

(2009) 12 CHH CK 0052
In the Chhattisgarh High Court

The Indure Private Limited

APPELLANT

Vs

Chhattisgarh State Power Generation Company Ltd. and
Others

RESPONDENT

Date of Decision : 10-12-2009

Acts Referred:

Citation : (2010) 4 MPJR 84

Hon'ble Judges : Sunil Kumar Sinha, J;Rajeev Gupta, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sunil Kumar Sinha, J.—Chhattisgarh State Power Generation Company Limited (hereinafter referred to as CSPGCL/Employer) issued notice inviting tenders (NIT) for awarding contract of work of Balance of Plant (BOP) Package for 1x500 MW Korba West, Thermal Power Project (TPP) Extension stage III. The scope of work as shown in the NIT was Design, Engineering, Manufacture, Assembly, Testing at Works, Supply, Civil and Structural Works, Erection, Testing and Commissioning of Balance of Plant Package as per Bid Specification No. 03- 06/ KORBA WEST/BOP-ICB/T-O1/09.

2. The tender had to be submitted in 3 Envelopes. Envelope No. 1 containing bid security; Envelope No. -2 containing technical & commercial bids and Envelope No. 3 containing price bid. The bidder found to be qualified after opening Envelope No. 1 was to be considered for next stage, i.e. for opening of Envelope No. 2, and envelope No. 3 was to be opened if the bid of concerned bidder is found responsive.

3. Clause 3 of Instructions to bidders (ITB) deals with Qualification and Eligibility Requirements of Bidders. The relevant sub-clauses of Clause 3 of ITB read as follows:

3.1 The bid is open for participation to the bidders who fulfill the following qualification requirements either:

The bidder should have executed contracts on Engineering, Procurement and Construction (EPC) basis for at least one (1) No. coal based/lignite based/gas based combined cycle power plant of installed unit capacity not less than 100 MW which has been commissioned during the last seven (7) years and has been in successful operation for a period of not less than one (1) year as on the date for bid opening. The scope of work of such a reference plant should have necessarily included design, engineering, supply, installation (with all associated mechanical, electrical, C & I systems, civil and structural works), testing and commissioning on turnkey basis.

OR

The bidder should have executed contracts on Engineering, Procurement and Construction (EPC) basis in at least 4 (four) out of 5 (five) Balance of Plant Systems namely (a) Coal/lignite handling plant, (b) ash handling plant, (c) cooling tower, (d) water system (Raw water/ DM Plant/Circulating water system/ Auxiliary Cooling Water System) and (e) Switchyard for 400 or 220 KV (minimum five bays) for at least one (1) No coal/lignite based power plant of installed unit capacity not less than 100 MW which has been commissioned during the last seven (7) years and is in successful operation for a period of not less than one (1) year as on the date of bid opening. The scope of work of such a reference plant should have necessarily included design, engineering, supply, installation (with all associated mechanical, electrical, C & I systems, civil and structural works), testing and commissioning on turnkey basis.

3.2 The bidder can submit the bid in his individual capacity or in consortium with other partner(s). In case of consortium, number of consortium partners should be limited to Four (4) and all consortium partners should jointly meet the requirement of Clause 3.1 above. One of the consortium partners shall be the consortium leader. The consortium partners shall be jointly and severally responsible for the execution of contract. The consortium agreement shall be furnished clarifying the split of scope between consortium partners (Format for the same is enclosed as Annexure F (ITB)). In case of award:

If the bidder is qualified on individual basis (without consortium partners), the bidder shall be required to furnish Contract Performance Security for 10% (Ten percent) of Contract Price.

If the bidder is qualified on the basis of consortium partners, each consortium partners excluding consortium leader shall be required to furnish Contract Performance Security for 5% (five percent) of contract Price. In addition to this, the consortium leader shall be required to furnish the Contract Performance Security for 10% (ten percent) of the Contract Price.

3.4 The average annual turnover of the bidder/consortium leader should be at least INR 4000 Million or equivalent USD during the preceding three consecutive financial years. Net worth of the bidder/consortium leader as on the last day of the preceding financial year should not be less than INR 400 Million or equivalent

USD. The bidder should submit along with the bid a letter from any schedule commercial bank (as per the enclosed Annexure-2) containing approval/undertaking/commitment in-principle to provide working capital to the bidder for minimum of INR 1000 Million for the execution of the contract.

3.6 The bidder must submit the relevant information regarding financial and commercial particulars in the appropriate columns of annexure 1A and the details regarding his experience to meet the qualification requirement in the annexure 1B, enclosed with the bid specification.

3.7 Notwithstanding anything stated above, the Owner reserves the right to assess bidder's capability and capacity to perform, should the circumstances warrant such assessment in the overall interest of the Owner. &

3.8 Bidders not fulfilling qualifying requirements are advised not to submit their offer against this bid specification. The offer of the bidder not fulfilling the qualifying requirements shall not be considered for further evaluation and will be rejected.

4. Thus the bids were permitted to be submitted by a bidder in his individual capacity or in consortium. In case of offer by consortium, the partner(s) of the consortium were required to execute the consortium agreement in the prescribed format Annexure-F annexed with the tender documents. So far as the financial requirements are concerned, it was required that the average annual turnover of the consortium leader should be at least INR 4000 Million during the preceding three consecutive financial years and, that, net worth of the consortium leader as on the last day of the preceding financial year should not be less than INR 400 Million.

5. Five bidders namely Larsen & Toubro, Tata Projects Ltd., M/s TECPRO Systems Ltd., M/s McNally Bharat Engineering Co. Ltd. & The Indure Pvt. Ltd. submitted their bids. Larsen & Toubro and Tata Projects Ltd. submitted their bids in individual capacity, whereas, the remaining 3 bidders submitted their bids in consortium. As per consortium agreement submitted by the petitioner, it has 2 consortium partners (I) M/s Paharpur Cooling Towers Ltd. & (II) Crompton Greaves Ltd. According to the consortium agreement of M/s McNally Bharat Engineering, it has also 2 consortium partners (I) M/s Techno Electric and Engineering Co. Ltd, (II) M/s Paharpur Cooling Tower Ltd. Therefore M/s Paharpur Cooling Tower Ltd. was a common consortium partner in the offers made by M/s McNally Bharat as well as the petitioner. Respondent No. 1/ employer, after evaluation of the Techno Commercial bid of the petitioner through the tender evaluation committee found that the bid of the petitioner suffers with dual participation defect and held it to be non-responsive and decided not to open the price bid of the petitioner. Same was the fate of M/s McNally Bharat Engineering Co. Ltd.

6. Apart from the above, the petitioner was also held disqualified on the ground of not satisfying the qualification requirement of sub-clause 3.1 of the ITB, as

according to the certificates produced by the petitioner showing their past performance, the employer held that on the scrutiny of the said documents they do not satisfy the said requirement of the ITB.

7. Respondents 1 & 2/employer have also taken a ground in Para-22 of their return that according to the documents filed to show the credential, capability & capacity, the petitioner did not satisfy the financial criteria as desired in sub-clause 3.4. of the ITB.

8. After rejection of the Techno Commercial bid of the petitioner and McNally, the price bids of Larsen & Toubro, Tata Projects and respondent No. 5 were opened and ultimately, respondent No. 5 being the L-1 by quoting 999.00 crores was issued a letter of award (LOC) dated 25.8.2009 at the rate of 993.00 crores agreed acceptance after the negotiation.

9. The petitioner has pleaded that if the petitioner's bid is opened, it would result in an advantage to the State Exchequer in excess of Rs. 125 crores.

10. In the background of these facts, the following questions that arise for our consideration are:

(i) Whether rejection of the Techno-Commercial bid of the petitioner on account of dual consortium participation by its partner was arbitrary and unreasonable ?

(ii) Whether the petitioner satisfied the qualification requirement of sub-clause 3.1 of the ITB and rejection of its bid on non-satisfaction was further arbitrary and unreasonable ?

(iii) Whether the petitioner's bid was liable for rejection on account of non-fulfilling of the financial criteria as per sub-clause 3.4 of the ITB ?

11. Mr. M.L. Verma, learned Senior Counsel appearing on behalf of the petitioner firstly argued on principles, test of reason and relevance and arbitrariness in State action. He referred to the three decisions of the Apex Court rendered in the matters of E.P. Royappa Vs. State of Tamil Nadu and Another, ; Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, & Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . He then contended that dual participation by the consortium partner was never prohibited by an expressed provision in the tender document. It is also not prohibited in law. One partner can enter into consortium with more than one. Therefore, rejection of the bid on this account saying it to be non- responsive was arbitrary and unreasonable. If such participation in consortium was not permissible it should have been mentioned specifically in the tender document with legal certainty. He relied on the decision of the Apex Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, . He further contended that the petitioner fulfills the qualification requirement of sub-clause 3.1. of the ITB and the scrutiny in this regard was not proper. About financial credential, capability and capacity, he argued that the same was not a ground for rejection of the Techno- Commercial bid of the petitioner but it's a new ground

taken in the return which shows that respondents 1 & 2, are supplementing reason for a decision already taken. Moreover, the petitioner fulfills the financial criteria as per sub-clause 3.4. of the ITB. In this regard he referred to the judgment of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

12. On the other hand, Mr. Prashant Mishra, learned Advocate General appearing on behalf of respondents 1 to 3, opposed these arguments supporting the decision taken by the Tender Evaluation Committee. He argued that the dual consortium participation was never permissible which would be clear from various sub-clauses of the tender conditions. He very specifically referred to particular format of the consortium agreement. According to him, the consortium agreement executed by the partners was made irrevocable document. Therefore, entering into a subsequent agreement by a common consortium partner would be bad-in-law and the bid would be non-responsive on this account. He also argued that the bidding essentially and inherently means "competitive bidding". The element of "competition" is inherent in the concept of bidding, "competition" and "bidding" are so intrinsically intertwined that there cannot be any bidding without a fair competition. He further argued that any procedure or act of the bidder that impinges on the competitiveness of the bidding process, therefore, militates against the very purpose and spirit of bidding. He argued that the principle that one bidder may submit only one bid is inherent in every bidding process lest the process itself will be frustrated.

13. Mr. Ravishankar Prasad, learned Senior Counsel appearing on behalf of respondent No. 5 supported the contentions raised by the Advocate General and argued that dual participation in bidding cannot be permitted. Permitting dual participation in consortium would go against the spirit of The Competition Act, 2002. Author of the ITB has chosen to interpret the ITB in a particular manner and has applied its said interpretation to all bidders uniformly. It is the domain of the employer to choose the best bidder in the public interest. The decision of the CSPGCL/employer is neither arbitrary nor unreasonable, therefore, it cannot be interfered within the scope of judicial review. He also argued supporting the decision of the employer regarding past performance and financial credentials of the petitioner.

14. We have heard the learned Counsel for the parties at length and have also perused the records of the writ petition and the Tender Evaluation Committee.

15. Referring to the decisions of E.P. Royappa & MSR. Maneka Gandhi (supra), the Supreme Court held in Ramana Dayaram Shetty (supra) that "Where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its

sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance. This rule also flows directly from the doctrine of equality embodied in Article 14 which strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. 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."

16. Now we shall examine the matter in light of the above principles of Article 14 of the Constitution.

17. The question raised before us is whether a dual participation by a common partner was permissible and rejection of the bid on account of dual participation was arbitrary and unreasonable ? According to the ITB, the consortium agreement was to be entered into in Annexure-F (ITB). Para-4 of the agreement reads as follows:

4. We, the Contractor and the Partner(s) do hereby undertake and confirm that we will be jointly and severally responsible for satisfactory execution and completion till Performance testing of complete Balance of Plant package for 1x500 MW Korba West TPP, however the split of scope amongst/between the Partners and their respective shares will be as stated hereunder:

1. M/s.. as Lead Partner/Bidder will execute ... Package(s) with .. percent of total Contract price.

2. M/s .. as Partner-1 will execute ... Package(s) with .. percent of total Contract price.

3. M/s .. as Partner-2 will execute Package(s) with .. percent of total Contract price

4. M/s .. as Partner-3 will execute ... Package(s) with .. percent of total Contract price.

A perusal of the contents of Para-4 of the agreement would show that the consortium partners had to agree and declare about the work which they have agreed to execute and also about the percentage of the total contract price. This shows the split and scope of work amongst the consortium partners and their respective shares qua the work and the contract price also. As soon as a declaration with relation to contract price has to be given in the agreement and a consortium partner is giving such declaration, it shall be presumed that the said

consortium partner was fully aware about the price quoted by the consortium leader. In common trade practice in a commercial transaction, one cannot agree to take responsibility in the contract to be executed by the consortium leader unless he would know the price bid to be offered by him. Otherwise he would not be able to know the responsibility which he/it is going to take in terms of money. In the consortium agreement of Pharpur with McNally Bharat, Pharpur has agreed to execute the Cooling Tower Package(s) with 7.2. percent of the total contract price. However in the consortium agreement with the Indure (petitioner), Pharpur has agreed to execute Cooling Tower Package(s) declaring it to be minor portion of the total contract price. Unless Pharpur would be knowing that what contract price has been quoted or is going to be quoted by its consortium leader(s), it would not be able to know as to what liability in terms of money is going to come on them. In this connection Para-7 of the agreement (Annexure- F) is also important. It says that apart from the Contractor's Performance Bank Guarantee, the partner(s) shall furnish "as security" the performance Bank Guarantee from the Bank as per prescribed list in Annexure-2 of ITB in favour of the Employer in a form acceptable to Employer and the value of such Bank Guarantee shall be equal to five percent (5%) of the total contract price. Unless a person knows the contract price, how he/it would be agreeable to give the Bank Guarantee in the above percentage. That is to say that Pharpur, or any consortium partner must be knowing the contract price offered by the consortium leader(s).

18. Now the question arises that if a common consortium partner was knowing about the contract price offered by two or more consortium leaders or competitors, and then bids were offered by them, whether the bids were responsive bids or they were the fair bids for the purpose of competition ? The competition is the effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favourable terms. In `common trade practice and commercial transactions, it is the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time. The competition is the antithesis of monopoly, and any elimination of competition would increase monopoly. In the realm of commercial law it is a contest for trade. Therefore, bidding for the competition should be fair and non- collusive as also responsive. Any act done in the bidding which eliminates the element of competitiveness or its policy, cannot be held to be responsive. Keeping in view the economic development of the country, The Competition Act 2002 (12 of 2003) has been introduced with various provisions to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of customers and to ensure freedom of trade carried on by other participant in markets in India. It has enacted various provisions relating to anti-competitive agreements which directly or indirectly results in bid rigging or collusive bidding, the overall effect of which is eliminating or reducing competition for bids or adversely affecting or manipulating the process for

bidding. Therefore, if any action is done by a bidder which effects a fair competition or it eliminates or reduces competition in which there was directly or indirectly an element of bid rigging or collusiveness, would be against public policy and the bids suffering from any of the aforesaid element would be a non-responsive bid. If a consortium partner is allowed to be a common partner in more than one consortium, it shall take away the element of competition in the bidding process. We may supplement our contentions by an example when one consortium partner becomes a partner in the consortium agreements of all the bidders and the bids are offered. It would be a situation in which he/it would be knowing the amount of price bids offered by each consortium leader and it can not be ruled out that the price bids may be offered accordingly and the very purpose of competition is frustrated. Therefore, in the facts and circumstance of the case, particularly in light of the content of the specified terms of the consortium agreement which was meant for the purposes of bidding, it was not permissible for a consortium partner to be a partner in more than one consortium agreement, otherwise it would amount to promoting cartelisation.

19. Apart from the above, Clause 5 of the consortium agreement provides that the said agreement shall be irrevocable and shall not be revoked till the expiry of the warranty period of the Balance of Plant (BOP) under contract. It further stipulates that the agreement therein contained shall terminate upon satisfactory completion of such warranty period. If the said agreement was made irrevocable in the above terms, one consortium partner entering into agreement with the consortium leader would not be allowed to enter into a subsequent agreement with another consortium leader unless the earlier agreement is cancelled. In case on hand, Pharpur had entered into consortium agreement with McNally on 1.6.2009 and without cancellation of this consortium agreement, it again entered into a subsequent consortium agreement with the petitioner on 4.6.2009. Therefore, the subsequent agreement was bad-in-law. A conjoint reading of sub-clause 6 of the first part of the consortium agreement and Para-10 of its second part, would further make it clear that the consortium agreement which the consortium leader would be filing along with the ITB was, in clear terms, an irrevocable document and was made as the integral part of the contract and it was prepared for the purpose of bidding. Mr. Verma has argued that according to Para-11 of the consortium agreement, it was agreed between the parties that the said deed shall be operative from the effective date of contract. Therefore, it was not effective prior to the said date and even if one consortium partner entered into agreement with the others prior to the date of awarding of contract, that would make no difference. In view of the entire contents of the agreement and the provisions of sub-clause 3.2 of the ITB, the consortium agreement was for the purpose of bidding by the consortium leader and was for clarifying the split of scope between consortium partners as also for clarifying the liability so as to make it known to the employer. Therefore, it cannot be held that the various Clause of the agreement or the contents of the agreement were non-est prior to award of contract as the very purpose of executing such consortium agreement

was for the purpose of the bidding having its bidding effect till the completion of the contract if the contract was awarded. We find that it has been mentioned in Para-15 of the return of respondents 1 & 2 that on 13.8.2009 McNally Bharat issued a communication to them that after knowing that Pharpur is also the consortium partner with the other bidder they have taken up the matter with Pharpur and Pharpur continues to be a consortium partner with McNally. Therefore, the subsequent consortium agreement between the petitioner and Pharpur was not competent.

20. Mr. Prashant Mishra, learned Advocate General, also argued that recently Bombay High Court has dealt with the matter of dual participation in consortium agreements in Shapoorji Pallonji & Company Ltd. and Anr. v. Maharashtra State Power Generation Co. Ltd. and Anr. (hereinafter referred to as Bombay Judgment/ Bombay Case) and has held that it was not permissible. He submitted that the SLP filed against the said judgment before the Supreme Court has also been dismissed. The copy of the Bombay Judgment is filed as Annexure-R/17.

21. Mr. M.L. Verma, learned Sr. Advocate, has distinguished the said judgment on facts. He submitted that in Bombay case, there was a Clause in the ITB as Clause 9.4 which specifically said that "Not more than one bid for the work shall be submitted by one Bidder or one firm of Bidders. If the bidder submits more than one bid, by way of submitting one bid under the name of the firm and the other bid as a joint venture partner or has interest or participation in more than one bid, in such an eventuality, all the bids are liable for rejection. The bidder in his own interest should ensure to submit only one bid." But there is no such Clause in the present ITB like the Bombay case, therefore, that logic cannot be applied in this case. He referred to the decision of Reliance Energy Ltd. (supra), wherein the Supreme Court held that "When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. The "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field" which is an important concept while construing Article 19 (1) (g) of the Constitution. In the said case, the State had not specified the accounting norms with clarity for calculation of the "net cash profit" for a certain number of years, one of the criteria specified in the tender conditions, that had led to confusion and uncertainty as to whether the petitioner had met the criterion in question, leading ultimately to their disqualification from the bidding process". We have no doubt about applicability of doctrine of "level playing field" and "legal certainty" in tender matters. The concept of legal certainty would apply in a case where there is vagueness in the norms or conditions of the tender document and the fact in issue would be the interpretation of such norms or the conditions. When the matter does not relate to interpretation of any norm or specified condition of the tender document or ITB, question of the applicability of the principle of legal certainty does not arise. The question in the present case is that when there is no specified condition in the ITB that a dual or multiple participation by a consortium partner was not

permissible, even then, the bids offered by such participants can be held to be non-responsive ? In our considered view, if in the facts and circumstances of a particular case, the bids offer are against the public policy and there is a possibility of bid rigging, bid- fixing or collusiveness, demolishing the aspect of competitiveness on account of knowing the contract price of each other, then such bids would be non-responsive even if an expressed condition like Bombay case is not there in the tender documents.

22. Referring to the decision rendered in the matter of State of Kerala Vs. Zoom Developers Pvt. Ltd. and Others, , Mr. Verma argued that the relationship between the consortium partners was on principal-to-principal basis and the consortium agreement was just to spelt out the work allocation and the responsibility. As per Clause 11 of the agreement, the agreement would be effective from the dated of award of the contract, therefore, it was not a defective agreement. In Zoom Developers (supra), the consortium agreement spelt out the work allocation and the responsibility of the each member of the consortium. It made the consortium responsible jointly and severally for implementation of the project. As per Para-51 of the judgment, the Clause dealing with the "relationship of the parties" merely stated that till the formation of SPC, each member shall be related to each other on principal-to-principal basis. The Supreme Court said that this is because the consortium is formed to make a bid for this project only and till the formation of SPC and till the consortium becomes a successful bidder, the parties relate to each other on principal-to-principal basis. The said argument is altogether on different aspect. In the present case, as we have held supra, on the basis of specified criterion in the consortium agreement, each consortium partner was bound to know the price bid quoted or to be quoted by the consortium leader and on this account we have held that "dual" or "multiple" consortium agreement was not possible as it would be collusive and unfair demolishing the aspect of competitiveness. Therefore, the logic of the agreement being only on principal-to-principal basis cannot be applied in the present case in view of the specified terms of the consortium agreement.

23. Mr. Verma then argued that it is a case in which the rules of game have been changed after the game has started. He referred to the decisions of Crag Martin Distillery Pvt. Ltd. Vs. Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., . We are unable to accept the said contention raised by Mr. Verma. It is not a matter in which some changes in the tender conditions have been brought by the employer. Present is a matter of interpretation of various Clauses of the ITB. If after interpretation, a particular inference is bound to be drawn, result of which goes to the root of the matter and frustrates the very purpose of fair competition, as we have held supra that non-inclusion of prohibiting "dual" or "multiple" participation in the consortium agreement in ITB will make no difference, then there is no question of changing the rule of game.

24. For the foregoing reasons, considering the facts and circumstances of the

case, particularly considering the provisions of Clause 3.2 of the ITB and the contents of the consortium agreement Annexure-F, we are of the view that a dual or multiple consortium partnership like Pharpur in the present case was not permissible and the bids offered by the bidders i.e. the petitioner and the McNally, in which Pharpur was a common consortium partner, were the non-responsive bids and the decision taken by the employer in this regard was neither arbitrary nor unreasonable.

25. Now we shall consider about the experience qualification. According to Clause 3.1 of the ITB (supra) the petitioner claimed to have executed Coal Handling Plant (CHP) and Ash Handling Plant (AHP) for which certificate from the Haryana Power Generation Corporation Limited (HPGCL) was submitted. According to the said certificate, the project of 2 x 250 MW Unit- 7 & 8 Panipat TPS was awarded to BHEL on turnkey basis. BHEL had awarded the complete Balance of Plant packages to M/s BSES (Now Reliance Infra) and the 12 Nos. of Mechanical Balance of Plant Packages (mentioned in certificate) were certified to be executed by the petitioner on turnkey basis which were awarded to it by Reliance Infra. The respondents/employer have pleaded vide Para-18 that they had floated another NIT for BOP packages in District Janjgir and in the said NIT, one M/s Thyssen Krupp Industries Pvt. Ltd. has submitted the certificate (Annexure-R/5) issued by the Chief Engineer Tau Devilal Thermal Power Project, Panipat (TDL) certifying that M/s Thyssen Krupp Pvt. Ltd. have carried out the contract for Design and Engineering, Manufacturing, Supplying, Erection, Testing and Commissioning of Coal Handling Plant system 2 x 250 MW units 7 & 8 of Tau Devilal Thermal Power Project, Panipat. It was also certified that the said concerned had also executed the Fabrication and Erection of structural steel of 3200 MT for the Coal Handling Plant during the 12 months period from September- 2003 to August-2004. They have fabricated and erected 450 MT, with a peak fabrication & erection in the month of March-2004. Mr. Prashant Mishra, learned Advocate General, contended that since with respect to the same work, two certificates were on record, the employer verified the correctness and it was found that in fact, Thyssen Krupp Pvt. Ltd. had executed the CHP package in the TDL, TPP of HPGCL, Panipat unit 7 & 8 and it was not the petitioner. He argued that another certificate was also produced by the petitioner which was issued by the Tata Project Ltd. It certifies that the TDL had engaged services of the petitioner for CHP and it does not say in express terms that the petitioner has carried out the work of CHP on EPC basis. Hence, it was held that the said work was not done on EPC basis as per eligibility criteria and therefore, the petitioner was not satisfying the criteria laid down in sub- Clause 3.1. of the ITB. He has also highlighted many instances relating to the petitioner services. Mr. M.L. Verma, learned Sr. Advocate for the petitioner has argued that many explanations were given by the petitioner in this regard, the petitioner fulfils the qualification criterion and the assessment of the employer was not proper.

26. Scope of Judicial review in relation to technical matters is very limited. As held in *Tata Cellular Vs. Union of India*, , the Court does not sit as an Appellate

Court but it merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted by the Court, it shall be substituting its own decision, without the necessary expertise which itself may be fallible.

27. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , the Supreme Court held that if the decisions have been taken in bonafide manner although not strictly following the norms laid down by the Courts, such decisions are normally upheld. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process" as it cannot act as an Appellate Authority by substituting its opinion in respect of selection made for entering into contracts.

28. In *Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others*, , the Supreme Court held that when the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

29. In case on hand, the employer has considered the technical qualifications of the petitioner by making an enquiry about the project conducted by the petitioner and has taken a particular view in the matter that the petitioner's experience qualification was not satisfactory and it does not inspire the confidence of the employer to award the subject contract to the petitioner on technical grounds. The decision has been taken by the expertise committee, therefore, while exercising jurisdiction of judicial review, we do not deem it appropriate to take a different view than the one which has been taken by the expertise committee otherwise it would amount to exercising power as an Appellate Authority which is not permissible particularly when the decision could not be shown to be arbitrary or unreasonable. Moreover, this is secondary. When we have already held that the bid offered by the petitioner was a non-responsive bid on account of dual participation by Pharpur in consortium agreement, this ground of lacking in technical qualification would hardly carry any weightage.

30. The third point for consideration is about non- fulfilling the financial criteria by the petitioner. Mr. Verma argued that this was not the ground for rejection of the price bid of the petitioner. This ground has been taken later on in the writ petition itself. Therefore in one manner it is not relevant to be examined with reference to the rejection of the price bid. Referring to the decision of *Mohinder Singh Gill (supra)*, he argued that the reasons for a particular decision cannot be supplemented later on.

31. Mr. Prashant Mishra, learned Advocate General for respondents 1 & 2 admitted that this was not the ground at the time of rejection of the technical bid of the petitioner. We have also perused the report of the tender evaluation committee dated 11th of August, 2009. There is no comment in the report about the financial credentials of the participants, therefore, we find that it was not a ground at the time of rejection of the technical bid of the petitioner. Mr. Mishra submitted that according to sub- Clause 3.4 of the ITB, each bidder was required to submit the balance sheet for the year ending 31st March, 2009. The petitioner submitted the provisional balance sheet issued by Gupta & Gupta Associates (CA) which was not signed by them. They were statutory auditor of the petitioner Company. The petitioner also submitted a certificate issued and signed by B. Lugani & Associates (CA) regarding expected turnover and net worth for the year ending on 31st March, 2009. According to Mr. Mishra, the certificate issued by B. Lugani, who was internal auditor of petitioner Company, was not acceptable as they were not statutory auditor. When the petitioner was informed that the balance sheet was not signed by the statutory auditor, the petitioner submitted the balance sheet issued by R. Khattar & Associates (CA). R. Khattar & Associates was appointed as statutory auditor on 6.7.2009 on the resignation submitted by Gupta & Gupta on 17.3.2009 w.e.f. 31.3.2009. Therefore, the provisional balance sheet prepared by Gupta & Gupta which was also unsigned was suspicious. His submission was that this conduct of the petitioner was serious and it is relevant for the overall evaluation in regard to his capability and capacity to perform the work.

32. We are not commenting on the merits of the argument advanced by Mr. Prashant Mishra in this regard. We have already held that the bid offered by the petitioner was non- responsive on account of dual participation by its partner Pharpur as also on account of decision of the employer regarding technical qualifications. The said ground was not taken at the time of the rejection of technical bid of the petitioner. Therefore, in view of the foregoing reasons, the decision on this point would now only be academic.

33. Mr. Verma lastly argued that the price bid offered by the petitioner was lesser by about 125 crores. Therefore, if the petitioner's bid is accepted, it is going to save public exchequer of about 125 crores. According to Mr. Verma the bid of the petitioner was lowest bid. Firstly we may note that since the price bid of the petitioner has not been opened, we do not know as to what exact offer the petitioner has made. In Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , the Apex Court held that it is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be

awarded. At times, a higher price for a much better quality of work, can be legitimately paid in order to secure proper performance of the contract and good quality of work- which is as much in public interest as a low price. The Court should not substitute its own decision for the decision of an expert evaluation committee.

34. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , quoting many earlier decisions including that of *Raunaq International Ltd.*, the Supreme Court again held that the award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

35. Therefore, it is clear that in commercial transaction, only the price bid would not be a criterion and the lowest one (L-1) cannot claim as a matter of rights for awarding the contract in his favour. Although if all other things are equal, the L-1 would certainly have a right to claim the award of contract and if it is not done the same would be arbitrary and unreasonable. In the present case, we have already held that the bid offered by the petitioner was non- responsive. Therefore, even assuming that the petitioner would have been L-1 (though it is not knowing to us), it cannot claim award of the work on this account.

36. For the foregoing reasons, we do not find any substance in the petition. The petition is liable to be dismissed and is hereby dismissed.

37. There shall be no order as to cost.