HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 91/2022

1. Abhimanyu Sharda Son Of Narayan Sharda, Aged About 68 Years, Resident Of 'Satya' S-25, Mangal Marg, Bapu Nagar, Jaipur 302015 (Raj.)
2. Kamal Kumar Agarwal S/o Debi Prasad Agarwal, Aged About 54 Years, R/o 33, Dhamani Market, Chooda Raasta, Jaipur (Rajasthan)
3. Vasudev Singh Rathore S/o Late Padam Singh, Aged About 52 Years, R/o. V.R. And Company, Sardarpura, Barmer (Raj.)
4. M/s Madini Coal Depo, Properitor Raees Mohammad S/o Ibrahim Qureshi, R/o. Ratlam Road, Banswara(Raj.)
5. Hira Lal Jindal S/o Jugal Kishor, Agarwal Colony, Ramdan Textile Ke Pass, Balotra(Rural), Barmer(Raj.) 344022.

----Petitioners

Versus

1. The State Of Rajasthan, Through The Chief Secretary, Govt. Of Rajasthan, Secretariat, Jaipur.
2. Rajasthan State Mines And Minerals Limited, Through Managing Director Having Its Registered Office At Khanij Bhawan, Tilak Marg, C-Scheme, Jaipur-302005 (Rajasthan).
3. MSTC Limited, Through Its Chairman-Cum-Managing Director Having Its Branch Office At Room No.114, First Floor, BSNL Building, Lalkothi, Behind Nagar Nigam, Jaipur-302015 (Rajasthan).

----Respondents

Connected With

S.B. Civil Writ Petition No. 72/2022

Amar Prem And Sons, Through Its Sole Proprietor Mohit Sarin Having Its Registered Office At 334, Govindam Commercial Hub,

Old Rto Road, Bhilwara, Rajasthan 311001

----Petitioner

Versus

1. The State Of Rajasthan, Through Chief Secretary, Government Of Rajasthan, Secretariat, Jaipur.
2. Rajasthan State Mines And Minerals Limited, Through Managing Director Having Its Registered Office At Khanij Bhawan, Tilak Marg, C-Scheme, Jaipur 302005 (Rajasthan)
3. Mstc Limited, Through Its Chairman-Cum-Managing Director Having Its Branch Office At Room No. 114, First Floor, Bsnl Building, Lalkothi, Behind Nagar Nigam, Jaipur 302015 (Rajasthan)

----Respondents

S.B. Civil Writ Petition No. 84/2022

Shri Mahipal Transport Company, Through Proprietor Vijendra Singh Son Of Shri Bhanwar Singh, Aged About 63 Years, Resident Of 61, Champa Nagar, Beawar - 305901 (Rajasthan)

----Petitioner

Versus

1. State Of Rajasthan, Through Additional Chief Secretary, Department Of Mines And Geology, Secretariat, Jaipur.
2. Rajasthan State Mines And Minerals Limited, Through Chairman Cum Chief Secretary Of The State Of Rajasthan, Secretariat, Jaipur.
3. Managing Director, Rajasthan State Mines And Minerals Limited, 4 Meera Marg, Udaipur.
4. Group General Manager (Lignite), RSMM Limited, SBU And PC Lignite, Khanij Bhawan, Tilak Marg, Jaipur.
5. MSTC Limited (Govt Of India Enterprises), Through Manager, Room No. 114, First Floor, Bsnl Building, Lal Khoti Behind Nagar Nigam, Jaipur, Pin - 302015

----Respondents

For Petitioner(s)	:	Mr. Rajendra Prasad, Senior Counsel assisted by Mr. Vipul Sharda Adv., & Mr. Deepak Bishnoi Adv. & Mr. Ashwani Kumar Chobisa Adv., through VC.
For Respondent(s)	:	Mr. M.S. Singhi, Advocate General assisted by Mr. Sheetanshu Sharma Adv., through VC

HON'BLE MR. JUSTICE INDERJEET SINGH

Order

12/01/2022

1. These writ petitions since involve common questions, hence with consent of the parties, have been heard together and are being decided by the present order.

2. For adjudication of the questions raised for consideration, the facts, on request of the parties, have been noticed from S.B. Civil Writ Petition No.72/2022, as such the prayer made in this writ petition is reproduced here as under :-

> "It is, therefore, humbly prayed that this writ petition may kindly be accepted and allowed and:
>
> (i) By writ, order or direction the condition in the eligibility with respect to lifting of at least 1.25 lac MT in preceding 3 financial years and the condition of minimum quantity of 1.25 lac MT to bid in the impugned notice ref.Mstc/Jpr/Rajasthan State Mines & Minerals Limited/2/Khanij Bhawan, C-Scheme/21-22/26538 and special terms and conditions of e-auction for sale of Run of Mine (RoM) Lignite from Matasukh Mine (Annexure-1) may kindly be quashed and set aside and the petitioner be allowed to participate in the bidding process.

(ii) By appropriate writ, order or direction any action taken in pursuance of the impugned e-auction notice during the pendency of the writ petition may also be quashed and set aside.

(iii) Any other suitable order or direction which this Hon'ble Court deems expedient in the facts and circumstances of the case may kindly be passed in favor of the petitioner."

3. The respondent no.3 issued an E-auction notice for sale of (ROM) Lignite on behalf of respondent no.2 Rajasthan State Mines & Minerals Limited (hereinafter to be referred as **'RSMML'**) and according to E-auction notice, the total quantity of the (ROM) Lignite is 15 Lac MT. In the present writ petitions the petitioners have challenged two conditions incorporated in the E-auction notice i.e. any Indian buyer who has lifted a cumulative quantity of at least 1.25 lac MT of lignite from all of RSMML mines in the last three years i.e. 2018-19, 2019-20 & 2020-21 can participate in the e-auction and another that one has to lift minimum 1.25 lac MT lignite. Except the challenge to these two conditions, referred above, no other question has been raised by the petitioners in the present writ petitions.

4. Mr. Rajendra Prasad, learned Senior Counsel, assisted by Mr. Vipul Sharda Adv., Mr. Deepak Bishnoi Adv., & Mr. Ashwani Kumar Chobisa Adv., appearing for the petitioners submitted that there is violation of Articles 14, 19(1)(g), 21, 38 & 39 of the Constitution of India committed by the respondents as the conditions under challenge herein have been incorporated in the tender document/E-auction notice by the respondents only just to

give undue benefit to few persons. Learned Senior Counsel further submitted that action of the respondents of inserting the conditions, referred to in the tender document/E-auction notice is arbitrary in nature and completely without application of mind. Learned Senior Counsel further submitted that in earlier years, no such condition was imposed/inserted by the respondents while auctioning the lignite and it has been a continuous practice of the respondents to give chance to all the Indian Buyers to participate in the E-Auction process. Learned Senior Counsel further submitted that if these conditions are allowed to stand, some of the petitioners who are new in business, will certainly be debarred from participating in the E-Auction process. Learned Senior Counsel further submitted that the State Government cannot act as an individual in a commercial matter, like E-auction of lignite. Learned Senior Counsel further submitted that the conditions imposed by the respondents in the tender document/E-auction notice has no nexus with the objects sought to be achieved. Learned Senior Counsel further submitted that one of the petitioner Amar Prem & Sons has placed on record a certificate issued by the Chartered Accountant with regard to their capacity of doing the business and lifting of lignite as offered by the respondents but on account of these arbitrary conditions the petitioners have been debarred from participating in the E-Auction process.

5. In support of the contentions, learned Senior Counsel, relied upon the following judgments of the Hon'ble Supreme Court.

6. In the matter of **Meerut Development Authority and Ors. vs. Association of Management Studies and Ors. (2009) 6 SCC 171,** the Hon'ble Supreme Court has observed as under :-

"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.

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

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 reasons, 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 favoritism.

35. In Tata Cellular, this Court observed that: (SCC p. 675 para 71) Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness. Any unfair action must be set right by judicial review.

36. In Chief Constable of North Wales Police v. Evans , Lord Hailsham stated: (WLR p. 1161 A-B)

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eyes of the court.

37. Large numbers of authorities have been cited before us in support of the submission that even in contractual matters the State or "other authorities" are bound to act within the legal limits and their actions are required to be free from arbitrariness and favourtism. The proposition that a decision even in the matter of awarding or refusing a contract must be arrived at after taking into account all relevant considerations, eschewing all irrelevant considerations cannot for a moment be doubted. The powers of the State and other authorities are essentially different from those of private persons.The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12, while awarding contracts in respect of properties belonging to the State, can be judged and tested in the light of Article 14. Once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14. These

principles are settled by the judgments of this Court in the cases of Ramana Dayaram Shetty v. International Airport Authority of India, Kasturi Lal Lakshmi Reddy v. State of J & K, Ram and Shyam Co. v. State of Haryana , Mahabir Auto Stores v. Indian Oil Corporation, Sterling Computers Ltd. v. M & N Publications and A.B. International Exports v. Export Credit Guarantee Corporation of India.

38. The executive does not have an absolute discretion, certain principles have to be followed, the public interest being the paramount consideration. It has been stated by this Court in Kasturi Lal's case: (SCC p. 13, Para 14)

"14...It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and contrary to public interest. The government, therefore, cannot, for example, give a contract or sale or lease out its property for a consideration less than the highest that can be obtained from it, unless of course, there are other considerations which render it reasonable and in public interest to do so."

39. The law has been succinctly stated by Wade in his treatise, Administrative Law

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private

person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground, though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."

45. There cannot be any disagreement that unjustified discriminations violate the Constitution and unreasonable decisions are susceptible to be interfered with and corrected in judicial review proceedings. But general propositions do not decide concrete cases as has been famously put by Justice Oliver Wendell Holmes in Lochner v. New York. 198 U.S. 45,76 (1995) It remains to be decided which acts of discrimination are justified and which are not. It is for the court to decide in the given facts and circumstances whether the action complained of is unreasonable? How to do that is always a complex and complicated one."

7. In the matter of **Reliance Energy Limited and Ors. Vs. Maharashtra State Road Development Corporation Ltd. and**

Ors. 2007 (8) SCC 1, the Hon'ble Supreme Court observed as under :-

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "nondiscrimination". However, it is not a freestanding provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho v. State of Tamil Nadu , Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The

economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g) . Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

8. In the matter of **Ashoka Smokeless Coal Ind. P. Ltd. and Ors. Vs. Respondent: Union of India (UOI) and Ors., (2007) 2 SCC 640,** the Hon'ble Supreme Court observed as under :-

> "101. Coal, being such a vital product to the Indian industries and the common man, nationalization of coal was necessary for realization of the ideals contained in Article 39(b) of the Constitution.
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> 102. In Sanjeev Coke Manufacturing Company etc. v. Bharat Coking Coal Limited and Anr. etc. , this Court observed:(SCC p. 166, paras 18-19)
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> "18...Coal is, of course, one of the most important known sources of energy, and, therefore, a vital

national resource. While coal is necessary as a source of energy for very many industries, coking coal is indispensable for the country's crucial iron and steel industry. So, Parliament gave the first priority to coking coal. First there was legislation in regard to the coking coal mines and then there was legislation in regard to all coal mines, coking as well as non-coking. By the Coking Coal Mines (Nationalisation) Act all coking coal mines known to exist in the country were nationalised. Coke oven plants which were part of the coking coal mines so nationalised being in or belonging to the owners of the mines also stood automatically nationalised. Other coke oven plants which did not belong to the owners of the mines but which were located near about the nationalised coking coal mines were also identified and nationalised by express provision to that effect. At that stage of the rationalisation and nationalisation of the coal mining industry, it was apparently thought necessary and sufficient to nationalise such coke oven plants as were in or belonged to the nationalised coking coal mines or as were identified as located near the nationalised coking coal mines, leaving out all other coke oven plants.

19. The nationalisation of the coking coal mines and the coke oven plants was "with a view to reorganising and reconstructing such mines and plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet the growing requirements of the iron and steel industry and for matters connected therewith or incidental thereto". We do not entertain the slightest doubt that the nationalisation of the coking coal mines and the specified coke oven plants for the above purpose was towards securing

that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good".
[Also see State of T.N. v. L. Abu Kavur Bai]

103. Article 37 of the Constitution of India provides that the provisions contained in Part IV of the Constitution of India shall not be enforceable by any court and it enjoins upon the State to apply the provisions of this Part in making laws.

104. It is of some interest to note that whenever an action is taken by a State in consonance with the provisions laid down in the Directive Principles of State Policy as envisaged under Part IV of the Constitution of India, the same is considered to be a reasonable action.

105. In M.R.F. Ltd. v. Inspector Kerala Govt.: a question arose as to whether the rights of industrial concerns under Article 19(1)(g) are said to be affected having regard to the provisions of the Kerala Industrial Establishments (National and Festival Holidays) (Amendment) Act, 1990 whereby the number of national holidays were increased. In view of Article 43 of the Constitution of India, the restriction imposed were held to be reasonable restrictions stating:(SCC p. 236 para 22)

"22. The plea under Article 14 also cannot be entertained. The decision by legislative amendment to raise the national and festival holidays is based upon relevant material considered by the Government, including the fact that the holidays allowed by the Central Government and other public sector undertakings were far greater in number than those prescribed under the Act. As pointed out earlier, the Act is a

social legislation to give effect to the Directive Principles of State Policy contained in Article 43 of the Constitution. The law so made cannot be said to be arbitrary nor can it be struck down for being violative of Article 14 of the Constitution."

Therein it was also observed: (SCC p. 233, paras 11-12)

"11. In examining the reasonableness of a statutory provision, whether it is violative of the Fundamental Right guaranteed under Article 19, one cannot lose sight of the Directive Principles of State Policy contained in Chapter IV of the Constitution as was laid down by this Court in Saghir Ahmad v. State of U.P. as also in Mohd. Hanif Quareshi v. State of Bihar.

12 . This principle was also followed in Laxmi Khandsari case in which the reasonableness of restrictions imposed upon the Fundamental Rights available under Article 19 was examined on the grounds, amongst others, that they were not violative of the Directive Principles of State Policy."

[Also see B.P. Sharma v. Union of India ; State of Punjab v. Devans Modern Breweries Ltd.; State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat].

106. It may not be correct to say that any action which is not in consonance with the provisions of Part IV of the Constitution would be ultra vires but there cannot be any doubt whatsoever that the principles contained therein would form a relevant consideration for determining a question in regard to price fixation of an essential commodity. Directive Principles of State Policy provides for a guidance to interpretation of Fundamental Rights of a citizen as also the statutory rights.

113. The State or a public sector undertaking plays an important role in the society. It is expected of them that they would act fairly and reasonably in all fields; even as a landlord of a tenanted premises or in any any other capacity. [See Baburao Shantaram More v. The Bombay Housing Board SCR at 577; Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay SCR at pp. 760,762; and Pathumma and Ors. v. State of Kerala SCR at p 545.]

144. While adopting a policy decision as regards the mode of determining the price of coal either fixed or variable, the coal companies were bound to keep in mind social and economic aspect of the matter. They could not take any step which would defeat the constitutional goal [See Mahabir Auto Stores and Ors. v. Indian Oil Corporation.]

192. We, in the peculiar facts and circumstances of this case, are of the opinion that it may not be difficult to find out as to who the genuine consumers are. So far as owners of the hard coke ovens are concerned, they are members of the association and their identity can easily be verified.

193. However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy decision. They evidently can; but therefore there should be a public interest as contra distinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But

the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or E-tender would be welcome but then therefor a greater transparency should be maintained.

9. In the matter of **Sterling Computers Limited vs. M/s M & N Publications Limited and Others: 1993 (1) SCC 445**, the Hon'ble Supreme Court observed as under:-

"14. The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this Court in the cases of Ramana Dayaram Shetty v. The International Airport Authority of India; Kasturi Lal Lakshmi Reddy v. The State of Jammu & Kashmir: Fertilizer Corporation Kamagar Union (Regd.) Sindri v. Union of India; Ram and Shyam Co. v. State of Haryana; Haji T.M. Hasan Rawther v. Kerala Financial Corporation; Mahabir Auto Stores v. Indian Oil Corporation; and Shrilekha Vidyarthi v. State of U.P. It has been said by this Court in Kasturi Lal (SCC p. 13, para 14):

"It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The

Government, therefore, cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

10. In the matter of **Ram Krishna Dalmia vs. Justice S.R. Tendolkar and Ors. AIR 1958 SC 538,** the Hon'ble Supreme Court observed as under:-

11. The principal ground urged in support of the contention as to the invalidity of the Act and/or the notification is founded on Art. 14 of the Constitution. In Budhan Choudhry v. The State of Bihar 1955-1 S C R 1045: ((S) A I R 1955 SC 191) (A) a Constitution Bench of seven Judges of this Court at pages 1048-49 (of S C R) (at p. 193 of explained the true meaning and scope of Art. 14 as follows:

"The provisions of Article 14 of the Constitution have come up for discussion before this court in a number of cases, namely, Chiranjit Lal Choudhuri v. The Union of India, The State of Bombay v. F. N. Balsara, The State of West Bengal v. Anwar Ali Sarkar, Kathi Raning Rawat v. The State of Saurashtra, Lachmandas Kewalaram Ahuja v. The State of Bombay, Qasim Razvi v. The State of Hyderabad; and Habeeb Mohamad v. The State of Hyderabad. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled,

namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish-

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions

to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

11. In the matter of **Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. AIR 1979 SC 1628,** the Hon'ble Supreme Court observed as under:-

> "12. We agree with the observations of Mathew, J., in V. Punnan Thomas v. State of Kerala: AIR 1969 Ker 81 (FB) that : "The Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever

its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". The same point was made by this Court in Erusian Equipment and Chemicals Ltd. v. State of West Bengal [1975] 2 SCR 674: (AIR 1975 SC 266) where the question was whether black-listing of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench pointed out that black-listing of a person not only affects his reputation which is in Poundian terms an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions...The

activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

12. In the matter of **Union of India (UOI) and Ors. vs. International Trading Co. and Ors. AIR 2003 SC 3983,** the Hon'ble Supreme Court observed as under:-

"15. It is, trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

16. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily on by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging impugned action and if so, does it really satisfy the test of reasonableness."

13. In the matter of **Tata Cellular vs. Union of India AIR 1996 SC 11,** the Hon'ble Supreme Court observed as under:-

"97. To quote again, Michael Supperstone and James Goudie; in their work 'judicial Review (1992 Edition) it is observed at pages 119 to 121 as under:-

The assertion of a claim to examine the reasonableness been done by a public authority inevitably led to differences of judicial opinion as to the circumstances in which the court should intervene. These difference of opinion were resolved in two landmark cases which confined the circumstances for intervention to narrow limits. In Kruse v. Johnson a specially constituted divisional court had to consider the validity of a bye-law made by a local authority. In the leading judgment of Lord Russell of Killowen CJ the approach to he adopted by the court was set out. Such bye-laws ought to be 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they would be reasonably administered. They could be held invalid if unreasonable: where for instance bye-laws were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the rights of citizens as could find no justification in the minds of reasonable men. Lord Russell emphasised that a bye-laws is not unreasonable just because particular judges might think it went further than was prudent or necessary or convenient.

In 1947 the Court of Appeal confirmed a similar approach for the review of executive discretion generally in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation. (1948 (1) KB 223:1947 (2) All ER 680). This case was

concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that 'no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not', In an extempore judgment, Lord Greene M.R. drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review. (At page 229, where it was said that the dismissal of a teacher for having red hair (cited by Warrington LJ in Short v. Poole Corporation, [1926] 1 Ch 66,91, as an example of a 'frivolous and foolish reason') was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described a being done in bad faith; see also R. v. Tower Hamlets London Borough council, ex Chetnik Developments Ltd., [1988] AC 858 at page 873 chapter 4, p.73, (supra). He summarised the principles as follows :

97. The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matter which they ought not to have taken into account, or, conversely, have refused to take into account 01 neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a

case, again, I think the court can interfere. The power of the court to interfere of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, as concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them."

This summary by Lord Greene has been applied in countless subsequent cases.

The modern statement of the principle is found in a passage in the speech of lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service:(1985 (1) AC 374):

> By "irrationality" I mean that can now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 (233)). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.

14. In the matter of **State of Punjab vs. Ramjilal and Ors. AIR 1971 SC 1228,** the Hon'ble Supreme Court observed as under:-

> "9. Counsel for the State of Punjab contended that the plea that the action of the State was not bona fide established, cannot be said to be unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose, and since no such attempt was

made and the High Court did not find that any named officer or officers was or were responsible for that official act, the plea that it was bona fide must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority, and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government, and it would be placing an intolerable burden in proof of a just claims to require a party alleging mala fides of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose."

15. In the matter of **S.R. Venkataraman vs. Union of India (UOI) and Ors. AIR 1979 SC 49,** the Hon'ble Supreme Court observed as under:-

> "5. We have made a mention of the plea of malice which the appellant had taken in her writ petition. Although she made an allegation of malice against V.D. Vyas under whom she served for a very short period and got an adverse report, there is nothing on the record to show that Vyas was able to influence the Central Government in making the order of premature retirement dated March 26, 1976. It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her

premature retirement so as to amount to malice in fact. Malice in law is, however, quite different. Viscount Haldane described it as follows in Shearer and Anr. v. Shield [1914] A.C. 808 at p. 813:-

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense -innocently."

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

16. In the matter of **Olga Tellis and Ors. vs. Bombay Municipal Corporation and Ors. AIR 1986 SC 180,** the Hon'ble Supreme Court observed as under:-

"28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and substance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on

the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29, and some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would

defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well founded is another matter. But, the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-today transactions. In Basheshar Nath v. The Commissioner of Income Tax Delhi: [1959] Supp. 1 S.C.R. 528:(AIR 1959 SC 149) a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the

benefit of an individual and those enacted in public interest or on grounds of public policy."

17. Mr. M.S. Singhvi, learned Advocate General, assisted by Mr. Sheetanshu Sharma Adv., while opposing the writ petitions submitted that the RSMML issued the E-Auction notice purely for commercial purpose. Learned Advocate General further submitted that the RSMML is having every right to put the conditions in the tender document/E-Auction Notice. Learned Advocate General further submitted that the conditions imposed by the respondents can only be challenged on the ground of malafides and further submitted that although the allegation of malafides has been levelled and argued by the learned Senior Counsel appearing for the petitioners but no person by name has been impleaded as party in the writ petitions to demonstrate as to who will be favoured by the alleged person. Learned Advocate General further submitted that no public interest is involved in this matter as the transaction is purely of commercial nature. Learned Advocate General further submitted that the recently the Hon'ble Supreme Court has observed that the courts should not interfere in the tender matters, specially in the conditions incorporated in the tender documents. Learned Advocate General further submitted that as per Regulation-107 of the Coal Mines Regulations of 2017, it is the duty of the excavator to suitably reclaim the mine by back filling of the same. In this regard learned Advocate General submitted that in Nagaur there are two pits known as Matasukh pit and Kasnau pit and in Matasukh pit the mining is going on since 2003 and the reserve left in Matasukh pit is estimated to 15 lac tones, as such decision has been taken to develop Kasnau pit

soon simultaneously with exhaustion of the reserve at Matasukh. He further submitted that the RSMML will require appropriate place for the purpose of dumping the overburden generated from exploiting of mineral in Kasnau pit and it has been therefore decided to exhaust the same in two years and to develop Kasnau pit so that there may not be any gap in the production; it was further decided that only those players who have good track record of lifting the lignite in the past should participate in the auction process and for this purpose the management has taken a decision to qualify those players who have lifted minimum 1.25 lac tone of lignite during last three financial years and accordingly the eligibility criteria was fixed in a manner that those who are having good track record may only participate. Learned Advocate General further submitted that criteria fixed by the RSMML has a rational nexus with the objects sought to be achieved i.e. within the time frame the entire reserve of 15 lac tons of lignite available in Matasukh pits gets exhausted so as to make way for operationalising the Kasnau pit by the time the mining in Matasukh pit get completely exhausted.

18. In support of the contentions, learned Advocate General relied upon the following judgments of the Hon'ble Supreme Court.

19. In the matter of **The Silppi Constructions Contractors vs. Union of India (UOI) and Ors. 2020 (16) SCC 489,** the Hon'ble Supreme Court observed as under :-

> "6. Aggrieved, the original writ Petitioner is before us in these petitions. This Court in a catena of judgments has laid down the principles with regard to judicial review in contractual matters. It is settled law

that the writ courts should not easily interfere in commercial activities just because public sector undertakings or government agencies are involved.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere

where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

20. In the matter of **Haffkine Bio-Pharmaceutical Corporation Ltd. and Ors., 2018 (12) SCC 790,** the Hon'ble Supreme Court observed as under :-

"16. It has been urged by Mr. Banerji, learned senior Counsel that Haffkine has about 550 employees and at the time of floating of tender it had virtually no orders. Therefore, it wanted that the bulk supplier should be able to give some commitment with regard to repurchase of the finished products, that is, oral polio vaccine. Therefore, this condition was incorporated and since Nirlac did not fulfil this condition, its tender

was not found to be technically qualified. We find merit in this submission. It is for the party issuing a tender to decide what conditions should be incorporated in the tender. The party floating a tender is the best judge of its own requirements and there is nothing wrong if Haffkine wanted that the successful tenderer, who supplied the raw material, should take responsibility to sell or generate business for sale of some portion of the finished product."

21. In the matter of **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Ors. 2016 (16) SCC 818,** the Hon'ble Supreme Court observed as under :-

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) it was held by this 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. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

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.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.

22. In the matter of **Shimnit Utsch India Pvt. Ltd. and Ors. vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Ors. 2010 (6) SCC 303,** the Hon'ble Supreme Court has observed as under :-

"49. In the light of the afore-noticed legal position, we shall now examine whether judicial intervention is called for in NIT issued by the State of West Bengal and State of Orissa for manufacture and supply of HSRP. Insofar as State of West Bengal is concerned, the first NIT was issued in the month of July, 2003 fixing August 6, 2003 as the last date for submission of tender papers. Pursuant thereto, four bidders participated. The finalization of the tender process could not take place because of interim order passed by this Court in Association of Registration Plates and other connected cases. These cases were decided by this Court on 30-11-2004.

50. Of the four bidders, who initially participated in the tender process, one withdrew and as regards Promuk, an objection was raised by Shimnit about their eligibility. Shimnit approached Calcutta High Court and obtained an interim order from the Single Judge that tender process shall not be finalized. As a matter of fact, due to litigation no substantial progress took place for two years in finalization of process for which NIT was issued in July, 2003 and practically two bidders in the entire tender process remained in fray. In interregnum, considerable number of indigenous manufacturers obtained the requisite TAC from the approved institutions as per the provisions of 1988 Act and thereby acquired capacity and ability to manufacture HSRP.

51. In the backdrop of these reasons, the State Government seemed to have formed an opinion that by increasing competition, greater public interest could be achieved and, accordingly, decided to cancel first NIT and issued second NIT doing away with conditions like experience in foreign countries and prescribed minimum turnover from that business.

Whether State Government could have changed terms of NIT despite the judgment of this Court in Association of Registration Plates? Once a particular matter relating to conditions in NIT has been finally decided by the highest Court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects as aforenoticed, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality. In considering whether there has been a change of circumstances sufficient to justify departure from the previous stance, the Division Bench of Calcutta High Court recorded a finding that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be sub-served because of financial implications."

23. In the matter of **Association of Registration Plates vs. Union of India (UOI) and Ors. 2005 (1) SCC 679,** the Hon'ble Supreme Court observed as under :-

> "35. Taking up first the challenge to the impugned conditions in the Notices Inviting Tenders issued by various State authorities, we find sufficient force in submissions advanced on behalf of the Union and the State authorities and the contesting manufacturers. The State as the implementing authority has to ensure that scheme of high security plates is effectively implemented. Keeping in view

the enormous work involved in switching over to new plates within two years for existing vehicles of such large numbers in each State, resort to 'trial and error' method would prove hazardous. Its concern to get the right and most competent person cannot be questioned. It has to eliminate manufacturers who have developed recently just to enter into the new field. The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. The relevant terms and conditions quoted above are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity. Only such tenderer has to be selected who can take responsibility for marketing, servicing and providing continuously the specified plates for vehicles in large number firstly in initial two years and annually in the next 13 years. The manufacturer chosen would, in fact, be a sort of an agent or medium of the RTOs concerned for fulfillment of the statutory obligations on them of providing high security plates to vehicles in accordance with Rule 50. Capacity and capability are two most relevant criteria for framing suitable conditions of any Notices Inviting Tenders. The impugned clauses by which it is stipulated that the tenderer individually or as a member of joint-venture must have an experience in the field of registration plates in at least three countries, a common minimum net worth of Rs. 40 crores and either joint-venture partner having a minimum annual turnover of at least Rs. 50 crores and a minimum of 15% turnover of registration plates business have been, as stated, incorporated as essential conditions to ensure that the manufacturer selected would be technically and financially competent to fulfil the contractual

obligations which looking to the magnitude of the job requires huge investment qualitatively and quantatively.

38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates."

24. In the matter of **Raunaq International Limited vs. I.V.R. Construction Ltd. and Ors. 1999 (1) SCC 492,** the Hon'ble Supreme Court observed as under :-

> "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;
> (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.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, die court must be very careful to see if there is any element of public interest involved in

the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bonafide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the court must be careful to weigh conflicting simple interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious: consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the

consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bonafide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226."

25. In the matter of **Trilochan Mishra and Ors. vs. State of Orissa and Ors. 1971 (3) SCC 153,** the Hon'ble Supreme Court observed as under :-

"14. With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an

overall consideration to be preferred to the higher tenderer."

26. In the matter of **Uflex Ltd. Vs. Government of Tamil Nadu and Ors. 2021 SCC OnLine SC 738,** the Hon'ble Supreme Court observed as under :-

"1. The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court Under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court Under Article 226 of the Constitution. The Public Interest Litigation (TIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the

parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted."

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka as under:

"23. 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."

5. One other aspect examined by this Court is whether the terms and conditions of the tender have been tailor-made to suit a person/entity. In fact, this is what is sought to be contended in the facts of the present case by the Respondents who were the original Petitioners before the Court. In order to award a contract to a particular party, a reverse engineering process is evolved to achieve that objective by making the tender conditions such that only one party may fit the bill. Such an endeavour has been categorized as "Decision Oriented Systematic Analysis" (for short 'DOSA').

6. The burgeoning litigation in this field and the same being carried to this Court in most matters was the cause we set forth an epilogue in Caretel Infotech Ltd. v. Hindustan Petroleum Corporation Limited.Even if it amounts to repetition, we believe that it needs to be emphasized in view of the controversy arising in the present case to appreciate the contours within which the factual matrix of the present case has to be analysed and tested.

"37. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable Under Article 226 of the Constitution of India. In view of Government and public sector enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings Under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field.

Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the public sector.

38. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited, this Court has expounded further on this aspect, while observing that the decision-making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision-making process would not suffice.

39. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of Respondent No. 1 must prevail. Respondent No. 1 itself, appreciative of the wording of Clause 20 and the format, has taken a considered view. Respondent No. 3 cannot compel its own interpretation of the contract to be thrust on Respondent No. 1, or ask the Court to compel Respondent No. 1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not

acceptable to the constitutional Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under:

"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 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."

40. We may also refer to the judgment of this Court in Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL), authored by one of us (Sanjay Kishan Kaul, J.). The legal principles for interpretation of commercial contracts have been discussed. In the said judgment, a reference was made to the observations of the Privy Council in Attorney General of Belize v. Belize Telecom Ltd. as under:

"45. ...16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or

articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended...."

"19.....In Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

"...the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

41. Nabha Power Limited (NPL)4 also took note of the earlier judgment of this Court in Satya Jain v.

Anis Ahmed Rushdie, which discussed the principle of business efficacy as proposed by Bowen, L.J. in the Moorcock. It has been elucidated that this test requires that terms can be implied only if it is necessary to give business efficacy to the contract to avoid failure of the contract and only the bare minimum of implication is to be there to achieve this goal. Thus, if the contract makes business sense without the implication of terms, the courts will not imply the same.

42. The judgment in Nabha Power Limited concluded with the following observations in para 72:

"72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural

grammatical contour, keeping in mind the nature of the contract."

43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

7. It may also be pertinent to note the principles elucidated in the case of Tata Cellular v. Union of India:

"94. The principles deducible from the above are:

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

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

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

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

not, such decisions are made qualitatively by experts.

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

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

42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its

role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

43. The present dispute has its history in many prior endeavours by the original Petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original Petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a Court ought to play.

45. We are concerned with sale of liquor. The objective has been set out by the State Government, i.e., use of such technology as would prevent spurious liquor from being sold. It is a well-known fact that a large revenue collection comes in Tamil Nadu through sale of liquor. It thus must be left to the State Government to see how best to maximize its revenue and what is the technology to be utilized to prevent situations like spurious liquor, which in turn would impede revenue collection, apart from causing damage to the consumers.

47. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate. The prohibition arising from only a Limited company being permitted to participate was again addressed by the corrigendum permitting LLPs to participate. If entities like Kumbhat and Alpha want to participate they must take some necessary actions. Alpha is already an LLP. Kumbhat cannot insist that it will continue to be a partnership alone and, thus, that partnerships must necessarily be allowed to participate.

48. Insofar as Kumbhat's plea based on the Tender Act is concerned, a reading of the provisions would show that some benefit is sought to be given to MSMEs to the extent of 25% of the order based on their willingness to match the price of the lowest tender. However, to be able to avail of that benefit, it must be an entity which is capable of bidding in terms of the tender conditions. There is no prohibition against limiting the participation to Limited companies of LLPs. Domestic enterprise in the Tender Act is defined to mean any micro and small enterprise as defined in the MSMED Act. This argument also appears to be an afterthought, as it is not as if Kumbhat participated claiming such right as an MSME."

27. Heard counsel for the parties and perused the record including the judgments relied upon by the parties.

28. The first argument raised by the learned Senior Counsel for the petitioners with regard to violation of Articles 14, 19(1)(g), 21, 38 & 39 of the Constitution of India & also the malafides on the part of the respondents in formulating the impugned conditions just to favour certain persons is not acceptable as mere alleging malafides or violation of any Statute/Constitutional provision in itself is not sufficient to hold that there has been malafide or violation of any Rule/Statute/Constitutional provision or an arbitrary exercise of power by any authority unless the same is supported with tangible documentary evidence, which in my view, the petitioners have failed to prove and apart from it no person by name has been impleaded as party in the writ petitions, in the absence of which the allegation/argument of the petitioners is without any factual foundation.

29. The second argument raised by learned Senior Counsel with regard to tailor made conditions is also not acceptable as in formulating the conditions of tender document, greater latitude is required to be conceded to the State Authorities and if the State or its instrumentalities act reasonably, the interference of the Courts is very restrictive since no person can claim fundamental right to carry out business with the Government, as has been held by the Hon'ble Supreme Court in the matter of **Uflex Ltd. (supra)**.

30. The other argument raised by learned Senior Counsel for the petitioners about the action of the respondents in incorporating the impugned conditions being arbitrary in nature and without application of mind is also not acceptable as the respondents in their reply have clarified that they have to exhaust the present Matasukh pit by excavating the reserve of lignite and to start

another pit of Kasnau to shift the burden of earlier pit as per the requirement of Regulation-107 of the Coal Mines Regulations of 2017.

31. In view of the above discussion, the writ petitions filed by the petitioners deserve to be dismissed for the reasons; firstly the allegation of the petitioners that action of the respondents in incorporating such enormous conditions in the tender document/E-auction notice is only to just favour few persons and the same is in violation of Articles 14, 19(1)(g) & 21 of the Constitution of India, is without any basis as neither any tangible documentary evidence has been placed on record in support thereof nor any person by name has been impleaded as party in either of the writ petition, against whom malafide could be alleged to favour any person or to give undue benefit which is not permissible under the law; secondly the another allegation of the petitioners about the impugned decision of the respondents being arbitrary in nature and without application of mind, is also not sustainable as it is reflected from the reply that only after having an overall scrutiny of the availability of the lignite in the concerned mines and taking into consideration the provision of Regulation 107 of Regulations of 2017, such decision was rightly taken by the respondents in incorporating such conditions; thirdly from the perusal of the material placed by the respondents on record, I am of the considered view that certainly the action of the respondents in imposing the conditions, impugned herein, has a nexus with the objects sought to be achieved; fourthly in the entirety of the facts and circumstances, in my view the action of the respondents in incorporating the conditions, impugned herein, does not appear to be either arbitrary in nature or a case of

discrimination which could call upon this Court to exercise jurisdiction under Article 226 of the Constitution of India; lastly in view of the judgment passed by the Hon'ble Supreme Court in the matter of Uflex Ltd (supra) where the interference of the Court in tenders has been held to be very restrictive, I am not inclined to interfere in the impugned policy decision of the respondents.

32. In that view of the matters, the writ petitions are dismissed. Copy of the order be separately placed in each connected file.

(INDERJEET SINGH),J

VIJAY SINGH SHEKHAWAT/S-180 to S-182