

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2008

CORAM

THE HON'BLE MR.JUSTICE **S.NAGAMUTHU**

W.P.Nos.6425 & 6426 of 2008

&

M.P.Nos.2 to 5 of 2008

M/s.MSPL Gases Limited,  
Represented by its Senior Manger (Sales)  
Mr.D.Ramesh Babu  
Baldota Enclave, Abheraj Baldota Road,  
Hospet-583 203, Karnataka . . . Petitioner in both the  
petitions

Vs

- 1.M/s.Steel Authority of India Limited  
Through its Executive Director (Operations)  
ISPAT Bhavan,  
Lodi Road, New Delhi-110 003.
- 2.Salem Steel Plant  
Through its Deputy General Manager,  
I/C (Materials Management)  
A Unit of Steel Authority of India Limited,  
Salem-636 013,  
Tamil Nadu.
- 3.Deputy General Manage I/C (Materials Management)  
Salem Steel Plant,  
Salem- 636 013,  
Tamil Nadu.
4. M/s.INOX Air Products Ltd.,  
7<sup>th</sup> Floor, Ceejay House,  
Dr.A.B.Road,  
Worli, Mumbai- 400 018.
- 5.M.N.Dastur & Company (P) Ltd.,  
480, Annasalai,  
Nandanam,  
Chennai-600 035.

.. Respondents in both the petitions

W.P.No.6425 of 2008

Writ Petition filed under Article 226 of the Constitution of India to issue a writ of certiorarified mandamus to call for the records from the second respondent, Salem Steel Plant in respect of the impugned tender notice No.E/19 dated 23.02.2008 and quash the same.

W.P.No.6426 of 2008

Writ petition filed under Article 226 of the Constitution of India to issue a writ of Mandamus directing the second respondent, Salem Steel Plant to issue the letter of acceptance to the petitioner as the successful bidder under Tender Document No.PU-E 882801R dated 12.11.2007.

For Petitioner : Mr.A.L.Somayaji Senior Counsel for  
for Mrs.Uma Vijayakumar

For Respondents : Mr.R.Krishnamoorthi Senior Counsel &  
Mr.Jagdeep Dhankar Senior Counsel  
for Mr.A. Ilango for R1 to R3  
Mr.K.Harishankar for R4  
Mr.Habibullah Badsha Senior Counsel  
for M/s.C.Mani Shankar for R5

**COMMON ORDER**

By consent, writ petitions are disposed of.

"M/s. Steel Authority of India Limited "(in short SAIL)" is a public sector company and is an integrated iron and steel producer in India. The second respondent "Salem Steel Plant" (in short SSP) is a plant of the first respondent SAIL which manufactures steel and allied products. The third respondent is the Deputy General Manager in charge of Materials Management of SSP. The fourth respondent "INOX" Air Products Ltd. is a Company registered under the Indian Companies Act and is a manufacturer of industrial gases such as oxygen, nitrogen, helium, argon, carbon dioxide, hydrogen etc., The 5<sup>th</sup> respondent "M.N. Dastur and Company (P) Ltd" is a consulting company of the respondents 1 and 2 that provides engineering consultancy services for projects in the metallurgical and allied industries.

2. The petitioner is also a registered Company under the Indian Companies Act and claims to be one of the largest producers of Industrial gases and medical oxygen in India. It is further claimed by the petitioner that, the petitioner Company is the

first of its kind to set up an air separation plant on "Build Own and Operate" (in short BOO) basis for respondent No.1 SAIL.

3. M/s. Salem Steel Plant evolved an expansion project to set up steel melting and casting facilities to produce stainless steel slabs of about 189,350 tonnes per year and the same was approved by the SAIL Board directors. To achieve the said project, Salem Steel Plant proposed to install in the steel melt shop, an electric arc furnace, ladle furnace, argon oxygen decarburizing (AOD), slab caster and slab grinder among other equipments. According to the petitioner, the estimated requirement of industrial gases for this project was 3500 Nm<sup>3</sup>/hour of Gaseous oxygen, 1200 Nm<sup>3</sup>/hour of gaseous nitrogen and 20 tonnes per day (in short TPD) of gaseous argon which was to be out sourced and supplied for the project.

4. It is further stated that in order to meet the above requirement, the respondent Salem Steel Plant proposed that a "New Cryogenic Air Separation Plant" be set up on or near its premises on a "Build, Own and Operate" (BOO) basis for which the respondent Salem Steel Plant issued an invitation for tenders by Tender Document No. PU-E 782801 dated 13.3.2007 (hereinafter referred as the 1<sup>st</sup> tender). In the tender conditions, it was mentioned that while the requirements of oxygen and nitrogen could be met from the air separation plant, but the requirement of argon would exceed the capability of the air separation plant. Therefore, it was proposed that the balance quantity of argon about 18 TPD should be procured by the bidder from an external source and supplied to the respondent Salem Steel Plant. The last date for receiving tenders was 24.04.2007. According to the tender documents, there were three stages to the bid viz (1) Earnest Money Deposit (EMD); (2) Techno-Commercial bid and (3) Price bid. According to the tender document, after opening of the EMD, the tenderers would be evaluated on the eligibility criteria set out in the tender documents. The technical bids of bidders who were found eligible would be further evaluated and the respondent Salem Steel Plant would hold techno-commercial discussions to bring all the tenderers on common comparison on techno-commercial grounds and freeze the same before the price bids were to be opened. After evaluating the techno-commercial criteria, the price bids of techno-commercially qualified bidders would be opened and the respondent Salem Steel plant would award the contract to the L1 bidder. The bidders were to offer fixed facility charges and a variable cost was to be quoted by the bidders for oxygen, nitrogen and argon. The tender document also specified that any discussions/negotiations, post price bids, would be only with the L1 bidder.

5. In pursuance of the said tender invitation dated 13.3.2007, there were four tenderers namely, the petitioner, the respondent



"INOX", "M/s. BOC India Ltd." and "M/s Goyal MG Gases Ltd." During the evaluation of the technical bids, the bid of M/s. Goyal MG Gases Ltd., was rejected based on their previous track record. After the technical bids were opened, the revised price bids were called for. Thereafter, when the price bids were opened "M/s. BOC India Limited" was found as L 1 bidder and as a result, the 5<sup>th</sup> respondent Consultant "M.N. Dastur and Company India Ltd." recommended to Salem Steel Plant who in turn forwarded the same to the respondent SAIL. It is further alleged by the petitioner that though the respondent DGM Salem Steel Plant was obliged to declare "M/s. BOC India Limited" as L 1, with the intention to accommodate the respondent "INOX," the DGM changed the tender conditions by increasing the requirement of oxygen from 100 to 120 TPD and argon from 18 to 20 TPD and consequently, called for re-tender. However, "M/s. BOC India Limited" did not challenge the decision of the respondent Salem Steel Plant calling for a re-tender.

6. Pursuant to the above decision, the second respondent issued tender notice No.E/14 dated 14.11.2007 inviting fresh tenders (hereinafter called as 2<sup>nd</sup> tender). The last date for reception of tenders was 12.12.2007. In this 2<sup>nd</sup> tender notice, certain revised terms and conditions were incorporated. As per this, the delivery period of the ASP plant was revised as 23 months instead of 18 months as stipulated in the 1<sup>st</sup> tender with a view to synchronize the functions of Steel Melting Shop after due completion of other works. This time, four companies submitted their tenders namely, "Goyal MG Gases", "MSPL Gases Ltd.", "Inox Air Products" and "PRAX AIR". Out of the four tenderers, "Goyal MG Gases" was rejected on the ground of unsatisfactory performance and adverse report from Alloy Steel Plant, Durgapur which is an unit of SAIL. The remaining three companies namely "MSPL Gases Ltd.", "Inox Air Products" and "PRAX AIR" were found to be eligible. It should be noted that "PRAX AIR" did not participate in the 1<sup>st</sup> tender.

7. The fifth respondent, who is a consulting company, requested the second respondent to call the tenderers for techno commercial discussion. According to the fifth respondent, there were certain deviations found in the tender documents submitted by "Inox Air Products" and "PRAX AIR". Admittedly, discussion was held on 17.12.2007, in which representatives of all the three companies participated. During the said discussion, it was made clear to all the tenderers that deviations were not permitted in view of the nature of the project. Admittedly, "Inox" and "PRAX AIR" withdrew their deviations from the tender conditions and thereafter "Inox" and "PRAX AIR" wanted to submit their revised price bids in view of withdrawal of their deviations. Thereafter, the technical evaluation committee and the commercial evaluation committee recommended on 10.01.2008 that all the three parties are techno

commercially eligible. In view of the withdrawal of the deviations made by "Inox" and "PRAX AIR", the commercial evaluation committee suggested to seek revised price bids from all the three bidders. Accordingly, all the three tenderers were given option to submit their revised price bids. This, according to the respondents, was made under Clause 15 and Clause 21.5 of Section III of instructions to tenderers of the tender document. The Plant Level Tender Committee (PLTC) also recommended to obtain revised price bids from all the three techno commercially acceptable parties. Admittedly, the second respondent issued a letter dated 11.01.2008 requesting all the three tenderers to submit their revised price bids on or before 14.01.2008. In response to the same, all the three tenderers submitted their revised price bids. However, the petitioner sent a letter dated 12.01.2008 opposing the action of the second respondent to call for revised price bids stating that it was unwarranted. According to the petitioner, instead of revised price bids supplementary price bids should have been called for.

8. On 14.01.2008, in the presence of the representatives of all the three tenderers, the price bids were handed over to the fifth respondent for the purpose of evaluation to arrive at "Net Present Value" (NPV) and consequently to calculate the total cost for the contract period of 15 years as contemplated in Annexure-I Section V of tender document (Tendering and Evaluation Procedure) in instruction to tenderer.

9. On opening the price bids, according to the petitioner, he emerged as the lowest bidder (L1). It is further claimed by the petitioner that as soon as it was found that the petitioner was the L1, the representatives of the fifth respondent told that the fifth respondent would soon send a letter to the second respondent making a recommendation for award of contract in favour of the petitioner as the petitioner had emerged as the L1 bidder. But, this version of the petitioner is denied by the fifth respondent.

10. On 16.01.2008, the petitioner sent a representative to the second respondent requesting for issuance of letter of acceptance as the petitioner was the lowest bidder. Another letter was sent on 18.01.2008 by the petitioner, once again claiming himself to be the lowest bidder, according to its own calculation. A third similar letter was sent on 19.01.2008. Yet another letter dated 21.01.2008 and a last letter dated 22.10.2008 were also sent by the petitioner with the same request for award of contract.

11. Similarly, "Inox" namely, the fourth respondent, also sent letters on 16.01.2008, 23.01.2008 and 30.01.2008 claiming that "Inox" is the lowest bidder on the basis of hourly average flow rate (i.e.) NM3/hr.

12. "Prax Air India Private Limited" also sent similar letters on 14.01.2008, 15.01.2008, 19.01.2008 and 21.01.2008, wherein "Prax Air India Private Limited" had claimed that there was lack of clarity for considering the evaluation of price bids and further claimed that price bids should be evaluated only on the basis of daily average flow rate required (i.e.) NM3/day for all the gases. "Prax Air India Private Limited" claimed that it was the lowest bidder.

13. From the above pleadings it is seen that the petitioner company, the fourth respondent and the "Prax Air India Private Limited" claimed that each one of them was the lowest bidder. According to the respondents, each tenderer interpreted the tender conditions in their own way and calculated the price bids for the purpose of arriving at NPV in their own method.

14. The following are the evaluation methods adopted by each tenderer, which could be culled out from the representations of the tenderers.

1) the petitioner claimed that Oxygen, Nitrogen have to be calculated on the basis of average hourly flow rate (i.e. NM3/hr) basis and for Argon gas, the average flow rate per day (i.e. NM3/day) is to be considered;

2) Prax Air India Private Limited claimed that the evaluation has to be made on the basis of average flow rate per day (i.e. NM3/day) for all the three gases namely Oxygen, Nitrogen and Argon;

3) Inox, in the letter dated 16.01.2008 claimed that evaluation is to be done either on the basis of average hourly flow rate or on the basis of average flow rate per day (i.e. NM3/hr. Or NM3/day) for all the three gases.

15. Subsequently, by letter dated 23.01.2008, "Inox" claimed that evaluation has to be made only on the basis of average hourly flow rate (i.e. NM3/hr) for all the three gases.

16. It is the case of the petitioner that on 30.01.2008 itself, the fifth respondent made a final recommendation to the second respondent wherein, the fifth respondent is alleged to have stated as follows;

"Based on the above results of NPV it is found that MSPL Gases Limited is the lowest bidder and the prices quoted by them are considered reasonable. Therefore, it is



recommended to consider M/s. MSPL Gases Limited for establishment of New Cryogenic Air Separation Plant on BOO basis for supply of stipulated Gases to SSP. It is however suggested that SSP may try and negotiate with MSPL for any possible reduction in supply price of Argon as it is their bought out item."

Stopping for a moment here, it should be mentioned that the second respondent in his counter has made a denial of having received any such letter dated 30.01.2008 from the fifth respondent.

17. Back to narration, on 01.02.2008, the fifth respondent sent a letter to the second respondent stating that the tenderers have not clearly understood the tender requirement/evaluation criteria as stipulated in the tender documents and have interpreted the tender documents differently, to the extent that all of them claiming themselves as the successful bidder according to their own individual interpretation in a way which suits them for evaluation purpose in arriving at NPV. The fifth respondent therefore, suggested to the second respondent to seek "fresh price bid" once again from all the three eligible bidders, defining once again the evaluation criteria.

18. According to the respondents 1 to 3, the suggestion of the fifth respondent dated 01.02.2008, was placed before the tender Committee on the same day itself and it was decided that the suggestion made by the fifth respondent for obtaining fresh price bid after opening of price bid, is not in accordance with the terms and conditions of the tender as the same would be in violation of existing procedure contemplated under Clause 7.17 of PCP-06. Therefore, according to the respondents 1 to 3, the tender Committee recommended that the proposed course of action could be decided after getting necessary clearance from Chief Vigilance Officer on the suggestion made by the fifth respondent.

19. According to the respondents 1 to 3, the subject matter was placed before the Executive Director (Vigilance) and the Chief Vigilance Officer of SAIL and the General Manager (Law) and the Principal Law Officer of SAIL at Corporate Office, New Delhi. The discussion culminated in a decision that, asking for fresh revised price bids after opening of price bids would amount to clear deviation from PCP-06 and so, it was decided not to go for the said auction. The respondents 1 to 3 would further state that it was decided the case can be re-tendered with necessary clarification, correction as suggested by the consultant, the fifth respondent herein.

20. The above said course of action for re-tendering with necessary clarification, correction as suggested by the Executive Director of the second respondent was communicated to the third respondent herein over phone and based on the same, a proposal for re-tender for ASP was initiated on 02.02.2008, it is contended by the respondents 1 to 3.

21. It is further stated by the respondents 1 to 3 that in the mean while, the fifth respondent also sent another letter dated 02.02.2008, suggesting the points which are required to be kept in mind while seeking proposal for fresh revised prices as suggested by them in the earlier letter dated 01.02.2008. But, the said evaluation method suggested by the fifth respondent was not acceptable. It is further stated by the respondents 1 to 3 that, because of the above confusion and lack of clarity in the tender document, in the matter of evaluation criteria, the view of the fifth respondent's suggested course of action for getting revised price bid in his letter dated 01.02.2008, which was elaborated in his another letter dated 02.02.2008 and the tentative decision of the third respondent, were all placed before the tender committee again on 02.02.2008 along with the suggestion made by the Executive Director (Operation) of the first respondent to go for re-tender of ASP.

22. It is the further case of respondents 1 to 3 that the plant level tender committee found that seeking revised prices would not be in accordance with the existing Purchase Contract Procedure (PCP-06) and as such, the fifth respondent's proposal for seeking fresh revised price bid is not acceptable. Further, the plant level tender committee recommended on 02.02.2008, that the case may as well be re-tendered on open tender basis after incorporating all the necessary clarifications and corrections in the tender document including the suggestions made by the fifth respondent. The said decision of the tender committee, according to the respondents 1 to 3, was placed before the Executive Director of the second respondent on 04.02.2008, who in turn approved the decision of the tender Committee for re-tender. It is further stated that, the second respondent placed the said re-tender proposal before the Executive Director (Operation) of the first respondent SAIL, New Delhi. The Executive Director of the Corporate Office sought the opinion from the General Manager and the Principal Law Officer who have opined that revised tender seems to be the "better alternative". After taking the opinion from the Principal Law Officer of the first respondent, the Executive Director (Operation) of the first respondent SAIL, New Delhi approved the recommendation of the plant level committee for re-tendering on 22.02.2008, it is contended by R1 to R3.



23. Thereafter, for re-tendering of ASP as approved by the first respondent, after due clearance from the Principal Law Officer of the first respondent, for which decision was taken on 22.02.2008 to go for re-tender, the second respondent placed the proposal for issue of fresh tender of Air Separation Plant before the approving authority on 22.02.2008, itself with necessary modification in respect of technical specification as suggested by the fifth respondent and in respect of evaluation criteria in the tender document. The competent authority approved the said re-tender as ASP package on 22.02.2008 itself. As the Executive Director of the second respondent was camping at New Delhi on that day (i.e.) on 22.02.2008, the recommendation was faxed to the Executive Director, the second respondent, who approved the recommendation and as such, the approval was informed to the third respondent through fax on 22.02.2008 itself; it is contended.

24. Thereafter, the second respondent sent letter dated 23.02.2008 to all the three tenderers including the petitioner herein informing the cancellation of the previous tender dated 13.11.2007 and the return of the EMD was being arranged and requested to participate in the proposed re-tender. On 23.02.2008 itself, notice inviting fresh tender (hereinafter called as 3<sup>rd</sup> tender) for establishment of Air Separation Plant was issued indicating the last date for submitting and opening of the tender as 15.03.2008, which was subsequently extended to 22.03.2008 and further extended to 31.03.2008.

25. In the meanwhile, the petitioner sent a letter dated 01.02.2008 to the Chairman, SAIL, stating as if the fifth respondent had recommended him as the lowest bidder and requested him to issue letter of acceptance. Subsequently, a letter dated 04.02.2008, was sent by the petitioner to the second respondent herein claiming that the fifth respondent had recommended in his letter dated 30.01.2008, that the petitioner was L1. There were several letters sent by the petitioner to the first respondent requesting the respondents 1 to 3 to give letter of acceptance on the basis of the alleged recommendation made by the fifth respondent by his letter dated 30.01.2008.

26. The re-tender notification No.PU-E 882802 dated 23.02.2008 was issued under Tender Notice No.E/19 dated 23.02.2008. After the said tender notification, the petitioner has approached this Court by filing W.P.No.6425 of 2008 seeking to quash the said tender notice N.E/19 dated 23.02.2008. On the same day, the petitioner filed another writ petition in W.P.No.6426 of 2008 for a writ of mandamus to direct the respondents to issue letter of acceptance to the petitioner as the successful bidder in the 2<sup>nd</sup> tender and to award the contract to him. That is how these two writ petitions are now before this Court for disposal. Since common

issues are involved in these writ petitions, they are disposed off by means of a common order.

27. In W.P.No.6425 of 2008, as many as 21 grounds have been raised. In the other writ petition namely in W.P.No.6426 of 2008, as many as 26 grounds have been raised. Almost all the grounds raised in both the writ petitions are common. The respondents 1 to 3 have filed a detailed counter affidavit.

28. The main ground raised in both the writ petitions is that the decision to go for fresh tender (3<sup>rd</sup> tender) is arbitrary, discriminatory and malafide. The said decision has been taken only with a view to favour the fourth respondent M/s.INOX Air Products Ltd., to see that ultimately contract is awarded to the said company.

29. The said contention of the petitioner is stoutly denied by the respondents 1 to 3. According to them, at the outset, the petitioner has no *locus standi* to maintain the writ petitions. Secondly, according to the respondents 1 to 3, the issues involved in these writ petitions cannot be subjected to judicial review as these issues do not fall within the scope of judicial review under Article 226 of the Constitution of India. It is further contended that there was neither unreasonableness, nor arbitrariness nor malafides in the action of R1 to R3.

30. Now, let me first consider the preliminary objection raised by the respondents on the ground of locus standi of the petitioner to maintain these writ petitions. As I have extracted above, the objection is, having either failed or avoided to participate in the 3<sup>rd</sup> tender floated by the respondents 1 to 3, it is not open for the petitioner to question the said tender notice.

31. In general, a person who had participated in the tender process and whose tender was rejected can very well complain that his tender had been wrongly rejected and the tender of someone else had been wrongly accepted. Admittedly, in this case, the petitioner has not participated in the 3<sup>rd</sup> tender. While so, is it permissible for him under law to question the said tender process? In answer to this question, the learned counsel for the petitioner would place reliance on a judgment of the Honourable Supreme Court in RAMANA DAYARAM SHETTY v. THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA (AIR 1979 SC 1628). In the said case, the question of locus standi was raised on the ground that a person who did not participate in a tender process cannot question the acceptance of the tender of a participant. The Honourable Supreme Court rejected the said argument as misconceived. In the said judgment, the Honourable Supreme Court has held as follows;

"The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4<sup>th</sup> respondent, but that he was differentially treated and denied equality of opportunity with the 4<sup>th</sup> respondent in submitting a tender. His complaint was that if it were known that non-fulfillment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4<sup>th</sup> respondents were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition."

32. In the above case, the writ petition came to be filed after the acceptance of the tender of a tenderer. The appellant in that case could not submit his tender as he was not informed about the non-fulfillment of certain conditions of the tender, in respect of eligibility, would not be a bar for consideration for tendering. But, in the instant case, of course, there was no hurdle for the petitioner to have participated in the 3<sup>rd</sup> tender. There was no denial of opportunity to him in any manner to participate in the tender process. The petitioner cannot complain that there was discrimination against him. The petitioner has not been differentially treated in any manner as it was the case of the appellant in the judgment of the Honourable Supreme Court cited supra. Therefore, in my considered opinion, the principle enunciated in the said judgment would not be applicable to the petitioner as there is no question of denial of equality of opportunity.

33. It could have very well participated in the tender and then come to this Court by way of a writ petition. But, it would have been only an empty formality for the Petitioner to submit it's tender first, though according to the petitioner, the very administrative decision to go for fresh tender notice itself is not in accordance with law and the same suffers from unreasonableness,



arbitrariness and malice to unduly favour a particular company. If the petitioner had waited till the award of contract was made in favour of a tenderer and then approached this Court to challenge the said award of contract, then there could be some force in the argument that the petitioner will have no locus standi. But, that is not the case here. The petitioner has, well in advance, as soon as the tender notification was issued and the moment he felt that the administrative action of the respondents 1 to 3 in canceling the earlier tender process and in calling for the fresh tender, was unreasonable, illegal arbitrary and malafide, has approached this Court. The administrative action deciding to cancel the earlier tender process and to call for the fresh tender notice form part of the same transaction which are inseparable. When the petitioner challenges the entire administrative decision namely canceling the 2<sup>nd</sup> tender process and calling for fresh tender, in my considered opinion, the petitioner has got locus standi to maintain these writ petitions.

34. The next ground of attack on the side of the respondent is, in respect of scope of judicial review of contract under Article 226 of the Constitution of India. In TATA CELLULAR v. UNION OF INDIA ((1994) 6 SCC 651) the Honourable Supreme Court after analysing various other judgments of the Honourable Supreme Court in respect of the power of judicial review of the High Court under Article 226 of the Constitution of India has deduced the following principles;

"1. The modern trend points to judicial restraint in administrative action.

2. The court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

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, 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 malafides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. "

35. In CENTRE FOR PUBLIC INTEREST LITIGATION v. UNION OF INDIA ((2008) 8 SCC 606), the Honourable Supreme Court has held as follows;

"Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The duty of the court is thus to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. committed an error of law;
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

36. Similarly in RELIANCE AIRPORT DEVELOPERS (P) LTD., v. AIRPORTS AUTHORITY OF INDIA ((2006) 10 SCC 1) wherein the Honourable Supreme Court has re-affirmed the above view in the following terms;

"25. In the multi-tier system in the decision-making process the authority empowered to take a decision can accept the view expressed by one committee in preference to another for plausible reasons. It is not bound to accept the view of any committee. These committees, it needs no emphasis, are constituted to assist the decision making authority in arriving at the proper decision. It is a matter of discretion of the authority to modify the norms. It is not a case of absolute discretion.

62. Therefore, to arrive at decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view.

62. In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself."

37. Keeping in view the principles deduced by the Honourable Supreme Court time and again in the above referred to judgments, in mind, let me now analyse the facts of the present case to see whether this Court should review the decision of the respondents 1 to 3 to cancel the second tender process and to notify the third tender.

38. According to the petitioner, the impugned notice calling for fresh tender (3<sup>rd</sup> tender) is wholly arbitrary, discriminatory and actuated by malice. If the petitioner is able to make out a case to substantiate his claim that the fresh tender notice falls under any one or more of the above, this Court has to necessarily interfere with the said decision of the respondents 1 to 3.

39. The reasons stated by the respondents 1 to 3 for taking the above decision are precisely as follows;



a. There is lack of clarity in the evaluation mechanism prescribed in the tender document dated 12.11.2007 (2<sup>nd</sup> tender notification).

b. Because of the lack of clarity, the tenderers have interpreted the same in their own way and each one claimed that he was the lowest bidder.

c. There were several representations from the tenderers claiming that the evaluation mechanism adopted by the fifth respondent namely the consulting company was not correct and each one of them evolved it's own evaluation mechanism.

d. The consulting company namely the fifth respondent in its communications dated 01.02.2008 and 02.02.2008 indicated that the parties have not clearly understood the tender requirements/stipulations and have interpreted the tender document differently to the extent of all of them claiming to be the successful bidder.

e. The fifth respondent further suggested that evaluation criteria be redefined so as to impart clarity and certainty.

f. Based on the representations of the tenderers and on the basis of the suggestions of the fifth respondent the issue was discussed at various levels (as extracted in the previous paragraphs) and at last in the interest of the organisation it was decided to cancel the second tender process and go for a fresh tender notice with clarity in respect of the evaluation mechanism.

40. But, the contentions of the petitioner are thus;

(a) There was no lack of clarity in evaluation mechanism as stated by the respondents 1 to 3.

(b) The contention of the respondents that numerous representations were received (after the opening of the price bids on 14.01.2008) which shall show the confusion in the minds of the tenderers is baseless and untenable.

(c) The fifth respondent made a final recommendation on 30.01.2008 itself in favour of the petitioner recommending to the respondents 1 to 3 that the petitioner was the lowest bidder and so, on accepting the same, contract should have been awarded to the petitioner.

(d) The respondents 1 to 3 have not come before this Court with clean hands inasmuch as the respondents 1 to 3 have denied the recommendation made by the fifth respondent through its letter dated 30.01.2008.

(e) The contention of the respondents 1 to 3 that the letter dated 30.01.2008 of the fifth respondent is only an alternative evaluation/calculation cannot be accepted, since the said letter clearly indicates that it is a final recommendation.

(f) Respondents 1 to 3 have acted arbitrarily by ignoring the recommendation of the fifth respondent dated 30.01.2008.

(g) There is no lack of transparency in the entire tender process during the 2<sup>nd</sup> tender necessitating cancellation of the same.

(h) The decision to cancel the 2<sup>nd</sup> tender and to go for the 3<sup>rd</sup> tender is actuated by malice and there are factual foundations to establish the same.

41. The learned Senior Counsel for the petitioner placed reliance on the following decisions:

(i) DIRECTOR OF EDUCATION v. EDUCOMP DATAMATICS ((2004) 4 SCC 19) wherein the Honourable Supreme Court, while dealing with the scope of judicial review to interfere with the terms of a tender notice, has held as follows;

"13. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice."

ii. GLOBAL ENERGY LTD. v. ADANI EXPORTS ((2005) 4 SCC 435), the Honourable Supreme Court has held as follows;

"10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice."

iii) NOBLE RESOURCES v. STATE OF ORISSA ((2006) 10 SCC 236) wherein the Honourable Supreme Court has held as follows;

"15. it is trite that if an action on the part of the State in violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the Court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favoritism on its part."

42. At the out set, on going through the above judgments of the Honourable Supreme Court cited supra, I am of the view that the principles stated in the above judgments have got no relevance to the facts of the present case at all. In those cases, certain terms and conditions incorporated in the tender documents came to be challenged and, the Honourable Supreme Court considered whether



such terms and conditions are arbitrary, unreasonable or actuated by malice. But in the case on hand, the terms and conditions of the tender notice (3<sup>rd</sup> tender) are not under challenge and the challenge is only to the decision of the respondents 1 to 3 to cancel the earlier tender process (2<sup>nd</sup> tender) and call for a fresh tender (3<sup>rd</sup> tender). If it is the grievance of the petitioner that the 3<sup>rd</sup> tender notification is liable to be quashed, as some of the terms and conditions incorporated in the said tender notice are arbitrary, unreasonable or actuated by malice, then the principles enunciated in the above judgments would have relevancy. Here the petitioner does not challenge the 3<sup>rd</sup> tender notification on any such ground.

43. Applying the principles deduced in TATA CELLULAR case followed in many other cases cited supra, let me now analyse the rival contentions of the parties in the instant case.

44. The Steel Authority of India Limited is governed by Purchase/Contract Procedure 2006 (in short PCP-2006) adopted on 3<sup>rd</sup> October 2006. The preface to PCB-2006 says that the most important function of public procurement is to maintain transparency which not only ensures a level playing field to the suppliers/contractors but also results in qualitative improvement in material/services received due to increased competition.

45. Clause 6.17 of PCP-06 provides for constitution of Tender Committee. The functions of tender committee would be as follows;

a) To constitute Technical Evaluation Committees (TEC) & Commercial Evaluation Committees (CEC) and also sub-committees, if required, in consultation with the TEC & CEC. TEC & CEC shall function concurrently.

b) To monitor the progress made by the TEC & CEC and Consultants.

c) To examine the recommendations of TEC & CEC and Consultants.

d) To take decision to open the price bids after freezing the Technical & Commercial conditions.

e) To evaluate the price offers, conduct negotiation with L-1 tenderer, if required, without any further approval and put up the recommendations of order placement to the Competent Authority after justifying the reasonability of the price.

The Committee should complete the scrutiny and give the recommendations to the Competent Authority within a period of three months from the date of opening of the tender or one month from the date of receipt of recommendations from the Technical & Commercial Evaluation Committees.

46. Clause 6.17.3 deals with the functions of the Technical Evaluation (TEC) as under;

a) To scrutinise the Technical part of the tender and the recommendations of the consultants/Technical Evaluation Sub Committee, if any.

b) To conduct clarification meetings with the tenderers.

c) To evaluate the performance of on-going work/contract, if any in SAIL including Subsidiaries.

d) To give the recommendations to the Tender Committee.

e) To assist the Tender Committee, if required.

The TEC should complete the scrutiny and submit the recommendations to the Tender Committee within a period of two months from the date of opening of the tender.

47. Clause 6.17.4 deals with the functions of the Commercial Evaluation Committee (CEC) as under:

a) To scrutinise the Commercial part of the tender and the recommendations of the consultants or Commercial Evaluation Sub Committee, if any.

b) To conduct clarification meetings with the tenderers.

c) To give the recommendations to the Tender Committee.

d) To assist the Tender Committee, if required.

The CEC should complete the scrutiny and submit the recommendations to the Tender Committee within a period of two months from the date of opening of the tender.

48. Clause 7.17 deals with opening of tenders as under;

"Where tenders are issued in 2/3 parts, only the techno-commercial bids (including that of trial parties) shall be opened on the tender

opening date. The price bid shall not be opened, but, after signing on the envelopes, shall be kept under lock and key till the receipt of final technical/commercial recommendations from the Indentor/Consultants/Negotiating Committee. In case, the quoted techno-commercial bids are in conformity to that of the tender, the price bids received shall be considered for opening. In case the techno-commercial bids need to be discussed and clarified by the tenderers, clarification meetings should be held with them. However, clarifications/confirmations/details sought from the tenderers should not amount to change in basic structure and specifications of the Tender Documents. After clarification meetings and freezing of the technical and commercial bids, the tenderers should be advised to confirm the validity of their price bids. In the event, tenderers desire to update their price bids, and it is permitted, the opportunity to be provided to all techno-commercially accepted tenderers."

49. Clause 9.2.1 deals with "quotations" as under:

"The techno-commercial bids after its opening as per Para 7.17, shall be evaluated by the Indentor/Tender Committee and, wherever applicable, comments recommendations of the Consultants would be obtained. In case evaluation is done by the Indentor, a comparative statement of techno-commercial scrutiny of all the tenders shall be prepared and given along with its recommendations to the MM Deptt./Contract Cell within seven days of the receipt of the Techno-commercial bids.

9.2.2 The Technical & Commercial Evaluation Committees may discuss the techno-commercial bids with the tenderers. After completion of discussions and freezing the techno-commercial conditions, the Technical & Commercial Evaluation Committees shall submit their recommendations to the Tender Committee. After due deliberations, the Tender Committee shall open the valid price bids for final evaluation of the tender including the price and submit its recommendation for the approval of the Competent Authority for placement of



order/award of contract to the suitable tenderer.

50. Clause 9.4 deals with Comparative Statement of price bids as under;

9.4.1. After completion of the techno-commercial scrutiny, as explained in Paras 9.1 and 9.2, the price bids shall be opened and evaluated. At this stage if price bids are less than X+2, prior approval of Competent Authority be obtained for opening the price bids.

9.4.4 The evaluated prices as per Paras 9.4.1 to 9.4.3 worked out in the comparative statement for different tenderers will be ranked as L-1, L-2, L-3 . . . . .L-1 being the lowest. The estimated price, as per the indent and its percentage variation from the total quoted price worked out as per comparative statement for each tenderer, will also be recorded in the comparative statement.

51. The above are the relevant Clauses in PCP-06 which would make one understand as to how, a tender is floated, processed and finalised and who are the functionaries involved in the process and their powers and duties. In the light of the above provisions, let me further analyse the case.

52. It is the case of the petitioner that there was no lack of clarity prescribed in the tender documents and in an arbitrary and unreasonable manner and on a false ground, the 2<sup>nd</sup> tender process had been cancelled.

53. The evaluation criteria according to the second tender notice is as follows;

1. The total cost of all the three gases including fixed charges for fifteen (15) years shall be brought down to Net Present Value of the gases.

2. An escalation @ 5% p.a. shall be applicable for power rates only for the contract period.

3. A discounting factor of 10% shall be the basis for computing the Net present value.

4. For the purpose of evaluation, one uniform Power Cost on base date shall be considered for all the three gases.

54. A glance through the above evaluation criteria in the second tender notification would go to show that there is no definite evaluation mechanism mentioned therein, in the sense, whether the evaluation has to be made on the basis of Average Flow Rate per hour or on the basis of days requirement of all the three gases. From the records placed before me, I am not able to find that this aspect was anytime discussed when the Techno Commercial bids were opened and when the tenderers participated in the discussions held on 20.12.2007 to 21.12.2007. All that could be gathered would be that certain deviations in the tender documents submitted by Inox Air Products and Prax Air were noticed during negotiations; same was brought to the notice of their representatives and when they were informed that such deviations were not permissible, they withdrew their deviations.

55. It is admitted in paragraph 20 of the counter affidavit by the respondents 1 to 3 that after the withdrawal of the deviations by the tenderers, the Technical Evaluation Committee (TEC) and Commercial Evaluation Committee (CEC) recommended on 10.01.2008 that all the three parties are Techno Commercially eligible. Thereafter, Inox Air Products and Prax Air submitted revised price bids also. The price bids of all the tenderers were admittedly handed over to the fifth respondent for the purpose of evaluation to arrive at Net Present Value (NPV) and consequently to calculate the total cost for the contract period of 15 years as contemplated in the tender documents.

56. The price bids were thereafter opened on 14.01.2008. It is stated by the petitioner that on such opening, the petitioner company was found to be the L-1. But the fifth respondent appears to have not prepared the comparative statement of price bids at once. Between 14.01.2008 and 30.01.2008, there were representations sent in writing by the tenderers, including the petitioner.

57. On 14.01.2008, the Prax Air sent a representation to the respondents 1 to 3 wherein in respect of the evaluation criteria adopted by the fifth respondent on the day of opening of the price bids, Prax Air stated as follows;

"We understand that there is some lack of clarity on the flow rates to be considered for evaluation. We strongly feel that Price Bid evaluation should be done on the basis of daily average flow required by SSP indicated in the tender (Gaseous Oxygen:51,600 NM3/day, Gaseous Nitrogen:22,500 NM3/day, and Argon:11,500

NM3/day), and not on the basis of production capacity of the Oxygen Plant. This is because SSP will make payments on the basis of their average daily requirement, and not on the basis of production of the Oxygen Plant.

As per current statutory tax and duty structure prevalent in India, excise duty and local ST are CENVATable and VATable respectively. Accordingly, we request you to do the price bid evaluation on Net of CENVAT and Net of VAT basis. This is a true reflection of the Total Gas Price indicated in the tender, because this will be the net outgo for SSP."

58. On 15.01.2008 Prax Air India Private Limited sent another communication wherein, it stated as follows;

"We understand that your consultant, M/s.MN Dastur has chosen to do the Price Bid Evaluation based on Plant Production Rate for Gaseous Oxygen & Nitrogen, and Day Requirement for Gaseous Argon. We would like to bring to your kind attention that this is an erroneous method of evaluation. The correct mode of evaluation should be based on your Day requirement for all gases (gaseous oxygen, nitrogen and argon). We request you to refer to Preamble Art.1.1 (3<sup>rd</sup> paragraph) of Specification No.SSEP-04-UTL-001 (Rev.01), and to Annexure-II of the Draft Agreement.

The lowest bidder as per MN Dastur's chosen method will charge SSP an additional Rs.12 lakhs per month at your Day Requirement level. Please find enclosed detailed calculation of the monthly invoice to SSP for all the bidders at the Day Requirement level.

Hence, we request you to do the Price Bid Evaluation based on your Day Requirement for all gases and not on Average Flow Rate for some gases, as this will increase the overall monthly gas cost for SSP as demonstrated above."

59. From the above said two representations, it is clear that according to Prax Air, evaluation should be made on day requirement basis in respect of all the three gases and the price bids evaluation on Net of CENVAT and Net of VAT basis should also be done.

60. On 16.01.2008, the petitioner sent a representation to the respondents wherein he had stated as follows;



"We are happy to note that M/s. MSPL Gases limited was the lowest bidder as calculated based on the evaluation criteria specified in your price format attached to the tender documents (i.e. escalation of 5% applicable for Power rates for the contract period and a discounting factor of 10% shall be the basis for computing the net present value)."

61. On 16.01.2008, the respondent Inox sent a representation to the following effect;

"We understand that the NPV calculations, as done by MN Dastur & Company, are on the basis of Average Flow Rate for Gaseous Oxygen and Nitrogen, but for Argon they have used the day's consumption as mentioned in Annexure-II of the Draft Agreement. You will appreciate that this cannot be the basis of evaluation and hence it should only be evaluated either on the basis of Day's Requirement for all three gases or Average Flow Rate per hour of all three gases, as per Annexure-II of the Draft Agreement, as mentioned above." A comparative table of all the three gases on Nm3 per Day as per annexure 2 of the draft agreement is also attached to the said communication.

62. On 16.01.2008, the respondent Inox sent another communication wherein it has been stated as follows;

"We understand that the NPV calculations are being done by M N Dastur & Company on the basis of Average Flow Rate for Gaseous Oxygen and Nitrogen in conjunction with day's consumption of Argon. You will appreciate that this cannot be the basis for evaluation from the "Principles of Equity" and hence it should be evaluated either on the basis of Day Requirement of Average Flow Rate as per Annexure-II as mentioned above."

63. While so, the petitioner sent a letter dated 18.01.2008 wherein inter alia it has stated as follows;

"From this, it is evidently clear that the quantity of argon gas to be outsourced was not above 20 tpd taking into account the expected production of 2 tpd from the Air Separation Unit to be installed by the Successful bidder."

"Therefore the quantities of Argon Gas indicated in the Annexure II under average flow rate per hour or per day requirements has no relevance to the quantities to be taken for evaluation beyond the Argon gas quantity produced from the plant in total disregard to the stipulations made at various places in the bid documents in express terms. To bring more clarity on the subject the tender documents has clearly brought out and frozen the quantity to 20 tons per day of argon gas to be outsourced and supplied which finds specific mention at various places in the tender document. These stipulations are specified in express terms and therefore, can not be ignored and disregarded. This is therefore, relevant for eligibility and evaluating the price impact.

After evaluation and qualifying the technical bids and having given final opportunity to the tenderers to seek any clarifications before submitting the price bids vide your letter no:PU-E 88280 1R dated 11.01.2008, entertaining and considering any other interpretation and proposal from any of the unsuccessful bidders will amount to a deviation from the evaluation guidelines prescribed in the bid document after submission of price bids and should not be permitted by SSP."

64. On 19.01.2008 another letter was sent by the petitioner which contains almost the similar contentions. Again on 19.01.2008, the Prax Air has sent a letter wherein the Prax Air has contended as follows;

"Your daily requirement is given in Annexure-II of the draft agreement. We also bring to your notice the steel production and the corresponding gas requirement indicated in the preamble to the ITT. Additional production above 179,400 t/year of liquid steel in EAF, 189,350 t/year of liquid steel in AOD, and higher consumption gases thereof appears to be beyond the scope of the subject tender. Accordingly, we maintain that the "Contracted Requirement", and the "Contracted Quantity" are both equal to the daily requirement indicated in the Annexure-II of the draft agreement and the Preamble of the ITT, which is 51,600 Nm<sup>3</sup>/hr

for gaseous oxygen, 22,500Nm<sup>3</sup>/hr for gaseous nitrogen, and 11,500Nm<sup>3</sup>/hr for gaseous argon.

We trust that you will look into this using your esteemed judgment and agree with us on this matter."

65. On 21.08.2008, the petitioner has sent another representation wherein the petitioner has stated as follows;

"There is inconsistency in the figures shown against Gaseous Argon requirement in Annexure-II. Therefore, in order to know the correct figure of outsourcing requirement one needs to go deeper and find out whether at any place in the tender document requirement of Gaseous Argon specified or quantified and taking all the stipulations in account harmoniously which one is the correct requirement having regard to the object i.e. the process requirement of the Argon Gas which is clearly specified in the Preamble as explained above.

In other words, if there is a doubt about which of the two interpretations or meaning is the correct one, then they have to be given harmonious interpretation having regard of the object which the process requires.

It is well recognized and established rule of interpretation of tender conditions that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the tender. Any other interpretation that frustrates the present purpose of the tender will not be fair."

66. On 21.01.2008, the Prax Air sent another letter wherein it is stated as follows;

"We would like to highlight that we are the lowest bidder at the "Day Requirement" level, and our competitors monthly bill at this level is higher than ours by Rs.12-17 lacs. Please find below detailed calculation of the monthly invoice to SSP for all the Bidders at the "Day Requirement" level

	<b><i>Praxair</i></b>	<b><i>INOX-AP</i></b>	<b><i>MSPL</i></b>
Fixed Facility Fee (Rs lacs/month)	59.5	125.0	100.00



	<b>Praxair</b>	<b>INOX-AP</b>	<b>MSPL</b>
Gaseous Oxygen Bill (Rs lacs/month)	$(51,600 \times 358 \times 5.68) / 12/100,000=87.44$	$(51.600 \times 358 \times 4.61) / 12/100,000=70.97$	$(51.600 \times 358 \times 4.00) / 12/100,000=61.58$
Gaseous nitrogen bill (Rs lacs/month)	$(22,500 \times 358 \times 2.22) / 12/100,000=14.90$	$(22,500 \times 358 \times 1.00) / 12/100,000=6.71$	$(22,500 \times 358 \times 0.80) / 12/100,000=5.37$
Gaseous argon bill (Rs lacs/month)	$(11,500 \times 358 \times 22.00) / 12/100,000=75.48$	$(11,500 \times 358 \times 15.00) / 12/100,000=51.46$	$(11,500 \times 358 \times 24.00) / 12/100,000=82.34$
Total outgo for SSP (Rs lacs/month)	237.32	254.14	249.29
Higher than Praxair monthly bill by (Rs lacs/month)	-	16.82	11.97

In fact, our monthly billing will be lower than all our competitors' over the entire range of expected operation. The graph showing the comparison between the monthly billing figures for all bidders is enclosed as annexure-I.

Hence, we request you to do the Price Bid Evaluation based on your "Day Requirement" for all gases on "net of CENVAT/VAT" basis.

We trust that you will look into this using your esteemed judgment, and agree with us on this matter."

67. On 22.01.2008, the petitioner sent another letter wherein it is stated as follows;

"From the above it is clear that there was no doubt or any ambiguity among SSP and all bidders about the contracted requirement of Argon Gas which was admittedly 20 TDP only.

In view of the above stipulations made in the bid document as conveyed Vide our above reference letter including the letter dated 21.01.2008 there is no scope for taking any other interruption about contracted requirement of Argon."

68. On 23.01.2008, the respondent Inox Air has sent another letter wherein it claimed as follows;

"In view of the above, it is abundantly clear and contract specific that the evaluation of the offer shall be made on the following basis:

<b>Gas</b>	<b>UOM</b>	<b>Average Flow</b>
GOX	Nm3/Hr	3500
HP GAN	Nm3/Hr	1200
GAR	Nm3/Hr	825.0

On the basis of the above INOXAP's offer becomes the Lowest."

69. From the above correspondences from the tenderers, it is very obvious that there was no clear understanding of the evaluation criteria. It is evident that each company claimed that the evaluation criteria adopted by it alone is correct.

70. As per Annexure-II (Draft Agreement), Requirement of Gases is as follows;

<b>Sl. No.</b>	<b>Product</b>	<b>Parameters</b>	<b>Unit</b>	<b>Oty</b>
1 Oxygen	Gaseous	Purity	% O2 (Balance Argon)	99.6 to 99.8
		Pressure	Kg/Cm <sup>2</sup>	24
		Day Requirement	Nm <sup>3</sup> /day	51600
		Average Flow rate	Nm <sup>3</sup> /hr	3500
2 Pressure	High	Purity	2 ppm O2 Maximum	same
Nitrogen	Gaseous	Pressure	Kg/Cm <sup>2</sup>	22
		Day Requirement	Nm <sup>3</sup> /day	22500
		Average Flow rate	Nm <sup>3</sup> /hr	1200

3 Pressure  Nitrogen	Low	Purity	2 ppm O2 maximum	same
	Gaseous	Pressure	Kg/Cm <sup>2</sup>	7-9
		Day Requirement	Nm <sup>3</sup> /day	250 (For Occasional Purging of the accumulator)
		Average Flow rate	Nm <sup>3</sup> /hr	- ---
4 Argon	Gaseous	Purity	< 2ppm O2 <2ppm N2 and maximum total impurities 5 ppm	same
		Pressure	Kg/Cm <sup>2</sup>	22
		Day Requirement	Nm <sup>3</sup>	11500
		Average Flow rate	Nm <sup>3</sup> /hr	825

71. At this juncture, once again it is necessary to reproduce the evaluation criteria as per the tender documents.

1. The total cost of all the three gases including fixed charges for fifteen (15) years shall be brought down to Net Present Value of the gases.

2. An escalation @ 5% p.a. shall be applicable for power rates only for the contract period.

3. A discounting factor of 10% shall be the basis for computing the Net present value.

4. For the purpose of evaluation, one uniform Power Cost on base date shall be considered for all the three gases.

72. From the requirements of Gases as found in annexure-II of the draft agreement it could be seen that requirement of Gaseous Oxygen per day is 51600 Nm<sup>3</sup> and the Average Flow rate is 3500 Nm<sup>3</sup>/hr. The requirement of Gaseous Nitrogen per day is 22500 Nm<sup>3</sup> and Average Flow rate is 1200 Nm<sup>3</sup>/hr. The requirement of Gaseous Argon per day is 11500 Nm<sup>3</sup> and Average Flow rate is 825 Nm<sup>3</sup>/hr.

73. This would go to show that in respect of all the three gases, the value of the quantity of gases to be supplied per day



should be calculated for evaluation purposes. To put it otherwise in respect of all the three gases, evaluation is to be made on the basis of the days requirement. Average Flow rate means supply of the required gas in a particular pressure/hr on a day. There should be a minimum average flow rate of all the three gases as mentioned in the annexure 2 of the draft agreement. If it is the interpretation of the petitioner that the average requirement per day should be the basis for evaluation, that should be done in respect of all the three gases. To put it in a more understandable manner, either evaluation should be made for all the three gases on the basis of days requirement or on the basis of average flow rate per hour. This is the plain interpretation one could reasonably give on going through the draft agreement.

74. There is yet another reason to state that the evaluation criteria stated in tender documents and the requirement of gases stated in annexure 2 of the draft agreement are inconsistent. If the average hourly flow rate (Nm<sup>3</sup>/hr) is converted into day's requirement (Nm<sup>3</sup>/day) (hourly flow rate in Nm<sup>3</sup>/hr of gas multiplied by 24 hrs,) the resultant figure should tally with the day's requirement mentioned in the annexure II. But it differs from the day's requirement as given in Annexure -II as detailed below;

<b>Gas</b>	<b>Hourly flow rate converted in to day requirement NM<sup>3</sup>/hrX24 =</b>	<b>Day requirement as provided in Annexure -II</b>
Oxygen	3500X24= <u>84,000</u> i.e., (120 TPD)	<u>51,600</u> (73.71 TPD)
Nitrogen	1,200X24= <u>28,800</u> i.e., (36 TPD)	<u>22,500</u> (28.125 TPD)
Argon	825X24= <u>19,800</u> i.e., (35.35 TPD)	<u>11,500</u> (20.5 TPD)

75. From the above it could be easily found that the daily requirement per hour calculated on the basis of the hourly flow rate do not tally with the annexure. The tender documents do not also say whether gases are to be supplied for 365 days continuously in a year for a period of 15 years. It is also not clear whether supply is to be made for all the 24 hours in a day. Thus, the annexure II to the draft agreement instead of clarifying the evaluation method in the tender document, goes to confuse the same.

76. While so, a letter dated 30.01.2008 allegedly came to be sent by the fifth respondent to the respondents 1 to 3. Though in the counter it is stated that the respondents 1 to 3 did not receive any such letter from the fifth respondent dated 30.01.2008, in the absence of any counter filed by the fifth respondent explaining this, there is every possibility for this Court to assume that such a letter would have been sent to the respondent 1 to 3 by fifth respondent. On such assumption, let me now analyse the said letter. In that letter dated 30.01.2008, the fifth

respondent made evaluation in respect of Oxygen and Nitrogen on days requirement basis but in respect of Argon alone it made on Average Flow rate per hour basis. In my considered opinion this evaluation cannot be correct.

77. Now, the next question is; what is the force or effect of this letter dated 30.01.2008 on the respondents 1 to 3? It may be true that such a letter was sent on 30.01.2008 by the fifth respondent to respondents 1 to 3. But, the ultimate authority to make the evaluation is only the Tender Committee. The fifth respondent is only the consultant who could only suggest. Of course, as per the letter dated 30.01.2008, the petitioner was L-1. But it does not mean that the said evaluation so made by the fifth respondent would bind either the tender committee or the other authorities of the respondents 1 to 3. Even in the absence of any other communication from the fifth respondent and assuming that the letter dated 30.01.2008 was the final recommendation made by the fifth respondent, even then, it is quite within the competence of the tender committee and the other authorities of the respondents 1 to 3 to examine whether the evaluation made by the fifth respondent is correct and the same would be in the interest of SAIL. Therefore, there can be no doubt that the respondents 1 to 3 are not bound by the letter dated 30.01.2008 of the fifth respondent as the evaluation is to be made finally only by the Committee.

78. On the next day, that was on 01.02.2008, the fifth respondent sent another letter to the Steel Authority of India wherein it has stated as follows;

"In view of the above and to give one more equal opportunity to the bidders, we are proposing that SSP may consider requesting all the eligible bidders to submit fresh prices once again defining once again the evaluation criteria and other applicable contract terms."

79. This letter, according to the learned Senior Counsel appearing for the petitioner, would have been got only to favour "Inox" so as to reject the evaluation made in favour of the petitioner. It is contended by the learned Senior Counsel that the letter dated 30.01.2008 indicates that it was the final recommendation. Admittedly, there was no representation made between 30.01.2008 and 01.02.2008, but the letter dated 01.02.2008 states as if the said letter came to be written on considering the representations received from all the parties. The learned Senior Counsel would, therefore, question as to how this letter could come to be written when, in fact, there was no representation from any tenderer between 30.01.2008 and 01.02.2008.

80. Per contra, the learned Senior Counsel for the respondents 1 to 3 would submit that the representations referred to in the letter dated 01.02.2008 would refer to the representations received prior to 30.01.2008. The learned Counsel for the fifth respondent would also say so. In my considered opinion, for the fifth respondent, being the consultant of the respondents 1 to 3, there is no bar to change its opinion and to send any number of communications. Had it been true that the letter dated 01.02.2008 came to be issued at the instance of respondents 1 to 3, one can expect the fifth respondent to have suggested for cancellation of the entire tender process and to go for fresh tender process. But in the letter dated 01.02.2008, the fifth respondent has only requested R1 to R3 to define once again the evaluation criteria and to call for fresh bids from the parties. In my considered opinion, being the consultant, the fifth respondent is free to make such suggestions. Thus, the argument of the learned Senior Counsel for the petitioner that the letter dated 01.02.2008 would have been got up at the instance of the respondents 1 to 3 is liable to be rejected.

81. From the records, it is seen that the letter dated 01.02.2008 and all the representations made by the parties were placed before several authorities of the respondents 1 to 3.

82. It is stated in the counter that the possibility of defining the evaluation criteria afresh and to call for fresh price bids was also discussed at various levels. But, the said Course was not possible since the same would be against the tender conditions. The said contention deserves to be accepted. Here it should be kept in mind that it is not as if, immediately on receiving the letter dated 01.02.2008 from the fifth respondent, the decision to cancel the 2<sup>nd</sup> tender process and to call for re-tender was taken.

83. The above matter was considered by the plant level tender committee and it decided not to seek for revised price bids as suggested by the fifth respondent. As extracted in the previous paragraphs, the matter was discussed at various levels of respondents 1 to 3 and finally it was decided to cancel the 2<sup>nd</sup> tender and to go in for re-tender by incorporating necessary changes in the evaluation criteria which lacks clarity (as concluded in the previous paragraphs) which lead to different interpretations by the bidders.

84. Now, let me see whether, really in the 3<sup>rd</sup> tender documents such changes have been introduced in order to obviate the different interpretations by the bidders. In the 3<sup>rd</sup> tender dated 23.02.2008, which is now under challenge, the evaluation criteria have been stated as follows;



1. Price bid evaluation will be done on Net of CENVAT and Net of TNVAT basis.

2. For the purpose of evaluation of Price bids and for calculating the total variable cost of gases, the contracted quantity of Oxygen shall be taken as 75600 NM3/day, HP Nitrogen as 28800 NM3/day and Argon as 11200 NM3/day. The number of days in a year shall be taken as 358 (i.e. 365 days less 7 days of annual schedule maintenance).

3. The total variable cost, net of CENVAT & TNVAT, of all the three gases (Oxygen, HP-Nitrogen & Argon) and fixed facility charges excluding taxes and duties shall be calculated for fifteen (15) years and brought down to Net Present Value (NPV) of the gases. The taxes and duties, if any, applicable on fixed facility charges as indicated under fixed facility charges will not be taken for the purpose of evaluation.

4. As escalation @ 5% p.a. shall be applicable for power rates for all three Gases (Oxygen, HP-Nitrogen & Argon) during Contract period of 15 years only for the purpose of evaluation.

5. A discounting factor of 10% shall be the basis for computing the Net Present Value (NPV).

6. For evaluation purpose, the notional Power Cost on base date i.e.; Rs.4.86/=(Rupees four and paise eighty six only) per unit shall be considered for Oxygen and HP Nitrogen gases.

7. For evaluation purpose, the notional Power cost on base date i.e. Rs.4.86/=(Rupees four and paise eighty six only) per unit shall be considered also for Argon gas irrespective of the source/state of supply.

8. Extent of leased land required or lease rent paid by SELLER, will have no impact on evaluation criteria."

85. A perusal of the above evaluation criteria stipulated in the impugned tender documents would go to show that it has been clarified that evaluation of price bids and for calculating the total variable cost of gases, the contracted quantity of all the gases (Oxygen, Nitrogen and Argon) shall be on NM3/day requirement and the number of days shall be 358 that means less 7 days of annual schedule maintenance. In the annexure-II of the draft agreement, the contract quantity of gases is stated as follows;

<b>Sl.No.</b>	<b>Product</b>	<b>Parameters</b>	<b>Unit</b>	<b>Value</b>
1. Oxygen	Gaseous	Purity	% O2 (Balance Argon)	99.6 to 99.8
		Pressure	Kg/Cm2 (g)	24
		Avg.Consumption	Nm3/day	75600
2. Pressure N2	High Gaseous	Purity	ppm	2ppm O2 Maximum
		Pressure	Kg/Cm2 (g)	22
		Avg.Consumption	Nm3/day	28800
3. Argon	Gaseous	Purity	ppm	<2ppm O2 <2ppm N2 and maximum total impurities 5 ppm
		Pressure	Kg/Cm2 (g)	22
		Avg.Consumption	Nm3/day	11200

86. A glance through the said annexure would go to show that the Hourly Flow Rate of all the three gases as found in the 2<sup>nd</sup> tender has been given up and only Average Consumption per day of all the three gases is mentioned. There is no contradiction between the evaluation criteria for contracted quantity of gases mentioned in the tender notification and the contracted quantity of gases stated in annexure-II of the Draft Agreement. The evaluation criteria further clarifies that the total variable cost, net of CENVAT and TANVAT of all the three gases and fixed facility charges

excluding taxes and duties shall be calculated for 15 years and brought down to Net Present Value (NPV) of the gases. But, in the previous 2<sup>nd</sup> tender, there is no such reference about the CENVAT and TNVAT. Two more Clauses have also been incorporated in the 3<sup>rd</sup> tender documents. Now, in my considered opinion, a reading of the evaluation criteria and the contracted quantity of the gases as found in the 3<sup>rd</sup> tender documents would not lead to more than one interpretation. The terms and conditions are simple, precise and clear. This shows that the cancellation of the second tender and to go in for the 3<sup>rd</sup> tender is only with good intention in the interest of SAIL and not with a view to favour "Inox" as contented by the learned Senior Counsel for the petitioner.

87. The learned Senior Counsel appearing for the petitioner would submit that various circumstances are available in this case to infer malafide intention. He would submit that though in the first tender floated, recommendation was made by the fifth respondent in favour of "BOC India Ltd.," without assigning any reason, the same was cancelled which itself was only to favour Inox. Admittedly, in the 1<sup>st</sup> tender, the company, which was the L1 (BOC India Limited), did not challenge the decision of the authorities. Though the petitioner MSPL Gases Limited was also a bidder, the petitioner did not choose to challenge the same. Therefore, it is too late on the part of the petitioner to contend that the 1<sup>st</sup> tender itself was cancelled only to favour Inox. Unless the cancellation of the 1<sup>st</sup> tender is challenged before this Court, one cannot expect the respondents 1 to 3 to give details as to why the 1<sup>st</sup> tender came to be cancelled. Therefore, the contention of the learned Senior Counsel that the cancellation of the first tender itself would be sufficient to infer mala fide on the part of the respondents 1 to 3 is only to be rejected. In respect of the cancellation of the 2<sup>nd</sup> tender, as I have already concluded, there was no consistency between the evaluation criteria as found in the tender documents and the required quantity of gases as found in the annexure-II of the draft agreement. The annexure stated both, about the days requirement as well as the Hourly Flow Rate. If Hourly Flow Rate is multiplied by 24 hours, it does not tally with the days requirement. If days requirement is multiplied by 365 days, then it does not tally with the yearly requirement. The tender document does not specifically say whether the evaluation would be made on the basis of daily requirement or on the basis of Hourly Flow Rate. As stated above, each one of the bidders wanted evaluation to be done in its own way. The fifth respondent in its letter dated 30.01.2008, evaluated on the basis days requirement in respect of Oxygen and Nitrogen, whereas in respect of Argon it evaluated on the basis Hourly Flow Rate. Admittedly, if the cost is calculated on the basis of Hourly Flow Rate by arriving at the Net Present Value, it would be totally different from the value of the gases calculated on the basis of the daily requirement by arriving



at NPV on that basis. In arithmetical calculation, if Hourly Flow Rate is multiplied by 24, it should tally with days requirement. But in this case, demonstrably, it does not do so. Thus, it is very clear that there are lot of confusions in the 2<sup>nd</sup> tender documents. There is also every chance to believe that some other companies, by going through the second tender documents, would have been misled by these anomalies and so they would not have participated in the tender process. For all these reasons, I am of the clear opinion that the respondents 1 to 3 have taken the right decision to cancel the 2<sup>nd</sup> tender process and to go in for the 3<sup>rd</sup> tender without any confusion. I do not find anything arbitrary, unreasonable or mala fide in the said decision of the respondents 1 to 3.

88. Yet another contention of the learned Senior Counsel for the petitioner is that the respondents 1 to 3 have not come forward with the clean hands inasmuch as they have denied the receipt of letter dated 30.01.2008 from the fifth respondent. As of now, there is no material to show that such letter was received by the respondents 1 to 3. The fifth respondent has not filed any counter to clarify the same. But, from the records, it is seen that before taking the decision to cancel the 2<sup>nd</sup> tender, on learning from the correspondence of the petitioner that a letter was sent on 30.01.2008 by the fifth respondent, immediately the fifth respondent was called to state as to whether any such letter was sent and to explain. In response, the fifth respondent has sent a letter dated 20.03.2008 wherein it is stated as follows;

"During the meeting SAIL has informed that they have received a representation from M/s MSPL enclosing letter Ref.MD-25046-288A dated 30<sup>th</sup> January 2008 and enquired about the status of this letter. Dasturco clarified that this was one of the alternative evaluation calculations worked out by them. Daturco further stated that they had worked out other alternative calculations considering daily flow rate of all gases etc. These alternatives were worked out to check the various representations received. Dasturco also clarified that the said letter had not been officially dispatched to SAIL-SSP since it was felt that any evaluation method followed will not be able to address the various representations received and the matter needed further review."

89. This letter would go to show that the fifth respondent company did not dispatch this letter officially to the respondents 1 to 3. Thus, the representation of the petitioner that the fifth respondent had recommended for grant of order of acceptance to the



petitioner treating him as the L1 was also duly considered by the authorities and it is not as if the representation was not duly considered. Thus, I do not find any material to hold that the respondents 1 to 3 have not come forward with clean hands.

90. As extracted in the earlier paragraphs, the law laid down by the Honourable Supreme Court is that if the action of the authorities is actuated by malice or the same is arbitrary or unreasonable, certainly this Court should exercise its power of judicial review to interfere with the same. But in this case, as I have concluded, there is neither malice nor unreasonableness nor arbitrariness. Instead, as I have discussed above, there are enormous circumstances to safely conclude that the said decision was taken with good intention in the interest of SAIL. The decision of the respondents 1 to 3 to go in for fresh tender after canceling the 2<sup>nd</sup> tender does not suffer from any illegality. Thus, it does not require any interference at the hands of this Court at all.

91. In the result, the writ petitions fail and they are accordingly dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-  
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

vsi/jbm/jikr

To

1. Executive Director (Operations)  
M/s.Steel Authority of India Limited  
ISPAT Bhavan,  
Lodi Road, New Delhi-110 003.

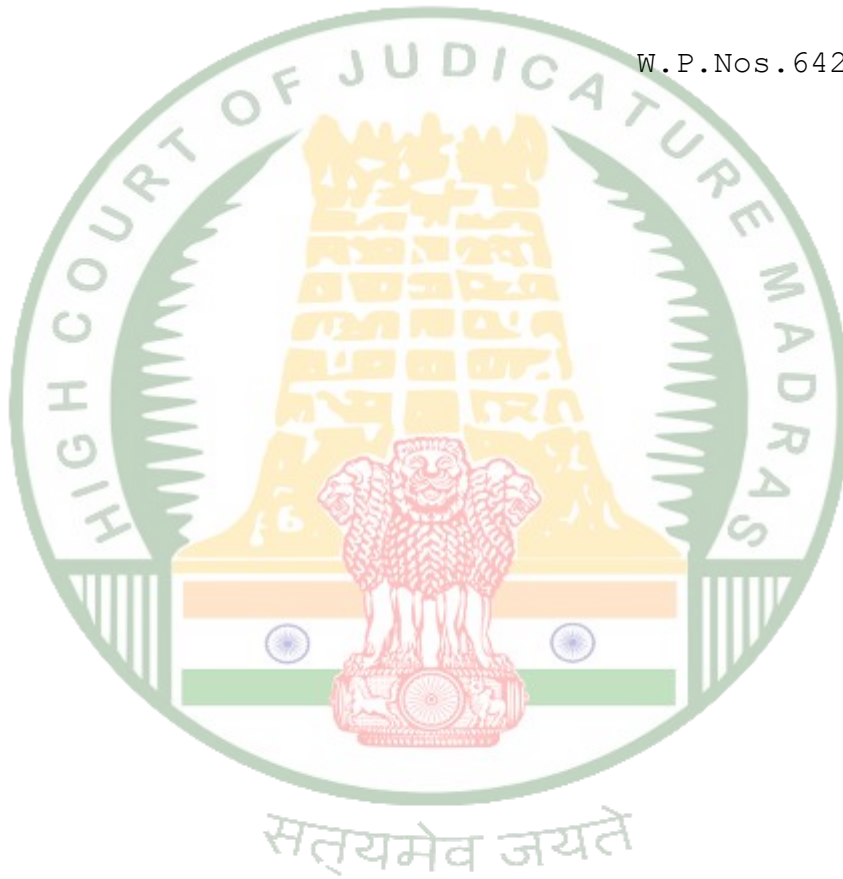
2. Deputy General Manager,  
Salem Steel Plant  
I/C (Materials Management)  
A Unit of Steel Authority of India Limited,  
Salem-636 013,  
Tamil Nadu.

3. Deputy General Manager I/C (Materials Management)  
Salem Steel Plant,  
Salem- 636 013,  
Tamil Nadu.

1 cc to Mrs. Uma Vijaya Kumar, Advocate, SR. 41992  
1 cc to Mr. Srinath Sridevan, Advocate, SR. 41938  
2 ccs to Mr. A. Ilango, Advocate, SR. 41511  
1 cc to Mr. Mani Shankar, Advocate, SR. 41499

W.P.Nos. 6425 & 6426 of 2008

GV (CO)  
kk 6/8



WEB COPY