

Mr. B.S.N. Joshi & Sons Ltd vs Nair Coal Services Ltd. & Ors on 31 October, 2006

Equivalent citations: AIR 2007 SUPREME COURT 437, 2006 (11) SCC 548, 2006 AIR SCW 5834, 2007 (1) AIR BOM R 230, (2006) 11 SCALE 526, (2007) 1 WLC(SC)CVL 216, 2008 (1) ALLMR (NOC) 3, (2007) 3 BOM CR 744

Author: S.B. Sinha

Bench: S.B. Sinha, Dalveer Bhandari

CASE NO.:

Appeal (civil) 4613 of 2006

PETITIONER:

Mr. B.S.N. Joshi & Sons Ltd.

RESPONDENT:

Nair Coal Services Ltd. & Ors.

DATE OF JUDGMENT: 31/10/2006

BENCH:

S.B. Sinha & Dalveer Bhandari

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No.24879 of 2005] S.B. SINHA, J :

Leave granted.

A notice inviting tender was issued by the Maharashtra State Electricity Board, now known as 'Maharashtra State Power General Co. Ltd.' (for short, MAHAGENCO'), inter alia, for coal liaisioning, quality and quantity supervision for its Thermal Power Station on 03.03.2005. Indisputably, coal is used as a primary fuel for generation of electrical energy in the power stations belonging to MAHAGENCO wherefor coal is procured from various coal mines belonging to Government Companies including Western Coalfields Ltd., South Eastern Coalfields Ltd., Mahanadi Coal Ltd. and Singareni Collieries Ltd.

Pursuant to and in furtherance of the said notice inviting tender, Appellant herein as also Respondent Nos. 1, 4 and 5 submitted their tenders. Tender of Appellant herein was accepted by MAHAGENCO. Estimated amount of contract as per MSPGCL was Rs.4842.25 per M.T. The rates quoted by the respective parties are as under :

"

Sl.

No. PARTICULARS ESTIMATED ORDER AMOUNT/PER YEAR % OF AMOUNT WITH RESPECT TO MSPGCL ESTIMATION

1. M/s BSN Joshi & Sons Ltd.

Rs.1287.64 26.59%

2. M/s Nair Coal Services Ltd.

Rs.6459.77 133.42%

3. M/s Karam Chand Thapar & Bros (CS) Ltd.

Rs.6510.70 134.47%

4. M/s Nareshkumar & Co. Ltd.

Rs.6544.96 135.17% "

On the premise that Appellant herein failed to fulfill the essential qualifications as contained in Para 1.5(ii), 1.5(v) and 1.5(vii) of the notice inviting tender, a writ petition was filed by First Respondent before the Nagpur Bench of the Bombay High Court.

The said writ petition has been allowed by a Division Bench of the High Court by reason of the impugned judgment quashing the order awarding contract in favour of Appellant.

Indisputably, the tender documents were in two parts : (a) technical bid; and (b) financial bid. Ordinarily, nine conditions mentioned therein were required to be fulfilled by the bidders before their respective financial bids could be opened.

As indicated hereinbefore, according to First Respondent, Appellant did not fulfill the essential conditions laid down in the technical bid and, thus, was ineligible for being considered for awarding the said contract.

The relevant provisions of the notice inviting tender are as under :

"(ii) The Bidder should have executed the work of total minimum quantity of 5 (Five) Million Metric Tons per year for preceding 5 years. Besides this bidder should have

The bidder should submit the copies of the relevant documents to authenticate his claim towards experience.

Indisputably, handling of quantum of coal by Appellant herein for five years preceding invitation to treat was as under :

1999-2000 | 2000-01 | 2001-02 | 2002-03 | 2003-04

[illegible]

2. Liaisoning with M/s SCCL & Railways for loading supervision shortage minimization & dispatch of good quality coal as per specification to Power Station of APGENCO APGEN CO to KTPS (O&M) Paloncha To KTPS Vth Stage Paloncha | 30,75,996.08 |||||

23,22,337.48 |||||

3. Liaisoning work in respect of Quantity & Quality I/c Loading supervision and movement of coal to Satpura Thermal Power Station, Sarni.

MPSEB

13,98,269.55 | 32,55,587.39 | 35,23,708.55 | 32,52,401.01 | | | | | | | | | | | | | | | | | |

4. Liaisoning work in respect of Quality & Quantity aspects including loading supervision & movement of coal by rail to (SGTPS), Birsingpur Pali.

MPSEB

7,36,553.00 | 38,96,023.00 | 35,21,527.00 | 41,87,553.00

GRAND TOTAL

81,40,714.86 | 1,91,80,192.84 | 81,82,949.02 | 74,39,934.01 | 66,53,864 It is not in dispute that whereas a contractor was required to handle 30 million metric tones of coal during last five years, Appellant had handled more than 49 million metric tones of coal. In relation to the contract, Appellant claimed that it had entered into a contract with Andhra Pradesh Power Generation Corporation Limited (APGENCO) and it was awarded a contract for one year with effect from 11.09.2003, It completed the said contract successfully. The contract came to an end on 10.09.2004.

It is also not in dispute that whereas in terms of the notice inviting tender the proof in regard to handling of contract was to be shown in the calendar year, all the participants showed the same for financial year; and the authorities of MAHAJENCO accepted the change. The requisite term in the contract is as under :

"Please confirm that you have similar experience of liaisoning for loading, dispatches and monitoring the movement of coal by railways, at least continuously for a period of 3 (three) years for thermal power stations. The bidder should have executed the work of total minimum quantity of 5 (five) million metric tones per year for preceding five calendar years (2000, 2001, 2002, 2003, 2004) and should have executed the work of total quantity of 10 (ten) Million MTs in any of the preceding

5 (five) years on behalf of State Electricity Board and/or NTPC and/or other State or Central Undertakings and/or the Private Power Generating Companies as their liaison agent with regard to receipt and supply of the coal including supervision on dispatch, loading, movement of the coal upto the destination by Railways only. Experience of monitoring and movement of coal of manufacturers of cement or steel will also be considered. However, the experience of movement of coal by road and ropeway shall not be considered for such purposes. Bidder should have experience of monitoring of coal supplies from any or more of the following coal companies for preceding three years SECL, MCL, SCCL, WCL."

Indisputably the said term had been modified after opening of the technical bid from calendar year to financial year. It is also not in doubt or dispute that if requirements were treated to be furnishing details in each calendar year and not financial year, no tenderer was qualified for award of the contract. Appellant contended that there had been a consistent practice in the past that the contracts were awarded for one year or two years, as the case may be, and in view of the fact that the contracts were not awarded on financial year or calendar year basis, deviation was permissible.

Our attention has been drawn to the fact that if the quantity supplied in the said period is taken into consideration, Appellant must be held to be qualified.

In regard to the finding of the High Court that Appellant did not satisfy the criteria that it had engaged 100 workers, the question which arose was as to whether having regard to the fact that tender document issued on 03.03.2005, the requirement to engage minimum 100 persons in the previous year would mean financial year 2003-04 or 2004-05.

In this connection, reference has been made to a letter dated 10.03.2005 issued by Appellant herein to the Assistant Commissioner, Employees' Provident Fund, stating :

"We will appreciate if you could arrange to inform us about your Accounting & Financial Year i.e. how do you take the Accounting & Financial Year.

This information is needed for computing our accounts.

Please do the needful at the earliest."

In response thereto by a letter dated 16.03.2005 the Assistant Provident Fund Commissioner informed Appellant that :

"After verifying our records we hereby confirm that M/s B.S.N. Joshi & Sons Ltd., has paid Provident Fund Contributions for more than 100 persons for the period from March, 2004 to February, 2005 and deposited Provident Fund amounts.

The above letter is issued at the request of M/s B.S.N. Joshi & Sons Ltd."

In regard to the purported violation of Condition No.1.5(vii), it was submitted that Appellant had never been declared to be a defaulter. Only because certain disputes were pending by and between Appellant and Madhya Pradesh State Electricity Board and some recovery proceedings had been initiated by the latter, the same would not mean that it was a declared defaulter. According to Appellant, no hearing was given to it by the Madhya Pradesh State Electricity Board, prior to passing of an order declaring it to be a defaulter, which was sine qua non therefor. It was further contended that Board of Directors of MAHAGENCO took into consideration each of the documents filed by each of the tenderers scrupulously and opined that keeping in view the rates quoted by Appellant, acceptance thereof would be in the interest of the Board, as thereby it would save about Rs.52 crores and in that view of the matter it was improper on the part of the High Court to interfere therewith in exercise of its power of judicial review under Article 226 of the Constitution of India.

Mr. Vivek Tankha, learned Senior Counsel appearing on behalf of the Writ Petitioner-Respondents, on the other hand, would contend that each of the nine conditions laid down in the notice inviting tender were pre-requisites for the tenderers being considered therefor. They, being imperative in character, could under no circumstances be relaxed. If the Board keeping in view the magnitude of the contract intended to have an experienced contractor who had not only handled specified quantity of coal but also have sufficient personnel on its roll and/or must not necessarily be a defaulter vis-à-vis any other public sector undertaking, no exception thereto could be taken and Appellant, thus, necessarily was required to comply with each of the said conditions. In regard to modification of clause 1.5(ii) from calendar year to financial year, it was urged that such deviation was permissible in law.

Mr. Tankha would submit that in regard to the violation of condition No.1.5(v) not only more than 100 persons should have been on the roll of Appellant during the period April to March in the financial year 2003-04, but also it was required to file proof of payment of provident fund for the preceding year. The learned counsel contended that from the records produced by Appellant, it would appear that whereas at the first instance, it filed proof of payment of the employees' provident fund for a few persons, it later on furnished supplementary challans on 07.03.2005 so as to raise the number of employees to more than 100. The Board, according to learned counsel, overlooked this fact and purported to have relaxed the condition, which power it did not have. In regard to the finding of the High Court that Appellant was a declared defaulter, it was contended that the expression 'declared' would merely mean to make it known that a huge amount was payable to the Madhya Pradesh State Electricity Board, and furthermore the same was required to be considered having regard to the fact that when in relation to such a contract dated 17.04.2005 the case of Appellant was not considered, it filed a writ petition before the Madhya Pradesh High Court, which was dismissed, inter alia, on the ground that it was a defaulter. The Letters Patent Appeal filed thereagainst having also been dismissed by the Madhya Pradesh High Court, Appellant must be held to have been declared a defaulter by the High Court itself.

Mr. A.S. Bhasme, learned counsel appearing on behalf of MAHAGENCO drew our attention to the fact that the pursuant to the order of the High Court dated 03.05.2005 fresh tenders had been invited and by an order dated 27.03.2006 this Court directed :

"Learned counsel for the petitioner submits that the main petition is coming up for final hearing on 17th April, 2006. Learned counsel appearing for respondent Nos.2 and 3 submits that for purposes of generating power, coal supplies have to be continued to the respondents failing which the entire generation of electricity shall come to a standstill. Keeping in view this fact, the respondents are permitted to go ahead with their tender process including award of contract. They are free to make whatever arrangement they want to make in this behalf to ensure continued supply of coal to them. It is, however, made clear that whatever arrangement is made by the respondents the same will be subject to the final decision of this Special Leave Petition."

Respondent Nos. 1, 4 and 5 had been allotted contract in furtherance thereof. According to the learned counsel, the Board shall abide by the decision of this Court.

Offers are to be made in response to the notice inviting tender. Only when an offer is made and accepted, a contract comes into being.

The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down therefor. We would, a little later, notice the underlying intention of the employer in prescribing the so called essential conditions.

So far as non-fulfilment of Condition No.1.5(ii) of the tender document is concerned, the High Court opined that Appellant did not fulfil the condition of handling a quantity of 5 million metric tones in the financial year 2004-04, stating :

" They also demonstrate that the Authority floating tender must insist upon compliance of essential conditions of eligibility and is not entitled to deviate from insistence on strict compliance of such essential conditions of eligibility. However, in case of ancillary or subsidiary condition, it is open to the Authority to deviate therefrom "

With a view to understand the implication of the conditions, we may notice certain broad facts. In its letter dated 18.08.2005, Appellant stated :

"It may be relevant to mention here that the total quantity of coal handled by us during the preceding five years as shown at page no.85 in the tender submitted by us is 4,73,76,084 tonnes, thereby average figure of quantity handled per year is 9.47 million tonnes which is far above the desired figure of 5 million tonnes as per tender requirement.

Further, the quantity of coal handled by us in the year 2002-03 has been shown as 10,30,829.84 tones in the tender which is in fact 32,52401.01 tones as confirmed vide S.E. Services-II, MPSEB. Sarni's letter no.905/1800/2097 dated 29.03.2005. A copy

of the letter has already been submitted as annexure 'O' of our confidential letter no.BSNJ/NGP/MSEB/04-05 dated 16.04.2005 addressed to the Dy. Chief Engineer (GEN. TIS &C MSPGC, Nagpur.

Thus, the quantity handled by us during the preceding five years is in fact 4,95,97,663 tonnes i.e. 49.60 million tones as per figures confirmed and certified by the respective power station authorities. Even after excluding the figure 3.164 million tones, which is part of the quantity handed by us at APGENCO under the aforesaid L.O.I.s, at para no.1, during the contract period of one year ending in Sept. 04, the average yearly quantity handled by us for the preceding five years is 9.29 million tones per year as against the required figure of five million tones per years.

We hope that our explanation as stated above shall clarify the position on the points raised in your above referred letter.

Further, we humbly wish to submit that, as being L-1 party, if the work, as a whole, is awarded to us, we are ready to service MSPGCL. We have no objection if the work is awarded to us for a period of one year only. We also do not have any objection if the work is distributed among all the bidders including us."

An inquiry admittedly was conducted on behalf of MAHAGENCO as to whether the statements made by Appellant herein in relation thereto were correct. The Andhra Pradesh Power Generation Corporation Limited in its letter dated 15.06.2005, stated :

"With reference to the letter cited above it is to confirm that M/s B.S.N. Joshi & Sons Ltd. has supervised the following Coal quantity for the year 2003-04 and 2004-05.

S. No. Period Name of Colliery Quantity in MT

01.

11.09.2003 to March 2004 M/s MCL Talcher 3172750.00

02. 01.10.2003 to 31.03.2004 M/s MCL, Ibvalley Area 316930.00

3489680.00

03. 01.04.2004 to 10.09.2004 M/s MCL Talcher 2774455.00

04. 01.04.2004 To 30.09.2004 M/s MCL Ibvalley Area 389732.00

3164187.00
-----"

It is, therefore, evident that total quantity of 62,64,135 metric tones of coal had been handled by Appellant for them.

The intention of introduction of the said clause becomes self-evident from the aforementioned note. It may be true, as was observed by the High Court, that the Respondents in the tender documents did not categorically state that the block of 365 days in respect of handling of coal by the tenderes shall be taken into consideration. It is also true that the Corporation must be held to be aware as to what was the true intent and purport of the said term.

A special committee was constituted to scrutinize the tender document submitted by all the four bidders. A comparative statement was prepared wherein the discrepancies vis-à-vis the conditions of tender were recorded. Clarifications were sought for from the bidders. The Scrutiny Committee made its observations on such clarifications. It recorded that Appellant substantially complied with all the essential conditions. It also noticed that Appellant had enclosed three copies of the PF Challans for the year 2003-04 showing that Provident Fund for more than 100 employees has been deposited. In regard to the contention that Appellant was a declared defaulter, it took into consideration the opinion of the Law Officer, which was as under :

"In this regard, I would like to state that M/s BSN Joshi & Sons Ltd. filed application for deleting observations in para 8 of the order by filing MCC No. 644 of 2004. In the said application M/s BSN Joshi & Sons Ltd. contended before the High Court that they never admitted as 'defaulter and therefore, the word "admittedly" used in para 8 of the judgment is not appropriate. It was contended that the word "admittedly"

in the order was coming in their way in securing other contracts and also that it may affect other pending litigations. The Hon'ble Division Bench deleted the word "admittedly" and replaced it by word "apparently". The Hon'ble Bench further observed that in view of such observation there can be no basis for apprehension that the said order will come in the way of any other litigation. Thus, the High Court has clarified that the observation will not come in the way of M/s BSN Joshi & Sons Ltd.

From the circumstances on record, it seems that the possibility that there might be business rivalry between M/s Nair Coal Services Ltd. & M/s BSN Joshi & Sons Ltd., cannot be ruled out. Admittedly there are litigations between MPEP & M/s BSN Joshi & Sons Ltd. may be for breach of contract. However, that does not mean that M/s BSN Joshi & Sons Ltd. is declared defaulter by the

said Board. The High Court has already clarified that the observations about defaulter, will not come in way, in any other litigations."

From the note-sheet in regard to price bids, it furthermore appears, that the following observations were made therein :

"9.1. As per instructions, vide letters dated 8.6.2005, all the bidders were informed the decision to open price bids on dated 13.6.2005 (Please refer Annexure 'V' enclosed).

The price bids of all the four bidders were opened on 13.6.2005 and the audited statements of the rates quoted by the 4 bidders is enclosed herewith as Annexure 'W'.

9.2 From the comparative statement, it is observed that rates quoted by M/s B.S.N. Joshi & Sons Ltd. for all the seven items P,Q,.R,S,T,U, V (as detailed under paragraph 3 of this note) are quite less than the rates quoted by other three bidders, namely, M/s Nair Coal Services Ltd., M/s Karam Chand Tahpar & Bros. (CS) Ltd. and M/s Nareshkumar & Co.

9.3 For item 'P' contract (i.e. for linkage materialization, shortage minimization and quality monitoring M/s B.S.N. Joshi & Sons Ltd., have quoted Rs. 5.70 while other three bidders have quoted Rs. 12.50 present rate in the existing contract for the similar type of work is Rs. 6.50 For items Q, R, R, S, T, U, V, M/s B.S.N. Joshi & sons Ltd., have quoted their rates in the range of 12 paise to 50 paise whereas other three bidders have quoted the rates in the range of Rs. 10 to Rs. 75/-"

It is also of some significance to note that the Chief Engineer in his note dated 19.08.2005, by which date the writ petition had already been filed by the First Respondent in the High Court, upon consideration of the recommendations made by a Committee appointed for the said purpose and upon inviting all the four bidders for negotiation of rates and matching of rates with the lowest bidder by the other three parties, stated :

"Since above three bidders are not ready to mach the rates with lowest bidder, we do not have any other option but to award whole contracts to M/s BSN Joshi & Sons and accordingly we may intimate the bidder M/s Nair Coal Services Ltd. as per the court directives.

It is therefore requested to accord the approval for above so as to enable coal office to communicate our decision to the Petitioner as well as Hon. High Court The estimated order value of this tender is about Rs.13 crores. As per B.R.No.277 dated 11.10.2004 (copy enclosed as Annexure-C) the M.D. MAHAGENCO in consultation with Director (Operation) and & Director (Finance) is empowered to place the order upto Rs.15 crores in works contract."

The said note received the approval of the Director (Operation). The Director (Finance) in his note dated 19.08.2005 opined :

"All the four tenderers were called for negotiations on 17th August, 2005. M/s Nair Coal Services Ltd., Nagpur, M/s Nareshkumar & Co. Ltd., Nagpur and M/s Karamchand Thapar & Brs. Ltd., Mumbai have submitted in writing that they are not in a position to match their rates with LI. All the parties have also raised the issue of LI not satisfying the qualifying requirement. In this connection, it is noted that as per the tender conditions the requirement regarding turnover was to be evaluated for 5 calendar years. However, while submitting the offers, all the firms including the LI have submitted their physical turnover for financial years instead of calendar years. In order to evaluate all the firms on the same footing the deviation from calendar year to financial year was made. The intention of introducing such qualifying requirement is essentially to ascertain the physical capability of the bidder to carry out the work of the scale stipulated in the tender. It is, therefore, not very relevant whether for the purpose of evaluation the calendar year or financial year or any other period of 365 days is considered. Therefore, considering the documents submitted by M/s B.S.N. Joshi & Co. in this regard and confirmation given by M/s APGENCO it was recommended that M/s B.S.N. Joshi & Co. can be considered to satisfy the qualifying requirement and that their financial bid be opened along with the other tenderers.

On the issue of LI being apparent/admitted defaulters etc. L.O. has already given his opinion. As per the comparative statement of rates placed by Pg.24 it is seen that M/s Nair Coal Services Ltd., Nagpur, M/s Karamchand Thaper & Brs. Ltd. and M/s Nareshkuamr & Co. Ltd. have formed a cartel. The difference between the rates quoted by LI and other three firms is of the order of Rs.51 crs. to 52 crs. Keeping in view the huge difference and the interest of the organization, it would be appropriate to consider the offer of LI and award the contract to LI."

The Managing Director of MAHAGENCO approving the note of the Director, Finance, stated :

"On perusal of rates M/s Nair Coal Services Ltd., Nagpur, M/s Nareshkumar & Co. Ltd. Nagpur and M/s Karamchand Thapar & Brs. Ltd., Mumbai, it is apparent that they have formed a cartel. The rates quoted by these firms are nearly 51 crs. to 52 crs. More than quoted by LI. As a goodwill gesture the above parties were called for negotiations. However, they have refused to match the LI rates.

In view of the above, it is in public interest and in the interest of MAHAGENCO a Govt. owned, public utility that the work is allocated to the lowest qualified bidder namely M/s B.S.N. Joshi & Co."

Deviation, if any, therefore, was made by the competent authority of MAHAGENCO keeping in view the peculiar facts and circumstances of the case.

It is significant to note that a finding was arrived at that the private respondents herein formed a cartel. What a cartel has been stated in Advanced Law Lexicon, 3rd edition by P. Ramanatha Aiyar at page 693 in the following terms :

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale of price of, or, trade in goods or provision of services."

In *Union of India v. Hindustan Development Corporation* [AIR 1994 SC 988, 1008], this Court held :

"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."

A similar interpretation was made by the appropriate authority of MAHAGENCO in relation to compliance of Condition No.1.5(v) of the tender document.

Before we embark upon the respective contentions made before us on the said issue, we may notice that although the point was urged during hearing before the High Court, the First Respondent in its writ application did not raise any plea in that behalf. The High Court was not correct in allowing First Respondent to raise the said contention. [See *Tmajirao Kanhojirao Shirke and Another v. Oriental Fire & General Insurance Co. Ltd.*, [(2000) 6 SCC 622, at page 625] The short question before the High Court was as to whether the financial year should be taken to be April to March or March to February. According to the authorities of the Provident Fund, the financial year is taken to be from March to February in the sense that dues in respect of March are deposited in April and those of February are deposited in March. Yet again, the same logic would apply in regard to the intention of MAHAGENCO which according to them was to ascertain that the contractor should have minimum 100 number of employees on its roll so that its works ultimately do not suffer.

This brings us to the question as to what would be the meaning of a 'declared defaulter'.

The expression 'declaration' has a definite connotation. It is a statement of material facts. It may constitute a formal announcement or a deliberate statement. A declaration must be announced solemnly or officially. It must be made with a view 'to make known' or 'to announce'. [See *Prativa Pal v. J.C. Chatterjee* [AIR 1963 Cal. 470 at 472]. When a person is placed in the category of a declared defaulter, it must precede a decision. The expression 'declared' is wider than the words 'found' or 'made'. Declared defaulter should be an actual defaulter and not an alleged defaulter.

When it is proclaimed or published affecting the rights of the parties, in the sense in which it has been used, so far as the affected person is concerned, its effect, would be akin to black-listing. When a contractor is black-listed by a department, he is debarred from obtaining a contract, but in terms

of the notice inviting tender when a tenderer is declared to be a defaulter, he may not get any contract at all. It may have to wind up its business. The same would, thus, have a disastrous effect on him. Whether a person defaults in making payment or not would depend upon the context in which the allegations are made as also the relevant statute operating in the field. When a demand is made, if the person concerned raises a bona fide dispute in regard to the claim; so long as the dispute is not resolved, he may not be declared to be defaulter.

In *M/s Erusian Equipment & Chemicals Ltd. etc. v. State of West Bengal and Another* [(1975) 1 SCC 70], this Court stated the law thus :

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

Yet again in *Raghunath Thakur v. State of Bihar and Others* [(1989) 1 SCC 229], it was opined :

"4. Indisputably, no notice had been given to Appellant of the proposal of blacklisting Appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order "

In this case, Appellant had made a counter claim. It had raised a bona fide dispute. It may be true that when the tender document was not furnished to Appellant by the Madhya Pradesh State Electricity Board, on the premise that he is a defaulter, it filed a writ petition. A learned Single Judge of the Madhya Pradesh High Court while passing an order dated 05.08.2004 recorded a finding that it was a defaulter in respect of the said demand.

We may, however, notice that the principal ground for not entertaining the writ petition filed by Appellant was judicial restraint on the part of the court. It refused to intervene in the decision making process relying on or on the basis of a decision of this Court in [*Tata Cellular v. Union of India* - AIR 1996 SC 11].

The matter was carried in appeal The Division of the High Court in its order stated :

"The ratio of the Judgments (supra) makes it clear that the Judicial review in such matter should be in rare cases and on limited grounds as quoted above. Appellant admittedly being a defaulter it cannot be said that the Board has committed any illegality in outstanding Appellant from the tender process. No mala fides has been alleges."

It is, however, not in dispute that a Misc. Application was filed and the Division Bench by an order dated 03.05.2005 deleted the word 'admittedly' and substituted the same by the term 'apparently'. It was clearly observed : "in view of such observation, there can be no basis for apprehension that the said order will come in the way of any other litigation'.

Mr. Tankha was, therefore, not correct in submitting that the High Court declared Appellant to be a defaulter, Nor could it do so. By reason of the impugned judgment, the High Court while noticing that the term 'defaulter' would mean a formal statement, proclamation or announcement, wrongly opined :

" We cannot close our eyes to the fact that the bidder, who is a defaulter, merely because the State Electricity Board for some reasons, fails to declare such bidder a defaulter, however, in absence of such declaration, the bidder, in our view does not cease to be a defaulter "

The observations were made out of context. The Madhya Pradesh High Court did not declare Appellant to be a defaulter. So was the Madhya Pradesh State Electricity Board. They could not have declared Appellant to be a defaulter. It had no jurisdiction to do so. In the said writ petition filed by Appellant before the Madhya Pradesh High Court, the Madhya Pradesh State Electricity Board took a categorical stand in its counter affidavit that it had not declared Appellant to be a defaulter, stating :

" So far as the performance of the petitioner is concerned, it was found satisfactory he has supplied the coal to the destination and there was no default on his part. On he has delayed in making payment to the Railway authorities on which 15% surcharge was imposed and virtually recovered from the Board but now the Respondent no.3 has undertaken to pay said amount. So far as the award of Labour Court is concerned the Board has no knowledge about it because Board was not party in the Labour Court."

It was further stated :

"That till today the Respondent no. 3 has not been blacklisted by the Board. There are various decisions of this Hon'ble High Court and Supreme Court that unless a contract declared black listed, the tender document cannot be refused to him. Though there is Rs. 97 lacs recoverable from Respondent no.3 but he has given undertaking that he will pay the amount to the Board."

The High Court, thus, failed to notice the materials placed on records by the parties. The matter was internally examined by the officers of MAHAGENCO. The opinion of the Law Officer was sought for. The Law Officer of MAHAGENCO clearly opined :

" Considering their business rivalry it is advisable not to pay much attention to such pressure tactics in the interest of the Board. Merely because some litigations are pending between MPSEB and BSN Joshi and Sons, it may not be proper to hold them declared defaulter "

The said opinion of the Law Officer was accepted by the Scrutiny Committee. The Scrutiny Committee as also the competent authority of MAHAGENCO thought it fit to relax the conditions keeping in view the fact that the same would create a healthy competition.

The rates quoted by the parties have been considered at great details. The difference of the amount in view of the rates quoted by Appellant vis-a- vis the other three firms was of the order of about Rs. 52 crores. Thus, a decision was taken in the interest of the organization. Such a decision taken in public interest should ordinarily be not interfered with.

We, however, at the cost of repetition would place on record that the other three bidders had clearly stated that they would not be able to match the rates of Appellant. It is also relevant to note here the categorical stand taken by MAHAGENCO before the High Court in its counter affidavit was that the contract had been awarded in favour of Appellant in its own interest. In regard to the order passed by the Madhya Pradesh High Court, it stuck to its stand that a clear finding was arrived at therein that the observations which were incidentally made in the judgment should not come in the way of Appellant in securing other contracts.

In its counter affidavit it was contended by MAHAGENCO before the High Court :

"It is denied that there was any question of reasonable expectation to oust the respondent no.3 from the tender process on the ground that the Respondent No. 3 did not satisfy the basic qualifying criteria, as alleged. The petitioner has referred to several communications annexed to the Petition at Annexures-N to X. The contents of all these communications are taken into consideration by the Respondents while taking the ultimate decision in the matter."

A contention has also been raised that the rates quoted by Appellant were unrealistic. MAHAGENCO denied or disputed the said stand, stating :

"It is denied that the rates quoted by the Respondent No. 3 are unrealistic according to estimates of the Respondent No.1, as alleged. The Petitioner has not placed on record any material to substantiate the contention. As a matter of fact, it is submitted that presently, the petitioner is carrying out the work in question at the rate of Rs.6.50 as against the rate of Rs. 12.5 which he has quoted in the tender document. As a matter of fact, the rates quoted by the Respondent No. 3 are even lower than the

rates at which the petitioner is presently working. Presently, the work is being carried out by the Petitioner and the Respondents Nos. 4 and 5 at the very same rate i.e. Rs.6.50. Thus, it is apparent that the Petitioner and the Respondents No. 4 and 5 have formed a Cartel. The rates quoted by them are really unrealistic and not competitive. Hence, keeping in view a huge difference and the interests of the Respondent No.1, the decision taken by the Respondent No.1 Company is legal, correct and proper."

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

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

"30. Dawn Oliver in *Constitutional Reforms in the UK* under the heading "The Courts and Theories of Democracy, Citizenship and Good Governance" at p. 105 states:

"However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risks for the judges and for the public. Courts may interfere inadvisedly in public administration. The case of *Bromley London Borough Council v. Greater London Council*¹¹ is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions, but were accused of themselves misunderstanding transport policy in so doing. The courts are not experts in policy and public administration hence Jowell's point that the courts should not step beyond their institutional capacity (Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws, L.J. in *International Transport Roth GmbH v. Secy. of State for the Home Dept.*¹² and of Lord Nimmo Smith in *Adams v. Lord Advocate*¹³ in which a distinction was drawn between areas where the subject-matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, the Government may react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. The Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law."

[See also *State of U.P. and Another v. Johri Mal* (2004) 4 SCC 714] In Jagdish Swarup's *Constitution of India*, 2nd Edition, page 286, it is stated:

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

Recently, in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Another* [(2005) 6 SCC 138,], upon noticing a large number of decisions, this Court stated "15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*⁴ and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

[See also *Noble Resources Ltd. v. State of Orissa and Anr.* [2006 (9) SCALE 181] Strong reliance has been placed by Mr. Tankha on *G.J. Fernandez v. State of Karnataka and Others* [(1990) 2 SCC 488] wherein this Court observed :

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or

document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed ."

No such case of prejudice was made out by Respondent before the High Court or before us.

Law on the similar term has been laid down in Poddar Steel Corporation v. Ganesh Engineering Works and Others [(1991) 3 SCC 273] in the following terms :

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases ."

In Indian Railway Construction Co. Ltd. v. Ajay Kumar [(2003) 4 SCC 579], this Court explained as to what would amount to bad faith and non-application of mind in regard to exercise of power on the part of the employer. It further opined that the burden would be on the person who seeks to invalidate or nullify the act or order to prove charge of bad faith and abuse or mistake by the authority of its power. It opined that an attempt should be made to balance the conflicting interest.

In Delhi Development Authority and Another v. UEE Electricals Engg. (P) Ltd. and Another [(2004) 11 SCC 213], the Court was considering a case where conduct of the Director of the company was found to be relevant. However, the Court opined that if the Authority felt that in view of the background facts, it would be undesirable to accept the tender, the power of judicial review should not be exercised in absence of any mala fides or irrationality.

In State of NCT of Delhi and Another v. Sanjeev alias Bittoo [(2005) 5 SCC 181], the Court reiterated the principles of judicial review.

We are not oblivious of the expansive role of the superior courts on judicial review.

We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the

aforementioned decisions may be summarized as under :

- i) If there are essential conditions, the same must be adhered to;
- ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing
- iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction..
- v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.
- (vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.
- (vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

Law operating in the field is no long res integra. The application of law, however, would depend upon the facts and circumstances of each case. It is not in dispute before us that there are only a few concerns in India who can handle such a large quantity of coal. Transportation of coal from various collieries to the thermal power stations is essential. For the said purpose, apart from transportation job, the contractor is required to see that coal of appropriate grade is supplied. Appellant herein is in business for the last 52 years. It had been taking part in contracts involving similar jobs in various parts of India. It had all along been quoting a low rate. According to it, despite the same it has been generating profits.

The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able discharge its contractual obligations. It must not forget the ground realities. MAHAGENCO considered all aspects of the matter while accepting Appellant's offer. In its counter affidavit, it categorically stated that

Appellant would be able to perform the contractual undertaking even at such a low rate.

While saying so, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

The question which arises for consideration is as to what relief can be granted in the instant case. The private respondents who had formed a cartel have successfully obtained the contract after the judgment of the High Court. Award of such contract although was subject to the decision of this appeal, this Court cannot ignore the fact that if Appellant is permitted to take over forthwith, supply of coal to the Thermal Power Station may be affected. We, therefore, intend to give another opportunity to MAHAGENCO. It shall consider the offer of Appellant upon consideration of the matter afresh, as to whether it even now fulfils the essential tender conditions. If it satisfies the terms of the tender conditions, the contract may be awarded in its favour for a period of one year; but such contract shall take effect after one month from the date of the said agreement so as to enable the private Respondents herein to wind up their business. This order is being passed in the interest of MAHAGENCO as also the private Respondents herein.

Private Respondents, however, shall be paid their dues in terms of the offer made by them and accepted by MAHAGENCO. The appeal is allowed with the aforementioned observations and directions. All the Private Respondents shall pay and bear their cost of Appellant which is quantified at Rs.50,000/- each.