

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.07.2016

+ W.P.(C) 7630/2015

KOLKATA GLASS & CERAMICS PRIVATE LIMITED ... Petitioner

versus

UNION OF INDIA & ANOTHER

... Respondents

Advocates who appeared in this case:-

For the Petitioner : Mr P. Chidambaran and Mr Ajit Kumar Sinha, Senior Advocates with Mr Sujit Ghosh, Mr Shailendra Singh, Mr Krishna Rao, Mr Rajit Mittal and Ms Amrita Roy Choudhury

For the Respondents : Mr Sanjay Jain, ASG with Mr Amit Mahajan and Mr Shreshth Jain

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J

1. In this writ petition, the following prayers have been made:-

“(a) That this Hon’ble Court be pleased to issue a writ, order or direction of mandamus, or certiorari or a writ in the nature of mandamus or certiorari or any other writ directing the Respondents to include the name of the Petitioner in the List of Technically Qualified Bidders dated 8.08.2015;

- (b) That this Hon'ble Court be pleased to issue a writ, order or direction of mandamus, or certiorari or a writ in the nature of mandamus or certiorari or any other writ striking down the validity of Clause 5.13.1 of Tender Document dated 8.06.2015 in so far as the same is arbitrary and violative of Article 14 of the Constitution of India in as much as even in contractual matters, the State and its instrumentalities cannot act arbitrarily;
- (c) That this Hon'ble Court be pleased to issue a Writ of mandamus or certiorari, or a Writ in the nature of mandamus or certiorari, or any other appropriate Writ, Order or directions, directing the Respondents to give the Petitioner a fair hearing to present its case in order to satisfy the requirements of the tender document if at all are non-compliant in any manner whatsoever.
- (d) That this Hon'ble Court be pleased to Stay the Financial Bidding scheduled to be conducted by Respondent No.2 on 12.08.2015 for the Chitarpur Coal Block and / or direct that the date for the said financial bidding be extended in order to enable the Petitioner to participate in the bidding process.
- (e) That this Hon'ble Court be pleased to direct other reliefs, including costs of this Petition, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

2. The present petition was filed because the petitioner was aggrieved by the fact that its name was not included in the list of the Technically Qualified Bidders of Auction Tranche-III dated 08.08.2015 without assigning any reasons. The list of Technically Qualified Bidders in

respect of Auction Tranch-III for the Chitarpur Coal Mine showed the Technically Qualified Bidders to be Hindalco Industries Limited, Jindal Steel and Power Limited and Vedanta Limited. The petitioner's name did not figure in the said list. A challenge is also made to the validity of clause 5.13.1 of the Tender Document dated 08.06.2015, whereby, according to the petitioner, the Nominated Authority has been conferred absolute power to reject any or all of the bids without assigning any reason whatsoever. It was submitted that the petitioner's bid was complete in all respects and that there were no omissions, defects or lapses in the same and, therefore, the petitioner ought to have been included in the list of Technically Qualified Bidders for the Chitarpur Coal Mine.

3. On 08.06.2015, the Nominated Authority issued the Tender Document inviting bids for allotting Schedule-III Coal Mines. The Tender process consisted of two stages – (a) the Technical Bid Stage; and (b) the Financial Bid Stage after which the coal block was to be awarded to the successful bidder. On 24.07.2015, the petitioner submitted its online document for the Technical Bid for the Chitarpur Coal Mine. On 27.07.2015, it submitted the requisite offline documents as required under

the Tender Conditions. On 03.08.2015, the name of the petitioner was published in the list of bidders. But, to the surprise of the petitioner, on 08.08.2015, when the list of Technically Qualified Bidders for Auction Tranch-III was published, the petitioner's name was not in the list for the Chitarpur Coal Mine. According to the respondents, the Technical Evaluation Committee in its meeting held on 31.07.2015, observed as follows:-

“23. In one instance, the Bidder was a JV company with JV partners. However, the coal allocation share of one of the JV partners was assessed at around 8% i.e. less than minimum 20% as required under the Tender Document. Further, even after considering the coal entitlement of the remaining two JV Partners, the coal entitlement of these JV Partners was less than the extractable reserves of the coal mine. Thus, this bid was rejected.”

4. It was further pointed out that in the evaluation sheets prepared by the Technical Evaluation Committee containing the key issues and recommendations, the following was mentioned regarding the bid submitted by the petitioner for the Chitarpur Coal Mine:-

“Issues: 1. The Bidder is a JV of 3 companies: Adhunik Metaliks Limited, Adhunik Corporation Limited and Adhunik Alloys and Power Limited with shareholding of 60%, 20% and 20% respectively. However, economic

interest of Adhunik Corporation Limited is assessed at 7.63% i.e. less than 20% as stipulated in the Tender Document.

Action Prescribed by Technical Evaluation Committee: 1. As per Clause 4.1.2 (c) of the Tender Document, each of the JV Partner should hold at least twenty per cent of voting rights and economic interest in the joint venture company. It is further clarified that economic interest for the purpose of this clause 4.1.2 (c) shall include allocation of coal amongst JV Partners.

Since Adhunik Corporation Limited economic interest in terms of coal allocation is assessed at 7.63%, it does not meet the specified condition of the Tender Document. Further, even if the coal entitlement of the remaining two JV Partners i.e. Adhunik Metaliks Limited and Adhunik Alloys and Power Limited is considered, the coal entitlement of these JV Partners is less than the extractable reserves of the Coal Mine. Hence, the bid is rejected.”

5. It was further submitted on behalf of the respondents that clause 4.1.2(c) is relevant for the purposes of the present petition and the same reads as under:-

“(c) Additional Eligibility conditions for Bidders which is a joint-venture:

In the event that, a Bidder is a joint venture company formed by two or more companies (“**JV Partners**”), then each such JV Partner should: (i) independently meet all the Eligibility Conditions as mentioned in this Clause 4.1; and (ii) hold at least twenty per cent of voting rights and economic interest in the joint venture company.

It is clarified that in such cases, the JV Partners would be required to independently meet the requirements regarding specified expenditure of the total project cost. However, for the purposes of Clause 4.1.2(b), the coal requirements for Specified End Use Plant of each of the JV Partners shall be considered collectively.

It is further clarified that economic interest for the purpose of this clause 4.1.2 (c) shall include allocation of coal amongst JV Partners.”

6. As per the respondents, the petitioner did not fulfill the criteria spelt out in clause 4.1.2 (c) inasmuch as each of the JV partners did not hold at least 20% of the economic interest in the JV company insofar as the allocation of coal amongst the JV partners was concerned. To be precise, it was submitted that Adhunik Corporation Limited had an allocation of coal of only 7.63% in the joint venture company and, therefore, this might not match upto any economic interest of 20% which was the prescribed minimum for each JV partner.

7. The learned counsel for the petitioner submitted that each of the three JV partners of the petitioner company had at least 20% voting rights and, therefore, they fulfilled the conditions of clause 4.1.2 (c). It was also argued that each JV partner also had at least 20% economic interest in the JV company and that the word “include” in the last line of the clause

signified that there were other components of the term “economic interest” and that allocation of coal amongst JV partners was only one of them. It was, therefore, argued on behalf of the petitioner that, although the allocation of coal to a particular JV partner might be less than 20%, but the other components of “economic interest” taken together add upto more than 20%.

8. Mr Chidambaram, the learned senior counsel, appearing on behalf of the petitioner, submitted that insofar as the voting rights were concerned, it was measurable, but, the economic interest is not measurable as such and the expression “economic interest” which included “allocation of coal amongst JV partners” did not imply that there must be at least 20% allocation of coal in each of the JV partners. With regard to use of the word “include”, it was submitted by Mr Chidambaram that it was only enumerative. He placed reliance on the following Supreme Court decisions:-

- “1) **Commissioner of Commercial Tax, Indore and Others v. T.T.K. Healthcare Limited:** 2007 SCC (11) 796;
- 2) **Ramanlal Bhailal Patel and Others v. State of Gujarat:** 2008 (5) SCC 449;

- 3) **Bharat Coop Bank (Mumbai) Limited v. Coop. Bank Employees Union: 2007 (4) SCC 685;**

The observations which have been relied upon in each of these decisions are as under:-

- 1) ***Commissioner of Commercial Tax, Indore and Others***
(supra):-

12. In the present case we have quoted the definition of the term “cooked food”. It is an inclusive definition. It includes sweets, batasha, mishri, shrikhand, rabari, doodhpak, tea and coffee but excludes ice cream, kulfi, ice candy, cakes, pastries, biscuits, chocolates, toffees, lozenges and mawa. That the item “cooked food” is inclusive definition which indicates by illustration what the legislature intended to mean when it has used the term “cooked food”. Reading of the above inclusive part of the definition shows that only consumables are sought to be included in the term “cooked food”. In the case of “fryums” there is no dispute that the dough/base is a semi-food. There is also no doubt that in the case of “fryums” a further cooking process was required. It is not in dispute that the “fryums” came in plastic bags. These “fryums” were required to be fried depending on the taste of the consumer. In the circumstances we are of the view that “fryums” were like seviyan. “Fryums” were required to be fried in edible oil. That oil had to be heated. There was certain process required to be applied before “fryums” become consumable. In these circumstances the item “fryums” in the present case will not fall within the term “cooked food” under Item 2, Part I of Schedule II to the 1994 Act. It will fall under the residuary item “all other goods not included in any part of Schedule I”.

13. In *Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union* [(2007) 4 SCC 685 : (2007) 2 SCC (L&S) 82 : (2007) 5 Scale 57] this Court has held that when the word “includes” is used in the definition, as is the case under Section 2(g) of the 1994 Act, the legislature does not intend to restrict the definition; it makes the definition enumerative and not exhaustive, that is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within the term certain matters which in its ordinary meaning it may or may not comprise. Applying the above test to the term “cooked food” in Section 2(g) of the 1994 Act we find that the said term uses the word “includes” in the definition. The said term “cooked food” makes the definition enumerative when it includes within the said term sweets, batasha, mishri, shrikhand, doodhpak, tea and coffee. When it enumerates items like sweets, mishri, batasha, doodhpak, tea and coffee the enumerated items help us to probe into the legislative intent. The legislative intent in the present case under Section 2(g) is to include consumables. “Fryums” in the present case at the relevant time were not directly consumable. They were undercooked items. They were semi-cooked items. They required further process of frying and addition of preservatives to make them consumables even after the specified time. But for the preservatives, the items would have become stale.”

2) ***Ramanlal Bhailal Patel*** (*supra*):-

“23. The word “person” is defined in the Act, but it is an inclusive definition, that is, “a person includes a joint family”. Where the definition is an inclusive definition, the use of the word “includes” indicates an intention to enlarge the meaning of the word used in the statute. Consequently, the word must be construed as comprehending not only such things which they signify according to their natural import, but also those things

which the interpretation clause declares that they shall include. Thus, where a definition uses the word “includes”, as contrasted from “means”, the word defined not only bears its ordinary, popular and natural meaning, but in addition also bears the extended statutory meaning (see *S.K. Gupta v. K.P. Jain* [(1979) 3 SCC 54 : AIR 1979 SC 734] following *Dilworth v. Commr. of Stamps* [1899 AC 99 : (1895-99) All ER Rep Ext 1576 : 79 LT 473] and *Jobbins v. Middlesex Country Council* [(1949) 1 KB 142 : (1948) 2 All ER 610 (CA)]).

24. The ordinary, popular and natural meaning of the word “person” is “a specific individual human being”. But in law the word “person” has a slightly different connotation and refers to any entity that is recognised by law as having the rights and duties of a human being. Salmond defines “person” as “any being whom the law regards as capable of rights and duties” or as “a being, whether human or not, of which rights and duties are the attributes” (*Jurisprudence*, 12th Edn., p. 299). Thus the word “person”, in law, unless otherwise intended, refers not only to a natural person (male or female human being), but also any legal person (that is an entity that is recognised by law as having or capable of having rights and duties). The General Clauses Act thus defines a “person” as including a corporation or an association of persons or a body of individuals whether incorporated or not. The said general legal definition is, however, either modified or restricted or expanded in different statutes with reference to the object of the enactment or the context in which it is used. For instance, the definition of the word “person” in the Income Tax Act, is very wide and includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not, a local authority and every other artificial juridical person. At the other extreme is the Citizenship Act, Section 2(f) of which reads thus: ‘ “Person” does not include any company or

association or body of individuals whether incorporated or not.’ Similarly, the definition under Section 2(g) of the Representation of People Act, 1950, is “person” does not include a body of persons.”

3) ***Bharat Coop Bank (Mumbai) Limited (supra):-***

“23. Section 2(bb) of the ID Act as initially introduced by Act 54 of 1949 used the words “means ... and includes” and was confined to a “banking company” as defined in Section 5 of the Banking Companies Act, 1949, having branches or other establishments in more than one province and includes Imperial Bank of India. Similarly, Section 2(kk), which was also introduced by Act 54 of 1949, defines insurance company as “an insurance company as defined in Section 2 of the Insurance Act, 1938 (4 of 1938), having branches or other establishments in more than one province”. It is trite to say that when in the definition clause given in any statute the word “means” is used, what follows is intended to speak exhaustively. When the word “means” is used in the definition, to borrow the words of Lord Esher, M.R. in *Gough v. Gough* [(1891) 2 QB 665 : 60 LJQB 726 : 65 LT 110] it is a “hard-and-fast” definition and no meaning other than that which is put in the definition can be assigned to the same. (Also see *P. Kasilingam v. P.S.G. College of Technology* [1995 Supp (2) SCC 348 : AIR 1995 SC 1395] .) On the other hand, when the word “includes” is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word “means” followed by the word “includes” in Section 2(bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only

those banking companies which fall within the purview of the definition and no other.”

9. Mr Chidambaram also raised the *contra proferentem* argument and for this purpose, he placed reliance on **United India Insurance Company Limited v. Pushpalaya Printers: 2004 (3) SCC 694.** Paragraph 6 of the said decision reads as under:-

“6. The only point that arises for consideration is whether the word “impact” contained in clause 5 of the insurance policy covers the damage caused to the building and machinery due to driving of the bulldozer on the road close to the building. It is evident from the terms of the insurance policy that the property was insured as against destruction or damage to whole or part. The appellant Company agreed to pay towards destruction or damage to the property insured to the extent of its liability on account of various happenings. In the present case both the parties relied on clause 5 of the insurance policy. Clause 5 is also subject to exclusions contained in the insurance policy. That a damage caused to the building or machinery on account of driving of vehicle on the road close to the building is not excluded. Clause 5 speaks of “impact” by any rail/road vehicle or animal. If the appellant Company wanted to exclude any damage or destruction caused on account of driving of vehicle on the road close to the building, it could have expressly excluded it. The insured possibly did not understand and expect that the destruction and damage to the building and machinery is confined only to a direct collision by vehicle moving on the road with the building or machinery. In the ordinary course, the question of a vehicle directly dashing into the building or the machinery inside the building does not arise. Further, “impact” by road vehicle found in the company of other words in the same clause 5 normally indicates that damage

caused to the building on account of vibration by driving of vehicle close to the road is also included. In order to interpret this clause, it is also necessary to gather the intention of the parties from the words used in the policy. If the word “impact” is interpreted narrowly, the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a building or machinery would not arise. In the absence of specific exclusion and the word “impact” having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings “to drive close”, “effective action of one thing upon another” and “the effect of such action”, it is reasonable and fair to hold in the context that the word “impact” contained in clause 5 of the insurance policy covers the case of the respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its “impact”. It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression “impact”, even otherwise applying the rule of contra preferentem, the use of the word “impact” in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in *General Assurance Society Ltd. v. Chandmull Jain* [AIR 1966 SC 1644 : (1966) 3 SCR 500] has expressed that (AIR p. 1649, para 11)

“in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed

contra proferentem, that is, against the company in case of ambiguity or doubt”.”

10. Mr Chidambaram then placed reliance on **General Assurance Society Limited v. Chandumull Jain and Another**: 1966 (3) SCR 500, in particular on paragraph 11 thereof, which reads as under:-

“11. A contract of insurance is a species of commercial transactions and there is as well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporate by reference to the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover note operates, The relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even

then are governed by the future policy if the cover notes give sufficient indication that it would be so. In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e., good faith on the part of assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes, that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of the acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being.”

11. It was next contended by Mr Chidambaram that if two views are possible, then the view that does not exclude the bidder ought to be preferred as it encourages competition. Reliance was placed on **Shably Limited and Another v. State of Goa and Others: 2012 (1) Mh. L.J. 533 (DB) (Bom).** The relevant paragraphs are 22 and 23. They read as under:-

“22. The Petitioner also relied on the judgment of this Court in *A 2 Z Maintenance & Engineering Services Ltd. v. Maharashtra State Electricity Distribution Company Ltd. and Anr.* 2010 (5) ALL MR 4 where this Court took a view that a tender ought not to have been considered as non responsive because the Power of Attorney submitted was not in conformity with a clause in the tender document. The Court observed that "the Bidder ought to have been given an opportunity to cure the defect as was done in the case of any other bidder." Further, we are of the view that in a case where two views are possible, the view holding that a party should not be disqualified should be accepted since disqualification prevents the applicant from participating in the budding process and affects fundamental rights under Article 19(1)(g) of the Constitution of India, which also affects finances of the State.

23. The learned Advocate General for the State of Goa further submitted that in any event, the Petitioners' bid is liable to be rejected since its quotation is nonviable. According to the Respondents, the Petitioners' bid is liable to be rejected because its expenditure is three times its net worth. There is No. merit in this contention, particularly since there is No. clause in the RFP which requires a particular amount of net worth to be maintained by its bidder in proportion to its annual expenditure. Thus, it is not permissible to adopt any hidden criteria. Clause 4.4.5 of the RFP requires a bidder to have net worth of Rs. 20 Crores. Net worth of the Petitioners is 31,53 Lacs. The proposition of the net worth to annual expenditure is nowhere prescribed as a criterion. Moreover, the Petitioners' bid has been rejected as non responsive which means that it has not been rejected on the basis of any evaluation. It would, therefore, not be appropriate to consider these objections raised by the Respondents at this stage. The judgments relied upon by the learned Advocate General in *Siemens Public Communication Networks Pvt. Ltd. and Anr. v. Union of India and Ors.* (2008) 16 SCC 215 and other judgment in *Larsen and Tubro*

Ltd. and Anr. v. Union of India and ors; (2011) 5 S.C.C. 430 are not applicable to the facts and circumstances of the case. As already held herein, the action on the part of the Respondents to hold that the bid of the Petitioners was non-responsive, cannot be accepted for the reasons stated hereinabove.”

12. Lastly, he submitted that if conditions have been satisfied, there is no scope for implied conditions. Reliance was placed on paragraph 10 of the Supreme Court decision in Naihati Jute Mills Limited v. Khyaliram Jagannath: AIR 1968 SC 522 which reads as under:-

“10. Assuming, however, that there was a chance of policy and that the Government in the intervening period had decided to place an embargo on import of Pakistan jute the question would still be whether the appellants were relieved that from liability for their failure to deliver the licence. A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. M/s Alopri Parshad & Sons v. Union of India [1960]2SCR793. The question would depend upon whether the contract which the appellants entered into was that they would make their best endeavours to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation. In a case falling under the former category, Lord Reading C.J. in Anglo-Russian Merchants-Traders v. John Batt & Co. [1917] 2 K.B. 679 observed that there was no reason why the law should imply an absolute obligation to do that which the law forbids. It was so said because the Court construed the contract to mean only that the sellers there were to make their best efforts to obtain the requisite permits.

As a contract to such a case there are the cases of Pattahmull Rajeshwar v. K. C. Sethia [1951] 2 All. E.R. 352 and Peter Cassidy Seed Co. v. Osuustickaanppa [1957] W.L.R. 273 where the courts have observed that there is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk he must be held bound to his stipulation. As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. [1919] A.C. 435 said:-

‘Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name.’

In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.”

13. Mr Sanjay Jain, learned ASG, appearing on behalf of the respondents, submitted that the Standard Tender Document for Coal Block Auctions was known to all the bidders and all of them clearly understood the meaning of the expression ‘economic interest’. According to him, all the bidders have understood it, *inter alia*, to mean 20% of the coal allocation. He submitted that a number of bidders had been disqualified in the series of auctions of coal blocks on this very understanding. Those bidders, whose JV partnerships had any partners

who did not have a minimum 20% coal allocation, have been disqualified. It was further submitted that the auction is specific to a coal block and, therefore, the 'economic interest' also has a reference to the allocation of coal. He submitted that the clause must be read in the manner it was intended by the Government. Reliance was placed on the decision of the Supreme Court in the case of **P.H. Paul Manoj Pandian v. P. Veldurai: 2011 (5) SCC 214**, more particularly on paragraph 28, which reads as under:-

“28. One of the accepted principles of interpretation is as to how those, who are conversant with the government order and are expected to deal with the same, construe and understand the order. The opinion expressed by the government officials, who are expected to have sufficient knowledge and experience as to how a government order should be operated and/or implemented, may be relied upon. In order to ascertain this, it would be necessary to refer to the evidence on record. Though the High Court has concluded that the Chief Engineer had no power to terminate contracts in terms of the Government Order dated 16-11-1951, this Court finds that the High Court has not adverted to the evidence on record at all.”

Then, he placed reliance on **M/s G.J. Fernandez v. State of Karnataka and Others: 1990 (2) SCC 488**. Paragraph 15 is relevant. The same reads as under:-

“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. But neither of these situations is present here. Shri Vaidyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already

supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in *Ramana case* [(1990) 2 SCC 486] will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, therefore, rightly not called upon to go into this question.”

14. It was further submitted by Mr Sanjay Jain that the word ‘include’ may be extensive. But, it may also be specific such as a ‘means and include’ clause. Reliance was placed on **N.D.P. Namboodripad v. Union of India & Others: 2007 (4) SCC 502.** A reference was also made to the Supreme Court decision in **Commissioner of Customs, New Delhi v.**

Caryaire Equipment India Private Limited: 2012 (4) SCC 645.

Paragraph 21 of the said judgment is relevant. The same reads as under:-

“21. In *South Gujarat Roofing Tiles Manufacturers Assn. v. State of Gujarat* [(1976) 4 SCC 601 : 1977 SCC (L&S) 15] , this Court has held thus: (SCC pp. 605-06, para 5)

“5. ... Though ‘include’ is generally used in interpretation clauses as a word of enlargement, in some cases the context might suggest a different intention. Pottery is an expression of very wide import, embracing all objects made of clay and hardened by heat. If it had been the legislature's intention to bring within the entry all possible articles of pottery, it was quite unnecessary to add an explanation. We have found that the explanation could not possibly have been introduced to extend the meaning of potteries industry or the articles listed therein added ex abundanti cautela. It seems to us therefore that the legislature did not intend everything that the potteries industry turns out to be covered by the entry. What then could be the purpose of the explanation. The explanation says that, for the purpose of Entry 22, pottery industry ‘includes’ manufacture of the nine articles of pottery named therein. *It seems to us that the word ‘includes’ has been used here in the sense of ‘means’; this is the only construction that the word can bear in the context. In that sense it is not a word of extension, but limitation; it is exhaustive of the meaning which must be given to pottery industry for the purpose of Entry 22. The use of the word ‘includes’ in the restrictive sense is not unknown.* The observation of Lord Watson in *Dilworth v. Commr. of Stamps* [1899 AC 99 : (1895-99) All ER Rep Ext 1576] which is usually referred to on the use of

‘include’ as a word of extension, is followed by these lines: (AC p. 106)

‘... But the word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include”, and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.’

It must therefore be held that the manufacture of Mangalore pattern roofing tiles is outside the purview of Entry 22.
(emphasis supplied)”

It was submitted that the word ‘include’ has been used in the exhaustive sense and not in an extensive sense. It was further submitted by Mr Sanjay Jain that, in the present case, two views are not possible. Therefore, the argument of Mr Chidambaram that where two views are possible, the one in favour of the petitioner ought to have been preferred, does not arise.

15. In rejoinder, it was pointed out by the learned counsel for the petitioner that while Mr Jain submitted that in all the coal block auctions, the same meaning has been given to the expression ‘economic interest’,

the same is not correct. A reference was made to page 256 of the paper book which contains clause 4.1.2(c) in respect of an earlier auction in which the clarification part with regard to economic interest is not there.

16. After having considered all the submissions made by the learned counsel for the parties, the crux of the matter is with regard to the interpretation to be given to the expression 'economic interest' in the context of the clarification given in clause 4.1.2(c) itself. There is no dispute with the fact that the allocation of coal amongst JV partners is such that one of the JV partners does not match upto 20% allocation of coal for the JV company. According to the petitioner, the expression 'economic interest' does not only mean allocation of coal and that there are other components of 'economic interest' which a JV partner may have in the JV company. All these components taken together, apart from the 20% share-holding, in respect of each JV partner should be in excess of 20% of the JV company. It was, therefore, contended that as 'economic interest' may have components other than allocation of coal, merely because the allocation of coal for a JV partner was less than 20% would not result in the disqualification of the JV company as a bidder because

the other components taken together with the allocation of coal of that JV partner may be in excess of 20%. We are unable to agree with this interpretation.

17. First of all, holding at least 20% of the voting rights would, in any event, imply that a JV partner has a 20% stake in the JV company. What has been stipulated is that each JV partner must not only hold at least 20% of voting rights but also 20% 'economic interest' in the JV company. It has further been clarified that the 'economic interest' for the purposes of clause 4.1.2 (c) shall include allocation of coal amongst JV partners. What this means is that whatever may be the other 'economic interest' of the JV partner in the joint venture company, insofar as the 'economic interest' qua the allocation of coal is concerned, it must have a 20% interest in the total allocation of coal for the JV company. The word 'include', to us, ought to be read as 'means' because allocation of coal is the subject matter of the auction. Other economic interests have not been specified.

18. In this view of the matter, we cannot agree with the submission made on the part of the petitioner and, therefore, find no merit in the

present writ petition. We need not go into the issue of validity of clause 5.13.1 as that does not come into play. The petitioner has been found to be not technically qualified for valid reasons. The writ petition is dismissed. There shall be no orders as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

JULY 25, 2016

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