HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

OWP No.635/2016
MP No.01/2016
MP No.02/2016

Date of order: 28.01.2017

Drangdhuran Hydro Power Consortium and another

Versus

Chenab Valley Power Projects Private Limited and others

Coram:

Hon'ble Mr Justice Tashi Rabstan, Judge

Appearing Counsel:

For petitioner(s):	Mr Z. A. Shah, Senior Advocate with Mr Vipin Gandotra, Advocate
For respondent(s):	Mr Sunil Sethi, Senior Advocate with Mr Ankesh Chandel, and Mr Parimoksh Seth Advocates

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i) Whether to be reported in Press/Media:	**Optional**
ii) Whether to be reported in Digest/Journal:	**Yes.**

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1. Chenab Valley Power Projects Private Limited – respondent No.1, which is a Joint Venture of National Hydro Power Corporation Limited (NHPC), J&K State Power Development Corporation Limited (JKSPDC) and Power Trading Corporation India Limited (PTC), responsible to plan, promote and organise an integrated and efficient development of *Pakal Dul, Kiru* and *Kwar* Hydroelectric Projects in Chenab River Basin in all its aspects in the State of Jammu and Kashmir, intends to

implement Pakal Dul (Drangdhuran) Hydroelectric Project 1000 MW (4 x 250 MW) in J&K and, as such, invited sealed tenders vide Invitation of Bid (International Competitive Bidding) bearing No.CVPP/ PD/MW/RB/TK/ 2013 dated 19th June 2013, for "*Turnkey Execution*" of Pakal Dul (Drangdhuran) Hydroelectric Project from Consortia/Companies through International Competitive Bidding (ICB). The scope of work included all necessary additional investigations, planning, design and engineering, supply of equipments and materials, civil construction, design, manufacturing, supply installation, testing and commissioning. The project was to be handed over to respondent No.1. One of the conditions contained in Invitation of Bid, at condition No.13, was that the "*Owner shall have the right to reject all or any Bid and shall not be bound to accept the lowest or any other Bid or to give any reason for such decision*".

2. Petitioner and proforma respondents 2 and 3 as well responded to above Invitation of Bid. In all, five tenderers responded. Of five, four tenderers were found sound, including petitioner. However, respondent No.1 vide letter No.CVPP/PD/MW/RB/TK-07/2016/2383 dated 16th February 2016, informed petitioner that prices quoted by it were substantially higher than estimated cost of works,

based on CEA cleared/Government of India sanctioned estimate of the project, the manner in which the price bid had been structured involving unbalanced distribution among various work components, large amount of front loading and hedging of risks against Owner (respondent No.1) did not infuse confidence on the consortium for successful completion of project works and accordingly conveyed cancellation of both “Turnkey Tender” as also “petitioner’s bid”.

3. Petitioner, aggrieved with decision of cancellation of tender as also its bid, conveyed vide letter No.CVPP/PD/ MW/RB/TK-07/2016/2383 dated 16th February 2016, has knocked at portals of this Court with writ petition on hand, seeking quashment thereof, with further direction to respondent to reconsider petitioner’s tender for allotment of Pakal Dul Project. The case set up by petitioner is:

a) Petitioner No.1 is consortium of three companies, i.e. petitioner no.2 and proforma respondents 2&3, which had entered into a Consortium Agreement dated 1st October 2013, for submitting a bid to respondent No.1, in response to its Invitation to Tender for Turnkey execution of Pakal Dul Hydro Electric Project in District Kishtwar, Jammu. Petitioner no.2 is a company, duly incorporated under provisions of Companies Act, 1956, having its registered office at Patel Estate Road, Jogeshwari – (W), Mumbai 400102, Maharashtra. Petitioner No.2 is lead

partner of said Consortium, i.e. petitioner No.1, and is duly authorised to act for and on behalf of petitioner company and to institute present proceedings through petitioner No.1, Mr Reshi Kumar Sharma, constituted attorney of petitioner no.2, and by virtue of Resolution dated 30th March 2016, duly adopted and passed by Board of Directors of petitioner no.2; he is duly authorised and empowered to institute and file proceedings. Proforma respondent no.2 is a company, duly incorporated under Laws of Turnkey. Proforma respondent no.3 is a company, owned by Government of India and duly incorporated under Companies Act, 1956. The interest of petitioners and proforma respondents 2&3, are common and similar and, as such, petitioner company is claiming no relief against proforma respondents 2&3.

b) Respondent No.1 is an instrumentality/agency of the State and all its directors are appointed/nominated by Government of Jammu and Kashmir/Government of India. There are no private shareholders in the company. The decisions taken by said company are decision of the Government and decisions of Government, its instructions, etc. are binding on respondent company. The company qualifies as a “State” within the meaning of Article 12 of the Constitution.

c) Respondent No.1 invited tenders vide NIT dated 19th June 2013. Respondent No.1 had initially invited bids for the said project on 12th August 2011 and in response thereto, it was noticed that only few bidders could qualify and their numbers was very less. Having regard to poor response, respondent No.1 decided to retender for execution of the said project. After second NIT dated 19th

June 2013 was issued, petitioner company along with proforma respondents responded thereto and submitted their tender before due date.

d) Tendering process comprised of two stages. Every prospective tenderer was required to submit his tender with regard to “Technical Qualifications Bid” in a separate envelop and the “Price Bid” contained in the second separate envelop. In terms of the prescribed producers the prospective tenderer was required to first submit his “Technical Qualification Bid” and thereafter approximately two months’ time was granted to him to submit the “Financial Bid”. Accordingly respondents submitted their “Technical Qualification Bid” and “Price Bid” before its due dates i.e. on 5th October 2013 and 30th November 2013 respectively.

e) In all respondent No.1 received five tenders. Out of five tenderers, four tenderers were found “Techno-commercially sound” including petitioner and as such four bidders qualified for stage two of the bidding process. Petitioner received letter dated 8th January 2014 from respondent No.1 as regards petitioner meeting qualification criteria and its proposal found substantially responsive for execution of the project.

f) Petitioner company was invited to be present on 3rd February 2014 at the time of unsealing of “Price Bid”. Petitioner’s representative was present when “price bids” were opened and it was found petitioner had submitted lowest tender in comparison to other three tenderers. The rate offered, on turnkey basis by four bidders whose financial bid was opened were as follows:

(i)	Petitioner:	- 9278.53 Crore
(ii)	SCA Consortium:	- 9627.61 Crore
(iii)	Impregile-Gammon Consortium:	- 9861.14 Crore
(iv)	Soma-Song da PM Consortium:	- 11403.59 Crore

Petitioner's price bid was reportedly recommended by Tender Evaluation Committee (TEC) to Board of Directors, which was followed by calling petitioner for negotiations.

g) Petitioner was informed vide letter no.CVPP/PD/MW/RB/TK-07/2014/826 dated 5th May 2014 that prices/rates quoted by it in price bid are higher in respect of certain components of work and therefore a discussion was required with the company to justify and/or reduce the prices/rates. Petitioner company was also informed that discussions would include various aspects relating to prices quoted in Bill of Quantities (BOQ) and any other point, which might need clarification. In response thereto, petitioner addressed communication No.100/3551/533 dated 7th May 2014, wherein petitioner company asked for official confirmation of being lower bidder. Petitioner company also expressed its willingness to discuss the issue of prices/rates.

h) Having regard to response of petitioner company, respondent No.1 vide letter no.CVPP/PD/MW/RB/TK-07/2014/846 dated 9th May 2014 confirmed to petitioner company that upon evaluation, petitioner company had turned out to be lowest as per Article 19 of "ITB" of Bid document and for discussing issue, petitioner company was further informed to come for discussion on 20th May 2014.

i) The first meeting between parties took place on 7th June 2014. Respondent No.1 asked petitioner company to offer a discount on its bid price. Responding to suggestion, petitioner company explained to respondent No.1 that their tender bid was based on E.P.C. (Engineering, Procurement and Construction) arrangement and that itemwise rates quoted by petitioner company were only to relate cash flow and were not determinative of the price of the work done at the time the bills were raised. The price bid had been arranged in a manner that the overall price remained what was being offered by petitioner company but the payment was linked to various stages of work as would come into existence during the execution of the project as well as to BOQ. However, respondent No.1 insisted that in "public interest", petitioner company should offer discount notwithstanding the fact that company had not offered "item-rate contract rates". Petitioner company sought time to respond. After petitioner company had consultations with other members of the Consortium, second meeting was fixed on 30th June 2014 between the parties, upon request made in this behalf by petitioner company. In the second meeting, petitioner company responded to suggestion of respondent No.1 and submitted that price quoted by them was justified and that there was misevaluation and misappreciation of financial bid by respondent No.1 in the sense that respondent No.1 looked at the rates offered by petitioner company "itemwise" whereas the rates offered were in the context of overall execution of work and timely payment linked with the progress in the execution of the project. Respondent No.1 insisted on discount and linearization of certain items. At this stage petitioner

company finds it relevant to mention that respondent No.1 had made its own estimate of total cost of the project and while doing so item rate contract model had been taken into consideration. On the contrary tenders invited by respondent No.1, was on EPC Model and petitioner company responded on “EPC basis”. The fundamental difference between the two essentially lies in the risk involved during execution relating to variation in quantities, geological conditions including joint and several responsibilities for the successful performance of the plant with guaranteed output parameters as defined in the bid documents, failing which huge penalties are foreseen as per the terms and conditions of the Tender. Petitioner company had submitted its tender in a manner that the risks mentioned above were taken by it and was made itself responsible for remedying them whereas in the case of itemwise rates the risks are always that of the contract allotting authority. It is because of the difference in the approach to the evaluation of the financial bid that the parties were negotiating. Petitioner company sought further time to respond to the suggestion of respondent No.1.

j) On 3rd July 2014, petitioner company informed respondent No.1 the reasons and the basis of price difference between the estimate of the project as assessed by respondent No.1 and by petitioner company. Parties again met for third time on 15th July 2014. Having no choice in the matter and in the overall interests of the project, its need by the State and above all public interest, petitioner company offered discount of Rs.90.00 crore and reduced its Bid price accordingly. Respondent No.1 appreciated response of petitioner company on the one

hand but at the same time on the other have again insisted for further discount and linearization of rates. In the context of discussions between the parties in the third meeting, respondent No.1 asked petitioner company to submit their response/justification and reduction in the prices/rates along with various clarifications vide letter no.CVPP/PD/MW/RB/TK/2014/1320 dated 23rd July 2014. Petitioner company responded thereto vide its communication No.100/3551/1565 dated 28th July 2014, wherein petitioner confirmed reduction of the Bid price by Rs.90.00 Crores and sought further time for reverting back in the matter. After submitting response dated 28th July 2014, petitioner company submitted a detailed response vide their communication No.100/3551/1725 dated 9th August 2014, in which petitioner company justified quoted rates highlighting major variations in comparison with estimate of respondent No.1.

k) Fourth meeting was convened on 27th August 2014, as was requested by respondent. In 4th meeting there were further discussions and respondent No.1 insisted that there should be further reduction in the Bid Price. Respondent No.1 also insisted that there should be further linearization of certain lump sum items in BOQ. Placed in the situation and again in the overall interests of public and execution of project, petitioner company further reduced its Bid Price by Rs.35.00 Crores. It was followed by a formal letter by petitioner company bearing No.100/3551/1920 dated 28th August 2014, in which petitioner company clarified the position and explained the so-called difference between estimate of respondent company and petitioner company involved in execution of EPC contract. Petitioner company also in modification of

payment by way of linearization of certain items/rates in BOQ to suit the requirements of respondent No.1; petitioner company also confirmed discount offered by it in all amounting to Rs.125.00 Crore on the Bid price for civil works.

l) In response to petitioner's communication, respondent No.1 vide letter no.CVPP/PD/MW/RB/TK-07/2014/1612 dated 6th September 2014, made the observations that petitioner company has not specified as to how they wish to distribute/locate discount in the quoted prices and that the discounted prices are not comparable with the estimated cost and the prices are still on the higher side particularly in the TBM works component. Petitioner company was informed of the next meeting to review and discuss the matter.

m) Before next meeting (5th meeting) was convened, petitioner company was requested to extend the bid validity of their bid by four months i.e. upto 31st January 2014 (it should reach 2015). A request for extension in the bid security was also made vide letter dated 10thSeptember 2014.

n) 5th meeting was held between parties on 26th September 2014 and various aspects of matter were discussed and respondent No.1 was keen to bring prices as close as possible to the estimates which they had prepared at their own level. Petitioner company keeping in view variety of factors including the time span on negotiations, keeping validity of security and tender document intact etc. finally agreed to the following:

(a) Petitioner company would reduce its Bid price by Rs.75.00 Crore, in all making a reduction of Rs.200.00 Crore from their initial Bid price.

(b) Petitioner company also granted minimum interest recovery of Rs.275.00 Crore on the advanced as and when made available to it.

This was followed by a formal communication from petitioner company vide No.100/3551/2295 dated 29th September 2014. In this manner, petitioner company substantially tuned its tender with the estimate already prepared by respondent No.1. Petitioner company represented to respondent No.1 that having regard to reductions made including modification in linearization of payment, contract be allotted to them. By this time nearly two years had passed ever since bids were invited and there was price escalation in all the inputs required in execution of the project. Petitioner company, having granted maximum discount and benefit to respondent No.1, during the course of discussions, represented that it had legitimate expectation in the allotment of the contract and that the company did not have much to gain because of the time taken by respondent No.1. At this stage petitioner company finds it relevant to mention that ordinarily their bid, which was lowest in comparison to all other bidders, should have been accepted way back in 2013/14, but for insistence of respondent No.1 for reduction of the prices and for making other modification, petitioner company finally made aforesaid offer during course of negotiations to respondent No.1.

o) While petitioner company was awaiting for formal allotment of contract, it received another letter no.CVPP/

PD/MW/RB/TK-07/2014/1961 dated 21st October 2014, asking petitioner company to submit its revised cash flow statement as per linearization and discount in the quoted price offered by Consortium. Petitioner company was also informed that Government of Jammu and Kashmir has sanctioned exemption from the tax leviable on works contract as well as entry tax in respect of 1000 MWE Pakal Dul Project. Petitioner company was informed that its Bid price shall be accordingly reduced. In response thereto, petitioner company addressed communication No.100/3551/2583 dated 24th October 2014, clarifying the position consequent to grant of tax exemption by the Government.

p) After putting all clarifications, discounts, exemptions etc. the entire matter reportedly was discussed by the Committee, which was corresponding with petitioner company and had previously been set up by the Board of Directors, had submitted its detailed report to the Board of Directors and recommended allotment of contract in favour of petitioner company. It appears to petitioner company that no decision was taken. Instead petitioner company was again called for further deliberations/ discussions. Responding thereto, representative of petitioner company held first meeting with Directors Committee on 15th December 2014. Once again Directors Committee asked petitioner company to grant further discount as also linearization in rates of certain items. Petitioner company's representative sought time to respond to the suggestion of Directors Committee.

q) Second meeting with Directors Committee was held on 22nd December 2014, in which petitioner company agreed

for linearization of lump sum items to the satisfaction of Directors Committee. Petitioner company did not agree to any further discount. Company also provided clarification of road works as required by Directors Committee. The discussions were followed by letters from petitioner company. On 13th January 2015, petitioner company was requested to extend validity of its bid till May 31, 2015, which was extended by petitioner company. On 23rd March 2015, petitioner company submitted its cash flow as per revised linearization and discount already offered and clarification on WCT.

r) Petitioner company did not hear anything thereafter till 16th May 2015, when petitioner company was again asked to extend its bid validity till 31st August 2015, which was extended up to 31st August 20105 and thereafter extended up to 30th November 2015. Again in view of request, petitioner company extended its bid validity till 31st March 2016. No extension of bid validity beyond 31st March 2016 was sought for by respondent No.1.

s) By March 2015, after petitioner company had last meeting with Directors Committee on 22nd December 2014, there were changes in Board of Directors. Two of Directors had demitted their office and in their place only one person was nominated in the Board of Directors.

t) Having regard to the fact situation it is clearly established that decision to cancel tender is exercise of *mala fide* power, arbitrariness, unreasonableness and defeats rights of petitioner, apart from being violative of doctrine of legitimate expectation.

4. Above set of facts and submissions, according to petitioner company, forced it to knock at portals of this Court. The grounds of challenge are:

a) Rejection of petitioner company's tender notice is clearly arbitrary and unreasonable. Respondent No.1 had a poor response when it for the first time invited tenders for the project in August 2011. It took no steps thereafter till June, 2013, when it decided to retender. The delay of two years in inviting tenders, for no reason or justification is patently contrary to public interest in view of ever increasing costs.

b) After bids were invited in June 2013, at the global level, out of five tenderers, four were found to have qualified "technical qualification". The 5th tenderer (a Chinese company) approached the court of District Judge at Jammu and obtained an interim order). It was only on 1st February 2014 that the interim order was vacated. After vacation of interim order, price bids were opened on 3rd February 2014 and petitioner company was found the lowest tenderer among the four tenderers.

c) Negotiations were held with petitioner company between 7th June 2014 to 22nd December 2014. During this period petitioner company was asked to extend its bid validity as well as that of bid security. Petitioner company was asked to reduce its prices which it did by Rs. 200.00 Crore. Petitioner company also offered guarantee of Rs.275.00 Crore by way of minimum interest on the advances. Petitioner company also

offered cash flow as per revised linearization and discount.

d) Between 22nd December 2014 to 16th February 2016, matter remained pending with respondent No.1 and finally the tender was called in terms of impugned order. Thus it is evident that from June 2013 February 2016, tendering process was kept alive and finally rejected. Respondent has further invited two fresh tenders after cancellation of Turnkey Tender in which petitioner was declared lowest bidder.

e) Conduct of respondent No.1 is clearly arbitrary and unreasonable as during the said period petitioner company, after it offered its discount and cash flow linearization, was expected award of contract as was recommended in its favour by the Negotiations Committee. Impugned communication records reasons which are outside the purview of terms and conditions of NIT and are clearly unsustainable being arbitrary reasons based on no material. Irrelevant considerations have entered the process of decision making and petitioner company has been treated unfairly. It was asked to keep its bid alive right from June 2014 till 31st March 2016 and its securities. Respondent No.1 while cancelling tender has failed to take into consideration important elements involved in decision making process. After evaluation of technical bid and report of Negotiation Committee, there was no basis before Directors Committee to justify cancellation of tender. The present case demonstrates patent arbitrariness and unreasonableness on part of respondent No.1.

f) Cancellation of tender and inviting fresh tenders are patently against public interest. The project, which was intended to be set up is one of the milestones in power sector. Respondent No.1 was set up as a company with prime purpose of setting up Hydel Projects. The company has considerably delayed setting up of Hydel Projects as a result of delay there is bound to be escalation in the costs.

g) The decision of respondent No.1 is against public interest because the cost per Megawatt involved in setting up of Hydel Project, based on actual cost incurred by the Government agencies for Hydel Projects of similar nature, ranges between Rs.4.92 Crore per MW to 21.89 Crores per MW, which is evident from the report of Negotiation Committee. The cost considerably varies according to the site conditions. The ultimate offer made by petitioner company after it allowed discounts and government granted exemption, was reduced to Rs.7790.10 Crore. It would mean 7.79 Crore per MW for the EPC component. The estimate made by respondent No.1 including above Bid Price for EPC component, which was disclosed during the course of negotiations and has been mentioned in the report of the Negotiation Committee estimates the cost of per MW approximately Rs.10.00 Crore. Negotiation Committee had after comparison of rates also found that by delay of one year the escalation in costs would be around Rs.600.00 Crore apart from the revenue loss. Petitioner company states that ordinarily the contract with it should have been fixed way back in February 2014, when the Price Bids were opened and petitioner

company found to be lowest. Two years have been wasted by respondent No.1 and as per the report of Negotiations Committee any fresh tender as invited now by respondent would involve additional cost of approximately 1200 Crores on the same project. Petitioner company, therefore, submits that in the context of the finances required for setting up of the project, the Directors Committee completely lost sight of cost escalation and by cancelling petitioners' tender, there is reason to believe that in the event the project is retendered the cost will be much higher than what was offered by petitioner company. Negotiation Committee has given its detailed report showing reasons as to why the contract was required to be allowed to petitioner company. By rejecting tender and inviting fresh tenders, respondent has acted contrary to public interest and public exchequer.

h) Reasons recorded in impugned communication suffer from non-application of mind, are baseless and are unsustainable in the light of the facts of the case. Petitioner company hereinafter deals with reasons ad seriatim to demonstrate that the reasons are perverse.

(a) First reason recorded in impugned communication relates to alleged gap of over Rs.300 Crore between the bid price and estimated cost. It submitted that alleged difference of Rs.300 Crore is not that in the cost of the project. The difference is only because under EPC mode all risks and quantity variations mentioned by Negotiation Committee in its report are responsibility of contractor whereas in the estimated costs the risk

and also the variation in the quantities is responsibility of owner. Impugned communication mischievously represents the cost difference.

(b) Second reason stated in impugned communication relates to item-wise rate mentioned in tender document. It is stated that petitioner company has by financial mobilization reduced requirement of mobilization advance which would have otherwise attracted interest and furnishing of bank guarantee. The reasoning is perverse. Petitioner company agreed to provide minimum interest guarantee of Rs.275.00 Crore on the advances as may be made to it by respondent No.1. Petitioner company obviously would also furnish bank guarantees against advances. So far as commission of TBM (Tunnel boring Machine) is concerned, petitioner company had rightly included it as an item of work in Bill of Quantities (BOQ). Petitioner company had already in their communication dated 22nd December 2014 stated the reason as to why TBM was included as an item of work in BOQ. It had stated that it intended to avail machinery advance against TBM in stages according to the payment schedule of TBM manufacturer. The machine is required by petitioner company in 21st month of its working as also in 24th month of the project execution. This aspect of the matter has also been considered by the committee.

(c) Third reason recorded is equally perverse. Under the tender, the work of planning, designing and engineering works is responsibility of petitioner

company and for this purpose petitioner company is to engage its own Consultant to be paid by petitioner company. It is absolutely irrelevant and demonstrates non-application of mind to say that PDE Consultant would be under control of petitioner company when in terms of tender the Consultant is required to hold sub-contract with petitioner company to render services relating to planning, designing and engineering. The service has to be provided by Consultant to petitioner company which is ultimately responsible for executing the contract. It makes no sense to say that consultant of petitioner company would be under influence of petitioner company. That apart, each and every specification, design and planning has to be approved by respondent No.1 before putting it to execution. Insofar as mention of Rs.55.00 Crore has been made it relates to execution of civil works/site facilities otherwise required for electro-mechanical works (E&M). The work is to be executed by an independent contractor who is otherwise also part of Consortium but gets directly paid by respondent No.1 in the event contract is concluded. The amount mentioned reflect assessment made by petitioner company in civil works/site facilities as may be required during execution of work by E&M.

(d) Fourth reason recorded is equally fantastic and perverse. It is the case of petitioner company throughout that responsibility of risks, as explained in the report of Negotiation Committee, is taken by company and not by Owner. No risk has been hedged against owner. To safeguard interests of

respondent No.1, petitioner company is required to furnish bank guarantee against advances as also against performance. There is no threat to financial status/existence of Consortium should any major risk, event occur. The front loading of Rs.600.00 Crore is a figure misunderstood by respondent No.1 as would be evident from reason no.2, where taking TBAM as a separate item has been questioned. It is absolutely unreasonable to state that front loading raises doubts about capability of Consortium. The competent capability and experience of Consortium has already been certified by respondent No.1 when it found technical bind to be in order. Negotiation Committee has already opined on this aspect of the matter. The observations about the confidence are patently subjective in character and based on extraneous consideration

(e) All the reasons stated by respondent No.1 arise out of wrong evaluation of tender documents, pattern of EPC in working out contract, misunderstanding with regard to the amount of front loading and failure to appreciate that the risks are shared by petitioner company to a great extent, impugned communication seeks to justify cancellation of tender on grounds and basis which are totally uncalled for. Evaluation of entire tender made by Director Committee, in ignorance of the views of Negotiation Committee and in fact contradictions thereto, is outcome of extraneous considerations and *mala fide*. Petitioner company, therefore, questions decision to cancel its tender not only on ground of being arbitrary and against public interest

but even on merits. The decision making process is itself contrary to law, discriminatory and arbitrary.

(f) Respondent No.1 has also relied on its power to reject any tender. Article 1.2 clearly provides the basis on which bids can be rejected. The expression “any other cause” appearing in the said clause is to be read *ejusdem generis* with “national security”. The jurisdiction of this Court to judicially review the order rejecting tender of petitioner is not excluded by Article 1.2. Respondent No.1 is not entitled to cancel the bid under Article 1.2 of “ITB”. The view taken by Directors Committee is contrary to public exchequer as the same contract, if retendered, would cost exchequer higher price than the one offered by petitioner company.

(g) In view of course of events, ever since tenders were submitted, negotiations held, discounts granted and other benefits agreed to and allowed in favour of respondent No.1, petitioner company had legitimate expectation that the contract would be allotted to it. Petitioner company was asked to keep validity of its bid and security document alive throughout this period which further lends support to the expectations of petitioner company that the contract would be allotted to it. Impugned action of respondent No.1 violates doctrine of legitimate expectation. It is inequitable on part of respondent No.1 to have cancelled tender to the prejudice and detriment of petitioner company.

(h) Action of respondent company has also been mala fide. With the change of Directors, the whole

position was changed and a complete U-turn was taken. Initially members of Negotiation Committee failed to appreciate tender of petitioner company but during course of negotiations when the things became clear to them, the committee for well good reasons recommended allotment of contract in favour of petitioner company. The Directors who took decision to cancel the tender suffered some imperfection in their understanding of tender and unreasonably compare the assessment of cost between estimated cost and tendered cost. This position had already been clarified in communications by petitioner company and during course of negotiations with Negotiation Committee. the cause and reasons for front loading was also explained as also inclusion of TBM as an item of work in BOQ. All these aspects and all elements of public interest were considered by Negotiation Committee unlike the Directors Committee. the Directors, who ultimately took decision some of them were different form the Directors who had earlier negotiated with petitioner company. The Directors Committee, therefore, failed to appreciate the clarifications/explanations of petitioner company and thus erred in law in cancelling the tender.

5. Petitioner on the edifice of case set up and grounds taken, seeks the relief:

> *"It is accordingly prayed that by an appropriate writ, direction or order including a writ in the nature of certiorari/mandamus communication No.CVPP/PD/MW/RB/TK-07/2016/2383 dated 16.02.2016 be quashed and the fresh Notices*

Inviting Tenders (NITs) against the said Project be stayed and by writ of mandamus respondents be directed to reconsider the tender of petitioner company for allotment of Pakal Dul Project."

6. Writ petition on hand came to be filed on 27th April 2016. It was listed before the Court on 30th April 2016. The respondent No.1 was on caveat, who was represented by its senior counsel. Caveat was discharged. Writ petition was directed to be listed in week commencing 16th May 2016. *Ad interim* application (MPno.01/2016) was, after hearing both parties, reserved for orders. It was on 2nd May 2016 that orders were passed in *ad interim* application (MP no.01/2016), keeping in abeyance impugned communication dated 16th February 2016 with liberty to respondent No.1, if it so chooses, to reconsider the decision so taken, after hearing the petitioners and the fresh tender notices issued regarding the project and the bids, if any, received shall not be carried into effect till next date before the Bench.

7. Respondent No.1, on 12th May 2016, filed its objections in opposition to writ petition. Glance thereof is imperative :

a) Writ petition is highly defective insofar as its very maintainability on account of lack of authorization by other two Companies i.e. respondents 2 and 3 in favour of the petitioner No.1 – Consortium, to file writ petition is

concerned. Petitioner No.1 is a Consortium of three companies i.e. petitioner No.1, respondents 2&3, for the purpose of submitting a tender to respondent No.1 in response to NIT dated 19th June 2013 for turnkey execution of Pakal Dul (Drangdhuran) Hydroelectric Project. The preamble of Joint pursuit as provided in Article 1 of the Consortium agreement which has given birth to petitioner No.1 – Consortium, fully defines three companies viz. petitioner no.2, respondents 2&3, shall collectively form an unincorporated Contractual Consortium, namely, "Drangdhuran Hydro Power Consortium". Petitioner No.1 Consortium lacks basic authority to file present writ petition as two other companies with petitioner no.2 have not given any authorisation for filing present petition. Further, with cancellation of entire tendering process including tender bids of petitioner No.1 Consortium, it has ceased to exist as per Article 9 of the Consortium Agreement entered into between petitioner no.2, respondents 2&3. The instant writ petition has been filed by petitioner No.1 through petitioner no.2 only whereas other two companies have not authorised petitioner No.1 consortium to file present petition. Since petitioner No.1 does not have original authority to file instant writ petition, therefore, the same deserves outright dismissal.

b) Petitioners have miserably failed to make out a case as against respondent which requires judicial review by this Court. For maintaining writ petition, seeking judicial review of contracts, petitioners are required to establish prima facie case, which warrants exercising of principles relating to judicial review. The law relating to exercise of judicial review coupled with judicial restraining in

government contract has been extensively discussed in celebrated case of ***Tata Cellular v. Union of India***[1].

c) Petitioners have also miserably failed to establish a case which warrants interference of this Court. Writ petition filed by petitioners does not establish:

   a. Whether a decision making authority exceeded its powers?
   b. Committed an error of law
   c. Committed a breach of the rules of natural justice;
   d. Reached a decision which no reasonable tribunal would have reached; or
   e. Abused its powers

   These factors, sine quo non for maintaining writ petition, are prima facie missing. It is well settled law that judicial review of administrative decisions is limited to examining whether decision making process is vitiated by any illegality, procedural irregularity or perversity. This Court does not sit in appeal over decision, so long as the process leading to the same is found to be satisfactory and free from any one of the infirmities.

d) In cases where decision making process involve technical expertise, scope of review gets further reduced because the courts are not equipped with expertise necessary to sit in judgment over the decisions taken by experts. Even otherwise, scope of judicial review in matters involving challenge to tender condition is very limited. The nature of scope of judicial review has been subject matter of long list of decisions rendered by the Hon'ble Supreme Court including in the case of ***Directorate of Education and others v. Educomp Datamatics Ltd***[2]and ***Master Marine***

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[1](1994) 6 SCC 651
[2](2004) 4 SCC 19

Services Pvt Ltd vs. Met Calfe & Hodgkinson (P) Ltd[3]. It has been held in the various decisions that terms of invitation of tender are not open to judicial scrutiny. The Court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, *mala fide* or actuated by bias. The Court cannot strike down the terms of the tender prescribed by Government because it feels that some other terms in the tender would have been fair, wiser or logical. There is no *res integra* to the proposition that scope of judicial scrutiny in government contract is extremely limited. The parameters for determining the infringement of Article 14 are confined to examining the decision making process and not the decision itself. The said decision making process can be interfered with only in exceptional cases where the same is vitiated by biasness, favouritism and the same is against public interest. The judicial review cannot take away powers of Government to accept or to reject any bid on the grounds of public interest. The Government contracts are a matter of the public policy and thus public interest is paramount in such transaction rather than the commercial interests of competitive bidders. The law relating to exercise of judicial review coupled with judicial restraint in Government contract has been extensively discussed in various judgments by the Hon'ble Supreme Court of India. The same very issue once again came up before the Supreme Court in ***Air India Limited v. Cochin International Airport Limited***[4].

e) Through the medium of instant writ petition, petitioners have challenged communication by virtue of which tender

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[3](2005) 6 SCC 138
[4](2000) 2 SCC 617

of Turnkey Execution of Pakal Dul (Drangdhuran) Hydro-Electric Project has been cancelled and necessary intimation with detailed reasoning has been given to petitioners. Besides, this, petitioners have also challenged fresh two NITs issued by respondents on such grounds which, on the face of the same, are highly motivated and do not at all advance the case of petitioners.

f) Respondent, being a joint venture of NHPC Limited, JK State Power Development Corporation and PTC India Limited, floated tender dated 19th June 2013 for Turnkey execution of Pakal Dul (Drangdhuran) Hydroelectric Project. Petitioner no.2 by forming Consortium agreement dated 1st October 2013 with respondents 2&3 created petitioner No.1 – Consortium, and applied for allotment of contract. The bids quoted by petitioner No.1 through evaluated to be lowest amongst all bidders, but were found to be substantially higher than estimate costs worked out by respondent on the basis of estimates by Central Electricity Authority/sanctioned by the Government of India.

g) After considering higher bid prices than estimated cost, discussion/ negotiations were held with petitioner No.1 by respondent with a view to seek clarification/justification on the quoted bid prices through a Committee of officers duly constituted by the Board of Directors of respondent. Even in negotiation process, petitioner No.1 Consortium vide letter dated 29th September 2014 offered various discounts in bid prices. Despite negotiations on various aspects and after taking into consideration discounts offered by petitioner No.1 consortium, price bids submitted by petitioner were not found feasible and

reasonable as such another High Level Committee comprising of Directors of respondent was constituted but again price bids were found to be substantially on a higher side which has impact of causing loss to public exchequer. Thereafter reports of two committees were deliberated upon by Board of respondent and following startling revelations came out:

(a) Even after discount offered by petitioner No.1 consortium, there was a gap of over Rs.300 Crore between bid price and estimated costs and no further discounts were offered by petitioner No.1 consortium;

(b) Work of consortium involves a number of items of work, some of which are to be carried out during initial stage of construction, viz. typographical survey, development of tunnel portal, installation and commissioning of TBM. However, it was found that prices for these items on lump sum basis quoted by petitioner No.1 consortium were exorbitantly high and unjustifiable, thus, making price bid not only loaded, but reducing requirement of mobilization advance to that extent, which otherwise would have attracted interest and submission of bank guarantee. Despite petitioner No.1 consortium agreeing for removal/ flattening to some extent, there remains a front loading to a large extent of about Rs.600 Crore.

(c) Petitioner No.1 consortium's act of keeping about Rs.100 Crore, on account of planning, designing and engineering work under Civil Works Component which was found to be a serious issue as the PDE Consultant will not have independence in the design and engineering of the project. Overall price of civil works is much higher as compared to other bidders. Further

above said bid structuring would put PDE Consultant under undue control and influence of civil contractors which has been found not to be in the interest of project.

(d) Pakal Dul is a Turnkey contract involving various risks but the way petitioner consortium has submitted price bid most of the risk elements are hedged against respondent. Further large front loading of Rs.600 Crore as a part of strategy adopted by petitioner consortium raises doubts about capability of petitioner consortium.

h) Keeping in view following serious factors:

(a) Substantially higher bid than the estimated cost of work;

(b) The manner in which price bid has been structured involving unbalanced distribution amongst various work components;

(c) Large amount of front loading; and

(d) Hedging of risk against respondent;

are reasons which do not infuse confidence on petitioner No.1 consortium for successful completion of project works. Accordingly, respondent decided to cancel present turnkey tender and necessary intimation with all the concomitant reasoning and justification in this behalf was given to petitioner consortium by virtue of impugned communication dated 16th February 2016 notwithstanding the fact as per Article 1.2 of ITB, respondent was not obliged to assign any reason for cancelling or withdrawing NIT. For facility of ready reference Article 1.2 of tender document reads as under:

> "Owner reserves the right to itself to accept any bid or to reject any or all bids or cancel/withdraw invitation to Bids on the ground of national security and any other cause without assigning any reasons thereof. Such decision by the owner shall not be subject to question by any bidder and the owner shall not bear any liability whatsoever for such a decision".

In addition to this, the NIT Clause 13 clearly states that 'the owner shall have the right to reject all or any bid and shall not be bound to accept the lowest or any other bid or to give any reason for such decision.

i) After cancellation of turnkey tender, respondent has floated two new tenders. Had petitioner no.2 been genuine, it would have competed in the process of fresh tendering. Instead of doing so, petitioner no.2 by arraying a totally non-existent entity in view of Article 9 of the Consortium Agreement i.e. petitioner No.1 Consortium and without proper authorization from respondents 2&3 has filed instant writ petition for obvious mala fide reasons.

j) Impugned communication of respondent in cancelling the turnkey tender and floating new tenders is neither arbitrary, nor discriminatory nor with mala fide intention but said action has been taken purely in interest of public because it involves huge public money. Further there is no biasness or favouritism to any other party as the instant contract has not been allotted to any other tenderer who participated in tendering process. Thus, in view of settled position of law, the said decision of respondent which has been impugned instant writ petition, not opens for judicial review.

k) The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions by the Hon'ble Supreme court of India. The Supreme Court in ***Maa Binda Express Carrier and another v. North-East Frontier Railway and others***[5], has held that submission of a tender in response to a notice, inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to, is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders.

l) Without arraying the State of J&K as party respondent, writ petition under Section 103 of the Constitution of Jammu and Kashmir is not maintainable. Despite being lowest tenderer, no right is vested in petitioner No.1 consortium to claim allotment of contract. It is submitted that report of the Committee has been obtained by petitioner in an unauthorised manner, which shows intention of petitioner to resort to unfair means for purpose of award of contract. The report of the committee states that considering the prices quoted by bidder, the total project cost shall be 16.5% above the updated CCEA cost at Oct. 2013 Price level with inclusion of excise, custom duty and BOCWC. The report of committee was deliberated by Board of Director, and the

[5](2014) 3 SCC 760

Board, after detailed deliberations, decided to constitute Directors level Committee to explore further scope of reduction of cost. Directors Level Committee constituted for BoD, held discussions with petitioner on 15th December 2015 and 22nd December 2014 and after considering earlier Committee report/recommendations concluded that M/s DHPC is not ready to reduce prices any further thus the unjustifiable/unjustified gap calculated by earlier Committee as Rs.545.84 Crore remains as it is and consortium has included some items as lump sum items which have been quoted on much higher side making the price bid front loaded.

m) As is evident and apparent from perusal of brief facts of case as enumerated by petitioner No.1 consortium in writ petition, it is nowhere remotely inferable that any mala fide on part of respondent or its Directors. Despite being lowest bidder, no right is vested with petitioner No.1 consortium to claim award of contract. Further respondent has never communicated to petitioner No.1 consortium that contract will be awarded to it. The plea of legitimate expectation of petitioner in the present case is not attracted.

n) Previous bidding process has no relevance with reference to current position. Despite being lowest, price quoted in the price bid by petitioner No.1 consortium was exorbitantly higher than estimated cost worked out by Central Electricity/Authority sanctioned by the Government of India. Pendency of matter cannot be attributed to respondent but it is petitioner No.1 consortium which kept altering price bids and the matter remained pending scrutiny at different levels and finally

keeping in view the overall public interest and public revenue, it was not found feasible by respondent to award tender and respondent decided to go for re-inviting tenders.

8. To respond to the Objections, filed by respondent No.1, petitioner submitted Supplementary Affidavit on 28th May 2016. It would be appropriate to have glimpse thereof:

a) Respondent No.1 is an incorporated company under Companies Act. It is a joint venture among NHPC Ltd, JK SPDC, and PTC Ltd. NHPC Limited is a Government of India Undertaking. JKSPDC is a company under Companies Act and is fully owned by the Government of Jammu and Kashmir. PTC India is a Government of India undertaking.

b) The bids qua the project were invited by respondent No.1 on its own behalf and not on behalf of the Government of Jammu and Kashmir or Union of India. The ultimate contract was to be concluded with respondent No.1. In that view of the matter respondent No.1 being agency/ instrument of the State. There are no private shareholders in respondent No.1 nor are its shares listed in the Stock Exchange. Under Article 226 of the Constitution read with Section 103 of the Constitution of the State, with can be issued against agency/instrument of the State.

c) After bids were invited by respondent No.1, three companies joined hands and formed Consortium. A formal agreement in this behalf was executed on October

1, 2013. The Consortium namely “Drangdhuran Hydro Power Consortium” comprises of:

i. Patel Engineering Limited, a company incorporated under Indian Companies Act;
ii. Limak Insaat Sanayive Ticaret A.S. (Limak Construction Industry and Trade Inc.), a company organized and existing under the laws of the Republic of Turkey; and
iii. Bharat Heavy Electricals Ltd., a company incorporated under Indian Companies Act, which is fully owned company by Government of India.

d) The decision to file writ petition was taken by Consortium. In terms of circular no.4/3/07 dated 03.03.2007 and office order No.15/3/05 dated 24.03.2005, issued by Central Vigilance Commission, the standard of decision is required to be maintained by contract allotting authorities while considering allotment or rejection of a contract.

e) The report submitted by Technical Experts has been given a complete goby. The Committee, constituted to hold discussions with petitioner consortium, comprised of experts as would be evident from the report itself. The subsequent committee constituted by Board of Directors known as “Directors Committee” comprised of four Directors. Two members of the Expert Committee recommended allotment of contract in favour of petitioner consortium. The Board of Directors constituted another committee called Directors Committee which held discussion with representative of petitioner consortium. The discussions were held in the month of December 2014 and thereafter no discussion were held at any stage till impugned order was passed. All the six members of the Expert Committee recommended allotment of contract in favour of petitioner consortium. In the Directors Committee, the representatives of the same organization i.e. NHPC and JKSPDC opposed allotment of contract.

f) Petitioner consortium does not seek judicial scrutiny of any condition of Invitation of Tender, in the present proceedings. Petitioner consortium questions impugned order on grounds sustainable in law at pre-contract stage.

g) Comparison of rates offered in a “turnkey contract” with estimate costs, where the rates are determined itemwise, is irrational and arbitrary. The estimate prepared by CVPP is based on itemwise, is irrational and arbitrary. The estimate prepared by CVPP is based on “item rate contract model” and not based on “turnkey model”. Reportedly CVPP had sent to CEA its estimates based on “item rate contract” but issued NIT on “turnkey basis”.

h) Nothing has been stated in impugned order as to report of Expert Committee. Impugned order does not show that Expert Committee report was even seen, muchless considered, by Directors Committee and Expert Committee, which deliberated with petitioner consortium, did not find any startling revelation.

i) The gap of over Rs.300 Crore is not because of the rate offered by petitioner consortium but the gap is sought to be stated on the basis of comparing incomparable methodologies of evaluation. It is reiterated that “itemwise rates” and “turnkey rates” can never be compared. At this stage petitioner consortium submits that in the case of “turnkey contracts” most of the risk are taken by contractor during execution of work and/or thereafter during “defeat liability period”. Any variation in quantities, modifications of the design, geological occurrences etc. are taken by contractor. In case of “turnkey contract”, while as the price limit is fixed subject to plus 5%, any variation in quantities does not entitle contractor to any

further payment. Such is not the position in the case of item-wise contracts. In normal item rate contracts risks pass on to contract allotting authority. Ultimately itemwise contracts exceed value of turnkey contracts. Further in estimates of CVPP expenditure required for electricity consumption (construction power) is calculated on tariff basis. In the case of petitioner consortium, since no such power is available and it had to use DG Sets, the cost of construction power comparatively would be higher than the estimated cost. These aspects of the matter have been noticed by Expert Committee but completely ignored by Directors Committee. Non-consideration of such elements in decision making clearly show arbitrariness. These are some aspects which demonstrate irrational and arbitrary rejection of the tender by respondents.

j) During course of negotiations petitioner consortium agreed to “linearization” of the lump sum amount quoted by it. It is denied that post negotiation “front loading” remained any controversial issue between parties. Impugned order has completely ignored Expert Committee report which takes care of alleged exorbitant demand for “front loading”. Petitioner consortium had further agreed that the amount payable would be commensurate with progress of work. Respondent No.1 has totally confused payments, described by it as front loading payments, with scale of work executed by petitioner consortium. Petitioner consortium, unlike in the case of itemwise work payments, was not entitled to payments in consideration of the work done but in view of the overall ceiling limit to enable contractor to execute simultaneously several works of the project and to maintain cash flow. Further during course of negotiation

petitioner consortium had guaranteed minimum Rs.275 Crores as “interest” against advances. It is, therefore, incorrect to state that requirement of consortium to avail mobilization advance was reduced in any manner. Since minimum interest was guaranteed on the advances, therefore, it is but reasonable to say that consortium would require advances. It is therefore, denied that there remained front loading to large extent of about Rs.600 Crore.

k) Under the Bid documents, it was a requirement that contractor would engage a planning, designing engineer (PDE) Consultant as a sub contractor to main contractor. In accordance with the said condition petitioner consortium had indicated in its tender PDE Consultant who would act as consultant. PDE Consultant was to be paid by petitioner consortium. It is sheer perversity on part of respondent to say that PDE Consultant would be under control of consortium when Bid documents themselves provide that contractor would engage PDE consultant as sub-contractor. Most of the risk elements have been taken by consortium. How and in what manner risk elements have been “hedged against the respondent” has not been spelt out anywhere nor stated with clarity. The Experts Committee examined each and every aspect of tender documents in depth but they could nowhere find that risk elements were “hedged” against respondent No.1. The statement is bereft of any merit. It is sheer concoction. It is reiterated that the issue of front loading is no longer an issue in view of linearization, guaranteed payment of interest by petitioner consortium of Rs.275 Crore and gradual release of the payment. The allegation of high front loading is preposterous. The capability of

consortium is established by the fact that one of the companies in consortium is a Government of India Undertaking and that respondent No.1 found, in Technical Bid, petitioner consortium suitable and qualified for executing the work.

9. Respondent No.1, filed Reply Affidavit in opposition to Supplementary Affidavit of petitioner. What has been contended therein, is worth to be gone through hereunder.

a) Under the garb of supplementary affidavit, petitioners have attempted to rebut objections/reply filed by respondent No.1 to maintainability and admissibility of writ petition. Through the medium of supplementary affidavit, petitioners at the most can place on record additional facts or documents but cannot be allowed or permitted to rebut the objections/reply filed by respondent No.1

b) Through supplementary affidavit petitioners have attempted to improve upon their glaring legal infirmities and errors crept in writ petition, which has been filed by petitioner no.2 without being properly authorised by other two companies with whom petitioner no.2 had formed petitioner No.1 consortium. Even authorisation provided by M/s Patel Engineering Limited authorises Mr. Reshi Kumar Sharma, to represent only company M/s Patel Engineering Limited and the said authorisation does not provide any power to Mr Reshi Kumar to represent M/s Drangdhuran Hydro Power Consortium. After filing writ petition and after earning interim directions, petitioner

no.2 appears to have approached proforma respondents 2&3, who in turn have given authorisations. Moreover M/s BHEL – proforma respondent no.3 has given only Letter of No Objection for continuance of said writ proceeding carried out by petitioner No.1. As per documents placed on record by petitioners, Executive Director/ General Manager of M/s BHEL has no power to authorise M/s PEL to file petition on behalf of M/s BHEL. Delegation of powers by Board of Directors provides power to Executive Directors to represent BHEL concerning the affairs of company in any court and/or quasi-judicial authority. As per records placed in supplementary affidavit, petitioner no.2 has not been authorised by M/s BHEL to represent M/s DHPC/ M/s BHEL in the matter. Even these authorisations are admittedly given after filing of writ petition. If proforma respondents 2&3 intend to join hands with petitioner no.2 to authorise petitioner No.1 consortium to plead their case, then they are required to withdraw instant writ petition and file afresh writ petition.

c) Writ petition is a unique writ petition, first of its kind, where petitioner No.1 consortium of three companies has not been authorised by two companies to file writ petition. Petitioner no.2 – Patel Engineering Limited, without any proper authority from other two companies filed instant writ petition by arraying Drangdhuran Hydro Power Consortium as petitioner No.1 and putting other two companies in the array of respondents. After, this Court entertain writ petition and passed interim order, petitioner no.2 managed and manoeuvred with other two companies to give their consent/authorisation for instant litigation. Since with issuance of authorisation by aforesaid two companies, entire scenario of writ

proceedings in has changed, therefore, no proceedings in writ petition can be conducted. Under the given peculiar facts and circumstances of the case, present writ petition is liable to be dismissed, being highly defective on account of mis-joinder/non-joinder of proper parties and petitioners are liable to file fresh writ petition.

d) PTC India Limited is not a Government of India Undertaking. Respondent No.1 is a joint venture of NHPC, JKSPDC and PTC, and NHPC and PTC have public and financial institution's shareholding and are listed companies in the Stock Exchange. On one hand petitioners state that bids in respect of the project were invited by respondent No.1 on its own behalf and not on behalf of Government of Jammu and Kashmir or Union of India and on other hand, have stated that respondent No.1 being agency/instrument of State. Respondent No.1 is admittedly a Company incorporated under Companies Act, but same under law is not amenable to writ jurisdiction of this Court as it is not the "State" as per Article 12, Constitution of India.

e) Article 8 of Consortium Agreement relates to obligations under the Contract and it is not applicable in present circumstances as no contract has been entered into with petitioner No.1 consortium. It is highly and ex facie wrong on part of petitioners to state that the decision to file petition was taken by consortium. Authorisations placed on record by petitioners are post facto and are aimed at changing basic architecture of writ proceedings. As per Article 9 of Consortium Agreement, petitioner No.1 consortium consisting of petitioner and proforma respondents 2&3 comes to an end on issue of Letter of

Cancellation dated 16th February 2016 and Expiry of Bid Validity on 31st March 2016. This goes to the root of the case that after 16th February 2016 or even after 31st March 2016, petitioner No.1 is a defunct Entity and does not have any power or authority. The plea taken by petitioners that petitioner No.1 consortium continues to exist as M/s BHEL and M/s LIMAK, consortium partners, have contested the order of rejection, is not as per consortium agreement.

f) Petitioners throughout their highly defective petition have prima facie failed to substantiate any ground. Detailed reasons for cancellation have been communicated to petitioner vide letter dated 16th February 2016, which completely demolishes allegations of petitioners. Petitioner No.1 was given enough opportunity as seven meetings were held by two Committees constituted by Board of Directors to hold discussions with LI bidder.

g) Petitioners have adopted a conspicuous silence as regards law relating to exercise of judicial review coupled with judicial restraint in government contract. Their silence is thus required to be treated as admission on their part. After evaluation of Price Bid, Tender Evaluation Committee recommended that lowest evaluated bidder i.e. petitioner No.1 be invited for negotiation to justify and reduce his prices/rates for different components of work to bring them to a reasonable level with respect to estimated cost and to seek clarification on other points. Respondent No.1 had sufficient grounds to hold negotiations with LI bidder. Therefore, after approval of Board of Directors, L1 Bidder was invited vide letter dated

5th May 2014 for discussions and to justify prices/rated quoted.

h) There was no Administrative Officer in Directors Committee. The Directors Committee comprised of four Directors, out of which three were Technical members and one was Finance member. It was a higher level committee as compared to first Discussion Committee constituted by Board (now being projected as “Expert Committee” by petitioner in order to mislead the Court. Directors’ experience and expertise on Technical and Financial angle regarding evaluation of Bids was more as compared to earlier constituted Discussion Committee.

i) For higher cost, front loading and wrong structuring of the bid, petitioner has tried to attribute it to Turnkey contract, which is totally misleading, baseless and mischievous, hence denied. The reasoning projected by petitioner relating to deviation and modification of bid does not assist case of petitioner and also does not restrain power of respondent to accept or reject any bid and further call for retendering or rebidding in large public interest. Petitioner’s statement “Ultimately item wise contracts exceed the value of turnkey contracts” is emphatically denied as upward/downward variation of quantities of work at the time of detailed designing/execution of works cannot be predicted at the tendering stage. Under the tender conditions, there is no restriction for use of grid power by contractor and contractor is at liberty to make suitable arrangements for use of grid power. It cannot be said that contractor shall be dependent on DG power only.

j) Petitioner has tried to take undue advantage of bidding process by way of trying to draw huge payments in initial stages of work without committing commensurate works on ground and thereby, in effect, taking advances from respondent without any interest liability thereof and without need to provide appropriate bank guarantees against such amount. The argument regarding offer of minimum interest guarantee is misleading as by taking additional advances, which shall be interest bearing, no favour is being extended to respondent. Payment of interest of advances is in no way an advantage being granted to respondent by petitioner. Respondent's objection has been on misuse of bidding process by way of introduction of certain items at the price bid stage (which were not part of technical submission – stage I bid) which were highly quoted and were to be executed during initial stages of the contract, which resulted in front loading of the bid.

k) Planning, Design and Engineering works is responsibility of PDE contractor, but petitioner in reply to a query, has revealed that a provision of Rs.100.28 Crore has been kept under Civil Works component on account of Planning, Design and Engineering works. This kind of structuring of bid may jeopardise timely payments to PDE subcontractor. Also through BoQ of civil works, it cannot be deduced at what stage(s) this payment of Rs.100.28 Crore is being drawn by civil contractor. Similar cross costing has been resorted to between work groups of Civil Works and E&M Works, wherein payment related to E&M Works have been charged under Civil Works, thereby trying to avail contingency provision for amount, which was not due.

l) Petitioner No.1 has structured his bid in such a way that payments drawn by him in initial stages are much in excess compared to actual work executed on ground during that period. Respondent No.1 apprehended great risk in contract execution under such type of bid structuring wherein contractor would draw substantial payment before starting major activities on ground. The Board while considering the matter reviewed all reports but did not find it appropriate to approve award of works to petitioner. Recommendations of Committees are not binding on Board and Board of Directors is final authority to take decision in the matter.

m) Petitioner No.1 was qualified in Technical Bid stage based on submissions including unpriced Bill of Quantities. Petitioner made substantial changes in submission of Bill of Quantities at the stage of submission of Price Bid. Such changes are alteration in terms, under which petitioner was technically qualified. Also during discussions with Directors' Committee, petitioner was not ready to delete the new items introduced during price bid stage, which resulted in front loading of the bid.

n) As one of the two new tenders is for inviting bids on EPC/Turnkey basis, petitioner and proforma respondents are at liberty to participate in fresh bidding process and moreover petitioner No.1 has purchased tender documents in respect of fresh NITs published.

10. I have heard learned counsel for the parties at length.

I have gone through the record produced by

respondent CVPP. I have given my thoughtful consideration to the case.

11. Mr Z. A. Shah, learned senior counsel appearing for petitioners, in support of his arguments advanced, has submitted "Written Submissions". So has been filed by Mr Sunil Sethi, senior counsel appearing for respondent No.1. In Written Submissions filed by petitioners, learned senior counsel has given certain Issues/Points, to be settled vis-à-vis the subject-matter of writ petition. The said Issues/Points are:

i) Cause of action must be antecedent to the filing of Lis in Court.
ii) Whether respondent No.1, a company incorporated under Companies Act, 1956 is amenable to writ jurisdiction of this Court?
iii) Whether State of Jammu and Kashmir is a necessary party in the writ petition?
iv) Whether writ petition is maintainable by the lead partner without other members of the Consortium having joined as writ petitioners?
v) Whether the Consortium has come to an end?
vi) Whether the tender submitted by the Consortium continues to be valid?
vii) Grounds for showing that impugned decision dated 16.02.2016 is bad in law.
viii) Analysing the impugned order dated 16.02.2016.
ix) What is the scope of judicial review in contractual matters?
x) What is arbitrary?
xi) What is reasonable?
xii) What is meant by public interest?
xiii) Whether respondent No.1 has violated doctrine of legitimate expectation?
xiv) Power of the court to review decision of respondent No.1 on facts?
xv) Whether respondent No.1 has absolute power to reject tender in terms of Article 1.2 of ITB, relied upon in the order of rejection dated 16.02.20-16?
xvi) Cost of rebidding.

12. Though various issues/points have been raised by learned senior counsel for petitioner, yet it would be appropriate to narrow down the same in following issues:

a) *Whether respondent No.1 is amenable to writ jurisdiction of this Court?*

b) *Whether impugned decision of respondent CVPP, cancelling "turnkey tender" as also petitioner's bid, and issuing fresh tender notices on "package mode", is arbitrary and unreasonable?*

13. Let's take the first issue for discussion and settlement. The first issue is "*Whether respondent No.1 is amenable to writ jurisdiction of this Court?*"

14. Learned senior counsel appearing for respondent No.1 has submitted that respondent No.1 CVPP has been constituted by virtue of Articles of Association between NHPC, JKSPDC and PTC India Limited and as per the Articles of Association, all the three constituents have contributed finances for respondent No.1 CVPP, for earning returns on their investments. Though the joint venture is amongst the Government of India Undertaking (NHPC) and State Government Undertaking (JKSPDC) and PTC India Limited, but merely because the money contributions are majorly coming from Government will

not make respondent No.1 CVPP a State for the reasons: that the money is contributed by the Government of India/State Government by way of investments and not by way of expenditure and this investment by the Government of India/State Government is for the purpose of earning returns for the same; that because of contribution of money by the constituents, they have been given the authority to nominate the Directors of respondent No.1 CVPP, but the authority of administration lies exclusively with respondent No.1 CVPP itself, and to that extent there is no governmental interference in day to day working or policy decisions of respondent No.1 CVPP; that the policy decision of Government, which are binding upon respondent No.1 are only legislative powers of the Government, which are applicable to any private venture as well, but there is no administrative monopoly or interference by the Government in the working of respondent CVPP; that respondent CVPP's Directors, including Managing Director, are empowered to take decisions independently and they do not have to seek permission from the Government before taking a decision; that respondent CVPP is master of its accounts; that through the Government has got the power to withdraw or transfer

Directors from the Board of respondent CVPP but it does not have the power to direct nominated directors to act in a particular way and/or to take a particular decision.

15. On the other hand, learned senior counsel for petitioner has submitted that in terms of Articles of Association, prior to formation of the company under Companies Act, 1956, “PTC India Ltd”, “NHPC Ltd”, “JK State Power Development Corporation” and “Government of Jammu and Kashmir” had executed an agreement called “Promoters Agreement” dated 21st December 2010, which is expressly made in Articles of Association. According to Clause 7 of Articles of Association, the payment of shareholding of the issued share capital of CVPP is 49% of paid up share capital of CVPP is made by NHPC, 49% by JKSPDC and 2% by PTC. NHPC is a Government of India Undertaking and 86% of the shares in the said company are held by Government of India and that writ petition against NHPC is maintainable and the said company is amenable to writ jurisdiction of this Court. JKSPDC is also a company incorporated under Companies Act, which is fully owned by the Government of Jammu and Kashmir and is not a listed company. Qua PTC (Power Trading Corporation), it is also a company incorporated under Act.

16. While relying on various decisions of the Apex Court, to be discussed below, learned senior counsel for petitioner submits that the Supreme Court has laid down following parameters or guidelines for identifying “other authorities” in Article 12, which are:

a) If the entire share capital of the corporation is held by government it would go a long way towards indicating that the corporation is an instrumentality or agency of the government.

b) Where the financial assistance of the State is so much as to make almost entire expenditure of the corporation, it would assume indication of the corporation being impregnated with governmental character.

c) It may also be a relevant factor whether the Corporation enjoys monopoly status which is State conferred or State protected.

d) Existence of deep and pervasive State control may afford an indication that the Corporation is an agency or instrumentality.

e) If the functions of the corporation are of public importance and closely related government functions it

would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.

f) Specifically, if a department of government is transferred to a Corporation it would be a strong factor supportive of the inference of the Corporation being an instrumentality or agency of Government.

17. Learned senior counsel for petitioner has also mentioned that the Supreme Court has ruled that when the body is "financially", "functionally" and "administratively" dominated by or under the control of the Government and such control is brought to the body and is pervasive, then it is a State within Article 12 and that the real test to consider the status of the body is to see how far it is controlled by the Government and not forms in which the body is constituted. Learned counsel further submits that respondent No.1 is an "agency of the State" on the following grounds:

i. 49% shares are held by NHPC and 49% by JKSPDC. 2% are held by PTC. Both NHPC and JKSPDC are Government owned and controlled companies.

ii. The basis of incorporation of respondent No.1 (CVPP) is the agreement dated 21st December 2012 between PTC, NHPC Limited, JKSPDC and Government of

Jammu and Kashmir. The company has its original in the decision of NHPC Limited, a Government of India Undertaking and Government of Jammu and Kashmir.

iii. Under Clause 5(b) of the Articles of Association invitation to the public to subscribe for any shares or debentures is prohibited. Similarly, acceptance of deposits from persons other than members is prohibited. The right of transfer of shares is prohibited. Under Clause 5 (c) the ratio between JKSPDC, NHPC and PTD of 49:49:2 is to be maintained at all times. Under Clause 7 the authorised share capital has to be subscribed only by NHPC, JKSPDC and PTD. Subscription by NHPC and JKSPDC are clearly subscriptions by these fully owned Government companies. Under Clause 35, if shares become available as a result of increase in capital, they are to be shared in accordance with Article 7. Under Clause 55, the company is to have not less than four but not more than fourteen Directors. The Directors are not to hold any qualification share. Under Clause 55 (iii) the Board of Directors has to have equal representation from NHPC and JKSPDC. PTC is not to be represented on the Board of Directors. The Directors have been nominated, two in number by JKSPDC and

two by NHPC Limited. Under Clause 56 Chairman of Board is to be appointed by JKSPDC in consultation with NHPC. Under Clause 57, the nominees of NHPC, JKSPDC can hold office of the Directors in the company “at the pleasure of respective appointing authority”, who have the power to remove their nominees on the Board. Under Clause 60, a Director representing JKSDC or NHPC will cease to be a Director if he ceases to be an official or nominee of JKSPDC or NHPC. Under Clause 72, the Board of Directors have the power to make, vary and repeal by-laws etc. Under Clause 73 (b) in respect of matters mentioned therein, the Board is not competent to take decision unless NHPC and JKSPDC separately approve the decisions. Under Clause 84 post of Managing Director and Joint Managing Director can only be held by nominees of NHPC and JKSPDC. Under Clause 101 the Government of Jammu and Kashmir is to get 12% free power generated from the project. Additional 1% free power for local area development fund is also to be provided by CVPP. Out of the balance 87% power the Government of Jammu and Kashmir has the right to purchase power from CVPP in proportion to the share of JKSPDC. The

remaining power can be sold by NHPC and PTC in proportion to their paid up equity share capital. The Jammu and Kashmir Power Development Department has the first right of refusal. Under clause 106, the Government of Jammu and Kashmir is to provide staff on deputation to enable the company to carry out its task. 80% of group C&D staff in the company have to be permanent residents of the State. Clause 107 clines the issue when it says that “notwithstanding anything contained in these articles, the directives issued by the President to NHPC/Government of Jammu and Kashmir to JVC will be applicable to the company for the conduct of its business. The Directors shall give immediate effect to the directives or instructions so issued”. Under Clause 113 the company is to adopt Promoters Agreement which is between NHPC Limited, JKSPDC, PTC and Government of Jammu and Kashmir dated 21st December 2010 and Memorandum of Understanding dated 10th October 2008. Therefore, respondent CVPP is clearly an “agency” of the “State”. All its major substantive functions are controlled not only by NHPC Limited and JKSPDC, both being “State” under Article 12, but respective Central and State Government. The

financial, functional and administrative control of the State Government is deep and pervasive.

iv. There is direct nexus between respective executive governments and respondent No.1, which is substantiated by Clause 107. All the directions issued by President of India and Government of Jammu and Kashmir are binding on CVPP. In respect of major decisions, CVPP is not competent to deal with them but a separate approval is required from NHPC and JKSPDC. The funding is provided by respective governments through their own companies. The Board of Directors comprise of nominees made of the State Government and Central Government through their companies. The Directors can hold office only till the time they hold their office in the State/Central Government.

v. Under Constitution of India, both Parliament and State Legislatures have power to enact laws. Entry 38 in Concurrent List relates to “electricity”. Legislature of the State of Jammu and Kashmir has, therefore, full powers to enact laws relating to electricity. Accordingly various legislations have been passed. Sections 2(3), 3, 7, 8, 10, 24 and 28 of the Electricity Act, 2010,

demonstrate control of the State on generation of electric power. Since the State of Jammu and Kashmir has power to deal exclusively with electricity, the State Government has notified “Hydro Electric Projects Development Policy – 2011” vide Government Order No.205-PDD of 2011 dated 7th July 2011. In terms of the Preamble of the Policy it has been notified that the State intends to accelerate harnessing hydro power as an integral part for economic development. According to the State, it will bring in huge economic benefits in the form of infrastructure development, industrialization and employment generation. The policy is aimed at using electrical energy as an article of export. In the Policy of the State itself, has given sector-wise breakup of harnessing Hydro potential. In category-C, “projects planned for execution” of the policy at serial no.3, 1000 MW Pakaldul has been mentioned as “Joint Venture”. The policy says that JKSPDC was carved out of Jammu and Kashmir Power Development Department in 1989 and incorporated as a company in 1995 with the mandate to plan, execute, operate and maintain all Generating Stations including such stations that existed at the time of creation of the Corporation. It also provides that installation capacity

of the projects under operation with NHPC is 1680 MW. The policy also states that in 2008 the State Government vide Order No.168-PDD of 2008 dated 25th April 2008 has approved implementation of Hydro Electric Projects, among others, by means of Joint Venture of JKSPDC with Central Power Sector Undertakings. Under the policy, JKSPDC has been made as a nodal agency and for developing the potential of hydro power in the State and for this purpose the State can use any of the modes as provided in the policy. The State Government has accordingly formed CVPP with NHPC. The company is to carry out the policy of the State Government with regard to power generation. CVPP, therefore, is not an independent power producer but is a part of the State's policy. Big projects (like the one subject matter of writ petition) are handled by the State Government itself through JKSPDC.

vi. CVPP is intended to implement Government policy. Its functions are "public functions" as the Government by implementation of policy is to achieve following objectives among others:

i) Maximization of benefits to the State by meeting its power requirement.

j) Provide employment opportunities to people of the State.

These are clearly public functions.

18. As regards “public function”, while relying on decision of the Supreme Court in (2013) 6 SCC 452, learned counsel made mention of following factors:

i) The extent to which the State has assumed responsibility for the function in question;
ii) The rule and responsibility of the State in relation to the subject matter in question;
iii) The nature and extent of the public interest in the function in question;
iv) The nature and extent of any statutory power or duty in relation to the function in question;
v) The extent to which the State directly or indirectly regulates, supervisees or instructs the performance of the function in question;
vi) The extent to which the State makes payment for the function in question;
vii) Whether the function involves or may involve the use of statutory coercive powers;
viii) The extent of the risk that improper performance of the function might violate and independent convention right.

The Apex Court concluded these observations making it abundantly clear that any order for it to be held that the body is performing public function, the appellant would have to prove that the body seeks to

achieve some collective benefit for the public or section of public and accepted by public as having authority to do so. A “public authority” is a body which has statutory duties to perform and which performs these duties and carries out its transaction for the benefit of the public and not for private profit. It was held that State is abstract entity. Therefore, the State acts through its agencies or instrumentalities of the State.

19. Learned senior counsel for petitioner, in response to the submission of respondent No.1 that it (respondent No.1) is a private company; there is no role of Government in CVPP; and CVPP is not a Government controlled company, has submitted, and rightly so, that all companies, so long as public at large do not hold shares in that company, but by declaring a company as a private company, it does not lead to the conclusion that whatever profits are generated by that company it goes to the personal pocket of the shareholders and that there are no “individuals” as shareholders in the company. He has further submitted JKSPDC is a State Government owned company and NHPC is a Central Government owned company, and any profit which the company may make, will be shared by the Government and not by individuals.

Therefore, to say that CVPP is a private company, leading to the inference that it has nothing to do with the government, is a misleading argument.

20. Further submission of learned senior counsel for petitioner is that shareholding by governments or by government undertakings is one of the parameters of ascertaining character of a company. It shows that funding of the company is done by the Governments and it means that the funding is not made by private individuals. The funding made by the Government, being the shareholder, indicate the source of finances. The shareholding and percentage of share is an important factor in ascertaining the nature of a company. Greater the share of the Government, more concern the Government will have about the company. The Governments, by investing in the companies, do not leave the companies free to deal with the finances in the manner company chooses. In the present case, as rightly pointed out by learned senior counsel for petitioner, the finances are made available by the Government and the Government controls the finances by nominating its Directors on the company through their undertakings. Thus on the one hand the Government finances an incorporated company and on the other hand controls its

affairs. There is direct link between Board of Directors and finances. In CVPP all members of the Board of Directors are nominees of NHPC Limited and JKSPDC. There is, thus, complete control of Government in the affairs of CVPP. The shareholding of PTC is hardly 2%. Learned senior counsel further avers that there is no law laid down by the Supreme Court that a company, incorporated under Companies Act, can never be a State within the meaning of Article 12. In fact the law is that companies, incorporated under Companies Act, qualify as an “agency” of the State if they satisfy the tests laid down by the Apex Court. The Constitutional Bench decision of the Supreme Court reported in (2002) 5 SCC 111, according to learned senior counsel, clearly lays down the test for ascertaining character of a company and the question as to whether CVPP is a State or not has to be answered on the touchstone of the law laid down by the Apex Court in the said decision and that the functions of CVPP are patently public functions. Huge projects cannot be equated with small hydro projects of 02 MW or 100 MW. In terms of the policy, big projects, like the instant one, have to be executed in “joint venture” and therefore, CVPP satisfies other conditions as well. His further contention is that reliance placed on a decision reported

in (2006) 1 SLJ 1, by learned senior counsel appearing for respondent No.1, is not applicable to present case inasmuch as in the said case the Court found that 54% shares had been held by Government and 47% shares were held by public at large and the Court after considering the Articles of Association of the Bank, arrived at conclusion that the Government was not exercising any dominant control on the bank. And the Court also ruled that in the event any public duty is not performed by the bank as enjoined on it under law, a writ petition would be competent. Learned senior counsel for petitioner further contends that to ascertain whether an incorporated company is an agency of the State within meaning of Article 12 of the Constitution, has to be decided in light of Memorandum and Articles of Association, leading to the conclusion whether governmental control is deep and pervasive in administration, functionality and in fairness and it is submitted by learned counsel that respondent CVPP qualifies as a “State” within meaning of Article 12 of the Constitution.

21. Learned senior counsel for petitioner, on the issue of not arraying State as party respondent in writ petition, has that the State of Jammu and Kashmir is not a necessary

party for the reason that no cause of action has accrued to petitioners against Government of Jammu and Kashmir or Government of India and that the law recognises only two types of parties, they are, either “necessary parties” or “proper parties”; there is a clear distinction between two groups; a party is a necessary party if the court at the end of proceedings is unable to give any relief to petitioner because of absence of necessary party. In a case a “party” is a “proper party”, if court finds the presence of party is necessary for adjudication of the matters in controversy and that respondents do not say whether State of Jammu and Kashmir is a “necessary party” or “proper party”. According to learned senior counsel for petitioner, there are several decisions delivered by Apex Court, laying down tests for determining whether a particular party is a “necessary party” or a “proper party”. These decisions, according to him, have been delivered in AIR 1963 SC 786, (1992) 2 SCC 524, (1995) 2 SCC 326 and (1996) 5 SCC 539, and that all these decisions of the Apex Court lay down the test as to whether a particular party is a “necessary party” or a “proper party”. He further states that since no action of the State is called in question, therefore, the State of Jammu and Kashmir is not a necessary party in the

proceedings. Respondent CVPP, as stated by learned senior counsel, qualifies as a State within meaning of Article 12. While relying on judgements report in (2003) 6 SCC page 1 and (2001) 7 SCC page 1, it is stated that action of respondent CVPP, for purposes of law, being the action of the State, there is no requirement of arraying the State of Jammu and Kashmir as a party to the proceedings. There is no distinction between CVPP, as an “agency” of the State and the “State”. For purposes of Article 12, the State is not distinct from the body, the State has crated (incorporated a company) and in fact respondent CVPP itself represents the State and that respondent CVPP, as an incorporated company, on the one hand, has its own distinct personality but on the other hand when the incorporated veil is lifted respondent CVPP represents the Government. Therefore, the law treats action of respondent CVPP as “State action” and not a distinct action of an incorporated body, and therefore, State of Jammu and Kashmir is neither a proper nor a necessary party. Learned senior counsel further submits that respondent CVPP’s contention is that ultimate effect of the judgment is on the State and the State of Jammu and Kashmir is, thus, a necessary party and respondent for that purpose has placed reliance on

decisions reported in (1976) 1 SCC 481 and (2003) ACR 294. To this learned senior counsel states that contention of respondent CVPP is misconceived inasmuch as the reliance place on judgment relates to a case where damages were sought from Railways and Union of India had not been made party to the case. In the said case, the Apex Court ruled that Union of India is a necessary party because the amount claimed by claimant in that case was ultimately payable by Union of India. It is submitted that that the said case has no bearing on the issue involved. The Supreme Court of India in a decision in (1977) 1 SCC 484 has ruled that department of railways does not have an independent statutory status but it represents Union of India and having regard to the said decision it is submitted by learned senior counsel that in the judgment cited by respondent CVPP, the Supreme Court had taken the same view that Railways represents Union of India and does not have any independent status, statutory or otherwise and therefore, Union of India, was a necessary party. Insofar as matter under consideration is concerned, according to senior counsel respondent CVPP is a company under Companies Act and therefore, is a legal entity. It can sue

or be sued in its own name and the position of CVPP is not like that of Railways.

22. Before adverting to the core issues at some length, let's take a look at Article 12, the Constitution of India. It reads:

> "12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

23. Article 12, the Constitution of India, does not define the word 'State'. It is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word 'or' is disjunctive and not conjunctive. The expression "authority" has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. What is necessary, is to notice functions of the 'body' concerned. A 'State' has different meaning in different contexts. In a traditional sense, it can be a body politic, but in modern international practice, a State is an organisation, which receives general recognition, accorded to it by existing group of other States. The expression "other authorities" in Article 12, the Constitution of India, is 'State' within territory of

India as contradistinguished from a State within control of Government of India. The concept of 'State' under Article 12, is in relation to fundamental rights guaranteed by Part-III of the Constitution and Directive Principles of the State Policy contained in Part-IV thereof. The contents of these two parts manifest that Article 12, is not confined to its ordinary or constitutional sense of an independent or sovereign meaning, so as to include within its fold whatever comes within purview thereof, so as to instil public confidence in it.

24. The State undertakes commercial functions in combination with Governmental functions in a welfare State. Governmental function must be authoritative. It must be able to impose decision by or under law with authority. The element of authority is of a binding character. The rules and regulations are authoritative because these rules and regulations direct and control not only exercise of powers by companies, corporations and bodies, but also all persons, who deal with these bodies. In ***Rajasthan State Electricity Board, Jaipur v. Mohan & Ors.***[6], the Supreme Court said that an "authority" is a public administrative agency or corporation having quasi-governmental powers and authorised to administer a

[6](1967) 3 S.C.A. 377

revenue-producing public enterprise. The expression "other authorities" in Article 12 has been held by the Supreme Court in the said case (*Rajasthan Electricity Board*) to be wide enough to include within it, every authority created by a statute and functioning within territory of India, or under control of the Government of India. The Supreme Court, while referring to earlier decisions, further said that the expression "Other authorities" in Article 12, will include all constitutional or statutory authorities on whom powers are conferred by law. The State itself is envisaged under Article 298 as having the right to carry on trade and business. The State as defined in Article 12 is comprehended to include bodies created for purpose of promoting economic interests of people. The circumstance that statutory body is required to carry on some activities of the nature of trade or commerce does not indicate that the ‘body’ must be excluded from the scope of word "State." The concurring judgment in *Rajasthan Electricity Board* case (supra) provide that the Board was invested by statute with extensive powers of control over electricity undertakings.

25. A public authority is a body which has public or statutory duties to perform and which performs those duties and

carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit. Regard being had from *Halsbury's Laws of England 3rd. Ed. Vol. 30 paragraph 1317 at p.682*. The feature that the CVPP has been allowed to exercise the powers enabling it to trespass across the fundamental rights of a citizen is of great significance. In terms of the Memorandum of Association, CVPP is to acquire and require land for constructing Power Stations. It is in need of water of the State to generate power, obviously, for benefit of the public.

26. In ***Sukhdev Singh v. Bhagat Ram***[7], *Mathew, J*. stated that even big industrial houses and big trade unions would come in the purview of 'State'. While doing so, the courts did not lose sight of difference between the State activity and individual activity. The Supreme Court took into consideration the fact that new rights in citizens have been created and if any such right is violated, they must have access to justice, which is a human right. There is an ongoing effect of globalization and/or opening up of markets by reason of liberalization policy of the Government. "Other authorities", *among others*, would be

[7](1975) 1 SCC 421

there, which, *inter alia*, function within territory of India/ State and the same need not necessarily be the Government of India, the Parliament of India, the Government of each of the States, which constitute the Union of India or the legislation of the States. Article 12 must receive a purposive interpretation, as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power, have been conferred the object being to limit and control power wherever it is found. A 'body', exercising significant functions of "public importance", would be an authority in respect of these functions. In those respects it would be same as is executive government, established under the Constitution and the establishments of organizations funded or controlled by the Government.

27. The development of law in this field is well-known. At one point of time, companies, societies, etcetera, registered under Indian Companies Act and Societies Registration Act, were treated as separate corporate entities, being governed by its own rules and regulations and, therefore, held not to be 'States', albeit they were virtually running as departments of Government. However, situation has completely changed. The 'statutory authorities' and 'local bodies' were held to be 'States' in ***Rajasthan State***

Electricity Board, Jaipur case (supra). The courts, however, did not stop there and newer and newer principles were evolved, as a result whereof different categories of 'bodies' came to be held as 'State'.

28. *Mathew, J.* in his concurring, but separate judgment, raised a question as to for whose benefit the Corporations were carrying on the business and in answering the same, came to the conclusion that respondents therein were 'States' within meaning of Article 12, the Constitution of India. It was observed that even big companies and trade unions would answer the said description as they exercise enormous powers. Same is true about the case in hand. Respondent CVPP has been given enormous powers to use and utilise the resources of the J&K State. Respondent CVPP is to generate and supply power, which *per se* is an enormous task and authority. The activities that are attributed to respondent CVPP and the benefits derived therefrom, are not for individual(s), but for public.

29. In ***UP State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey & Ors.***[8], the land development bank was held to be a State. The Supreme Court, upon

[8]AIR 1999 SC 753

analysing various provisions of Act and the rules framed thereunder, observed:

> "It is not necessary for us to quote various other sections and rules but all these provisions unmistakably show that the affairs of the appellant are controlled by the State Government though it functions as a cooperative society and it is certainly an extended arm of the State and thus an instrumentality of the State or authority as mentioned under Article 12 of the Constitution."

Insofar as the case in hand is concerned, respondent CVPP has been given the authority of generating and supplying the power of the State. The activities of respondent CVPP are not less than a 'State' itself.

30. *Madon, J.* in ***Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another***[9] questioned : -

> "Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak?

It was opined:

> "The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: 'When I hear any man talk of an

[9](1986) 3 SCC 156

> unaltelrable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies"

31. Constitutions have to evolve the mode for welfare of their citizens. Flexibility is the hallmark of our Constitution. The growth of the Constitution shall be organic, the rate of change glacial. Regard being had from *R. Stevens, the English Judges:Their Role in the Changing Constitution* (Oxford 2002), p. xiii) *[Quoted by Lord Woolf in 'The Rule of Law and a Change in the Constitution, 2004 Cambridge Law Journal 317]*. A school would be a 'State' if it is granted financial aid, as said in ***Jiby P. Chacko v. Mediciti School of Nursing, Ghanpur, Ranga Reddy District and Anr.***[10].

32. An association, performing function of Housing Board, would be performing a public function and would be bound to comply with Human Rights Act, 1998. Reliance may be had from ***Poplar Housing and Regeneration Community Association Ltd. v. Donoghue***[11]. A school can be run by a private body without any State patronage. It is permissible in law because a citizen has fundamental right to do so as his occupation in terms of Articles 19(1)(g) and 26. But once a school receives State patronage, its activities would be State activities and thus

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[10]2002 (2) ALD 827
[11][2002] Q.B. 48]

would be subject to judicial review. Even otherwise it is subjected to certain restrictions as regard its right to spend its money out of the profit earned. Reliance in this regard is placed on ***T. M. A. Pai Foundation and Others v. State of Karnataka and Others***[12] and ***Islamic Academy of Education and Another v. State of Karnataka and Others***[13].

33. The concept of 'public law' function is yet to be crystallised. Concededly, however, the power of judicial review can be exercised by this Court under Article 226 of the Constitution of India, only in a case, where the dispute involves a public law element as contradistinguished from a private law dispute, as has been stated and observed in ***Dwarka Prasad Agarwal (D) by LRs. and another v. B.D. Agarwal and others***[14]. General view, however, is that whenever a State or an instrumentality of a State is involved, it will be regarded as an issue within the meaning of 'public law' but where individuals are at loggerheads, the remedy therefor has to be resorted in private law field. Situation, however, changes with the advancement of the State function particularly when it enters in the fields of commerce, industry and business,

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[12](2002) 8 SCC 481
[13](2003) 6 SCC 697
[14](2003) 6 SCC 230

as a result whereof either private bodies take up public functions and duties, or they are allowed to do so. The distinction has narrowed down but again concededly such a distinction still exists. Drawing an inspiration from the decisions, as discussed above, it may be safely inferred that when essential governmental functions were placed or allowed to be performed by private body, they must be held to have undertaken 'public duty' or public functions. Same is true as to respondent CVPP herein. The respondent CVPP has to undertake public importance project(s), where, obviously, not only public interest but public function as well is involved, i.e. execution of three Hydroelectric Projects namely *Pakal Dul*, *Kiru* and *Kwar*, with aggregate capacity of 2164 MW at Chenab River Basin in Distt Kishtwar of Jammu & Kashmir. The said responsibility and task was that of the J&K State Government in assistance/consultation with the Central Government. Both the State and Central Governments have assigned the said task and job to respondent CVPP. The respondent CVPP has not only to own the said Projects, but also to operate and maintain the said Projects. Thus, respondent CVPP, after completion of said Projects, is also to operate and maintain the said Projects. In addition, it would not be appropriate to give

such hydroelectric projects in the hands of individuals/ private persons/company(ies) for individual/personal gains. Respondent CVPP is to exercise all rights and powers exercisable in planning, investigation, research, design and preparation of preliminary, feasibly and definite project reports, construction, generation, operation, maintenance of Power Stations and Projects, transmission, distribution, trading and sale of power and to carry on business of purchasing, selling, importing, exporting, producing, trading, manufacturing or otherwise dealing in all aspects of planning, investigation, research, design and preparation of preliminary, feasibility and definite project reports, construction, generation, operation and maintenance of Power Stations and Projects, transmission, distribution and sale of Power, Power Development and for that purpose to install operate and manage all necessary plants, establishments and works. The activities of CVPP, therefore, cannot be said to be carried by a private industry or an individual for individual/personal gains and profits.

34. When the State "merely" authorizes a given "private" action imagine a green light at a street corner authorizing pedestrians to cross if they wish that action cannot automatically become one taken under "state authority" in

any sense that makes the Constitution applicable. Which authorizations have, that Constitution triggering effect will necessarily turn on the character of the decision making responsibility thereby placed (or left) in private hands. However described, there must exist a category of responsibilities regarded at any given time as so "public" or "governmental" that their discharge by private persons, pursuant to state authorization even though not necessarily in accord with the State direction, is subject to the federal constitutional norms that would apply to public officials discharging those same responsibilities. For example, deciding to cross the street when a police officer says you may, is not such a "public function;" but authoritatively deciding who is free to cross and who must stop, is a "public function", whether or not the person entrusted under State law to perform that function wears a police uniform and is paid a salary from state revenues or wears civilian garb and serves as a volunteer crossing guard". Performance of a public function in the context of the Constitution of India, would be to allow an entity to perform the function as an authority within the meaning of Article 12, which makes it subject to the constitutional discipline of fundamental rights.

35. It may not be out of place to mention here that the Government, representing executive authority of the State, does act through instrumentality or agency of natural persons or it employs instrumentality or agency of certain persons to carry out its functions. In the early days, when the Government had limited functions, it did operate effectively through natural persons, constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government burgeoned the advent of the welfare State, it began to be increasingly felt that framework of civil service was not sufficient to handle new tasks, which were often of specialised and highly technical character. The inadequacy of civil service to deal with these new problems, came to be thought of and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation(s), body(ies), authority(ies) came into being as the third arm of the Government. As early as in 1819, the Supreme Court of the United States in ***Mac Cullough v.***

Maryland[15]*,* held that the Congress has power to charter corporations as incidental to or in aid of governmental functions and, as pointed out by *Mathew, J.*, in ***Sukhdev Singh v. Bhagat Ram*** case (supra), such federal corporations would *ex hypothesi* be agencies of the Government. In Great Britain too, the policy of public administration through separate corporations and bodies was gradually evolved and the conduct of basic industries through giant corporations and companies, has now become a permanent feature of public life. So far as India is concerned, the genesis of emergence of corporations and companies as instrumentalities or agencies of Government, is to be found in the *Government of India Resolution on Industrial Policy* dated 6th April, 1948, where it was stated, *inter alia*, that "*management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this"*. It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial Policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions.

[15]4 Wheat 315 (1819)

Ordinarily these functions could have been carried out by Government departmentally through its service personnel, but the instrumentality or agency of the corporations, authorities and companies, was resorted to in these cases, given the nature of the task to be performed. The corporations, companies and authorities, acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government, acting through its officers, is subject to certain constitutional and public law limitations, it must follow *a fortiori* that Government, acting through the instrumentality or agency of corporations, companies or bodies, should equally be subject to the same limitations. But the question is how to determine whether a corporation, company or a body, is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty.

36. A corporation or company may be created in one or two ways. It may be either established by statute or incorporated under a law, such as the Companies Act or Societies Registration Act. Where a corporation is wholly controlled by Government not only in its policy making but

also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matter. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature or the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is

quite often the case, a corporation, established by statute, may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this consideration also may not be determinative, because even while the directors are appointed by Government, they may be completely free from governmental control in discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all-inclusive or exhaustive test, which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations or companies into those which are instrumentalities or agencies of Government and those which are not.

37. The analogy of the concept of State action as developed in the United States may not, however, be altogether out of place while considering this question. The decisions of the courts in the United States, seem to suggest that a private agency, if supported by extraordinary assistance given by the State, may be subject to the same constitutional limitations as the State. Indubitably, it may

be pointed out that the State's general common law and statutory structure under which its people carry on their private affairs, own property and contract, each enjoying equality in terms of legal capacity, is not such State assistance as would transform private conduct into State action. However, if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation or company is an instrumentality or agency of Government. The leading case on the subject in the United States is ***Kerr v. Eneck Pratt Free Library***[16]. The Library system in question in this case was established by private donation in 1882, but by 1944, 99 per cent of the system's budget was supplied by the city, title to the library property was held by the city, employees there paid by the city payroll officer and a high degree of budget control was exercised or available to the city government. On these facts the Court of Appeal required the trustees managing the system to abandon a discriminatory admission policy for its library training courses. It will be

[16]149 F 2d 212

seen that in this case there was considerable amount of State control of the library system in addition to extensive financial assistance and it is difficult to say whether, in the absence of such control it would have been possible to say that the action of the trustees constituted State action. Thomas P. Lewis has expressed the opinion in his article on "*The meaning of State Action" (60 Colombia Law Review 1083)* that in this case "it is extremely unlikely that absence of public control would have changed the result as long as 99% of the budget of a nominally private institution was provided by government. Such extensive governmental support should be sufficient identification with the Government to subject the institution to the provisions of the Fourteenth Amendment". It may, therefore, be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. But where financial assistance is not so extensive, it may not by itself, without anything more render the corporation an instrumentality or agency of government, for there are many private institutions, which are in receipt of financial assistance from the State and merely on that account, they cannot be classified as

State agencies. Equally a mere finding of some control by the State would not be determinative of the question "since a State has considerable measure of control under its police power over all types of business operations". But “a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characteristic an operation as State action" as observed in ***Sukhdev Singh v. Bhagatram*** case (supra). So also the existence of deep and pervasive State control may afford an indication that the corporation/company is a State agency or instrumentality. It may also be a relevant factor to consider whether the company enjoys monopoly status, which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State, as are the observations of *Douglas, J.*, in ***Jackson v. Metropolitan Edison Co***[17].

38. Another factor that can as well be regarded as having a bearing on this issue and it is whether operation of corporation, company, body or entity is an important public function. It has been held in a number of cases in the United States that the concept of private action must

[17]419 US 345 : 42 L Ed 2d 477

yield to a conception of State action, where public functions are being performed as said by *Arthur S. Miller* [*"The Constitutional Law of the Security State" (10 Stanford Law Review 620 at 664)]*. It was pointed out by *Douglas, J.*, in ***Evans v. Newton[18],*** that "when private individuals or groups are endowed by the State with powers or functions, governmental in nature, they become agencies or instrumentalities of the State". Same is apropos in present case as well. Respondent CVPP has been endowed by the State Government as well as Central Government with powers and functions, which, in essence, are governmental in nature, therefore, respondent CVPP becomes agency or for that matter instrumentality of the State.

39. Of course, with the growth of welfare State, it is very difficult to define what functions are governmental and what are not, because, as pointed out by *Villmer, L.J.* in ***[Pfizer v. Ministry of Health[19]***, there has been since mid-Victorian times, "a revolution in political thought and a totally different conception prevails today as to what is and what is not within the functions of Government". *Douglas, J.*, also observed to the same effect in ***New***

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[18]382 US 296 : 15 L Ed 2d 373
[19]*(1964) 1 Ch 614, 641 : (1963) 1 All ER 590 (affirmed in 1965) AC 512]*

York v. United States[20]: "A State's project is as much a legitimate governmental activity whether it is traditional or akin to private enterprise, or conducted for profit." And as observed is in ***Cf. Helverillg v. Gerhardt***[21]: A State may deem it as essential to its economy that it owns and operates a railroad, a mill, or an irrigation system as it does to own and operate bridges, streetlights, or a sewage disposal plant. What might have been viewed in an earlier days as an improvident or even dangerous extension of State activities, may today be deemed indispensable. It may be noted that besides the so-called traditional functions, the modern State operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation, company or body are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation, company or body as an instrumentality or agency of Government. This is precisely what was pointed out by *Mathew, J.*, in ***Sukhdev v. Bhagatram*** (supra) where learned Judge said that "institutions engaged in matters of high public interest of performing public functions are by virtue of the nature of the functions performed government agencies.

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[20]326 U.S. 572
[21]304 U.S. 405, 426, 427

Activities which are too fundamental to the society are by definition too important not to be considered government functions. This demands the delineation of a theory which requires government to provide all persons with all fundamentals of life and the determinations of aspects which are fundamental. The state today has an affirmative duty of seeing that all essentials of life are made available to all persons. The task of the state today is to make possible the achievement of a Good life both by removing obstacles in the path of such achievements and in assisting individual in realizing his ideal of self-perfection".In the present case, respondent CVPPis engaged in matters of high public interest and/or performing public functions, which are by virtue of the nature of the functions being performed by government departments. It is germane to point out that the State today has an affirmative duty of seeing that all essentials of life are made available to its citizens. The task of the State today is to make possible achievement of a good life, both by removing obstacles in path of such achievements and in assisting individual in realizing his ideal of self-perfection. The State needs power, to run State machinery, banks, hospitals, schools, industries etcetera. The power (electricity), it may not be out of

place to mention here, can very well be said, has catapult to pinnacle, where one cannot imagine life without electricity. Our life today is contingent on electricity. Household utensils, tools, gadgets, appliances, reliant on electricity, have made our life easier. Minus electricity, our life is Stone Age. In such circumstances, the major and main focus of the State is to provide more and more electricity to its citizens and for that aim and objective, CVPP has been established. Therefore, respondent CVPP is discharging the important public importance function of the State.

40. Chenab Valley Power Projects Private Limited – respondent No.1, which is a Joint Venture of National Hydro Power Corporation Limited (NHPC), JKSPDC and PTC India Limited, has been given responsibility to plan, promote and organise an integrated and efficient development of *Pakal Dul, Kiru* and *Kwar* Hydroelectric Projects. Respondent CVPP is to execute these Projects on Build, Own, Operate and Maintain (BOOM) basis. Respondent CVPP is to use and utilise all the resources of J&K State, for public purpose i.e. to generate and supply power. And generation and supply of power cannot be permitted to be in the hands of an individual or private person.

41. Further to say, one of the principal tests applied by the United States Supreme Court in ***Marsh v. Alabama***[22]for holding that a corporation which owned a Company town, was subject to the same constitutional limitations as the State. This case involved the prosecution of Marsh, a member of the *Johevah's* witnesses' sect, under a state trespass statute for refusing to leave the side walk of the company town where she was distributing her religious pamphlets. She was fined $ 5/- and aggrieved by her conviction she carried the matter right upto the Supreme Court contending successfully that by reason of the action of the corporation her religious liberty had been denied. The Supreme Court held that administration of private property such as a town, though privately carried on, was, nevertheless, in the nature of a public function and that the private rights of the corporation must, therefore, be exercised within constitutional limitations and the conviction for trespass was reversed. The dominant theme of the majority opinion written by Mr Justice Black was that the property of the corporation used as a town not recognisably different from other towns, lost its identification as purely private property. It was said that a town may be privately owned and managed but that does

[22]326 U.S. 501: 19 L Ed. 265 (1946)

not necessarily allow the corporation to treat it as if it was wholly in private sector and the exercise of constitutionally protected rights on public, street of a company town could not be denied by the owner. "*The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation*". *Mr Justice Frankfurter*, concurring, reduced the case to simpler terms. He found in the realm of civil liberties the need to treat a town, private or not, as a town. The function exercised by the corporation was in the nature of municipal function and it was, therefore, subject to the constitutional limitations placed upon State action.

42. The same test of public or governmental character of the function was applied by the Supreme Court of the United States in ***Evans v. Newton*** (supra) and ***Smith v.***

Allwigh[23]. The decisions show that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation/ company, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between governmental functions and non-governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the *laissez faire* is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between governmental activities which are private and private activities which are governmental. But the public nature of the function, if impregnated with governmental character or "*tied or entwined with Government*" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. In distinction from others, if a department of Government is transferred

[23]5 321 US 649

to a corporation, it would be a strong factor supportive of this inference. It will, thus, be seen that there are several factors which are to be considered in determining whether a corporation, company or a body is an agency or instrumentality of Government. Some of these factors which may be summarised are: whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance; whether there is any other form of assistance, given by the State; and if so whether it is of the usual kind or it is extraordinary; whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control; whether a body enjoys State conferred or State protected monopoly status and whether the functions carried out by the company or corporation are public functions closely related to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the company, corporation or a body and Government calling for flexibility, adapt ability and innovative skills, it is not possible to make an exhaustive

enumeration of the tests, which would invariably and in all cases provide an unfailing answer to the question whether a corporation, organisation, company or a body is governmental instrumentality or agency. Moreover even amongst these factors which have been described, no one single factor will yield a satisfactory answer to the question and the court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case. "*The dispositive question in any stale action case*," as pointed out by *Douglas, J.*, in ***Jackson v. Metropolitan Edison Company***(supra) "*is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility*". It is not enough to examine seriatim each of the factors upon which a body, company or corporation is claimed to be an instrumentality or agency of the Government and to dismiss each individually as being insufficient to support a finding of that effect. It is the aggregate or cumulative effect of all the relevant factors that is controlling. Now, obviously where a company, organisation, or a body 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.

43. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such a body, corporation or company 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. Now this rule, flowing as it does from Article 14, applies to every State action and since "State" is defined in Article 12 of the Constitution, to include not only the Government of India and the Government of each of the States, but also "*all local or other authorities within the territory of India or under the control of the Government of India*", it must apply to action of "*other authorities*" and they must be held subject to the same constitutional limitation as the Government. But the question arises what are the "*other authorities*" contemplated by Article 12 of the Constitution of India, which fall within the definition of 'State'? On this question considerable light is thrown by the Supreme Court in ***Rajasthan Electricity Board v. Mohan Lal***[24]. In

[24](1967) 3 SCR 377: AIR SC 1857

the said case the Supreme Court considered the question, whether Rajasthan Electricity Board was an 'authority' within meaning of the expression "*other authorities*" in Article 12 of the Constitution.*Bhargava, J.*, delivering the judgment of the majority pointed out that the expression "*other authorities*", in Article 12 of the Constitution of India, would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if a body of persons has authority to issue directions, disobedience whereof would be punishable as a criminal offence, that would be an indication that that authority is 'State'. *Shah, J.*, who delivered a separate judgment, agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression "*other authorities*". He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression "other authorities", if it has been invested with statutory power to issue binding directions to third parties,

the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C.J., in ***Sukhdev v. Bhagat Ram*** (supra). *Mathew, J.*, in the same case, propounded a broader test, namely, whether the statutory corporation or other body or authority, claimed to fall within the definition of State', is as instrumentality or agency of Government: if it is, it would fall within the meaning of the expression 'other authorities' and would be ‘State'.

44. The most significant expression used in Article 12 is “other authorities”. This expression is not defined in the Constitution. The interpretation of the term “other authorities” has caused a good deal of difficulty, and judicial opinion has undergone changes over time. Today’s government performs a large number of functions because of the prevailing philosophy of a social welfare state. The government acts through natural persons as well as juridical persons. Some functions are discharged through traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as companies, corporations etcetera. While the government acting departmentally, or through

officials, undoubtedly, falls within the definition of ‘state” under Article 12, doubts had been cast as regards the character of autonomous bodies. Whether they could be regarded as ‘authorities’ under Article 12 and, thus, be subject to Fundamental Rights. An autonomous body may be a statutory body, i.e. a body set up directly by a statute, or it may be a non-statutory body, i.e. body registered under general law, such as, the Companies Act, the Societies Registration Act, or a State Cooperative Societies Act, etc. Questions have been raised whether such bodies may be included within the coverage of Article 12. For this purpose, the Supreme Court has developed the concept of an “instrumentality” of the State. Any ‘body’ which can be regarded as an “instrumentality” of the State, falls under Article 12. The reason for adopting such a broad view of Article 12 is that the Constitution should, whenever possible, be construed as to apply to arbitrary application of power against individuals by centres or power. The emerging principle appears to be that a public corporation being a creation of the state is subject to the Constitutional limitation as the state itself. Further that the governing power wherever located must be subject to fundamental constitutional limitations. The question was considered more thoroughly

in ***Ramana D. Shetty v. International Airport Authority***[25]. The International Airport Authority, a statutory body, was held to be an 'authority'. The Supreme Court also developed the general proposition that an 'instrumentality' or 'agency' of the government would be regarded as an 'authority' or 'State' within Article 12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not. Where a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as the government itself. In this case, the Court was enforcing the mandate of Article 14 against the corporation.

45. In ***Som Prakash v. Union of India***[26], the company was held to fall under Article 12. The Court emphasized that the true test for the purpose whether a body was an 'authority' or not was not whether it was formed by a statute, or under a statue, but it was "functional". In the instant case, the key factor was "the brooding presence of the state behind the operations of the body, statutory or other". In this case, the body was semi-statutory and semi-non-statutory. It was non-statutory in origin, as it was registered; it also was recognised by the Act in

[25](1979) 3 SCC 489
[26](1981) 1 SCC 449

question and, thus had some "statutory flavour" in its operation and functions. The question regarding the status of a non-statutory body was finally clinched in ***Ajay Hasia v. Khalid Mujib***[27], where a society registered under the Societies Registration Act, running the regional engineering college, sponsored, supervised and financially supported by the Government, was held to be an 'authority'. Money to run the college was provided by the State and Central Governments. The State Government could review the functioning of the college and issue suitable instructions if considered necessary. Nominees of the State and Central Government were members of the society including its Chairman. The Supreme Court ruled that where a corporation is an instrumentality or agency of the government, it must be held to be an authority under Article 12 of the Constitution of India. The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society. Thus, a registered society was held to be an 'authority' for the purposes of Article 12. *Ajay Hasia* has initiated a new judicial trend, viz. that of expanding the significance of the term "authority". The Supreme Court in the said case laid

[27](1981) 1 SCC 722

down the following tests to adjudge whether a body is an instrumentality of the government or not:

a) If the entire share capital of the corporation is held by government it would go a long way towards indicating that the corporation is an instrumentality or agency of the government.

b) Where the financial assistance of the State is so much as to make almost entire expenditure of the corporation, it would assume indication of the corporation being impregnated with governmental character.

c) It may also be a relevant factor whether the Corporation enjoys monopoly status which is State conferred or State protected.

d) Existence of deep and pervasive State control may afford an indication that the Corporation is an agency or instrumentality.

e) If the functions of the corporation are of public importance and closely related government functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.

46. The important question is not how the juristic person is born, but why has it been into existence? It does not matter what is the structure of the body in question: it may be statutory or non-statutory; it may be set up by, or under, an Act of the Legislature or even administratively. It does not matter whether the body in question has been

set up initially by the government or by private enterprise. It does not matter what functions the body does discharge; it may be government, semi government, educational, commercial, banking, social service. The Supreme Court has pointed out that even if it may be assumed that one or the other test as provided in the case of *Ajay Hasia* may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of the public nature or State. In view of the several views and tested suggested by the Supreme Court it is not possible to make a close ended category of bodies which would be considered to be a state within the meaning of Article 12. The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by, or under the control of the Government. Such control must be particularly to the body in question and must be pervasive.

47. The Courts have been led to take expansive view of Article 12 because of the feeling that if instrumentalities of the government are not subject to the same legal discipline as the government itself because of the plea

that they were distinct and autonomous legal entities, then the government would be tempted to adopt the stratagem of setting up such administrative structures on a big scale in order to evade the discipline and constraints of the Fundamental Rights thus eroding and negating their efficacy to a very large extent. In this process, judicial control over these bodies would be very much weakened.

48. The judicial anvil was in ***Mysore Paper Mills Ltd. vs. The Mysore Paper Mills Officers Association*** JT 2002 (1) SC 61 which fairly represents what we have seen as a continuity of thought commencing from the decision in *Rajasthan Electricity Board* in 1967 upto the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is 'an authority' within the meaning of Art.12.

49. The Supreme Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology***[28], by majority view, agreed to the statement of law in ***Rajasthan Electricity Board*** case (supra), that "*The State, as defined in Art.12,*

[28](2002) 5 SCC 111

is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people". What has been observed in *Pradeep Kumar Biswas*, by majority view, is:

> "The picture that ultimately emerges is that the tests formulated in ***Ajay Hasia*** are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.
> xxxxxx
> These objects which have been incorporated in the Memorandum of Association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in ***Rajasthan Electricity Board v. Mohan Lal*** (Supra) where it was said:
>
> > "The State, as defined in Art.12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people".
>
> We are in respectful agreement with this statement of the law."

50. The term "authority" used in Article 226, must receive a liberal meaning unlike the term in Article 12.Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only

to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied." In ***Dr. Janet Jeyapaul v. SRM University and anr*** (AIR) 2016 SC 73, while discussing Article 12 and 226 of the Constitution of India, the Supreme Court has observed and opined:

> "(h) Against the said order, respondent No.1 herein filed Writ Appeal No. 932 of 2013 before the High Court. By impugned judgment dated 04.07.2013, the Division Bench of the High Court allowed the appeal. It was held that the writ petition filed by the appellant against respondent No.1 was not maintainable as according to the Division Bench, respondent No.1 is neither a State nor an authority within the meaning of Article 12 of the Constitution of India and hence it cannot be subjected to writ jurisdiction of the High Court under Article 226 of the Constitution to examine the legality and correctness of the dismissal order. The Division Bench, therefore, did not examine the merits of the case made out by the appellant successfully before the Single Judge. The Division Bench, however, granted liberty to the appellant to approach the Tribunal for ventilating of her grievance on merits.
> xxxxx
> 7. Submissions of Mr. Harish Salve were many fold. According to him, while deciding the question as to whether the writ lies under Article 226 of the Constitution of India against any person, juristic body, organization, authority etc., the test is to examine in the first instance the object and purpose for which such body/authority/organization is formed so also the activity which it undertakes to fulfill the said object/purpose.
> 8. Pointing out from various well known English commentaries such as *De Smith's Judicial Review*, 7th Edition, *H.W.R.Wade* and *C.F. Forsyth Administrative law*,

10th Edition, *Michael J. Beloff in his article Pitch, Pool, Rink,……Court? Judicial Review in the Sporting World*, 1989 Public Law 95, English decisions in *Breen vs. A.E.U. (1971) 2 QB 175*, *R. vs. Panel on Take-overs and Mergers*, ex parte Datafin Plc and another (Norton Opax Plc and another intervening) (1987) 1 All ER 564, *E.S. Evans vs. Charles E. Newton* 382 US 296 (1966) and of this Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. vs. V.R. Rudani & Ors., (1989) 2 SCC 691* and *Zee Telefilms Ltd. vs. Union of India (2005) 4 SCC 649*, Mr. Harish Salve submitted that perusal of these authorities/decisions would go to show that **there has been a consistent view of all the learned authors and the Courts all over the world including in India that the approach of the Court while deciding such issue is always to test as to whether the concerned body is formed for discharging any "Public function" or "Public duty" and if so, whether it is actually engaged in any public function or/and performing any such duty**.

9. According to learned counsel, **if the aforesaid twin test is found present in any case then such person/body/ organization/authority, as the case may be, would be subjected to writ jurisdiction of the High Court under Article 226 of the Constitution**.

10. Learned senior counsel elaborated his submission by pointing out that the expression "any person or authority" used in Article 226 are not confined only to statutory authorities and instrumentalities of the State but may in appropriate case include any other person or body performing "public function/duty". Learned counsel urged that emphasis is, therefore, always on activity undertaken and the nature of the duty imposed on such authority to perform and not the form of such authority. According to Mr. Harish Salve, once it is proved that the activity undertaken by the authority has a public element then regardless of the form of such authority it would be subjected to the rigor of writ jurisdiction of Article 226 of the Constitution.

11. Learned counsel then urged that in the light of several decisions of this Court, one cannot now perhaps dispute that "imparting education to students at large" is a "public function" and, therefore, if any body or authority, as the case may be, is found to have been engaged in the activity of imparting education to the students at large then irrespective of the status of any such authority, it should be made amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.

12. Learned counsel further pointed out that the case in hand clearly shows that respondent No. 1 - a juristic body is engaged in imparting education in higher studies and what is more significant is that respondent No. 1 is conferred with a status of a “Deemed University" by the Central Government under Section 3 of the UGC Act. These two factors, according to Mr. Harish Salve, would make respondent No. 1 amenable to writ jurisdiction of the High Court under Article 226 because it satisfies the twin test laid down for attracting the rigor of writ jurisdiction of the High Court.

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14. Having heard learned counsel for the parties and on perusal of the record of the case, we find force in the submissions urged by Mr. Harish Salve.

15. To examine the question urged, it is apposite to take note of what De Smith, a well-known treaty, on the subject "Judicial Review" has said on this question [See *De Smith's Judicial Review*, 7th Edition, page 127 (3-027) and page 135 (3-038)].

> "AMENABILITY TEST BASED ON THE SOURCE OF POWER. The courts have adopted two complementary approaches to determining whether a function falls within the ambit of the supervisory jurisdiction. First, the court considers the legal source of power exercised by the impugned decision-maker. In identifying the "classes of case in which judicial review is available", the courts place considerable importance on the source of legal authority exercised by the defendant public authority. Secondly and additionally, where the "source of power" approach does not yield a clear or satisfactory outcome, the court may consider the characteristics of the function being performed. This has enabled the courts to extend the reach of the supervisory jurisdiction to some activities of non-statutory bodies (such as self-regulatory organizations). We begin by looking at the first approach, based on the source of power." "JUDICIAL REVIEW OF PUBLIC FUNCTIONS The previous section considered susceptibility to judicial review based on the source of the power: statute or prerogative. The courts came to recognize that an approach based solely on the source of the public authority's power was too restrictive. Since 1987 they have developed an additional approach to determining susceptibility based on by the type of function performed by the decision-maker. The "public function" approach is, since 2000, reflected in the Civil Procedure Rules: CPR.54.1(2)(a)(ii), defines a claim for judicial review as a claim to the lawfulness of "a decision, action or failure to act in relation to the exercise of a public function." (Similar terminology is used in the Human Rights Act 1998, s. 6(3)(b) to define a public authority as "any person certain of whose functions are functions of a public nature", but detailed consideration of that provision is postponed until later). As we noted at the outset, the term "public" is usually a synonym for "governmental"."

16. The English Courts applied the aforesaid test in *R. vs. Panel on Take-overs and Mergers*, ex parte Datafin Plc and another (Norton Opax Plc and another intervening) (1987) 1 All ER 564, wherein *Sir John Donaldson MR* speaking for three-judge Bench of Court of Appeal (Civil Division), after examining the various case law on the subject, held as under:

> "**In determining whether the decisions of a particular body were subject to judicial review, the**

> **court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions**……."

17. In *Andi Mukta's* case (supra), the question before this Court arose as to whether mandamus can be issued at the instance of an employee (teacher) against a Trust registered under Bombay Public Trust Act, 1950 which was running an educational institution (college). The main legal objection of the Trust while opposing the writ petition of their employee was that since the Trust is not a statutory body and hence it cannot be subjected to the writ jurisdiction of the High Court. The High Court accepted the writ petition and issued mandamus directing the Trust to make payments towards the employee's claims of salary, provident fund and other dues. The Trust (Management) appealed to this Court.

18. This Court examined the legal issue in detail. *Justice K. Jagannatha Shetty* speaking for the Bench agreed with the view taken by the High Court and held as under:

> "11. Two questions, however, remain for consideration:
>
> (i) The liability of the appellants to pay compensation under Ordinance 120-E and
>
> (ii) The maintainability of the writ petition for mandamus as against the management of the college……
>
> 12. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Bombay Public Trust Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court: (a) *Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain*, (1976) 2 SCC 58 and (b) *Deepak Kumar Biswas v. Director of Public Instructions*, (1987) 2 SCC 252. In the first of the two cases, the respondent institution was a Degree College managed by a registered cooperative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Cooperative Societies Act and affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not

a statutory body since not created by or under a statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory body.

15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12.Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32.**Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.**"

19. This issue was again examined in great detail by the Constitution Bench in *Zee Telefilms Ltd. & Anr. Vs. Union of India & Ors.,* (2005) 4 SCC 649 wherein the question which

fell for consideration was whether the Board of Control for cricket in India (in short “BCCI”) falls within the definition of “State” under Article 12 of the Constitution. This Court approved the ratio laid down in *Andi Mukta’s* case(supra) but on facts of the case held, by majority, that the BCCI does not fall within the purview of the term State. This Court, however, laid down the principle of law in Paras 31 and 33 as under :

> “31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.
>
> 33. **Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226**……”

20. It is clear from reading of the ratio *decidendi* of judgment in *Zee Telefilms Ltd.* (supra) that firstly, it is held therein that the BCCI discharges public duties and secondly, an aggrieved party can, for this reason, seek a public law remedy against the BCCI under Article 226 of the Constitution of India.

21. Applying the aforesaid principle of law to the facts of the case in hand, we are of the considered view that the Division Bench of the High Court erred in holding that respondent No.1 is not subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution. In other words, it should have been held that respondent No.1 is subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution.

22. This we say for the reasons that firstly, respondent No. 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under Section 3 of the UGC Act. Fourthly, being a “Deemed University”, all the provisions of the UGC Act are made applicable to respondent No. 1, which inter alia provides for effective discharge of the public function - namely education for the benefit of public. Fifthly, once respondent No. 1 is declared as “Deemed University" whose all functions and activities are governed by the UGC Act, alike other

> universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of High Court under Article 226 of the Constitution.
> 23. In the light of foregoing discussion, we cannot concur with the finding rendered by the Division Bench and accordingly while reversing the finding we hold that the appellant's writ petition under Article 226 of the Constitution against respondent No. 1 is maintainable." (emphasis supplied)

51. To settle Issue No.1, let's see "*whether respondent No.1 falls within realm of Article 12, Constitution of India*". Chenab Valley Power Projects [P] Limited (CVPP), has been incorporated on 13th June 2011 as a Joint Venture Company of NHPC Limited, JKSPDC and PTC (India) Limited, for execution of 03 Hydroelectric Projects namely *Pakal Dul, Kiru* and *Kwar* with aggregate capacity of 2164 MW at Chenab River Basin in District Kishtwar of Jammu & Kashmir, with equity participation of 49%, 49% and 2% by NHPC, JKSPDC & PTC respectively. Respondent CVPP is to execute these Projects on Build, Own, Operate and Maintain (BOOM) basis. Thus it can be safe to say that respondent CVPP in not only Government of India undertaking but Government of J&K undertaking as well. It has to undertake public importance project(s), where, obviously, public interest is involved, i.e. execution of three Hydroelectric Projects namely *Pakal Dul*, *Kiru* and *Kwar*, with aggregate capacity of 2164 MW at Chenab River Basin in Distt Kishtwar of Jammu &

Kashmir. And thereafter it has not only to own the said Projects, but also to operate and maintain the said Projects. Thus, respondent CVPP is not a Project or a Programme for a particular period of time, to execute the above Projects, but after completion of said Projects, it is to operate and maintain the said Projects thereafter. Above and beyond, it would not be appropriate to give such hydroelectric projects in the hands of private persons/company(ies). Memorandum of Association of CVPP reveals that CVPP is to act as an “agent” of Government. CVPP is to use and utilize the important resource of the State i.e. water, for generation of power. The water of the State is not a personal property of any individual. It is the property of the State and its subjects. CVPP is to make use of land of the State for construction of hydroelectric projects. The land is to be provided either by the Government (Government Department(s), or by subjects of the State. CVPP’s Memorandum of Association also provides that it will exercise all rights and powers exercisable in planning, investigation, research, design and preparation of preliminary, feasibly and definite project reports, construction, generation, operation, maintenance of Power Stations and Projects, transmission, distribution, trading and sale of power and

to carry on business of purchasing, selling, importing, exporting, producing, trading, manufacturing or otherwise dealing in all aspects of planning, investigation, research, design and preparation of preliminary, feasibility and definite project reports, construction, generation, operation and maintenance of Power Stations and Projects, transmission, distribution and sale of Power, Power Development and for that purpose to install operate and manage all necessary plants, establishments and works. The activities of CVPP, therefore, cannot be said to be carried by a private industry as if the CVPP is owned or controlled by an individual person or a commercial company, but carries the above activities in the capacity of being an agency or instrumentality of the State. In that view of the matter, respondent CVPP is the voice and the hands of the Central Government and State Government.

52. In such situation, being an undertaking of both Government of India and Government of J&K, respondent CVPP is to generate and supply the power to both Government of India and Government of J&K. In that view of matter, as far as provisions of Article 12 of the Constitution, are concerned, respondent CVPP being “instrumentality” of the State, the provisions of Article

12 of the Constitution of India are attracted, and for that reason, writ petition under Article 226 of the Constitution is maintainable. This aspect also gets support from the law laid down in ***Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsa vs. Smarak Trust and others***[29]wherein the Supreme Court has held that term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentality of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. Similarly, in ***Ramesh Ahluwalia v. State of Punjab & Ors.***[30]**,** it is held that writ cannot be denied if a person or authority concerned performs public duty not necessarily imposed by the Statute. Technicalities should not come in the way of granting relief. Reliance is also placed on the judgment of

[29]AIR 1989 C 1607
[30](2012) 12 SCC 331

Supreme Court in the case of ***Zee Telefilms Ltd. & Anr. Vs. Union of India & Ors.***[31]. It has been held that when a private body exercises its public functions even if it is not a State, aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Apart from that, respondents have made some admission as about respondent CVPP being agency or instrumentality of the State. In written argument, in the concluding paragraph, respondent CVPP has submitted that Pakal Dul is a prestigious project and upon completion will bring much needed relief to the people of Jammu & Kashmir from power shortages in addition to huge revenue generation for the State. It is further averred in the written argument that the project is of utmost importance, involving huge public money and that the project is listed under Prime Minister Reconstruction Plan (PMRP) for Jammu & Kashmir and is being vigorously monitored by various Ministries, Government of India and Office of Prime Minister (PMO) and needs to be implemented at the earliest. In addition to that, respondent CVPP in its objections to the writ petition has at various places stated that impugned decision cancelling the turnkey tender and

[31](2005) 4 SCC 649

flowing new tenders is neither arbitrary, nor discriminatory nor with mala fide intention but the interest of public because it involves huge public money and that scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions by the Supreme Court. Though respondent CVPP has tried to show itself a private entity, yet respondent CVPP has cited judgements and decisions, which exclusively relate to the action of the State, its agencies and instrumentalities in contract matters and not to private entities. And on the basis of said cited judgements, respondent CVPP defends, rationalizes and guards its decision, impugned in this writ petition. *That being the case, respondent CVPP is amenable to writ jurisdiction of this Court.*

53. After deciding first issue in affirmative, let's discuss and decide Second Issue viz. *whether the impugned decision of respondent CVPP, cancelling "turnkey tender" as also petitioner's bid and issuing fresh tender notices for "package mode", is arbitrary and unreasonable*. And on deciding the said Issue (Issue no.2) what would be its impact and what would be the relief that this Court would pass in favour of either of the parties.

54. Learned senior counsel for petitioner has placed reliance on various judgments in support of his written as well as oral submissions. It would be appropriate to take up and discuss the said judgements sequentially:

55. ***CSPEDI – TRISHE Consortium v. Tamil Nadu Generation and Distribution Corporation Limited***[32]. The said case is totally different from the instant one. In the said case, third respondent was identified as L1 and appellant was said to have no role, after L1 was identified. Besides, the judgment is not conclusive *per se*. The judgement again remanded the subject-matter to TANGEDCO for evaluation of the appellant's price bid along with the bid of the third respondent therein. What is important to be seen is the concluding para (paragraph 40) of the judgement. It closes on the observation that "*this Court has not expressed any opinion on whether or not the subject contract should be awarded to the appellant or the 3rd respondent as it is for the TANGEDCO to decide which one of these two bidders, would subserve the large public interest in executing the project by taking into consideration all relevant parameters*". Insofar as case in hand is concerned, there is no third party, who has been declared as lowest bidder

[32][2015 (7) MLJ 260]

(L1) or given preference and petitioner company thrown out of the race.

56. ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation***[33]. This is an English law case that sets out the standard of unreasonableness of the public body decisions that would make them liable to be quashed on judicial review, known as *Wednesbury* unreasonableness. In the said case, the court gave three conditions on which it would intervene to correct a bad administrative decision, including on grounds of its unreasonableness in the special sense later articulated in ***Council of Civil Service Unions v Minister for the Civil Service***[34]***,*** by *Lord Diplock*: So outrageous in its defiance of logic or accepted moral standards that no sensible person, who had applied his mind to the question to be decided, could have arrived at it.The fact of the said case are that in 1947 Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation in Staffordshire to operate a cinema on condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. Under the Cinematograph Act 1909, cinemas could be opened from

[33][1972 (2) All. ELR 680]
[34][1984] 3 All ER 935

Mondays to Saturdays but not on Sundays, and under a Regulation, the commanding officer of military forces in a neighbourhood could apply to the licensing authority to open a cinema on Sunday. The Sunday Entertainments Act 1932 legalized opening cinemas on Sundays by the local licensing authorities "subject to such conditions as the authority may think fit to impose" after a majority vote by the borough. Associated Provincial Picture Houses sought a declaration that Wednesbury's condition was unacceptable and outside the power of the Corporation to impose. The Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that: in making the decision, the defendant took into account factors that ought not to have been taken into account, or the defendant failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it. The court held that the decision did not fall into any of these categories and the claim failed. As *Lord Greene, M.*R said: It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with phraseology, commonly used in relation to exercise

of statutory discretions, often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. *Warrington LJ* in ***Short v Poole Corporation***[35]***,*** gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith and, in fact, all these things run into one another. The test laid down in this case, in all three limbs, is known as "the Wednesbury test". The term "Wednesbury unreasonableness" is used to describe the third limb, of being so unreasonable that no reasonable

[35][1926] Ch. 66, 90, 91

authority could have decided that way. This case or the principle laid down is cited in United Kingdom courts as a reason for courts to be hesitant to interfere with decisions of administrative law bodies. In recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciary have resiled from this strict abstentionist approach, recognising that in certain circumstances it is necessary to undertake a more searching review of administrative decisions. The European Court of Human Rights requires the reviewing court to subject the original decision to "anxious scrutiny" as to whether an administrative measure infringes a Convention right. In order to justify such an intrusion, respondents will have to show that they pursued a "pressing social need" and that the means, employed to achieve this, were proportionate to the limitation of the right. The UK courts have also ruled that an opinion formed by an employer in relation to a contractual matter has to be "reasonable" in the sense in which that expression is used in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*: Some extracts of the said cited judgement are: “*What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has*

contravened the law…. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever, it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good." In the present case what is to be seen is *whether or not the decision*, taken by respondent CVPP in cancelling turnkey tender as also petitioner company's offer and issuing fresh tenders for 'package mode', *is good*. As already pointed out, we should not forget the importance of the project. The NIT for "Turnkey Mode" has been cancelled by respondent CVPP and in its place "PackageMode" has been adopted. Respondent CVPP has not started or initiated afresh the same "Turnkey mode", after taking impugned decision, to preclude petitioner company from entering the said arena, but has come up with new mode and mechanism, which is called 'package mode'. Respondent CVPP is the master in the field, equipped with experts. Whatever the respondent CVPP, in its wisdom, has thought better and decided for achieving the goal of establishing the Project in question, is best known to it and that decision is

unopen to be put in a dock. This Court is not equipped or armed with necessary specialists, experts, to sit in judgement over the effectiveness of respondent CVPP's decision as regards starting and initiating fresh tender process on "Package Mode". Respondent CVPP was and is within its domain to cancel petitioner company's offer/bid having regard to importance of the project and issue fresh tender on "package mode" instead of "turnkey mode". It cannot be heard saying from petitioner that respondent CVPP, while cancelling petitioner company's bid, entered into negotiation or, for that matter, contract with some other tenderer/bidder on "Turnkey Mode". Respondent CVPP has in whole cancelled "Turnkey Tender" mode and invited fresh bids on "Package Mode", so that respondent CVPP incurs cost for only those events which actually occurs.

57. ***Drillmec S.P.A. v. Oil India Limited & ors***[36]. Insofar as the said case is concerned, it relates to awarding of contract in favour of respondent no.4 instead of petitioner, while ignoring his bid. In the cited case, petitioner was not informed about rejection of its bid, not to speak of disclosure of the grounds thereof. The petitioner filed writ petition claiming strict adherence of the terms and

[36][2013 (3) GauLT 624 : 2013 (4) GauLJ 58]

conditions of the bid and to award the contract, having regard to the lowest bid offered by it and that it was only when respondents filed affidavit-in-opposition, wherein they first time disclosed the factum of rejection of the bid as well as the grounds of such rejection and award of contract to third party. The present case, as ingeminated above, is distinguishable from the facts and circumstances of the said case inasmuch as present petitioner is before this Court with cancellation order in his hand and in the present case contract has not been awarded to any third party.

58. ***Maa Binda Express Carrier and another v. North-East Frontier Railway and others***(supra). The cited judgement squarely covers the instant case. The Supreme Court in the cited case has held that the bidders, participating in tender process, cannot insist that their tenders should be accepted simply because a given tender is highest or lowest depending upon whether contract is for sale of public property or for execution of works on behalf of the Government. It would be advantageous to reproduce relevant portion of judgement hereunder:

> "Suffice it to say that not only is the reserve price applicable as on date higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any

contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand.

8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. *(See: Meerut Development Authority v. Association of Management Studies and Anr. etc. (2009) 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505).*

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India (1994) 6 SCC 651, Raunaq International Ltd.'s* case (supra) and in *Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517* besides several other decisions to which we need not refer. In *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216* the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

> "19. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence

and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) **fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process** except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis supplied)

11. As pointed out in the earlier part of this order the **decision to cancel the tender process was in no way discriminatory or mala fide**. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent

> be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition.
>
> 12. In the result this appeal fails and is hereby dismissed with costs assessed at Rs.25,000/-" (Emphasis supplied)

In the cited judgement, not only appeal has been dismissed but costs as well have been imposed by the Supreme Court. It would be appropriate to say that the above judgement, cited by learned senior counsel for petitioner,has proved to be the petitioner's *Achilles' heel*in its case against respondent CVPP.

59. ***Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another***[37], cited by learned senior counsel for petitioner is again not giving some useful and necessary helpto present petitioner as it relates to award of contract in favour of a particular individual/person. In the said cited case, contract was awarded to appellant (Master Marine Services (P) Ltd), against which first respondent (Metcalfe & Hodgkinson (P) Ltd.) filed writ petition before the Delhi High Court. Writ petition, vide judgment and order dated 15th December 2004, was allowed, quashing contract of work of professional services awarded by second respondent (Container Corporation of India) in favour of appellant.

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[37](2005) 6 SCC 138

Aggrieved thereof, appeal, by special leave, was preferred by appellant before the Supreme Court. In concluding part, the Supreme Court holds that "*In such circumstances, no such public interest was involved which may warrant interference by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while undertaking judicial review of an administrative action relating to award of contract. We are, therefore, clearly of the opinion that the High Court erred in setting aside the order of CONCOR awarding the contract to the appellant*". Thus, it can be safe to say that the Supreme Court has vehemently held that the High Court erred in allowing writ petition while undertaking judicial review of an administrative action relating to award of contract.

60. ***B. S. N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others***[38]. In the cited case, challenge was thrown to acceptance of tender of appellant as appellant was stated to have failed to fulfil essential qualifications as contained in the Conditions of the Notice Inviting Tender before the Nagpur Bench of Bombay High Court. Writ petition was allowed by a Division Bench of the High Court by reason of judgment, quashing the Order, awarding contract in

[38](2006) 11 SCC 548

favour of appellant. Dissatisfied therewith, appellant knocked at doors of the Supreme Court. The outcome of appeal was that the Supreme Court gave right to the authority to consider offer of appellant. Upon consideration of matter afresh, as to whether it even now fulfils essential tender conditions. If it satisfies terms of tender conditions, contract may be awarded in favour of appellant. In the case in hand, respondent CVPP has not awarded contract in favour of either petitioner or for that matter any other Consortium. The Supreme Court in the cited judgment observed that it may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor. The same ordinarily being within its domain. The court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature. The Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. It would be profitable to reproduce paragraphs 56 to 59 of the said decision infra:

> “56.It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on

the part of the employer is apparent on the face of the record.

57. This Court in *Guruvayoor Devaswom Managing Committee and Another v. C.K. Rajan and Others [(2003) 7 SCC 546]* observed:

> "30. Dawn Oliver in Constitutional Reforms in the UK under the heading "The Courts and Theories of Democracy, Citizenship and Good Governance" at p. 105 states:
>
> "However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risks for the judges and for the public. Courts may interfere inadvisedly in public administration. The case of Bromley London Borough Council v. Greater London Council11 is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions, but were accused of themselves misunderstanding transport policy in so doing. **The courts are not experts in policy and public administration hence Jowell's point that the courts should not step beyond their institutional capacity** (Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws, L.J. in *International Transport Roth GmbH v. Secy. of State for the Home Deptt*.12 and of *Lord Nimmo Smith in Adams v. Lord Advocate*13, in which a distinction was drawn between areas where the subject-matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, the Government may react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. The Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law."
>
> [See also *State of U.P. and Another v. Johri Mal (2004) 4 SCC 714]*

58. In *Jagdish Swarup's Constitution of India, 2nd Edition, page 286*, it is stated:

> "It is equally true that even in contractual matters, a public authority does not have an unfettered decision to ignore the norms recognized by the Courts, but at the same time if a decision has been taken by a public authority in a bona fide manner, although not strictly following the norms laid down by the Courts, such decision is upheld on the principle that the Courts, while judging the constitutional validity of

> executing decisions, must grant a certain measure of freedom of "play in the joints" to the executive."

59. Recently, in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Another [(2005) 6 SCC 138]*, upon noticing a large number of decisions, this Court stated

> "15. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd.4 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that 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 powers 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 interfere."

61. ***Asha Sharma v. Chandigarh Administration and others [(2011) 10 SCC 86]***. This cited case relates to allotment and retention of government accommodation by an officer belonging to Indian Administration Services and not qua contract. The facts of the cited case have no equation with the present case. The rules and regulations vis-à-vis allotment and extension of government accommodation to a government officer, cannot bear a resemblance to the rules and regulations governing the field of contracts. The Supreme Court observed that courts can issue directions with regard to the dispute in a particular case, but should be very reluctant to issue

directions, which are legislative in nature. It would be advantageous to extract relevant portion of the judgement hereunder:

> "13. **The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances**. **The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical**. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to *Netai Bag v. State of West Bengal [(2000) 8 SCC 262]*.
> 14. xxxxx
> 19. However, in the case of *Guruvayoor Devaswom Managing Committee vs. C.K. Rajan [(2003) 7 SCC 546]* this Court, while specifying the scope and ambit of the Public Interest Litigation, clearly distinguished between the powers of the High Court under Article 226of the Constitution and the powers of this Court under Article 142 of the Constitution and observed
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> > "50. (x) The Court would ordinarily not step out of the known areas of judicial review. The High Courts although may pass an order for doing complete justice to the parties, it does not have a power akin toArticle 142 of the Constitution of India'.
>
> 20. Usefully, reference can also be made to the judgment of this Court in the case of *Reliance Airport Developers (P) Ltd. v. Airport Authority of India and Ors.* [(2006) 10 SCC 1], where while considering the scope for judicial interference in matters of administrative decisions, this Court held that it is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or if the exercise of power is manifestly arbitrary. Courts would exercise such power sparingly and would hardly interfere in a manner which may tantamount to enacting a law. They must primarily serve to bridge any gaps or to provide for peculiar unforeseen situations that may emerge from the facts and circumstances of a given case. These directions would be in force only till such time as the competent legislature enacts laws on the same issue. The high courts could exercise this power, again, with great caution and circumspection. Needless to say, when the High Court issues directions, the same ought not to be in conflict with laws remaining in force and with the directions issued by this Court.
> 21. In *Chandigarh Administration v. Manpreet Singh [(1992) 1 SCC 380]* while dealing with a matter of admission to

engineering colleges and reservation of seats etc., this Court held as under:

> "11. Counsel for Chandigarh Administration and the college (petitioners in SLP Nos. 16066 and 16065 of 1991) contended that the High Court has exceeded its jurisdiction in granting the impugned directions. He submitted that **High Court, while exercising the writ jurisdiction conferred upon by Article 226 of the Constitution of India, does not sit as an appellate authority over the rule-making authority nor can it rewrite the rules**. If the rule or any portion of it was found to be bad, the High Court could have struck it down and directed the rule-making authority to re-frame the rule and make admissions on that basis but the High Court could not have either switched the categories or directed that Shaurya Chakra should be treated as equivalent to Vir Chakra. By its directions, the High Court has completely upset the course of admissions under this reserved quota and has gravely affected the chances of candidates falling in category 4 by downgrading them as category 5 without even hearing them. These are good reasons for the categorisation done by the Administration which was adopted by the college.
>
> * * *
>
> 21. While this is not the place to delve into or detail the self-constraints to be observed by the courts while exercising the jurisdiction under Article 226, one of them, which is relevant herein, is beyond dispute viz., while acting under Article 226, the High Court does not sit and/or act as an appellate authority over the orders/actions of the subordinate authorities/tribunals. Its jurisdiction is supervisory in nature. One of the main objectives of this jurisdiction is to keep the government and several other authorities and tribunals within the bounds of their respective jurisdiction. The High Court must ensure that while performing this function it does not overstep the well recognised bounds of its own jurisdiction."

22. It is a settled canon of Constitutional Jurisprudence that this Court in the process of interpreting the law can remove any lacunae and fill up the gaps by laying down the directions with reference to the dispute before it; but normally it cannot declare a new law to be of general application in the same manner as the Legislature may do. This principle was stated by a Seven-Judge Bench of this Court in the case of *P. Ramachandra Rao v. State of Karnataka [(2002) 4 SCC 578]*.

23. On a proper analysis of the principles stated by this Court in a catena of judgments including the judgment afore-referred, it is clear that the courts can issue directions with regard to the dispute in a particular case, but should be very reluctant to issue directions which are legislative in nature…." (emphasis supplied)

What emerges from the above is that the Government is entitled to make adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical. Having said so, respondent CVPP has taken a decision, which petitioner company has impugned in instant writ petition, to go for execution of work in question by “Package Mode” instead of “Turnkey Mode”; this Court cannot ask or, for that matter, foist respondent CVPP to adopt a particular policy, because the policy decision, taken by respondent CVPP, equipped with and having battery of experts, mavens, professionals with it, is within its domain and not the domain of this Court.

62. ***Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others [(2015) 13 SCC 233]***. The cited judgement, while answering all issues/points raised by learned senior counsel for petitioner in support of the writ petition,settle all those issues/points at rest, which relate, in core, to awarding contract to a particular person and reject tenders of others. It would be advantageous to reproduce pertinent

portion of the judgement herein below as it discusses and decides the Issue as regards the decision taken by the authority therein, to cancel the tender process and start fresh process, as has been done by respondent CVPP in the present case, and the Supreme Court held that the decision taken by the authority, cancelling tender process and starting fresh process was not arbitrary and *mala fide*:

> "I. Whether decision contained in Resolution no. 108 dated 9.12.2010 is arbitrary and mala fide.
> x x x x x
>
> 21. …….. there is hardly any scope for argument that the decision of the Port Trust is arbitrary. It is based on valid considerations. We have to keep in mind that while examining this aspect we are in the realm of administrative law. The contractual aspect of the matter has to be kept aside which would be examined separately while dealing with the issue as to whether there was a concluded contract between the parties. This distinction is lucidly explained in *Kisan Sehkari Chini Mills & Ors. v. Vardan Linkers & Ors.(2008) 12 SCC 500*. Keeping in mind this distinction between the two, we are not required to bring in the contractual elements of the case while dealing with the administrative law aspects.
> x x x x x
> 23. The guiding principles in such cases can be noted from the judgments discussed hereinafter.
> 24 *In Meerut Development Authority v. Assn. of Management Studies(2009) 6 SCC 171*, the decision related to disposal of public property by an instrumentality of the State. In the said context, the Court inter alia held as follows:
>
> > "26. **A tender is an offer**. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. **The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract**. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the biding process.

> 27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.
> x x x x
> 29. **The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder**, if there exist good and sufficient reason, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."
>
> (emphasis supplied)

It is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. There are inherent limitations in exercise of power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. There can be no infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power, is trite law on the subject. In the case in hand, petitioner company and respondent CVPP entered into negotiations, which, however, could not conclude to the expectation of

petitioner company. The decision to cancel turnkey tender and start fresh tender process by impugned tender notices, cannot be said to be arbitrary, unreasonable and *mala fide*. It would be beneficial to extract further portion(s) of the above cited judgement hereunder:

> "26. In *Tejas Constructions and Infrastructure (P) Ltd. v. Municipal Council, Sendhwa &Anr.;2012 (6) SCC 464*, the Court was dealing with the case of challenge to the awarding of contract to the 2nd respondent in the writ petition on the ground that he had not complied with eligibility requirements in NIT. Paragraph 17 of that case reads as follows:
>
> > "17. In *Raunaq International Ltd. v. IV.R. Construction Ltd.(1999) 1 SCC 492*, this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transaction in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide."
>
> 27. In so far as argument of mala fides is concerned, apart from bald averment, there are no pleadings and there is not even a suggestion as to how the aforesaid decision was actuated with malafides and on whose part. Even at the time of arguments Mr. Vikas Singh did not even advert to this aspect. In fact, the entire emphasis of Mr. Vikas Singh was that since there was a concluded contract between the parties, cancellation of such a contract amounted to arbitrariness. As already pointed out above that can hardly be a ground to test the validity of a decision in administrative law. **For the sake of argument, even if you presume that there a concluded contract, mere termination thereof cannot be dubbed as arbitrary**. **A concluded contract if terminated in a bona fide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract.**……..
> 28. We, therefore, reject this contention of the appellant."
>
> (Emphasis supplied)

63. The Supreme Court has made it clear that even if it is presumed that there is a concluded contract, its termination cannot be labelled as arbitrary because if a contract is terminated in a *bona fide* manner, such termination may amount to breach of contract and the

consequences therefrom would follow under the law of contract. The Supreme Court on the issue of "*legitimate expectation*", as is one of the issues/points raised by learned senior counsel for petitioner for seeking the relief beseeched in the writ petition, has made following illustrious observations:

> "29. Again, we clarify at the outset that even the principle of promissory estoppel is in the field of administrative law and while entertaining the arguments and discussion on this issue, the question Has to whether there was a concluded contract or not as to be kept aside. Precisely this was done in *Kisan Sehkari Chini Mills* Case (Supra). The Court dealt with the issue of legitimate expectation etc. separating it from the issue pertaining to concluded contract and made following pertinent observation in the process:
>
> > "23. If the dispute was considered as purely one relating to existence of an agreement, that is whether there was a concluded contract and whether the cancellation and consequential non-supply amounted to breach of such contract, the first respondent ought to have approached the civil court for damages. On the other hand, when a writ petition was filed in regard to the said contractual dispute, the issue was whether the Secretary (Sugar), had acted arbitrarily or unreasonably in staying the operation of the allotment letter dated 26.3.2004 or subsequently cancelling the allotment letter. **In a civil suit, the emphasis is on the contractual right**. **In a writ petition, the focus shifts to the exercise of power by the authority**, that is, whether the order of cancellation dated 24.4.2004 passed by the Secretary (Sugar), was arbitrary or unreasonable. The issue whether there was a concluded contract and breach thereof becomes secondary. **In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract**, and relegate the petitioner to the remedy of a civil suit. **Even in cases where the High Court finds that there is a valid contract, if the impugned administrative action by which the contract is cancelled**, is not unreasonable or arbitrary, **it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a civil court**. In other words, **when there is a contractual dispute with a public law**

> **element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full fledged adjudication of his contractual rights, but only a judicial review of the administrative action**. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action.
>
> 24. In this case, the question that arose for consideration in the writ petition was whether the order dated 24.4.2004 passed by the Secretary (Sugar), cancelling the allotment letter dated 26.3.2004 was arbitrary and irrational or violative of any administrative law principles. The question whether there was a concluded contract or not, was only incidental to the question as to whether cancellation order dated 24.4.2004 by the Secretary (Sugar), was justified. **As the case involved several disputed questions in regard to the existence of the contract itself, the High Court ought to have referred the first respondent to a civil court**. **But the High Court in exercise of its writ jurisdiction, proceeded as if it was dealing with a pure and simple civil suit relating to breach of contract**."
>
> (Emphasis supplied)

64. It would be suitable to discuss and settle the other ground/issue raised by learned senior counsel for petitioner as to "*legitimate expectation*" herein now, while dealing with other issues as well, simultaneously.

65. Learned senior counsel for petitioner has stated that the impugned decision cancelling the tender is exercise of *mala fide* power, arbitrary, unreasonable and defeats rights of petitioner, apart from being violative of doctrine of legitimate expectation, and that in view of course of events, ever since tenders were submitted, negotiations

held, discounts granted and other benefits agreed to and allowed in favour of respondent No.1, petitioner company had *legitimate expectation* that the contract would be allotted to it. Petitioner company was asked to keep validity of its bid and security document alive throughout this period, which further lends support to the expectations of petitioner company that the contract would be allotted to it. Impugned action of respondent No.1 violates doctrine of legitimate expectation. It is inequitable on part of respondent No.1 to have cancelled tender to the prejudice and detriment of petitioner company.To this contention, learned senior counsel appearing for respondent CVPP has stated that as is evident and apparent from facts of the case as enumerated by petitioner company in its writ petition, it is nowhere remotely inferable that any *mala fide* on part of respondent or its Directors. Despite being lowest bidder, no right is vested with petitioner No.1 consortium to claim award of contract and that respondent has never communicated to petitioner company that contract will be awarded to it. The plea of *legitimate expectation* of petitioner in the present case is not attracted.

66. It is pertinent to mention here that once parties enter into contract, they are bound by terms and conditions of the

said contract. In the present case, parties are even yet to reach that stage, where it would be said that any formal letter, communication or order was made in the name of petitioner company, intimating itqua allotment of contract. The meeting(s) and negotiation(s), between respondent CVPP and petitioner company or any *inter se* communications of respondent CVPP or internal meeting(s) of respondent CVPP, concerning rates offered by petitioner company, will not *per se* be construed or interpreted extending any promise by respondent CVPP to petitioner company, inasmuch as there was no formal allotment order issued by respondent CVPP in favour of petitioner.

67. On the legitimate expectation, the Supreme Court in ***A.P. Transco Vs. Sai Renewable Power (P) Ltd.***[39], while considering the doctrine of legitimate expectation with reference to various communications extending certain incentives to producers of electricity from non-conventional energy resources, held that the parties had voluntarily signed the Power Purchase Agreements, by which they were governed and neither the doctrine of promissory estoppel nor legitimate expectation could, therefore, have any application in regard to the

[39](2011]) 11 SCC 34

correspondences exchanged between the parties, whereby the Government had extended certain incentives to the producers of electricity from non-conventional energy resources.

68. The same doctrine had been considered by the Supreme Court in ***Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer***[40]; ***State of Himachal Pradesh Vs. Ganesh Wood Products***[41]; ***Kasinka Trading Vs. Union of India***[42] and ***Sethi Auto Service Station Vs. D.D.A***[43].

69. The protection of legitimate expectations as pointed out in *De Smiths Judicial Review (Sixth Edition) (para 12-001)* is at the root of the constitutional principle of the rule of law, which requires regularity predictability and certainty in governments dealings with the public. The doctrine of legitimate expectation and its impact in the administrative law has been considered by the Courts in a catena of decisions but in order to avoid prolixity all these cases are not referred here. Nonetheless, with the purpose of appreciation of the concept a few decisions are referred and discussed. Let me refer to a decision delivered by the House of Lords in ***Council of Civil Service Unions &***

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[40](2005) 1 SCC 625
[41](1995) 6 SCC 363
[42](1995) 1 SCC 274
[43](2009) 1 SCC 180

Ors. Vs. Minister for the Civil Service[44], an authoritative and often-quoted judgement on the subject. In the said case it was for the first time that an attempt was made to give an inclusive definition to the principle of legitimate expectation. Enunciating the basic principles relating to legitimate expectation, *Lord Diplock* observed that for a legitimate expectation to arise the decision of the administrative authority must affect such person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either: (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or (ii) he has received assurance from the decision-maker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.

70. In ***Attorney General of Hong Kong Vs. Ng Yuen Shiu***[45], a leading case on the subject, *Lord Fraser* said "*when a*

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[44][1984] 3 All ER 935
[45](1983) 2 All.ER 346

public authority has promised to follow a certain procedure it is in the interest of good administration that it should act fairly and should implement its promise so long as the implementation does not interfere with its statutory duty".

71. Explaining the nature and scope of the doctrine of legitimate expectation a three-Judge Bench of the Supreme Court in ***Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries***[46], had observed thus:

> "The mere reasonable or legitimate expectation of a citizen in such a situation may not by itself be a distinct enforceable right but failure to consider and give due weight to it may render the decision arbitrary and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises it is to be determined not according to the claimants perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

72. The concept of legitimate expectation again came up for consideration in ***Union of India & Ors. Vs. Hindustan Development Corporation & Ors***[47]. Referring to a large number of foreign and Indian decisions including in

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[46](1993) 1 SCC 71
[47](1993) 3 SCC 499

Council of Civil Service Unions and Kamdhenu Cattle Feed Industries (supra) and elaborately explicating concept of legitimate expectation, it was observed:

> "If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary discriminatory unfair or biased gross abuse of power or violation of principles of natural justice the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits particularly when the element of speculation and uncertainty is inherent in that very concept."

73. Taking note of the observations of the Australian High Court in ***Attorney General for New South Wales Vs. Quinn***[48] that "*to strike down the exercise of administrative power solely on the ground of avoiding disappointment of legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism*", speaking for the Bench, *K. Jayachandra Reddy J*. said that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. The caution

[48](1990) 64 Aust LJR 327

sounded in the said Australian case that the Courts should restrain themselves and restrict such claims duly to the legal limitations, was also endorsed.

74. A three Judge Bench of the Supreme Court again in ***National Buildings Construction Corporation Vs. S. Raghunathan & Ors.***[49], observed:

> "The doctrine of legitimate expectation has its genesis in the field of administrative law. The Government and its departments in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of legitimate expectation was evolved which hastoday become a source of substantive as well as procedural rights. But claims based on legitimate expectation have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."

75. In ***Punjab Communications Ltd. Vs. Union of India & Ors.***[50], the Supreme Court, after referring to a large number of authorities on the question, observed that a change in policy can defeat a substantive legitimate expectation if it can be justified on *Wednesbury* reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find

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[49](1998) 7 SCC 66
[50](1999) 4 SCC 727

out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

76. The Supreme Court in ***Jitendra Kumar & Ors. Vs. State of Haryana & Anr.,***[51] has reiterated that a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity predictability and certainty in the Governments dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters.

77. An examination of the afore-noted decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation, which it would be within its powers to fulfil, unless some overriding public interest comes in the way. However a person, who bases his claim on the doctrine of legitimate expectation in the first

[51](2008) 2 SCC 161

instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation cannot *ipso facto* give a right to invoke these principles. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. In ***Hindustan Development Corporation*** case (supra) it was pointed out that the court must not usurp the discretion of the public authority, which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected.

Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.

78. It may not be out of place to mention here that the doctrine of legitimate expectation is not applicable in the instant case inasmuch as there is no foundation for such a claim. The negotiations held between petitioner company and respondent CVPP, cannot, *per se*, be treated or termed as if it were formal allotment. In ***Sethi Auto Service Station*** case (supra), the doctrine of legitimate expectation had been considered, where appellant's claim was based on an old policy and it was held that Appellant merely had an expectation for being considered for resitement. It was also held that a person, basing his claim on doctrine of legitimate expectation, has to establish that he had relied on said representation and had altered his position and that denial of such expectation worked to his detriment.

79. The Courts can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and contrary to public interest. It is also reiterated here that the concept of legitimate expectation has no role

to play where the said action is a matter of public policy or in the public interest, unless, of course, the action taken amounts to an abuse of power. The Supreme Court has further emphasized that in order to establish a claim of promissory estoppel, it must be proved that there was such a definite promise and not any vague offer which could not been forced. In this regard learned senior counsel appearing for respondent CVPP, submits and rightly so, that the reliance placed on minutes of meeting(s) and *inter se* letters by learned senior counsel for petitioner, stated to have been issued or addressed by respondent CVPP, is of no avail as any word or expression made in such letter(s) or meeting(s) does not constitute a promise that could be made enforceable and obligatory for respondent CVPP to issue formal allotment order in favour of petitioner. Mr Sethi, for that reason, submits that writ petition is liable to be dismissed.

80. As will be evident from record and submissions made on behalf of parties, the case of petitioner is based on doctrine of legitimate expectation, and not on promise made by respondent CVPP to petitioner that he would be granted contract. From the facts as disclosed, there is evidence on record to indicate that negotiations with petitioner and meeting(s) were held by respondent CVPP,

and *inter se* communications were made by respondent CVPP. However, we should not lose sight of the fact that whatever exercise undertaken by respondent CVPP, during negotiations with petitioner company or during its internal meetings, the same would not by itself confer any right upon petitioner company to say that concluded contract was entered into between parties and if so, question of enforcement of such a contract would be in the field of law of contract, inasmuch as there was no formal contract made or any communication made or issued in this regard by respondent CVPP in favour of petitioner company.

81. I am inclined to hold that the doctrine of legitimate expectation or for that matter promissory estoppel, as canvassed on behalf of petitioner, cannot be made applicable to this case. The decisions cited on behalf of learned counsel for petitioner, are not, therefore, relevant for a decision in this case.

82. Mere meetings or correspondences cannot be construed as a promise extended by respondent CVPP to petitioner company to arrest them from rejecting the offer/bid of petitioner company. Further to say again here that mere reliance on *intra*office noting(s), agenda notes, meetings

references and communications of respondent CVPP, is misplaced and against settled principles of law reiterated by the Supreme Court in a catena of judgments. In ***Sethi Auto Service Station*** case (supra) the Supreme Court has held that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final and formal order of allotment is communicated to the person concerned. Reliance is also placed on ***Union of India v. Vartak Labour Union (2)***[52]; ***State of Bihar v. Kripalushanker***[53]; and ***Jasbir Singh Chhabra v. State of Punjab***[54]**,** in this regard. Having said so, it would be safe to say that writ petition is without any merit.

83. Learned senior counsel for petitioner has also placed reliance on ***Tata Cellular*** case (supra). The said citation has already been discussed in ***Maa Binda Express Carrier*** case (supra).

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[52](2011) 4 SCC 200
[53](1987) 3 SCC 34
[54](2010) 4 SCC 192

84. ***Ramana Dayaram Shetty v. International Airport Authority of India and others***[55] has also been relied upon by learned senior counsel for petitioner. The said case relates to challenge thrown to allotment/award of contract to an ineligible tenderer and the doctrine(s) connected therewith. The cited judgement also discusses Article 12, Constitution of India and its application. The judgment also refers to observation of *Douglas, J*., in *New York v. United States* case (supra) that "*A State's project is as much a legitimate governmental activity whether it is traditional or akin to private enterprise, or conducted for profit*",and that a State may deem it as essential to its economy that it owns and operates a railroad, a mill, or an irrigation system as it does, to own and operate bridges, streetlights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of the State activities may today be deemed indispensable. Besides so-called traditional functions, modern State operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation

[55](1979) 3 SCC 489

as an instrumentality or agency of Government. Hence, cited judgement relates to controversy of post-contract stage and not pre-contract stage.In the cited judgment, one of the decisions of the Supreme Court, which is counterproductive to present case of petitioner, in ***C.K. Achuthan v. State of Kerala***[56] was discussed. The facts of the said case were that the petitioner therein and the 3rd respondent, Co-operative Milk Supply Union, Cannanore, submitted tenders for supply of milk to Government Hospital at Cannanore, for the year 1948-49. Superintendent, who scrutinised tenders accepted that of petitioner and communicated reasons for decision to Director of Public Health. The contract in favour of petitioner was, however, subsequently cancelled, by issuing a notice in view of the policy of the Government that in the matter of supply to Government Medical Institutions, the Co-operative Milk Supply Union should be given contract on the basis of prices filed by Revenue Department. The petitioner challenged the said decision in a petition on the grounds, *inter alia*, that there had been discrimination against him vis-à-vis 3rd respondent and as such, there was contravention of Article 14 of the Constitution. The Constitution Bench of the Supreme

[56]1959 Supp 1 SCR 878: AIR 1959 SC 490

Court rejected this contention of the petitioner and while doing so, *Hidayatullah, J.*, observed that "*There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a particular contract must be left to the Government.*" In the cited judgement, another decision of the Supreme Court in ***State of Orissa v. Harinarayan Jaiswal & ors***[57],was discussed. In the said case respondents were highest bidders at an auction held by the Orissa Government through Excise Commissioner for exclusive privilege of selling by retail country liquor in some shops. The Government of Orissa did not accept any of the bids made at the auction and subsequently sold the privilege by negotiations with some other parties. One of the contentions raised on behalf of writ petitioners in that case was that power retained by the Government "*to accept or reject any bid without any reason therefor*", as is projected by petitioner in the present case, was an arbitrary power, violative of Articles 14 and 19(1)(g). This

[57](1971) 3 SCC 153

contention was negatived and *Hegde, J*. speaking on behalf of the Court observed that "*The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in on auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privilege set out in section 22 was not denied. It was also not disputed that these privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate.*" The Supreme Court, after quoting the above observations made in ***State of Orissa v. Harinarayan Jaisal*** case (supra), observed in the cited judgment (*Raman Dayaram Shetty v. International Airport Authority*)

that it "*will be seen from these observations that the validity of clause (6) of the order…. was upheld by the Court on the ground that having regard to the object of holding the auction, namely, to raise revenue, "the Government was entitled to reject even the highest bid, if it thought that the price offered was inadequate. The Government was not bound to accept the tender of the person who offered the highest amount and if the Government rejected all the bids made at the auction, it did not involve any violation of Article 14 or 19(1)(g).*" The said case, as reiterated above, is totally different from the case in hand. In the cited case, tender was accepted of a person, who was not fulfilling the conditions/eligibility of the tender notice.

85. ***Air India ltd. v. Cochin International Airport Ltd. and others***case (supra). The facts of the cited judgement deserve to be talked about here. Cochin International Airport Limited (CIAL) invited offers, by writing letters to some companies for awarding a contract for ground handling facilities at the new Airport. The letters were written to Cambatta Aviation Limited (Cambatta), Air India, and six others. The Committee, constituted by CIAL, took note of the fact of Cambatta and Air India being Indian organisations, operate mainly in India and

having better proven adaptability for operating in Indian conditions. Out of those two, it recommended Cambatta for awarding the work. The Government of India wrote a letter to the Government of Kerala, recommending Air India for awarding contract on the ground that Air India is national carrier and has better experience. Thereafter, a meeting took place between the Managing Director of Air India and the Chief Minister of Kerala. That was followed by a letter by Managing Director of Air India to the Chief Minister of Kerala, seeking an opportunity to make a more detailed presentation to the Board of CIAL. The Board of Directors decided to have a detailed discussion with Air India, before taking a final decision and informed it to give a presentation before the Board. Having come to know about this development, Cambatta wrote a letter to the Chief Minister of Kerala, pointing out that their company is also an Indian company and they also have experience of over 30 years in ground handling work. Cambatta again protested and informed CIAL that acceptance of revised offer of Air India and not to accept Cambatta's offer would be unfair and unethical and violative of Limited Global Competitive Building Norms. But the first respondent awarded the contract to Air India. Thereagainst, Cambatta filed a writ petition in the Kerala High Court. Cambata's

contention was that its offer was highest and it had fulfilled all conditions. The offer given by Air India did not come anywhere near their offer, yet the contract was given to Air India because of influence exerted by Air India and Secretary of Ministry of Civil Aviation. It was also challenged on the ground that CIAL had not acted fairly and impartially as it had carried on negotiations with Air India behind the back of Cambatta and no opportunity was given to Cambatta to give a better offer. The petition was heard by a learned Single Judge of the High Court who held that there was no illegality, arbitrariness or unreasonableness in the decision making process of CIAL and the decision taken was *bona fide* after evaluating both the offers and on being satisfied that in the matter of experience, expertise, infrastructure and financial capacity the offer of Air India was superior and more beneficial. As regards the allegation of actual *mala fides*, learned single Judge held that the pleading in that behalf was very vague and scanty.

The matter went in appeal. The Division Bench held that it was a case of public tender. It also held that though the decision of evaluation committee was only recommendatory and not binding on the Board of Directors of CIAL, the fact that evaluation committee had

considered all relevant aspects and found Cambatta as most competent party and yet no reasons were disclosed for explaining what prompted the Board of Directors to take a different view, which was clearly indicative of the fact that CIAL was influenced in its decision making process by Air India and Secretary of the Ministry of Civil Aviation. Challenging this decision of the High Court, Air India and CIAL knocked at portals of the Supreme Court, which resulted in passing of the cited judgment of learned senior counsel for petitioner.

The Supreme Court said : "*The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R. D. Shetty v. International Airport Authority 1979 (3) SCC 488), Fertilizer Corporation Kamgar Union v. Union of India 1981 (1) SCC 568), Assistant Collector, Central Excise v. Dunlop India Ltd. 1985 (1) SCC 260 = 1984 (2) SCALE 819), Tata Cellular v. Union of India 1994 (6) SCC 651 = 1995 (1) Arb. LR 193), Ramniklal N. Bhutta v. State of Maharashtra 1997 (1) SCC 134 = 1996 (8) SCALE 417), and Raunaq International Ltd. v. I.V.R. Construction Ltd. 1999 (1) SCC 492 = 1999 (1) Arb. LR 431 (SC). The award of a 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 mala fides, 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".

After making the above discussions, what is important to be seen is, that what the Supreme Court observed, held and concluded in the above cited judgment, which is necessary to be quoted below with emphasis supplied, inasmuch as the same gives befitting answer to all queries that petitioner has posed before this Court in the case in hand:

> "11. This narration of facts makes it clear that all along, after the High Level Committee had recommended Cambatta for awarding the contract, what Cambatta was contending was that CIAL having accepted the limited global competitive bidding norms and having decided 28-7-1998 as the last date for inviting final offer, it was not open to it thereafter to negotiate with Air India behind the back of Cambatta and permit Air India to revise its offer. Even though Cambatta had written protest letters, it had not requested CIAL to give it any opportunity to negotiate or to improve upon its offer. **The decision of the High Level Committee was obviously not the final decision and certainly it was not binding on the Board of Directors** who were the final authority to take the decision. The **Board of Directors, at the meeting held on 7-11-1998, considered the proposals of Air India and Cambatta**….. and, therefore, **called it for negotiations with a view to have better terms** and take the final decision. **The Board of Directors did take the final decision on 27-11-1998 as Air India agreed to make its offer more beneficial to CIAL**. That becomes apparent from Air India's letter dated 1-12-1998. The Board of Directors having taken tentative decision on 7-11-1998 there was no point in calling Cambatta thereafter for any

> negotiation. It may be recalled that Cambatta was recommended over Air India by the High Level Committee only because Cambatta's financial rating was found higher. What is significant to note is that even the High Level Committee had in its minutes noted that financial rating cannot be the sole criterion for taking the final decision. **Moreover, in a commercial transaction of such a complex nature a lot of balancing work has to be done while weighing all the relevant factors and the final decision has to be taken after taking an overall view of the transaction**…..
> 12. ….**As regards the merits of the rival offers, we do not think it proper to look at only the financial aspect and hold that CIAL did not accept Cambatta's offer, even though it was better**, because it wanted to favour Air India **or that it had acted under the influence of Air India and the Ministry of Civil Aviation**. **In a commercial transaction of a complex naturewhat may appear to be better**, on the face of it, **may not be considered so when an overall view is taken**. **In such matters the Court cannot substitute its decision** for the decision of the party awarding the contract. On the basis of the material placed on record we find that CIAL bona fide believed that involving a public sector undertaking and a national carrier would, in the long run, prove to be more beneficial to CIAL. For all these reasons it is not possible to agree with the finding of the High Court **that CIAL had acted arbitrarily and unreasonably and was also influenced by extraneous considerations during its decision making process.**
> 13. We, therefore, allow these two appeals, set aside the judgment of the Division Bench of the Kerala High Court in Writ Appeal No. 462 of 1999 and confirm the decision of the learned Single Judge in O.P. No. 25560 of 1998."
>
> (emphasis supplied)

The above quoted observations and conclusions drawn by the Supreme Court in the aforementioned judgment,cited by learned senior counsel for petitioner and the emphasis supplied thereto, provide a lot vis-à-vis the case in hand. First part thereof is that the decision/ recommendation(s) of the Evaluation Committee(s) or for that matter of High Level Committee(s), as has been projected by petitioner in the case in hand as well, would not inhibit the authority of Board of Directors to take a

decision contrary to recommendations/decisions of Evaluation Committee and/or High Level Committee. Second important part of the cited judgment is that the decision whatever taken by CIAL, as in the instant case is CVPP, is aiming at to be more beneficial for CIAL. Subsequent important part of the cited judgement is that in a commercial transaction of such a complex nature a lot of balancing work has to be done while weighing all the relevant factors and the final decision, as has been taken by respondent CVPP in the present case as well, has to be taken after taking an overall view of the transaction.

Further aspect of the above quoted conclusions drawn by the Supreme Court are that in a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so, when an overall view is taken. In such matters the Court cannot substitute its decision for the decision of the party awarding the contract. In the present case, respondent CVPP has not awarded contract to any other company, but entered into negotiations with petitioner company.However, the same did not yield any result as was expected by respondent CVPP or for that matter by petitioner company. And as a consequence thereof,

respondent CVPP, in its apex body meeting, decided to cancel the turnkey execution tender and start fresh tender process by inviting *package mode* instead of *turnkey mode*. In such circumstances, the decision taken by respondent CVPP, impugned in the writ petition on hand, cannot be held arbitrary, unreasonable or *mala fides*, muchless influenced by extraneous consideration during its decision making process.

86. Though the submission of learned senior counsel for petitioner as regards "legitimate expectation" has been discussed herein above, yet it would be proper to go through and discuss the judgements cited by him here. The first judgment cited by learned senior counsel is of the Supreme Court in ***Union of India and another v. International Trading Co. and another***[58]. It is apt to mention here that the cited judgment is again deeply weakening the case of petitioner. The referred judgment relates to the case of non-renewal of permit under the provisions of Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 and the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Rules, 1982. The Delhi High Court held that renewal of the permit was a valuable right and that policy decision

[58](2003) 5 SCC 437

which is contrary to the Statute cannot be upheld. The authorities were directed to pass appropriate order on the prayer for renewal of the permit. The Delhi High Court also concluded that though licence was not granted for 15 years, there had been a legitimate expectation that renewal would be granted. The Supreme Court, when the matter came up before it, observed that doctrine of promissory estopped and legitimate expectation cannot come in the way of public interest and indisputably, public interest has to prevail over private interest. The Supreme Court went further ahead by holding that it cannot be said that the respondents have acquired any right for renewal and that the High Court was not justified in observing that the policy decision was contrary to the Statute and that a claim based on mere legitimate expectation without anything more cannot *ipso facto* give a right to invoke the principles. It can be one of the grounds to consider, but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognized general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action must be

restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is 'not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits', particularly, when the element of speculation and uncertainty is inherent in that very concept. It would be useful to extract relevant portion(s) of the judgment herein below, with emphasis supplied:

> "21. As observed in *Attorney General for New South wales v. Quin [1990 (64) Australian LJR 327)* to strike the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the negotiation of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law; If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but **a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles**. It can be one of the grounds to consider, but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognized general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the **concept of legitimate expectation is 'not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits'**, particularly, **when the element of speculation and uncertainty is inherent in that very concept**. As cautioned in *Attorney General for New*

Southwale's case the **Court should restrain themselves and respect such claims duly to the legal limitations**. **It is a well-meant caution**. Otherwise, **a resourceful litigant having vested interest in contract**, licences, etc. **can successfully indulge in getting welfare activities mandated by directing principles thwarted to further his own interest**. The caution, particularly in the changing scenario becomes all the more important.

22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

24. **Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interest of persons** upon whom the restrictions have been imposed or upon abstract consideration. **A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly**. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Cancalization of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. *(See Parbhani Transport Co-operative Society Ltd. v. The Regional Transport Authority, Aurangabad and Ors. (AIR 1960 SC 801 : 62 Bom LR 521); Shree Meenakshi Mills Ltd. v. Union of India (1974) 1 SCC 468: AIR 1974 SC 366; Hari Chand Sarda v. Mizo District Council and Anr. AIR 1967 SC 829; and Krishnan Kakkanth v. Government of Kerala and Ors. (1997) 9 SCC 495 : AIR 1997 SC 129)*.

x x x x x

26. Keeping in view the analysis made of legal positions, and in the absence of any material to discount legitimacy of policy, the respondents have not made out a case for interference.

27. In the aforesaid background the residual **plea of the respondents regarding legitimate expectation is also sans merit**.

28. The appeals deserve to be allowed; which we direct. Costs made easy." (emphasis supplied)

87. The second judgment of the Supreme Court, cited by learned senior counsel for petitioner, is in ***Food Corporation of India v. Kamdhenu Cattle Feed Industries*** case (supra). What is all about in the said case is regarding invitation of tenders by the State government, reserving power to reject all tenders, as is available in the case in hand with respondent CVPP, for sale of stocks of damaged food grains. In the said case, since the amount of the highest tenderer was found to be inadequate, negotiations were made with all the tenderers but offer of significantly higher amount than quoted in the highest tender, accepted. Such acceptance by the authority has been held by the Supreme Court not arbitrary or discriminatory. In the said case, the respondent's bid in the tender was admittedly the highest as found on opening the tenders. It appears that the appellant was not satisfied about the adequacy of the amount offered in the highest tenders for purchase of the stocks of damaged food grains and therefore, instead of accepting any of the tenders submitted, the appellant invited all tenderers to participate in the negotiation. The respondent refused to revise the rates in its tender. During negotiations, in which all tenderers, including the respondent, were present, were given equal opportunity

and amongst them one of the tenderer gave highest bid than respondent. Respondent filed writ petition before Punjab and Haryana High Court. The writ petition was allowed and appellant Food Corporation of India was directed to allot to the respondent the necessary stocks of damaged rice for which the tenders had been invited by the appellant since the respondent was highest bidder. Thereagainst, appellant Food Corporation of India knocked at doors of the Supreme Court. In terms of the cited judgment, the Supreme Court allowed the appeal and set-aside the judgment of the Punjab and Haryana High Court. The Supreme Court held that respondent's highest tender was superseded only by a significantly higher bid made during the negotiations with all tenderers, giving them equal opportunity to compete by revising their bids and the fact that it was a significantly higher bid obtained by adopting this course is sufficient in the facts of the case to demonstrate that the action of the appellant satisfied the requirement of non-arbitrariness, and it was taken for cogent reason of inadequacy of price offered in the highest tender, which reason was evident to all the tenderers invited to participate in the negotiations and to revise their bids. Thus the High Court was in error in taking the contrary view.

Now, if we see within the prism of cited case (*Food Corporation of India v. Kamdhenu Cattle Feed Industries*), and the course adopted therein, which has been held by the Supreme Court sufficient to demonstrate that the action of appellant (Food Corporation of India) satisfied the requirement of non-arbitrariness and the same having been taken for cogent reason, then in the case in hand, such course should have been adopted by respondent No.1, which has not been adopted by respondent CVPP. Thus, it would be safe to say that had respondent No.1 adopted the course, as was adopted by appellant Food Corporation of India in the cited case, the situation might have been totally different and the better bid/offer might have been given by any of the other tenderers in the present case. Petitioner company herein should not forget that respondent CVPP, instead of calling all tenderers to negotiation, exclusively gave preference to and invited petitioner company and tried its best to persuade petitioner company to reach at a level, where respondent CVPP and petitioner company could reach at concluded-contract. However, negotiations between petitioner company and respondent CVPP did not mature, which resulted in cancellation of the turnkey execution tender and starting of fresh tender on package mode basis. In

such circumstances, the course, adopted herein by respondent CVPP, was sufficient to demonstrate that action of respondent CVPP satisfied the requirement of non-arbitrariness and the decision, impugned in this petition, has been taken for cogent reason, which need not be interfered with by this Court.

88. ***Madras City Wine Merchants' Association and another v. State of T.N. and another***[59]. The cited judgement relates to challenge thrown to change of policy. The Government of Tamil Nadu terminated licences for carrying on business in retail vending of Indian-made foreign spirits. The challenge to change of policy terminating the licences was on the ground that change of policy should pass muster of Article 14 of the Constitution of India as once the State Government permitted sale of liquor, change of policy was to be tested on the touchstone of Article 14 of the Constitution as the Supreme Court had taken the view in one of its earlier judgements that due consideration of every legitimate expectation in the decision-making process was a requirement of the rule of non-arbitrariness and change of policy should not be done arbitrarily. It may not be out of place to mention here that again the instant cited

[59](1994) 5 SCC 509

judgment on the *doctrine of legitimate expectation* is not coming forward to push any help to the case of petitioner owing to the Supreme Court in the cited judgement, in net result, dismissed the appeals and writ petition of Madras City Wine Merchants' Association. Some of germane extracts of cited judgement on *doctrine of legitimate expectation*, with emphasis supplied, are reproduced:

> "Question No.2: Whether the appellants can claim the benefit of doctrine of legitimate expectation?
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> 43. We will briefly deal with the doctrine of legitimate expectation. It is not necessary to refer to large number of cases excepting the following few: On this doctrine *Clive Lewis in 'Judicial Remedies in Public Law at page 97* states thus :
>
> > "Decisions affecting legitimate expectation. — In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or a representation made by a public body, or from a proviso practice of a public body, The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. A promise to confer, or past practice of conferring a substantive benefit, may give rise to an expectation that the individual will be given a hearing before a decision is taken not to confer the benefit. The actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be removed without the individual being given a hearing. On occasions, individuals seek to enforce the promise of expectation itself, by claiming that the substantive benefit be conferred. Decisions affecting such legitimate expectations are subject to judicial review."
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> 44. In *Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All ER 935* at pages 943-44 it is stated thus:
>
> > "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by *Lord Diplock* in *O'Reilly v. Mackman, [1982] 3 All ER 1124 = (1983) 2 AC 237* and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Examples of the former type of expectation are *Re Liverpool Taxi Owners' Association [1972] 2 All ER 589, (1972) 2 QB 299 and A-G of Hong Kong v. Ng Yuen Shiu, [1983] 2 All ER*

346 = (1983) 2 AC 629. (I agree with *Lord Diplock's* view, expressed in the speech in this appeal, that 'legitimate' is to be preferred to 'reasonable' in this context, I was responsible for using the word 'reasonable' for the reason explained in *Ng Yuen Shiu*, but it was intended only to be exegetical of 'legitimate.') An example of the latter in R v. Hull Prison Board of Visitors, ex p. *St. Germain, [1979] 1 All ER 701, [1979] QB 425*, approved by this House in *O'Reilly v. Mackman, [1982| 3 All ER 1124 at 1126 = [1983] 2 AC 237* at 274."

45. In *Halsbury's Laws of England*, Vol. 1(1) Fourth Edition Para 81 at pages 151-52 it is stated thus:

"81 Legitimate expectations. A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment.

O'Reilly v. Mackman, [1983] 2 AC 237 at 275, HL; A-G of Hong Kong v. Ng Yuen Shiu, [1983], 2 AC 629, [1983] 2 All ER 346, PC; *Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374, [1984] 3 All ER 935, H.L*. The expectation must plainly be a reasonable one: *A-G of Hong Kong v, Ng Yuen Shiu* supra. It seems that a person's own conduct may deprive any expectations he may have of the necessary quality of legitimacy. *Cinnamond v. British Airports Authority, [1980] 2 All ER 368, [1980] 1 WLR 582, CA*.

The expectation may arise either from a representation or promise made by the authority,

R v. Liverpool Corpn. ex p. Liverpool Taxi Fleet Operator's Association, [1972] 2 QB 299, [1972] 2 All ER 589, CA; A-G of Hong Kong v. Ng Yuen Shiu, [1983] 2 AC 629, [1983J 2 All ER 346, PC; Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374 = [1984] 3 All ER 935, HL; R. v. Home Secretary, ex P. Oloniluyi, [1988] Times, 26 November, CA; R. v. Brent London Borough Council, ex P, Macdonagh, [1989) Times, 22 March. Although there is an obvious analogy between the doctrines of legitimate expectation and of estoppel, the two are distinct, and detrimental reliance upon the representation is not a necessary ingredient of a legitimate expectation; see *R. v. Secretary of State for the Home Department, ex p Khan, [1985] All ER 40 at 48, 52, [1984] 1 WLR 1337 at 1347, 1352, CA*; and see para 23 ante. In relation to Inland Revenue extra - statutory concessions and assurances, see *R v. A-G, ex p ICI pic, [1986] 60 TC I; R v. HM Inspector of Taxes, Hull, ex p Bnmfteld, [1988]* Times, 25 November; and *R v. IRC, ex p MFK Underwriting Agencies Ltd., [1989] Times, 17 July; of Re Preston, [1985] AC 835, [1984] 2 All ER 327, HL.)* including an implied representation, *[R v. Secretary of State for the Home Department, ex p Khan, [1985] 1 All ER 40, [1984] 1 WLR 1337, CA* (setting out criteria for exercise of discretion in guidance letter given to prospective adoptive parents of children requiring entry clearance led to legitimate expectation that clearance would be granted where those criteria were satisfied. See also *R v, Powys County Council, ex p Howner [1988] Times*, 28 May; and *R v. Brent London Borough Council, ex p Macdonagh, [1989] Times* 22 March. In *R v. Brent London Borough Council,* ex p gunning, [1986] 84 LGR 168 the court appears to have relied in part on what were in effect express or implied

representations by the Secretary of State (contained in departmental circulars) that there would be consultation, although the duty to consult was being imposed upon the local authority.]

or from consistent past practice.

O'Reilly v. Mackman, [1983], 2 AC 237 at 275, [1982] 2 All ER 1124 at 1126-1127, HL; Council of Civil Service Unions v. Minister for the Civil Service, [1985], AC 374, [1984] 3 All ER 935, HL; R v. Brent London Borough Council, ex p Gunning, [1986] 84 LGR 168; R v. Secretary of State for the Home Department, ex p Ruddock, [1987] 2 all ER 1025, [1987] 1 WLR 1482.

It is not clear to what extant a legitimate expectation may arise other than by way of a representation or of past practice; neither factor would seem to have been present in *R v. Secretary, of State for Transport, exp Greater London Council, [1986] OB 556=[1985] 3 All ER 300*. *See also* note 8 infra. However, procedural duties imposed as a result of looking at all the surrounding circumstances will normally be treated as illustrations of the general duty to act fairly in all the circumstances (see para 84 post) rather than of a legitimate expectation; of *R. v. Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd, [1988] 56 p & CR 99 at 109*; and see *Westminister City Council (1986) AC 668 at 692-693, [1986] 2 All ER 278 at 288-289, HL*, per Lord Bridge of Harwich, dissenting on another point.

The existence of a legitimate expectation may have a number of different consequences: it may give locus standi to seek leave to apply for judicial review;

(O'Reilly v. Mackman, [1983] 2 AC 237, 275, [1982] 3 All ER 1124-1127; HL; Council of Civil Sendee Unions v. Minister for the Civil Service, [1985] AC 374 at 408, [1984] 3 AU ER 935 at 949, HL, per Lord Diplock; Re Findlay [1985] AC 318, [1984] 3 AU ER 801 at 830, HL.)

It may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so;

R. v. Liverpool Corpn. ex p Liverpool Taxi Fleet Operators' Association, [1972] 2 OB 299, [1972] 2 All ER 589, CA; R v. Secretary of State for the Home Department. exp Ruddock, [1987] 2 All ER 1025, [1987] 1 WLR 1482, and cf HTV Ltd v. Price Commission, [1976] ICR 170, CA. But where the expectation arises out of an administrative authority's existing policy, it can only be that the policy for the time being in existence will be fairly applied, and cannot be invoked to prevent a change of policy fairly carried out: *Re Findlay [1985] AC 318 at 338, [1984] 3 AU ER 801 at 830, HL; R v. Secretary of State for the Environment, ex p Barratt (Guildford) Ltd, [1988]* Times 3 April; and see *R v. Secretary of State for the Home Department, ex p Ruddock* supra.

or it may mean that, if the authority proposes to defeat a person's legitimate expectation, it must affirm him an opportunity to make representations on the matter.

A-G of Hong Kong v. Ng Yien Shiu, [1983] 2 AC 629 = [1983] 2 All ER 346, PC; Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374, [1984] 3 All ER 935, HL; R v. Secretary of State for the Home Department, ex p Khan, [1985] 1 All ER 40, [1984] 1 WLR 1337, CA. Sometimes the expectation will itself be of

consultation or the opportunity to be heard; *R v. Liverpool Corpn., ex p Liverpool Taxi, Fleet Operators' Association, [1972] 2 QB 299, [1972] 2 All ER 589, CA; A-G of Hong Kong v. Ng Yien Shiu supra; Council of Civil Service Unions, v. Minister for the Civil Service supra; and see Ltyod v. McMahon, [1987] AC 625 at 715 1 All ER 1118 at 1170-1171, HL*,**per Lord Templeman (legitimate expectation is just a manifestation of the duty to act fairly). But the scope of the doctrine goes beyond the right to be heard**; *R v. Secretary of State for the Home Department, ex p Ruddock, [1987] 2 All ER 1025, [1987] 1 WLR 1482. See also R. v. Bamet London Borough Council, ex p Pardes House School Ltd, [1989] Independent, 4 May; and R v. Powys County Council, exp Homer, [1988] Times, 28 May.* There is, however, a legitimate expectation of reappointment to a public body: *R v. North East Thames Regional Health Authority, ex p de Groot,* [1988] Times, 16 April.

The courts also distinguish, for example in licensing cases, between original applications, applications to renew and revocations; a party who has been granted a licence may have a legitimate expectation that it will be renewed unless there is some good reason not to do so, and may therefore be entitled to greater procedural protection than a mere applicant for a grant.

Mclnnes v. Onslow Fane, [1978] 3 All ER 211 at 218, (1978) 1 WLR 1520 at 1529; Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch 149,' [1968] 3 All ER 795, CA (legitimate expectation of foreign alien that residence permit will not be revoked before expiry but not of renewal); *Breen v. Amalgamated Engineering Union, (1971] 2 OB 175, [1971] 1 All ER 1148, CA* (legitimate expectation that winner of trade union election would be confirmed in his post by relevant committee); *R v. Bamsley Metropolitan Borough Council, ex p Hook, [1976] 3 All ER 452, [1976] 1 WLR 1052, CA*. **Where there has previously been no general system of control, an existing trader does not have a legitimate expectation of being granted a licence when such a system is introduced**; *R. v. Bristol City Council, ex p Pearce, [1985] 83 LGR 711*.

46. Three cases of this Court may now be seen. In *State of H.P. v, Kailash Chand Mahajan, [1992] Supp. 2 SCC 351* at pages 386-87 in a judgment to which one of us was a party it was stated thus:

"It might be urged by the tenure of appointment there is a right to continue; the legitimate expectation has come to be interfered with. In a matter of this kind, as to whether legitimate expectation could be pleaded is a moot point. However, we will now refer to Wade's Administrative Law (6th Edn.) wherein it is stated at pages 520-21, as under:

"Legitimate expectation : positive effect. - The classic situation in which the principles of natural justice apply is where some legal right, liberty or interest is affected, for instance where a building is demolished or an office-holder is dismissed or a trader's licence is revoked. But good administration demands their observance in other situations also, where the citizen may legitimately expect to be treated fairly. As Lord Bridge has explained :

> Westminister CC, Re, (1986) AC 668 at 692, Lord Diplock made a formal statement in the Council of Civil Service Unions case (below) at 408, saying that the decision must affect some other person either -
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) **by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy** and which he can legitimately expect to be permitted to continue to do until there has been communicated to him more rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
> This analysis is 'classical but certainly not exhaustive' : R v. Secretary of State for the Environment ex. p. Nottinghamshire CC, [1986] AC 240 at 249 (Lord Scarman). One case which does not seem to be covered is that of a first-time applicant for a licence (below, p.559).

The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.'

In a recent case, in dealing with legitimate expectation in R v. *Ministry of Agriculture, Fisheries and Food, ex pane Jaderow Ltd., [1991] 1 All ER 41*, it has been observed at page 68:

> "Question II: Legitimate expectation: It should be pointed out in this regard that, under the powers reserved to the member states by Article 5(2) of Regulation 170 of 1983, fishing activities could be made subject to the grant of licences which , by their nature, are subject to temporal limits and to various conditions. Further-more, the introduction of the quota system was only one event amongst others in the evolution of the fishing industry, which is characterised by instability and continuous changes in the situation due to a series of events such as the extensions, in 1976, of fishing areas to 200 miles from certain coasts of the Community, the necessity to adopt measures for the conservation of fishery resources, which was dealt with at the international level by the intro-duction of total allowable catches, the arguments about the distribution amongst the member states of the total allowable catches available to the Community, which were finally distributed on the basis of a reference period which ran from 1973 to 1978 but which is reconsidered every year.
>
> In those circumstances, operators in the fishing industry were not justified in taking the view that the Community rules precluded the making of any changes to the conditions laid down by national legislation or practice for the grant of licences to fish against national quotas as the adoption of new conditions compatible with Community law.
>
> Consequently, the answer to this question must be that com-munity law as it now does not preclude legislation or a practice of a member state whereby a new condition not previously stipulated is laid down for the grant of licences to fish against national quotas."

Thus, it will be clear even legitimate expectation cannot preclude legislation,"

47. *In Food Corporation of India v. M/S. Kamdhenu Cattle Feed Industries, JT (1992) 6, 259* at 264 this Court observed thus: (SCC p. 76, para 8)

> "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweight what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this matter would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent"

48. *In Union of India v. Hindustan Development Corporation, JT (1993) 3 S.C. 15* at pages 50-51 this Court observed thus ;

> "It has to be noticed that the concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that "Legitimate expectation" is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and "in future", perhaps, the principle of proportionality." A passage in Administrative Law, Sixty Edition by H.W.R. Wade page 424 reads thus :
>
> "These are revealing decisions. They show that the courts now expect government departments to honour their published statements or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness here comes close to unfairness in the form of violation of natural justice, and the doctrine of legitimate expectation can operate in both contexts. It is obvious, furthermore, that this principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly. Lord Scarman has stated emphatically that unfairness in the purported exercise of a power can amount to an abuse or excess of power, and this seems likely to develop into an important general doctrine."

Another passage at page 522 in the above book reads thus:

> "It was in fact for the purpose of restricting the right to be heard that 'legitimate expectation' was introduced into the law. It made its first appearance in a case where alien students of 'scientology' were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would

be granted to this sect. The Court of Appeal held that they had no legitimate expectation of extension beyond the permitted time, and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy, therefore, may cancel legitimate expectation, just as they may create it, as seen above. In a different context where car-hire drivers had habitually offended against airport byelaws, with many convictions and unpaid fines, it was held that they had no legitimate expectation of being heard before being banned by the airport authority.

There is some ambiguity in the dicta about legitimate expectation, which may mean either expectation of a fair hearing or expectation of the licence or other benefit which is being sought. But the result is the same in either case; absence of legitimate expectation will absolve the public authority from affording a hearing. (emphasis supplied)"

Again, at pages 56-57 it is observed thus :

".....A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectations, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made but then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors. " (Emphasis supplied)

Again at pages 57-58 it is observed thus :

"Legitimate expectations may come in various forms and owe their existence to different land of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be absolute before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though no guaranteed by way of a statutory right, in cases of contracts, distribution of largess by the Government and in somewhat similar situations. For instance in cases of discretionary grant of licences, permits of the like, carries with it a reasonable expectation, though not a legal right to renewal or non- revocation, but to summarily disappoint that expectation may be seen as unfair without the expectant person being heard, But there again the court has to see whether it was done as a policy or in the public interest either by way of G.O., rule or by

way of a legislation. If that be so, a decision denying a legitimate expectation based on such grounds docs not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice watch the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance if an authority who has full discretion to grant a licence and if he prefers an existing licence holder to a new applicant, the decision cannot be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice, It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. In other words such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed in Attorney General for New South Wales' case "To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law." If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power of violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles." (Emphasis supplied)

From the above it is clear that legitimate expectation may arise -

(a) if there is an express promise given by a public authority; or

(b) because of the existence of a regular practice which the claimant can reasonably expect to continue ;

(c) Such an expectation must be reasonable.

However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."

After having quoted the above observations and law laid down by the Supreme Court, what emerges in relation to instant case, is that there was no express promise given by respondent CVPP to make formal allotment order in favour of petition company for turnkey execution. There was non-existence of a regular practice in respondent CVPP, which petitioner company could have practically expected to continue. However, since respondent CVPP has changed the *turnkey execution* to *package mode*, therefore, no question of legitimate expectation would arise.

89. Some of the observations in cited judgment of the Supreme Court in ***Union of India and others v. Hindustan Development Corporation and others***, case (supra) have already been discussed and quoted in above referred to judgement passed in *Madras City Wine Merchants' Association & anr. v. State of T.N. and anr*. However, it would be apt to have a glimpse of the cited judgment. This case relates to fixation of price. On the *doctrine of legitimate expectation*, while discussing meaning, nature and scope of the doctrine and also basis or foundation of rights and obligations vis-à-vis the administrative authorities arising out therefrom, the Supreme Court has held that it only operates in public law

field and "*denial does not by itself confer an absolute right to claim relief*, and *that the court will not interfere merely on ground of change in government policy"*. In government contract private parties for supply of goods, in absence of any fixed procedure for fixation of price and allotment of quantity to be supplied, the Supreme court has also held that "*adoption of dual pricing policy by government (lower price for big suppliers and higher price for small suppliers) in public interest and allotment of quantity by suitability adjusting the same so as to break the cartel* [lobby/alliance/ league]*, does not involve denial of any legitimate expectation"*.

On the question of Courts' interference in the action taken by Government, it was observed that one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because as we

said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down government action as invalid

The Supreme Court considered the circumstances under which the Government is not always bound to accept the highest bid offered in a public auction and held that : "*It appears to us that the High Court had clearly misdirected itself. The Conditions of Auction made it perfectly clear that the Government was under no obligation to accept the highest bid and that no rights accrued to the bidder merely because his bid happened to be the highest. Under condition 10 it was expressly provided that the acceptance of bid at the time of auction was entirely provisional and was subject to ratification by the competent authority, namely, the State Government. Therefore, the Government had the right, for good and sufficient reason, we may say, not to accept the highest bid but even to prefer a tenderer- other than the highest bidder. The High Court was clearly in error in holding that the Government could not refuse to accept the highest bid except on the ground of inadequacy of the bid. Condition 10 does not so restrict the power of the Government not to accept the bid. There is no reason why the, power*

vested in the Government to refuse to accept the highest bid should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. In fact, to give an antithetic illustration, the very enormity of a bid may make it suspect. It may lead the Government to realise that no bona fide bidder could possibly offer such a bid if he meant to do honest business. Again the Government may change or refuse its policy from time to time and we see no reason why change of policy by the Government, subsequent to the auction but before its confirmation, may not be a sufficient justification for the refusal to accept the highest bid. It cannot be dispute that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest".

Again the Supreme Court resolutely makes it clear that if the Government is the exclusive owner of the privileges, reliance on Article 19(1)(g) or Article 14 of the Constitution of India, becomes irrelevant and that citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article

14, if the Government tries to get the best available price for its valuable rights. The Supreme Court observed : "*It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performed and executive function. The correctness of its conclusion is not open 'to judicial review. We fail to see how the plea of contravention of Art. 19 (1) (g) or Art. 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in s. 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell then cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids —see Union of India and ors. v. M/s Bhimsen Walaiti Rani [1970] 2 SCR 594. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If*

the Government is the exclusive owner of those privileges, reliance on Art. 19 (1) (g) or Art. 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights".

It may not be out of place to mention here that we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, therefore, its validity cannot be tested on any rigid 'a priori' considerations or on the application of any strait-jacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom to play in the joints to the executive and that the Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical.

In the cited judgment, the Supreme Court referred to and quoted following observations of the decision of ***India Cement Ltd v. Union of India***[60]:

> "It was pointed out that what is best for the industry and in what manner the policy should be formulated and implemented. hearing in mind the object of supply and equitable distribution of the commodity at a fair price in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government and such matters do not ordinarily attract the power of judicial review. It was also held (hit even if some persons are at a disadvantage and have suffered losses on account of the formulation and implementation of the government policy. that is not by itself' sufficient ground for interference with the governmental action. Rejection of the principle of fixation of price unit wise on actual cost basis of' each unit was reiterated and it was pointed out that such a policy promotes efficiency and provides and incentive to cut down the cost introducing an element of healthy competition among the units."

In the cited judgment, the Supreme Court also made reference and quoted observations of the decision rendered by its Constitution Bench in ***R. K. Garg v. Union of India (1981)***[61], that rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching the civil rights such as freedom of speech religion etc. It has been said by no less a person than *Holmes, J*. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-.jacket formula and this is particularly true in case of legislation dealing

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[60](1990) 4 SCC 356
[61]4 SCC 675 : 1982 SCC (Tax) 30

with economic matters, where having regard to the nature of the problems required to be dealt with. Greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation then in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud 354 US 457* where Frankfurter, J said in his inimitable style:

> In the utilities, tax and economic regulation cases, **there are good reasons for judicial self-restraint** if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events --self-limitation can be seen to be the path of judicial wisdom and institutional prestige and stability." (emphasis supplied)

In Peerless General Finance and Investment Co. Limited and Another v. Reserve Bank of India etc.[62],the accent of power of the Courts interfering in such economic policy matters was considered and it was held as under:

> "The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. **Courts are not to interfere with economic policy which is the function of experts**. **It is not the function of the courts to sit in judgment over**

[62](1992) 2 SCC 343

> **matters of economic policy** and **it must necessarily be left to the expert bodies**. In such matters even expert can seriously and doubtlessly differ. **Courts cannot be expected to decide them without even the aid of experts**." (emphasis supplied)

Pertinent to mention here that expectation cannot be the same as anticipation. It is not like a wish, a desire or a hope nor can it amount to a claim or demand on the ground of right. However, earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is found on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense. These are the observations and expressions made by the Supreme Court in the cited judgement.

In the cited judgment, the Supreme Court has made an important observations on the *doctrine of legitimate expectation*, which are reproduced hereunder with emphasis supplied:

> "33. On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular then decision-maker should justify the denial of such expectation by showing some overriding public interest. **Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person**. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question Would be whether failure to give an opportunity of hearing before the decision affect such legitimate expectation is taken has resulted in failure of' justice and whether on that ground the decision should he quashed. If that be so then what should be the relief is again a matter which depends on several factors.
>
> 34. We find in *Attorney General for New South Wales'* case that the entire case law on the doctrine of legitimate expectation has been considered. We also find that on an elaborate an erudite discussion **it is held that the courts'**

jurisdiction to interfere is very much limited and much less in granting any relief in a claim based purely on the ground of 'legitimate expectation'. In *Public Law and Politics* edited by Carol Harlow, we find an article by Gabriele Ganz in which the learned author after examining the views expressed in the cases decided by eminent judges to whom we have referred to above, concluded thus:

> "The confusion and uncertainty at the heart of the concept stems from its origin. It has grown from two separate roots, natural justice or fairness and estoppel., but the stems have become entwined to such an extent that it is impossible to disentangle them. This makes it that it is very difficult to predict how the hybrid will develop in future.This could be regarded as giving the concept a healthy flexibility, for the intention behind it is being it has been fashioned to protect the individual against administrative action which is against his interest. On the other hand, the uncertainty of the concept has led to conflicting decisions and conflicting interpretations in the same decision."

However, it is generally accepted and also clear that legitimate expectation beings less than right operate in the field of public and not private law and that to some extent such legitimate expectation ought to be protected though not guaranteed.

35. Legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be obsolete before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right, in cases of contracts, distribution of largest by the Government and in somewhat similar situations. For instance in cases of discretionary grant of licences, permits or the like, carries with it a reasonable expectation, though not a legal right to renewal or non-revocation, but to summarily disappoint that expectation may be seen as unfair without the expectant person being heard. But there again the court has to see whether it was done as a policy or in the public interest either by way of G.O., rule or by way of a legislation. If that be so. a decision denying a legitimate expectation based on such (,rounds does not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power, **the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply and objective standard which leaves to the deciding authority the full range of choice** which the legislature is presumed to have intended. Even in a case where the

decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance if an authority who has full discretion to grant a licence and if he prefers an existing licence holder to a new applicant, the decision cannot be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice. It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. In other words such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed *in Attorney General for New South Wales'* case "To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of power when its exercise otherwise accords with law." If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory unfair or based, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14**but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles**. It can be one of the ground to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits," particularly when the element of speculation and uncertainty is inherent in that very concept. As cautioned in *Attorney General for New South Wales'* case the courts should restrain themselves and restrict such claims duty to the legal limitations. It is a well-meant caution. **Otherwise a resourceful litigant having vested interests in contracts. licences etc. can successfully indulge in getting welfare activities mandated by directive principles thwarted to further his own interests**. The

> caution, particularly in the changing scenario, becomes all the more important." (emphasis supplied)

90. The judgement of the Supreme Court, cited by learned senior counsel for petitioner, passed in case titled ***Jitendra Kumar and others v. State of Haryana and another***, has already been discussed herein above. The said judgement relates to service-matter and bears no resemblance with the case in hand. In the said case, appeals arose out of common judgment and order passed by a Division Bench of the Punjab and Haryana High Court, whereby and whereunder writ petitions filed by appellants (Jintendra Kumar and others) praying, *inter alia*, for issuance of a writ in the nature of mandamus directing respondents to issue letters of appointments to them on the premise that they had been selected in Haryana Civil Services (HCS) (Executive Branch) and/or Allied Services pursuant to or in furtherance of the result declared by Haryana Public Service Commission as also for quashing Notification whereby cadre strength of HCS (Executive Branch) was reduced from 300 to 230, were dismissed. The Supreme Court held that no case was made out for interference with impugned judgment of the High Court and dismissed the appeals accordingly. Though the attention of the Supreme Court in the cited case was invited to legitimate expectation but the

Supreme Court made it clear that "*We also fail to see any reason as to why the doctrine of promissory estopped will apply in the instant case*".

91. The judgement of the Supreme Court in ***Punjab Communications Ltd. v. Union of India & Ors.***, referred to by learned senior for petitioner, has already been discussed herein above on the doctrine of legitimate expectation. Nevertheless, given the facts and circumstances of the cited case as having some resemblance with the case in hand, it is relevant to make mention of certain facts of the said case herein, for facilitation of arriving at just conclusion in the present case. In the said case, appellant [Punjab Communications Ltd.(PCL)] filed two appeals against judgment of High Court of Punjab and Haryana as also against order in review application, before the Supreme Court. The main facts of the case are that in September 1993, Asian Development Bank (ADB) agreed to grant a soft loan to the Union of India (1st respondent) for funding a project meant to provide digital wireless telecom facility to 36,000 identified villages in Eastern U.P. The Department of Telecommunications (DOT) floated a tender inviting offers open to Indian and foreign companies. There were 14 offers including one from the appellant. The Technical

Evaluation Committee (TEC) examined the offers. After scrutiny, TEC shortlisted appellant (PCL) and BEL. It is appellant's case that on account of some pressure brought on respondents no.5 (Member (P) Telecom Commission) DOT and Respondent no.6 (Advisor (T) Telecom Commission) DOT, the matter was referred by respondent no.5 to High Level Committee (HLC), with a view to obtain an opinion to disqualify appellant so that the Department could go in for an outmoded `analog' system (rather than the `digital' system) to be provided by some multinational company, which was wanting to dump its outmoded `analog' system in the India. It is the appellant's case that this was done with a view to enable the issue of a fresh notification calling for fresh tenders pertaining to `analog' system. HLC submitted its report that there were two `deviations' in appellant’s tenders submitted as noticed by TEC in respect of the required specifications. The Committee required department to negotiate orally with the appellant. Negotiation was held. A note was prepared by respondent no.6, convenor of High Level Committee, stating that further Technical Evaluation of the project was likely to go further due to complexities of bids offered by manufacturers and also in view of the want of authentication of the "proveness" of

the system proposed by appellant. It then stated that a decision had been taken not to go ahead with the ADB loan as it would result in heavy commitment charges and Department must go ahead for implementation of rural telecom project through its own resources. According to the appellant, these minutes were back-dated inasmuch as Chairman TC's office diary recorded a note that Chairman (TC) wanted para 2 to be modified to say that the Department did not have any technically responsive bid and that none of the offered systems were proven and therefore Department might not go ahead with the loan and the draft might be modified in consultation with ADV(T)/DDG(LPT) & resubmitted. According to the appellant, the convenor of the High Level Committee created these imaginary deficiencies in the appellant's bid and prepared backdated minutes and showed that all the High Level Committee members had signed the minutes. These backdated minutes, it is alleged, were prepared as a ground for rejection of the tender, in spite of the fact that 5 years were spent on drafting the specifications and in the evaluation of bids. Appellant made a representation to respondent no.2, but order was passed, cancelling the tenders. Appellant then filed writ petition in Punjab & Haryana High Court, which was dismissed. A review

application was filed but that was also dismissed. Thereafter, appellant moved the Supreme Court. The Supreme Court, after discussing all facets of the matter, including doctrine of legitimate expectation, opined that nothing was irrational or perverse in the decision taken by respondents inasmuch as irrationality or perversity was not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate expectation of the appellant and accordingly dismissed the appeals. Therefore, the cited case as well has not rendered any support to the case of petitioner.

92. On the ground/point of "arbitrary" he has referred: (i) ***Sanchit Bansal and another v. Joint Admission Board and others***[63]; ***State of Orissa and another v. Mamata Mohanty***[64]; ***State of Tamil Nadu and others v. K. Shyam Sunder and others***[65]; ***Kumari Shrilekha Vidyarthi and others v. State of U.P. and others***[66]; and ***East Coast Railway and another v. Mahadev Appa Rao and others***[67].

93. Insofar as citation ***Sanchit Bansal and another v. Joint Admission Board and others***, is concerned, the said

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[63](2012) 1 SCC 157
[64](2013) 3 SCC 436
[65](2011) 8 SCC 737
[66](1991) 1 SCC 212
[67](2010) 7 SCC 678

case relates to education, selection, admission and procedure to various courses. In the said case, the Supreme Court, while referring to its earlier decisions, observed that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men, possessing technical expertise and rich experience of actual day-to-day working of educational institutions and department controlling them and that the courts are neither equipped nor have academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education. If the courts start entertaining petitions from individual institution or students to permit courses of their choice, either for their convenience or to alleviate hardship or to provide better opportunities, or because they think that one course is equal to another, without realising the repercussions on the field of technical education in general, it will lead to chaos in education and deterioration in standards of education. The Supreme Court further observed that Courts do not act as appellate authorities to examine the correctness, suitability and appropriateness of a policy,

nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate and that courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. The Supreme Court, while summing up, observed that the procedure adopted in JEE 2006 may not be the best of procedures, nor as sound and effective as the procedures. But there is no ground for the courts to interfere with the procedure, even if it was not accurate or efficient in the absence of mala fide or arbitrariness or violation of law and it is not possible to impute mala fides or arbitrariness, or grant any relief to the first appellant, therefore, dismissed the appeal.

94. Qua ***State of Orissa and another v. Mamata Mohanty***, it relates totally to different field. In the said case respondent was appointed as Lecturer in Niali College, Niali. Government of Orissa, in order to provide better facilities to teachers and enhance standard of higher education, came out with a Notification with revised pay scale as per recommendations of University Grants Commission (UGC). Respondent approached High Court for pre-revised pay scale retrospectively. High Court passed in her favour placing reliance on various orders passed earlier in cases of other persons. Dissatisfied

therewith and other orders passed by the High Court, State of Orissa filed various appeals before the Supreme Court, which were clubbed and disposed of by the cited common judgement. It is pertinent to mention here that the Supreme Court in the cited judgement after considering rival submission made by the parties, as of the view that as the questions raised had never been considered by any of the courts and involve questions of law of public importance, as such, took up various issues/questions, like Statutory provisions, procedure of selection of candidates, condition of eligibility of candidates, relevant part of notification/circulars/ letters, education, appointment/employment with advertisement, order bad in inception, eligibility lacking, relaxation, delay/laches, relief not claimed—cannot be granted, Article 14, per *incuriam*—doctrine, including arbitrariness. On the ground of arbitrariness, the Supreme Court observed that every action of the State or its instrumentalities should neither be suggestive of discrimination nor even an impression of bias, favouritism and nepotism. Insofar as case in hand is concerned, respondent CVPP has not entered into negotiation with any other company or as far as that is concerned has not granted, given or allotted contract in favour of any other

company, instead of petitioner company. But respondent CVPP has cancelled the whole process of 'turnkey tender' and started fresh tender on 'package mode', so that the owner/respondent incurs cost for only those events which actually occurs. As already made clear hereinabove, that right to refuse the lowest or any other tender, is always available to the Government. There can be no infringement of Article 14, if the Government tries to get best person or best quotation. The right to choose cannot be considered to be an arbitrary power, is trite law on the subject. In the case in hand, petitioner company and respondent CVPP entered into negotiations, which, however, could not conclude to the expectation of petitioner company. The decision to cancel 'turnkey tender' by impugned decision, and start fresh tender process for 'package mode', by impugned tender notices, cannot be said to be arbitrary, unreasonable and *mala fide*. Be that as it may, the action of respondent CVPP contained in impugned decision, is not arbitrary.

95. Insofar as ***State of Tamil Nadu and others v. K. Shyam Sunder and others*** is concerned, it has completely no sameness with the case in hand. It relates to school education system, curriculum, youth of the nation and development of personality of a child at the time of basic

education during his formative years of life. The Supreme Court in the cited case has held that the younger generation has to compete in global market and education is not a consumer service nor can the educational institution be equated with shops, therefore, there are statutory prohibitions for establishing and administering educational institutions without prior permission or approval by the authority concerned. In that view of the matter, the case in hand does not at all relate to the subject-matter of cited judgment. Whatever, observations made in the cited judgement with respect to any various *doctrines*, including arbitrariness, have direct link, bearing and nexus with education system and matters incidental therewith and not with commercial activities or contract matters, as is in the present case.

96. ***Kumari Shrilekha Vidyarthi and others v. State of U.P. and others*** relates to terminating appointment of all Government Counsel (Civil, Criminal, Revenue) in all districts of the State of Uttar Pradesh. Whatever discussed therein in toto relate and pertain to service matters and not to contract-matters. Whatever laid down in the cited judgement or those discussed herein above, which have been cited by the learned senior counsel for petitioner, cannot be treated as a statute to apply to the

every case that are commercial in nature as is the present case. It is well settled law that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as *Euclid's theorems* nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes.

97. It may not be out of place to point out here that it is well settled law that a judgment of a Court is not to be read mechanically as a *Euclid's theorem* nor as if it was a Statute. On the subject of precedents Lord *Halsbury, L.C.* said in ***Quinn vs. Leathem***[68]:

> "Now before discussing the case of Allen Vs. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

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[68] 1901 AC 495

The Supreme Court in***Ambica Quarry Works v. State of Gujarat and ors***[69] has observed that the "ratio of any decision must be understood in the background of the facts of that case. It has been said a long time ago that a case is only an authority for what it actually decides and not what logically follows from it".

In ***Bhavnagar University v. Palittana Sugar Mills Pvt. Ltd.***[70]**,** the Supreme Court observed that "*It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision*". As held in ***Bharat Petroleum Corporation Ltd. & another v. N.R. Vairamani & another***[71], a decision cannot be relied on, without disclosing the factual situation. The Supreme Court also observed:

> "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes"

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[69](1987) 1 SCC 213
[70](2003) 2 SCC 111
[71]AIR 2004 SC 4778

Lord *Mac Dermot*in ***London Graving Dock Co. Ltd. v. Horton***[72]**,** observed that "*The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge*".

In ***Home Office v. Dorset Yacht Co.***[73]Lord *Reid* said, "*Lord Atkin's speech ... is not to be treated as if it was a statute definition; it will require qualification in new circumstances, Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament*". And in ***Herrington vs. British Railways Board***[74]**,** Lord *Morris* said:

> "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.
>
> Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become locus classicus : Each case depends on its own facts and a close similarity between one case and

[72](1951 AC 737 at page 761)
[73](1970 (2) All ER 294)
[74](1972 (2) WLR 537)

> another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.
>
> Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it."

The same view has been taken by the Supreme Court in ***Sarva Shramik Sanghatana (K.V.), Mumbai v. State of Maharashtra & Ors.***[75], and ***Government of Karnataka &ors. v. Gowramma & ors***[76].

Thus, in view of the above decisions, it cannot be said that the decision relied upon or for that matter other citations referred to by learned senior counsel for petitioner, is/are an authority on the extreme proposition canvassed.

98. Insofar as ***East Coast Railway and another v. Mahadev Appa Rao and others***, case (supra), cited by learned senior counsel for petitioner, is concerned, it relates and pertain to the process of examination, selection and recruitment for filling up vacant posts of Chief Typists in East Coast Railway and has no resemblance as it totally

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[75]AIR 2008 SC 946
[76]AIR 2008 SC 863

fall within realm of Service Jurisprudence and not the Law of Contract.

99. On the issue/ground of 'reasonableness', learned senior counsel has referred the judgements passed in ***Union of India v. Shiv Shanker Kesari***[77], which relates to Nacotic Drugs and Psychotropic Substances and grant of bail, and ***Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another***[78], which relates to arbitration. The second citation relates to post-contract-stage dispute and not pre-contract stage, which was referred to arbitration and the Arbitrator's Award was assailed before the High Court and thereafter before the Supreme Court. The Supreme Court held that the award of the arbitrator was assailed on trivial grounds and the challenge was rightly rejected by the High Court and dismissed the appeal.

100. On the ground of power of the "*Court to review decision of respondent CVPP on facts*", learned senior counsel for petitioner submits that this Court, while dealing with the question of arbitrariness and unreasonability, has power to review and examine the facts, so as to arrive at requisite conclusion and that this Court may see the

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[77](2007) 7 SCC 798
[78](1987) 4 SCC 497

opinion of the Experts, decision of the Board of Directors and reports of the Committees which had recommended to allot contract and no committee had recommended rejection of the tender, which will demonstrate that the Board of Directors illegally evaluated the reports of the Committee, which reports had earlier been accepted by the Board. On the same set of facts the Board of Directors, with different composition of members, has arrived at two different conclusions. Learned counsel has submitted that instant case is a fit case, where the facts need to be evaluated by this Court as having been ruled by the Apex Court in ***Tata Cellular v. Union of India*** case (supra) and ***New Horizons Limited and another v. Union of India and others***[79]. Insofar as Tata Cellular case (supra) is concerned, the said citation has been discussed in detail in ***Maa Binda Express Carrier*** case (supra) by the Supreme Court, which squarely covers the instant case. The Supreme Court in ***Maa Binda Carrier*** case (supra) has held that the bidders, participating in the tender process, cannot insist that their tenders should be accepted simply because a given tender is highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the

[79](1995) 1 SCC 478

Government. Now remains the second cited case, i.e. *New Horizons LIimted and another v. Union of India and others*; it relates to joint venture company, as in the said case the appellant (New Horizons Limited) was not allowed to partake in tender process as according to respondents appellant was not possessing some of eligibilities of tender, whereas appellant was possessing required experience/eligibility for partaking and competing in tender process. The said judgement also makes interesting scholarly transcripts as about four different attitudes towards the company in judicial pronouncements as also with respect to a company being an agency or instrumentality of the State in terms of Article 12 of the Constitution of India, which aspect has also been dealt with herein above. Therefore, the said case is totally different from the facts and circumstances of the instant case.

101. Learned senior counsel for petitioner has, on the ground/point of "*whether respondent CVPP has absolute power to reject tender in terms of Article 1.2 of ITB*", cited judgements passed in ***Union of India and others v. Dinesh Engineering Corporation and another***[80], which relates to purchase of spare parts under a proprietary

[80](2001) 8 SCC 491

basis from EDC without calling for tenders whereas in the instant case, tender notice was floated; and ***Kopex-shaft Sinking Company and ors v. Hindustan Copper Limited and anr.***[81], which is totally on different subject-matter. He has, on the ground/point of "*cost of re-bidding*", "*price treated as sole criteria*", and "*commercial consideration*" also cited ***Asia Foundation & Construction Ltd v. Trafalgar House Construction (I) Ltd and others***[82]. On the ground/point of "*what is meant by public interest*" learned senior counsel has cited decision of the Supreme Court in ***Raunaq International Ltd. v. I.V.R. Contraction Ltd. and others***[83]. The said judgement, it is relevant to mention here, deals with various facets of the matter which relate to the instant case as well, including Courts to adopt restrain in granting interim orders, where public interest is involved. It would be appropriate to reproduce relevant portion(s) of the judgement, with emphasis supplied:

> "9. **The award of a 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 importance are commercial considerations**. These would be:
>
> (1) The price at which the other side is willing to do the work;
>
> (2) Whether the goods or services offered are of the requisite specifications;

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[81]2013 AIR (Calcutta) 34
[82](1997) 1 SCC 738
[83](1999) 1 SCC 492

(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
(5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often
(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) **The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer**. **Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money** and **delaying the availability of services**, facilities or goods. e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

x x x x

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

x x x x x

18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. **The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in**

appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution;

x x x x x x

21. **It is unfortunate that despite repeated observations of this court in a number of cases, such petitions are being readily entertained by the High Courts without weighing the consequences**. In the case of *Fertiliser Corporation Kamgar Union (Regd.), Sindri and Ors. v. Union of India and Ors,[1981] 1 SCC 568*, this court observed that if the Government acts fairly, though falters in wisdom, the court should not interfere. The Court observed:

> "A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangement..... emerges..... The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration."

22. *In Tata Cellular v. Union of India*, *[1994] 6 SCC 651*, this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, **there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power**. ……

After examining a number of authorities, the Court concluded (at page 687) as follows ;-

> (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.**
(5) **The Government must have freedom of contract**. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.
(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased arid unbudgeted expenditure.

Dealing with interim orders, this Court observed in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Ors.,[1985] 2 SCR 190 at page 196* that an interim order should not be granted without considering balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in *Ramniklal N. Bhutto and Anr: v. State of Maharashtra and Ors., [1997] 1 SCC 134*, the Court said that while granting a stay the court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a stay. Therefore, in granting an injunction or stay order against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far out-weighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.
Therefore, when such a stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counter-productive. In the present case it was submitted that the terms and conditions of the tender specified the requisite qualifying criteria before a person could offer a tender. The criteria which were so laid down could not have been relaxed because such a relaxation results in a denial of opportunity to others.
In our view the High Court has seriously erred in granting the interim order. The appeals are, therefore, allowed and the impugned order is set aside. M/s IVR

> Construction Ltd. shall pay to the appellants herein the costs of the appeals." (emphasis supplied)

102. Learned senior counsel has also placed reliance on the decision in ***Maa Binda Express Carrier*** case(supra), which has already been discussed herein above. He has as well cited ***Onkar Lal Bajaj and others v. Union of India and another***[84], which relates to cancellation of allotments, made with respect to retail outlets, KPS distributorships and SKO-LDO dealerships and therefore, distinguishable from the facts of the instant case and insofar as case titled, ***Oil and Natural Gas Corporation Limited v. Western Geco International Limited***[85], is concerned, the same is totally on different subject-matter viz. post contract dispute, which was referred to arbitration and the award of arbitrator was under challenge, thus, having no likeness with the facts of the instant case.

103. In ***Jagdish Mandal v. State of Orissa and ors***[86], the Supreme Court has held that a contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in

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[84](2003) 2 SCC 673
[85](2014) 9 SCC 263
[86](2007) 14 SCC 517

public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.

104. Tenders, in the present scenario, are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by technical experts and sometimes third party assistance from those not connected with owner's organisation is taken. This ensures objectivity. It is because to check and ascertain that technical ability and financial feasibility are confidently optimistic and cheerful and are workable and realistic. There is multifaceted complex approach, highly technical in nature. The tenders where public largesse is put to auction, stand on a different area. The subject-matter of case in hand requires technical expertise. Parameters applied in it are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. In view of that, technical evaluation or comparison by this Court would be impermissible. The principle which is applied to

scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner (respondent CVPP), therefore, should be allowed to carry out the purpose and there has to be allowance of free play in the joints. My view is fortified by the observations and conclusions drawn by the Supreme Court in ***Montecarlo Ltd v. NTPC Ltd***[87]. It observed:

> "24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied in it are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule…… Technical evaluation or comparison by the Court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

[87] AIR 2016 SC 4946

105. In ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***[88], it was held by the Supreme Court, relying on a host of decisions, that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer, should not be interfered with. Interference is permissible only if the decision making process is *mala fide* or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one, which no responsible authority acting reasonably and in accordance with law could, have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. The constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority.

106. The Supreme Court in ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd***[89] has pointed out that mere disagreement with the decision making process of the decision of the authority is no reason for a constitutional Court to interfere. The owner of a project as

[88]AIR 2016 SC 3814
[89]AIR 2016 SC 4305

author of tender, is best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents and that it is possible that the owner may give interpretation to tender documents, which is unacceptable to constitutional Courts, but that *per se* is not a reason for interfering with the interpretation given. The Supreme Court held:

> "13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.
> ….
> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

107. The Supreme Court has also in ***Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd. and another***[90], pointed out that normally the courts would not exercise such a discretion where there are very serious disputed questions of fact, which are of complex nature and require oral evidence for their determination. Even in

[90]AIR 2016 SC 4502

cases where question is of choice or consideration of competing claims before entering into the field of contract, the facts have to be investigated and found before the question of violation of Article 14 of the Constitution, could arise. If those facts are disputed and require assessment of evidence, the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution.

108. The Supreme Court has by judgement dated 18th October 2016, in *Civil Appeal Nos. 10182-10183 of 2016 (SLP(C) Nos. 28959-28960 of 2015)* ***Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) and another v. CSEPDI – Trishe Consortium and another*** *with Civil Appeal Nos. 10184-10185 of 2016 (SLP Nos. 30098-30099 of 2015)*[91], held that in fiscal evaluation the Court has to apply the doctrine of restraint and several aspects, clauses, contingencies, etcetera have to be factored and that these calculations are best left to experts and those, who have knowledge and skills in the field. The Court further has observed that the financial computation involved, the capacity and efficiency of the

[91]AIR 2016 SC 4879

bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants; the courts cannot enter into the said realm in exercise of power of judicial review; and that the courts cannot sit in appeal over financial consultant's assessment and that it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd. The concluding paragraphs are very important to be noticed, which are reproduced hereunder, with emphasis supplied:

> "36. From the aforesaid, it is vivid that the Consultant has analysed the offers regard being had to the tender conditions. Be it ingeminated that the analysis and determination made by the financial consultant has been carried out before receipt of any additional document from either side. The documents were called for by the owner from both the qualifying bidders in a transparent manner and the same have been considered at the time of evaluation by the Consultant. Submission of Mr. Sibal is that the evaluation is ex facie defective inasmuch as the Consultant has loaded certain charges as a consequence of which the price has gone up. Mr. Rohatgi, learned Attorney General appearing for BHEL and Mr. Prasad, learned senior counsel appearing for the Corporation would submit that the evaluation is founded on definities leaving nothing to any kind of contingency. They have referred to the Term Sheet and what is put up by Industrial and Commercial Bank of China Limited. At this juncture we are obliged to say that in a complex **fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review.We cannot sit in appeal over the financial consultant's assessment**. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.

> 37. Before parting with the case we are constrained to add something. **We do so with immense pain**. The respondent, before finalization of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that **the High Court at that stage should have exercised caution**. **If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest**. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently……. **We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint**.
>
> 38. In view of our preceding analysis we are of the considered opinion that **the Division Bench through the delineation has adopted the approach of an appellate forum or authority and extended the principle of judicial review to certain areas to which it could not have** and, therefore, the **judgment and order of the Division Bench followed the path of error in continuum**. Consequently, the inevitable conclusion is unsettlement of the impugned order and we so direct. In the ultimate eventual the appeals stand allowed. There shall be no order as to costs."

109. From the above comprehensive discussion, what is deducible is that: (i) submission of tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept; (ii) the bidder(s), participating in tender process, cannot insist that his/their tender(s) should be accepted simply because a given tender is highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government, (iii) there can be no question of infringement of Article 14, if Government tries to get the

best person or best quotation; the right to choose cannot be considered to be an arbitrary power, (iv) the court does not sit as a court of appeal; (v) the court does not have expertise to correct the administrative decision; if a review of administrative decision is permitted, it will be substituting its own decision, without necessary expertise which itself may be fallible, (v) the terms of invitation to tender cannot be open to judicial scrutiny because invitation of tender is in the realm of contract; the decision to accept tender or award contract is reached by process of negotiations through several tiers; more often than not, such decisions are made qualitatively by experts, (vi) Government must have freedom of contract, (vii) quashing decision may impose heavy administrative burden on administration and lead to increased and unbudgeted expenditure.

In that view of the matter, Issue No.2 is decided in negative. As a corollary the decision taken by respondent CVPP to cancel the bid of petitioner company and "Turnkey Tender" as also to invite fresh bids on "package mode" in terms of the fresh tenders, need not be interfered with by this Court.

110. Further to point out here that if the rights are purely on private character, no mandamus can be issued, it has

been significantly made clear by the Supreme Court in ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Samark Trust & ors v. R. Rudani & ors***[92]. Thus, even if the respondent is a 'State', other condition, which has to be satisfied for issuance of a writ of mandamus is the public duty. In a matter of private character or purely contractual field, no such public duty element is involved and, thus, mandamus will not lie. There is line of decisions on the subject-matter where the contract entered between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order, it is a trite law, can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract.

111. It is not appropriate for the Court to interfere in a decision taken by the Government or the authorities concerned, after due consideration of all perspectives and full application of mind. The Supreme Court in ***N. D. Jayal vs. Union of India***[93], has observed:

> "This Court cannot sit in judgement over the cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decision on matters related to safety and allied aspects. The opposing viewpoints

[92](1989) 2 SCC 691
[93](2004) 9 SCC 362

> of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere."

112. In ***Joshi Technologies International versus Union of India***[94], the Supreme Court, after discussing various decisions relating to contract and contractual obligations, dismissed the appeal of the contractor appellant, and held that writ jurisdiction of the High Court under Article 226 of the Constitution, would not exercise such a discretion if there are very serious disputed questions of fact, which are of complex nature and require oral evidence for their determination. It would be expedient to reproduce relevant portion of the judgement hereunder:

> "The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:
>
> (a) the Court may not examine the issue unless the action has some public law character attached to it.
>
> (b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
>
> (c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

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[94](2015) 7 SCC 728

(d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

Further legal position which emerges from various judgments of this Court dealing with different situations/ aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under

the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

Keeping in mind the aforesaid principles and after considering the arguments of respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.

As pointed out earlier as well, the contract in question was signed after the approval of Cabinet was obtained. In the said contract, there was no clause pertaining to Section 42 of the Act. The appellant is presumed to have knowledge of the legal provision, namely, in the absence of such a clause, special allowances under Section 42 would impermissible. Still it signed the contract without such a

> clause, with open eyes. No doubt, the appellant claimed these deductions in its income tax returns and it was even allowed these deductions by the Income Tax Authorities. Further, no doubt, on this premise, it shared the profits with the Government as well. However, this conduct of the appellant or even the respondents, was outside the scope of the contract and that by itself may not give any right to the appellant to claim a relief in the nature of Mandamus to direct the Government to incorporate such a clause in the contract, in the face of the specific provisions in the contract to the contrary as noted above, particularly, Article 32 thereof. It was purely a contractual matter with no element of public law involved thereunder.
>
> Having considered the matter in the aforesaid prospective, we come to the irresistible conclusion that the appellant is not entitled to the relief claimed. Though it may be somewhat harsh on the appellant when it availed the benefit of Section 42 for few years and acted on the understanding that such a benefit would be given to it, but we have no option but to hold that PSCs did not provide for this benefit to be given to the appellant and the contract can be amended only if both the parties agree to do so, and not otherwise. Therefore, we are constrained to dismiss the appeal for the reasons given above."

From the above, the Supreme Court has laid down that if the contract between private party and the State/ instrumentality and/or agency of State is under the realm of a private law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law, rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction and that it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226, Constitution of India, as the matter is in the realm of pure contract. Same is true about the case in hand.

113. In the present case the Pakal Dul HE Project is located on Marusudar River in District Kishtwar in Jammu and Kashmir. It involves transfer of Marusuadar River water to Chenab River upstream of Dul Dam of Dul Hasti HE Project. Palak Dul Project is a storage scheme and the gross storage of the reservoir is 125.4 Mcum. A maximum gross head of 417 m between the dam site at Drangdhun and power house site at Dul shall be utilized for power generation. For completion of the said project, International Competitive Bidding (ICB) was adopted for tendering for Turnkey Execution of Pak Dul HE Project. This comprised of two stage system of bidding, Stage-I (Technical and Qualification Particulars) Bids followed by Stage-II (Price) Bids. In response to Tender Notice dated 19th June 2013, five Consortia submitted their bids. The Stage-II Bids (Price Bid) were also submitted by all five Consortia on due date. Tender Evaluation Committee (TEC) was constituted by respondent CVPP to evaluate Stage-I Bid (Technical and Qualification Particulars) as well as Stage-II Bid (Price Bid) submitted by bidders. Four Bidders were considered techno-commercially responsive after detailed evaluation of Stage-I bid by TEC. The Stage-II (Price Bid) Bids of the four Bidders, who met the Qualification Criteria and whose Techno-commercial were

found responsive by TEC with approval of competent authority, were opened by the Tender Opening Committee (TOC) on 3rd February 2014. Petitioner company was assessed as lowest evaluated bidder by TEC. It was proposed to invite petitioner company for negotiation. The record reveals five meetings between June, 2014 to September, 2014 took place but of no yield. It appears that respondent CVPP, considering all aspects involved in Turnkey works, decided to cancel the "turnkey tender" and "*invite fresh bids on package mode, so that CVPP incurs cost for only those events which actually occurs*". This was followed by impugned cancellation letter dated 16th June 2016. Two Notices Inviting Tenders have also been issued by respondent CVPP. One is dated 2nd March 2016, for Domestic Competitive Bidding for the work and package of "*Construction of Diversion Tunnel (alongwith HM works) of Pakal Dul Hydroelectric Project"*. Second Notice Inviting Tender is for International Competitive Bidding for the work and package of "*Design and Construction of 2 nos. circular shaped Head Race Tunnels of length 7700 m each to be exacavated by two new independent TBMs and Associated works for Pakal Dul HE Project*". Forthrightly saying, this Court cannot ask or foist respondent CVPP to stick to earlier *Turnkey*

execution of Pakal Dul (Drangdhuran) Hydroelectric Project. Respondent CVPP has expert's body available to take into account all facets as regards adoption of "*turnkey execution*" or "*package mode*" system. This Court cannot ask respondent CVPP that "*turnkey execution*" is in the best interest of CVPP. The reason being that it is in the field and domain of respondent CVPP and this Court cannot step into the shoes of CVPP to decide what would be and would not be better for CVPP. It is exclusive domain of CVPP and not that of this Court.

114. It may not be out of place to mention here that this Court cannot sit as a court of appeal as this Court does not have the expertise to correct the decision of respondent CVPP inasmuch as reviewing the decision of respondent CVPP would be substituting its own decision, without the necessary expertise which itself may be fallible. This Court cannot scuttle or strangulate the freedom of contract of respondent CVPP.

115. Applying the foregoing parameters to the case at bar, this Court finds that the decision, impugned in the instant writ petition is immune from judicial review. Reliance is also placed on the decisions rendered by the Apex Court in

M/s Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.[95]***,State of Jharkhand and Ors. v. Cwe-Soma Consortium***[96]***,*** as also ***Tamil Nadu Generation and Distribution Corporation Ltd.*** case (supra). The Supreme Court in ***State of Jharkhand*** (supra) observed and held that "*When the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh tenders, it cannot be said that there is any mala fide or want of bona fide in such decision. While exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by malafide, unreasonableness or arbitrariness.*" It was held that "*The right to refuse the lowest or any other tender is always available to the government…. While so, the decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the Appellate to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.*"

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[95]AIR 2012 SC 2915
[96]AIR 2016 SC 3366

116. In view of the aforesaid analysis, specially in absence of *mala fide*, prejudice, unreasonableness, arbitrariness, extraneous consideration or the decision being against public interest, the decision of respondent CVPP, cancelling "turnkey tender" as also petitioner's bid and issuing fresh tender notices for "package mode", need not be interfered with by this Court, is immune from judicial review in the given facts and circumstances. As a corollary, writ petition is devoid of any merit.

117. For all what has been discussed above, writ petition is **dismissed**. Interim direction(s) is/are vacated. However, it may not be out of place to mention here that it is expected that respondent CVPP will allow petitioner company, proforma respondents, or for that matter any other individual/company, to participate and compete in fresh bids on package mode, so that more competitors/bidders participate in the fresh bids, which will ultimately have a better results.

118. Having regard to the peculiar facts of the case, the parties are left to bear their individual costs.

119. Registry is directed to return the records to the learned counsel for the respondents.

(Tashi Rabstan)
Judge

Jammu
28/01/2017
'Madan'