Supreme Court of India Union Of India And Ors vs Hindustan Development Corpn. And ... on 15 April, 1993 Equivalent citations: 1994 AIR 988, 1993 SCR (3) 128 Author: K J Reddy Bench: Reddy, K. Jayachandra (J) PETITIONER: UNION OF INDIA AND ORS

Vs.

RESPONDENT: HINDUSTAN DEVELOPMENT CORPN. AND ORS

DATE OF JUDGMENT15/04/1993

BENCH: REDDY, K. JAYACHANDRA (J) BENCH: REDDY, K. JAYACHANDRA (J) RAY, G.N. (J)

CITATION: 1994 AIR 988 1993 SCR (3) 128 1993 SCC (3) 499 JT 1993 (3) 15 1993 SCALE (2)506

ACT: Constitution of India, 1950: Articles 12, 14, 19, 32, 136, 226, 298. 299-Government Contracts.-Railway Board-Tender to supply, cast steel bogies-Three of the tenderers quoting identical price- Inference of formation of cartel-Board's decision of dual pricing to control unfair trade practice and not to accept lowest price-Held, dual pricing under certain circumstances may be reasonable-Railways decision to adopt dual pricing under the circumstances was bonafide. Administrative Law: Government contracts-Judicial review of. Doctrine of Legitimate Expectation-Concept,scope and applicability of. Words and Phrases.-"Cartel", "predatory."-Meaning of.

HEADNOTE: These special leave petitions were disposed of by this Court's order dated 14.1.1993.By the said order the Court gave its conclusions and certain directions observing that reasons In support thereof would be given at a later stage. Giving the reasons in support of the conclusions, this Court, HELD: 1.1 The Government in a Welfare State has the wide powers in regulating and dispensing of special services like leases, licences, and contracts etc. The Government while entering Into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy stan-129 dards and norms. Such actions should not be arbitrary, irrational or irrelevant. In the matter of awarding contracts, inviting tenders is considered to be one of the fair ways. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves are reasonable and not discriminatory. (144-G-H, 145-A) Erusian Equipment and Chemicals Ltd. v. State of West Bengal [1975] 2 SCR 674, Ramana Dayaram Shety v. The International Airport Authority of India and Ors. [1979] 3 SCR 1014, and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr. [1980] 3 SCR 1338, relied on. 1.2 The concept of reasonableness rinds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles, and Article 14 strikes at arbitrariness In State action. (149-C) Maneka Gandhi v. Union of India. [1978] 2 SCR 621, and E.P. Royappa v. State of Tamil Nadu & Anr. [1974] 2 SCR 348, relied on. 1.3 The policy

of the Government is to promote efficiency in the administration, to provide an incentive to the uneconomic units to achieve efficiency, to prohibit concentration of economic power and to control monopolies so that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, and to ensure that while promoting industrial growth there is reduction in concentration of wealth and that the economic power is brought about to secure social and economic justice. (159-F, 161-C) Monopolies Inquiry Commission's Report, referred to. American Jurisprudence 2 vol. 54. p. 668, referred to. 1.4 In view of the conditions in the tender notice, validity whereof was not questioned, the Government had the right to either accept or 130 reject the lowest offer. From a perusal of the proceedings of the Tender Committee as well as the opinion expressed by the Financial Commissioner and the other members of Railway Board, it is clear that Rs. 76,000 per bogie could be the reasonable price and the post tender offer at a lower price was made with the hope that the three big manufacturers would get the entire or larger quantity allotted,-which, if accepted, would result in monopoly extinguishing the smaller manufacturers. (46 D-G) State of Uttar Pradesh and others v. Vijay Bahadur Singh and others [1982]2 SCC365, State of Orissa and Ors. v. Harinarayan Jaiswal and Ors. [1972] 3 SCR 784, G.B. Mahajan and others V. Jalgaon Municipal Council and others [1991] 3 SCC 91, State of Madhya Pradesh & ors. v. Nandial Jaiswal & Ors. [1987] 1 SCR 1, Shri Sitaram Sugar Co. Ltd. V. Union of India [1990] 3 SCC 223, R.K. Garg v. Union of India [1981] 4 SCC 675, and Peerless General Finance and Investment Co. Limited and another etc. v. Reserve Bank of India etc. [1992] 2 SCC 348, relied on. 2.1 The cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular, industry or commodity. It amounts to an unfair trade practice which is not in the public interest. The intention to acquire monopoly power can be spelt out from formation of such a cartel by some of the producers.(167B-C) Collins English Dictionary; Webster comprehensive Dictionary International Edition; chamber's English Dictionary; Black's Law Dictionary: A Dictionary of Modern Legal Usage by Bryan A. Garner; American Jurisprudence 2d Vol. 54, page 677- referred to. 2.2 However, the determination whether an agreement unrea- sonably restrains the trade depends on the nature of the agreement and on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade and monopolise the same. (167 C-D) 131 National Electrical contractors Associations, Inc, et, at, National constructors Associations et. al., Federal Reporter 2d Series, 678 page 492, Matsushita Electric Industrial Co. Ltd., et. at v. Zenith Radio Corporation et al, 89 L.Ed. 2d 538, referred to. 2.3 Monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers. The price fixation is one of the essential factors. (171-E) American Jurisprudence 2d Vol. 54, referred to. 2.4 A mere offer of a lower price by itself though may appear to be predatory, does not manifest the requiste intent to gain monopoly and in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower

price cannot readily be inferred. (172 B-C) Matsushita Electric Industrial Co. Ltd. et. al. v. Zenith Radio Corporation et. al. 89 L.Ed. 2d 538, referred to. Webster Comprehensive Dictionary, International Edition; A dictionary of Modern Legal Usage by Bryan A. Garner; Collins English Dictionary Black's Law Dictionary; The oxford English Dictionary Vol. VIII, referred to. 2.5 The opinion of the Tender Committee that the identical price quoted by the three big manufacturers was a cartel price, was only a suspicion which got strengthened by post- tender attitude of the said manufacturers who quoted a much lesser price, and cannot positively be concluded on the basis of these two circumstances alone. There is not enough material to conclude that in fact there was formation of a cartel. (173 B-C) 2.6 A mere quotation of identical price and an offer of further reduction by themselves could not entitle the said manufacturers automatically to corner the entire market by way of monopoly since the final allotment of quantities vested in the authorities who in their 132 discretion can distribute the same to all the manufacturers including these three big manufacturers on certain basis. Besides. the authorities reserved a right to reject a lower price. (172-F, 173-A-B) 2.7 However, the opinion regarding formation of a cartel entertained by the concerned authorities including the Minister was not malicious nor was actuated by any extraneous considerations. They entertained a reasonable suspicion based on the record and other surrounding circumstances and only acted in a bonafide manner in taking the stand that the three big manufacturers formed a cartel. (173-C) 3.1 The legitimacy of an expectation can be Inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. It Is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense, A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The claim based on the principle of legitimate expectation can be sustained and the decision resulting in denial of such expectation can be quashed provided the same is found to be unfair, unreasonable, arbitracy and violative of principle of natural justice. (182-C, 192-A) Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries JT (1992) 6 S.C. 259, relied on. Halsbury's Law of England. fourth Edition, vol. 1 (1) 151, Administrative Laws of England, Sixth Edition by H.W.R. Wade, page 424, 522, referred to. Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch. 149;A.G. of Hong Kong v. Ng Yeun Shiu (1983) 2A.C.629;In Council of Civil Service Unions and others v. Minister for the Civil Service (1984) Vol.3 All E.R. 935, Amarjit Singh Ahluwalia v. The State of Punjab & Ors. [1975] 3 SCR 82; Att. Getz. for New South Wales v. Ouin [1990] Vol. 64 Australian Law 133 Journal Reports 327; 'R. v. Secretary of State for the Home Department ex parte Ruddock & Ors. (1987)2 All E R 518, Breen v. Amalcamated Engineering Union & Ors. (1971) 2 Law Reports Queen Bench Division 173, referred to. 3.2 Legitimate expectation gives the applicant sufficient locus standi for judicial review and the doctrine of legitimate expectation is to be confined mostly to, right of a fair hearing before a

decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystalised right as such is involved. (191-F) Navyoti Coo-Group Housing Society etc. v. Union of India & Others (1992) 2 Scale 548; Findlay v. Secretary of State for the Home Department (1984) 3 All E R801 and Council of Civil Service Unions case Lord diplock– 3.3 Legitimate expectation being less then right operate in the field of public and not private law and to some extent ought to be protected thought not guaranteed. (193-C) 3.4 Legitimate expectations may come in various forms and owe their existence to different kind of circumstances. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right, in cases of contracts, distribution of largess by the Government and in somewhat similar situations. (193-D) 3.5 Protection of legitimate expectation would not be available where an overriding public interest requires otherwise. The protection is limited to that extent and a judicial review can be within those limits. (191-H; 192-A- B). 3.6 A person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. The decision taken 134 by the authority must be found to be arbitrary, unreasonable and not taken in public interest. It that be so then what should be the relief is again a matter which depends on several factors. (192-C-D-E) 3.7 The courts jurisdiction to interfere is very Much limited and much less in granting any relief in a claim based purely on the ground of 'legitimate expectation'. A decision denying a legitimate expectation based on a policy or change of an old policy, or in the public interest either by way of G.O., rule or is made by way of a legislation does not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. (193- E-F) Att. Gen. for New South Wales v. Quin [1990] Vol. 64 Australian Law Journal Reports 327, referred to. Public Law and Politics-edited by Carol Harlow, referred to. 3.8 Therefore the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power. The concept of legitimate expectation can have no role to plan and the Court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. (193-G-A; 194-A) 3.9 If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary,discriminatory, unfair or based, gross abuse of power or violation of principles of natural justice, the same can be questioned on' the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative

of these principles warranting interference. (194-E-F) 135 3.10 The concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits," particularly when the element of speculation and uncertainty is inherent in that very concept. The courts would restrain themselves and restrict such claims duly to the legal limitations. It is a well-meant caution. Otherwise a resourceful litigant having vested interests in contracts, licences etc. can successfully indulge In getting welfare activities mandated by directive principles thwarted to further is own interests. The caution, particularly in the changing scenario, becomes all the more important. (194- G-H; 195-A-B) Att. Gen. for New South Wales v. Quin 1990 Vol. 64 Austraian Law Journal Reports 327, referred to. 3.11 In the instant case, the Rules for entering into contracts lay down certain norms and contain guidelines. They provide for constitution of Tender Committee and the procedure to be followed in the matter of inviting tenders. They also provide for negotiations but lay down that selection of contracts by negotiations is an exception rather than a rule and can be resorted to only under certain circumstances. As per the notice inviting tender, the price quoted is subject to price variation clause and the Railways reserved a right to accept the lowest price or accept the whole or any part or the tender or portion of the quantity offered. The tenderer cannot expect that his entire tender should be accepted in respect of the quantity. In the past also there were man-„ instances where the Railways as per the procedure followed, arrived at decisions in respect of both price and quantity for good and justifiable reasons. (178-A-B-C) 3.12 There is no legally fixed procedure regarding fixation of price and particularly regarding allotment giving scope to a legitimate expectation. The Tender Committee is not a statutory authority and its proposals are recommendatory in nature and have to be considered in the distribution procedure culminating in the decision of the approving authority who as a matter of fact, also can take decisions in respect of price and allotment of quantities taking into consideration various other aspects from the point of view of public interest. (178-D-E) 136 4. The modifications In the decision of the Railways by way of judicial review are not on the ground of legitimate expectation and violation of principles of natural justice but on the other ground namely the decision of the authorities was based on wrong assumption of formation of Cartel. (195 F-G) 5.The status of a manufacturer being a BIFR company or a small manufacturer was not taken Into account so far as the fixation of the price is concerned and these considerations were deemed relevant only for the purpose of allocation of quantities. The stand taken by the Railways is that smaller manufacturers should survive from the point of view of arresting monopolistic tendencies and from the point of view of public interest. The Tender Committee proceedings would indicate that on the basis of certain formulae namely the past performance, capacity etc, the allotment was being made. Therefore, these cannot be said to be irrelevant considerations and as a matter of fact they had been duly given effect to and weightage was given accordingly in respect of allotment of quantities to various manufacturers within the four corners of the limited tender. (196 C-E)

JUDGMENT: CIVIL APPELLATE JURISDICTION: S.L.P. (C) Nos. 1189798/92 etc. etc. From the Judgment and Order dated 28.8.1992 of the Delhi High Court in Civil Writ Petition Nos. 1152 & 1157 of 1992. V.R. Reddy, Addl. Solicitor General,, Kapil Sibbal, P.P. Rao, Rama Jois, A. Temton, Dr. Shankar Ghosh K. K. Venugopal, Harish Salve, F.S. Nariman, A.N. Haksar, Shanti Bhushan, K.N Bhat, T.R. Andhyarujina, C.V Subba Rao, P.P. Singh, Mrs. B. Sunita Rao, Sudhir Kulshreshtha, Rohit Tandon, Parijat Sinha, Ms. Sunanda Roy, Ms. S. Bhattacharya, B.D. Ahmed, Man Mohan Singh, Gopal Subramanium, D.N. Mishra, A.M. Dittia, P.K. Ganguli, Manoj K. Das. Amit Prabhat, Tripurary Roy. K.L. Mehta, S. Ganesh, Pratap Venugopal, K.J. John, Pramod Dayal, Ajay K. Jain and D.N Nanjunda Reddy for the appearing parties. The judgment of the Court was delivered by K. JAYACHANDRA REDDY, J. By our order dated 14th January, 1993 while disposing of these special leave petitions we gave our conclusions and we proposed to deliver the detailed judgment at a later stage giving all the reasons in support of those conclusions. We hereby deliver the detailed judgment In our earlier order we stated the relevant facts and the issues involved in a concised form. However, we think it appropriate and necessary to refer to some of them for a better appreciation of the reasons in their proper perspective. Every year the Railway Board enters into contracts with the manufacturers for the supply of cast steel bogies which are used in turn for building the wagons. Cast steel bogies come under a specialised item procured by the Railways from the established sources of proven ability. There are 12 suppliers in the field who have been regularly supplying these items. Two new firms Simplex and Beekay also entered the field. Among them admittedly M/s H.D.C., Mukand and Bharatiya are bigger manufacturers having capacity to manufacture larger quantities. On 25.10.91 a Iimited tender notice for procurement of 19000 cast steel bogies was issued to the regular suppliers as well is the above two new entrants for the year namely from 1.4.92 to 31.3.93. The last date for submission of offers to the Ministry of Railways was 27.11.91 by 2.30 P.M. and the tenders were to be opened on the same day at 3 P.M. It was also stated therein that the price was subject to the price variation clause and the base date for the purpose of escalation was 1.9.91 and that the Railways reserved the right to order additional quantity upto 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extensions in delivery period. The offers were to remain open for a period of 90 days. On that day the tenders were opened in the presence of all parties. The price quoted by the three manufacturers i.e. M/s H.D.C., Mukand and Bharatiya was an identical price of Rs. 77,666 per bogie while other tenders quoted between 83,000 and 84.500 per bogies After the tenders were opened and before the same could be finalised, the Government of India announced two major concessions namely reduction of custom duty on the import of steel scrap and dispensation of freight equalisation fund for steel. The tenders were put up and placed before the Tender Committee of the Railways which considered all the aspects. The Committee concluded that three of the tenderers namely M/s H.D.C., Mukand and Bharatiya who had quoted identical rates without any cushion

for escalation between 1.7.91 and 1.9.91, have apparently formed a cartel. The Tender Committee also noted that the rates quoted by them were the lowest. Taking into consideration the reduction of Rs. 1500 as result of the concessions in respect of the reduction of customs duty on the import of steel scrap and dispensation of the freight equalisation fund for steel. The Tender Committee concluded that the reasonable rate would be Rs. 76,000 per bogie. On the question of distribution of quantities to the various manufacturers the Tender Committee decided to follow the existing procedure. The Tender Committee signed these recommendations on 4.2.92 but on the same day the Member (Mechanical) of the Committee received letters from M/s H.D.C. and Mukand. M/s H.D.C. in its letter stated that in view of the concessions and also on the basis that per Kg. rate of casting per bogie could be reduced from Rs. 37.50 to Rs. 29 the cost of casting can also be reduced and therefore they would be in a position to supply the bogies at a lesser rate, in case a negotiation meeting is called. M/s Mukand in its letter also offered to substantially reduce (he prices and they would like to co-operate with the Railways and the Government and brings down the prices as low is possible and asked for negotiations. Though this was post- tender correspondence the Department felt that the offers made by M/s H.D.C. and Mukand could be considered. The whole matter was examined by the Advisor (Finance) in the first instance and by an collaborate note lie observed that the need for encouraging open competition to improve quality and brings down costs his been recommended by the government and if it is intended to continue the existing policy of fixing a rate and distributing the order among all the manufacturers, then negotiations may not he useful as uniform prices offered to all manufacturers have to be sufficient even for the smaller and less economical units and that as any review of the existing policy would take time, the present tender can be decided on the basis of the existing policy. With this noting the file was immediately sent to the Member (Mechanical), the net higher authority, The, with some observations however recommended the acceptance of the Tender Committee's recommendations. The file was then put up to Financial Commissioner. He noted that the Tender Committee was convinced that the three manufacturers who quoted identical price of Rs. 77,666 had formed a cartel. He also considered the offers made by M/s H.D.C. and Mukand and observed that these three manufacturers who quoted a cartel price intended to get a larger order on the basis of such negotiated price which would eventually nullify the competition from the other manufacturers and lead to their industrial sickness and subsequently to monopolistic price situation. He, however, approved the Tender Committee's recommendations that a counter-offer of Rs. 76,000 may he accepted but in the case of M/s H.D.C. a price lower by Rs. 11,000 may be offered as per their letter dated 4.2.92. He also recommended that the two manufacturers M/s Cimmco and Texmaco may be given orders to the extent of their capacity or quantity offered by them whichever is lower in view of the fact that they are wagon builders and the present formula regarding the distribution of quantities may be applied to all manufacturers except the three who have formed a cartel. The also recommended some recoveries from these three manufacturers

who are alleged to have formed a cartel on the basis of their letters wherein they have quoted prices which were much less than the updated price as on 1.9.91 of Rs. 79,305. He also made certain other recommendations and finally concluded that the post tender letters may be ignored and that for short-term gains the Department can not sacrifice long-term healthy competition. After these recommendations of the Financial Commissioner the file was put up to the approving authority i.e. the Minister for Railways, who in general agreed with the recommendations of the Financial Advisor. He also noted that these three manufacturers have formed a cartel. lie also noted that subsequent to the Financial Commissioner's note, besides M/s 1 1. D. C. and Mukand has also offered to reduce the price by 10% or more vide their letter dated 19.2.92 if called for negotiations. Taking these circumstances into consideration the Minister ordered that all these three firms may he offered a price lower by Rs. 11,000 with reference to the counter-offer recommended by the Tender Committee and the quantities also be suitably adjusted so that the cartel is broken, The Minister also noted that as a result of this a saving of about Rs. 11 crores would be effected. In his note, the Minister also ordered redistribution of the quantities. The also ordered that 30% option should straightaway be exercised. After the approving authority took these decisions, the file went to the Chairman. Railway Board for implementing the decisions. The noted that action will be taken as decided by the Minister but added that it results in dual-pricing namely one to the three manufacturers and the higher one to the others and therefore the Minister may consider whether they could counter-offer the lower price to all the manufacturers as that would result in saving much more. The file was then again sent to and was considered by the Financial Commissioner who noticed this endorsement made by the Chairman, Railway Board. The however noted that so far all the other firms are concerned it is Rs. 3305 less than the present contract price but it would not be equitable to offer the lower price put forward by the three manufacturers as it Would make the other units unviable and that incidentally the price of Rs. 76,000 now proposed to be counteroffered to the other firms is also in line with the recommendations of the Tender Committee. The, however, noted that some of the units were sick units and owe a lot of money to the nationalised banks and it would therefore be in the national interest to accept dual-pricing Therefore the file was again put up to the approving authority who agreed with the recommendations of the Financial Commissioner and the Tender Committee and directed that the same may be implemented. In view of this final decision taken by the approving authority a telegram was issued to the three manufacturers giving them a Counter-offer of Rs. 65,000 per bogie. The counter-offer was also made to the other nine manufacturers at the rate of Rs 76,000 per bogie namely the price worked out by the Tender Committee. Soon after the receipt of this telegram dated 18.3.92 M/s H.D.C. and Mukand filed writ petitions in the Delhi high Court challenging the so-called discriminatory counteroffer. M/s Bharatiya also filed a similar petition in Calcutta High Court but the same was withdrawn but another writ petition was filed later in the Delhi High Court. In the writ petitions filed by M/s H.D.C. and Mukund

the High Court stayed the operation of the telegram dated 18.3.92 and issued notice to the Union of India and to the Executive Director and Director of the Railways (Stores) who figured as respondents in those writ petitions. M/s M. D.C. and Mukand also wrote to the Minister of Railways in reply to the telegram that they were not prepared to accept the counter-offer at the rate of' Rs. 65,000 and instead they offered lo supply the bogies at the rate of Rs. 67,000 per bogie. The Railways accepted this offer and intimated M/s H.D.C. and Mukand accordingly. The High Court. at an interlocutory stage pending the writ petitions. passed an order on 2.4.92. directing the Ministry to accept the allocation of bogies recommended by the Tender Committee and to pay a price at the rate of Rs. 67,000 only per bogie and that would be subject to the final decision of the writ petitions. Being aggrieved by this order, the Railways filed a petition for special leave to appeal no. 5512/92 and this Court while refusing to interfere at that interlocutory stage made the following observations on 28.4.92: "However, we may observe-and so direct that during the pendency of the writ petition if any of the suppliers in terms of the package of distribution indicated by the High Court (including the petitioners in the High Court in the writ petition) seek an"on account" payment representing the difference between the sum of Rs. 67,000 indicated as price by the High Court and the sum of Rs. 76,000 contemplated by the Railways; the order of the High Court shall not prohibit the government making such on-account payment to such suppliers on each wagon on the condition that the said on-account payment of Rs. 9.0000) per bogie should he covered by a bank guarantee for its prompt repayment together with interest at 20% per annum in the event the on- account payment cannon(be observed in the price structure that may ultimately come to be determined pursuant to the final decision in the writ petitions. The special leave petitions are disposed of accordingly." Thereafter the High Court took up the writ petitions for final hearings any by the impugned judgment allowed the writ petitions filed by M/s H.D.C. and Mukand and directed that all the suppliers should make the supplies at the rate of Rs. 67,000 per bogie and also set aside the quantity allocation and directed that the same should he considered afresh on a reasonable basis and pending such fresh consideration future supplies should be made on the basis of the recommendations of the Tender Committee. In the course of the judgment, the High Court also made certain observations to the effect that the decision of the approving authority is arbitrary and that the Government has no justification to offer a higher price than the market price to any supplier to rehabilitate it. It was further observed that the stand of the Railways that those three manufacturers formed a cartel is based on extraneous considerations. The learned judges of the High Court also observed that they failed to understand as to why the Railway authorities could not initiate negotiations with those manufacturers who had offered to reduce their offer which could result in saving crores of 'rupees to the Railways. Aggrieved by this judgment of the High Court the Union of India filed S.L.P. (Civil) Nos. 11897-98/02. Before the High Court in the two writ petitions filed by M/s H.D.C and Mukand the other manufacturers figured as respondents Nos. 4 to 12 and M/s Bharatiya

otherwise known as Besco figured as respondent No. 13. The other S.L.Ps. are filed by those nine manufacturers. M/s Bharatiya, respondent No. 13, has not questioned the judgment of the High Court. As mentioned above M/s Bharatiya filed a separate writ petition No. 1753/ 92 in the Delhi High Court after withdrawing an earlier writ petition filed in the Calcutta High Court. The same also was disposed of in terms of the judgment in the other two writ petitions Nos. 1152 and 1157/92. But they have not questioned the same. Consequently M/s Bharatiya figures as a respondent before us in the SLP filed by the Union of India. In our earlier order we have already referred to the various Submissions made by the learned counsel on behalf of Union of India and on behalf of the respondents particularly M/s H.D.C. Mukand and Bharatiya and other smaller manufacturers. After considering the various submissions and issues involved we have given our conclusions in our earlier order which briefly stated are as follows: 1)There is no enough of material to conclude that M/s. H.D.C., Mukand and Bhartiya formed a cartel. However. there was scope for enter training suspicion by the Tender Committee that they formed a cartel since all the three of them quoted identical price and the opinion entertained by the concerned authorities including the Minister that these three big manufacturers formed a cartel was not per se malicious or was actuated by any extraneous considerations and the authorities acted in a bonafide manner in taking the stand that the three big manufacturers formed a cartel. 2)The direction of the High Court that the supply of bogie should be at Rs.67000 by every manufacturer can not he sustained and that a fresh consideration of a reasonable price is called for. The Tender Committee shall reconsider the question of fixation of reasonable price. While doing so it shall consider the offer of Rs. 67,000 made by M/s H.D.C. and Mukand alongwith the data that would given by them in support of their offer and the percentage of profits available to all the manufacturers and other relevant aspects and then fix a reasonable price at which the manufacturers would be able to supply. 3) Dual pricing under certain circumstances may be reasonable and the stand of the railways to adopt dual pricing under the circumstances is bonafide and not malafide. M/s H.D.C., Mukand and Bharatiya must be deemed to be in a position to supply at the rate of Rs. 67,000 per bogie and thus they form a distinct category. The smaller manufacturers belong to a different category and if a different price is fixed for them it is not discriminatory. 4) If the price that to be fixed by the Tender Committee as directed by us happens to be more than Rs. 67,000 than that would be applicable to the smaller manufacturers only and not to M/s H.D.C., Mukand and Bharatiya who on their own commitment have to supply at the rate of Rs. 67,000. (5) The price thus fixed by the Tender Committee which applies only to the smaller manufacturers shall he deemed to be final and the respective contracts shall be deemed to be concluded so for the price is concerned. (6) Coming to the allotment of quota of bogies the Tender Committee made recommendations on the basis of the existing practice. The Minister of Railways in his ultimate decision has made some variations taking into consideration the recommendations of the Financial Commissioner and other authorities. In making these variations, the Minister

accepting the suggestion that a cartel was formed by the three manufacturers reduced the allotment of quota to them by way of reprisal. Since we are of the view that formation of a cartel is not established, such a reduction of quota can not be justified. The Minister of Railways as the final authority as be justified in takings a particular decision in the matter of allotment of quota but such decision must be taken on objective basis. In allotting these quotas the Government is expected to be just and fair to one and all. 7)The three big manufacturers M/s H.D.C.,Mukandand Bharatiya should be allotted the quantities as per the recommendations of the Tender Committee.However, the quantities finally allotted by the competent authority to the smaller manufacturers need not be disturbed and the railway authorities may make necessary adjustments next year in the matter of allocation of quantities to them takings into consideration the allotments given to them this year; (8)It will be open to the Railways to exercise 30% option, if not already exercised. (9)Taking all the circumstances and the time factor into consideration the time to complete the supply is extended upto 31.3.1993. Before we proceed to consider each of these issues and give our reasons, we shall deal with few general submissions regarding the tender system and the economic policy of the Government in the matter of stopping monopolistic tendencies. Shri K.K. Venugopal, learned counsel appearing for M/s H.D.C. at the outset submitted that in a case of this nature the Government must either by way of public auction or by way of inviting tenders work out (he lowest price and award the contract accordingly, as that would safeguard the interests of the public exchequer. The further submission in this regard is that the Railways having invited tenders and having further entertained post-tender correspondence offering the lower price, should have accepted the price quoted by the three big manufacturers. Shri Sibal, learned counsel appearing for the Union of India, however, contended that it is a matter of policy decision by the Government and that where the Government realises that the lowest ,)rice offered is not reasonable and realistic, it may for a variety of good and sufficient reasons reject the same. It is true, as it is today, that the Government in a welfare State has the wide powers in regulating and dispensing of special services like leases, licences. and contracts etc. The magnitude and range of such Governmental function is great. The Government while entering into contracts or issuing quotas is expected not to act like private individual but should act in conformity with certain healthy standards and norms. Such actions should not be-arbitrary, irrational or irrelevant. In the matter of awarding contracts inviting tenders is considered to be one of the fair ways. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves are reasonable and not discriminatory. In the instant case the Railways every year used to enter into contracts with the established manufacturers for the supply of cast steel bogies and there are 12 such suppliers. On 25.10.91 a limited tender notice for the procurement of steel bogies was issued to these suppliers. Under Clause 5 of the Tender notice the Railways reserved the right to order additional quantity of 30% of the ordered quantity during the currency

of the contract on the same price and term: with suitable extension in delivery period. Clause 7 is to the effect that the tender will be governed by the IRS conditions of the contract. In the instructions appended to the Tender notice it is again reiterated that the contracts made under the tender would be governed by the IRS conditions of contract and also the instructions in the invitation of tender. Clause 9.3 of the instructions lays down that the price is subject to price variation clause and the base date for the purpose of escalation is 1.9.91. Under Clause 23 it is made clear that the Department does not pledge itself to accept the lowest or any tender and reserves to itself the right of acceptance of the whole or any part of the tender. Pursuant to this notice and subject to (lie conditions mentioned therein, 12 manufacturers in the field a well as two new manufacturers M/s Simplex and Beekay submitted their offers and they are as follows: NAME OF THE FIRMS PRICE QUOTED FOR 20.3.T AXLE LOAD 1. Himmat 84,510 2. Texmaco 83,950 3. Titaoarh 84,100 4. BECO Ltd. 83,350 5, Anup 84,980 6. Sri Ranga 84,600 7. Orient 84,750

8. Bum Standard 83,000
9. CIMMCO 84,800
10. Mukand 77,666

II. Bharatiya 77,666

12. HDC 77,666
13. Simplex 78,100
14. BEEKAY 75,000" These offers were got technically evaluated by the Research, Development and Standard Organisation (RDSO' for short). Thereafter a three-men Tender Committee comprising the officers of the rank of Joint Secretary designated as Executive Directors in the Railways Board considered the offers. Since the three big suppliers namely M/s H.D.C., Mukand and Bharatiya quoted an identical price of Rs. 77,666 which was lower than the updated price of the previous contract, the base date of which was 1.9,91, the Tender Committee formed an opinion that they have formed law carte
15. The offers made by the two new firms, however, were not accepted. The Tender Committee made their own recommendations and fixed Rs. 76,000 as a reasonable price at which counter offer could be made. Then as already mentioned there was post-tender correspondence and ultimately a dual price was fixed. In this regard the submission is that having entertained post-tender correspondence, the Government either should have accepted the same or rejected the same and in any event the lowest offer should have been accepted. From a perusal of the proceedings of the Tender Committee as well as the opinion expressed by the Financial Commissioner and the other members of the Board, it is clear that Rs. 76,000 per bogie can be the reasonable price and Rs. 67,000 was not a reasonable price. It is also clear that the post-tender offer at a lower price was

made with the hope that they would get the entire or larger quantity allotted. The stand taken by the Railways is that the three big manufacturers originally formed a cartel and the post-tender offers at least by two of them confirmed the same and if these three big manufacturers are allotted entire or larger quantity that would result in monopoly extinguishing the smaller manufacturers. The question is whether such a stand taken by the Government as a policy, is unfair and arbitrary as to warrant interference by the courts. It must be mentioned at this stage that the validity of the conditions in the tender as such are not questioned. Consequently the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should he on some rational and reasonable grounds. In Eurasian Equipment and Chemicals Ltd. v. State of West Bengal [1975] 2 SCR 674, this court observed as under: "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, hut if it does so, it must so fairly without discrimination and without unfair procedure. Approving these principles, a Bench of this Court in Ramana Dayaram Shetty v. The International Air-port Authority of India and Ors[1979] 3 SCR 10 14, held thus: "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 job so 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 or the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc. must be con- fined and structured by rational, relevant and nondiscriminatory 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 he shown by the Government that the departure %%,as not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory." ln Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr. [1980] 3 SCR 1338 an order awarding contract by the Government to a party was questioned on the ground that it was arbitrary, malafide and not in public interest and the same created monopoly in favour of that party and that the contract was awarded without affording an opportunity to others to compete and the same is not based on any rational or relevant principle and therefore was violative of Article 14 of the Constitution and also the rule of administrative law which inhibits the arbitrary action by the State. A Bench of

this Court while approving the principles laid down in the above cases further observed thus: "Though ordinarily a private individual would be guided by economic considerations of self- gain any action taken by him, it is always open to under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act is it likes in granting largess such as awarding a contractor selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract of leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid." Now coming to the test of reasonableness which pervades the constitutional scheme, this Court in several cases particularly with reference to Articles 14, 19 and 21 has considered this concept of reasonableness and has held that the same finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles and that Article 14 strikes at arbitrariness in State action. (vide Maneka Gandhi v. Union of India, [1978] 2 SCR 621 and E.P. Royappa v. State of Tamil Nadu & Anr. f 1974 12 SCR 348. After referring to these decisions it was further held in Kasturi Lal Lakshmi Reddy's case (supra) as under: "Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other over-riding- considerations qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable. So also the concept of public interest must as far as possible receive its orientation from the Directive Principles. What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody par excellence the constitutional concept of public interest. If, therefore, any governmental action is calculated to implement or give effect to a Directive Principle, it would ordinarily, subject to any other overriding considerations be informed with public interest. Where any government action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. 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 t o do so. Such considerations many that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or secretion of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Government is reasonable and in public interest." (emphasis supplied) On the question of courts interference in an action taken by the Government, it was further observed as under: "But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down government action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the governmental action. 'I-his is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law." (emphasis supplied) On the question of the power of the Government in granting largess, it was also observed that: "The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramanad Shetty v.International Airport Authority of India & Ors. (supra) that the Government is not free like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrim-

ination and without unfair procedure. where the Government is dealing with the public, whether by way of giving jobs or entering into contracts 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 some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Art. 14." (emphasis supplied) In State of Uttar Pradesh and others v. Vijay Bahadur Singh and others [1982] 2 SCC 365 this Court considered the circumstances under which the Government is not always bound to accept the highest bid offered in a public auction under which a contract was to be awarded to fell trees and exploit forest produce and held as under: "It appears to us that the High Court had clearly misdirected itself. The Conditions of Auction made it perfectly clear that (lie Government was under no obligation to accept the highest bid and that no rights accrued to the bidder merely because his bid happened to he the highest. Under condition 10 it was expressly provided that the acceptance of bid at the time of auction was entirely provisional and was subject to ratification by the competent authority, namely, the State Government. Therefore, the Government had the right, for good and sufficient reason, we may say, not to accept the highest bid but even to prefer a tenderer- other than the highest bidder. The High Court was clearly in error in holding that the Government could not refuse to accept the highest bid except on the ground of inadequacy of the bid. Condition 10 does not so restrict the power of the Government not to accept the bid. There is no reason why the, power vested in the Government to refuse to accept the highest bid should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. In fact, to give an antithetic illustration, the very enormity of a bid may make it suspect. It may lead the Government to realise that no bonafide bidder could possibly offer such a bid if he meant to do honest business. Again the Government may change or refuse its policy from time to time and we see no reason why change of policy by the Govern- ment, subsequent to the auction but before its confirmation, may not be a sufficient justification for the refusal to accept the highest bid. It cannot be dispute that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest. If the government has the power to accept or not to accept the highest hid and if the Government has also the power to change its policy from time to time. it must follow that a change or revision of policy subsequent to the provisional acceptance of the bid but before its final acceptance is a sound enough reason for the Government's refusal to accept the highest

bid at an auction. that is precisely what has happened here." (emphasis supplied) In State of Orissa and Ors. v. Harinarayan Jaiswal and Ors. [1972] 3 SCR 784 it was observed as under: "It is for the Government to decide whether the pi-ice offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performed and executive function. The correctness of its conclusion is not open 'to judicial review. We fail to see how the plea of contravention of Art. 19 (1) (g) or Art. 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in s. 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell then cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids-see Union of India and ors. v. M/s Bhimsen Walaiti Rani [1970] 2 SCR 594. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Art. 19 (1) (g) or Art. 14 becomes irrelevant. Citizens cannot have any funda- mental right to trade or carry on business in the properties or rights belonging to the Government, nor can there he any infringement of Art. 14, if the Government tries to get the best available price for its valuable rights." emphasis supplied) In G.B. Mahajan and others v. Jalgaon Municipal Council and others [1991] 3 SCC 91 it was observed thus: " The reasonableness' in administrative law must, therefore, distinguish between proper use and improper abuse of power. Nor is the test the court's own standard of 'reasonableness' as it might conceive it in a given situation." In State of Madhay Pradesh & ors v. Nandlal Jaiswal & ors. [1987] 1 SCR 1 it was observed thus: " We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, therefore, its validity cannot be tested on any rigid a priori' considerations or on the application of any straight-jacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or play in the 'joints' to the executive. xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the back-round of these observations and keeping the mind that we must now proceed to deal with the contention of the petitioners based on article 14 of the Constitution." In India Cement Ltd. and others v. Union of India and others[1990] 4SCC

356 a question arose whether the fixation of Rs. 100 per tonne of cement as the uniform retention price for the entire industry with the exception of M/s Travancore Cement Ltd. was rational and reasonable. This Court held as under: “It is. therefore, clear that fixation of Rs. 100 per tonne as die uniform retention price for the entire industry with the solitary exception of M/s. Travancore Cement Ltd. Kottayam for which justification has been shown. was on a rational basis taking into account all relevant data and factors including the cement industry's acceptance of the principle of a uniform retention price for the entire industry. the only difference being in die price actually fixed it Rs. 100 per tonne instead of Rs. 104 per tonne claimed by the cement industry. It is obvious that the fixation of Rs. 100 per tonne being shown to be made on a principle which has not been faulted. the actual fixation of Rs. 100 instead of Rs. 104 to be received by the industry is not within the domain of permissible judicial review, if the principle of a Uniform retention price for the entire industry cannot be faulted. (emphasis supplied) The Bench in die above case, after referring to die decision of the Constitution Bench in Shri Sitaram Sugar Co. Lid. v. Union of India [1990] 3 SCC 223, observed thus:” It was pointed out that what is best for the industry and in what manner the policy should be formulated and implemented. hearing in mind the object of supply and equitable distribution of the commodity at a fair price in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government and such matters do not ordinarily attract the power of judicial review. It was also held (hit even if some persons are at a disadvantage and have suffered losses on account of the formulation and implementation of the government policy. that is not by itself' sufficient ground for interference with the governmental action. Rejection of the principle of fixation of price unit wise on actual cost basis of' each unit was reiterated and it was pointed out that such a policy promotes efficiency and provides and incentive to cut down the cost introducing an element of healthy competition among the units. xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx It is. therefore. clear that the principle of fixation of uniform price for the industry is an accepted principle and this has to be done by fixing a uniform price on the basis of the cost of a reasonably efficient and economic representative cross-section of manufacturing units and not with reference to the cost in relation to each unit. Obviously, such a practice is in larger public interest and also promotes efficiency in the industry providing an incentive to the uneconomic units to achieve efficiency and to reduce their cost." Regarding the differential treatment given to M/s Travancore Cement Ltd. this Court held that: The only surviving question for consideration is the argument in Civil Appeal No. 2193 of 1972 for a differential treatment to the appellant, M/s Chettinad cement Limited, on the anology of M/s Travancore Cement Ltd., Kottayam. In the counter-affidavit of Shri G. Ramanathan Under Secretary to the Government of India, the reason for treating. Travancore Cement Limited differently has been clearly stated.

It has been stated that it is a sub- standard unit with a capacity of 50,000 tonnes ‘per annum only without any scope for expansion while the standard capacity for a unit is two lakh tonnes per annum; so that this unit is not capable of expanding the capacity and it is on the whole an uneconomic unit deserving a special consideration. No material has been produced by the appellant. M/s Chettinad Cement Corporation Limited. to show that it is a similar substandard uni t without any capacity for expansion. so that it too must continue to be an uneconomic unit like M/s Travancore Cement Limited, Kottayam deserving, a similar treatment. The counter affidavit. therefore. shows a rational basis for classifying M/s Travancore Cement Limited, Kottayam differently as a sub-standard and an uneconomic unit without any scope for improvement in comparison to other units. This argument also is untenable." In R.K. Garg v. Union of India, [1981]4 SCC 675, a Constitution Bench of this Court observed as under: " Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude. than laws touching the civil rights such as freedom of speech religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-.jacket formula and this is particularly true in case of legisla- (ion dealing with economic matters, where having regard to the nature of the problems required to be dealt with. greater play in the joints has to he allowed to tile legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation then in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud 354 US 457 where Frankfurter, J said in his inimitable style: In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility the courts have only the power to destroy not to reconstruct. When these are added to the complesity of economic regulation, the uncertainty, the liability to error. the bewildering conflict of the experts, and the number of times the judges have been overruled by events–self-limitation can be seen to be the path of judicial wisdom and institutional prestige and stability." (emphasis supplied) In Peerless General Finance and Investment Co. Limited and Another v. Reserve Bank of India etc. [1992] 2 SCC 343 the accent of power of the Courts interfering. in such economic policy matters was considered and it was held as under: “The function of the Court is to see that lawful authority is not abused but not to appropriate to itself’ the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit

in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even expert can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts." It was further observed thus: " The function of the Court is not to advise in matters relating to financial and economic policies for which bodies like Reserve Bank are fully competent. The Court can only strike some or entire directions issued by the Reserve Bank in case the Court is satisfied that the directions were wholly unreasonable or violative of any Provisions of the Constitution or any statute. It would be hazardous and risky for the courts to tread an unknown path and should leave such task to the expert bodies. This Court has repeatedly said that matters of economic policy ought to be left to the government." At this juncture it is also necessary to consider whether the policy of the Government in the matter of fixation of price and in allotment of the largess from the point of' view of prohibiting monopolistic tendencies and encouraging healthy competition among the units, is in any manner unreasonable or arbitrary. As submitted by the learned counsel, the policy of the Government is to promote efficiency in the administration and to provide an incentive to the uneconomic units to achieve efficiency. The object underlying the Monopolies and Restrictive Trade Practices Act, 1969 C'MRTP Act' for short) is to prevent the concentration of economic power and to provide for a control on monopolies prohibition of monopolistic trade practices and restrictive trade practices. The Monopolies Inquiry Commission in its report stated that: "There are different manifestations of economic power in different fields of economic activity. One such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. Another is the adoption by some producers and distributors, even though they do not enjoy such a dominant position. of practices which restrain competition and thereby deprive the community of the beneficent effects of the rivalry between producers and producers, and distributors and distributors to give the best service. It is needless to say that such practices must inevitably impede the best utilisation of the nation's means of production economic power may also manifest itself' in obtaining control of large areas of economic activity by a few industrialists by diverse means. Apart from affecting the economy of the country, this often results in the creation of industrial empires, tending to cast their shadows over political democracy and social values." In U.S.A. under the Sherman Act of 1890. every contract or combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce is declared to be illegal. By that at every person who monopolised or attempted to monopolise or combined or conspired with any other person or persons to monopolise any part of the trade or commerce was guilty of mis-demeanour. Regarding the constitutionality of the said Act. a passage in American jurisprudence 2d, vol. 54 pages 668-669 reads thus:

16. Constitutionality. The Sherman Act (15 USCSS 1-7) is a constitutional exercise of the commerce power. Its general language does not render it invalid as an unconstitutional delegation of legislative power to the courts or as an unconstitutionally vague criminal statue. Its application to a monopolistic association of newspaper publisher does not abridge freedom of the press: nor does its application to the continuance, after its enactment, of a contract made previously subject it to attack as ex post facto legislation." In England, the Competition Act, 1980 controls anti- competitive practices and if a person in the course of his business pursues a course of conduct which has or is intended to have or it likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods is deemed to engage in anti-competition practices, which is illegal. Therefore, the avowed policy of the Government particularly from the point of view of public interest is to prohibit concentration of economic power and to control monopolies so that the ownership and control of the material resources of the Community are so distributed as best to subserve the common good and to ensure that while promoting industrial growth there is reduction in concentration of wealth and that the economic power is brought about to secure social and economic justice. Bearing the above principles in mind, we shall now proceed to examine the action taken by the Railways in the matter of fixation of the price and distribution of quantities and see whether the same has been done pursuant to a policy and thus reasonable or whether there has been an arbitrary exercise of power. We have already noted that it is a case of limited tender meant for the 12 manufacturers who have been supplying the railway bogies. The offers made by the tenders were got technically evaluated by the RDSO and thereafter they were examined by the-render Committee as well as by the Railways Board and finally by competent authority. The assessed capacity of each manufacturer is the one assessed by the RDSO, a wing of the Railways and the same is based on the molten capacity of the manufacturers and other relevant factors. After fixing the reasonable price, the quantity distribution can be determined based on the assessed actual capacity of the manufacturers, best performance, outstanding orders to be executed and on the average of previous four years' performance. It is not in dispute that this formula was evolved in 1983. Later, to avoid certain inequalities and better utilisation of the installed capacity by larger units and uneconomic ordered quantity and under utilisation of capacity by smaller units, it was felt that in the interest of the economy, an equitable distribution has to he effected. A perusal of the Tender Committee's recommendations, the enclorsements made by the members of the Railway Board and the views expressed by the competent authority could show that for the year in question they want to bring about some changes in the policy of distribution pending a permanent policy being evolved. The 'render Committee in the first instance examined the prices quoted-by the tenderers. The Committee decided that while placing orders, only the RDSO permitted deviations will be allowed and

the suppliers have to adhere to rest of the specifications as was being done in the earlier years. Then coming to the prices, the Tender committee noted that the three big manufacturers quoted identical price in terms by forming a cartel among themselves. Having applied the price variation formula, the updated price was fixed at Rs. 79,305 as on 1. 9.91. However, taking into consideration the two concessions is respect of import duty and (fie freight equalisation the Committee ultimately recommended the price of Rs. 76.000. The Tender Committee also noted that this price is very near to the lowest among the updated price. Regarding the distribution of quantities the Tender committee recommended that the same may be distributed among the various manufacturers as shown in (he annexure to their recommenda- tions. In recommending such distribution to various manufacturers the Tender committee has taken into consideration the fact that the four wagon builders namely M/s H.D.C. Texmaco, Cimmco and Burn should be given weightage. The Tender Committee ultimately recommended that a counter-offer at the price of Rs. 76,000 for 20.3 T bogies can be made and the quantities can be distributed as indicated in the be annexure. This was done on 4. 2. 92 and then the post- tender correspondence was there %%,hereby two of the three big manufacturers offered to reduce their price if negotiations be held. Then the file went to the Railway Board. Advisor (Finance) particularly indicated that a view has to be taken whether a large number of manufacturers should be continued manufacturing these bogies in small quantities as at present or to permit a small number of manufacturers to expand their production at the cost of other prices and that the policy which has been followed by the Railways so far is to encourage a large number of parties to manufacture the bogies, with the idea of generation competition as also by way of encouraging small scale industries. fie, however, pointed out that since the review of policy would take time, the tender could be decided on the basis of the existing policy. The Member (Mechanical) agreed with this recommendation. Then the file went to Financial Commissioner. He noted that the three big manufacturers have formed a cartel and they have given offer to reduce their price if negotiations are held and their intention apparently is to get a larger share on the basis of such negotiated price which would eventually nullify the competion from the other manufacturers and Subsequently to monopolistic price situation. Having stated so he recommended that the wagon builders and other smaller manufacturers must he given larger quantities and that the three big manufacturers should be given the balance. In the last paragraph. the Financial Commissioner noted thus: " Now, due to the new economic policy, the structural changes are in a flux and as a monopoly buyer it is incumbent on the part of the Railway not to precipitate any crisis by resorting to negotiation on the basis of II DC's letter at SN 26 but treat carefully and protect smaller firms from being gobbled up. In other words, for short-term gains, we may be sacrificing, long-term healthy competition. 1, therefore, advocate that this post-tender letter may be ignored as the prices quoted by firms are in

the close range or prices updated by Tender Committee for counter-offer." With these nothings, the file went to the Railway Minister and in his order, he noted that the three big manufacturers have formed a cartel and that under the circumstances all the three of them may be offered a price lower by Rs. 11.000 and the quantities also should be suitably adjusted so that the cartel is broken and he ordered 1795, 2376 and 2500 number of bogies to M/s H. D.C., Mukandand Bharativa respectively. The Minister further observed that since the present formula suffers from serious blemishes as pointed out by the Financial Commissioner, a judicious distribution of order is called for between the other suppliers and that some of them are sick units and owe a lot of money to the nationalised banks and their cases are pending before BIFR. and that it would be in the national interest to give them sufficient order so that they are able to rehabilitate themselves and repay the loans. In this view of the matter, he ordered redistribution of the balance quantities as follows: Bum 500 Cimmco 1200 Texmaco 1200

Sri Ranga 1560 Anup 1136 Orient 1050 TSL 1400 Himmat 1150 BECO 1600" The Minister also ordered that straight away 30% option should be exercised. The further noted that as a result of this policy, the Railways would be effecting a saving of about Rs. 11 crores. Then the file with this order went back to the Member (Mechanical) and others for being implemented. he, however. noted that the Minister for Railways may consider whether the lower price could be counter offered to all the companies. The Financial Commissioner again noted that dual pricing would be in the national interest and finally the Minister having noted these endorsements of the Member (Mechanical) as well as the Financial Commissioner made an endorsement that if some are allowed to hold monopoly instead of giving protection to smaller units, who have formed a cartel, they may gang up and fight and fritter the smaller ones and that Railways should always demonstrate of its own vision of long term Railway interest and not short-terms gains and finally agreed with the recommendations of the Financial commis- sioners and also the recommendation of the 'Fender Committee and directed the implementation of the same without further delay. The above documents would show that a particular policy has been adopted by the Government, though it resulted in a change as compared to the previous one. As held by the courts, change of policy by it self does not affect the pursuant action provided it is rational and reasonable However, the submission is that the decision taken pursuant to this policy in the matter of fixation of price and distribution of quantities is based on wrong grounds and suffers from the vice of unreasonableness. S/Shri Nariman, Venugopal and Shanti Bhushan, learned counsel appearing for M/s Mukand, H.D.C. and Bharatiya respectively submitted in this context that the grounds namely that the three big manufacturers formed a cartel and that the post-tender price offered by them was predatory are unfounded and that dual pricing and the ultimate allotment of the quantities in a punitive manner are based on a wrong premise and the final decision arrived at is consequently unreasonable and arbitrary. The further submission is that these manufacturers have a legitimate expectation of being treated in certain

ways by the administrative authorities on the basis of practice and policy of the previous years and such a decision, which is punitive and which defeats such legitimate expectation and which is taken without affording an opportunity to these manufacturers to explain, is violative of principles of natural justice. First we shall consider the submissions regarding the formation of cartel by these big manufacturers, The word "Cartel" has a particular meaning with reference to monopolistic control of the market. In collins English Dictionary, the meaning of the word "Cartel" is given as under: " cartel I also called: trust, a collusive international association of independent enterprises formed to monopolize production and distribution of a product or service, control prices etc.————————" In Webster Comprehensive Dictionary, International Edition, the meaning of the word "Cartel" is given thus: "cartel————————- xx———— 3. An international combination of independent enterprises in the same branch of production, aiming at a monopolistic control of the market by means of weaking or eliminating competition.——— xx———- In Chambers' English Dictionary the word"Cartel" is defined thus: "Cartel-A combination of firms for certain purposes especially to keep up prices and kill competition————XX———— In Black's Law Dictionary, fifth edition the meaning of the word"Cartel" is given thus: "Cartel-A combination of producers of any product joined together to control its production, sale, and price, and to obtain a monopoly in any particular industry or commodity.Also, an association by agreement of companies or sections of companies having common interests, designed„ to prevent extreme or unfair competition and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products." In American Jurisprudence 2d Vol. 54 page 677 it is mentioned thus: "A cartel is an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and to allocate markets, and perhaps also to exchange scientific or technical knowledge or patent rights and to standardize products, with competition regulated but not eliminated by substituting computational in quality, efficiency, and service for price-cutting. An international cartel arrangement providing for a worldwide division of a market has been held a per se violation of 15 USC S 1. An American corporation violates the Sherman Act by entering into agreements with English and French companies to (1) allocate world trade territories among themselves; (2) fix prices on products of one sold in the territory of the others; (3) co-operate to protect each other's markets and eliminate outside competition; and (4) participate in cartels to restrict imports to and exports from the United States.' In a Dictionary of Modern Legal Usage by Bryian A.Gemer,it is noted thus:"cartlize=to organize into a cartel. See- IZE. Yet cartel has three quite different meanings; (1) " an agreement between hostile nations"' (2)"an anticompetitive combination usu. that fixes commercial prices"; and (3)"a combination of political groups that work toward common goals." Modern usage favours sense (2)." The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of a cartel

in other words, it amounts to an unfair trade practice which is not in the public interest. The intention to acquire monopoly power can be spelt out from formation of such a cartel by some of the producers. However, the determination whether such agreement unreasonably restrains the trade depends on the nature of the agreement and on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade and monopolise the same. Dealing with the provi- sions of Sherman Anti-Trust Act, in National Electrical Contractors Associations, Inc. etal. v. National Contractors Association etal Federal Reporter 2d Series, 678 page 492 it was observed as under: "We know of no better statement of the rule than that of this court in United States v. Society, of Ind. Gasoline Marketers, 624 F. 2d 461, 465 (4th Cir. 1979) cert. den. 101 S.Ct. 859,449, U.S. 1078, 66 L.Ed. 2d 801, where stated:"Since in a price-fixing conspiracy the conduct is illegal per se further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." It was also observed that: "The critical analysis in determining whether a particular activity constitutes a per se violation is whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive." Matsushita Electric Industrial Co., Ltd. et al v. Zenith Radio Corporation et al 89 L.Ed. 2d 538 is a case where American manufacturers of consumer electronic products brought suit against a group of their Japanese competitors in the United States District Court alleging that these competitors had violated Sections 1 and 2 of the Sherman Act and other federal statutes. It was alleged that the Japanese companies had conspired since 1950 to drive domestic firms from the American Market, by maintaining artificially high prices for these products in Japan while selling them at a loss in the United States. The District Court after excluding bulk of evidence, finally granted the Japanese companies' motion for summary judgment dismissing the claims. The United States Court of Appeal reversed and remanded for further proceeding. On a certiorari, the United States Supreme Court while considering the standards supplied by the Court of Appeals in evaluating the summary judgment, observed thus: "To survive petitioners motion for summary judgment respondents must establish that there is a genuine issue of material (475 US 586) fact as to whether petitioners entered into an illegal conspiracy that caused respondents to. suffer a cognizable injury." It was further observed that: A predatory pricing conspiracy by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational (475 US 589) the conspirators must have a reasonable expectations of recovering, in the form of later monopoly profits, more than the losses suffered. xxxxxxxx xxxxxxxx xxxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in

such a conspiracy accrue before the gains, they must be “repaid” with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supra competitive prices turn depends on the continued cooperation of the conspirators, an the inability of other would- be competitors to enter the market, and not incidentally on the conspirator; ability to escape antitrustliability for their minimum price-fixing cartel. Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial as would likely be necessary (475 US 593) in order to drive out the competitionpetitioners would most likely have to sustain their cartel for years simply to break even." (emphasis supplied) In this context, one of the submissions is that the price of Rs. 67,000 offered by these manufacturers during the post- tender stage was not predatory and that the view taken by the authorities that such an offer of lower price was predatory one confirming the formation of a cartel, is also unwarranted. In Matsushita's case (supra) it was observed that predatory pricing conspiracies are by nature speculative and that the agreement to price below the competition level requires the conspirators to forgo profits that free competition would offer them. It was also held therein as under: “To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of S 1 of the Sherman Act must present evidence”that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. (emphasis supplied) Therefore mere offering of a lower price by itself, though appears to be predatory, can not be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. In webster Comprehensive Dictionary International Edition. The meaning of the word “Predatory” is given as under: “predatory-1. characterized by or under taken for plun- dering. 2. Addicted to pillaging: 3. Constituted for living by preying upon others, as a beast or bird; raptorial.” In A Dictionary of Modern Legal Usage by Bryan A. Garner, “predatory” is defined thus: “Predatory preying on other animals. The word is applied figuratively in the phrase from antitrust law, predatory pricing. The forms predaceous, predatorial, and predative are needless variants. The spelling predacious has undergone differentiation and means” devouring; rapacious." In collins English Dictionary, “Predatory” is defined thus: “predatory- 1. another word for predacious (sense 12. of, involving, or characterized by plundering, robbing, etc..... xxxx..... In Black's Law Dictionary,”Predatory intent" is defined asunder: “Predatory intent.”predatory intent," in purview of Robinson-patmen Act, means that alleged price dis- criminator must have at least sacrificed present revenues for purpose of driving competitor out of market. with hope of recouping losses through subsequent higher prices. International Air Industries, Inc. v. American Excelsior Co., C.A. Tex. 517 F. 2d 714, 723." In The oxford English Dictionary Vol. VIII, “predatory” is defined thus" “Predatory 1. Of, pertaining to, characterized by, or consisting in plundering, pillaging, or robbery-xx - 2. Addicted to, or living by, plunder; plundering, marauding, thieving, in modern use sometimes

applied to the criminal classes of great cities.- xx- 3. Destructive, consuming, wasteful, deleterious,- xx 4. Of an animal; That preys upon other animals; that is a beast, bird, or other creature of prey; carnivorous. Also, of its organs of capture, xx We have noticed that monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers. The price fixation is one of the essential factors. In American jurisprudence. 2d Volume 54, a passage at page 695 reads thus:"The Sherman Act does not out law price uniformity. An accidental or incidental price uniformity or even pure conscious price parallelism, is not itself unlawful. Moreover, a competitor's sole decision to follow price leadership- is not a violation of 15 USC S 1. On the other hand, a price- fixing conspiracy does not necessarily involve an express agreement, oral or written. It is sufficient that a concert of action is contemplated and that the defendants conform to the arrangement. The fixing of prices by one member of a group pursuant to express delegation,acquiescence, or under standing is just as illegal as the fixing of prices by direct joint action. A price-fixing combination is illegal even though the prices are fixed only by one member and without consultation with the others." (emphasisd supplied) A mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price can not readily be inferred. In the instant case, the fact that two of the three big manufacturers entered into post-tender correspondence and also offered a lower price of Rs. 67,000 is not dispute. Though they did not place the necessary material in support of their offer as to how it is viable and workable, they, however, sought to contend before us that the price offered by them is not predatory and is only a reasonable price. By our earlier order dated 14th January, 1993 we directed the Tender Committee to examine the matter afresh regarding the reasonable price on the basis of the data that may be placed by these big manufacturers in support of their offer of Rs. 67,000. Therefore no conclusion can be reached definitely that offer of the price of Rs. 67,000 by itself was predatory and the manufacturers who offered such a price consequently formed a cartel. Therefore, whether in a given case, there was formation of a cartel by some of the manufacturers which amounts to an unfair trade practice, depends upon the available evidence and the surrounding circumstances. In the instant case, initially the Tender Committee formed the opinion that the three big manufacturers formed a cartel on the ground that the price initially quoted by them was identical and was only a cartel price. This, in our view, was only a suspicion which of course got strengthened by post-tender attitude of the said manufacturers who quoted a much lesser price. As noticed above it can not positively be concluded on the basis of these two circumstances alone. In the past these three big manufacturers also offered their own quotations and they were allotted quantities on the basis of the existing practice. However a mere quotation of identical price and an offer of further reduction by themselves would not entitle them automatically to comer the entire market by way of monopoly since the final allotment of quantities vested in the authorities who in their discretion can distribute the same to all the man-

ufacturers including these three big manufacturers on certain basis. No doubt there was an apprehension that if such predatory price has to be accepted the smaller manufacturers will not be in a position to compete and may result in elimination of free competition. But there again the authorities reserved a right to reject such lower price. Under these circumstances though the attitude of these three big manufacturers gave rise to a suspicion that they formed a cartel but there is not enough of material to conclude that in fact there was such formation of a cartel. However, such an opinion entertained by the concerned authorities including the Minister was not malicious nor was actuated by any extraneous considerations. They entertained a reasonable suspicion based on the record and other surrounding circumstances and only acted in a bonafide manner in taking the stand that the three big manufacturers formed a cartel. S/Shri Nariman, Venugopal and Shanti Bhushan, learned counsel appearing for M/s Mukand, H.D.C. and Bharatiya respectively. contended that the Railways were bound to follow the rules and standards pertaining to the tender system and on the basis of these provisions and the course of conduct followed by the Railways in the matter of fixation of price and allotment of quota in the past let the manufacturers believe that the same course of conduct would be followed and the manufacturers legitimately expected that they would be treated equally and in a non-arbitrary manner and such legitimate expectation is a right guaranteed under Article 14. In Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries JT (1992) 6 S.C. 259 Justice J.S. Verma Speaking for the Bench observed as under: "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrari- ness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the state and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy this requirement of non- arbitrariness in a State action, it is therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bonafides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by it self be a distinct enforceable right; but failure to consider and give due weight to it may render the decision arbitrary and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable

or Legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations, may outweigh what would otherwise have been the legitimate expectation of the claimant. A bonafide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in. our legal system in this manner and to this extent." (emphasis supplied) In Navjoti coo-Group Housing Society etc. v. Union of India & Others (1992) 2 SCALE 548,justice G.N. Ray speaking for the Bench observed as under: "In the aforesaid facts, the Group Housing Societies were entitled to legitimate expectation of following consistent past practice in the matter of allotment, even though they may not have any legal right in private law to receive such treatment. The existence of legitimate expectation' may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the 'legitimate expectation without some overriding reason of public policy to justify its doing so. In a case of 'legitimate expectation' if the authority proposes to defeat a person's 'legitimate expectation' it should afford him an opportunity to make representations in the matter. In this connection reference may be made to the discussions on 'legitimate expectation' it page 151 of volume 1(1) of Halsbury's Laws of England Fourth Edition (Reissue). We may also refer to a decision of the House of Lords in Council of civil Service Union and others versus Minister for- Civil Service reported in [1985] 3 All England Reporter page 935. It has been held in the said decision that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment on such reasons. It may be indicated here that the doctrine of 'legitimate expectation imposes in essence a dun, on-public authority to act fairly, by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of 'legitimate expectation', the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent passed policy, come in. We have not been shown any compelling reasons taken into consideration by the Central Government to make a departure from the existing policy of allotment with reference to seniority in Registration by introducing a new guideline." (emphasis supplied) Relying on these decisions, it was contended that the decision of the Railways in fixing the price and in allotment of the quantities is arbitrary and unreasonable affecting the right to such legitimate expectation. To appreciate these contentions, it becomes necessary to refer to some of the rules governing these contracts and followed by the Railways, before we examine the impact of the doctrine of 'legitimate expectation'. The Rules prescribed by the Minister for Railways for entering into contracts lay down certain norms and contains guidelines. The rules provide for constitution of Tender Committee and the Procedure to be followed in the matter of inviting

tenders. They also provide for negotiations but lays down that selection of contracts by negotiations is an exception rather than a rule and can be resorted to only under certain circumstances. Regarding splitting of tendered quantity in more than one form, we find some guidelines in Annexure 50 which reads as under: "3.0. Where warranted, the tendered quantity may be split and tender decided in favour of one or more firms on merits of each case, in consultation with Associate Finance and with the approval of the authority competent to accept the tender having due regard to the following factors:- (i) Vital/Critical nature of the items; (ii)Quantity to be procured; (iii)Delivery requirements; (iv)Capacity of the firms in the zone of consideration; (v) Past performance of firms. xxxxxxx xxxxxxxx xxxxxxxxx 5.0 Splitting should not be done merely with a view to utilising developed capacity of the different sources but should be for valid reasons to be recorded in writing for splitting the tendered quantity." Annexure 213 contains the Railway Board letter dated 19.4.90 addressed to General Managers, All Indian Railways and others dealing with the subject of Non-acceptance of late/delayed/post/ Tender-offers. The relevant portion reads thus: "2. Instances have come to notice of the Board where on a strict application of the above instructions even late Tenders submitted by Public Sector firms for highly specialised equipments have been rejected. 3.The matter, has therefore been reconsidered by the Board and it has been decided that where late Tenders from established/reliable suppliers and conferring a substantial financial advantage is to be considered, notwithstanding the general ban, it will be open to the Railways to seek the Board's approval for the consideration of such Tenders, since this should be a very exceptional situation, such cases should be recommended for consideration of the Board with the personal approval of the General Manager, duty concuffed in by the F.A. & C.A.O. 4.The Railways should not enter into any dialogue with the agency submitting a delayed Tender without obtaining Board's prior clearance". Now coming to the notice inviting tender in the instant case, we have already noted that the price quoted is subject to price variation clause and the Railways reserved a right to accept the lowest price or accept the whole or any part of the tender of portion of the quantity offered. The notice however, mentioned that the tenderer is at liberty to tender for the whole or any portion or to state in the tender that the rate quoted shall apply only if the entire quantity is taken from him. From these provisions it becomes clear that the tenderer can not expect that his entire tender should be accepted in respect of the quantity and that the Railways have a night to accept the tender as a whole or a part of it or portion of the quantity offered. It is not in dispute that in the past also there were many instances where the Railways as per the procedure followed, arrived at decisions in respect of both price and quantity for good and justifiable reasons. In the year 1991 the quantities of M/s H.D.C. and Bharatiya were in fact reduce from the allocations made by the Tender Committee which made its recommendations on the basis of certain data. It has to be noted that the Tender Committee is not a statutory authority and its proposals are recommendatory in nature and have to be considered in the distribution procedure culminating in the decision of the approving authority who as a matter of fact, also can take decisions in respect of price and allotment

of quantities taking into consideration various other aspects from the point of view of public interest. Therefore it is evident that there is no legally fixed procedure regarding fixation of price and particularly regarding allotment giving scope to a legitimate expectation. However, with this facture background, we shall consider the contention regarding 'legitimate expectation'. In Halsbury's Laws of England, Fourth Edition, Volume 1(1) 151 a passage explaining the scope of "legitimate expectations" runs thus: "81. Legitimate expectations. A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past prac- tice. The existence of a legitimate expectation may have a number of different consequences'; it may give locus standi to seek leave to apply for 'judicial review; it may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so; or it may mean that, if the authority proposes to defeat a person's legitimate expectations, it must afford him an opportunity to make representation on the matter. The courts also distinguish, for example in licensing cases, between original applications, to renew and revocations; a party who has been granted a licence may have legitimate expectation that it will be renewed unless there is some good reason not to do so, and may therefore be entitled to greater procedural protection than a mere applicant for a grant." (emphasis supplied) We find that the concept of legitimate expectation first stepped into the English Law in Schmidt v. Secretary, of State for Home Affairs (1969) 2 Ch. 149 wherein it was observed that an alien who had been given leave' to enter the United Kingdom for a limited period had a legitimate expectation of being allowed to stay for the permitted time and if that permission was revoked before the time expires, that alien ought to be given an opportunity of making representations. Thereafter the concept has been Considered in a number of cases. In A.G. of Hong Kong v. Ng Yeun shiu, [1983] 2 A.C. 629 Lord Fraser said that "the principle that public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the government of Hong Kong to the respondent..... that each case- would be considered on its merits." In Council of Civil Service Unions and others v. Minister for the Civil Service (1984) Vol. 3 All E.R. 359, a question arose whether the decision of the Minister withdrawing the right to trade union member- ship without consulting the staff which according to the appellant was his legitimate expectation arising from the existence of a regular practice of consultation was valid. It was contended that the Minister had a duty to consult the staff as per the existing practice and that though the employee did not have a legal right, he had a legitimate expectation that the existing practice would be followed. On behalf of the Minister on the basis of the evidence produced, it was contended that the decision not to consult was taken for reasons of national security. The Court held as under: "An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit

or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellants legitimate expectation arising from the existence of a regular practice of consultation appellants could reasonably expect to continue gave rise to an implied limitation on the Minister's exercise of the power contained in Art. 4 of the 1982 order, namely an obligation to act fairly by consulting the GCHQ staff before withdrawing the benefit of trade union membership. xxxxxxxx xxxxxxx xxxxxxxx Once the Minister produced evidence that her decision not to consult the staff before withdrawing the right to trade union membership was taken for reasons, of national security, that overrode any right to judicial review which the appellants had arising out of the denial of their legitimate expectation of consultation. The appeal would therefore be dismissed. xxxxxxxx xxxxxxxx xxxxxxxx Administrative action is subject to control by judicial review under three heads: (1) illegality where the decision making authority has been guilty of an error of law, e g by purporting to exercise a power it does not possess; (2) irrationality where the decision-making authority has acted so unreasonably that no reasonable authority, would have made the decision, (3) procedural impropriety, where the decision making authority has failed in its duty to act fairly. (emphasis supplied) Therefore the claim based on the principle of legitimate expectation can be sustained and the decision resulting in denial of such expectation can be questioned provided the same is found to be unfair, unreasonable, arbitrary and violative of principles of natural justice. (vide Food Corporation of India's case and Navjyoti Coo-Group Housing Society's case (supra). The learned counsel for these three big manufacturers, however, relied on various decision in Amarjit Singh Ahluwalia v. The State of Punjab & Ors. [1975] 3 SCR 82, Ramana Dayaram Shetty's case and Peerless General Finance and Investment Co. Limited's case (supra) and contended that failure to follow the existing procedure resulting in denial of a right directly arising out of legitimate expectation is per se arbitrary and unreasonable and therefore illegal and consequently violative of Article 14 of the constitution. Of late the doctrine of legitimate expectation is being pressed into service in many cases particularly in contractual sphere while canvassing the implications underlying the administrative law. Since we have not come across any pronouncement. of this court on this subject explaining the meaning and scope of the doctrine of legitimate expectation, we would like to examine the same a little more elaborately at this stage. Who is the expectant and what is the nature of the expectation? When does such an expectation become a legitimate one and what is the foundation for the same? What are the duties of the administrative authorities while taking a decision in cases attracting the doctrine of legitimate expectation. Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes, the expectation can not be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand

on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves can not amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation can not amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense. It has to be noticed that the concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that"Legitimate expectation" is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and "in future, perhaps, the principle of proportionality." A passage in Administrative Law, Sixth edition by H.W.R. Wade page 424 reads thus: "These are revealing decisions. They show that the courts now expect government departments to honour their published statements or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness here comes close to unfairness in the form of violation of natural justice, and the doctrine of legitimate expectation can operate in both contexts. It is obvious, furthermore, that this principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly. Lord Scarman has stated emphatically that unfairness in the purported exercise of a power can amount to an abuse or excess of power, and this seems likely to develop into an important general doctrine." Another passage at page 522 in the above book reads thus: "It was in fact for the purpose of restricting the right to be heard that legitimate expectation was introduced into the law. It made its first appearance in a case where alien students of 'scientology were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this Sect, The Court of Appeal held that they had no legitimate expectation of extension beyond the permitted time, and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy, therefore, may cancel legitimate expectation, just as they may create it, as seen above. In a different context, where car-hire drivers had habitually offended against airport bye-laws, with many convictions and unpaid fines, it was held that they had no legitimate expectation of being heard before being banned by the airport authority. There is some ambiguity in the dicta about legitimate expectation, which may mean either expectation of a fair hearing or expectation of the licence or other benefit which is being sought. But the result is the same in either case; absence of legitimate expectation will absolve the public authority from affording a hearing. (emphasis supplied) In some cases a question arose

whether the concept of legitimate expectation is an impact only on the procedure or whether it also can have a substantive impact and if so to what extent. Att. Gen. For New South Wales v. Quin (1990) Vol. 64 Australian Law Journal Reports 327 is a case from Australia in which this aspect is dealt with. In that case the Local Courts Act abolished Courts of Petty Sessions and replaced them by Local Courts. Section 12 of the Act empowered the Governor to appoint any qualified person to be a magistrate in the new Courts System, Mr. Quin, who had been a Stipendiary Magistrate in charge of a Court of petty Sessions under the old system, applied for, but was refused, an appointment under the new system. That was challenged. The challenge was upheld by the appellate court on the ground that the selection committee had taken into account an adverse report on him without giving a notice to him of the contents of the same. In the appeal by the Attorney General against that order before the High Court it was argued on behalf of Mr. Quin that he had a legitimate expectation that he would be treated in the same way as his former colleagues considering his application on its own merits. Coming to the nature of the substantive impact of the doctrine, Brennan, J. observed that the doctrine of legitimate expectations ought not to " unlock the gate which shuts the court out of review on the merits," and that the Courts should not trespass "into the forbidden field of the merits" by striking down administrative acts or decisions which failed to fulfill the expectations. In the same case Mason, C.J. was of the view that if substantive protection is to be accorded to legitimate expectations that would encounter the objection of entailing "curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances." In R v. Secretary of State for the Home Department. ex parte Ruddock and others [1987] 2 All E R 518, Taylor, J. after referring to the ratio laid down in some of the above cases held thus: "On these authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesis there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty, or her duty as here, in the exercise of a prerogative power. I accept the submission of counsel for the Secretary of State that the respondent cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it. But then if the practice has been to publish the current policy, it would be incumbent on him in dealing fairly to publish the new policy, unless again that would conflict with his duties. Had the criteria here needed changing for national security reasons, no doubt the respondent could have changed them. Had those reasons prevented him also from publishing the new criteria, no doubt he could have refrained from doing so. Had he even decided to keep the criteria but depart from them in this single case for national security reasons, no doubt those reasons would have afforded him a defence to judicial review as in the GCHQ case." (emphasis supplied)

In Breen v. Amalgamated Engineering Union and Others [1971] 2 Law Reports Queen Bench Division 175, Lord Denning observed as under: "if a man seeks a privilege to which he has no particular claim such as an appointment to some post or other-then he can be turned away without a word. He need not be heard. No explanation need be given; see the cases cited in Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch. 149, 170-171. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should he afforded hint, according as the case may demand". (emphasis supplied) At this stage it is necessary to consider the scope of judicial review when a challenge is made on the basis of the doctrine of legitimate expectation. In Findlay v. Secretary of State for the Home Department, 19841 3 All E R 801 it was observed as under: "The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. These two applicants obtained leave. But their submission goes further. It is said that the refusal to accept them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will he examined individually in the light of whatever policy the State sees fit to adopt, provided always that the adopted policy is a lawful exercise of the discretion conferred on him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the Statute on the minister can in some cases be restricted so as to hamper, or even prevent. changes of policy. Bearing in mind the complexity of the issues which the Secretary of State has to consider and th e importance of the public interest in the administration of parole, I cannot think that Parliament intended the desecration to be restricted in this way." In Council of Civil Service Unions case Lord Diplock observed thus: "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decisions, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) lie has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (1) prefer to continue to call the kind of

expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to he enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences." In Attorney General for New South Wales case it is observed as under: "Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are"unfair" in the opinion of the court not to product of procedural fairness, but unfair on the meritsthe courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ. xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. The risk must be acknowledged for a reason which Frankfurter J. stated in Trop v. Dulles [1958] 356 US 86 at 119: All power is .in Madison's phrase of an encroaching nature. . . . . Judicial power is not immune against this human weakness. It also must he on guard against encroaching beyond its proper bounds and not he less so since the only restraint upon it is sell- restraint. If the courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open to the gate into the forbidden field of the merits of its exercise, the function of the courts would be exceeded of R v. Nat Bell Liquors Ltd. [1992] 2 A C 128 at 156. If the courts were to define the destine of legitimate expectations as something less than a legal right and were to protect what would be thus defined by striking down administrative acts or decisions which failed to fulfil the expectations, the courts would be truncating the power which are naturally apt to affect those expectations. 7o strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adript on a featureless sea of pragmatism. Moreover the notion of a legitimate expectation (falling short o a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. The authority of the courts and their salutary capacity judicially to review the exercise of' administrative power depend in the last analysis on their fidelity to the rule of law, exhibited by the articulation of general principles. To lie within the limits of judicial power the nation of"legitimate expectation " must be restricted to the illumination of what is the legal limitation on the exercise of administrative power tit a particular case. of course, if a legitimate expectation were to amount to a legal right, the court would define the respective limits of the right and any power which might be exercised to infringe it so as to accommodate in part both the right and the power or so as to accord to one priority over the other (That is a common place of cruial declarations.) but

a power which might be so exercised as to affect a legitimate expectation falling short of a legal right cannot be truncated to accommodate the expectation. So long as the notion of legitimate expectation is seen merely as indicating "the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded" to accord procedural fairness to an applicant for the exercise of an administrative power (see per Mahoney IA in Macrae, at 285), the notion can, with one important proviso, be useful. If. but only if, the power is so created that the according of natural justice conditions its exercise, the notion of legitimate expec- tation may useful focus attention on the content of natural justice in a particular case; that is, on what must be done to give procedural fairness to a person whose interests might he affected by an exercise of the power. But if the according of natural justice does not condition the exercise of the power, the notion of legitimate expectation can have no role to play. If it were otherwise, the notion would become a stalking horse for excesses of judicial review." (emphasis supplied) In this very case, Brennan J. after referring to Schmidt's case (supra) observed thus: "Again, when a court is decidsing what must be done in order to accord procedural fairness in a particular case it has regard to precisely the same circumstances as those to which the court might refer in considering whether the applicant entertains a legitimate expectation, but the inquiry whether the, applicant entertains a legitimate expectation is superfluous. Again if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to inquire whether those factors give rise to a legitimate expectation. But the Court must stop short of compelling fulfillment of the promise or practice unless the statute so requires or the statute permits the repostitory of the power to hind itself as to the manner of the future exercise of the power. It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits. The notion of legitimate expectation wits introduced at a time when the courts were developing the common law to suit modern conditions and were sweeping away the unnecessary archaisms of the prerogative writs, but it should not be used to subvert the principled justification I-or curial intervention in the exercise of administrative power." (emphasis supplied) In the same case, Dawsom. J. observed thus: "It also follows that the required procedure may very according to the dictates of fairness in the particular case. Thus, in order to succeed. the respondent must be able to point to something in the circumstances of the case which would make it unfair not to extend to him the procedure which he seeks. There is no doubt that the respondent had a legitimate expectation of continuing in his position as a stipendiary magistrate such that it should, apart from statute, have been unfair to remove him from that position without according him a hearing. If the principle of judicial independence expended to a stipendiary magistrate, then, no doubt, that would have strengthened his expectation. But the respondent was not removed from his position of stipendiary magistrate by administrative decision. He was removed

by a statute which abolished the position of stipendiary magistrate and established the new position of magistrate. Not only that, the statute, the Local Courts Act. clearly contemplated that not all the former stipendiary magistrates would be appointed as magistrates pursuant to its terms. Accordingly it made provision for those who where not so appointed. It may be possible to deprecate the manner in which the statute removed the respondent from office, but it is not possible to deny its effect. Any unfairness was the product of the legislation which conferred no right upon the respondent to a procedure other than that which it laid down." (emphasis supplied) On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question Would be whether failure to give an opportunity of hearing before the decision affect such legitimate expectation is taken has resulted in failure of' justice and whether on that ground the decision should he quashed. If that be so then what should be the relief is again a matter which depends on several factors. We find in Attorney General for New South wales' case that the entire case law on the doctrine of legitimate expectation has been considered. We also find that on an elaborate an erudite discussion it is held that the courts' jurisdiction to interfere is very much limited and much less in granting any relief in a claim based purely on the ground of 'legitimate expectation'. In Public Law and Politics edited by Carol Harlow, we find an article by Gabriele Ganz in which the learned author

after examining the views expressed in the cases decided by eminent judges to whom we have referred to above, concluded thus: "The confusion and uncertainty at the heart of the concept stems from its origin. It has grown from two separate roots, natural justice or fairness and estoppel., but the stems have become entwined to such an extent that it is impossible to disentangle them. This makes it that it is very difficult to predict how the hybrid will develop in future.This could be regarded as giving the concept a healthy flexibility, for the intention behind it is being it has been fashioned to protect the individual against administrative action which is against his interest. On the other hand, the uncertainty of the concept has led to conflicting decisions and conflicting interpretations in the same decision." However, it is generally accepted and also clear that legitimate expectation beings less than right operate in the field of public and not private law and that to some extent such legitimate expectation ought to be protected though not guaranteed. Legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be obsolete before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right, in cases of contracts, distribution of largest by the Government and in somewhat similar situations. For instance in cases of discretionary grant of licences, permits or the like, carries with it a reasonable expectation, though not a legal right to renewal or non-revocation, but to summarily disappoint that expectation may be seen as unfair without the expectant person being heard. But there again the court has to see whether it was done as a policy or in the public interest either by way of G.O., rule or by way of a legislation. If that be so. a decision denying a legitimate expectation based on such (,rounds does not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply and objective standard which leaves to the decising authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is 194 . taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance if an authority who has full discretion to grant a licence and if he prefers an existing licence holder to a new applicant, the decision can not be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice. It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expecta-

tion should not be substantively protected than the reasons as to why it should be protected. In other words such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed in Attornry General for New South Wales' case "To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of power when its exercise otherwise accords with law." If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory unfair or based, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim biased on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the ground to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits," particularly when the element of speculation and uncertainty is inherent in that very concept. As cautioned in Attorney General for New South Wales' case the courts should restrain themselves and restrict such claims duty to the legal limitations. It is a well-meant caution. Otherwise a resourceful litigant having vested interests in contracts. licences etc,. can successfully indulge in getting welfare activities mandated by directive principles thwarted to further his own interests. The caution, particularly in the changing scenario, becomes all the more important. In view of our conclusions in respect of the quantities allotted and the price fixed it may not be necessary for us to enter into further discussion on this aspect. We have already directed 0that the Tender Committee should consider afresh as to what should be the reasonable price and to that extent the price of Rs. 67,000 fixed in respect of smaller manufacturers is set aside and directed to be revised. So far these three big manufacturers are concerned, we held that on their own commitment they are bound to supply at the rate of Rs. 67,000 per bogie. So far the quantities are concerned, we held that these three big manufacturers should be allotted the quantities as per the recommendations of the Tender Committee. However, we considered this aspect to some extent only to show that the decision in respect of price fixation as well as allotment of quantities even though to some extent at variation with the procedure followed during the previous years, was not based on any irrelevant consideration. The Railways particularly the Financial Commissioner as well as the Minister and initially the Tender Committee formed an

opinion that these three big manufacturers formed a cartel and also quoted and unworkable predatory price at the post-tender stage. Therefore from the point of view of preventing monopoly in the public interest the decision in question was taken in a bonafide manner. However, on a factual basis we held that the alleged formation of cartel was only in the realm of suspicion and in that view the decision was modified, as already indicated. However, we make it clear that the said modifications by way of judicial review is not on the ground of legitimate expectation and violative of principles of natural justice but on the other ground namely the decision of the authorities was based on wrong assumption of formation of a cartel. The next submission is that the decision taken by the Railways resulting in reduction of the quantities and making a counter-offer of Rs. 65,000 to these three big manufacturers is punitive in nature visiting with civil consequences and such a decision taken without giving an opportunity to these manufacturers is violative of principles of natural justice. In view of our above mentioned conclusions resulting in modification of the decision of the authorities both in respect of price fixation and in allotment of quantities, there is no necessity to consider this aspect again in detail. It was next contended that the consideration that some manufacturers are small and others are BIFR companies taken into account by the approving authority for deviating from the age-old practice in allocation of quantities is irrelevant and discriminatory and therefore the decision is bad. It may be mentioned that status of a manufacturers being a BIFR company or a small manufacturers was not taken into account so far as the fixation of the price is concerned and these considerations were deemed relevant only for the purpose of allocation of quantities. The stand taken by the Railways is that smaller manufacturers should survive from the point of view of arresting monopolistic tendencies and from the point of view of public interest. The Tender Committee proceedings would indicate that on the basis of certain formulae namely the past performance, capacity etc. the allotment was being made. Therefore these can not be said to be irrelevant considerations and as a matter of fact they had been duly given effect to and weightage was given accordingly in respect of allotment of quantities to various manufacturers within the four corners of the limited tender. The learned counsel, however, contended that the allotment of the quantities to the smaller manufacturers also is not based on any acceptable principle and that some of them are given larger quantities without any justification rendering the decision bad because of arbitrariness. The proceedings mentioned above particularly the nothings of the Financial commissioner as well as the competent authority would show that some of the smaller manufacturers namely M/s Himmat, Texmaco and Sri Ranga were BIFR companies. As no price preferential treatment was given to any one of them. the approving authority considered that enhancement in allocation of quantities was necessary. Likewise M/s. Cimmco and Texmaco who are wagon builders and whose business in entirely with the Railways were also given some weightage. We can not say that these are irrelevant considerations for the purpose of arriving at a decision. In the past also there were such variations based on these circumstances. In any event for different reasons we have varied this decision and directed that the three big manufacturers should

be given allotment as per the recommendations of the Tender Committee. In our earlier order we have noticed that there has been some departure in respect of one or two smaller manufacturers in allotting the quantities. We have already indicated that the Railways authorities should in future make a proper consideration of the relevant factors in respect of each tenderer in an objective manner in allotting the quantities. Now coming to the question of dual pricing, the submission is that in respect of same set of manufacturers, some of them can not be made to supply at a lower price and the others namely smaller manufacturers can not be given advantage to supply at a higher price and such dual pricing is unreasonable and arbitrary. As already noted, the Tender Committee worked out an upgraded price and taking into other relevant factors like cost of the material etc. into consideration and applying the formula as was being done in the past and particularly taking into consideration the two concessions in respect of custom and freight fixed Rs. 76,000 as the reasonable price. This was very close to the price quoted by the three big manufacturers. But at a post- tender stage, they entered into correspondence offering a lower price and ultimately the three big manufacturers committed themselves to supply at the rate of Rs. 67,000 per bogie. In our earlier order we indicated that these big manufacturers formed a different category namely that they may be in a position to supply at that rate as is evident from their own commitment but to apply the same price which is much lower than the reasonable and workable price fixed by the Tender Committee to other smaller manufacturers would again result in ending the competition between the big and the small which ultimately would result in monopoly of the market by the three big manufacturers. That is a very important consideration from the point of view of public interest. However, as already mentioned we directed the 'render Committee to consider the matter afresh an even if it results in dual pricing, it would not be had in the circumstances mentioned above. These are all the reasons in support of our conclusions given in our order dated 14th January, 1993. V.P.R. SLPs disposed of,