Court is that while, on the one hand, the CIL informed the NEC that the policy of Open Sale Scheme had been "reviewed" and the decision had been taken by the appropriate authorities concerned, with the approval of the Union of India, to resort to E-auction as the sole mode of sale of coal at the NEC, the same Chairman, as late as on 07.02.2005, informed the CMDs of its subsidiary companies that E-auction was being resorted to as trial runs and that on the basis of the results of the trial runs to be held, the decision as to whether E-auction shall be resorted to or not would be taken.

62. In fact, to a pointed query made by this Court if there is any material to show that the Union of India had "reviewed" the policy of Open Sale Scheme and/or approved holding of trial runs of E-auction in respect of coal at the NEC, Mr. Pathak, learned Addl. Solicitor General, in his usual frankness, submitted that there is no material on record to show that the Union of India took any decision with regard to holding of trial runs of E-auction in respect of coal of NEC nor is there any document or paper to show that Union of India has approved sale of coal through E-auction, at the NEC, as the only medium of sale of the coal or to have trial runs of coal at the NEC. In short, there is no material on record to show as to how, when on what considerations, for what reasons and by whom the CIL's policy, announced purportedly with the approval of the Government of India. The Government of India's silence in this regard is really too ominous.

63. It, thus, appears that the Chairman, CIL, had incorrectly and unfairly informed the NEC that the Union of India had "reviewed" the policy of Open Sale Scheme and given approval to resort to E-auction as the only mode of sale of coal of the NEC and it was on the basis of such information that the impugned notice, dated 29.12.2004, aforementioned was published. Consistent with this information and the stand of the Chairman, CIL, the CIL and the NEC in the affidavits filed in this Court, on 28.01.2005, took the stand that the Government of India had approved the policy of the CIL to resort to E-auction as the only mode of sale of coal. While, on the one hand, the CIL was presenting such a case before this Court, the Chairman, CIL, on the other hand, in the meeting of the CMDs held on 07.02.2005, did not claim that the CIL had adopted the policy that E-auction would be the only mode of sale of coal of the NEC. Far from this, what the Chairman, CIL, told in the meeting of the CM Ds, as late as on 07.02.2005, was that on the basis of the assurance, which they had given before the Hon'ble Supreme Court in the SLP arising out of Calcutta High Court's order, dated 13.5.2004, in APOT No. 469/2001, AOP No. 313/2001 and WPC No. 1199/2000, that they would "evolve a transparent and equitable policy of coal distribution to core and non-core sector consumers making use of modern technology" through E-auction, the trial runs of such sale should be resorted to in different companies. Thus, the Chairman, CIL, was blowing hot and cold at the same time. He has projected one picture to the NEC and this Court and another picture in the meeting of the CM Ds of the subsidiaries of the CIL. This inherent contradiction in the stand taken by the CIL is too glaringly noticeable, the same remains unexplained and shrouded in mystery.

64. As I have already indicated herein above, the Respondents have also taken resort to a copy of the Circular, dated 18-12-2003, issued by the Central Vigilance Commission to sustain their policy decision as regards the E-auction. As per this Circular, organizations like the Government Departments, Public Sector Undertakings, etc. were asked to make efforts to switch over to the process of E-procurement/e-sale, wherever it is found to be "feasible and practical". From the circular of the CVC also, it is clear that the CVC never intended to compel any of the organizations to straightway switch over to the E-auction method without any

study as regards the feasibility of holding of E-auction and/or without arriving at a conclusion, whether it was "feasible and practicable" to adopt the E-auction as the sole method of sale or procurement. This Circular, in no uncertain words, makes it clear that the E-auction should be adopted, wherever it is found to be "feasible and practicable". In the case at hand, there is nothing on the record to show that any study on the "feasibility and practicability" of holding of E-auction as the lone mode of sale of coal, at the NEC, was conducted. Hence, the decision taken by the Respondents to resort to E-auction as the mode of sale of coal cannot be said to have been made on the basis of the CVC's circular.

65. The CVC's circular also shows that the E-auction was suggested by the CVC on account of complaints alleged to have been made "regarding inadequate or no publicity", or "procurement officials not making available bid documents", and in order to "prevent the possibilities of corruption" and "bring about greater transparency and curb the malpractices". This, in turn, shows as to what the objects of the CVC were in asking the Government Departments, Public Sector Undertakings, etc., to resort to E-auction. The policy to adopt E-auction as the permanent and only mode of sale of coal, as I have already indicated herein before, taken by the Chairman, CIL, was, however, neither aimed at removing muscle power of mafia nor to prevent possibilities of corruption, but solely for the purpose of making best use of the "favourable market condition". Though the CVC's letter encourages resorting to E-auction, the objects of E-auction suggested by the CVC were removal of corruption and greater transparency in the system. None of these conditions was borne in mind, when the letter, dated 18-12-2004, aforementioned was issued by the Chairman, CIL, for, this letter clearly shows that resort to the E-auction was taken on account of favourable market condition and not for any other reason. There is nothing in the materials on record showing that it was the CVC's letter, which had prompted the Respondents to take resort to E-auction. It is a different matter altogether that the CVC's letter also suggests resorting to E-auction, The reason for the CVC to suggest adoption of E-auction is not merely to get best possible price, but it also aims at removing the corruption. This apart, the CVC's letter also makes it mandatory for the organizations concerned that before resorting to E-auction, they determine if it is "practicable and feasible" to hold E-auction. This aspect of the matter was not taken into account at all at the time, when the Chairman, CIL, informed the NEC that the E-auction would be the lone mode of sale of coal at the NEC or when the Chairman, CIL, addressed the CMDs on 07.02.2005.

66. While dealing with the above aspect of the matter, it is also important to note that the Chairman's letter, dated 18.12.2004, aforementioned, makes no mention about CVC's said Circular nor did the Chairman referred to the said Circular of the CVC as one of the reasons for taking resort to E-auction as the only medium of sale, when the Chairman, CIL, addressed the CMDs on 07.02.2005.

67. In short, the object of taking resort to E-auction was earning better price.

Though the E-auction was resorted to and announced as the permanent and only policy of sale of coal at the NEC, neither the policy was permanent nor was the Chairman, CIL, alone competent to take such decision.

68. The Question No. (ii) shall, therefore, stand answered in the affirmative.

QUESTION No. (iii).

69. Let us, now, turn to the Question No. (iii) namely, as to whether the terms and conditions under which the E-auction has been decided to be held are constitutionally and legally sustainable.

70. Referring to *Tata Cellular Vs. Union of India*, and also relying upon *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, Mr. Sharan, learned Addl. Solicitor General, has submitted that the terms of the invitation to tender are not open to judicial review, for, the invitation to tender is in the realm of contract. Based on this submission, Mr. Sharan contends that it is not open to the writ Petitioners to challenge the terms and conditions under which the E-auction would be held. Reacting to this submission, Mr. N Dutta, learned senior counsel, has submitted that when the terms of the invitations to tender are in themselves arbitrary, discriminatory, irrational, mala fide, such terms contained in an invitation to tender can, indeed, be looked into, for, denial to exercise the power of judicial review in such cases would set at naught the very object with which, Article 226 stands enshrined in our Constitution.

71. While considering the rival submissions made above, it is pertinent to note that after examining the extent of judicial review permissible in contractual matters, the Apex Court in *Tata Cellular (supra)*, while deducing the principles governing the parameters of the powers of judicial review in contractual matters, observed, *inter alia*, as follows:

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

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

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

73. The question, therefore, is this: whether the terms of the invitation to tender are entirely outside the power of judicial review? While considering this question, what needs to be noted is that in a commercial contract, when tenders are floated, there are two stages, where the final decisions are taken. The first stage covers the period, when the terms and conditions of the contract are settled and decided by the authorities concerned. In the process of setting up of the terms and conditions of tender, many factors are taken into account. The decision as to what terms shall be included in the tender is really a policy decision, for, it is the authority issuing the invitation for tender, who is the best judge to determine as to what terms and conditions would be required for successful completion of the work or project concerned. Thus, it is, primarily, for the authority issuing the NIT to decide what particular terms and conditions should be incorporated in the NTT. Since the power to impose conditions in a notice inviting tender is within the realm of freedom to contract, requisite freedom must be allowed to the authorities to set up the terms and conditions in the notice inviting tender. However, when the invitation to tender is floated, the second stage, which consists of the process of selection of the person for awarding the contract, commences and this process comes to an end, when a decision either awarding the contract or cancelling the entire tender process is taken. The decision to award the contract is not open to judicial review, but the decision making process, which leads to the ultimate decision is, even according to the law laid down in *Tata Cellular (supra)*, open to judicial review.

74. To put it differently, while setting the terms to be incorporated in the invitation to tender, the authorities concerned must have complete freedom, for, the terms of the tender are in the realm of contract and it is for the authorities concerned to decide as to what would be the terms of the contract. Thus, the Government must have a free hand in setting the terms of the tender. It must have reasonable play in the joints as a necessary concomitant for an administrative body in an administrative sphere. The question, therefore, which, now, arises for consideration is this: If any of the terms and conditions embodied in an NTT is arbitrary, discriminatory, mala fide, irrational, whimsical, capricious or actuated by bias, whether the hands of the High Court would be tied and the High Court would refuse to interfere with the terms and conditions of the NTT, in exercise of the powers of judicial review, howsoever arbitrary, discriminatory, mala fide, whimsical, capricious or biased the terms and conditions may be?

75. The answer to the above question is not very far to seek. Assuming, in a given case, the terms embodied in an invitation to tender makes persons with mustache only eligible for participation. Will, in such a case, the High Court refuse to exercise its power of judicial review, though such a term ex facie is irrational, capricious and whimsical? Suppose, in a given case, the authorities concerned make only male persons eligible to participate in the selection process for construction of an airport building and a female person, who has already completed successfully construction of buildings at several international airports, approach the Court with the grievance that the terms, so set, are discriminatory;

would the Court refuse to interfere? Let us also assume a case in which the authorities concerned for construction of an airport building, at Bangalore, make only people from Lucknow eligible to participate in the tender process. Amongst others, one of the terms on which the terms of the tender is challenged is that the Government is trying to favour a particular individual from Lucknow and the Petitioner, who so approaches the Court, also places before the Court documents/papers to show that this Clause has been entered for the purpose of, eventually, awarding the contract to a particular individual from Lucknow. Will the Court be able to set aside such a term of contract as mala fide? The answer to all these questions can be found given in *Educomp Datamatics (supra)*, wherein, while following the view in *Tata Cellular (supra)*, that "terms of the invitation to tender cannot be opened to judicial scrutiny, the Court further held,

The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments, which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the government, because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

76. It is trite that a decision is an authority for what it actually decides and not what can be deduced from it. Though even obiter dictum of the Supreme Court is binding on all the Courts, the fact remains that to be a binding authority on any specific issue, the issue must be, at least, raised and answered directly or by implication. Reference maybe made to *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, wherein the Apex Court has observed, "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems or as provisions of the statute. These observations must be read in the context in which they appear". Reference may also be made to *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, wherein the Court has laid down, "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed." The Apex Court has explained the doctrine of judicial precedent in *Krishena Kumar and Others Vs. Union of India and others*, thus, "The doctrine of judicial precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it." Clarifying the doctrine of stare decisis, the Apex Court in *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, held, "it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "Law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions, which were before this Court. A decision of this Court takes its

colour from the questions involved in the case in which it is rendered and while apply the decision to a later case, "the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings". In H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, this Court cautioned:

It is not proper to regard a word, a Clause or a " sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

77. Bearing in mind the principles of interpretation of the doctrine of judicial precedents, when I revert to the decision rendered in Tata Cellular (Supra), what I notice is that it was not an issue raised, directly or indirectly, in Tata Cellular (supra) that when the terms of an invitation to tender are in themselves arbitrary, irrational, mala fide or actuated by bias, whether the power of judicial review would be attracted or not. Thus, when the issue, in question, was not raised and was not, directly or indirectly, addressed by the Court in Tata Cellular (supra), the Tata Cellular (supra) cannot be said to have laid down that howsoever irrational, arbitrary, mala fide or biased might be the terms, contained in the invitation to tender or bid, the same cannot be interfered with in exercise of the powers of judicial review.

78. Coupled with the above, when the Apex Court, after considering its earlier decisions including the decision rendered by a larger Bench, explains its earlier decision or interprets its earlier decision of even its larger Bench, such an interpretation of the earlier decisions given by the Apex Court, in its subsequent decision, will be binding on the High Court.

79. What follows from the above discussions is that when the Supreme Court in Educomp Datamatics (supra), after relying upon the decisions in Tata Cellular (supra) and Raunaq International (supra), has laid down as to when even the terms of the invitation to tender can be interfered, this Court cannot hold that under no circumstances, particularly, when the terms of an invitation to bid, are in themselves arbitrary, irrational, mala fide, discriminatory, contrary to statute or actuated by bias, the High Court can, in exercise of its powers under Article 226, interfere.

80. From the observations made in Educomp Datamatics (supra), which Mr. Sharan relies upon, it is, in fact, clear that though the courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism, there are inherent limitations on the exercise of the powers of judicial review in such matters. One of the limitations is that since the setting of the terms for invitation to tender is in the realm of contract and it is the Government, which knows as to

what are the re-quirements for execution of a particular work, the Government is the best judge of the situation and, hence, the Government must be given a fair play in the joints and the Courts would not interfere. However, if the terms and conditions incorporated in the NIT are not ex facie relatable to the interest of the work or on the very face of it are arbitrary, discriminatory, mala fide or based on extraneous considerations or collateral purpose, reluctance, on the part of the Court to interfere, would set at naught the purpose for which Article 226 stands enshrined in the Constitution. Though it is not for the Court to say as to what terms and conditions for a particular tender would be fairer, wiser or logical, yet the Courts can, indeed, interfere under Article 226 if the policy decision taken to incorporate a particular term or condition in a tender process is, in the light of the observations made in *Educomp Datamatics* (supra), found to be arbitrary, discriminatory, mala fide, irrational, whimsical, capricious or biased.

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

82. Judicial review means Court's power to review the action of other branches or levels of the government. "Justiciability" means that an issue, which is capable of being decided by a Court of law. Non-justiciability means that the judiciary does not have judicially manageable standards to undertake the exercise of judicial review. So long as a dispute or a controversy is capable of being decided by courts of law, it cannot be said to be non-justiciable. Since the policy decision as to what the terms should be included in an invitation to tender is, primarily, for the State and its instrumentalities to decide and since the Courts, while exercising the power of judicial review, does not act as an appellate authority over the administrative decision as to what the terms of the invitation to tender should be, the terms of tender are, in this sense, not justiciable. However, whether a particular term of invitation to tender is or is not mala fide, bias, arbitrary or irrational is an aspect, which can be decided by the Courts in exercise of power of judicial review, for, the question as to whether a particular term in the invitation to tender or bid is or is not mala fide, bias, irrational or arbitrary is capable of being judicially determined by the Courts. To put it differently, the power of judicial review will be available to determine whether a particular term incorporated in an invitation to tender does or does not withstand the tests of Article 14. Considered thus, the terms of an invitation to tender or bid may, in a given case, be open to judicial review. Normally, the Courts would not interfere with the policy decision of the public authority to include a particular term in the invitation to tender or bid; but when the very inclusion of such term is found to have been prompted by mala fide or actuated by bias or is irrational or arbitrary, the High Court cannot abdicate its authority of exercising the power of judicial review under Article 226. When the Court has the power of judicial review under Article 226, it follows, as a corollary, that in a given case, if the conditions precedent for exercise of the power of judicial review exists, such as,

when the terms of invitation to tender are shown to be suffering from mala fide, bias or arbitrariness, it will become the duty of the High Court to intervene and set at naught such terms and conditions incorporated in the invitation to tender or bid.

83. Bearing in mind the position of law indicated hereinabove, let me, now, turn to the terms and conditions under which the E-auction is stipulated to be held. In this regard, it is noteworthy that Clause 8 of the Terms and Conditions of the impugned notice, dated 29-12-2004, issued by the NEC mentions, "One lot comprises one full rake and the bidders are required to bid lot-wise" At the same time, Clause 9 of the said Terms and Conditions provides, "A bidder may bid for more than one lot in a single auction, but can qualify as a highest bidder for only one lot i.e. a bidder would be able to successfully bid for only one lot."

84. From a conjoint reading of the two Clauses, it is clear that though a bidder may be the highest bidder in more than one lot, he can qualify as the highest bidder and successfully bid for only one lot. Neither the terms and conditions set up by the NEC nor the terms and conditions of the MSTC explain, correctly contends Mr. Dutta, as to how the winning bidder for the respective bids would be determined. The consequences of such terms, as projected by Mr. N. Dutta, need a careful consideration. A hypothetical situation involving 3 lots and 3 bidders, namely, A, B and C making different bids for three different lots can be examined as follows:

BIDS

A:

Bidder

1st Lot Rs.10

2nd Lot Rs.7

3rd Lot Rs.5

B:

Bidder

1st Lot Rs.9

2nd Lot Rs.6

3rd Lot Rs.8

C:

Bidder

1st Lot Rs.6

2nd Lot Rs.5

3rd Lot Rs.5

LOST POSITION

1st Lot

10(A)

9(B)

6(C)

2nd Lot

7(A)

6(B)

5(C)

3rd Lot

8(B)

5(A)

5(C)

Lot No. Bidder Bid (Rs)

1st Combination 1 2 3 A B C 10 6 5

21

2nd Combination 2 1 3 A B C 7 9 5

21

3rd Combination 1 3 2 A B C 10 8 5

23

85. In the above hypothetical situation involving three bidders (A, B and C) and three lots (1,2 and 3), nine different combinations can be made. Let me take into consideration, out of the nine combinations, three combinations, which bring the maximum revenue to the authorities concerned.

86. In the 1st combination, Bidder A gets Lot No. 1 for Rs. 10, while Bidder B gets Lot No. 2 for Rs. 6 and Bidder C gets Lot No. 3 for Rs. 5. In the 2nd combination, Bidder B gets Lot No. 1 for Rs. 9, while Bidder A gets Lot No. 2 for Rs. 7 and C gets Lot No. 3 for Rs. 5. Similarly, in the 3rd combination, A gets Lot No. 1 for Rs. 10, B Lot No. 3 for Rs. 8 and C Lot No. 2 for Rs. 5.

87. In the event of bidders being more than the lots available, the choice of combination would really decide as to which of the bidders would be selected and which of the bidders would be left out.

88. The question, now, as correctly raised by Mr. Dutta, is this: who will decide, at what stage and on what basis as to which bidder would get which lot and what would be the rate or price for such a bidder. The terms and conditions under which the E-auction is stipulated to be held are absolutely silent in this regard. Different combinations, depicted above, would have inherently different advantages and disadvantages for the respective bidders and it is some one other than the computer, which has to take a decision on such matters. For this purpose, no guidelines, no principles and no instructions could be produced by the Respondents to explain as to who, when, on what basis or on what considerations would decide the bidder. Such unfettered and unbridled discretion given to the authorities leaves ample scope for manipulation of the result of the bid and this, in itself, is nothing but arbitrary. This problem of unfettered and unbridled power to manipulate the result would be several hundred times higher if we take the actual situation, where as many as 20 lots would be offered for sale and more than one hundred bidders would be bidding. Moreover, the terms and conditions do not clarify as to which of the Respondents, i.e the NEC or the MSTC, would be authorized to take the final decision as to who would be the winner. The terms and conditions incorporated for E-auction having not provided forbidding sequence, arbitrary unfettered and unbridled power rests with the Respondents to declare any of the bidders as winner. In fact, who would be the authority to make this declaration is also, as already indicated hereinbefore, completely vague.

89. Though the example given in Para No. 10 above is hypothetical in nature, it must be borne in mind that since the very introduction of the policy of E-auction and the terms and conditions subject to which the E-auction is proposed to be held are under challenge in the present writ petitions, it necessarily follows that the validity of the terms and conditions under challenge have to be tested on the basis of questions, which are likely to arise if the E-auction is permitted to be held. If the possibility of arbitrariness in selecting the bidder becomes too prominent, holding of E-auction with such arbitrary powers can't not be permitted.

90. The CIL and the NEC have, as already indicated hereinabove, referred to the Circular, dated 18-12-2003, aforementioned of the CVC to support the policy decision to resort to E-auction. I have already pointed out hereinabove that the materials on record do not reflect that the CVC's said Circular was the reason or one of the reasons for the Respondents' decision to resort to E-auction. Be that as it may, the CVC's suggestion to adopt E-auction aims at, as already pointed out hereinabove, "preventing the possibility of corruption", "to bring about greater transparency" and "curb malpractices". What, in short, was aimed at by the CVC was elimination of the possibilities of corruption and malpractices in selecting the winners amongst the bidders. The CVC wanted the entire selection process to become transparent and curb the possibilities of malpractices and limit the scope of corruption. Though the CIL and the NEC rely on the contents of this Circular, the very terms and conditions under which the E-auction has been decided to be held gives, as explained hereinabove, unfettered, unbridled,

unlimited and unguided powers on unspecified authority to declare the winner. Such terms and conditions cannot but be regarded as irrational and arbitrary, for, the same have been incorporated in the system of E-auction without taking into account the relevant factors.

91. Moreover, Clause 1.2 of the MSTC Buyer Specific Terms and Conditions provides, "In the event of Dual Winners displayed online for a single auction, the bidder, who has received by Winning Email will be rightful Winner, and beyond that there is no liability." This term and condition envisages a situation, where there can be two winners displayed on-line for a single auction and the bidder, who receives the winning E-mail, would be the rightful winner. The terms and conditions do not provide as to how and who will decide the winning E-mail and on what basis the winning E-mail would be decided. This, again, leaves the authority with unfettered and unbridled power to decide as to which of the bidders would be the winner and, hence, such terms are nothing, but arbitrary.

92. Furthermore, Clause 3.3 of the MSTC's Buyer's specific Terms and Conditions provides that if any bidder bids at the last minute prior to the closing time, the bid time would be automatically extended by 15 minutes. Again, if any further bid is made within the last minute of the extended time, the bid time would be further extended by another 15 minutes and so on. In this manner, if any bidder continues to make bids within the last minute of every extended time, the bid process would be never ending. Clause 3.3, thus, clearly makes it very easy and very simple for a frustrated bidder to prevent the auction process from coming to an end and thereby compelling the NEC or MSTC, at some stage, to declare the auction cancelled.

93. Confronted with the above unexplained situations, arising out of particularly, Clauses 8 and 9 read with Clause 1.2 aforementioned, as to how, by whom and on what principles and/or instructions, the winner would be decided, Mr. K.P. Pathak, learned Additional Solicitor General, has submitted that a mere possibility of misuse of a particular Clause in a contract relating to selection process cannot be challenged in a writ petition, for, such matters are not, according to Mr. Pathak, within the scope of Article 226.

94. While dealing with the above aspect of the matter, it needs to be noted that the possibility of abuse of a legislation or of any governmental scheme relating to selection process is one of the grounds, which, at times, has attracted the powers of judicial review. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, the Constitution Bench, while considering a writ petition challenging the validity of admissions to the regional engineering College, Srinagar, wherein the authorities concerned had kept out of the total 150 marks, 50 marks for interview, observed that reserving as much as 50 marks for interview out of the total 150 marks was "plainly arbitrary and unreasonable". In no uncertain words, the Constitution Bench, in *Ajay Hasia* (supra) expressed itself thus, "We must, therefore, regard the allocation of as high a percentage as 33.33 of the total marks for the oral interview as infecting the admission procedure with the vice of

arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained". The reason for expressing such an opinion by the Apex Court is obvious and the reason is that if as much as 50 marks are fixed for interview out of total marks of 150, there exists the possibility of abuse of manipulating the marks for the interview to the extent of 50 marks and frustrate or defeat thereby the very purpose of a due selection process.

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

96. In *Chintaman Rao Vs. The State of Madhya Pradesh*, the Supreme Court, while striking down the law, which was under challenge, observed thus, "So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void".

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

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

99. What is also of immense to note is that according to the MSTC's specific terms and conditions of E-auction, the higher price bid would always supersede the lower price bid and between the bids of the same price, the bid, which was

placed prior in point of time, shall supersede. Pointing out to these conditions, Mr. Dutta has pointed out that the relevant terms and conditions do not perceive a situation, where, if two persons bid at the same point of time, who would be declared as the winner.

100. While considering the above aspect of the matter, it is pertinent to note that the MSTC's general terms and conditions at para 17(e) states that all communications shall be deemed to have been completed as against the buyer/seller as soon as they enter the respective party's system resources. What it means is that it is on the basis of the entry of the bid into the system of the MSTC, recorded at a given point of time, that the winner would be declared. However, the terms and conditions do not indicate as to what would happen if two bids enter into the MSTC's system at the same point of time. On being pointed out this lacuna, Mr. P.N. Choudhury, learned Counsel appearing on behalf of the MSTC, submits that in a computer, it is not possible to have more than one entry recorded at the same point of time.

101. Reacting to the above submissions made on behalf of the MSTC, Mr. Dutta has drawn the attention of this Court to the definition of "Timestamp" on the web and what a "Distributed System" on the web is. A "timestamp" is a time value expressed in milliseconds. It is the time since the last server reset. "Timestamp" is reserved for use to represent the current server time. A "timestamp" is the mark or notation that indicates the date and the time of an action, the identity of the person or device that sent or received the "timestamp". A "Distributed System" is really a collection of autonomous, geographically dispersed computing entities (hardware or software) connected by some communication medium. The "Distributed System" is an information system, consisting of multiple software and hardware components, distributed across a computer network and it represents a set of computer hardware devices distributed across a computer network that can cooperate to execute a single program or support a single information system.

102. In other words, "Distributed System" is a non-centralized network consisting of numerous computers that can communicate with one another, which would appear to users as parts of a single, large, accessible storehouse of shared hardware, software and data. In computer assisted trading, without secure timestamping, bidders, who were on the an-tipode of the secure market would have bids delayed by, at least, one second and typically far more because of transmission delays and speed of light considerations. But with "timestamping", one can release continuous auction information to bidders and also receive bids with their respective "timestamped" data. With the help of a "distributed system", it is possible to have a synchronized "timestamp" and the result of such a synchronize system would be that a computer system may record more than one bid at the same point of time. To put in simpler words, what it means is that if E-auction is Held with the help of a "Distributed System" forged by "timestamp", the servers placed at different geographical regions can

record the exact time at which the bidders had bid in their respective regions. The result of such a system will be that though the main server may receive the bids at different points of time, the "timestamp" may indicate that more than one bidder had bid at one and the same point of time. The auctioneer may, in such a situation, can, provided that the terms of the auction so permit, continue with the auction and the bidders, whose bids were recorded at the same point of time, may continue to bid until one bidder wins the race. This system, in fact, helps in obtaining maximum possible price for an object put on sale by E-auction. In fact, when these aspects were pointed out, Mr. PN Choudhury, could not refute the correctness of the same.

103. It is, thus, clear that it is possible in a computer system of an auctioneer to record two bids at the same point of time. It is not, therefore, surprising that the MSTC mentions, in Clause 1.2 of its Buyer Specific Terms and Conditions, that there can be dual winner displayed on-line for single auction; but it appears that the MSTC does not really know as to how to solve this problem. This, in turn, shows that though the MSTC claims itself to be an expert on E-auction, it does not even know that a system can be devised or developed to register more than one bid at the same point of time. In fact, the terms and conditions of the E-auction offered by the MSTC, as discussed below, recognize such a possibility.

104. A close scrutiny of Clause 1.2 of the MSTC Buyer Specific Terms and Conditions, which we have referred to and discussed in Para Nos. 91 and 92 above, recognizes that it is possible even for the MSTC system to record dual winner for a single auction inasmuch as this Clause provides, "In the event of Dual Winners displayed online for a single auction, the bidder, who has received by Winning Email will be rightful Winner, and beyond that there is no liability." This term and condition envisages a situation, where there can be two winners displayed on-line for a single auction and the bidder, who receives the winning E-mail, would be the rightful winner. The terms and conditions do not, however, provide as to who will decide the winning E-mail and on what basis the winning E-mail would be decided. This, again, leaves the authority with unfettered and unbridled power to decide as to which of the bidders would be the winner and, hence, such terms are nothing, but arbitrary.

105. The specific terms and conditions of the MSTC, pointed out above, thus, recognizes that there can be dual winner displayed on-line for a single auction meaning thereby that the software, which will be used by the MSTC, can record more than one winner at a given point of time. In a situation, such as this, it is the bidder, who receives the winning E-mail, who would be the lawful winner. Who will decide the winner, how it will be decided and how the winning E-mail will be dispatched to the winner remain, however, undisclosed and unexplained.

106. It is the stand of the MSTC, supported by, of course, the CIL and the NEC that the MSTC has the experience of conducting E-auction. It is the MSTC, which has given the certificate to itself by claiming that it has the experience of holding E-auction in the past. To my mind, it is not relevant as to whether the MSTC has

held E-auction in the past or not. It is only when a system is challenged that the perfectness or effectiveness or the quality of the system is determined. This test cannot be avoided by saying that there has been no complaint in the past. When the possibility of abuse has been pointed out by the writ Petitioners, the MSTC cannot escape by merely giving the number of E-auction, which it had held in the past; it has to meet the challenges and explain and satisfy the Court that these challenges are not well-founded. Far from meeting the challenges, the MSTC, so also the CIL and the NEC, try to escape by giving account of the number of E-auctions, which the MSTC has held in the past.

107. To a pointed query made by this Court, Mr. PN Choudhury, learned Counsel for the MSTC, could not say as to who had developed the software, which the MSTC is making use of for holding E-auction. A software may be developed by a reputed company consisting of experts and same sort of software may be developed by ordinary software companies. It is just like making of music cassettes by an internationally reputed company and making of music cassettes by a person located in any corner of the street. Unless their quality is compared or comparable with each other, it cannot be said as to what quality of music cassette the persons have produced. The MSTC gives no indication as to what selection process was adopted by it to select the software, which it is using for holding of E-auction. In fact, Mr. H. Roy, learned Senior Counsel and Amicus curiae, has pointed out before this Court that the MSTC's software of E-auction is essentially the same as the scheme of any other private auctioneer, such as, Bazi dot Com except with a difference that for participating in the E-auction to be held by the MSTC, a prospective buyer must not only register himself with the MSTC, but shall also pay Rs. 2 lakhs as earnest money; whereas no earnest money is required to be deposited with a private auctioneer like Bazi dot Com. While a private auctioneer, such as Bazi dot Com, may offer terms and conditions for auction, which a person may or may not accept, the same kind of terms and conditions may not be allowed to be offered for E-auction by the State or its instrumentalities, for, the State and its instrumentalities have the responsibility to satisfy the Court that the terms and conditions, which they have offered withstand the tests of Article 14.

108. That the terms and conditions introduced by the MSTC suffer from complete non-application of mind can also be gathered: from the fact that one of the terms and conditions stipulated for E-auction was that the winning bidder cannot re-sell the purchased coal at a price higher than 10% of the basic bid price. When these writ petitions were being heard, it was submitted, on behalf of the CIL, that the E-auction has been adopted to introduce competitiveness in the bidding and also to enable the CIL to receive highest price for its coal. However, when it was pointed out to Mr. A. Sharan, learned Additional Solicitor General, that how do the CIL and the NEC expect high bid price for their coal, when they have put restrictions on the re-sale value of the purchased coal, the CIL came out with the information that it had deleted the ceiling imposed on the re-sale value of the coal sold in E-auction. In support of this policy decision, the CIL has

relied on the approval given by the Chairman of the CIL to the deletion of the restriction of not allowing a bidder to sell coal at a price higher than 10% of the basic bid price. This approval, however, has been given by the Chairman, CIL, as late as on 10.2.2005. No wonder, therefore, that when the CIL filed their affidavit on 20th of January, 2005, the reservation on the re-sell price still existed. This, in turn, shows that the terms and conditions subject to which the E- auction was sought to be held, "as a permanent policy", was fraught with deficiencies and without having held even trial runs, the CIL stopped the sale of coal through other modes of sale.

109. Coupled with the above, what is of utmost importance to note is that one of the objects of the CIL, as its website discloses is "to make efficient arrangements for marketing and supply of coal so that coal, coke and other similar derivatives are available to consumers throughout the country conveniently at a reasonable prices". This shows that the CIL cannot indulge in marketing of coal in an unreasonable manner so as to make its consumers suffer; rather, its aim is to make coal available to consumers through out the country conveniently and at a reasonable price. If the ceiling on re-sale value is removed as has been done in the present case, it would obviously lead to unmanageable rise in the price of the coal. This, as the Petitioners point out, is wholly contrary to the object with which the CIL is expected to market coal. To meet this contradictory situation, the CIL has offered no explanation and no explanation is discernible from the materials on record. This apart, it is the Union of India, which is, as already discussed above, the competent authority to decide the mode of sale of coal. The Union of India having already approved, (if the Chairman, CIL, is believed), the scheme for sale of coal by E-auction and if the scheme approved was that coal would be sold in E-auction subject to the condition that the coal purchased in E-auction cannot be resold by buyers at a price higher than 10% of the basic bid price, the CIL is not the competent to remove this ceiling and defeat thereby one of the indispensable objects with which the CIL was set up.

110. In all fairness, the CIL ought to have held the trial runs and upon testing how good was the response and how workable the system is that it should have decided its ultimate policy with regard to E-auction. What the CIL has done is to, first, take a final decision not to sell coal by any mode other than E-auction and without ascertaining the vagaries and deficiencies of the system, it chooses to force the prospective bidders to bid on the basis of the terms and conditions which the MSTC offers, and though the CIL resists challenge to the terms and conditions, the MSTC itself is unsure as to how accurate, reliable and effective the MSTC's system is. Such an approach cannot be allowed to be adopted by the State or its instrumentalities. When a challenge is posed to a system and the weaknesses of the system become too glaringly noticeable by the eyes, one has to, first, rectify the defects, improve the system and, then, introduce the system as the final system. When the State has the monopoly on the production of coal, it cannot force a citizen to buy coal on the basis of the terms and conditions, some of which are ex facie irrational, suffer from non-application of mind,

arbitrary, not feasible and leave the selection process wide open for malpractices, manipulation and corruption.

111. In terms of its commitment before the Hon"ble Supreme Court, in the SLP, which arose out of APOT No. 469/2001, AOP No. 313/2001 and WP No. 1199/2000, the CIL ought to have, first, evolved a transparent policy for sale of coal by making use of developed technology. What it has done is that it has adopted a policy, which is neither transparent nor free from deficiencies. This situation has arisen on account of the fact that contrary to its own understanding of the situation that it would take a final decision on the question as to whether E- auction shall be resorted to or not after completion of the studies carried out by the IIM, Kolkata, and after the responses from the trial runs were received, it, suddenly, took the final decision to sell coal by no mode other than E-auction. The question, now, is to what is the purpose of the trial runs. This Court made a query from Mr. KP Pathak, learned Additional Solicitor General, as to who, when, on what basis, on what considerations and for what reasons, changed the policy of having trial runs of E-auction to the permanent and sole mode of sale of coal and, then, once again, changed this permanent policy to trial runs. Mr. Pathak has candidly conceded that the materials on record are completely silent as to when, how and by whom the Government of India's approved policy of selling coal by E-auction alone was changed to trial runs.

112. When the Government of India had approved, if it had really approved, E - auction as the sole mode of sale of coal, no authority other than the Government of India, could have changed this policy. No body, however, explains as to who, why and when changed the said permanent policy to trial runs. Thus, the resort to trial runs is contrary to the scheme of the CIL's Memorandum of Association, for, in the affairs of the management of the CIL, the President of India, i.e. the Union of India has the final say and when it was the Union of India's final say (if the Chairman, CIL, has to be believed) that the E-auction would be the sole mode of sale of coal, no other authority could have changed this policy into trial runs.

113. There is yet another aspect of the matter, which needs undivided attention of this Court. The question is as to what is the purpose of trial runs? Is it to test the commercial response or to test the capability of the system of the MSTC to hold E-auction? In view of the fact that the CIL and the NEC stand by the efficiency of the system, which the MSTC has introduced as regards E-auction, the conclusion, which is irresistible to draw, is that it is the commercial response, which the CIL wanted to test by trial runs. Since, according to the CIL, the commercial response has been good, the consequence is obvious and the consequence is that it would continue to hold E-auction with the deficient system of conducting E-auction, which the MSTC has. Had the CIL come forward with an open mind that by holding the trial runs, it wants to test not merely commercial response, but also the capability and wherewithal of the MSTC to hold the E-auction, the situation would have been different.

114. Moreover, if the capability of the MSTC is being decided, how can it be promptly declared by the CIL to be a good system and how can such a system, which is being tested and determined by the trial runs, be described as a perfect, permanent and sole policy?

115. Coupled with what have been discussed above, what is of utmost importance to note, as pointed out by Mr. Dutta, is that Clause 17(b) of General Terms and Conditions of MSTC reads as follows:

Clause-17 Disclaimer of Warranties:

(a)...

(b) MSTC makes no warranty that (i) the service will meet your requirements, (ii) the service will be uninterrupted, timely, secure, or error-free, (iii) the results that may be obtained from the use of the service will be accurate or reliable, (iv) the quality of any products, service, information, or other material purchased or obtained by you through the service will meet your expectations.

116. Furthermore, The Clause 18 of General Terms and conditions of the MSTC reads as follows:

Clause-18 Limitation of Liability: You expressly understand and agree that MSTC shall not be liable for any direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss of profits, goodwill, use, data or other intangible losses (even if MSTC has been advised of the possibility of such damages), resulting from: (i) the use or the inability to use the service: (ii) the cost of procurement of substitute goods and services resulting from any goods, data, information or services purchased or obtained or messages received or transactions entered into through or from the service: (iii) unauthorised access to or alteration of your transmissions or data: (iv) statements or conduct of any third party on the service; or (v) any other matter relating to the service.

117. A combined reading of Clauses 17(b) and Clause 18 above mentioned makes it clear that the MSTC disclaims all responsibilities for the failure of its system, the accuracy of the results that it may announce and the quality of the information, which it gives to the bidders. It even disclaims that the results obtained from the use of the system would be accurate and reliable.

118. Though challenged, during the course of hearing, the MSTC could not justify its complete disclaimer and refusal to own any liability with regard to even accuracy of the results of E-auction. Can such an uncertain and wholly unguided policy adopted by the State or its instrumentalities be sustained?

119. While dealing with the above aspect of the matter, one predominant fact that needs to be borne in mind is that when the State or its instrumentalities hold monopoly with regard to sale of mines and minerals, it does not stand on the same footing as does a private party. If the ground of disclaimer, which the

MSTC forces a prospective buyer to agree to, is allowed to be carried out, it will mean that though the CIL holds monopoly as regards production of coal and invite bids by adopting the method of E-auction, it does not even declare that it has taken minimum possible care to ensure that the E-auction, which will be carried out, and/or the selection process, which it will adopt, would be fair, just, transparent and/or that it has taken due care to eliminate the possibility of abuse of powers of the authorities, who are vested with the discretion to make the selection of the winners).

120. The situation is like this: A State takes over the entire business of road transportation for the purpose of carrying passengers and runs its business of transportation with the help of a Corporation, such as the Assam State Transport Corporation (in short, ASTC). Assuming that the ASTC holds complete monopoly of taking passengers from one place to another. In these circumstances, a passenger comes to the office of the ASTC and on coming to know that there is a bus available to carry passengers from Guwahati to Bomdilla, which has very difficult hilly terrains, asks the Management of the ASTC to let him know if the driver, who is entrusted to take the passengers to Bomdilla by bus, has any experience of driving in hilly terrains as difficult and as dangerous as the hilly terrains in the State of Arunachal Pradesh, such as, Bomdilla, are. Assuming for a moment that the management of the ASTC reacts to such a query by saying that the driver concerned has driving license and it is not the responsibility of the ASTC to find out if he had ever had the occasion to see the hilly terrains of Bomdilla and/or driving a vehicle in any hilly terrain. Had the ASTC not been holding the monopoly of transporting the passengers, the passenger concerned could have opted for some private transporter; but when the ASTC holds monopoly, it will be wholly arbitrary and unfair on the part of the ASTC, if it does not, as an instrumentality of the State, even bother to find out whether the driver, who would be driving in the difficult hilly terrains of Arunachal Pradesh, had ever seen how the roads in the hilly terrains of Arunachal Pradesh are or if the driver had even seen any hilly terrains or driven in hilly terrains. Will it be fair and just for the ASTC to say that it is up to the passengers to opt to go by bus with such a driver, which the ASTC provides, or make arrangements, to reach Bomdilla, on foot or otherwise. When the bargaining powers between the State and its citizens are enormously unequal and wholly imbalanced, the State or its instrumentalities cannot be allowed to dictate the terms, which a person with conscience would never offer. While, on the one hand, the MSTC gives itself a certificate that it has the experience of holding E-auction, it, on the other hand, fails to explain the weaknesses of its own system and even refuse to own any liability or responsibility and does not even care to give a reasonable assurance of accuracy of the result to the persons, who wish to participate in the E-auction. The MSTC cannot say, as the sole selling agent of coal, that it is upto the buyer to agree or not to agree to participate in the E-auction when the terms and conditions, which the MSTC as the sole selling agent of a product as vital as coal, opts to offer are manifestly uncertain utterly vague and completely unsure.

121. Mr. Dutta also points out that in the E-auction, which is under challenge, the parties to the E-auction do not stand on the same footing, for, there is, on the one hand, a giant government undertaking, such as the CIL and MSTC, with the might and backing of the Union of India, and, on the other, we have traders, who earn their livelihood by sale and purchase of coal, and consumers, who sustain themselves on the basis of the coal used by them in their respective SSI Units. The bargaining powers between the two parties concerned is, points out Mr. Dutta, wholly unequal and in such a situation, it is unconscionable for the Respondents to insist that the Petitioners must enter into such conditions, which are *ex facie* arbitrary, irrational and leave huge scope for manipulation, malpractices and corruption. The apprehensions, so expressed by Mr. Dutta, are not really without substance.

122. Reacting to the above submissions made on behalf of the Petitioners, Mr. Pathak, referring to the case of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, has submitted that when the State or an instrumentality of the State ventures into corporate world, it assume to itself the robe of an ordinary share-holder and, having donned the robe of a share-holder, it acquires all the rights available to it as a shareholder and can manage its affairs like any other shareholder. Seeking to derive strength from the decision in Escorts (*supra*), Mr. Pathak points out that in the present case, since the State, with the help of its instrumentality, such as the CIL, has assumed the role of a trader in the production and sale of coal, the CIL can offer for agreement such terms and conditions, which the CIL considers necessary to enable it to do its business. The terms and conditions, so offered by the CIL for agreement, cannot, according to Mr. Pathak, be struck down on the question of inequality in bargaining powers of the two contracting parties, for, the CIL, contends Mr. Pathak, is just like any other trader in the business of production and sale of coal.

123. While considering the conflicting submissions made on behalf of the parties, what is of immense importance to note is that the inequality of bargaining powers in the realm of contract is a question, which has always tilted balance in favour of the person, who has entered into a contract on such terms and conditions, which are unfair and unreasonable to him, but has accepted such terms and conditions for reasons of his inequality in the bargaining strength. Irrespective of the fact whether such unfair and unreasonable terms and conditions are entered into between two unequally placed private individuals or between the State and its instrumentalities, on the one hand, and a private individual, on the other, the Court would, indeed, interfere so long as such terms and conditions have been agreed to because of unequal bargaining strength. In fact, if a citizen accepts the unfair and unreasonable terms of contract merely because of the fact that the State is strong and the citizen is weak, this weakness, having arisen out of unequal economic strength, the High Court, as a conscious keeper of the Constitution, would have no option but to interfere, particularly, if the State fails to justify the arbitrariness in the terms of the contract. While offering for sale by public auction a public property, the State and

its instrumentalities must act according to constitutional conscience and must not insist that its citizen must accept the terms of auction howsoever unreasonable, irrational or arbitrary those terms may be.

124. In fact, it was Lord Denning, who, had, for the first time, while construing an indemnity Clause in a contract, in *Gillespie Brothers and Co. Ltd. V. Roy Bowles Transport Ltd*, reported in (1973) 1 QB 400, raised the question as to whether the Courts should permit a party to enforce his unreasonable Clause, even when this clause is so unreasonable, or applied so unreasonably, as to be unconscionable. Reacting to such a situation, Lord Denning observed, "When it gets to this point, I would say, as I said many years ago,

there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused." It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.

125. Lord Diplock outlined the theory of unreasonableness or unfairness to relieve a party from the contract, when the relative bargaining powers of the parties were not equal. In *A. Schroeder Music Publishing Company Ltd V. Macaulay*, reported in (1974) 1 WLR 1308, the song writer had contracted with the publisher the terms more onerous to him and favourable to the publisher. The song writer was relieved from the bargain of the contract on the theory of restraint of trade opposed to public policy. The distinction was made even in respect of standard forms of the contracts emphasizing that when the parties to a commercial transaction, having equal bargaining power, have chosen to adopt the standard form of contract, it was intended to be binding on the parties. Conversely put, when the parties to a commercial transaction are not evenly situated and one of the parties has greater bargaining strength than the other and is in a position to say, "if you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it", the Court would not, if need be, refuse to relieve the party, which forces the other weaker party to enter into such a contract, and the Court may, if necessary, even relieve the weaker party from the terms of such a contract. The Court would not relieve any of the parties from such a contract if the contract is between the parties, whose bargaining strength is equal.

126. That a State, its instrumentalities or public authority, whose acts have the insignia of public element, cannot defend its action even in the field of private law on the ground that they are free to prescribe any conditions or limitations in their actions as private citizens simpliciter do in the field of private law is clear from the observations made in the *LIC of India and Another Vs. Consumer Education and Research center and Others*, wherein it has been observed as follows:

23. Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It

is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations.

127. The distinction between private law and public law remedy is, fairly, settled by the Apex Court's decision in *LIC V. Escorts India Ltd* (supra), wherein a Constitution Bench has held thus:

If the action of the State is related to contractual obligations or obligations arising out of the tort, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.

128. From the above observations, it is clear that it is in a given case and with reference to a particular given action that it has to be decided as to whether the activity of the State or the instrumentalities of the State fall in the domain of private law or public law.

129. It is, no doubt, true that the CIL, in the present case, is in the business of production and sale of coal; but while offering to an Indian citizen the terms and conditions for sale of its products it cannot behave as a private trader, inasmuch as it holds almost monopoly in the production of coal and it has been setup by the State with certain objectives. The coal, which the CIL sells, is a national wealth and the national wealth cannot be disposed of by an instrumentality of the State like a private trader.

130. In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, it was held that the Corporation must act in accordance with certain constitutional conscience and whether they have so acted must be discernible from the conduct of such Corporations. Every activity of public authority must be informed by reasons and guided by the public interest and that all exercises of discretion of power by public authority must be judged by that standard. Whatever be the activity of the public authority, it must meet the tests of Article 14 and judicial review strikes down an arbitrary action.

131. Striking down one of the conditions of service, which had provided for termination of service of a permanent employee by giving one month's notice or salary in lieu thereof, the Supreme Court in *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, while dealing with the development of the law on the subject of unequal bargaining powers, held thus:

37. Should then our Courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the Courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality Clause in Article 14. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable Clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No Court can visualize the different situations, which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a Clause in that contract or form or rules may be. This principle however will not apply where the bargaining power of contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and

unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The Court must judge each case on its own facts and circumstances.

132. In *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, it was held that the State, when acting in its executive power, enters into contractual relations with an individual, Article 14 would be applicable to the exercise of the power. The action of the State or its instrumentality can be checked under Article 14. Their action must be subject to the rule of law. If the Governmental action, even in the matter of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play, natural justice are part of the rule of law applicable in situation or action of the State or its instrumentality in dealing with the citizens. Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". It was also further held that whatever be the act of the public authority in such monopoly or semi-monopoly, it must be subject to rule of law and must be supported by reasons and it should meet the test of Article 14. (See *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*,

133. From a careful reading of the decision in *Mahabir Auto Stores* (supra), it is more than abundantly clear that duty to act in a fair, just and equitable manner is inherent in the activities of the State and its instrumentalities, such as the CIL, when its action, even in the sphere of contractual relations with private individuals, bear insignia of public element. No wonder, therefore, that in *LIC of*

India v. Consumer Education (supra), the Court held as follows:

26. This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public and private law rights and remedies, though may not be obliterated by any strait-jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has not become too thin and practicably obliterated.

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner, i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a

manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

134. In no uncertain words, the Supreme Court expressed the position of law on the subject of unconscionable contract in *LIC of India and Another Vs. Consumer Education and Research center and Others*, as follows:

47. It is, therefore settled law that if a contract or a Clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

135. In the face of the facts of the present case, it is more than abundantly clear that when the CIL, as an instrumentality of the State, which deals with national wealth, enters or offers to enter into contractual relations with private individuals, such as the Petitioners, the obligation to act fairly, justly and equitably remains an imperative part of the activities of the CIL and the High Court will not, as observed in *Brojo Nath Ganguly (supra)*, hesitate to interfere or strike down those terms of contract, which are unjustly and unfairly incorporated by the State or its instrumentalities, in the commercial contracts, but have to be accepted by the private individuals, such as the present writ Petitioners, on account of disparity of economic strength or unequal bargaining power, if the Petitioners have to survive.

136. When the terms and conditions offered by the Respondents to the Petitioners for the purpose of entering into the contract for purchase of coal by public auction are, as discussed hereinabove, arbitrary, irrational and gives unguided and unbridled powers to some unknown and non-specified authorities to make the selection of the winner, such terms and conditions have to be held as terms and conditions, which the Respondents cannot, as the State or its instrumentalities, set if they are to act in accordance with constitutional conscience. In the case at hand, the Respondents assumed undisclosed, unguided and unbridled power to decide the result of the E-auction. When one of the objects of holding E-auction has to be transparency of the system of selection process, the Respondents cannot assume to themselves unguided, undisclosed and unbridled power to decide the winner without even letting the parties to an auction, which is a public auction, know as to how, by whom and on what considerations, the winner will be selected. The terms and conditions, as

discussed hereinabove, cannot, being arbitrary, be allowed to form part of the agreement, which the Respondents have offered to the Petitioners to enter into for the purpose of enabling the Petitioners to participate in the E-auction.

137. What is also disquieting to note is that there is nothing on the record to show that the Union of India and the CIL have taken into account the terms and conditions subject to which the MSTC has offered the coal for sale by the E-auction. The MSTC is really an agent of the CIL for the purpose of disposal of the coal by E-auction. The CIL was bound, as the principal, to settle the terms and conditions of the contract subject to which its coal should be sold by way of E-auction by the MSTC.

138. It appears from the materials on record that neither the Union of India nor the CIL has bothered to ascertain if the terms and conditions set forth by the MSTC are fair, just and sustainable in law. The CEL had the duty to find out the terms and conditions subject to which the MSTC would be offering the coal for sale by E-auction. To the query made by this Court, none, on behalf of the CIL, could submit that there is any material on record to show that any exercise was undertaken by the Union of India and/or the CIL to ascertain as to what the terms and conditions have been set by the MSTC for disposal of the coal. Having done no exercise in this regard, the CEL has sought to defend the MSTC.

139. The Circular of the CVC under discussion aims at removing human hands from the selection process; but it is clear that the terms and conditions subject to which the MSTC has offered the coal for sale, human hands still remain very active; rather, their activities with regard to the process of selection will, now, remain unknown and undisclosed, but would bear the seal of approval of the Government of India. In the guise of introducing a modern commercial concept, such as E-auction, the Union of India or the CIL cannot adopt a wholly irrational and arbitrary selection process. The transparency in the whole scheme of disposal of coal, which the CVC wanted to introduce, stands defeated. No exercise appears to have been made, while resorting to E-auction, to ensure elimination of the possibility of manipulation, malpractices and corruption. Viewed from this angle too, the terms and conditions aforementioned suffer from non-application of mind the same are irrational, arbitrary and cannot be sustained.

140. For the reasons pointed out above, as a whole, I answer Question No. (iii) in the affirmative.

QUESTION No. (IV)

141. Let me, now, turn to, and deal with, the Question No. (iv), namely, as to Whether the resort to E-auction in the manner as has been done withstand the tests underlined under Article 14 of the Constitution of India?

142. While considering the above question, it is pertinent to point out that in Tata Cellular (supra), the Court has more than once clarified that judicial review is not

concerned with the decision, but with the decision making process and if, in the decision-making process, the relevant facts are not taken into consideration or irrelevant facts are taken into consideration, the power of judicial review will in either case be available. The Court has also made it clear in *Tata Cellular* (supra) that the principles of judicial review are applicable to economic policies as well as commercial transactions entered into by the State and its instrumentalities. Bearing in mind this basic tenet of the powers of judicial review, let me, now, consider the cases of the parties concerned.

143. Presenting the case, on behalf of the Petitioners, Mr. N Dutta, learned Senior counsel, has submitted that the decision to adopt E-auction was taken by the Respondents concerned without making any assessment of the ground realities and without conducting any study as regards the feasibility of holding of E-auction. The basic infrastructure required for holding of E-auction i.e. constant and uninterrupted supply of electricity and equal access to the Internet system is, points out Mr. Dutta, not as developed in the north-eastern region as in other parts of the country and even within the north-eastern region of India, these facilities are, further points out Mr. Dutta, not equally developed and/or available at all places; for instance, submits Mr. Dutta,

States like Nagaland passes not only hours, but even days without electricity and in such a situation, all the States in the north-eastern region cannot be said to have equal opportunity to participate in E-auction if the same is resorted to as the sole and permanent mode for sale of coal of the NEC. In this view of the matter, the intending purchasers of coal from the north-eastern region would not have, according to Mr. Dutta, equally levelled ground or playing fields for participating in the E-auction. Thus, the adoption of E-auction as the sole mode of sale of coal or even as trial runs is, in effect, contends Mr. Dutta, exclusionary and discriminatory in nature so far as the persons, such as, the Petitioners are concerned

144. Reacting to the above submissions, Mr. Sharan, learned Addl. Solicitor General, has submitted that the Internet connectivity is available even in the remotest parts of India and adequate materials have not been made available on record by the Petitioners to show that the supply of electricity in the north-eastern region is so erratic that if E-auction is held, the intending buyers would not be able to participate in such E-auction. This apart, the infrastructural facilities available in the northeastern region are, according to Mr. Sharan, at par with any other parts of the country and if one does not have his own computer, one can participate in the E-auction through Cyber Cafe, for, Cyber Cafe are, according to Mr. Sharan, available even at small townships in the north-eastern region.

145. While considering the above submissions made on behalf of the parties, it is of paramount importance to note that according to the writ Petitioners, erratic supply of electricity and unequal access to the internet system will function as the two major constraints for the traders of the north-eastern region if they have to participate in E-auction. The question, therefore, is as to whether these

grievances are true, genuine and bona fide. If it is so, whether the Respondents have taken these two constraints into consideration before resorting to E-auction, initially, as the sole mode of sale of their coal and, subsequently, as trial runs. In this regard, the Respondents have, unfortunately, not been consistent and have endeavoured hard to cross, by any means, the hurdles, which the Petitioners point out as their reasons for resisting the introduction of E-auction.

146. On a careful reading of the pleadings of the Respondents, what attracts the eyes, most prominently, is that at the initial stage, the pleaded case of the Respondents was this: (i) Cyber Cafes have come up in almost every nook and corner of even mufasil areas. This has enabled the public, at large, to have access to internet as well as computers and the economic activities, covered by the internet, have become order of the day. (ii) Even if there is failure of electricity, a computer can be operated for more than half an hour through UPS connection, (iii) It is unlikely that the Petitioners would face power failure for 24 hours a day. The supply of electricity in the north-eastern region is made by the States. The numerous computers operating in the north-east have had little or no complaints on account of failure of electricity, (iv) It has to be presumed that all participants have equal access to computer and internet facilities.

147. What is glaringly noticeable to the eyes from a careful reading of the affidavits filed, at the initial stage of the proceedings of the hearing, is that these Respondents projected that the north-eastern region suffers from no disadvantage so far as the supply of electricity and/or access to the internet system are concerned. However, the fact that the infrastructural facilities are not at par with the rest of the country and that it needs special care and attention, is, now, admitted by none other than the CIL inasmuch as this Respondent has, in no uncertain words, as indicated hereinabove, admitted, during the course of hearing, in their affidavit filed in WP(C) 958/2005, aforementioned, that the infrastructural facilities in the north-eastern region are, at present, far below other parts of the country.

148. It clearly follows from the affidavit filed in WP(C) 958/2005 aforementioned that the claim, which the Respondents had made at the initial stage of the hearing of these writ petitions, that the north-eastern region suffers from no deficiency of power and/or access to the internet system is factually incorrect. Notwithstanding, therefore, the assertions of the MSTC and the CIL, at the initial stage of the hearing of these writ petitions, that the Cyber Cafe have come up in every nook and corner of not only the district head- quarters and townships, but also at mufasil areas and that the north-eastern region suffers from no limitations as regards the supply of power and access to internet, the present admission by the Respondents in their affidavit filed in WP(C) No. 958/2005 aforementioned leaves no room for doubt that the position of supply of electricity and access to internet in the northeastern region, particularly, in States, such as, the States of Arunachal Pradesh, Nagaland, etc., is, if not abysmally low, definitely not at par with other parts of the country,

149. Coupled with the above, it is also pertinent to note that the Petitioners have placed on record reports published by the Government of India, North Eastern Council, which is a body consisting of the Governments of all the seven States of the north-eastern region. This report shows that the position of the power supply in the north-eastern region is too low. What is important to note is that while States like Meghalaya, in the north-eastern region, may have its own power generating plant, there are many States in the north-eastern region, which have no power generating plant of their own. This apart, the Petitioners have produced the news report published, on 16.02.2005, in The Sentinel, a daily newspaper, published from Guwahati, which shows that for three continuous days from 13th to 15th February, 2005, the State of Nagaland went without electricity.

150. It is also worth noticing that pursuant to the order, dated 03.03.2005, passed in the SLP Nos. 2060/2005, 2207/2005, 2210/ 2005 and 2295/2005 aforementioned, (whereby the Respondents were permitted by the Hon'ble Supreme Court to hold E-auction), the auctions have been held. The Petitioners have produced certificates from the Community Information Center, Dhemaji, which is same as other Community Information Centers established by the National Informatics Center, Govt, of India. This certificate shows that the Petitioner in W.P.(C) No. 442/2005, namely, M/s Maa Kamakhya and one M/s SDR Commerce Private Ltd., (which is not a Petitioner in this writ petition), were unable to bid in the process of the MSTC's E-auction held on 07.03.05, because of load-shedding from 10.45 A.M. to 1.45 P.M in and around Dhemaji Development Block, where the said Community Information Centre, Dhemaji stands located. The correctness and/or veracity of this certificate is not under challenge. Confronted with this situation, Mr. I. Ahmed, learned Senior Counsel for the NEC, has conceded, though reluctantly, that the situation of power supply in the north-eastern region is highly erratic and no proper arrangement is available even in the Community Information Centers, set up by the Govt, of India, for people to have access to the Internet, when there is load-shedding.

151. In the face of the report from the NEC coupled with the certificate given by the Community Information Centre, Dhemaji, and the admission by the CEL in their affidavit, it no longer remains in dispute that the position of power supply and access to internet is far below in the north-eastern region compared to other parts of the country.

152. In fact, when the contradictions in the two sets of affidavits filed by the Respondents were pointed out to Mr. Sharan, even Mr. Sharan had to concede that the Respondents had, initially, made tall claims with regard to the position of supply of power and access to Internet available in the north-eastern region.

153. To a pointed query made by this Court, Mr. PN Choudhury, learned Addl. CGSC, who had appeared on behalf of the Union of India except on the last date of hearing, conceded that the claim of the Respondents that Cyber Cafe are

available in every nook and corner of the country may not be correct inasmuch as many townships in the north-eastern region may not have Cyber Cafe. It is not uncommon, as correctly points out Mr. Dutta, that in some States like Arunachal Pradesh, Nagaland, etc., the supply of electricity is, at times, not available for days together and all the Petitioners in W.P.(C) No. 1020/05, are, it may be noted, residents of Arunachal Pradesh.

154. As regards the question of equal access to the internet system, it has also been pointed out by the Petitioners that the infrastructural facilities of the basic Internet provider i.e. BSNL is not as good in the north-eastern region as in other parts of the country, for, the infrastructural facility of the internet in the north-eastern region is of a narrower broad band, while in other parts of the country, it is of a wider broad band and as a result thereof, getting access to a website in the internet from the north-eastern region is far more difficult than in other parts of the country. It is not in dispute before me that the basic internet provider i.e. BSNL does not provide as wide broad band as it does in respect of many other parts of the country.

155. From the terms and conditions stipulated for holding of the E-auction, it clearly transpires that the auction would be conducted for a fixed period of time on a given day and opening as well as the closing time of auction would be fixed. In these circumstances, if the Petitioners, who would participate from the north-eastern region, fail to get access to the website of the MSTC during the period of time, when the E-auction would be on, such Petitioners would be deprived from participating in the E-auction. Apart from the problem of getting access to the internet, the other problem is that even if the access is initially available, the same may, as the Petitioners point out, go off depending on the traffic in the internet at a given point of time and if the internet link snaps during the period of auction, the Petitioners and the other participants from the north-eastern region would be deprived from increasing their bids before the closing time. The other factor, which the Petitioners point out, is that even if the internet access is available throughout the auction period, the speed at which the bid signal travels from the north-eastern region is slower than the speed at which it would travel from the other parts of the country to reach the central computer of the MSTC due to difference in the bandwidth. As a result, at the closing stages, the last second bid made by the participants from the other parts of the country would reach the central computer of the MSTC, whereas the bids made from the north-eastern region will not reach within closing time, although the time of sending of the bids from the respective computers, located in the north-eastern region, may be the same as in other parts of the country. This would put the participants from the northeastern region at an inherently disadvantageous state vis-a-vis the participants from the other parts of the country unless the MSTC uses "distributed system", as indicated hereinabove, for holding of the E-auction.

156.1 find considerable force in the above submissions of Mr. Dutta, for, the difficulties, which, as pointed out by Mr Dutta, the Petitioners, while bidding,

would face, cannot be readily brushed aside without assigning any reason whatsoever.

157. Thus, what clearly follows is that at the time, when the Respondents, initially, took the decision to resort to E-auction as the sole mode of sale for their coal, they did not take into account at all the factors including the factor as to whether the MSTC had the wherewithal to hold E-auction covering the north-eastern region. Since the MSTC is also a Government undertaking and is an instrumentality of the State, it was the duty of the MSTC as well to take into account these aspects. Not only that the MSTC had not taken into account at all these aspects of the matter, even the CIL or the NEC or the Union of India did not take into account these aspects of the matter before taking resort to E-auction as the sole mode of sale for their coal or before holding the trial runs nor did they ask the MSTC to look into these aspects of the matter. In fact, the CIL and the NEC did not make even the least of efforts to ascertain from the MSTC if holding of E-auction as the sole mode of sale of their coal or holding of trial runs in this regard would put the participants from north-eastern region to any disadvantage vis-a-vis the participants from the rest of the country or abroad. That the CIL and the NEC paid no attention to the factors, which have been pointed out hereinabove, is clear from the fact that in their affidavits, these Respondents merely stated, while dealing with the question of failure of electricity and accessibility to internet, that the apprehensions of the writ Petitioners were unfounded and even assuming that there is failure of electricity, a computer can be operated for more than half-an-hour on the UPS connection. However, after claiming that the apprehensions of the Petitioners were unfounded, these Respondents, again, in the affidavit filed in WP(C) 958/2005, averred that infrastructural facilities in the north-eastern region are not developed and the consumers located in the north-eastern region require special treatment. That there may not be mere failure of electricity for a brief period, but that there may not be available electricity at all for hours and days together had not been taken into account at all by these Respondents. In the face of the fact that infrastructural facilities for holding of E-auction is not, admittedly, adequate in many parts of the north-eastern region, there can be no escape from the conclusion that persons, who would participate from the north-eastern region, may fail to get access to the website of the MSTC during the given period of time, when the auction would be on, depriving thereby the bidders of the north-eastern region from effectively participating in the E-auction.

158. The letter, dated 18.12.2004, of the Chairman, CIL, which has become the policy letter of the Respondents for holding of E-auction and which I have already discussed, reveals that according to the Chairman, CIL, he had a discussion with the Chairman, MSTC, and the Chairman, MSTC, gave his view that twenty days' time would be enough to hold E-auction. While calculating these twenty days, did the MSTC take into account the infrastructural disadvantages of the northeastern region? The answer is not very far to seek, for, regarding the grievances of the Petitioners that "all interested participants do not have an equal access to

computer and internet system and in most of the places of North Eastern region, even if the computer and internet facilities are available, the required electricity may not be available at the appropriate time when the E-Auction is to be conducted", the MSTC replied by stating, most casually, in their affidavit-in-opposition, that it has to be presumed that all the participants have equal access to computer and internet facilities and that regional disparities or backwardness cannot be pleaded as a ground for violation of Articles 14,16 and 19 of the Constitution of India.

159. What the MSTC stated in their affidavit makes it abundantly clear that the MSTC proceeded on the basis of a presumption that all the participants have equal access to computer and internet facilities and that regional disparities or backwardness cannot be a ground for resisting introduction of E-auction, for, E-auction is blind to "class, regional imbalances and disparities". That the MSTC looked into the problems pointed out by the writ Petitioners not from the standpoint of the writ Petitioners, but from the point of view of its own convenience is more than abundantly clear from the affidavit filed by the MSTC, for, in its affidavit, the MSTC states that the MSTC does not have any other branch office in North East India and so far as the MSTC's business operations for the north east segment of the country is concerned, it is done through the MSTC's registered office at Kolkata and, hence, E-auction is the best solution for the MSTC as far as the MSTC's outreach is concerned. That the grievances expressed, on behalf of the writ Petitioners, that the Respondents had not taken into account at all the ground realities are not unfounded is crystal clear from the fact that even the affidavits of the CIL and NEC, at the initial stage, if I may reiterate, read, "the purported inherent disadvantages mentioned in the said paragraphs are imaginary and baseless".

160. Had it been the stand of the Union of India, the CIL and/or the NEC that though they were conscious of the fact that the participants from the north-eastern region would be placed in a disadvantageous position if E-auction is resorted to, but the CIL's objective of rinding the best possible price for coal had compelled it to take resort to E-auction, the situation might have, perhaps, been a little different. However, in the case at hand, the initial reaction of these Respondents was to brash aside, most rashly, the writ Petitioners' grievances with regard to the disadvantages/ deficiencies in the supply of electricity and access to the internet system in the region as baseless and unfounded. What this stand of the Respondents indicates is that these Respondents were, initially, of the view, maybe under a wrong impression, that the resort to E-auction as the only and permanent mode of sale for coal will not put the intending buyers and consumers from the north-eastern region to any disadvantage. This, in turn, indicates that these Respondents did not apply their mind at all to the ground realities of the situation.

161. Had the Respondents, particularly, the CIL adopted E-auction as one of the modes of sale for coal and allowed the Open Sale Scheme too to continue, the

situation would not have become so grave; but when the CEL took the decision that the sale of coal would be by no mode other than E-auction and when this decision was reached by the CIL without taking into account the real factors or incorrectly taking into account the factors, which were relevant, one has no option, but to treat the policy decision as entirely suffering from non-application of mind, irrational, arbitrary, whimsical and capricious. In other words, when the CIL, suddenly, decides to resort to E-auction as the only method of sale for coal and took this decision without taking into account the ground realities of the situation, though it claims to have taken into account these factors, its policy decision must be regarded as arbitrary, irrational, whimsical, capricious and suffering from complete non-application of mind.

162. Though it has been pointed out by Mr. Sharan, learned Additional Solicitor General, that out of 130 persons, who have registered themselves with the MSTC for E-auction in pursuance of the notice, dated 29.12.94, as many as 68 persons are from north-eastern region, what is crucial to note is that the data furnished by the Respondents clearly reveal that all the said 68 participants from the northeastern region are, in fact, from Guwahati and people, such as, the Petitioners, in WP(C) 1020/2005, who are all residents of Arunachal Pradesh, have not registered themselves and could not have, perhaps, on account of regional disparities, registered themselves with the MSTC, for, no meaningful purpose would be served by such registration unless the Petitioners have reasonable assurance that notwithstanding the regional imbalance, they would be able to effectively participate in the E-auction under such terms and conditions, which would not be arbitrary, irrational, unreasonable and unfair.

163. There can, perhaps, be no objection if the Union of India, the CIL and/or the NEC adopts, in its commercial interest, E-auction as one of the modes of sale of coal; but if it resorts to E-auction as the only mode of sale of coal, it must either say that the regional disparities or disadvantages are immaterial in this regard or it must say that the north-eastern region suffers from no disparity. Whereas the Union of India is maintaining silence, the CEL and the NEC blow hot and cold at the same time. While, on the one hand, they claim that the north-eastern region suffers from no infrastructural disadvantages and thereby indicate that the resort to E-auction as the permanent and lone mode of sale is not discriminatory for participants from the north-eastern region, they, in the same breath, in another set of writ petitions, admit that the infrastructural facilities are, indeed, not well developed in the north-eastern region. Since the CIL took the decision to resort to E-auction on the basis of the assumption that if the E-auction is resorted to as the only mode of sale of coal, participants from the north-eastern region would suffer from no disadvantages and when this assumption has been, admittedly, proved to be incorrect, the conclusion, which is inescapable, is that the resort to E-auction by the CEL suffers from non-application of mind, it is irrational, arbitrary, whimsical and capricious.

164.1 may also point out that the MSTC has claimed to have held a number of

auctions in the past. This is really not material for the purpose of this set of writ petitions if the MSTC is unable to answer unavoidable questions. In fact, the averments made by the MSTC, in their affidavit, leave no room for doubt that it did not care to find if they had the wherewithal to hold E-auction at the places, where the persons like Petitioners in the present set of writ petitions, are located. It is not the case of the CIL and/or the NEC that regional imbalances are of no significance, when the best price has to be obtained for the coal. Had such a claim been made, then, the situation would have been a little different. What was attempted to be projected by the CEL and the NEC was that they had provided equally levelled field for all the players to participate in the E-auction; but confronted with the question that they have not taken into account inherently disadvantageous position for the participants from the north eastern region, they have no convincing answer to offer. I may also hasten to point that though it was, initially, projected, on the basis of the sale proceeds realized from the E-auction held by BCCL, that as much as 30 % profit had been earned by the BCCL, the E-auction held,

on 14.03.2005, reveals, according to what the Respondents themselves admit, that the level of profit has come down to 4.2%.

165. One of the causes leading to introduction of E-auction in respect of coal is, according to the Respondents, removal of muscle power or, as Mr. Sharan describes, coal mafia. What the Respondents could not explain is as to how holding of E-auction can remove the use of muscle power from the arena of lifting of coal from the site, where it is kept staked, after the same is purchased by a bidder in E-auction, for, even after purchase of coal in E-auction, the bidder has to physically lift and remove the coal from the site. The Respondents do not undertake to deliver the coal purchased by E-auction at the door-step of the bidder. The Respondents also do not undertake to provide security to the winner of the E-auction to enable him to collect the coal. In a situation, such as this, it cannot be said that mere disposal of coal by E-auction will lead to elimination of muscle power from the business of coal.

166. It is also curious to note that though the Respondents, now, admit that the infrastructural facilities for holding of E-auction in the north-eastern region are not as developed as other parts of the country, yet what the Respondents have done, as the Petitioners have pointed out, is that while despite such infrastructural deficiencies, the Union of India and the CIL have decided to sell coal of the NEC by E-auction, the same Respondents, i.e., the Union of India and the CIL have not resorted to sale of coal by E-auction in other parts of the country. Reacting to this situation, the CIL and the NEC have merely stated that E-auction would be introduced in phased manner in other subsidiaries of the CIL.

167. From the above averments made in the affidavit-in-opposition, what transpires is that the Respondents have not been able to assign any cogent reason for not resorting to E-auction in other parts of the country for sale of coal. If the favourable market condition was the cause for resorting to E-auction as the

letter, dated 18.12.2004, aforementioned of the Chairman, CIL indicates, there is no good reason as to why the Respondents, while deciding to sell coal by E-auction in respect of the coal produced from the colliery in the north-eastern region, have chosen, at the same time, not to resort to E-auction in respect of the coal produced by their other collieries in India. Ideally, the E-auction should have had taken place in respect of coal produced from the collieries, which are located in more developed areas than the north-eastern region. This dichotomy, despite repeated queries made by the Court, could not be explained on behalf of the Respondents.

168. Bearing in mind the principles laid down in *Tata Cellular (supra)* that the judicial review is concerned not with the decision, but with the decision making process and the principle clearly laid down in *Dinesh Engineering Corporation (supra)* that even in formulating a policy decision if the authority concerned does not apply its mind to the relevant facts because of its ignorance or otherwise, such a policy decision cannot survive the tests of Article 14, let me, once again, revert to the facts of the present case.

169. While adopting the policy of E-auction, in the present case, it appears that the Union of India and the CIL were, while taking the decision to resort to E-auction, were completely unmindful and uninformed with regard to the ground realities, which their policy of E-auction was bound to confront, for, it did not even know, as its initial affidavit, discussed above, indicates, that the situation of the north-eastern region is such that the traders, located in the north eastern region, would necessarily get excluded from the rest of the country if the E-auction is held. The policy of E-auction, thus, suffers from complete non-application of mind and such a policy decision cannot be said to have withstood the tests of Article 14.

170. Should such non-application of mind by the Respondents, as described hereinabove, be made a ground to interfere with the policy of introduction of E-auction? The answer to this vital question maybe found in *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, In *Dinesh Engineering Corporation (in short, DEC)*, a tender was floated for supply of certain items of spare parts for use in GE governors. The writ Petitioner, namely, DEC, who had been supplying these items for 17 years, also submitted tender, their tender was kept pending and, eventually, the Petitioner was informed that the Railway Board had reviewed the policy on purchase of the said items and had decided to obtain the said items from *M/S Engineering Devices and Controls (in short, EDC)*. While coming to this decision, the policy maker of the decision preceded on the hypothesis that there is no supplier in the country, who is competent to supply the said spare parts. The effect of this presumption was that the policy-makers did not take into consideration the fact that the DEC had been supplying the said spare parts for the last 17 years. On noticing this aspect of complete non-application of mind, while taking the policy decision, *NS Hegde, J*, speaking for the Court, in *Dinesh Engineering Corporation (supra)*, observed and

held as follows,

...This policy proceeds on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the writ Petitioner has been supplying these spare parts for the last over 17 years to various divisions of the Indian Railways which fact has been established by the writ Petitioner from the material produced both before the High Court and this Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board as found in the letter dated 23-10-1992 suffers from the vice of non-application of mind. On behalf of the Appellants, it has been very seriously contended before us that the decision vide letter dated 23-10-1992 being in the nature of a policy decision, it is not open to courts to interfere since policies are normally formulated by experts on the subjects and the courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record.

but then the pertinent question is: has the Board taken into consideration the availability or nonavailability of such characteristics in the spare parts supplied by the writ Petitioner or, for that matter, was the Board alive to the fact that like EDC the writ Petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various divisions of the Railways ? A perusal of the letter dated 23-10-1992 does not show that the Board was either aware of the existence of the writ Petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution.

171. What emerges from the decision in Dinesh Engineering Corporation (supra) is that where the decision of an authority is on a policy matter, the Courts will not, ordinarily, interfere in exercise of the powers of judicial review, because the policy decisions are taken on expert knowledge of the persons concerned and Courts are, normally not equipped to question the correctness of the policy decision. However, this does not mean that the Courts have to abdicate their right to scrutinize whether the policy, in question, has been formulated bearing in

mind all the relevant facts and whether the policy decision is free from discrimination, unreasonableness or arbitrariness.

172. From what has been observed and held in *Dinesh Engineering Corporation* (supra), it also clearly emerges that irrespective of the fact as to whether a decision is an administrative decision or policy decision, if the decision has been taken without considering the relevant facts, it has to be termed as an arbitrary decision and if a decision whether a single administrative decision or a policy decision is arbitrary, it will be violative of Article 14 of the Constitution and cannot be allowed to survive.

173. What further emerges from the decision in *Dinesh Engineering Corporation* (supra) is that when the State or its instrumentalities are shown not to be even aware of the existence of the relevant facts, it demonstrates non-application of mind, while formulating a policy or taking a policy decision; hence, such a decision has to be struck down as arbitrary.

174. A feeble attempt has been made, on behalf of the Respondents, to show that the failure of electricity or failure to get access to internet are covered by the Clause of "force majeure", which the MSTC's Buyer Specific Terms and Conditions contain. While considering this plea, it needs to be noted that "Force Majeure" Clause contained in the said terms and conditions reads as follows:

MSTC/Owner shall not be liable for any failure or delay in performance due to any reason/ cause beyond their control including fires, floods, go-slow, lock-out, closure, pestilence, dispute with staff, dislocation of normal working conditions, war, riots, epidemics, political upheavals, government action, civil commotion, breakdown of machinery including technical failures," shortage of labour, acts demands or otherwise or any other cause of conditions beyond the control of aforesaid cause or not and the existence of such cause or consequence may operate at the sole discretion of MSTC/ Owner to extend the time of performance on the part of MSTC/Owner by such period as may be necessary to be necessary to enable MSTC/ Owner to effect performance after the cause of delay will have cause exist. The provisions aforesaid shall not be limited or abrogated by any other terms of the contract whether printed or written.

175. Force majeure, according to Black's Law Dictionary Sixth Edition is described thus: "Such Clause is common in construction contracts to protect the parties in the event that a part of the contract cannot be performed due to causes, which are outside the control of the parties and could not be avoided by exercise of due care".

176. Halsbury's Laws of England (Fourth Edition), Para-457, which deals with Force Majeure, reads as follows:

457. Force majeure Clauses: Many contracts expressly provide for performance to be excused if rendered impossible by unavoidable cause such as act of God, the Queen's enemies, force majeure or vis major. Stipulations to the effect are

effective, provided that they are not uncertain in their terms. A force majeure Clause, as such a stipulation is usually called, must be construed in each case with due regard to the nature and general terms of the contract and, in particular, with regard to the precise words of the Clause . Such a Clause on its proper construction may allow the Court to take account of the promisor's obligations under other contracts despite the fact that, as a rule, it is no excuse that contracts with third parties prevent the fulfillment of the contract in question. When the contract excuses a party from delays due to unavoidable causes he may be outside the protection of that provision if he fails, before making the contract, to inquire whether such unavoidable causes exist and inform the other party.

177 . Halsbury's Laws of England, 6th edition at para-458, while describing as to what constitutes an "act of God", states as follows:

458. What constitutes an act of God: In the legal sense of the term , an act of God may be defined as an extraordinary occurrence or circumstance, which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident (1) due to natural causes, directly and exclusively, without human intervention, and (2) which could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care and skill have been resisted. The occurrence need not be unique, nor need it be one that happens for the first time ; it is enough that it is extraordinary , and such as could not reasonably have been anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming, and not merely an ordinary accidental circumstance .

178. A close reading of what have been quoted above clearly shows that "force majeure" is a Clause, which absolves a party to a contract of his liability to perform the contract or part thereof on the ground of happening of an extraordinary occurrence, which is natural, or circumstances, which could not have been foreseen or which could not have been guarded against, or whose probability of re-occurrence could not have been anticipated. Hence, a regular phenomenon will not amount to "force majeure" or constitute an "act of God" enabling the party concerned to treat himself absolved of the bindings of the contract. In other words, if what has happened is what can be, normally, anticipated, such a happening cannot be treated as "force majeure" or "act of God". For instance, let us assume a Clause in an agreement that neither party shall be liable to the other for any loss or damage occasioned by, or arising out of, an "act of God", such as, unprecedented flood. Would an occurrence of flood by, in itself, enough to absolve the parties from the liabilities of such a contract ?

179. The answer to the above question maybe found answered in State of U.P. Vs. Allied Constructions, wherein, while interpreting such a clause in an

agreement, the Apex Court held as follows:

A perusal of Clause 47 reproduced above shows that it protected the State from liability and damage occasioned by unprecedented flood which could not have been foreseen or avoided as a prudent person. The Appellant herein did not lead any evidence before the arbitrator that the rain as a result of which the loss was sustained by the Respondent was unprecedented and in fact, it was an act of God. In absence of such an evidence, the arbitrator as well as the High Court has recorded a finding of fact that the flood which has caused loss to the Respondent was not due to the unprecedented rain and therefore, Clause 47 of the agreement was not attached.

180. What the decision in Allied Construction (supra) clearly shows is that a mere flood will not absolve a person unless the flood is "unprecedented". Similarly, since power failure and inability to have access to internet is, in the light of the admitted facts on record, not an unusual occurrence in the north-east-em-region, it cannot be pleaded, on behalf of the Respondents, that the failure of a bidder to have access to MSTC's website at the time of E-auction arising out of power failure or inability to get satellite space to have access to the MSTC's website cannot be anticipated or cannot be foreseen. Such a power failure or inaccessibility to internet would not amount to an act of God or force majeure. Since it is not beyond the anticipation of the parties that the power failure may occur and a bidder from the north-east may not be able to have access to the internet system, it is clear that these two factors are factors, which are within the knowledge of the Respondents too, and they ought to have taken these two factors into account, while taking the decision to resort to E-auction as a sole mode of sale of coal or as trial runs.

181. It is the case of the Respondents, particularly, the CEL that its policy of E-auction is not discriminatory and/or exclusionary in nature. What needs to be emphasized is that discrimination may be latent or patent. Similarly, an exclusion maybe expressed or implied. In the case at hand, though the northeastern region has not been specifically excluded from the purview of E-auction, the fact remains that the policy of E-auction in the manner in which it has been adopted and the terms subject to which it has been decided to be held would, undoubtedly, put persons from the north-eastern region, such as the Petitioners, out of the race. The implications are, therefore, clearly perceivable if one cares to notice. Though, in theory, the traders and consumers of the north-eastern region are not excluded from the scheme of E-auction, they will, in fact, stand removed from the race for the inherently disadvantageous situation of this region. Hence, the contention of the Respondents that the policy, in question, is not exclusionary in nature is really devoid of any material force and cannot be readily accepted.

182. It is reallytime, now, forus to remind ourselves that there is, though subtle, a marked difference between "formal equality" and "substantive equality"

183. In" formal equality", the government owes no special duty except to keep

away from differential treatment. Formal equality is merely procedural and believes in neutral legislation without attempting to examine or see the differences in the impact of such laws on two differently situated persons or class of persons. Laws will not be considered as discriminatory unless intention to do so is proved. It would, therefore, be difficult for anybody to prove that a legislation, which is supposedly impersonal, was motivated by a particular reason for discrimination.

184. Most frustrating part of "formal equality" approach is that it sticks to the letters of law, discourages any creative interpretation and rules out social context as a consideration in its application. This rigour, to some extent, reduces the equality Clause to a mechanical reproduction and disregard of the human dimension of the substantive equality.

185. In contrast, "substantive equality" is a pluralist approach. It rejects the principle of sameness to everyone. Since there are different groups with different life experiences, they cannot be treated in the same manner. "Substantive equality" recognizes that it is not enough if two differently situated groups, one advantaged and the other disadvantaged, are treated alike. The "substantive equality" questions the wisdom of the neutral policies on the basis of its impact on the disadvantaged group.

186. Substantive equality approach believes that neutral legislation can violate equality guarantee and may have adverse impact on disadvantaged group. Whether or not, equality has been violated needs to be seen in terms of the impact on the group.

187. Subjecting unequals to equals is really denying equality to the unequal, that is to say, when there are two groups of people, one in an advantageous position and the other in a disadvantageous position and if we make a neutral law, a neutral policy or provide for a neutral test for both these groups, the result will be denial of equality to those, who form the disadvantaged group, for, the weaker and disadvantageous group would, necessarily and automatically, get excluded without anyone having even noticed the latent exclusion.

188. I derive some inspiration for the proposition that I make from the famous case of *Griggs v. Duke Power Co.*, reported in 401 US 424, which Mr. Roy, learned Amicus Curiae, relies upon to show how an implied exclusionary policy be deciphered. This is a case relating to racial discrimination, wherein Griggs challenged the implementation of a policy of his company on the ground of discrimination that since he stands on a footing different from white-men, the qualifying test for seeking employment cannot be the same and must be varied in order to enable him, as a black, to qualify in the test. The US Supreme Court laid down that if a test for a position or opportunity is suitable for only a particular advantaged group, and if the services for qualifying the test is not equitably distributed, then, it is likely that only people from a particular group would pass the test and the underprivileged members would not receive

advantage in any way. Such a qualifying test was held by the US Supreme Court as a discriminatory one.

189. Though the case at hand is not a case of racial discrimination nor is it a case of service law, the philosophy behind the case of Griggs (supra) is relevant even in a policy decision, economic or otherwise, if the policy decision removes unfairly from the scene or unconsciously eliminates from the competition a disadvantaged group. The Apex Court reminded us as to what the real content of the principle of equality is, when ICPA Health Products (P) Ltd. Vs. Commissioner of Central Excise, Vadodara, it, in no uncertain words, expressed, "Implicit in the concept of equality is the concept that persons, who are, in fact, unequally circumstanced, cannot be treated on par".

190. The fundamental rights emerge from the preamble of our Constitution and the goals set out in the Preamble regarding status and opportunity are concretized in Article 14 to 18 of the Constitution of India. Apart from the religious, cultural and linguistic differences, there is vast disparity among the people ranging from extremely rich to extremely poor, areas with all infrastructure required for modernization and areas, which still live in abject deprivation of even basic necessities of life like water, road and electricity and, therefore, it was necessary to declare and guarantee Fundamental Rights to give to the people a sense of security and confidence and equal treatment before law. It will be interesting to note that the need to have Fundamental Rights in our Constitution was so widely accepted by the Constituent Assembly that there was, virtually, no debate on the question as to whether we should have Fundamental Rights in our Constitution or not. The debate really was on the curtailment of the fundamental rights by introduction of restrictive provisions thereto.

191. Equality is one of the magnificent corner-stones of our democracy and Article 14, which the outlaws discrimination in a general way and guarantees equality before law to all persons, denotes equality among equals and not equality amongst unequals.

192. Though Article 14 forbids class legislation, it does not forbid reasonable classification of persons and objects. Every classification must, however, pass the following two tests in order to be a reasonable classification permitted under Article 14 of the Constitution:

- (i) The classification should not be arbitrary, artificial or evasive. It should be based on intelligible differential, some real and substantial distinction, which distinguishes persons or things grouped together in a class from others;
- (ii) The difference adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute, policy, scheme or action, in question.

193. While the aforesaid judicially developed concept of classification is still recognized by the Courts in our country, the Apex Court in Union of India and

Ors. v. Consumer Education and Research Centre and Ors. reported in (1995) 5 SCC 488, cautioned against overemphasis on classifications holding, inter alia, that the doctrine of classification is only a subsidiary rule evolved by the Courts to give partial content to the doctrine of equality. At the same time, over emphasis on the said doctrine may gradually erode the content of equality enshrined in Article 14 of the Constitution.

194. Of course, by no stretch of reasoning, it can be said that before resorting to E-auction, the CEL must have taken into consideration the question as to whether each and every village, subdivision, district or State has equal and adequate facilities, infrastructure and required know how for participating in E-auction.

195. The principles of equality, as Article 14 envisages, Article 19(1) (g) perceives or as Article 21 demonstrates, do not postulate that unless the inequities between the States, with regard to facilities and opportunities, are totally removed, the new technology should not be adopted as it will be discriminatory between the haves and the have-nots. Article 38(2), contained in part IV of the Constitution, casts duty upon the State to minimize the inequalities with regard to facility and opportunity in different parts of the country, which is a gradual process and should not, therefore, be an impediment in the adoption of the new technology even though people in some part of the country may not be able to reap the benefits of the technology. The need, therefore, is to strike a balance between the necessity of holding of E-auction for sale of coal, on the one hand, and survival of the traders and consumers of the coal, on the other. While development has to be given importance, a balance has to be struck between the developmental goals and the fundamental rights.

196. However, the question of striking of the balance arises only when the State is concerned or aware or conscious of the fact that disparities or an imbalanced situation exists. If the State is not even aware of the fact that a particular region is not infrastructurally developed to participate in a given selection process, yet when the State opts to choose such a selection process, the action of the State cannot but be termed as uninformed and arbitrary. That the State, in the present case, was wholly unfair and arbitrary is evident from the fact that the State, initially, took the stand, as already indicated hereinabove, that the northeastern States are as developed in matters of electricity and access to internet as any other part of the country. This shows that State was not aware of the infrastructural deficiencies of the north-eastern region or despite the fact that the State was aware of it, as their subsequent affidavits do disclose, it had tried to gloss over the matter by saying that the north-eastern region is as developed as any other parts of the country. Either way, the State's action is arbitrary, for, if the State knew that the north-eastern region suffers from infrastructural deficiencies, the State ought to have tried to strike a balance between taking resort to E-auction and the plight of the traders or consumers of coal in the north-eastern region. If the State was unaware of the reality of the situation, this was,

again, nothing but arbitrary.

197. By striking a balance, the State might have found that while holding E-auction for coal, it may have to have some kind of package for sale of coal in the north-eastern region so that the buyers and consumers of coal do not get wholly excluded. Moreover, even after taking into consideration these factors, had the State formed the view that it was necessary for the survival of the CIL that notwithstanding the regional infrastructural deficiencies, E-auction be resorted to, this Court would not have, perhaps, stepped in. However, when the Union of India and the CIL failed to pay any attention to these aspect of the matter, this Court owes a duty to the Constitution and the people to ask the State to take these factors into account and, then, arrive at a policy decision on the poignant question as to whether or not E-auction shall be resorted to or if it has to be resorted to, can there be any reservation in favour of the people carrying on business of coal or business depending upon coal in relatively underdeveloped areas.

198. That the Respondents have been completely unmindful, while adopting E-auction as the sole mode of sale of coal of the NEC, is clear from the fact that while adopting such a policy, the Chairman, CIL, on 18.12.2004, did not take into account at all the fate of the SSI Units. When, with the help of their applications, which gave rise to WP(C) 958/2005 aforementioned, the owners of the SSI Units, located in Assam, approached this Court with the grievance that the resort to E-auction, if allowed, would make it impossible for them to purchase coal either at E-auction or from the buyers thereof, which would lead to not only closure of the SSI units, but it would make thousands of the families of the workforce, engaged in these Units, face starvation, the Respondents chose not to pay any attention to these grievances and it was only after the appearance of Mr. Sharan, learned Additional Solicitor General, that the CIL came out with a policy that it has decided to allow 20 MT of coal to be lifted per month by the identified SSI units. This is yet another feature of the present case, which is demonstrative of the complete non-application of mind by the Respondents, particularly, by the Union of India and the CIL, while deciding to sell the entire coal of the NEC through E-auction alone. Now, that the Respondents claim that the E-auction is trial runs, it really provides an opportunity to these Respondents to take into account all the relevant factors including the disturbing and disquieting features of their policy and evolve, thereafter, a transparent, reasonable, just and fair policy with regard to E-auction.

199. So far as the Union of India is concerned, despite the fact that it is the ultimate authority and has the final say in the matter, it undertook no exercise at all to determine if E-auction shall be resorted to and if so, what shall be done with regard to traders and consumers of the coal located in the north-east-em region. In fact, even the CIL made no clear research or study in this regard.

200. In Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, the Court observed thus, "The principle of reasonableness and rationality which is legally as

well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory".

201. From the principles laid down in Haji TM Hassan (supra), it is clear that even while formulating economic policies, the principles of reasonableness and rationality cannot be given a complete go-bye. In the case at hand, neither the Union of India nor the CIL took into account at all the conditions prevailing in the north-eastern region in the sphere of supply of electricity and accessibility to internet. On the principle of failure to observe reasonableness and rationalities too, the present policy of E-auction must be held to be arbitrary and needs to be interfered with.

202. It is an admitted case of the parties that till introduction of E-auction by the impugned notice, dated 29.12.2004, aforementioned, people from seven States, located in the northeastern region, were buyers of coal. When a decision was to be arrived at as to whether it was feasible and practicable to hold E-auction, was it not the duty of the State to determine whether those, who were, till yesterday, buyers of coal, would or would not be left out of the race if E-auction is adopted? Did it not require a conscious decision, on the part of the Union of India and the CIL, whether or not they should exclude (may be out of compelling reasons to encash favourable market condition) those traders from the north-eastern-region, who would have, but for E-auction, been purchasers of the NEC's coal? Was the Union of India and the CIL not required to give a minimum possible attention to this particular aspect of the matter? To a pointed query made by this Court, Mr. Sharan, learned Additional Solicitor General, to be fair to him, did not assert that this was not a relevant factor; but he attempts to justify the policy decision on the ground that E-auction has resulted into economic gain to the State.

203. What needs to be carefully noted is that there is a marked difference between the object and the factors, which are to be considered for achieving the object.

204. Even if the object was to encash the favourable market condition, the fact remains that while trying to achieve this object, was it not the corresponding duty of the State to take into account the fate of those persons, who used to participate in the purchase of coal or were customers of coal. After taking into account the case of the buyers, who had been making purchases in the past and the case of the consumers, whose SSI Units had been surviving on the consumption of coal, if the State would have found that they have to be necessarily excluded, the situation would have, perhaps, been different. Here is, however, a case, which demonstrates that no attention has been paid to the fact that the process of E-auction would, by implication, exclude the traders and

consumers of coal at places other than Guwahati and, perhaps, in the States other than the State of Assam.

205. The policy decision to introduce E-auction may not, as contended by Mr. Sharan and Mr. Pathak, be open to challenge; but the fact remains, if I may reiterate, that the selection making process can be examined by the Court. The decision to opt or not to opt for E-auction will be that of the State; but while taking the decision, the State ought to have taken into account all the factors, which were relevant, and it ought to have kept excluded from its consideration all factors, which were irrelevant. Thus, the minimum that was expected of the Respondents was that as State or its instrumentalities, they would take their policy decision after taking into account the factors, which were relevant.

206. There is yet another angle from which the problem at hand can be viewed. The holding of E-auction is not possible without electricity and without the satellite space. This shows that if the State has to be reasonable, it must take into account the availability of the electricity and satellite space. Necessarily, therefore, the Assam State Electricity Board (in short the ASEB) and the Bharat Sanchar Nigam Limited (in short, the BSNL) were a necessary concomitant, who would be de-termining success or failure of E-auction, for, while the ASEB provides power, the BSNL provides satellite space. Hence, the capacity of the ASEB, the capacity of the various State electricity boards to provide electricity for E-auction and the capacity of the BSNL to provide access to the internet were necessary factors, which ought to have been taken into account by the Union of India and the CIL. So far as the MSTC is concerned, it proceeded without even caring to inform itself about the availability of electricity and satellite space; hence, the MSTC's planning cannot but be termed as ill-informed.

207. When a person or authority is vested with some power by the law, such a person or the authority carries a corresponding responsibility or duty too. If this Court has the power to interfere with the administrative decision, economic or otherwise, in exercise of its power of judicial review within, of course, the contours of its powers of judicial review, it has a corresponding duty to exercise its powers in a given case. Denial by the Court, in such a situation, to exercise the powers inhere in it, will, in turn, lead to denial of the rule of law and, ultimately, the result will be chaos. Mr. AB Choudhury, learned Senior counsel, is not wholly wrong, when he pleads, though with great emotion, that if the approach of the CEL is such that the whole region gets excluded from an area in which people have been actively participating, it may, ultimately, not bear fruits for the Union of India, for, the people may loose confidence in the rule of law, which will help not in the spread of rule of law, but in the spread of extremism. Not only that the CEL and the MSTC did not take into account the infrastructural deficiencies of the north-eastern region, it did not even organize a training camp or demonstration camp for holding of E-auction in any of the northeastern States. It is not that no such training camps have been organized. In fact, it is an admitted position that in some parts of Punjab and Haryana, such training camps

have been organized; but in the north-eastern region, after having decided to hold a training camp, in this regard, at Guwahati, the same was, for reasons undisclosed, cancelled. When a training camp or a demonstration camp had been held for traders and consumers in the regions as developed as Punjab and Haryana, what prevented the CIL or the MSTC from holding such a training camp in the north-eastern region ? To the query so made by Mr. Dutta, the Respondents could not give any reply and the materials on record also furnish no answer thereto.

208. Referring to BALCO Employees Union (Regd.) Vs. Union of India and Others, Mr. Sharan has submitted that the Court should not embark upon the question of efficiency or otherwise of a policy, particularly, when it concerns economic issues, for, the Court must not transgress into the area, which is meant for the policy maker, i.e., the executive to decide. While considering the decision in Balco Employees' Union (supra), it needs to be noted, as pointed out by Mr. Sharan, that the Supreme Court, in this case, observed and held as follows:

In M.P. Oil Extraction and Another Vs. State of M.P. and Others, the Court at p. 610-11 held as follows:

This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields.

**** * The policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time may no longer be so.

**** * Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved.

**** * In the case of a policy decision on economic

matters, the courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself.

209. In *Balco Employees' Union* (supra), what the Supreme Court wanted the High Courts to guard against was that the High Courts should not enter into questions of determination of wisdom of a policy. In the case at hand, this Court would not interfere on the ground that the policy to resort to E-auction is unwise or there is a better policy, which could have been adopted. What has happened in the present case is that the policy decision taken by the Respondents concerned suffers from complete non-application of mind, it is arbitrary, discriminatory, exclusionary, capricious and whimsical in nature. The decision in *Balco Employee's Union* (supra), nowhere, lays down that howsoever arbitrary may be a policy, if the policy is in the realm of economics -or commerce, the High Courts shall not, in exercise of its powers of judicial review under Article 226, interfere. Such a proposition of law does not flow from the *Balco Employee's Union* (supra) nor can such an interpretation be attributed to the decision given in *Balco Employee's Union* (supra).

210. No wonder, therefore, that in *State of Rajasthan Vs. Sevanivatra Karamchari Hitkari Samiti*, the Apex Court has held as follows:

The wisdom in a policy decision of the Government, as such, is not justiciable unless such policy decision is wholly capricious, arbitrary and whimsical thereby offending the Rule of law as enshrined in Article 14 of the Constitution or such policy decision offends any statutory provisions or the provisions of the Constitution. Save as aforesaid, the Court need not embark on uncharted ocean of public policy.

211. In the case at hand, since the policy decision suffers from, as indicated herein-above, arbitrariness, such a policy offends the concept of rule of law as enshrined in Article 14 and cannot, therefore, be allowed to survive. The question No. (iv) shall, therefore, stand answered accordingly.

QUESTION No. (V)

212. Let us, now, turn to the Question No. (v), namely, as to what relief(s) the parties are entitled?

213. By an advertisement, dated 29.11.2004, issued by the NEC, the NEC invited applications for sale of coal under the Open Sale Scheme on the basis of "first come, first served". In terms of the advertisement so published, the Petitioners in WP(C) No. 393/ 2005 and some others applied for purchase of coal and, on finding some persons eligible, a list was prepared by the Respondents concerned for allotment of coal. This list, admittedly, included the Petitioners. There were altogether 15 rakes of coal to be allotted in favour of 15 different persons, whose names appeared in the said list. After allowing one of the allottees to lift the coal,

the Respondents, suddenly, by the impugned notice, dated 01.01.2005, informed the Petitioners and some other persons that no further coal would be released in terms of the said advertisement and that the offer made by the said advertisement stood cancelled and the value of the coal deposited with the Respondents by the allottees would be refunded.

214. While impugning the order, dated 01.01.2005, aforementioned, it has been submitted, on behalf of the Petitioners, that the Respondents have allowed one of the allottees to lift the entire coal allotted to the said allottee and have also passed two allotment orders in favour of two of the other applicants; but in the case of the Petitioners, the Respondents have arbitrarily cancelled the allotment of coal. The only justification, which is sought to be offered on behalf of the Respondents, is that the Respondents have, now, decided to auction the coal by resorting to the process of E-auction.

215. There is no dispute that the cancellation of the allotment by the Respondents was without giving any notice to the Petitioners and while the Respondents have allowed one of the allottees to lift the coal, they have refused to release the Coal allotted in favour of the Petitioners.

216. It is, no doubt, true that the Government of India can change its policy as regards the mode of sale; but when it had invited applications for sale of coal under the OSS and when it had not only allowed one of the allottees to lift the coal, but had also issued the purchase/allotment order(s) in favour of two more applicants, it could not have arbitrarily refused to allot coal to the remaining applicants, such as, the Petitioners in WP(c) No. 393/2005, particularly, without giving them any notice. In such a situation, when the uncontroverted facts are that the Petitioners in WP(C) No. 393/2005 aforementioned had already made commitments to their buyers on the basis of the select list prepared under the OSS, the Respondents/authorities could not have, suddenly, changed the OSS and thereby leave the Petitioners to suffer set back of reputation and economic loss. The action of the State or of its instrumentalities cannot be so mindless and arbitrary. While it may have very good reasons to resort to E-auction, it cannot arbitrarily make the citizens suffer, when a citizen had acted in terms of the Union of India's policy, the Union of India had selected the citizen in terms of its own policy/scheme and, upon being so selected, the citizen made commitments to his buyers and when person(s), similarly situated, have already been issued purchase/allotment order. The legitimate expectation is a question of fact and depends on the facts of a given case.

217. While dealing with the question of legitimate expectation, one may re-call that in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, the Supreme Court held thus:

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the

requirement of due consideration of legitimate expectation froms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and. withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

218. From the decision in Food Corporation of India (supra), it is apparent that the failure to consider and give due weight to legitimate expectation may render the decision arbitrary, for, every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process.

219. In the case at hand, the Respondents did not at all consider the fact that the Petitioners had already deposited the requisite amount in terms of the advertisement, dated 29-11-2004, aforementioned, that the Respondents had already acted upon the advertisement by issuing purchase/allotment order(s) in favour of other(s) and that the Respondents owed a duty to the Petitioners to issue allotment/purchase order, it is quite reasonable for the Petitioners to entertain a legitimate expectation that since they were similarly situated, as those applicants, who had already received allotment/purchase order(s) and had lifted the coal in terms of the allotment/purchase order(s), they (Petitioners) too would receive requisite allotment/purchase order. This apart, the Petitioners had made commitments to their buyers on the basis of the inclusion of their names in the list of selected applicants for allotment/purchase order(s) and also on account of the fact that some of the applicants had already been issued allotment/purchase order(s). These aspects were completely ignored and not taken into account at all by the State and its instrumentality, namely, the CIL, while refusing to act upon the said advertisement, dated 29.11.2004, aforementioned. Thus, the conduct of the Respondents suffer from arbitrariness, which strikes at the root of the rule of law and cannot be permitted to stand good on record.

220. In the case at hand, Mr. Sharan has, however, referred to The Chief of Marketing (Marketing Division), Coal India Ltd. and Another Vs. Mewat Chemicals and Tiny S.S.I. Coal Pulverision Unit and Others, in support of his contention that since the Open Sale Scheme stood withdrawn, the Petitioners cannot demand that the Respondents must act upon the impugned notice, dated 29-11-2004, aforementioned.

221. While considering the case of Mewat Chemicals (supra), what is important to note is that in Mewat (Supra), the application for allotment of the coal was

made in terms of the existing policy. After making of the application, the policy changed, but the Coal Controller allotted the coal on the basis of the policy, which prevailed on the date of the making of the application and ignored the changed guidelines/policy issued by the Government of India. In such circumstances, the Apex Court held thus:

The above provisions show that certain functions have been specifically given to the Coal Controller. However, the control of the Central Government is all-pervasive. Clause 12-A also makes it clear that it is the Central Government which has to specify who is the authority authorized to allot coal. That authority is subject to the instructions issued by the Central Government from time to time. Undoubtedly, under Clause 15 the Coal Controller may also exercise the powers which could be exercised by the Central Government under the clauses mentioned therein. However, such a power is merely a delegated power. The Coal Controller is not an authority equal to the Central Government. Only the Central Government can decide policy matters in respect of questions of production, distribution and sale of coal.

222. From the above observations, it is clear that what the Apex Court laid down is that the ultimate control as regards the policy of sale of coal stands vested with the Government of India and that the policy, which prevailed on the date of the allotment, would apply and not the policy prevailing on the date of making of the application. It was on these considerations that the allotment made by the Coal Controller was set aside.

223. What is, however, extremely important to note is that the Government of India's changed policy was not under challenge in *Mewat Chemical* (supra). What was contended was that the changed guidelines having been issued by the Director of the Ministry concerned, the same were not binding on the Coal Controller. This contention has been negated by the Supreme Court. It is also made clear by the Supreme Court that there is no right vested in a person, when he makes application for allotment of coal and the policy prevailing at the time of allotment will apply.

224. In the case at hand, what is pertinent to note is that the Government of India has already acted on its advertisement and allowed one of the applicants) to lift the coal and has also issued two allotment/purchase orders in respect of two more applicants. Thus, the Government of India, having already acted on the advertisement for sale of coal, cannot arbitrarily deny other applicant(s) the right to receive the allotment of coal on the basis of the same policy. The Government of India cannot pick and choose the applicants under the same advertisement and cannot adopt discriminatory attitude towards persons, who are applicants under one and the same advertisement.

225. Because of what have been pointed out above, I am firmly of the view that the Respondents acted arbitrarily in not allotting the coal in terms of the advertisement, dated 29.11.2004, aforementioned, particularly, when the

Government of India had already acted on its own advertisement, the legitimate expectation had obviously developed in the Petitioners to receive similar treatment as had been received by other allottee-applicants. Such expectations cannot be treated as illegitimate or unfounded. The denial by the Respondents concerned to issue allotment/purchase order(s) to these writ Petitioners is, in the face of the materials on record, wholly arbitrary and must be interfered with.

226. In the facts of the present case, there is no option, but to hold that the Petitioners in WP(C) 393/2005 aforementioned are entitled to receive allotment of coal in terms of the advertisement, dated 29.11.2004, aforementioned. However, so far as these Petitioners' grievance that the Respondents be directed to accept their applications in terms of the advertisement, dated 04-12-2004, aforementioned, I find that this grievance is absolutely untenable, for, long before the applications could be made in terms of the said advertisement, dated 04-12-2004, the policy stood changed and the Respondents did not act upon the terms of the advertisement, dated 04-12-2004, aforementioned and no allotment of coal has been made on the basis of the advertisement, dated 04-12-2004 aforementioned. To this extent, the prayer of the Petitioners in WP(C) No. 393/2005 aforementioned cannot be allowed and the Respondents cannot be directed to accept the applications of these Petitioners pursuant to the advertisement, dated 29-11 -2004 aforementioned.

227. The present one is one of those few cases, where legal issues are inextricably mixed with determination of economic policy and a plethora of technological issues. Courts of law are, generally, wary in readily interfering with such matters and the Court should exercise its power of judicial review in such cases with great circumspection, for, the Court shall not transgress into the realm of policy making; but when the policy decision is not in accordance with law, the Court cannot help but interfere with the policy decision. The Court shall, however, even in such a case, leave, if possible, the question of determination of the policy by persons competent to take a decision, in the matter, after considering the issues relevant for determination of the policy. In this regard, a classic is the case of Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., wherein the Apex Court observed thus,

At this juncture, we think it fit to make a few observations about our general approach to the entire case. This is a case of the type where legal issues are intertwined with those involving determination of policy and a plethora of technical issues. In such a situation, Courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policymaking, unless the policy is inconsistent with the Constitution and the laws. In the present matter, in its impugned judgment, the High Court had directed the Central Government to set up a Committee to analyse the entire gamut of issues thrown up by the present controversy. The Central Government had consequently constituted a Committee comprising high-

level functionaries drawn from various governmental/institutional agencies who were equipped to deal with the entire range of technical and long-term considerations involved. This Committee, in reaching its decision, consulted a number of policy documents and approached the issue from a holistic perspective. We have sought to give our opinion on the legal issues that arise for our consideration. From the scheme of the Act it is clear that the Central Government is vested with discretion to determine the policy regarding the grant or renewal of leases. On matters affecting policy and those that require technical expertise, we have shown deference to, and followed the recommendations of, the Committee which is more qualified to address these issues.

228. Tata Iron and Steel Co. Ltd. (supra) shows that the Committee, which the High Court had directed to be constituted, received approval of the Supreme Court, for, the Committee comprised of high-level functionaries drawn from various governmental institutional agencies, who were equipped to deal with the entire range of technical and long term considerations involved in the said case. The case, at hand too, needs formation of a Committee as had been done in Tata Iron and Steel Ltd (supra), for, it is imperative that an expert body formulates a policy decision in the present subject of controversy after dispassionately taking into account all the relevant facts.

229. In the result and for the foregoing reasons, the writ petitions are disposed of with directions given hereinbelow:

The Respondent No. 1, namely, the Union of India, represented by the Secretary to the Government of India, Ministry of Coal, shall constitute a Committee, which shall consist of the representatives from the Ministry of Information and Technology, Govt, of India, Ministry of Power, Govt, of India, Bharat Sanchar Nigam Ltd. and the CIL. The Committee, so constituted, shall be headed by the Secretary, Ministry of Coal, who may, if need be, include person(s) or body of person(s), who have special knowledge on the subject of E-auction and economic policies, and formulate the requisite policy with regard to sale of coal of the NEC by E-auction and, on the basis of the policy decision that the Committee may reach, adequate guidelines shall be issued by the Ministry of Coal, Government of India. The CIL and the NEC shall act upon the policy decision and the guidelines, which maybe issued in terms of the directions given hereinbefore. The exercise with regard to formulation of the policy and the issuance of the guidelines shall be completed within a period of three months from today. Until the time, the Committee determines the policy and issues the guidelines, as directed hereinbefore, the E-auction in respect of the coal of the NEC shall remain suspended until permitted in terms of the interim directions, which maybe issued by the Committee aforementioned. The Committee shall be competent to frame guidelines for sale of coal of the NEC during the interim period i.e., the period commencing from today until formulation of the final policy decision and the issuance of requisite guidelines aforementioned. The Respondent No. 1 and other Respondents shall act in terms of the decision(s),

which may, as interim measure, be taken by the Committee aforementioned.

230. The Respondents shall issue necessary purchase/allotment order of coal in favour of the Petitioners in WP(C) 393/2005 aforementioned in terms of the advertisement, dated 29.11.2004, aforementioned.

231. The prayer of the Petitioners made in WP(C) 393/2005 as regards issuance of directions to the Respondents to allow the Petitioners to submit applications for purchase/allotment of coal in terms of the advertisement, dated 04.12.2004, aforementioned stands rejected.

232. The parties shall bear their own costs.