IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 23.08.2017

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G.RAMESH
AND
THE HONOURABLE MR. JUSTICE RMT. TEEKAA RAMAN

W.A. NOS. 1976, 1618 & 1631 OF 2013
AND
W.P. NO. 16971 OF 2013 & 10911 OF 2012

W.P. NO. 16971 OF 2013

M/s. Smart Chip Ltd.
D-216, Sector 63
Noida, U.P., rep. By its
Authorised Signatory
Mr. Pritpal Singh Sachdev .. Petitioner

- Vs -

1. The Secretary to Government
Transport Department
Secretariat
Fort St. George, Chennai 600 009.

2. Transport Commissioner
Ezhilagam, Chapauk
Chennai – 5.

3. M/s.Bon Ton Softwares Pvt. Ltd.
Thro' its Managing Director
Prabhu Ramachandran
No.44/19, Krishna Sree Enclave
3rd Floor, 1st Main Road
Gandhi Nagar, Adyar, Chennai 600 020.

4. M/s. Madras Security Printers Pvt. Ltd.
   No.72, Tiruvottiyur High Road
   Chennai – 81.

5. M/s. VISA Support Services (I) Pvt. Ltd.
   The Capital, C-70, G-Block, A 1702
   Bandra-Kurla Complex
   Bandra (East), Mumbai 400 051.

6. M/s.M-Tech Innovations (P) Ltd.
   ½, Rajiv Gandhi Infotech Park
   Phase-I, Near Cognizant
   Hinjewadi, Pune 411 057. .. Respondents
   (R-6 impleaded vide order of Court dt.
   10.12.13 in MP No.4/13 in WP 16971/13)

W.P. NO. 10911 OF 2012

M/s. Madras Security Printers Pvt. Ltd.
No.72, Thiruvottiyur High Road
Chennai – 81. .. Petitioner

- Vs -

1. The Secretary to Govt.
   Transport Department,
   Secretariat Fort St. George
   Chennai-9.

2. The Transport Commissioner
   Ezhilagam, Chepauk
   Chennai-5.

3. M/s.Bonton Softwares Pvt Ltd.
   Thro' its Managing Director
   Prabhu Ramachandran
   No.44/19, Krishna Sree Enclave
   3rd Floor, 1st Main Road
   Gandhi Nagar, Adyar, Chennai 600 020.

4. M/s.M-Tech Innovations Ltd.
   P-1/2 Rajv Gandhi Infotect Park

Phase I Near, Cognizant Hinjewadi
Pune 411057. .. Respondents

W.A. NO. 1618 OF 2013

M/s. Bon Ton Softwares P Ltd
Thro' its Managing Director
Prabhu Ramachandran
No.44/19, Krishna Sree Enclave
3rd Floor, 1st Main Road
Gandhi Nagar, Adyar, Chennai 600 020. .. Appellant

- Vs -

1. M/s. Smart Chip Ltd.
D-216, Sector 63, Noida, UP
Through Its Authorized Signatory
Mr.Pritpal Singh Sachdev
R/o.Gaur Grandeur, D-255
Sector 119, Noida-201 301.

2. The Secretary To Government
Transport Department
Secretariat, Fort St. George
Chennai-9.

3. The Transport Commissioner
Ezhilagam, Chepauk
Chennai-5.

4. M/s. Madras Secuirty Printers Pvt. Ltd.
No.72, Thiruvittiyur High Road
Chennai-81.

5. M/s. Visa Support Services (I) Pvt. Ltd.
The Capital C-70, G Block A 1702
Bandra Kurla Complex
Bandra (East), Mumbai-400 051. .. Respondents

W.A. NO. 1631 OF 2013

1. The Secretary to Government
   Transport Department
   Secretariat, Chennai – 9.

2. The Transport Commissioner
   Ezhilagam, Chepauk
   Chennai – 5. .. Appellants

- Vs -

1. M/s.Smart Chip Ltd.
   D-216, Sector 63, NOIDA, UP
   Through Its Authorized Signatory
   Mr.Pritpal Singh Sachdev
   R/o.Gaur Grandeur, D-255
   Sector 119, Noida-201 301.

2. M/s. Bon Ton Softwares P Ltd
   Thro' its Managing Director
   Prabhu Ramachandran
   No.44/19, Krishna Sree Enclave
   3rd Floor, 1st Main Road
   Gandhi Nagar, Adyar, Chennai 600 020.

3. M/s. Madras Secuirty Printers Pvt. Ltd.
   No.72, Thiruvittiyur High Road
   Chennai-81.

4. M/s. Visa Support Services (I) Pvt. Ltd.
   The Capital C-70, G Block A 1702
   Bandra Kurla Complex
   Bandra (East), Mumbai-400 051. .. Respondents

W.A. NO. 1976 OF 2013

M/s.M-Tech Innovations Ltd.
P-1/2 Rajv Gandhi Infotect Park
Phase I Near, Cognizant Hinjewadi
Pune 411057. .. Appellant

- Vs -

1. M/s.Smart Chip Ltd.
   D-216, Sector 63, NOIDA, UP
   Through Its Authorized Signatory
   Mr.Pritpal Singh Sachdev
   R/o.Gaur Grandeur, D-255
   Sector 119, Noida-201 301.

2. The Secretary to Government
   Transport Department
   Secretariat, Chennai – 9.

3. The Transport Commissioner
   Ezhilagam, Chepauk
   Chennai – 5.

4. M/s. Bon Ton Softwares P Ltd
   Thro' its Managing Director
   Prabhu Ramachandran
   No.44/19, Krishna Sree Enclave
   3rd Floor, 1st Main Road
   Gandhi Nagar, Adyar, Chennai 600 020.

5. M/s. Madras Secuirty Printers Pvt. Ltd.
   No.72, Thiruvittiyur High Road
   Chennai-81.

6. M/s. Visa Support Services (I) Pvt. Ltd.
   The Capital C-70, G Block A 1702
   Bandra Kurla Complex
   Bandra (East), Mumbai-400 051. .. Respondents

(Cause title of Bon Ton Software, respondent in the respective writ petition/writ appeal amended vide order passed in MP Nos.1/2014 in WA No.1618/2014 & WP No.16971/13 dated 23.08.2017)

W.P. No.10911 of 2012 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records of the 2nd respondent comprised in "Preparation of Smart Card based Driving License and Registration Certificate of Vehicle BOOT model for 5 years" dated 28.06.2010 and quash the same in view of the substantial delay that had been caused in evaluating the tenders and any further proceedings upon the same tender being contrary to the provisions of the Tamil Nadu Transparency in Tender Act, 1998 and Rules, 2000 and set aside the same and consequently direct the 1st and 2nd respondents to forthwith issue a fresh tender calling for fresh bids with respect to 'Smart Card based driving licence and registration certificate of vehicles in BOOT Model' in the State of Tamil Nadu.

W.P. No.16971 of 2013 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari To call for the records of the respondents 1 and 2 in respect of Preparation of Smart Card based Driving License and Registration Certificate of Vehicle Boot Model for 5 years dated 28.6.2010 issued in favour of 3rd respondent and quash the Letter of Award dated 17.4.2013 bearing Letter No.40809/ S4/2009 for Smart Card based Driving Licence and Registration Certificate Project on BOOT basis in all regional Transport Office/ Unit Office to Bon Ton Software Pvt. Ltd i.e. respondent No.3 same as being illegal and arbitrary.

Writ Appeals filed under Clause 15 of the Letters Patent against the order dated 8th July, 2013, passed by the learned single Judge in W.P. No.16971 of 2013.

For Petitioners	:	
in WP No.16971/2013		Mr. Vijay Narayan, SC, for Mr. D.K.Singh, SC, for Mr.S.Kumaresan
in WP No.10911/2012	:	Mr. Rahul Balaji for M/s.Satish Parasaran
For Appellants	:	
in WA No.1976/2013		Mr. AL.Somayaji, SC for Mr. R.Bharanidharan
in WA No.1618/2013	:	Mr. G.Masilamani, SC, for Mr.Mani Sundar Gopal
in WA No.1631/2013	:	Mr. R.Muthukumaraswamy, AG asst. by Mr.T.N.Rajagopalan, Spl. G.P.
For Respondents	:	
in WP No.16971/2013		Mr. R.Muthukumaraswamy, AG asst. by Mr. T.N.Rajagopalan, Spl. G.P. For RR-1 & 2 Mr. G.Masilamani, SC, for Mr.Mani Sundar Gopal for R-3 Mr.Rahul Balaji for M/s.Satish Parasaran for R-4 Mr. V.V.Giridhar for R-5 Mr. AL.Somayaji, SC for Mr. R.Bharanidharan for R-6
in WP No.10911/2012	:	Mr. R.Muthukumarasamy, AG asst. by Mr. T.N.Rajagopalan, Spl.G.P. For RR-1 & 2 Mr. G.Masilamani, SC, for Mr.Mani Sundar Gopal for R-3 Mr. AL.Somayaji, SC for

Mr. R.Bharanidharan for R-4

in WA No.1976/2013	: Mr.Vijay Narayan, SC, for Mr. D.K.Singh, SC for Mr.S.Kumaresan for R-1 Mr. R.Muthukumaraswamy, AG asst. by Mr. T.N.Rajagopalan, Spl. G.P. For RR-2 & 3 Mr. G.Masilamani, SC, for Mr.Mani Sundar Gopal for R-4 Mr.Rahul Balaji for M/s.Satish Parasaran for R-5 Mr. V.V.Giridhar for R-6
in WA No.1618/2013	: Mr.Vijay Narayan, SC, for Mr. D.K.Singh, SC for Mr.S.Kumaresan for R-1 Mr. R.Muthukumaraswamy, AG asst. by Mr. T.N.Rajagopalan, Spl. G.P. For RR-2 & 3 Mr.Rahul Balaji for M/s.Satish Parasaran for R-4 Mr. V.V.Giridhar for R-5
in WA No.1631/2013	: Mr.Vijay Narayan, SC, for Mr. D.K.Singh, SC for Mr.S.Kumaresan for R-1 Mr. G.Masilamani, SC, for Mr.Mani Sundar Gopal for R-2 Mr.Rahul Balaji for M/s.Satish Parasaran for R-3 Mr. V.V.Giridhar for R-4

RESERVED ON	***14.06.2017***
PRONOUNCED ON	***23.08.2017***

COMMON JUDGMENT

HULUVADI G. RAMESH, J.

These appeals are directed against the order dated 8th July, 2013, passed by the learned single Judge, in and by which the learned single Judge, on the prima facie finding and in view of the larger public interest involved, while taking into account the huge loss to the exchequer due to the vast difference in the amounts quoted by the various parties and the rate at which the contract had been awarded, had granted an interim order of stay of all further proceedings, aggrieved by which the respective respondents are before this Court by filing the writ appeals assailing the said order.

2. Against the said interim order, while the respective respondents therein had filed the present appeals, this Court, on 19.11.2013, after hearing the learned counsel appearing for the appellants felt that since the matter touches upon the merits of the main writ petitions itself, it would be prudent to tag the writ petitions along with these writ appeals and dispose of the same as that would give a quietus to the matter, to which course of action, the learned counsel on either side did not have any objection. Therefore, the writ petitions on the file of the learned single Judge were directed to be tagged along with the writ appeals to be heard at one go. Accordingly, all the matters are placed before this Court for hearing.

3. The brief factual matrix, shorn of unnecessary details, is culled out hereunder :-

Notice Inviting Tenders (for short 'NIT') dated 28.6.2010, inviting tenders for preparation of Smart Cards for the purpose of issue of Driving License and Registration Certificates pertaining to 58 Regional Transport Offices and 49 Unit Offices on Build, Operate, Own and Transfer basis (for short 'BOOT') was floated by respondents 1 and 2. The petitioner, M/s.Smart Chip, forming a consortium with one M/s.Versatile Cards Technology Pvt. Ltd., submitted its bid.

4. Similarly, bids were submitted by the consortium of M/s.BonTon Software Pvt. Ltd. and M/s.M-Tech Innovations Ltd., M/s.Madras Security Printers and by a few other bidders. It is further averred by the petitioner that the NIT did not contain any information with regard to the date, time and place of opening of the technical and price bids. However, the bids were to be opened in the presence of the bidders as provided in Clause 22.1. and 22.4 of the NIT and that the bidders were informed that the date and time as regards the opening of the technical and financial bids would be intimated, which never happened. It is further averred that clause 27 of the tender document details the procedure for determination of the lowest evaluated price bid. It is further averred by the petitioner that Clause 12 of the Tender Document prescribes the eligibility criteria,

which eligibility the petitioner as also its consortium partner duly satisfy.

5. It is averred by the petitioner that though the petitioner and respondent No.4 alone satisfy the eligibility criteria as provided in Clause 12, however, with mala fide intentions and in an arbitrary manner, the tender was awarded to an ineligible person, viz., the consortium of 3rd and 6th respondent herein, who fail to satisfy the eligibility condition Nos. 2, 5 & 6 provided in Clause 12 (i) of the NIT.

6. It is further averred by the petitioner that as against the amount of Rs.197.51 Crores quoted by the petitioner, the 3rd respondent has quoted an initial amount of Rs.389.80 Crores and this exorbitant price was accepted by respondent Nos.1 and 2 to succeed in their sinister design to award the tender to the 3rd respondent, which action is wholly arbitrary, illegal and is in utter violation of laws, rules, principles of fairness, equality, justice and transparency. The petitioner further averred that even the final negotiated price of the 3rd respondent at Rs.293,72,80,000/= is higher by Rs.96,21,80,000/= to that of the amount quoted by the petitioner. This action of the respondent Nos.1 and 2 in awarding the tender to the 3rd respondent in abuse of powers for ulterior purpose at the cost of the public exchequer is against the Tender Transparency Act, as the condition of opening the tender in the presence of the tenderers has not been followed, which hits at the very base of the tender process and finalisation of the

technical bid.

7. As against the short-listing of respondents 3 & 6 and 4 in the technical bid and since no reason has been given for rejection of the petitioner's technical bid, the petitioner filed W.P. No.23151 of 2010 challenging the whole selection process. However, when the matter was taken up for hearing, on behalf of the respondents, statement was made by the learned Advocate General that on the finalisation of the tender evaluation process, both the technical and financial bids, tender bulletin would be issued and reasons would be communicated to all persons and based on the said submission of the learned Advocate General, the writ petition was dismissed, vide order dated 15.11.2010, as premature and liberty was given to the petitioner to challenge the final decision of the Tender Evaluation Committee.

8. It is further averred by the petitioner that inspite of the submission of the learned Advocate General that the tender bulletin would be issued stating the reasons on the finalisation of the tender process, till date, the same has not been issued by the authorities. Though the petitioner has submitted very many representations pointing out the irregularities and gross violation of the tender conditions, no action has been taken by the respondent Nos. 1 and 2, and instead the contract has been awarded to the consortium of 3rd and 6th respondents.

9. It is the further averment of the petitioner that without giving any notice to the bidders, who were five in number, with the connivance of 3rd and 6th respondent, to the exclusion of the other bidders, the financial bids of the consortium of respondents 3 and 6 and respondent 4 were opened and finding the bid of the 3rd respondent consortium to be lower, the bid was confirmed in favour of the 3rd respondent consortium. However, since then, negotiation has been going on between the authorities with the consortium of 3rd and 6th respondents for bringing down the price, which action is *per se* illegal and only shows that even the authorities feel that the amount quoted by the consortium of 3rd and 6th respondents is on the higher side and only with a cushioning motive, the negotiations for price reduction is going on, which is nothing but an eye-wash to screen the ulterior acts and the manipulations being made by the respondent authorities.

10. It is further averred by the petitioner that it came to the knowledge of the petitioner only through the counter filed by the State in the pending W.P. No.4636 of 2011 that only two bidders, viz., consortium of respondents 3 & 6 (for short 'L1 consortium) and 4th respondent are qualified in the technical evaluation and the financial bids of these two bidders were opened on 6.9.2010 and L1 consortium was found to be the lowest bidder, therefore, the petitioner filed W.P.

No.7449 of 2012 impugning the tendering process in disqualifying the petitioner in the technical evaluation and further awarding the contract to L1 consortium on the ground that it is an unjust, unfair and mala fide action on the part of the respondent authorities and is in gross violation of Article 14 of the Constitution as also the Tamil Nadu Transparency of Tenders Act, 1998 (for short the 'Act') and the Tamil Transparency of Tender Rules, 2000 (for short the 'Rules').

11. At the time of hearing of W.P. No.7449 of 2012, similar stand as was put forth before the Court by the learned Advocate General in the earlier round of litigation was taken by the learned Special Government Pleader and, therefore, this Court dismissed the writ petition with liberty to the petitioner to challenge the findings and the respondent authorities were directed to pass final orders in conformity with the provisions of the Act, within a period of three months.

12. It is averred by the petitioner that for want of any action in consonance with the above order, a contempt petition was filed. In the interregnum, the respondent authorities filed petition for extension of time and this Court vide order dated 1.1.12 extended the time by two months to comply with the order.

13. Inspite of the specific direction, till date the petitioner has not been informed of the reasons for rejection of its bid, but, however, the contract has

been awarded in favour of L1 consortium vide order dated 17.4.2013, which order of the respondent authorities is contemptuous and against the provisions of the Act and the Rules and also violative of Articles 14 and 19 (1) (g) of the Constitution. Therefore, left with no other alternative, the petitioner has come before this Court by filing the writ petition for the relief stated supra.

14. Along with the main writ petition, miscellaneous petition for stay was filed by the petitioner, praying this Court to grant an order of interim stay of the Letter of Award dated 17.4.2013 bearing Letter No.40809/S4/2009 for Smart Card based Driving Licence and Registration Certificate Project on BOOT basis in all the Regional Transport Office/Unit Office to Bon Ton Software Pvt. Ltd.

15. Learned single Judge, appreciating the contentions advanced for the purpose of interim order and on perusing the materials available on record as also the original files relating to the matter in issue, held that all is not well with the Transport Department in awarding the contract to L1 consortium as the documents available on record coupled with the rates quoted by the bidders clearly show that the award has been given to the bidder, who has quoted a far higher rate and disqualifying a bidder on technicalities would cause grave financial loss to the exchequer and the process of issuance of smart cards having not started, no prejudice would be caused in staying the impugned award of tender as

a prima facie case has been made out for grant of stay. Accordingly, the learned single Judge granted interim stay of all further proceedings pursuant to the tender notification dated 28th June, 2010 and the contract dated 30th April, 2013 until further orders. Aggrieved against the said interim order, writ appeals have been filed by L1 consortium as also the State.

16. Even prior to the above writ petition, W.P. No.10911 of 2012 has been filed by M/s.Madras Security Printers, who is the 4th respondent in W.P. No.16971 of 2013. The main contention of the petitioner in the said writ petition is that there being inordinate delay in finalising and awarding the tender, the tender is liable to be set aside, as the same has not been awarded in consonance with Rule 26 of the Tamil Nadu Transparency in Tender Rules, 2000 and the proviso thereto, which prescribes a particular period within which the tender has to be finalised, else the who tender process has to be scrapped and a new tender floated. The present tender not being finalised within the time prescribed therein, the same is liable to be set aside and a new tender needs to be floated.

17. In addition to the above ground, various other grounds in tune with the grounds raised by the petitioner in W.P. No.16971 of 2013 have been raised. The further averment is that except for the petitioner, none of the other bidders are qualified and, therefore, the bid should have been awarded in favour of the

petitioner. Though this has been brought to the notice of the respondents 1 and 2, but no action was taken, but L1 consortium had been declared as the successful bidder and the award has been given to L1 consortium, which act of the respondents 1 and 2 is illegal, arbitrary and against the rule of law and *per se* liable to be set aside. Further, the award of the contract to L1 consortium is in violation of the Transparency in Tender Rules and, therefore, the said award is liable to be set aside and the respondents 1 and 2 should be directed to call for fresh tenders keeping in mind the present market conditions and also the interest of the exchequer.

18. The 3rd respondent, viz., Bon Ton Software, who was declared as the successful bidder (hereinafter referred to as 'L1) along with its consortium partner, viz., 6th respondent, M/s.M-Tech Innovations, aggrieved against the interim order passed by the learned single Judge have filed W.A. Nos.1618 & 1631 of 2013, while the State has filed W.A. No.1976 of 2013 against the said interim order.

19. It is averred by the 3rd respondent, who is the appellant in W.A. No.1618 of 2013 that the learned single Judge, without affording an opportunity of hearing, while *suo motu* calling for the original files and perusing the same, by appreciating the original files, had granted the order of interim stay holding that

the petitioner has made out a prima facie case. It is the further averment of the 3rd respondent that the said view arrived at by the learned single Judge cannot be sustained in view of the fact that while the reason for rejection of the technical bid of the petitioner has not been communicated to petitioner, however, the learned single Judge had called for the original files and had culled out the reason for rejection, which is unsustainable in law as without there being a reason for rejection communicated, the petitioner cannot come before this Court and challenge the tender process. The said order passed by the learned single Judge is against the well accepted judicial precedents and is in violation of principles of natural justice, as L1 consortium has not been provided with an opportunity to defend the grant of tender to it. The learned single Judge cannot transpose himself into the shoes of the authority and cull out the reasons for the rejection as it would only go to show that the learned single Judge is trying to read into the mind of the respondent authorities rather than going on the facts as put forth before the Court. It is the further averment of the 3rd respondent/appellant that the records would reveal that the findings arrived at by the learned single Judge is not supported by documentary proof and, therefore, the finding is unsustainable in law. It is further averred by the 3rd respondent/appellant that the finding of the learned single Judge with regard to the composition of the consortium of the petitioner is wholly unsustainable as the same is contrary to the records. Further, the requisite qualifications, as prescribed in the tender document though is not possessed of by the petitioner, however, setting aside the rejection of the petitioner's tender by the Evaluation Committee without affording an opportunity to the other participants, more particularly the successful tenderer, is unknown to contractual jurisprudence and, therefore, the said finding arrived by the learned single Judge in the light of the ambiguities pointed out above, hits at the very root of the findings rendered by the learned single Judge, which requires to be interfered with at the hands of this Court.

20. Similar contentions as has been taken by the 3rd respondent herein has been taken by the 6th respondent as well, who is the appellant in W.A. No.1976 of 2013 *inter alia* submitting that the learned single Judge having not appreciated the facts and the documents on record in its proper perspective and appreciating the documentary evidence in the form of original files and, thereby, holding the rejection of the petitioner herein as bad and further holding that the award of the contract to L1 consortium is bad as L1 consortium has not satisfied the conditions as prescribed in the tender document, is in contradiction to the materials available on record and further no opportunity having been given to L1 consortium to plead its case before the learned single Judge, the view arrived at by the learned single Judge and the consequential order of stay granted by the learned single Judge is unsustainable and is liable to be interfered with. Similar averments as have been put forth by the 3rd respondent have been put forth by the 6th respondent as well

and prays for dismissal of the writ petition.

21. W.A. No.1631 of 2013 has been filed by respondents 1 and 2 against the interim order of the learned single Judge raising similar contentions as raised by the appellants in W.A. Nos._1976 and 1638 of 2013. In addition to the abovesaid contentions, the appellant authorities have contended that the view expressed by the learned single Judge relating to the rate at which the tender is awarded herein being far higher than what is paid in other States is not borne out by record. It is contended by the appellant that the fixing of price depends on very many factors, including global recession and comparing the prices as is being paid in other States with what is sought to be paid here cannot be a fair equation as the specifications of smart cards differ in different States so also the cost depends on various factors with relation to the geographical location as also the specification of the smart cards. Therefore, the view expressed by the learned single Judge equating one card with the other for holding that the price fixed in the present case is on the higher side is wholly unsustainable.

22. It is further contended that after obtaining the advise of the Additional Advocate General and also approval of the Government, which is reflected in the order of the learned single Judge, the Transport Commissioner has finally decided to go ahead with the project and to award the contract in favour of L1 consortium.

Therefore, the finding of the learned single Judge that the approval of the Government has not been obtained is factually incorrect. It is contended by the appellant that the implementation of the project has commenced and the requisite hardware and software as also the necessary space and other requisite infrastructure, including signing of the contract agreement has been completed and, therefore, the finding of the learned single Judge, on the basis of the note of the Joint Transport Commissioner that implementation proceedings are yet to begin is contrary to the documents available on record. The further finding of the learned single Judge that the award of the contract involves a huge loss to the exchequer is not fortified by any documents on record and that the contract has been awarded after following the provisions of the Tender Transparency Act and the Rules. In fine, it is the contention of the appellant that the documents not having been appreciated in its proper perspective and findings have been arrived at on the basis of erroneous deductions, which is not substantiated by materials available on record, the interim order granted is liable to be set aside, more so in public interest.

<u>CONTENTION OF THE PETITIONER IN W.P. NO. 16971 OF 2013</u> :

23. Mr. Vijay Narayan, learned senior counsel appearing for the petitioner submitted that the respondent authorities had called for tenders in sealed covers with separate technical bids and price bids specifying the last date for submission

of bids as 5.00 p.m. on 12.08.2010. It was also mentioned in the NIT that the technical bids will be opened at 5.30 p.m. on 12.08.2010 and the validity of the bids is mentioned as 180 days. It is further submitted that the guidelines and instructions to bidders specified that the standard specification of Smart Card Operating System for Transport Applications (for short 'SCOSTA') shall be used for standardising the smart card based driving licences and registration certificates.

24. It is further submitted by the learned senior counsel appearing for the petitioner that the NIT stipulates the necessities to be satisfied by the bidder, both in the technical bid as well as price bid. It is submitted by the learned senior counsel that the petitioner, along with its consortium partner, M/s.Versatile Card Technologies (for short 'VCT') had submitted its bid satisfying all the eligibility conditions put forth in the NIT. Even along with the bid, all the requisite documents, as were called for by the tender inviting authority, had been submitted. However, curiously, when the tenders were opened, the technical bid submitted by the petitioner was rejected, though the reasons for rejection were not communicated to the petitioner either at that particular point of time or even some time thereafter. The bid submitted by L1 consortium and the 4th respondent were short-listed for the purpose of evaluating the price bid.

25. It is the submission of the learned senior counsel for the petitioner that

though Rule 10 (h) of the Tamil Nadu Transparency in Tenders Rules, 2000 (for short 'Rules, 2000') mandates that the Notice Inviting Tenders should contain the date, time and place for opening of tenders received, however, the place where the tenders would be opened does not find a place in the Notice Inviting Tenders. It is further submitted by the learned senior counsel for the petitioner, viz., M/s.Smart Chip that inspite of several rounds of litigations, either by the petitioner or by one or the other tenderer, the reasons for rejection of the petitioner's technical bid has not been made known to the petitioner, but for the interim order passed by the learned single Judge, where the learned single Judge had perused the entire original records and culled out the reasons for rejection. Though it was informed by the learned Advocate General in W.P. No.23151 of 2010 that the tender bulletin will be issued communicating the reasons for rejection to all the persons concerned on the agreement being entered into with the successful tenderer, however, not only till the interim order was passed by the learned single Judge, but even till date, the tender bulletin has not been issued communicating the reasons for rejection to the petitioner, which is in contravention of Section 10 (7) of the Act. According to the learned senior counsel, this only portrays the mala fide attitude and intention of the respondent authorities in trying to sideline the petitioner for reasons best known.

26. It is the further submission of the learned senior counsel for the

petitioner that though the time and venue where the tenders would be opened should be specified in the Notice Inviting Tenders, however, only the date and time have been specified therein and the venue finds place only in the General Instructions portion, which is against Rule 10 (h) of the Rules, 2000.

27. It is further submitted by the learned senior counsel for the petitioner that though Clause 24 enumerates the parameters to be taken note of by the Technical Evaluation Committee while analysing the tenders, one of the main clauses therein stipulates that the bidder should meet all the conditions of eligibility as laid down in the tender document. Though the respondent authorities rejected the petitioner on the ground that the consortium of the petitioner had more than two partners, which is *per se* incorrect, however, giving a go-by to the other conditions of eligibility, had approved the technical bid of of L1 consortium. However, L1 consortium fails to satisfy many of the conditions imposed in the tender document, but the said bidder has been accepted to be one of the successful bidders in the technical bid and its case has been considered for evaluation of its price bid.

28. Learned senior counsel for the petitioner further submitted that the VISA/MASTER CARD certificate relating to security requirements have not been fulfilled by L1 consortium. It is the submission that Clause 12 (i) (2) prescribes

holding of requisite VISA/MASTER CARD certificate relating to Card Manufacturing, Magnetic Stripe Personalizer and Chip Embedding. However, a perusal of the VISA/MASTER CARD certificate issued to the 6th respondent, who is a member of L1 consortium pertains only to Card Manufacturer and Magnetic Stripe Personalizer and insofar as Chip Embedding is concerned, which is one of the material pre-requisites, more especially the smart card that is sought to be issued is a 64 KB chip based SCOSTA card, the 6th respondent does not possess valid VISA/MASTER CARD Certificate relating to chip embedding. However, the technical evaluation committee, for reasons best known, has approved the technical bid of L1 consortium, when in actuality, the technical bid of the said consortium should have been rejected for non-satisfying the VISA/MASTER CARD certification.

29. It is the further submission of the learned senior counsel for the petitioner that Clause 12 (i) (5) of the tender conditions stipulate that the bidder should have had experience in execution of atleast one project for supply and personalization of Smart Cards in ID Domain for Transport Department in any one of the States in India in any one of the preceding three financial years. A perusal of the documents submitted by L1 consortium shows that the consortium partner, viz., the 6th respondent, had entered into agreement for supply of Smart Cards to Zylog Systems Ltd., though the delivery alone was to be effected at the RTO's in

the State of Karnataka. According to the learned senior counsel, the said project execution, by no stretch of imagination, could be said to be a project executed by the 6th respondent for the Transport Department, but it is only a project, which has been executed at the behest of M/s.Zylog Systems and that delivery of smart cards was to be effected at the RTO's in the State of Karnataka. Therefore, according to the learned senior counsel for the petitioner, it cannot be said to be a project which had been executed for the Transport Department and that experience cannot be counted as experience for the purpose of approving the present bid of the consortium of the 3rd and 6th respondent. Further, the agreement entered into with M/s.Zylog Systems by M/s.M-Tech Innovations only describes the product as smart cards and there being no mention whether it pertains to chip based smart cards satisfying the SCOSTA platform. Therefore, learned senior counsel for the petitioner submitted that L1 consortium having failed to satisfy the experience, the award of tender in their favour is wholly unjust, illegal and arbitrary.

30. It is the further submission of the learned senior counsel for the petitioner that 12 (i) (6) requires that the bidder should have supplied SCOSTA based smart cards manufactured from its own manufacturing units in India for atleast one Driving Licence/Registration Certificate Project in any one of the States in India. Though such a condition is stipulated, the certificates in that regard

produced by L1 consortium do not disclose that the said consortium has executed any project relating to manufacture and supply of SCOSTA based smart cards for Driving Licence/Registration Certificate Project in any one of the States in India. However, the certificate produced by L1 consortium only disclose that smart cards have been delivered at the RTO's in the State of Karnataka as per the purchase order issued by M/s.Zylog Systems on the 6th respondent. Further, the other certificate submitted by L1 consortium pertains to execution of RFID Bus Pass System in the State of Gujarat, which, by no stretch of imagination could be said to be a project relating to issuance of smart cards for Driving Licence/Registration Certificate. Further, there is no mention in the purchase order that the smart cards are for the purpose of Driving Licence/Registration Certificate Project with chip based technology. Therefore, it is clear that the said project has not been executed for Driving Licence/Registration Certificate Project, but rather some project relating to bus pass issuance for Gujarat State Transport Corporation and the other one relates to a project entrusted by a third party to the 6th respondent in which delivery was directed to be made at the RTO's in the State of Karnataka. Further, the cost of the card for the said project, as is evident from the purchase order shows that it was executed for a sum of Rs.22/= per card. However, the rate quoted for the present card initially was Rs.112/= for Driving Licence and Rs.116.50 for Registration Certificate, which was reduced after negotiation to Rs.96.50 and Rs.107.50 respectively. From the above prices, it would be evident that the project executed by the 6th respondent is not a chip based smart card for Driving Licence/Registration Certificate Project, but rather some other type of card. This vital aspect has not been taken into account by the Technical Evaluation Committee while announcing L1 as the successful bidder. Since L1 has not satisfied the above requirement, as stipulated in Clause 12 (i) (6) of the tender conditions, its bid is liable to be rejected.

31. It is the further submission of the learned senior counsel for the petitioner that though the learned Advocate General, in the earlier round of litigation, had submitted that the tender bulletin citing the reasons for rejection will be communicated to all the bidders, but even after a lapse of seven years, the said tender bulletin citing the reasons for rejection has not been communicated, which is not in consonance with Section 10 (7) of the Act.

32. It is the further submission of the learned senior counsel for the petitioner that even after negotiation the reduced price quoted by L1 is Rs.96 Crores more than the bid of the petitioner. The technical bid of the petitioner having said to be rejected and no reasons having been assigned till date by the respondent authorities, but for the reasons shown in the interim order, awarding of the bid to L1, there will be a burden and in turn a loss to the exchequer to the tune of Rs.96 Crores, which is detrimental to public policy and public welfare.

Learned senior counsel appearing for the petitioner referred to Section 10 (2) and 10 (3) of the Act and submitted that while Section 10 (2) contemplates that the Tender Accepting Authority shall accept the lowest tender, Section 10 (3) contemplates that if the Tender Accepting Authority decides that the price of the lowest bidder is higher with reference to the prevailing market rate, negotiations can be held for price reduction with the tenderer. It is the submission of the learned senior counsel that the price quoted by the petitioner is far less than the amount quoted by L1, and even after negotiation with L1, the price quoted by L1 is higher than that of the petitioner. That being the case, without taking into consideration the rates prevailing in the market for a chip based smart card and without taking into consideration the rate quoted by the petitioner, the Tender Accepting Authority has gone ahead with finalising the tender of L1, which act of the Tender Accepting Authority is against the spirit of Sections 10 (2) and (3) of the Act. This also clearly portrays the total non-application of mind of the Tender Accepting Authority with regard to Section 10 (3) of the Act and further, when the Act itself provides for cancelling the tender process if the rates quoted are far higher than the rates normally prevailing in the marked, the Tender Accepting Authority, without resorting to the said procedure, has gone ahead and finalised the tender in favour of L1 consortium, which is detrimental to the exchequer to the tune of around Rs.96 Crores.

33. It is further submitted by the learned senior counsel for the petitioner that though there is a provision for appeal under Section 11 of the Act to the Government, however, the same is not a bar precluding the petitioner from approaching this Court. It is submitted by the learned senior counsel for the petitioner that Section 11 provides that a tenderer, if aggrieved by the order passed by the Tender Accepting Authority shall prefer appeal to the Government within 10 days of receipt of the said order. However, the Tender Accepting Authority has not passed any order rejecting the bid of the petitioner by citing reasons and, therefore, there being no order in the eye of law, the petitioner cannot approach the Government by filing an appeal. However, the petitioner is not precluded to approach this Court under Article 226 of the Constitution alleging mala fide act on the part of the respondent authorities in not adhering to the relevant Acts and Rules, in the process of finalising a tender.

34. It is the submission of the learned senior counsel for the petitioner that the SCOSTA certificate of the partner of the petitioner has not been viewed in its correct context and the same has been rejected with ulterior motive and the said act is mala fide, arbitrary and misuse of discretion vested in the respondent authorities.

35. It is further submitted by the learned senior counsel appearing for the

petitioner that M/s.Syscom Corporation Ltd., is a 100% wholly owned subsidiary (for short 'WOS') of the petitioner and the manufacturing activities of smart cards are being carried on by Syscom Corporation for the petitioner. The said company being a 100% WOS of the petitioner, it cannot be said to be a third partner in the consortium. The petitioner as well as Syscom Corporation are single entity as has been held by the Supreme Court time and again and, therefore, the ground of rejection put forth by the respondent authorities that Syscom Corporation is a different concern and, therefore, the bid is not in consonance with the tender stipulations is *per se* unsustainable.

<u>CONTENTIONS OF THE PETITIONER IN W.P. NO.10911 OF 2012</u> :

36. Mr.Rahul Balaji, learned counsel appearing for one of the successful bidders in the technical bid, who has been captioned as L2 by the Tender Accepting Authority, prays that the tender having been finalised in favour of L1 by the Tender Accepting Authority, which is against the statutory prescription as envisaged under the Act and the Rules, has to be quashed. The relevant provisions of the Act and the Rules having not been followed, the tender as a whole is liable to be quashed and a fresh tender needs to be floated once over by following the relevant provisions of law.

37. Learned counsel for the petitioner submitted that the pricing of the

smart card is dependent upon the pricing of the chip in the market. That being the case, the tender has been floated in the year 2010 at which point of time a rate of more than Rs.100/= was quoted for the chip based SCOSTA smart card. However, after a lapse of seven years, the prices of the chip having fallen down drastically and, therefore, finalising the tender at the same rate as was quoted in the year 2010 would not only entail a loss of Rs.96 Crore to the exchequer as pointed out by the petitioner in W.P. No.16971/2013, but would be much steeper than the said amount. Learned counsel for the petitioner also submitted that in tune with the market pricing, the petitioner had approached the respondent authorities in the year 2011 for negotiation of the price and had offered to quote a price, which is about half the price quoted by the petitioner initially when the tender was submitted, but due to the arbitrary act of the respondent authorities, the said proposal was put to trash. Such being the case, the prices of the electronic commodities getting lower everyday, finalising the tender in 2013/2014 at the rates offered in 2010 would be nothing but playing a fraud on the exchequer by the hand in glove game played by the respondent authorities along with L1 consortium.

38. It is submitted by the petitioner that the current market prices for chip based smart cards would only be around Rs.35 to Rs.40 per card, which is evident from the letters received from the various Transport Commissioners of Karnataka,

Andhra Pradesh, Punjab & Haryana and Maharashtra, wherein rates between Rs.49 to 62 and Rs.63 to Rs.136 have been paid for driving licence and registration certificate even during the year 2013. Curiously, the rates for driving licence and registration certificate in Maharashtra even during the year 2006 and 2004 was Rs.87.30 and Rs.200 respectively. That being the case, it is the submission of the learned counsel for the petitioner that even the negotiated rate at Rs.96.50 and Rs.112.50 for driving licence and registration certificate during the year 2013 can only be said to be highly exorbitant and excessive and could only be termed as a poly to loot the exchequer.

39. It is the further submission of the petitioner that the tender terms have not been applied in letter in spirit, since proper application of the tender terms would have made the petitioner as L1 and the present successful consortium as L2. In this regard, learned counsel submitted that while clause 27 (e) of the tender conditions prescribe the method for determining the lowest rate, clause 27 (h) provides for inclusion of general sales tax/value added tax for evaluation of the bids insofar as the bidders are concerned, be it within the State or outside the State. Clause 27 (i) prescribes that where the bidders are from the State of Tamil Nadu as well as outside the State of Tamil Nadu, Sales Tax shall be excluded for the bidders from the State of Tamil Nadu and added for the bidders from outside the State of Tamil Nadu for the purpose of evaluating the lowest price.

40. In the above backdrop, it is the submission of the learned counsel for the petitioner, that the petitioner being a bidder within the State of Tamil Nadu, the component of General Sales Tax/Value Added Tax has to be subtracted from its bid value, since the manufacturing unit of the petitioner is within the State of Tamil Nadu and the component of General Sales Tax/Value Added Tax has to be added to the bid value in the case of the present L1 consortium, as the manufacturing facility is outside the State of Tamil Nadu, viz., Maharashtra. That being the case, the value of the bid of the petitioner would be far less than that of the present L1 consortium and the petitioner should have been declared as L1. This pertinent tender term has not been considered by the respondent authorities while arriving at the lowest evaluated price and, therefore, the declaration of the present L1 consortium as the successful bidder is against the tender terms and not sustainable. Had the authorities properly evaluated the bid in the light of the above tender terms, the petitioner would have been the lowest bidder and would have been declared as L1. The tender evaluation not having been carried out in accordance with Rule 25 of the Rules, 2000, the same has to be set aside as the arbitrary act of the respondent authorities has vitiated the whole tender process.

41. It is further submitted by the learned counsel for the petitioner that not only the tender conditions impose the above conditions, but even Rule 29 (iii) and

(iv) prescribes inclusion of the tax component for the purpose of evaluation of the price in case the tenderers are from outside the State and exclusion of the tax component for the evaluation of the price in case the tenderers are from within the State.

42. It is submitted by the learned counsel for the petitioner that the learned Advocate General, in the earlier round of litigation initiated by the petitioner as well as M/s.Bon Ton Software Ltd., the lead bidder of L1 consortium, vide W.P. Nos.20824 and 21599 of 2010, had stated before the learned single Judge therein that evaluation of the financial bids will be done by the Evaluation Committee as per the Act, Rules and the Tender Notification. Such being the case, it is the submission of the learned counsel for the petitioner that Clause 27 (i) of the Tender condition has not been taken into account while arriving at the lowest evaluated price and, therefore, as has been held by the learned single Judge therein, liberty stands accrued on the petitioner to challenge the finding of the Tender Evaluation Committee, which has been done in the present case.

43. Lastly it is contended by the learned counsel for the petitioner that Rule 26 (1) of the Rules, 2000 stipulates that the contract shall be completed as far as may be practicable, within the period for which the tenders are held valid, while Rule 26 (2) confers power on the Tender Accepting Authority to seek extension of

the validity of tenders for completion of evaluation. The provision to Rule 26 (2) mandates that the sum total of all extensions shall ordinarily not exceed 180 days. Rule 26 (3) contemplates that where the award of contract is not completed within the extended validity period, all the tenders shall be deemed to have become invalid and fresh tenders may be called for.

44. It is the submission of the learned counsel for the petitioner that the period of validity along with extensions, if any, prescribed by the Rules, being 180 days, having elapsed long back, Rule 26 (3) automatically comes into operation and, therefore, the tender process has to be scrapped and a fresh tender should be called for. No amount of record or otherwise can cure the defect if the period goes beyond 180 days and, therefore, it is submitted the present tender has to be scrapped and a new tender has to be called for.

45. It is further submitted by the learned counsel for the petitioner that the then Transport Commissioner had addressed the Principal Secretary to Government, Home Department, pointing out certain fallacies/lacunae in the tender floated as also in the tender process vis-a-vis the rates quoted by the bidders and had sought the guidance of the Government in going ahead with the present tender process or whether the present tender may be cancelled and a fresh tender floated. Thereafter, the Transport Commissioner had addressed a

letter to the learned Advocate General seeking his opinion on the queries raised by him. It is the submission of the learned counsel for the petitioner that though six queries had been raised by the Transport Commissioner, with regard to the most pertinent and prominent queries, which form the fulcrum of the issue raised by the Transport Commissioner, no answer is found in the reply addressed by the learned Addl. Advocate General and further on the question of rates, discretion was left with the Transport Commissioner, that after negotiation if the price is found to be proper, the tender may be proceeded. It is the submission of the learned counsel for the petitioner that certain of the pertinent queries, which have financial impact on the public and the exchequer, having not been answered by the learned Addl. Advocate General, proceeding to finalise the tender of L1 consortium is not proper and the Transport Commissioner should have cancelled the present tender and called for fresh tender. Further, it is submitted by the learned counsel that even the letter addressed by the Transport Commissioner to the petitioner asking him to bring down the rate of smart cards that is being issued by the petitioner in the pilot project, the Transport Commissioner himself has said that the cost of card in other States is around Rs.55/= only and, therefore, the price of smart card cannot go beyond the said rate. Such being the case, for reasons best known, the smart card is being finalised for a price higher than what is said to be the nominal price, even according to the Transport Commissioner, and this only portrays that all is not well with the tender process and, therefore, the same is liable to be interfered with.

46. It is further contended by the learned counsel for the petitioner that contracts are price sensitive matters, which fact has been accepted by the learned Advocate General in the earlier round of litigation and the delay in the award of tender would grossly affect the exchequer. In the case on hand, the award has been delayed for quite a long time, be it through the litigation pressed in by the petitioners or by the respondents, the delay has contributed much to diminishing the price quoted by the parties and in the present day scenario, the volatile nature of prices, more particularly that of the chips that are an integral part of the smart cards, finalising and approving the bid of L1 consortium in the light of the delay will be fatal not only to the exchequer but very much against public interest and, therefore, it is submitted that the tender may be cancelled and the respondent authorities be directed to call for new tenders.

47. Learned counsel for the petitioners placed reliance on the following decisions :-

i) Whirlpool Corporation – Vs – Registrar of Trade Marks (1998 (8) SCC 1) ;

ii) S.J.S. Business Enterprises (P) Ltd. - Vs – State of Bihar & Ors. (2004 (7) SCC 166) ;

iii) L.K.Verma – Vs – HTML Ltd. & Anr. (2006 (2) SCC 269) ;

iv) State of H.P. - Vs – Gujarat Ambuja Cement Ltd. & Anr. (2005 (6) SCC 499) ;

v) State of UP & Ors. - Vs – Renusagar Power Company (1988 (4) SCC 59) ;

vi) New Horizons Ltd. & Ors. - Vs – Union of India & Ors. (1995 (1) SCC 478) ;

vii) Shee Pacetronix Ltd. & Ors. - Vs – State of Assam & Ors. (2010 (159) CompCas 386) ;

viii) Reliance Airport Developers (P) Ltd. - Vs – Airport Authorities of India & Ors. (2006 (10) SCC 1) ;

ix) Harminder singh Arora – Vs – Union of India & Ors. (1986 (3) SCC 427) ;

(x) Jagdish Mandal – Vs – State of Orissa & Ors. (2007 (14) SCC 517) ;

xi) Siemens Public Communications Networks – Vs – Union of India (2008 (16) SCC 215) ;

xii) Mahabir Auto Stores & Ors. - Vs – Indian Oil Corporation & Ors. (1990 (3) SCC 752) ; and

xiii) Glodyne Technosub Ltd. - Vs – State of Maharashtra & Ors. (2011 (5) SCC 103).

<u>SUBMISSIONS OF L-1 CONSORTIUM (RESPONDENTS 3 & 6)</u> :

48. Mr. G.Masilamani, learned senior counsel appearing for the lead bidder in the L1 consortium, viz., M/s.Bon Ton Software Ltd., leading the arguments, submitted that the petitioner, M/s.Smart Chip having lost in the technical bid, is estopped from challenging the award of tender to L1 consortium on the opening of the price bid. Only after the reason for rejection is communicated to the

aggrieved person, the same can be challenged and in the present case, reason for rejection having not been communicated to the unsuccessful bidder, the writ petition at its behest is premature and is liable to be dismissed. It is the further submission of the learned senior counsel for L1 consortium, more specifically, M/s.Bon Ton Software, the writ itself is not maintainable as the petitioner has not exhausted the appeal remedy provided under Section 11 of the Act, 1998. Without the tender bulletin showing the reason for rejection and when an effective alternative remedy is available to the petitioner, the petitioner cannot approach this Court with a writ petition challenging the award of contract to another party, more so when he is an unsuccessful bidder even at the technical evaluation stage.

49. It is the further submission of the learned senior counsel for the lead bidder in the L1 consortium that though the petitioner in W.P. No.16971/2013 had filed the petition challenging the award of contract to L1 consortium alleging that it is not qualified as per the terms in the tender, however, no consequential direction has been sought for award of contract in its favour. From the above, it is evident that it is more of a personal/private interest/vendetta against L1 consortium, though a colour is given as if it espouses the cause of public, which is nothing but abuse of process of the Court. It is the further submission of the learned senior counsel that there being no consequential prayer in the main writ

petition, passing of an order of interim stay is wholly unsustainable in law.

50 It is the submission of the learned senior counsel that the stand of the petitioner, M/s.Smart Chip that it satisfies the eligibility condition shown in the NIT, while L1 consortium does not satisfy the eligibility criteria is not borne out by records. It is the submission of the learned senior counsel that while M/s.Smart Chip does not satisfy clause 12 (i) of the Tender Notification, L1 consortium satisfies the all the eligibility conditions, more so the condition as stipulated in clause 12 (i) of NIT. Similarly, it is the submission of the learned senior counsel for L1 consortium that while M/s.Smart Chip has not satisfied clauses 12 (i) (5), 12 (i) (6) and 12 (i) (7) of NIT, L1 consortium satisfies all the requirements imposed in the said clauses. In that, L1 consortium has supplied smart cards to Transport Department manufactured from its manufacturing unit in India and that it has also supplied smart cards manufactured from its units in India for Driving Licence/Registration Certificate Project in any one of the States in India. Further, it is the submission of the learned senior counsel that one of the bidder in the consortium of M/s.Smart Chip, viz., M/s.Versatile Cards Technology, its parent company, M/s.Versatile Cards Technology Inc., USA has filed Bankruptcy Petition in the United States and, therefore, it does not satisfy clause 12 (v) of the NIT.

51. It is further submitted that one of the consortium partner of L1, viz.,

M/s.M-Tech Innovations Ltd., satisfies the requirements of Security Printing, Lamination and Embedding as is certified by VISA/MASTER CARD and documents to that effect has been enclosed in the documents which were placed before the Technical Evaluation Committee. The Technical Evaluation Committee, after satisfying itself that L1 consortium meets all the requirements as is contemplated in the NIT, has approved the technical bid of L1 consortium and, therefore, the contention of M/s.Smart Chip that the consortium partner of M/s.Bon Ton Software, viz., M/s.M-Tech Innovations is not possessed of the necessary VISA/MASTER CARD certification is not borne out by record.

52. It is further submitted by the learned senior counsel for L1 consortium that not only L1 consortium has experience in ID domain project in Transport Department, but has also supplied smart cards/RFID cards to student and monthly pass holders for Bangalore Metropolitan Transport Corporation and that it has also executed and supplied smart cards manufactured from its own manufacturing unit in Pune for Transport Department in Karnataka through M/s.Zylog Systems Ltd.

53. It is submitted that the petitioner, viz., M/s.Smart Chip having not qualified itself in the Technical bid cannot question the selection of a successful bidder, who has crossed all the stages in the selection process and has been

adjudicated as successful.

54. It is further submitted by the learned senior counsel for L1 consortium that the stand of the petitioners that the cost of chip has come down and, therefore, going ahead with the tender at the cost quoted by the bidder would be wholly unreasonable and would be against public interest cannot be sustained in view of the fact that delay has occasioned due to the prolonged litigation by one or other of the petitioners and, therefore, the delay cannot be put against L1 consortium to deprive itself of its right to execute the work awarded to it. Further, it is the submission of the learned senior counsel, for the sake of argument, but without admitting that the cost of the chip has come down, yet other operational costs like stationery, manpower, office space, equipment, consumables, etc., are on the increase and, therefore, the cost of chip alone coming down cannot be the deciding factor to state that the prices of smart cards are on the decline.

55. It is submitted by the learned senior counsel that certification as to the meeting of security requirements as certified by VISA/MASTER CARD, the security pertains only to the peripheral security that is required to be certified. In effect, the certification relates only to the "security facility" and not "security printing" and what is stipulated in the tender condition relates only to security facility and

not security printing. Therefore, the stand of the petitioner that L1 consortium is not possessed of VISA/MASTER CARD certification for chip embedding facility, though not correct, as M-Tech Innovation is possessed of the same, cannot be sustained.

56. It is the further submission of the learned senior counsel for L1 consortium that a subsidiary company is a separate legal entity and, therefore, the experience and facilities of a subsidiary company cannot be taken as that of the parent company and, therefore, the technical bid of M/s.Smart Chip has been rightly rejected as the facilities and requirements mandated of the lead bidder were possessed of only by the subsidiary company, which has been included as a third partner in the consortium, which is prohibited under the conditions of tender. The tender conditions stipulate that the consortium should not consist of more than two partners. That being the case, inducting a subsidiary company for the purpose of showing the necessities of facility and requirements prescribed in the tender conditions is *per se* diametrically opposite to the tender conditions and, therefore, rejection of the technical bid of M/s.Smart Chip by the respondent authorities cannot be said to be arbitrary and illegal.

57. It is further contended by the learned senior counsel for L1 consortium that M/s.Syscom Corporation Ltd., who has been shown to be the manufacturing

unit of the lead bidder, M/s.Smart Chip, is a separate company and, in effect is a separate legal entity and, therefore, lifting of corporate veil should be done only in very rare circumstances, unless it is so very necessary. In such backdrop, it is submitted by the learned senior counsel for L1 consortium that M/s.Syscom Corporation, though said to be a subsidiary of M/s.Smart Chip, but being a separate legal entity, therefore, its association in the consortium could only be termed as a partner and, therefore, the rejection of the bid of M/s.Smart Chip on the ground that the consortium consists of more than two partners cannot be said to be illegal or arbitrary.

58. It is further submitted by the learned senior counsel that the Transport Commissioner, who had initially written the letter seeking clarification of the Government for cancelling the tender and calling for a fresh tender, thereafter, further to the response from the Government to take a decision, had gone ahead with the finalisation and award of the contract to L1, more so after obtaining the advice and opinion of the learned Addl. Advocate General. The Transport Commissioner, in his wisdom, after analysing all the pros and cons and also taking into consideration the opinion of the learned Additional Advocate General having gone ahead and finalised the tender and awarded the contract to L1 consortium, it cannot be contended that the action of the Transport Commissioner is arbitrary and that the authority of the Government by not obtaining its approval before

finalisation of the tender would render the whole tender process vitiated.

59. Following the footsteps of Mr.G.Masilamani, learned senior counsel, who appears for one of the consortium partners, viz., M/s.Bon Ton Software, Mr.AL.Somayaji, learned senior counsel appearing for the other consortium partner, viz., M/s.M-Tech Innovations Ltd., while concurring with the submissions advanced by Mr.Masilamani, further submitted that the valuation of the technical bid was done by a seven member committee. However, when the same was challenged before this Court in W.P. Nos.20824 and 21599 of 2010, this Court had ordered revaluation of the tenders. Accordingly, the technical evaluation committee evaluated the bids once over and after getting necessary clarification from VISA/MASTER CARD evaluated the technical qualification and opined that M/s.Bon Ton Software & M/s.Madras Security Printers Pvt. Ltd. satisfy the secured facility requirement for production of smart cards as envisaged in the tender conditions.

60. It is the further submission of the learned senior counsel that the re-evaluation having been done in a manner known to law and there being no allegations raised against the members of the technical committee which re-evaluated the bids, it is not open to the petitioners to contend that the re-evaluation has not been done properly.

61. It is further submitted by the learned senior counsel that the petitioner, M/s.Madras Security Printers is barred from reagitating the matter as in the earlier round of litigation, while this Court vacated the order of interim injunction, directed that the tender process be proceeded in accordance with the Act and the Rules in terms of the tender notification. That being the case, it is not open to the petitioner to reagitate the issue saying that the tender process should be scrapped on account of the delay in the completion of the tender process and award of contract.

62. It is submitted by the learned senior counsel that the contention of the petitioners that L1 consortium is not possessed of VISA/MASTER CARD security certificate is untenable as the Technical Evaluation Committee, further to the direction of the High Court for re-evaluation, while re-evaluating had considered the correspondence received from VISA/MASTER CARD with regard to certification process and had opined that both L1 consortium and M/s.Madras Security Printers fulfil the technical qualifications. Such being the case, it is not open to the petitioner to contend that L1 consortium is not possessed of the requisite VISA/MASTER CARD certification with regard to secured facility as prescribed in the tender notification.

63. It is the further submission of the learned senior counsel that the second portion of clause 12 (i) (2) prescribes that the manufacturing facility should include security printing, lamination and embedding. It further prescribes that it should be a highly secured facility certified by VISA/MASTER CARD. It is the submission of the learned senior counsel that the crucial aspect in the whole of the prescription is that while the first part relates to security printing, lamination and embedding and the second part relates to a certification as a highly secured facility by VISA/MASTER CARD, the crucial point is that both the arms are segregated by the use of a semi-colon. Therefore, there is a clear severance of the sentences from one another which clearly denotes that they are independent of each other and that the certification relates only to the facility and not to the activities being carried on in the facility. However, the clause is totally misinterpreted by the petitioners to suit their convenience and that the petitioners and trying to take advantage of the same to suggest that the certification for chip embedding is not there for L1 consortium.

64. It is the further submission of the learned senior counsel that the requirement of satisfying clause 12 (i) (5) and 12 (i) 6, viz., namely supplying smart cards to Transport Department and execution of a Driving Licence/Registration Certificate Project in any one of the States, had been duly fulfilled by L1 consortium and documents to that effect has been placed before the Technical

Evaluation Committee. After satisfying itself, the Technical Evaluation Committee has accepted the Technical Bid of L1 consortium. That being the case, the petitioners contention that the said provision has not been satisfied by L1 consortium has no legs to stand.

65. It is the further submission of the learned senior counsel that Clause 44 relates to the definitions wherein in sub-clause 12 bidder has been defined, wherein the condition (i) prescribed thereunder clearly prescribes that the bids can be submitted by a company individually or through a Consortium of Companies. The consortium should not have more than two partners and each consortium should have exclusive partners. There being a clear prescription in Clause 44 (12) (i) prescribing that the consortium should not have more than two partners, the third partner in the case of M/s.Smart Chip, viz., M/s.Syscom Corporation, though is said to be a subsidiary of M/s. Smart Chip, but for all purposes it is a separate legal entity as per the provisions of Companies Act and, therefore, could only be termed as a third partner. Therefore, there was nothing wrong in the construction given to the said consortium by the Technical Evaluation Committee and, therefore, the rejection of the technical bid of M/s.Smart Chip cannot be said to be erroneous.

66. On the question of pricing, the submission of Mr.Somayaji, learned

senior counsel is similar to that of Mr.G.Masilamani, both of whom represent the respective partners of L1 consortium and the submission is to the effect that though there is reduction of price insofar as embedded chip in the smart card is concerned, however, the other overheads are very high and escalation is mounting in the present day scenario and keeping in mind the above prices of various commodities as also the establishment costs and the consumables costs, the price has been arrived at. It is therefore the submission that the pricing as is given in one State should not be equated to the other State as the configuration of the smart cards and the features differ and, therefore, based on the requirement of the cards, the pricing is adopted in addition to other additional factors. Therefore, it is the submission of the learned senior counsel for L1 consortium that equation of rates where there exists inequality in the cards should not be taken as yardstick for determining the rate to be fixed/quoted.

67. Learned senior counsel for L1 consortium placed reliance on the following decisions :-

i) Reliance Infrastructure Ltd. - Vs – MSRDC Ltd. (2011 (1) Mh. L.J. 443) ;

ii) Michgan Rubber Ltd. - Vs – State of Karnataka (2012 (8) SCC 216) ;

iii) TANGEDCO – Vs – CSEPDI – Trishe Consortium (AIR 2016 SC 4879 :: 2016 SCC Online SC 1150) ;

iv) Montecarlo Ltd. - Vs – NTPC (2016 SCC Online SC 1149) ;

v) Glodyne Technoserve Ltd. - Vs – State of Madhya Pradesh (2011 (5) SCC 103) ;

vi) Core Projects & Technologies Ltd. - Vs – State of Bihar (2010 SCC Online Pat 916) ;

vii) Rohde & Schwarz & Co. - Vs – Airport Authority of India (2013 SCC Online Del 4415) ;

viii) M/s.Komal Constructions – Vs – State of Maharashtra (2016 SCC Online Bom 5238) ;

ix) Ms. Anita Kaur – Vs – Universal Weather & Aviation India Pvt. Ltd. & Anr. (2014 SCC Online Del 3137) ;

x) Kumbhat Holographics & Ors. - Vs – State of Tamil Nadu & Ors. (2017 (1) CTC 83) ; and

xi) Vodafone International Holdings BV – Vs – Union of India & Anr. (2012 (6) SCC 613).

68. Countering the submissions advanced by the learned counsel appearing for the petitioners and concurring with the submissions advanced on behalf of L1 consortium, Mr.R.Muthukumaraswamy, learned Advocate General submitted that the evaluation, both technical bid as well as price bid has been done scrupulously following the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules framed therein.

69. While concurring with the submissions advanced by the learned senior counsel appearing for L1 consortium, in addition to the said submissions, learned Advocate General sought to submit that the Transport Corporation is a wholly

owned by the Transport Department and, therefore, it is a Government Undertaking and, therefore, for all practical purposes any work executed for a Transport Corporation could only be termed to be work executed for the Transport Department. In such view of the matter, it is submitted by the learned Advocate General that the documents submitted by L1 consortium relates to work executed for a Transport Corporation, which comes under the Transport Department and, therefore, it is a work executed for the Transport Department and, thus, L1 consortium satisfies the qualification as is prescribed in clause 12 (i) (5).

70. Learned Advocate General further submitted that insofar as clauses 12 (i) (5) & (6) are concerned, which relates to manufacture and supply of SCOSTA based smart cards to one Driving Licence/Registration Certificate Project for any one of the States in India, the said clause relates to manufacture and supply and does not relate to implementation of the project. That being the case, M-Tech Innovations, partner of L1 consortium having supplied SCOSTA based smart cards on the purchase order submitted by Zylog Systems had delivered the cards to RTO's offices in Karnataka. Similarly they had also manufactured and delivered RFID/smart cards for Bus Pass Issue System project for Gujarat State Road Transport Corporation. The partner of L1 consortium, viz., M-Tech Innovations having manufactured and supplied the said cards to RTO's offices in Karnataka and

for Bus Pass System in Gujarat, squarely fulfills the prescription envisaged under clause 12 (i) (5) & (6) and, therefore, they were certified to be technically qualified.

71. It is the further contended by the learned Advocate General that clause 12 (i) (6) does not prescribe supply of 10 lakhs cards. Clause 12 (i) (7) alone prescribes an experience of two years during which time the bidder or any one of its partner should have supplied 10 lakhs SCOSTA based smart cards. This prescription is also fulfilled by L1 consortium through relevant documentary evidence for it to progress to the next stage. Therefore, the contention of the petitioners that L1 consortium has not supplied 10 lakhs SCOSTA based smart cards for Driving Licence/Registration Certificate Project or that it has not supplied to Transport Department is totally baseless and unsustainable.

72. As contended by the learned senior counsel appearing for L1 consortium, it is the submission of the learned Advocate General that a subsidiary company is a distinct legal entity and taking the experience and manufacturing capabilities of the said subsidiary company as that of the parent holding is nothing but bringing another partner into the consortium. In such view of the matter, the Technical Evaluation Committee has rightly rejected the case of the petitioner, viz., M/s.Smart Chip for progressing to the next stage as the said petitioner does

not satisfy the condition as stipulated in the NIT.

73. It is further submitted by the learned Advocate General that the stand of L2, viz., M/s.Madras Security Printers relating to their letter, which was said to have been written by them after opening of the price bid offering to reduce the price to different extent in case of award of contract to them, is only an after thought and an attempt to defeat the tender process coming to a close. In this regard learned Advocate General submits that on the said letter of the petitioner, the Department had written to them asking them whether they would be willing to reduce the price to the said extent in the Pilot Project, which they were already executing, it has been negatived by the petitioner stating that the cost has increased manifold and even sought for enhancement. That being the case, it is submitted by the learned Advocate General as to how it would be feasible for the petitioner to reduce its rates and offer at somewhere around Rs.55/= per card. Therefore, it is nothing but an attempt on the part of L2 to defeat the avowed object for which the tender has been floated and finalised.

74. Insofar as the submission of the petitioner, viz., M/s.Madras Security Printers that the validity period of the tender having not been extended and that proposal for extension having not gone from the Department/Government, as is mandated under the Act, the tender is liable to be cancelled, learned Advocate

General submits that the validity of the tender has been periodically extended and that the same has been done on mutual basis initiated by the Department and accepted by L1 consortium and the same is borne out by record. Therefore, learned Advocate General submits that the said contention deserves to be rejected.

75. It is further submitted by the learned Advocate General that clause 3 (i) (f) of the Tender conditions stipulate that in case of technological innovation, the same is to be provided without any further additional cost, which is part of the tender condition and the same has been accepted by L1 consortium. That being the case, it cannot be said that the respondent authorities have not taken into consideration the future technological impact in the smart card revolution and the tender conditions have been well thought about and framed to meet all the contingencies and, therefore, no interference is warranted with the award of contract and, therefore, the interim order passed by the learned single Judge deserves to be set aside.

76. Countering the stand of the learned senior counsel appearing for L1 consortium and the learned Advocate General appearing for the respondent authorities, in reply, it is submitted by the learned counsel for the petitioner, viz., M/s.Smart Chip that till date, tender bulletin has not been issued, as has been

submitted by the learned Advocate General before the Division Bench in the earlier round of litigation. That being the case, the case of the petitioner having been rejected even prior to the award of contract to the successful bidder, non issue of tender bulletin as is prescribed under the Act and the Rules, even after award of contract, is fatal to the case of the respondent and, therefore, the respondent authorities cannot contend that the provisions of the Act and the Rules have been followed as has been directed by this Court.

77. It is submitted by Mr.Rahul Balaji that the bid validity period lapsed and the same has not been extended beyond the year Dec., 2012 and in the absence of validating the bid beyond the said time, the tender lapses and, therefore, award of contract in a lapsed tender is non est in law and impermissible. Further, it is submitted by the learned counsel that the extension for validity should emanate from the authorities and not from the bidder. In the present case, extension of validity of the bid has been sought for by the bidder, as is borne out by the records and since the same is not in consonance with the provisions of the Act, 1998 and the Rules, 2000, the extension of validity granted to the bidder is not sustainable in law. It is further submitted that for reasons best known to the respondent authorities the validity has been extended at the behest of the bidder, which clearly shows that the respondent authorities were not for extending the validity.

78. It is further submitted by the learned counsel that the records of the Government having lost, there is no whisper about copies in the files in the letter addressed by the Transport Commissioner, whereas curiously the reply given by the Addl. Advocate General refers to copies of the lost papers available in the office of the Transport Commissioner. When the Department itself has not said anything about the copies of papers being available, it is not known how the learned Addl. Advocate General has referred to the fact that the file could be reconstructed with the copies of the documents that are in the office.

79. It is the further submission of the learned counsel for the petitioner that the Transport Commissioner has opined that it would be wholly unsafe to proceed with the tender after a long lapse of time, the market for technology based smart cards being volatile. The Transport Commissioner has further raised a query that certain of the conditions in the tender document had not given a level playing field for other competitive bidders to submit their bid and whether in such circumstances the tender could be cancelled and a fresh tender floated. However, the learned Addl. Advocate General has not discussed anything about the cost factor involvement in his reply but has merely said that if the Transport Commissioner feels that on the current market conditions price negotiations could be carried out and a better negotiated price could be arrived at, the Transport Commissioner could proceed with the matter. Further, the learned Addl.

Advocate General has not dwelled upon the issue relating to certain tender conditions which has not created a level playing field thereby preventing other bidders to submit competitive bid. The said issue, which is one of the most important query raised by the Transport Commissioner has not been answered by the learned Addl. Advocate General. Further, on the basis of the said reply, the authority, who himself had raised the query that the market for chips being volatile and that the international prices are coming down and has also opined that certain of the tender conditions have not created a level playing field for submission of competitive bids, has gone ahead and accepted the tender and finalised the same. It is beyond ones comprehension to understand the logic behind the acceptance of the tender and finalisation of the same by the Transport Commissioner when the very same authority has raised certain queries, which materially stares at the whole tender process.

80. It is further submitted by the learned counsel appearing for the petitioners that certain of the correspondence do not find place in the typed set of records as they form part of the original file of the Department. Therefore, the learned single Judge had called for the original files and had perused the same and arrived at a substantive view that all is not well with the whole of the tender process and allowing the same to proceed to its logical conclusion would have a great monetary bearing on the exchequer and, therefore, thought it fit to grant

the interim order. The above narrated events coupled with the documents on record vindicate the stand of the petitioners that the whole of the tender process was done with intentions not honourable and to confer benefit on a selected individual, who does not fulfil the qualifying criteria. In such circumstances, it is submitted that on an over all consideration of the matter and also taking into account the length of time that has elapsed from the date of floating of the tender till date and the very many factors that affect the price quoted for the particular work, the validity having not been extended and the provisions of the Act relating to validity staring at the arbitrary act unveiled by respondent authorities for the benefit of L1 consortium, time prescription under Rule 26 (3) of Rules, 2000, which mandates that the tenders should be deemed to have become invalid and fresh tenders should be called, if the evaluation of tenders and award of contract is not completed within the extended validity period and the proviso to Rule 26 (2) mandating that the sum total of all extensions shall ordinarily not exceed 180 days, much water has flown under the bridge due to passage of considerable period of time, this Court, in exercise of its extraordinary jurisdiction should direct cancellation of the tender process and direct the authority to call for fresh tenders in the interest of justice and also safeguarding the exchequer from the loss that would be caused and to protect it from the clutches of persons, who try to compromise the law for their individual benefit.

81. Heard Mr.Vijay Narayan, learned senior counsel appearing for the petitioner in W.P. No.16971 of 2013, Mr. Rahul Balaji, learned counsel appearing for the petitioner, viz., M/s.Madras Security Printers in W.P. No.10911/2012, Mr.G.Masilamani, learned senior counsel appearing for the appellant in W.A. No.1618 of 2013, Mr.AL.Somayaji, learned senior counsel appearing for the appellant in W.A. No.1976 of 2013 and Mr.R.Muthukumarasamy, learned Advocate General appearing for the appellant in W.A. No.1631 of 2013 and perused the materials available on record as also the various decisions relied on by the learned counsel for the parties, more particularly with reference to the various provisions of law as provided under the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000.

82. Though very many decisions have been cited by the learned senioir counsel appearing on either side, however, for the purpose of determining the issues that have been raised in the present petitions, the following decisions are relatable as noted against their respective points :-

<u>Alternative Remedy – Is it a bar to entertain a writ petition</u> :-

1) Whirlpool Corporation – Vs – Registrar of Trade Marks & Ors. (1998 (8) SCC 1).

2) S.J.S. Business Enterprises (P) Ltd. - Vs – State of Bihar & Ors. (2004 (7) SCC 166).

3) L.K.Verma – Vs – HMT Ltd. & Anr. (2006 (2) SCC 269).

<u>Status of subsidiary company vis-a-vis the parent company</u> :

1) State of U.P. & Ors. - Vs – Renusagar Power Co. & Ors. (1988 (4) SCC 59)

2) New Horizons Ltd. & Anr. - Vs – Union of India & Ors. (1995 (1) SCC 478)

3) Shree Pacetronix Ltd. & Anr. - Vs – State of Assam & Ors. (MANU/GH/0161/2008) :: 2010 (159) CompCas 386 (Gauhati)).

4) Core Projects & Technologies Ltd. - Vs – The State of Bihar (2010 SCC OnLine 916).

5) Rohde and Schwarz Gmbh & Co. - Vs – Airport Authority of India (2013 SCC OnLine Del 4415).

6) Vodafone International Holdings B.V. - Vs – Union of India & Anr. (2012 (6) SCC 613).

<u>Judicial Review in Contractual Matters</u> :

1) Mahabir Auto Stores & Anr. - Vs – Indian Oil Corporation & Ors. (1990 (3) SCC 752).

2) Michigan Rubber Ltd. - Vs – State of Karnataka (2012 (8) SCC 216).

83. Keeping the contentions raised by the learned senior counsel for the respective parties in mind, the documents relied on by either side in support of their contentions and the decisions relied on by them to drive home their point, this Court now proceeds to analyse each one of the issues which has a bearing on the finalisation of the tender and the sanctity of the tender process.

<u>PLEA OF ALTERNATIVE REMEDY</u> :

84. It is the contention of the respective learned senior counsel appearing for L1 consortium as also the learned Advocate General appearing for the respondent authorities that a provision for appeal is provided under Section 11 of the Act and without exhausting the said remedy the petitioner in W.P. No.16971 of 2013 has rushed to this Court. It is the further contention of the respective learned senior counsel that the reasons for rejection of the technical bid having not yet been communicated to the unsuccessful bidders, there arises no grievance for the unsuccessful bidders to approach this Court. In such view of the matter, it is submitted that the writ petition itself though not maintainable, as there being no reason communicated to the petitioner, against which the petitioner would be aggrieved, the petitioner further not having exhausted the alternative remedy of appeal provided under Section 11 of the Act no cause of action arises for the petitioner to approach this Court and, therefore, the writ petition is liable to be dismissed at the threshold.

85. Countering the said stand, it is the submission of the learned senior counsel for the unsuccessful bidder that availability of alternative remedy is not a bar for the High Court to entertain a writ petition. It is further submitted by the learned senior counsel that availability of an alternative statutory remedy is not a

constitutional bar, but is only a self-imposed restriction. Time and again, this proposition has been highlighted by the Supreme Court in a catena of decisions and in this regard reliance was placed on the decision in *Whirlpool's case (supra)*. For better clarity, the relevant portion on which reliance was placed, is extracted hereunder :-

> *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".*
>
> *15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions*

of the evolutionary era of the constitutional law as they still hold the field.

16.Rashid Ahmed v. Municipal Board, Kairana [AIR 1950 SC 163 : 1950 SCR 566] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission[AIR 1954 SC 207 : (1954) 25 ITR 167] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in State of U.P. v. Mohd. Nooh [AIR 1958 SC 86 : 1958 SCR 595] as under:

> *"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."*

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani [AIR 1961 SC 1506 : (1962) 1 SCR

753] and was affirmed and followed in the following words:

> *"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."*

86. From a careful perusal of the above decision, it reveals that where the writ petition has been filed for enforcement of any fundamental rights or where there has been a violation of principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged, the Court is vested with inherent powers under Article 226 of the Constitution to remedy the wrong. Further, a careful perusal of the movement of law on the

jurisprudence of alternative remedy reflects that there has been no corrosive effect on the above decisions, though old, continue to hold the field till date as a result of which it follows that the law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, inspite of availability of alternative statutory remedy, is not affected in the above contingencies as laid down by the Supreme Court.

87. Therefore, in contractual matters, the Government must act in accordance with the statute and must not act unfairly or unreasonably, else the action would be amenable to judicial review under Article 226. The reasonableness of the action in the award of contract could be tested against the dominant consideration and whether a free and fair practice has been followed. Further, once a writ petition has been entertained and interim order granted, it would be wholly unsafe to interfere on the ground of existence of alternative remedy and relegate the parties back to pursue the alternative remedy, as the same would not only cause further delay, but would also open up the gates for a next round of litigation on the same subject, and, therefore, the Courts even at the initial stage, must be guarded while granting interim relief, else there would be no worthwhile reason not to take the matter to its logical conclusion.

88. In the case on hand, the procedure and practice adopted by the

respondent authorities in awarding the contract to L1 consortium alone is not put in issue, but non-communication of reason for rejection of technical bid of the unsuccessful bidder as also non issue of tender bulletin till date, as has been mandated under Section 10 (7) of the Act is put in issue. Further, it is also in issue before this Court that the provisions as contemplated under the Act and Rules has not been followed and, if it is said to be followed, it is the contention that it has been bent to the benefit of L1 consortium and, therefore, there is total violation of Article 14. In such a scenario, the procedure as contemplated under the Act having been put in issue praying that the same has not been followed, in effect, the said procedural lapse has prevented the petitioner from enforcing the remedy of appeal and, therefore, the principles of natural justice having been violated, in that the reason for rejection having not been communicated to the unsuccessful bidder, approaching the appellate authority by filing an appeal would be an exercise in futility and, therefore, it cannot be right in saying that entertaining of the writ petition on the ground of statutory bar of alternative remedy does not stand attracted to the case on hand at the present point of time.

89. Further, as per the mandate of Section 10 (7) of the Act, the Tender Accepting Authority is supposed to intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers.

On such communication of reasons, on the publication of the tender bulletin, the aggrieved party may file appeal to the Government within ten days from the date of receipt of the order whereupon the Government shall dispose of the appeal within fifteen days from the date of receipt. In the case on hand, though it is informed by the learned Advocate General that the award of contract has been passed in the year 2013, however, till the interim order passed by this Court, i.e., till 8th July, 2013, the reasons for rejection has not been communicated to the unsuccessful bidder. It is not known whether the reasons for rejection as per Section 10 (7) of the Act has been communicated to the unsuccessful bidder even till date. Such being the case, no fruitful purpose would be served in relegating the matter on the ground of alternative remedy and, therefore, this Court, exercising its extraordinary jurisdiction under Article 226 of the Constitution, had exercised its discretion and had entertained the writ petition and, therefore, the same cannot be said to be unreasonable and, therefore, the said plea of the respondents with regard to availability of alternative remedy and maintainability cannot be sustained.

RIGHTS & CONTROL OF PARENT COMPANY OVER SUBSIDIARY COMPANIES :

90. It is not in dispute that reasons for rejection has not been given to the unsuccessful bidder till date. However, the reasons for rejection of the technical bid of the unsuccessful bidder is available in the order passed by the learned single

Judge, which reasons, the learned single Judge, has carved out from a perusal of the original files that were produced before the Court. The reasons for rejection of the technical bid of the unsuccessful bidder as recorded in the minutes of the Technical Evaluation Committee in its meeting held on 24th August, 2010, as culled out by the learned single Judge from the original files produced by respondents 1 and 2, is tabulated hereunder :-

"3. The Technical Bid submitted by M/s.Smart Chip Ltd., as lead bidder in the consortium with M/s.Versatile Cards Technology Pvt. Ltd., fails to satisfy the following eligibility criteria :-

a) Consortium should not have more than two partners,

***whereas** the Technical bid of M/s.Smart Chip Ltd., the consortium consists of three partners as below :-*

1. M/s.SMART CHIP LTD.

2. M/s.VERSATILE CARDS TECHNOLOGY PVT. LTD.

3. M/s.SYSCOM CORPORATION LTD.

b) The manufacturing unit should have SCOSTA experience for two years and MASTER CARD or VISA certification and it should be in the name of the lead bidder or any one of the partner of the consortium,

***whereas** the Technical bid of M/s.Smart Chip Ltd., shows that manufacturing unit of M/s.Versatile Cards Technology Pvt. Ltd. (Consortium Partner) has MASTER CARD and VISA certification and M/s.Smart Chip Ltd., has got SCOSTA certification for smart cards manufactured from its own manufacturing unit. But M/s.Smart Chip Ltd., has produced a SCOSTA certificate with smart cards manufactured from M/s.Syscom Corporation Ltd.*

Hence, the bid may not be considered for further evaluation."

91. It is the submission of the learned senior counsel for the unsuccessful bidder that M/s.Syscom Corporation Ltd., is a wholly owned subsidiary (for short 'WOS') of M/s.Smart Chip Ltd., the petitioner, and that the Directors of both the firms are one and the same and, therefore, by no stretch of imagination could the subsidiary of the parent holding be termed as another partner in the consortium. It is the further submission of the learned senior counsel that though every company is a separate legal entity, but insofar as the experience and facilities are concerned, the parent holding could always exercise control over the affairs of the subsidiary unit so long as it is not detrimental to the affairs of the subsidiary company. In such view of the matter, the parent holding of M/s. Smart Chip Ltd., using the manufacturing facility and SCOSTA certification of its WOS, M/s.Syscom Corporation, had submitted its bid along with its consortium partner, M/s.Versatile Cards Technology. M/s.Syscom Corporation, being a WOS of the lead bidder in the consortium, definitely the said subsidiary unit cannot be construed to be a third member in the consortium and the view taken by the Technical Evaluation Committee is *per se* bad in law. The parent holding and the consortium form a "single entity" for the purpose of bidding and the WOS does not form part as a third member of the consortium. It is the submission of the learned senior counsel for the unsuccessful bidder that the Tender Scrutiny

Committee had totally misunderstood the meaning of *'consortium'* vis-a-vis *'partner'* and had erroneously disqualified the petitioner and, therefore, the said decision is liable to be set aside and the price bid of the petitioner should also be taken into consideration to arrive at the lowest bid.

92. Learned senior counsel, in this regard, placed heavy reliance on *Renusagar Corporation case* and *New Horizon case (supra)*, wherein the Supreme Court had extensively considered the decision of the English Courts in *DHN Food Distributors Ltd. - Vs – London Borough of Tower Hamlets (1976 (3) All ER 462), Harold Holdsworth & Co. (Wakefield) Ltd. - Vs – Caddies (1955 (1) All ER 725), Scottish Co-operative Wholesale Society Ltd. - Vs – Meyer (1958 (3) All ER 66), Merchandise Transport Ltd. - Vs – British Transport Commission (1961 (3) All ER 495 :: 1962 (2) QB 173, 206-07) and LIC – Vs – Escorts Ltd. (1986 (1) SCC 264)* and many other decisions in and by which it has been held that where the documents reveal that the associated companies are inextricably connected such that in reality, they are part of one concern, the question of the subsidiary being a partner in the consortium is *per se* illegal and against the well accepted judicial precedents. Therefore, it is submitted by the learned senior counsel that "single entity" theory overshadows the "separate legal entity" theory, which fact has been lost sight of by the Technical Evaluation Committee to reject the bid of the petitioner company.

93. Per contra, learned senior counsel appearing for the L1 consortium as also the learned Advocate General submitted that the Technical Evaluation Committee, taking into consideration clause 24 of the NIT, which prescribes the parameters to be taken into consideration for the purpose of technical evaluation, has considered the necessary parameters in the right perspective with regard to eligibility and technical suitability of the bidders and the competence of the bidders to perform the contract and has arrived at the decision that the petitioner company does not satisfy the requirements of clause 44 (12) (i), in that the consortium of the petitioner consists of more than two partners and, therefore, is disqualified in terms of the said clause. In this regard, reliance has been placed on the decision in *Core Projects case* and *Rohde & Schwarz case (supra)* to contend that experience of the subsidiary cannot be taken into account as experience of its holding company while evaluating a bid and that it is not obligatory on the Tender Accepting authority to conduct an in-depth investigation in order to determine whether the bidder has requisite experience or not and that the terminology to act reasonably and fairly does not mean that it is necessary for the tender Accepting Authority to ignore the corporate facade of all entities/bidders.

94. In the above backdrop of the rival contentions advanced by the parties to the *lis*, it is necessary to advert to the legal position prevailing with regard to a

parent holding vis-a-vis the subsidiary company and the circumstances in which it is permissible for the Courts to lift the corporate veil in order to see through the company structure.

95. In *Renusagar's case (supra)* relied on by the petitioner, the case related to the use of captive power generated by the WOS of the parent holding, M/s.Hindalco and the rejection of exemption for electricity duty by the State Government with regard to the energy consumed by any person from his own source of generation. In the appeal against the order of the High Court, the aspect for consideration before the Apex Court was whether the generation of power by the WOS, viz., Renusagar Power Co. Ltd., was 'own source' of generation of electricity for the parent holding, viz., M/s.Hindalco and whether the order of the State Government, in the facts and circumstances of the case and with regard to the nature of order was in accordance with the principles of natural justice. The main issue addressed by the Apex Court in the above decision was whether the generation of power by the WOS of the parent holding could be termed as the own generation of the parent holding and whether the lifting of corporate veil in that regard was permissible. The Supreme Court, referring to various decisions of the House of Lords as also the precedence on the issue, held that in the facts and circumstances of the case, the corporate veil should be lifted and the parent holding and the WOS should be treated as one concern and that the source of

generation of the WOS should be treated as the own source of the parent holding. For better appreciation of the issue, the relevant portion of the order of the Apex Court is extracted hereinbelow :-

> *"55. In Kodak Ltd. v. Clark [(1903) 1 KB 505] the Court of appeal in England while dealing with an English company carrying on business in the U.K. owned 98 per cent of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc. of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax. Renusagar was not the alter ego of Hindalco, it was submitted. On the other hand these English cases have often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of appeal in DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] . It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions of the Land Compensation Act, 1961 of England. Lord Denning at p. 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at p. 467 as follows:*

"Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law [Principles of Modern Company Law, 3rd Edn., p. 216 (1969)] says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725] . So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view *of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this Court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly."*

56. Lord Justice Goff proceeded with caution and observed as follows at pp. 468 and 469 of the report:

"Secondly, on the footing that that is not in itself sufficient, still, in my judgment, this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely whether the owners of this business have been disturbed in their possession and enjoyment of it. I find support for this view in a number of cases, from which I would make a few brief citations, first from Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725] where Lord Reid said: (All ER pp. 737-38)

'It was argued that the subsidiary companies were separate legal entities, each under the control of its own board of directors, that in law the board of the appellant

company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria, and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Mfg. Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective.'

That particular passage, is I think, especially cogent having regard to the fact that counsel for the local authority was constrained to admit that in this case, if they had thought of it soon enough, DHN could, as it were, by moving the pieces on their chess board, have put themselves in a position in which the question would have been wholly unarguable.

I also refer to Scottish Cooperative Wholesale Society Ltd. v. Meyer [(1958) 3 All ER 66] . That was a case under Section 210 of the Companies Act, 1948 and Viscount Simonds said: (All ER p. 71)

'... I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. He said:

"In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view".'

My third citation is from the judgment of Danckwerts, L.J. In Merchandise Transport Ltd. v. British Transport Commission [(1961) 3 All ER 495 : (1962) 2 QB 173, 206-07] where he said that the cases — (All ER p. 518)

'show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.'

The third ground, which I place last because it is longest, but perhaps ought to come first, is that in my judgment, in truth, DHN were the equitable owners of the property. In order to resolve this matter, it will be necessary for me to refer in some detail to the facts."

57. Shaw, L.J. also observed at p. 473 as follows:

"Even if this were not right, there is the further argument advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors

of Bronze; the shareholders of Bronze were the same as in DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group. If anything were necessary to reinforce the complete identity of commercial interest and personality, clause 6, to which I have referred already, demonstrates it, for DHN undertook the obligation to procure their subsidiary company to make the payment which the bank required to be made.

If each member of the group is regarded as a company in isolation, nobody at all could have claimed compensation in a case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land."

58. In this connection it would be useful to refer to Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725] , where Lord Morton of Henryton in England, at p. 734 of the report observed as follows:

"My Lords, this clause refers to a group of companies consisting of the appellant company and their existing subsidiary companies. I cannot read the clause as compelling the board to assign duties to the respondent in relation to the business of every company in the group. Nor can I read it as compelling the board to assign him duties in relation to the business of the appellant company. That business is not treated as being on a different footing from the business of British Textile or of another subsidiary of the appellant company, Whalley & Appleyard, Ltd., which is mentioned in the respondent's

condescendence 3. As I read the clause, it leaves the board of the appellant company free to assign to the respondent duties in relation to the business of one only, or two only or all of the companies in the group, and to vary the assignment and the duties from time to time. Further, I think the clause leaves the board free to appoint another person to be 'a managing director', and to divide the duties and powers referred to in the clause between the respondent and the other managing director in such manner as they think fit. It is true that each company in the group is, in law, a separate entity, the business whereof is to be carried on by its own directors and managing director, if any; but there is no doubt that the appellant company, by taking any necessary formal steps, could make any arrangements, they pleased in regard to the management of the business of (for instance) British Textile. They owned all the issued capital and the directors were their nominees."

59. Lord Reid at pp. 737-38 observed as follows:

"It was argued that the subsidiary companies were separate legal entities, each under the control of own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria, and it must be construed in the light of the facts and realities of *the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective."*

60. Our attention was drawn by Shri Sen to Scottish Cooperative Wholesale Society Ltd. v. Meyer [(1958) 3 All ER 66], where Viscount Simonds of House of Lords observed at pp. 71-72 as follows:

"My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former. It will give an example of this. I observed that, in the course of the argument before the House, it was suggested that the company had only itself to blame if, through its neglect to get a contract with the society, it failed in a crisis to obtain from the Falkland Mill the supply of cloth that it needed. The short answer is that

it was the policy of the society that the affairs of the company should be so conducted, and the minority shareholders were content that it should be so. They relied — how unwisely the event provided — on the good faith of the society, and in any case they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the company that it is illegitimate to regard the conduct of the company's affairs as a matter for which it had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President, Lord Cooper's words on the first hearing of this case. He said (1954 SC at p. 391):

'In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.'

At the opposite pole to this standard may be put the conduct of a parent company which says 'our subsidiary company has served its purpose, which is our purpose. Therefore let it die' and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this *section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself- strongly in this case because it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy."*

61. Similarly, at p. 84 of the report, Lord Keith's observations are also relevant to the facts of this case:

"My Lords, if the society could be regarded as an organisation independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. Lord Carmont pointed this out in the Court of Session. But that is not the position. In law, the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself unless it could have persuaded the respondents to become servants of the society. This the respondents were not prepared to do. The company, through the knowledge, the experience, the connections, the business ability and the energies of the respondents, had built up a valuable goodwill in which the society shared and which there is no reason to think would have been maintained, if not increased, with the Cooperation of the society. The company was in substance, though not in law, a partnership consisting of the society and the respondents. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is

common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in Lindley on Partnership (11th Edn.), p. 401:

'A partner cannot, without the consent of his co-partners, lawfully carry on for his own benefit, either openly or secretly, any business in rivalry with the firm to which he belongs.'

It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case."

62. In Charterbridge Corpn. Ltd. v. Lloyds Bank Ltd. [(1969) 2 All ER 1185] at p. 1194 Justice Pennycuick emphasised that the reality of the situation must be looked in.

63. Shri Trivedi drew our attention to the decision in Marshall Richards Machine Co. Ltd. v. Jewitt [36 Tax Cases 511] . where at p. 525 of the report Lord Upjohn, J. observed that where you have a wholly owned subsidiary, and both the parent company and wholly owned subsidiary enter into trading relationships, there is, of course, a dual relation, but you cannot for the purposes of tax disregard the fact that there are, in fact, two entities and two trades, that is to say, the trade of each company. It is normally a question of fact whether the disbursement in question is laid out wholly and exclusively and for the purposes of the trade. In aid of this proposition and in furtherance Shri Trivedi drew our attention to the profits of the two companies which were separately computed and also *referred to Vol. C, p. 641 where the profits of Renusagar were separately indicated and Vol. C at p. 642 where the profits of Hindalco were separately indicated.*

64. We are, however, of the opinion that these tests are not conclusive tests by themselves. ***Our attention was also drawn to the decision of the Madras High Court in Spencer & Co. Ltd. Madras v. CWT [AIR 1969 Mad 359 : 72 ITR 33 : 39 Com Cas 212 : ILR (1969) 2 Mad 450] where Veeraswami, J. held that merely because a company purchases almost the entirety of the shares in another company, there was no extinction of corporate character for each company was a separate juristic entity for the tax purposes. Almost on similar facts, are the observations of P.B. Mukharji, J. in Turner Morrison & Co. Ltd. v. Hungerford Investment Trust Ltd. [AIR 1969 Cal 238] where he held that holding company and subsidiaries are incorporated companies and in this context each has a separate legal entity. Each has a separate corporate veil but that does not mean that holding company and the subsidiary company within it, all constitute one company.***

65. Mr Justice O. Chinnappa Reddy speaking for this Court in LIC v. Escorts Ltd.[(1986) 1 SCC 264 : AIR 1986 SC 1370 : 1985 Supp (3) SCR 909 : (1986) 59 Com Cas 548] had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned *conduct, the involvement of the element of the public interest, the effect on parties who may be affected. After referring to several English and Indian cases, this Court observed that ever since A. Salomon & Co. Ltd. Case [1897 AC 22] a company has a legal independent existence distinct from individual members. It has since been held that the corporate veil may be lifted and corporate personality may be looked in. Reference was made to Pennington and Palmer's Company Laws.*

66. It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the *generation in Renusagar as the own source of generation of Hindalco. In the impugned order the profits of Renusagar have been treated as the profits of Hindalco."*

(Emphasis supplied)

96. In *New Horizon's case (supra)* relied on by the petitioner, the Supreme Court, while reiterating the *Wednesbury's Principle of Reasonableness'*, further went on to hold that the experience of the WOS can be taken for the purpose of considering the experience of the parent holding. The Supreme Court further went on to hold that where the Articles of Association and Memorandum of Association reveals that the two entities are intricately connected and that the WOS is under the full control of the parent holding, the parent holding can very well utilise the experience of its WOS, subject however to the clauses in the tender conditions, and that the court can very well lift the corporate veil for the purpose of seeing whether the parent holding and the WOS could be termed as a single entity, though for all legal purposes, as per Companies Act, the WOS is a separate legal entity. Referring to a catena of decisions, the Supreme Court went on to hold as under :-

"17. .... The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in

such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere [See : Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : (1979) 3 SCR 1014] (SCR p. 1034 : SCC pp. 505-06, para 12); Kasturi Lal Lakshmi Reddy v. State of J&K [(1980) 4 SCC 1 : (1980) 3 SCR 1338] (SCR p. 1355 : SCC pp. 11-12, para 11); Fasih Chaudhary v. Director General, Doordarshan [(1989) 1 SCC 89 : 1988 Supp (3) SCR 282] (SCR p. 286 : SCC p. 92,); Sterling Computers Ltd. v. M & N Publications Ltd. [(1993) 1 SCC 445] ; Union of India v. Hindustan Development Corpn. [(1993) 3 SCC 499] (at p. 513)].

18. In the recent decision in Tata Cellular v. Union of India [(1994) 6 SCC 651] this Court has examined the scope of judicial review in the field of exercise of contractual powers by Government bodies and, after noticing the current mood of judicial restraint in England, the Court has laid down the following principles: (SCC pp. 687-688, para 94)

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

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

made.

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

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

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

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

19. "Wednesbury principle of reasonableness" to which reference has been made in principle (5) aforementioned is contained in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. [(1948) 1 KB 223 : (1947) 2 All ER 680] . In that case Lord Greene, M.R. has held that a decision of a public *authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. In Tata Cellular [(1994) 6 SCC 651] this Court, has mentioned two other facets of irrationality:*

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes.

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23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a *company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials* *are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of* *companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.*

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27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of Salomon v. Salomon & Co. [1897 AC 22 : (1895-9) All ER Rep 33] Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : Gower's Principles of Modern

Company Law, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in US v. Milwaukee Refrigerator Transit Co. [(1905) 142 Fed 247, 255] :

> *"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."*

29. In Scottish Coop. Wholesale Society Ltd. v. Meyer [1959 AC 324, 343 : (1958) 3 All ER 66 : (1958) 3 WLR 404] , a case under Section 210 of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper:

> *"In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view."*

* * * * * * * *

30. Similarly in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725 : (1955) 1 WLR 352] it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid with the observation: "This is too technical an argument." The learned *law Lord went on to hold : "This is an argument in re mercatoria, and it must be construed in the light of the facts and realities of the situation." (All ER p. 738)*

31. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462 : (1976) 1 WLR 852] the Court of Appeal was dealing with three companies, out of which one was the holding company and the other two were its subsidiaries. After quoting the views of Prof. Gower that "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group" Lord Denning, M.R. has observed : "This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point." (p. 467) In the same case, Goff, L.J. has said : "[T]his is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil." (p. 468) The observations of Shaw, L.J. were to the following effect:

> *"Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice?" (p. 473)*

In this case the holding company was held entitled to compensation for disturbance from premises in its occupation on account of compulsory purchase of the property which belonged to one of the subsidiaries and in which the holding company had no interest. This was a case in which the court lifted the corporate veil so as to confer a benefit on the company.

32. It may, however, be stated that the existing state of the law in England in this field is not very satisfactory. According to Professor Gower the development "has been essentially haphazard and irrational" (See : Gower's Principles of Modern Company Law, 4th Edn., p. 138).

33. This Court in Juggi Lal Kamlapat v. CIT [(1969) 1 SCR 988 : AIR 1969 SC 932] has laid down that "in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade". (SCR p. 995).

34. In State of U.P. v. Renusagar Power Co. [(1988) 4 SCC 59 : 1988 Supp (1) SCR 627] this Court lifted the veil to hold that Hindalco, the holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed : (SCC p. 94, para 66)

> *"It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. … The horizon of the doctrine of lifting of corporate veil is expanding."*

35. There are cases where the court has looked behind the facade of the company and its place of registration in order to determine its residence and for this purpose the test laid down is *the place of the central management and control. (See : De Beers Consolidated Mines Ltd. v. Howe [1906 AC 455 : (1904-7) All ER Rep Ext 1256] .) Similarly the Court has looked at the corporators in order to determine the character of the corporation as an enemy alien or as a British resident (See : Daimler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd. [(1916) 2 AC 307 : (1916-17) All ER Rep 191]). According to Professor Gower this does not involve breach of the principle laid down in Salomon case [1897 AC 22 : (1895-9) All ER Rep 33] . (See : Gower's Principles of Modern Company Law, 4th Edn., p. 136.)*

* * * * * * * *

37. This Court has adopted a similar approach and in some cases it has seen through the corporate veil. In Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : (1986) 2 SCR 278] the Court was considering the question whether the appellant company was an agency or instrumentality of the State for the purpose of Article 12 of the Constitution. It was said: (SCR p. 349 : SCC p. 202, para 67)

> *"For the purpose of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State."*

So also in State of U.P. v. Renusagar Power Co. [(1988) 4 SCC 59 : 1988 Supp (1) SCR 627] it has been observed : (SCR p. 668 : SCC p. 95, para 68)

> *"The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent*

in modern company jurisprudence.”

*   *   *   *   *   *   *   *

40. Thus the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore-based constituent (IIPL) has 25 years' experience in printing the telephone directories with “yellow pages” in Singapore. The said experience has been ignored by the Tender Evaluation Committee on erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated 26-4-1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of Respondent 4. The total amount of royalty offered by Respondent 4 for three years was Rs 95 lakhs whereas NHL had offered Rs 459.90 lakhs, i.e., nearly five times the amount offered by Respondent 4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by Respondent 4, it must be held that decision of

> *the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of Respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed.*

97. In *Shree Pacetronix case (supra)* relied on by the petitioner, the moot questions, which the Court addressed to itself was *"(i) Whether a subsidiary of a subsidiary of a holding company be treated as the subsidiary of the holding company even if the holding company is not registered in India and functions in India through its subsidiary, which is not registered in India, as a company under the Companies Act, but which in turn, functions through its subsidiary, which is registered, in India, as a company under the Companies Act, 1956? and (ii) When a subsidiary is a wholly owned subsidiary of the holding company, can the law ever treat the activities, acts or omissions of such a subsidiary as the activities, acts or omissions of its holding company?"* While answering the said issues raised before the Court, a learned single Judge of the Delhi High Court, adverting to the provisions of law as is reflected in the Companies Act, vis-a-vis the various decisions relating to the legal status of the parent holding vis-a-vis the subsidiary company, after an exhaustive analysis, on the question of doctrine of corporate personality and doctrine of lifting of corporate veil analysing the various propositions of law as it stood since *Salomon's case (supra)* followed by various judicial pronouncements across the various continents, crystallized the

proposition of law with relation to distinct legal corporate personality as under :-

"66. The question, therefore, is this: Can, in law, a subsidiary of a subsidiary of a holding company be treated as the subsidiary of the holding company even if the holding company is not registered in India, but functions through its Indian subsidiary? This question is fully answered by section 4. For the sake of clarity, section 4 of the Companies Act, 1956, with its illustration, is reproduced hereinbelow:

"4. Meaning of 'holding company' and 'subsidiary'.—(1) For the purpose of this Act, a company shall, subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if,

(a) that other controls the composition of its board of directors; or

(b) that other—

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is the other's subsidiary.

Illustration

Company B is a subsidiary of company A, and company C is a subsidiary of company B. Company C is a subsidiary of company A, by virtue of clause (c) above. If company D is a subsidiary of *company C, company D will be a subsidiary of company B and consequently also of company A, by virtue of clause (c) above, and so on."*

70. In the well-known case of Salomon v. A. Salomon and Co. Ltd. reported in [1897] AC 22, the law laid down was that a company is an entity, which is separate and distinct from its shareholders. The principle of law, so propounded, in Salomon's case, by the House of Lords, held the field for a long time. Ordinarily, even today, a company is a legal entity, different from its shareholders, and, consequently, a subsidiary of a holding company is a legal entity distinct and different from the holding company. To this extent, therefore, Mr. Bhattacharjee is not incorrect in referring to Turner Morrison and Co. Ltd. v. Hungerford Investment Trust Ltd.[1969] AIR 1969 Cal 238. This, principle has, however, not remained invariable or a principle of universal application. With passage of time, when a company, taking advantage of its independent legal entity from that of its holding company, was found indulging in activities aimed at evading legal obligations, pecuniary or otherwise, the courts discarded the concept of separate legal entity of a company, whenever it was found that the company stood, constituted, formed or used, for the purpose of facilitating evasion of legal obligations. (See Pennington's Company Law, 4th edition—page 50-51).

* * * * * * * *

71. Thus, there have been inroads into the doctrine of corporate personality propounded in Salomon v. A. Salomon and

Co. Ltd., [1897] AC 22 by statutory provisions as well as by judicial pronouncements. By a process, commonly known as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This principle is resorted to, when it is found that the principle of corporate personality, as propounded in Salomon v. A. Salomon and Co. Ltd., [1897] AC 22, is too flagrantly opposed to justice, convenience or the interest of the revenue. (See Gower's Principles of Modem Company Law, 4th edition page 112). This concept, which is described as "piercing the veil" in the United States, has been described by Sanborn J. in U.S. v. Milwaukee Refrigerator Transit Co., [1905] 142 Fed 247, 255 in the following words:

> *"When the-notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."*

72. State of Uttar Pradesh v. Renusagar Power Co. reported in (1988) 4 SCC 59 : [1991] 70 Comp Cas 127 and New Horizons Ltd. v. Union of India reported in (1995) 1 SCC 478 : [1997] 89 Comp Cas 849 (SC), are the two important cases, which point out how judicial pronouncements have departed from the narrow legalistic view, taken in Salomon v. A. Salomon and Co. Ltd., [1897] AC 22, in order to take note of the realities of the situation.

73. Dealing with the doctrine of lifting the "corporate veil" and thereby looking into the real situation in a given case and ignoring thereby, to a great extent, the principle that every company is an independent legal entity and it can be bound for its own action and not for the action of anyone else or to look into the question as to which one, between two or more companies, is the one that controls the affairs of the other companies, in order to fasten with legal liability the company, which controls the activities of the other company or companies, the Supreme Court, in State of Uttar Pradesh v. Renusagar Power Co. reported in (1988) 4 SCC 59 : [1991] 70 Comp Cas 127 observed, at paragraph 53, by referring to the comments in Pennington's Company Law, thus (page 151 of 70 Comp Cas):

> *"53. The learned editor of Pennington's Company Law, 5th edition at page 49 has recognised that this principle has been relaxed in subsequent cases. He states that the principle of company's separate legal entity has on the whole been fully applied by the courts since Salomon v. A. Salomon and Co. Ltd., [1897] AC 22 (HL). Corporate veil has been lifted where the principal question before the court was one of company law, and in some situations where the corporate personality of the company involved was really only of secondary importance and the application of the old principle has worked hardship and injustice. In England, there have been only a few cases where the court had disregarded the company's corporate entity and paid attention to where the real control and beneficial ownership of the company's undertaking lay. When it had done this, the court had relied either on a principle of public policy, or on the principle that devices used to*

perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency or trusteeship, which at first sight Salomon v. A. Salomon and Co. Ltd., [1897] AC 22 seems to prohibit. Again at page 36 of the same book, the learned author notes a few cases where the courts have disregarded the separate legal entity of a company and investigated the personal qualities of the shareholders or the persons in control of it because there were overriding public interests to be served by doing so."

74. From the observations, made in paragraph 53 of State of Uttar Pradesh v. Renusagar Power Co. reported in (1988) 4 SCC 59 : [1991] 70 Comp Cas 127, it becomes clear that when the question of fraud having been committed by a company is raised or when a question of legal obligation arises, the courts have, acting under the principle of public policy or, on the principle that the device, used for perpetrating frauds or evading legal obligations, shall be treated as nullities, lifted the corporate veil and looked behind the company to find out as to who the real player in the game is. Elaborately dealing with the development of the doctrine of lifting the corporate veil or piercing and penetrating a corporate veil, the court, in State of Uttar Pradesh v. Renusagar Power Co. reported in (1988) 4 SCC 59 : [1991] 70 Comp Cas 127, at paragraph 55, referring to the popular observations made by Lord Denning, as Master of the Rolls in DHN Food Distributors Ltd. v. London Borough of Tower Hamlets, [1976] 3 All ER 462 (CA) quoted, with approval, the following passages (page 153 of 70 Comp Cas):

"55. Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants

on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance-sheet and profit and loss account. They are treated as one concern. Professor Gower, in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth and Co. (Wakefield) Ltd. v. Caddies, [1955] 25 Comp Cas 205 : [1955] 1 All ER 725. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this court, we must decide differently from him. These companies as *a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly.”*

(emphasis [Here printed in italics.] is supplied)

* * * * * * * *

88. In the light of the observations made in New Horizons Ltd. v. Union of India, [1997] 89 Comp Cas 849 (SC), it is clear that when a subsidiary is an alter ego of its principal or holding company, because of the fact that the activities of the subsidiary are controlled by the holding company, the court may regard, in public interest or as a matter of public policy, the two separate legal entities as one either for the purpose of imposing legal obligations on them or for the purpose of giving them legally due benefit. In the present case, when respondent No. 4 is, admittedly, a wholly owned subsidiary of its holding company, namely, the parent American company and all that the NIT needs is a lifetime warranty from the principal company in respect of the pacemakers, which may be supplied by a subsidiary, such as, respondent No. 4, there can be no escape from the conclusion that in the facts and circumstances of the present case, the court will not be wrong in looking into the realities of the situation and in treating respondent No. 4 eligible to supply the products manufactured by its holding company in terms of the NIT.

* * * * * * * *

> *93. From the observations made above on the concept of single economic unit by Professor Gower, it clearly follows that a facade, concealing the true state of affairs, is not a condition precedent for lifting of a corporate veil. In a given case, the principle of single economic unit can be taken into account in determining the economic reality in the expanding horizon of global economy. There is a presumption that a subsidiary will act in accordance with law, but according to the conscience of its parents. Unless, therefore, this presumption is rebutted, it is proper for the parent and the subsidiary to be treated as single economic unit. Considered thus, there can be no escape from the conclusion that the conditions, stipulated by the NTT, made respondent No. 4 eligible to offer the products of its parent company."*

98. The above referred to decisions placed on record by the learned senior counsel for the unsuccessful bidder ignites its cause in the expanding horizon of global economy to the extent that the parent holding and the subsidiary company can be considered as one economic entity for the purposes of economic reality and, thereby, brings to fore the stand of the unsuccessful bidder that their case should have been considered keeping in mind the above decisions. However, decisions contra to the one cited above have been placed by the learned senior counsel for L1 consortium to drive home the point that the parent holding and the subsidiary company are different legal entities/persona and piercing the corporate veil is impermissible, unless it pertains to evasion of tax or revenue loss

to the exchequer due to the activities of the said concern.

99. In this regard, reliance has been placed on the decision in *Core Projects case (supra)* wherein the Division Bench of the Patna High Court, in a matter relating to contract, held that where there is no provision in the tender notice that the experience of the subsidiary company may be taken into account as the experience of the holding company, the course of action adopted by the respondent therein in not accepting the experience of the subsidiary company as that of the appellant company by lifting the corporate veil cannot be said to be bad and that the decisions relied on in the case of *Renusagar* and *New Horizons (supra)* are not applicable to the facts of the case and that they are clearly distinguishable on facts. In the said context, the Patna High Court held as under:-

> *"11. Reliance was also placed upon Section 212 of the Indian Companies Act to highlight that the Balance Sheet of holding company is required to include particulars relating to its subsidiaries including a copy of Balance Sheet of the subsidiary, a copy of its profit and loss account and several other particulars. Reliance was also placed upon the judgments of the Supreme Court in the case of (1) State of U.P. v. Renusagar Power Company, (1988) 4 SCC 59, (2) New Horizons Limited v. Union of India, (1995) 1 SCC 478and some other cases noticed by the learned writ Court in paragraphs-9 and 10 of the impugned judgment. Those judgments clearly lay down the law that the Corporate veil can be lifted or pierced when the Courts find that the Corporate personality is opposed to justice, convenience or*

interest of revenue. The case of Renusagar Power Company (supra) was related to payment of electricity duty involving interest of revenue. The case of New Horizons Limited related to Government contracts and thus involved interest of revenue as well as issue of justice. The present case also relates to award of contract and therefore in view of law laid down by the Apex Court in New Horizons Limited (Supra) respondent no. 4 could have the option of looking into the experience of a subsidiary company which was wholly owned by the appellant-company provided the tender notice contained provisions permitting such a course of action either by the express words or by necessary implications.

12. It was rightly submitted on behalf of the respondents that in the case of New Horizons Limited (supra) a joint venture was permitted and the Apex Court in paragraph-26 came to a clear conclusion that New Horizons Limited is a joint venture as claimed by it in the tender and therefore the experience of its various constituents had to be taken into consideration by the standard of a prudent businessman.

13. In the present case, as per definition, the word "affiliate" refers to the subsidiary company of a holding company ***but there is no provision in the tender notice which may lead to the conclusion, explicitly or impliedly, that for the project at hand the experience of the subsidiary company may be taken into account as experience of the holding company****. As a fact Clause 17(a) highlights that the bid is required to be by an individual organization only and consortium is not allowed. In view of such specific prohibition in the tender notice, the view and course of* *action adopted by the respondent no. 4 in not accepting the experience of the subsidiary company as that of the appellant company cannot be treated to be whimsical or arbitrary so as to permit interference in exercise of writ jurisdiction. Even if two views could be possible in interpreting the relevant eligibility clauses, since the view taken by respondent no. 4 is also a probable and possible view, the writ Court was right in not interfering in the matter."*

(Emphasis supplied)

100. In *Rohde & Schwarz Co. case (supra)* relied on by L1 consortium, a Division Bench of the Delhi High Court, while distinguishing the decision in *New Horizons case (supra)* held that it is not necessary that the corporate veil must be pierced in each case of a commercial tender and it is incumbent upon the authority to ignore the corporate structure altogether. The Delhi High Court, in the abovesaid case, held that the decision in *New Horizons case (supra)* is clearly distinguishable on facts. In the said context, the Supreme Court held as under :-

"22. In our view the decision of the Supreme Court in the case of New Horizons (supra) cannot be interpreted to mean that the corporate veil must be pierced in each case of a commercial tender and it is incumbent upon the authority to ignore the corporate structure altogether. ***In the case of New Horizons (supra) the Supreme Court was considering a case where past experience was not considered as a condition of eligibility for consideration of the tender but was to be examined at a subsequent stage of tender evaluation.*** *In that case tenders by*

joint ventures were permissible and in that context the question arose whether the experience of the constituent joint venture partners of a joint venture company should be taken into account for considering the experience and the resources available with the joint venture company. The Supreme Court clearly held that it is not necessary that the experience should be in the name of the tenderer only and it was possible to envisage situations where a bidder may have sufficient experience yet the same may not be in its own name. The relevant extract from the said judgment is quoted below:-

> *"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22.4.1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the*

company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to *execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22.4.1993. This would required that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22.4.1993 when read with the notice for inviting tenders dated 26.4.1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr. Aroon Purie and 40% of the share capital is owned* *by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India."*

23. Applying the ratio of the aforesaid decision in New Horizons (supra) the question which is required to be answered is whether the petitioner has the requisite experience albeit not in its own name and whether the respondent is justified in not considering the experience of R&S Topex as that of the petitioner. It is relevant to note that the petitioner has submitted his bid as an Original Equipment Manufacturer (OEM) and not as an agent of another entity and it stands to reason that in order to qualify, the petitioner must show past experience of installation and supply of equipment as an Original Equipment Manufacturer. Its subsidiary R&S Topex is admittedly not the Original Equipment Manufacturer and thus we are unable to accept that the action of respondent in not accepting the experience of R&S Topex as the experience of the petitioner is in any manner arbitrary or unreasonable.

24. It is also relevant to note that R&S Topex claims to have acquired the experience of supply and installation of equipments as complying with the requirements of Clause 4.3 of NIT in the year 2008 and at the material time R&S Topex was not a *subsidiary of the petitioner. It is contended that the petitioner acquired the majority shares of R&S Topex in 2010 and by virtue of the acquisition has also acquired the experience available with the said company. This contention is also liable to be rejected as according to the petitioner R&S Topex ceased to be a manufacturer and it is thus difficult to see as to how its past experience as an Original Equipment Manufacturer can be construed to be an experience of the petitioner.*

25. In order to fall within the test as laid down in the case of New Horizons (supra) it would be necessary for a bidder to show that it has the relevant experience, however, the same may not recorded in its name. ***It is not open for a bidder to claim experience of another entity as its own experience. The instances given by the Supreme Court are cases where the bid is submitted by a partnership firm in which case the entities submitting the bid are essentially the partners and therefore the experience of partners becomes relevant****. Joint venture companies formed for a specific purpose are also akin to partnerships although in an incorporated form. In cases of mergers or amalgamations the resources of the companies are pooled although the amalgamating company loses its corporate name and identity which merges with the identity of the amalgamated company. In such cases, in essence, the bidder continues to be an erstwhile company although the experience may not be in the name of the amalgamated company. In all the examples given in the decision of New Horizon (supra) the vital test which has to be met is that the bidder must in fact have the requisite experience although for some reason it may not be available in his name. In the present case the bidder is the*

> *petitioner and the benefit of experience which is being claimed is that of a completely different entity. Although the petitioner may have acquired a majority stake in that entity, the same does not automatically translate the experience of R&S Topex as that of the petitioner."*
>
> *(Emphasis supplied)*

101. The Supreme Court, in the case of ***Vodafone International Holdings B.V. - Vs – Union of India & Anr. (2012 (6) SCC 613)*** had occasion to consider the legal status of a parent holding vis-a-vis the subsidiary in relation to its legal persona as also its duties and responsibilities in the realm of taxation and the circumstances and the situations under which the corporate veil could/should be lifted. Though the said judgment was predicated upon tax avoidance and sham transactions perpetrated by the corporate entities under the taxation laws, as a sequel to the finding of the Supreme Court relating to tax evasion/avoidance vis-a-vis genuine transactions, necessity arose for the Supreme Court to deal with the corporate structures in the pyramid pattern and the control and guidance exerted by the parent holding on the subsidiary and the duty/liability on the subsidiary towards the parent holding in the matter of conduct of the business affairs of the subsidiary unit. In the said context, the Supreme Court had analysed the various decisions relating to parent holding and subsidiary and in extenso dealt with the various decisions rendered by the House of Lords on the subject. The Supreme

Court, in the said decision, enunciated the following proposition of law :-

"71. In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be excommunicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle.

72. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle i.e. treat a company as a separate person. The Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on stand-alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders / participants. Furthermore, shareholders/participants that are subject to (personal or corporate) income tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Nowadays, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers.

73. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries.

However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive Directors. Such a restriction, which is the inevitable consequence of any group structure, is generally accepted, both in corporate and tax laws.

74. However, where the subsidiary's executive Directors' competences are transferred to other persons/bodies or where the subsidiary's executive Directors' decision making has become fully subordinate to the holding company with the consequence that the subsidiary's executive Directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling non-resident enterprise (NRE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, recharacterise the equity transfer according to its economic substance and impose the tax on the actual controlling non-resident enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and *circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).*

75. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in Salomon v. Salomon and Co. Ltd. [1897 AC 22 : (1895-99) All ER Rep 33 (HL)] that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of holding structures.

76. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as a Cayman Islands or Mauritius-based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e. without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such holding structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance.

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100. Be that as it may, did HTIL possess a legal right to appoint Directors onto the board of HEL and as such had some "property right" in HEL? If not, the question of such a right getting "extinguished" will not arise. A legal right is an enforceable right. Enforceable by a legal process. The question is what is the nature of the "control" that a parent company has over its subsidiary. It is not suggested that a parent company never has control over the subsidiary. For example, in a proper case of "lifting of corporate veil", it would be proper to say that the parent company and the subsidiary form one entity. But barring such cases, the legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation. No multinational company can operate in a foreign jurisdiction save by operating independently as a "good local citizen".

101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and *subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded.*

102. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies.

103. The Directors of the subsidiary under their articles are the managers of the companies. If new Directors are appointed even at the request of the parent company and even if such Directors were removable by the parent company, such Directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholders' influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) Directors. They cannot be reduced to be puppets. The decisive criterion is whether the parent company's management has *such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive Directors.*

104. Before dealing with the submissions advanced on behalf of the Revenue, we need to appreciate the reason for execution of the SPA. Exit is an important right of an investor in every strategic investment. The present case concerns transfer of investment in entirety. As stated above, exit coupled with continuity of business is one of the important tell-tale circumstance which indicates the commercial/business substance of the transaction. Thus, the need for SPA arose to readjust the outstanding loans between the companies; to provide for standstill arrangements in the interregnum between the date of signing of the SPA on 11-2-2007 and its completion on 8-5-2007; to provide for a seamless transfer and to provide for fundamental terms of price, indemnities, warranties, etc.

105. As regards the right of HTIL to direct a downstream subsidiary as to the manner in which it should vote is concerned, the legal position is well settled, namely, that even though a subsidiary may normally comply with the request of a parent company, it is not just a puppet of the parent company. The difference is between having the power and having a persuasive position. A great deal depends on the facts of each case. Further, as stated above, a company is a separate legal persona, and the fact that all the shares are owned by one person or a company has nothing to do with the existence of a separate company. Therefore, though it may be advantageous for a parent and subsidiary companies to work as a group, each *subsidiary has to protect its own separate commercial interests.*

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129. When a business gets big enough, it does two things. First, it reconfigures itself into a corporate group by dividing itself into a multitude of commonly owned subsidiaries. Second, it causes various entities in the said group to guarantee each other's debts. A typical large business corporation consists of sub-incorporates. Such division is legal. It is recognised by company law, laws of taxation, takeover codes, etc. On top is a parent or a holding company. The parent is the public face of the business. The parent is the only group member that normally discloses financial results. Below the parent company are the subsidiaries which hold operational assets of the business and which often have their own subordinate entities that can extend layers. If large firms are not divided into subsidiaries, creditors would have to monitor the enterprise in its entirety. Subsidiaries reduce the amount of information that creditors need to gather. Subsidiaries also promote the benefits of specialisation. Subsidiaries permit creditors to lend against only specified divisions of the firm. These are the efficiencies inbuilt in a holding structure.

130. Subsidiaries are often created for tax or regulatory reasons. They at times come into existence from mergers and acquisitions. As group members, subsidiaries work together to make the same or complementary goods and services and hence they are subject to the same market supply and demand conditions. They are financially interlinked. One such linkage is *the intra-group loans and guarantees. Parent entities own equity stakes in their subsidiaries. Consequently, on many occasions, the parent suffers a loss whenever the rest of the group experiences a downturn. Such grouping is based on the principle of internal correlation. The courts have evolved doctrines like piercing the corporate veil, substance over form, etc. enabling taxation of underlying assets in cases of fraud, sham, tax avoidance, etc. However, genuine strategic tax planning is not ruled out.*

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254. The Companies Act in India and all over the world have statutorily recognised subsidiary company as a separate legal entity. Section 2(47) of the Companies Act, 1956 defines "subsidiary company" or "subsidiary", a subsidiary company within the meaning of Section 4 of the Act. For the purpose of the Companies Act, a company shall be subject to the provisions of sub-section (3) of Section 4, be deemed to be subsidiary of another, subject to certain conditions, which includes holding of share capital in excess of 50% controlling the composition of the Board of Directors and gaining status of a subsidiary with respect to the third company by the holding company's subsidisation of the third company.

255. A holding company is one which owns sufficient shares in the subsidiary company to determine who shall be its Directors and how its affairs shall be conducted. The position in India and elsewhere is that the holding company controls a number of subsidiaries and respective businesses of companies within the *group and manage and integrate as a whole as though they are merely departments of one large undertaking owned by the holding company. But, the business of a subsidiary is not the business of the holding company (see Gramophone and Typewriter Ltd. v. Stanley [(1908) 2 KB 89 : (1908-10) All ER Rep 833] , All ER Rep at p. 837).*

256. Subsidiary companies are, therefore, the integral part of corporate structure. Activities of the companies over the years have grown enormously of its incorporation and outside and their structures have become more complex. Multinational companies having large volume of business nationally or internationally will have to depend upon their subsidiary companies in the national and international level for better returns for the investors and for the growth of the company. When a holding company owns all of the voting stock of another company, the company is said to be a WOS of the parent company. Holding companies and their subsidiaries can create pyramids, whereby a subsidiary owns a controlling interest in another company, thus becoming its parent company.

257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In Bacha F. Guzdar v. CIT [AIR 1955 SC 74], this Court held that shareholders' only right is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting. Refer also to Carew and Co. Ltd. v. Union of India [(1975) 2 SCC

791] and Carrasco Investments Ltd. v. Directorate of Enforcement [(1994) 79 Comp Cas 631 (Del)] .

258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed decentralised management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.

259. The US Supreme Court in United States v. Bestfoods [141 L Ed 2d 43 : 524 US 51 (1998)] explained that it is a general principle of corporate law and legal systems that a parent corporation is not liable for the acts of its subsidiary, but the Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, if the corporal form is misused to accomplish certain wrongful purposes, when the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary is not *sufficient to pierce the status of their relationship and, to hold parent company liable. In Adams v. Cape Industries Plc.[1990 Ch 433 : (1990) 2 WLR 657 : (1991) 1 All ER 929 (CA)] , the Court of Appeal emphasised that it is appropriate to pierce the corporate veil where special circumstances exist indicating that it is mere facade concealing true facts.*

260. Courts, however, will not allow the separate corporate entities to be used as a means to carry out fraud or to evade tax. Parent company of a WOS, is not responsible, legally for the unlawful activities of the subsidiary save in exceptional circumstances, such as a company is a sham or the agent of the shareholder, the parent company is regarded as a shareholder. Multinational companies, by setting up complex vertical pyramid-like structures, would be able to distance themselves and separate the parent from operating companies, thereby protecting the multinational companies from legal liabilities.

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274. Shares, we have already indicated, represent congeries of rights and controlling interest is an incident of holding majority shares. Control of a company vests in the voting powers of its shareholders. Shareholders holding a controlling interest can determine the nature of the business, its management, enter into contract, borrow money, buy, sell or merge the company. Shares in a company may be subject to premiums or discounts depending upon whether they represent controlling or minority interest. Control, of course, confers value but the question as to whether one will pay a premium for controlling *interest depends upon whether the potential buyer believes that one can enhance the value of the company.*

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277. Lifting the corporate veil doctrine is readily applied in the cases coming within the company law, law of contract, law of taxation. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction.

278. This Court in CIT v. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819] held that the court is entitled to lift the veil of the corporate entity and pay regard to the economic realities behind the legal facade meaning that the court has the power to disregard the corporate entity if it is used for tax evasion. In LIC v. Escorts Ltd.[(1986) 1 SCC 264] this Court held that: (SCC p. 336, para 90)

> *90. … the corporate veil may be lifted where a statute itself contemplates lifting [of] the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a [beneficial] statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.*

279. Lifting the corporate veil doctrine was also applied in Juggilal Kamlapat v. CIT [AIR 1969 SC 932 : (1969) 1 SCR 988] , wherein this Court noticed that the assessee firm sought to avoid tax on the amount of compensation received for the loss *of office by claiming that it was capital gain and it was found that the termination of the contract of managing agency was a collusive transaction. The Court held that it was a collusive device, practised by the managed company and the assessee firm for the purpose of evading income tax, both at the hands of the payer and the payee.*

280. Lifting the corporate veil doctrine can, therefore, be applied in tax matters even in the absence of any statutory authorisation to that effect. The principle is also being applied in cases of holding company-subsidiary relationship, where in spite of being separate legal personalities, if the facts reveal that they indulge in dubious methods for tax evasion."

102. The law on the subject has been analysed threadbare in all the cases, starting from *Salomon's case (supra)* to *New Horizons case (supra)* culminating in the decision of the Apex Court in *Vodafone case (supra)* as also the various distinguishing judgments of the High Courts on the subject of lifting the corporate veil as also the facts and circumstances under which the corporate veil can be pierced. Albeit, it is necessary for this Court to analyse the case on hand with the reference to the above well accepted judicial precedents on the subject of lifting the corporate veil to come to the conclusion whether, on facts, the corporate veil needs to be pierced and if so pierced, whether the experience and facilities of the subsidiary can be said to be that of the parent holding for it to stake a claim for consideration of its price bid by approving its technical bid.

103. To answer the above plea of lifting the corporate veil and to consider the subsidiary as a merged entity with that of the parent holding, it is but necessary to have a detailed look at the relevant clauses in the NIT based on which the Tender Accepting Authority had rejected the technical bid of the unsuccessful bidder. The relevant clauses in the NIT, which have a bearing on the case, are reproduced hereinbelow for better clarity :-

*"**8. Documents comprising the Bids :***

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*(iii) **Documentary evidence of constitution of firm such as Memorandum and Articles of Association, Partnership Deed, etc., with details of Name, Address, Telephone Number, Fax Number, E-mail Address of the Bidder firm and of its Managing Director / Partner / Proprietor dealing with the Bid**.*

* * * * * * * *

(vii) Qualifying data duly filled in as per relevant Pro-forma and Annexure provided in the Bid proposal form along with documentary evidence for the eligibility criteria in Section-II, that the Bidder is eligible to Bid and is qualified to perform the Contract if the Bid is accepted.

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(ix) Details of Manufacturing facilities and capacity with details of highly secured features.

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(xii) Photocopies of Letter of awards, attested certificates granted on satisfactory completion of other similar works from their clients.

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12. (i) Eligibility Criteria

The Bid is open to all eligible Tenderers who meet the following requirements --

*1. The Bidder/any one of the partner in case of a Consotrium should have a valid SCOSTA certificate in its own name issued by NIC, for 64 KB contact based smart cards **manufactured from its own manufacturing plant** within the geographical boundaries of India.*

[A valid SCOSTA Certificate issued by NIC in its own name should be submitted before the date of opening of price Bids.]

2. The smart card manufacturing facility should have been in operation for at least one year with reference to the tender opening date. The manufacturing facility should include Security Printing, Lamination and Embedding; and should be a highly secured facility certified by VISA or MASTERCARD.

3. The Bidder/all the members of the Consortium should have positive net worth, for the last three financial years (2007-08, *2008-09, 2009-2010).*

4. The Bidder/any one of the partner in case of a Consortium should have had a minimum turnover of Rs.25 Crores in any one of the last three financial years, i.e., 2007-08, 2008-09, 2009-10.

5. The Bidder/any one of the partner in case of a Consortium should have had a experience in execution of atleast one project for supply and personalization of Smart Cards (manufactured from its own manufacturing units in India) in ID domain for Transport Department in any of the States in India, in any of the last three financial years, i.e., 2007-08, 2008-09, 2009-10. Work orders in the name of the Bidder/consortium partners have to be submitted as proof.

6. The Bidder/any one of the Partner in case of Consortium should have ***supplied SCOSTA based smart cards manufactured from its own manufacturing units in India for at least one Driving Licenses / Registration Certificates Project in any one of the States in India****.*

7. The Bidder/any one of the Partner in case of Consortium should have had a minimum experience of two years for supply of at least 10 Lakhs SCOSTA based smart cards (non GSM) manufactured from its units in India.

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23. Preliminary Examination

23.1. The Tender Inviting Authority will cause an initial *examination of the tenders submitted, to determine their substantial responsiveness.*

23.2. The initial examination will cover the following among other factors, namely -

(i) Whether the Bidder meets the eligibility criteria as laid down in para 12 in the tender documents.

* * * * * * * *

24. Evaluation and Comparison of Bids

The Department shall constitute a Technical Evaluation Committee and a Price Evaluation Committee especially for the Tender. The Technical Committee will evaluate the Technical Bids, previously determined to be substantially responsive, to find out the eligibility, technical suitability and competence of a Bidder to perform the Contract.

The important parameters for Technical evaluation of the Bidders include

*a. **The Bidder meets all the eligibility criteria laid down in the conditions of Tender Document**.*

b. The EMD is submitted along with the tender.

c. All Proforma and Annexures attached to the Tender document are duly complied with/filled in.

d. The Samples of Smart Cards.

*e. **A valid SCOSTA Certificate for manufacturing of Smart Cards issued by NIC in its own name**.*

f. Financial capability certificate signed by a registered Chartered Accountant or a Nationalized Bank, to ascertain compliance with the eligibility criteria.

<u>SECTION IV : GENERAL CONDITIONS OF CONTRACT</u>

44. DEFINITIONS, ABBREVIATIONS AND INTERPRETATIONS

In this Bid, the following terms shall be interpreted as indicated :

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*12) "**Bidder**" means the Individual or Organisation participating in the Tender Bid.*

i. The Bids can be submitted by a Company individually or through a Consortium of Companies. The Consortium should not have more than two partners and each consortium should have exclusive partners. No company will be allowed to participate in more than one Bid. In case it is observed that two consortiums have a common partner then both the consortium will stand disqualified and in no circumstances their Bids will be entertained.

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iii. One of the members of the Consortium shall be nominated and authorized, by all the members of the Consortium, as being in charge (Lead Bidder) & system integrator and this authorization shall be supported by a Power of attorney. Bid will be submitted by the Lead Bidder.

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*13) "**Lead Bidder**" shall mean the partners of a Consortium,* *which shall be answerable and accountable to the Government of Tamil Nadu and shall interface with the Government on behalf of Consortium, for the successful execution of the project for the entire agreement period.*

* * * * * * * *”

(Emphasis Supplied)

104. Insofar as the present issue as to whether the subsidiary company is an organ of the parent holding, though the subsidiary company is a separate legal entity, would stand covered under the above clauses so as to preclude the unsuccessful bidder from bringing to the fore the experience/manufacturing facilities and certificate of its WOS for the purpose of clearing the technical bid, the above clauses in the Notice Inviting Tender are material and the same needs to be looked into for the purpose of whether the corporate veil could be pierced for the parent holding to claim the experience/manufacturing facilities and certification of its WOS subsidiary unit.

105. It is admitted by the learned Advocate General appearing for the respondent authorities that the tender bulletin is yet to be issued and reasons the for rejection of the bid of the unsuccessful bidder is to be communicated and at the same time the successful bidder also is yet to be notified in the tender bulletin, though the contract has been entered into and the work has

commenced, but for the interim order of the learned single Judge.

106. In the above factual scenario, reasons having not been known for the rejection of the technical bid of the unsuccessful bidder, though for all purposes it can be said that Section 10 (7) of the Act, contemplating intimation of information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers has not been followed in its true letter and spirit, however, it can safely be concluded, as borne out by record, that but for the two rounds of litigation either at the instance of the petitioners or at the instance of the respondents the matter has been dragged in this Court for one reason or the other since the year 2010, thereby putting a clog in the wheel of the respondent authorities from publishing the Tender Bulletin notifying the reasons for rejection. However, after finality in the second round of litigation in the year 2012, the contract, as informed by the learned Advocate General, has been awarded in the year 2013 and in the very same year, the present writ petition has been filed and orders have been passed thereto. Due to the grant of interim order, the Tender Bulletin has not been published till date. The said non-compliance of the procedural formality as contemplated under the Act, though would go to the weight of the act of the respondent authorities, but would not render the act of the respondent authorities mala fide. Though there is some delay since 2012 upto

the award of the contract in the year 2013, however, due to the subsequent interim order, compliance there has been non-compliance of the procedure contemplated under Section 10 (7) of the Act. However, non-compliance of Section 10 (7) of the Act alone cannot be said to be sufficient to quash the contract. The delay though occasioned, but cannot be attributed to the sole act of the respondent authorities, but the delay has branched due to the prolonged legal battle by one party or the other to the *lis* and, therefore, this Court is not venturing into the said aspect of non-compliance of Section 10 (7) of the Act to render a decision on the outcome of these writ petitions and writ appeals.

107. However, it is to be pointed out that the reasons for rejection has been culled out by the learned single Judge in his order by going through the original files, which were called for by the Court for passing the interim order. It transpires from the said order that one of the reasons for rejection of the unsuccessful bidder's claim was that the consortium consisted of more than two partners and, therefore, is not in compliance with clause 44 (12) (i) of NIT.

108. Vide clause 44 (12) (i) of NIT, a specific provision has been made that bids could be submitted by any individual or organisation, and insofar as bids submitted through a consortium of companies, it has been clearly mentioned that the consortium should not have more than two partners. However, the bid of the

unsuccessful bidder was rejected on the ground that the consortium consisted of three partners and in view of violation of the said clause the bid of the petitioner was rejected. Though the petitioner/unsuccessful bidder contends that the third company, viz., M/s.Syscom Corporation, which has been taken to be one of the consortium partners by the respondent authorities is in fact a subsidiary of the Lead Bidder, viz., M/s.Smart Chip, it is the stand of the respondent authorities that the said entity is a third partner in the consortium and, therefore, for violation of the eligibility criteria, the bid of the unsuccessful bidder was rejected. Further, the third partner, being a separate legal entity as per the Companies Act, which has been time and again propounded by the Courts, the subsidiary cannot be treated to be a merged entity with the parent holding to pierce the corporate veil.

109. The foremost issue that needs to be decided by this Court is *whether the manufacturing facility of the subsidiary company could be taken as that of the parent holding to satisfy clause 12 (i) (1) , 12 (i) (5) and 12 (i) (6) of the NIT and that the subsidiary could be treated as one having merged with the parent holding for all practical and technical purposes*.

110. The path of law leading to the coinage of separate legal entity in respect of a subsidiary company evolved since the case of ***Aron Salomon – Vs – Saloman & Co. Ltd. (1897 AC 22)*** way back in the year 1897 itself. Ever since the

said binding precedent, the said law had held the field for more than a few decades until the decision in ***Bank voor Handel en Schee pvaart N.V. - Vs – Slatford (1953 (1) QB 248)***, where the distinction between a shareholder and a company was emphasised and highlighted. From thereon, every company, be it a subsidiary of a parent holding, was treated as a separate legal persona. However, the veil over the corporate structure was lifted only where the corporate entities played upon the exchequer for unlawful gains by perpetrating fraud or indulged in evasion of tax. The corporate veil was not lifted in other situations thereby retaining the separate legal entity intact.

111. The judgments piercing the corporate veil dated way back to the year 1953 through the decision of the House of Lords in ***Harold Holdsworth & Co. (Wakefield) Ltd. - Vs – Caddies (1955 (1) All ER 725)***, in a situation when a parent company owned all the shares of the subsidiaries so much so that it can control every movement of the subsidiaries. Followed upon the heels of the said decision, came the noted decision of the House of Lords in ***DHN Food Distributors Ltd. - Vs – London Borough of Tower Hamlets (1976 (3) All ER 462)***. In the said decision, Lord Denning, the Master of the Rolls, at page 467, taking reference to the *Harold Holdsworth's case (supra)* observed that where the shares in toto are held by the parent company and the parent company is able to control every movement of the subsidiaries hand and foot, the parent holding as also the subsidiaries should

not be treated separately and their case be defeated on a technical point and rather, the entities should be treated as one and that the parent company and the subsidiary company would be treated as that one. In extenso, the said judgment has been dealt with in *Renusagar case (supra)*, where the interpretations as well as the basis on which the lifting of corporate veil in matters other than tax and revenue, was dealt with by the House of Lords in a very elaborate manner to hold that where the subsidiary is a WOS of the parent holding, the parent holding and the subsidiary should be considered, for all purposes, as a single entity.

112. There is no ambiguity in the various decisions and also on the law propounded by the English Courts as also the Apex Court in the matter of treating the parent holding and its WOS company. The law has taken a paradigm shift over the past century with the Courts reading down the law by lifting the corporate veil in situations where the state of affairs in the expanding horizon of global economy warrants the presumption that a subsidiary will act in accordance with the dictates of the parent holding so long as it is not detrimental to the interest of the subsidiary and where the subsidiary is wholly controlled by the parent holding. The completeness of the identity of the various companies coupled with the Directors in-charge of the affairs of the company and the common interest between the various companies in the group and the shareholding pattern are all considerations that had weighed in the mind of the courts to lift the corporate veil

to treat the different business entities as a single economic entity. Therefore, where the parent holding and its WOS company are so intricately cob-webbed with each other so that the identity of the parent holding is that of the WOS company and where the interest are so common and so also the Directors in-charge of the company, and in essence the parent holding could control the internal management of the subsidiary company and in the unlikely event of there being any difficulty, necessity to go through the formal procedure of merger/amalgamation rests with the said Directors, then in that scenario, the business realities of the situation does not confine giving a narrow legalistic view. Therefore, where the associated companies are inextricably connected as to be in reality part of one concern, lifting of corporate veil in such a scenario is permissible. The above proposition, in a nutshell, is the crux of the decisions of the English Courts as also the Apex Court, which is evident from the decisions in *Renusagar's case and New Horizon's case (supra).*

113. It is evident from clause 12 (i) (1) of the NIT that bids were called for from the bidder/any one of the partners of the consortium, who are in possession of a valid SCOSTA certificate in its own name, issued by NIC for 64 KB contact based smart cards manufactured from its own manufacturing facility situated within the geographical boundaries of India. Clause 44 (12) (i) defines "Bidder", which means that a bidder can be an individual or an organisation or a

consortium, but the consortium should not have more than two partners.

114. To address the above issue whether the lead bidder, viz., the petitioner, M/s.Smart Chip is entitled to claim the manufacturing facility of its WOS subsidiary unit, M/s.Syscom as also the SCOSTA certification for the purpose of bidding in the above tender process, without treating the WOS as another partner in the consortium.

115. A tender document is a self-contained document. The document is prepared by experts with technical and financial knowledge. Knowing fully well the implications and the necessities of the situation, clauses in the document are incorporated. Any person aggrieved with any of the clauses in the tender document is entitled to challenge the said clause. In the present case, no challenge is made with regard to any of the clauses in the tender document. No mala fides has been attributed or allegations made that certain clauses have been added to favour one person or the other. Therefore, looked from any angle, no aspersions has been casted on the tender document or on any individual.

116. Once the tender document is found to be drafted in right spirits with the necessities of the situation in mind, all the clauses that form part of the document should be treated as solemn scriptures that lead to the path of

enlightenment in achieving one's objective. In that the objective is the issuance of smart cards of a certain specification and configuration. Clauses are incorporated for specific purpose, which are technical in nature, at the behest of the technical experts and courts should be circumspect while dealing with those conditions. It is always best left to the experts in the particular field to fix the terms relating to technical aspects and courts should not interfere with the terms in the tender on the premise that some other terms would have been more fairer, wiser or more logical. In this regard, useful reference can be had to the decision of the Supreme Court in ***Michigan Rubber (India) Ltd. - Vs – State of Karnataka (2012 (8) SCC 216).*** After looking into various decisions, the Supreme Court held that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory or mala fide or actuated by bias, the courts would interfere. Such being the case, there being no arbitrariness, discriminatory, mala fide or bias alleged with regard to the tender terms and no challenge being made to any of the terms in the tender document, it automatically follows that the terms set-forth in the tender document needs to be followed in letter and spirit.

117. One of the terms of the tender, as is reflected in clause 12 (i) (1) is that the bidder/any one of the partners in the consortium should be in possession of a valid SCOSTA certificate in its own name. It is not in dispute that neither the lead

bidder, viz., M/s.Smart Chip nor its consortium partner, M/s.Versatile Card Technology, is in possession of such a certificate. However, the certificate in the name of M/s.Syscom Corporation, who is said to be a WOS of the lead bidder, M/s.Smart Chip has been annexed with the tender document. Further, it is also not in dispute that the manufacturing facility for smart cards is with M/s.Syscom Corporation, which is said to be a WOS of M/s.Smart Chip. However, the first and foremost condition in the tender document is that the SCOSTA certificate should be in the name of one of the consortium members and that the said smart cards should be manufactured from its own manufacturing facility, which is situated within the geographical boundaries of India. As is borne out by records, neither the manufacturing facility for smart cards nor the SCOSTA certification is in the name of one of the consortium partners. That being the case, the requirements as laid down in clause 12 (i) (1) having not been satisfied, the rejection of the technical bid by the Technical Evaluation Committee cannot be said to be perverse or arbitrary and against law. Further, M/s.Syscom Corporation is not a partnership firm, which includes M/s.Smart Chip for it to have the benefit of the law laid down in *New Horizon case (supra)*.

118. One of the other reasons for the rejection of the technical bid of the petitioner is that the consortium should consists only of two partners, whereas, the consortium of the petitioner has three partners. According to the Technical

Evaluation Committee, the consortium has three partners, viz., M/s.Smart Chip, M/s.Versatile Cards Technology and M/s.Syscom Corporation Ltd. Though according to the petitioner, M/s.Syscom Corporation is a WOS of M/s.Smart Chip and that the manufacturing facility of M/s.Syscom Corporation, in all probability, is that of the parent holding, however, the said contention is controverted by the respondent authorities.

119. The petitioner has drawn impetus from the decision of the Apex Court in *Renusagar case* and *New Horizon case (supra).* Whether those decisions would carry the case of the petitioner to any length requires to be determined in the light of the facts as is woven around those judgments.

120. In *Renusagar's case (supra)*, the subsidiary company was a 100% wholly owned subsidiary of the parent holding. Though it is a subsidiary company, transaction between the two entities culminated into an agreement whereby sale-purchase of electricity has taken place. The said subsidiary was established by the parent holding to avoid complications in the case of take over of the power plant by the State/Board. All the borrowings of the subsidiary company were arranged and guaranteed by the parent holding. Documentary proof in regard to the above transaction were placed before the concerned authorities to claim that the subsidiary is a 100% WOS of the parent holding. The Supreme Court, taking

cue from the decision of the House of Lords in *DHN Food Distributors case (supra)* and series of other English case laws, wherein Lord Denning, speaking for the House of Lords observed that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account and, therefore, there is evidence of a general tendency to ignore the separate legal entities of various companies within the group and look at them an one holistic economic entity, when the parent company owns all the shares of the subsidiaries so much so that it can control every movement of the subsidiaries. It was also on record in the said decision that the Directors of the parent holding were the same as the Directors of the subsidiary company and so also the shareholders and, therefore, a common interest in maintaining the business of the group arises. In such a scenario, it was held therein, that the corporate veil requires to be lifted so as to deem the parent holding and WOS subsidiary company as one holistic economic unit. Following the principle laid down therein, the Supreme Court in *Renusagar case (supra)* lifted the corporate veil and treated the parent holding and the subsidiary as one economic entity.

121. Similarly in *New Horizons case (supra)*, the experience of the subsidiary was sought to be counted towards the parent holding so as to satisfy the eligibility criteria. In such a scenario, the Supreme Court, after taking note of the tender conditions as also the documents on record by which it was evident

that the parent holding and the subsidiary were mentioned as a joint venture company and also the holding pattern of the shares, held that though the company is a distinct legal entity from its members, lifting the veil in law, either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. Considering the overall aspect, the Supreme Court, in the said judgment, held that the joint venture of the parent and the subsidiary and the partnership between the various companies which contribute to the assets and risks, would predominantly prevail to make the enterprise a single entity, though it consists of different companies.

122. In the case on hand, it is not in dispute that the manufacturing facility and SCOSTA certification is in the name of M/s.Syscom Corporation, which is said to be a WOS of the parent holding, M/s.Smart Chip. On that basis, it is claimed by M/s.Smart Chip that the subsidiary being a WOS is, for all practical purposes, an entity within the umbrella of the parent holding and, therefore, the parent holding and subsidiary should be treated as one economic unit as held in *Renusagar case* and *New Horizons case (supra).* Though, such contention is advanced on behalf of the petitioner, M/s.Smart Chip, who is the unsuccessful bidder, however, the said contention is liable to be rejected for the following reasons :-

i) No documents have been submitted to prove the shareholding pattern of the WOS;

ii) No documentary evidence submitted with regard to the composition and the details of the Board of Directors of the WOS;

iii) No documentary proof submitted with regard to the Articles and Memorandum of Association of the WOS;

iv) No documentary evidence submitted with regard to any joint venture arrangement between the parent holding and the subsidiary; and

v) No averment has been addressed before this Court to the effect that such of those documents were placed before the Tender Evaluation Committee.

123. It is not borne out by record that the above materials, which are important for determining the status of the different entities, were made available before the Tender Evaluation Committee. In the absence of those documents, it is not within the domain of the Tender Evaluation Committee to take into consideration the homogeneous nature of the relationship that is likely to exist between the parent holding and the WOS entity to come to a conclusion that it is a single economic entity and, therefore, thus satisfies the requirement put forth in the tender document. The absence of the documents before the

Tender Evaluation Committee hits at the very base of the petitioner's case that the parent holding and WOS are one and the same and that the controlling whip is with the parent holding to arrive at a conclusion that they form a single entity.

124. In *Renusagar's case* and *New Horizon's case (supra)*, documents in proof of a single entity concept was made available before the concerned authorities at the initial point of time and so also before the Court. Taking into consideration all those records, which form the substratum that both the holdings are one and the same, the Court, taking cognizance of the said documents, pierced the corporate veil to hold that the parent holding and the WOS are one single economic unit for all practical purposes, though they are two distinct and separate legal entities as per the Companies Act. In the absence of any of the above documents to prove a homogeneous constituent, it is not necessary for this Court to pierce the corporate veil, as has been done in *Renusagar case* and *New Horizons case (supra)*. Even in the said decision, depending on the individual facts and circumstances of each case, the Supreme Court held that corporate veil can be pierced only on the basis of the facts and circumstances of individual cases and not as a matter of routine. Such being the law laid down in the above cited decisions, there being no proper and conclusive material to arrive at a conclusion than the one arrived at by the Tender Evaluation Committee, this Court would be wholly unjustified in substituting its reason for that of the Committee, when the

necessities of the technical specifications are within the domain of the technical experts. This Court should not substitute its view to that of the experts, more particularly in a case relating to contract.

125. A subsidiary company, further, cannot be restrained from carrying on its business in the manner it deems fit and the parent holding cannot control the activities of the subsidiary, even to the very extent of issuing of issuing rights of shares, on the premise of the parent holding's interest would get jeopardised. The subsidiary company, for all practical purposes and even as per Section 4 of the Companies Act, is a separate legal entity and is well within its ambit to have its rights and prerogatives safeguarded in a manner as it thinks fit. Useful reference in this regard can be had to the decision of the Delhi High Court in ***Freewheel (India) Ltd. - Vs – Dr. Veda Mitra (1969 (39) Com Cases 1 (Delhi))***.

126. Further, lifting of corporate veil has pre-dominantly been done only in cases where there has been tax evasion or fraud being perpetrated on the exchequer. In the case on hand, there being no tax evasion or fraud being perpetrated, piercing of corporate veil, in the facts and circumstances of the case, solely rests on the shoulders of the petitioner, who is bound to produce evidence to substantiate its claim. There being total silence on that aspect, this Court is left with no other alternative but to approve the rejection of the technical bid of the

petitioner by the Tender Evaluation Committee.

127. Further, the technical bid has been assessed by persons very high in the Governmental hierarchy like the Director of National Informatics Centre. When a persons of such high positions have assessed the technical capability of the petitioner based on the tender conditions and found that the petitioner has not satisfied the conditions put forth in the tender document, the same cannot be slightly brushed aside. Further, it is not also open to the Court to read between the lines in the tender document to the benefit of a bidder, as the said exercise would be wholly against the spirit of the tender document and against the principles of natural justice. If a thing is contemplated to be done in a particular manner, it should be done in the said manner and not otherwise. Doing the thing in a manner otherwise than is contemplated in the tender document is against the spirit of the clauses in the tender document, which has been time and again deprecated by the Courts. Therefore, it would be wholly unsafe to substitute the view of the Court to that of the technical experts and, therefore, this Court refrains from adopting the said exercise.

128. The facts of the case being of such a nature as narrated above, learned single Judge has failed to appreciate the above facts in proper perspective, though the original records of the respondent authorities were browsed at the behest of

the Court, and, therefore, the decision arrived at by the learned single Judge that the parent holding and the WOS are one single entity and that M/s.Syscom Corporation is not a partner in the consortium and that the consortium consists only of two partners is not substantiated not only by documentary evidence, but is also against the rule of law as has been laid down by the various Courts time and again and, therefore, the said finding of the learned single Judge is liable to be set aside.

NON-FULFILMENT OF MASTERCARD/VISA CERTIFICATION BY L1 CONSORTIUM :

129. Learned senior counsel appearing for the unsuccessful bidder, M/s.Smart Chip submitted that L1 consortium though has been declared as the successful bidder, however, it has not satisfied the requirement of clause 12 (i) (2) read with clause 12 (i) (1) of the NIT. Learned senior counsel, drawing the attention of this Court to the VISA certificate issued to M/s.M-Tech Innovations submitted that the scope of the certification as is evident from the certificate issued on 1st Jan., 2010, pertains only to "Card Manufacturer" and "Magnetic Stripe Personalizer", but it falls short of "Chip Embedding" as is mandated under Clause 12 (i) (2). The condition as prescribed under clause 12 (i) (2) having not been fulfilled by M/s.M-Tech Innovations, the consortium partner of the successful bidder, the award of contract to L1 consortium is bad in law and, therefore, the said award has to be set aside.

130. Contradicting the said submission advanced by the petitioner, learned senior counsel appearing for L1 consortium contended that the clause 12 (i) (2) does not mandate a certificate relating to Chip Embedding to be issued by VISA/MASTER CARD. What is mandated under clause 12 (i) (2) is that the manufacturing facility should include Security Printing, Lamination and Embedding and that the manufacturing facility should be certified as a highly secured facility by VISA/MASTER CARD. In this regard, attention of this Court is drawn to the semi colon that separates the first part of the clause 12 (i) (2) with the second part. Referring to the same, it is contended that the two parts operate in its own sphere and the conjoint reading of both the parts by the petitioner, to suit its convenience, is bad and the contention is liable to be rejected.

131. This Court has perused the SCOSTA Certificate issued by the Government of India and the certificate issued by VISA/MASTER CARD with regard to the high security features of the manufacturing facility. For appreciating the contentions advanced, it is necessary to have a perusal of clause 12 (i) (2), which has already been extracted above. While the first part of the clause 12 (i) (2) prescribes that the manufacturing facility should include Security Printing, Lamination and Embedding, the second part of the said clause relates to the certificate to be obtained from VISA/MASTER CARD certifying the facility as a

highly secured facility.

132. An unambiguous reading of the said clause 12 (i) (2) clearly reveals that the certificate to be obtained from VISA/MASTER CARD does not pertain to the processes that are to be carried on in the manufacturing facility, viz., Security Printing, Lamination, Embedding, but only pertains to the high security around the periphery of the manufacturing facility. This is evident from the semi colon that breaks up clause 12 (i) (2) into two parts, the first part dealing with the requirements that are necessary to be available in the manufacturing facility and the second part dealing with the high security certification from VISA/MASTER CARD relating to the security at the manufacturing facility. The clause should be broken and read and a conjoint reading is impermissible, for the simple reason that a comma is not used, but usage is specific with a semicolon.

133. The Writers Handbook dealing with "semicolon" describes the rules for usage of "semicolon" in the following words :-

> *"**Rules for Using Semicolons :-***
> *A semicolon is most commonly used to link (in a single sentence) two independent clauses that are closely related in thought.*
> *When a semicolon is used to join two or more ideas (parts) in a sentence, those ideas are then given equal position or rank."*

134. Thus, from the above, it is categorically clear that a semicolon is used to link two independent clauses into a closely related thought. The ideas that are expressed in the two independent clauses are equally persuasive and important that it is just and fair that both the conditions must be satisfied but not read into one another. Reading one into the other defeats the very object of usage of semicolon and would render the object redundant and would import a different meaning than what was really the object of the insertion of the clause. Therefore, the Court should be circumspect in portraying a different meaning than the one that is intended to be given to the said clause in the tender document. The Court should not try to put its ideas and interpretations into the tender document and rather should go by the intention of the Tender Inviting Authority. Such being the case, the intention of the Tender Inviting Authority being to have the two independent clauses clustered into one but having the same weightage and equal persuasiveness for a singular purpose, it will not be right in reading the clause in any other manner than what is the intention of the Tender Inviting Authority and any such interpretation by the Court or by the aggrieved party is *per se* impermissible. Therefore, the contention of the learned senior counsel for the petitioner that L1 consortium does not have the requisite VISA/MASTER CARD certification relating to chip embedding is misconceived and is liable to be rejected.

NON-FULFILMENT OF ELIGIBILITY CRITERIA REGARDING PREVIOUS PROJECT EXECUTION BY L1 CONSORTIUM :

135. The submission of the learned senior counsel for the petitioner, viz., M/s.Smart Chip, relating to non-meeting of the eligibility criteria by L1 consortium is on two fronts :-

i) L1 consortium has not fulfilled clause 12 (i) (5), in that L1 consortium does not have the experience of executing one project for supply and personalisation of smart cards in ID Domain for Transport Department in any of the States in India during any one of the three preceding financial years, viz., 2007-2008, 2008-2009 and 2009-2010;

ii) L1 consortium has not fulfilled clause 12 (i) (6) and 12 (i) (7), in that L1 consortium have not supplied SCOSTA based smart cards manufactured from its own manufacturing units in India for atleast one Driving Licence/Registration Certificates project in any one of the States in India and has also not supplied 10 Lakhs SCOSTA based Smart Cards during the preceding two years.

136. It is the submission of the learned senior counsel for the petitioner that the documents submitted by L1 consortium to substantiate eligibility reveals

that L1 consortium have delivered smart cards at the RTO's office based on the purchase order placed by M/s.Zylog Systems. First of all, the said purchase order does not speak as to whether the smart cards are SCOSTA compliant. Another purchase order for SCOSTA based smart cards has been entered into between M-Tech Innovations with M/s.United Telecoms Ltd. The said purchase order for issuance of SCOSTA based smart cards cannot be said to be a project relating to Driving Licence/Registration Certificate, as the purchase order reveals that the total number of cards supplied under the said purchase order is only 50,000. Further, M-Tech Innovations has supplied the cards, more so blank cards, as a sub-contractor and not as the project executor. Therefore, there is total non-compliance of clause 12 (i) (6), L1 consortium not having the requisite eligibility criteria for supplying SCOSTA based smart cards for Driving Licence/Registration Certificate Project and that it does not also satisfy the minimum experience of supply of atleast 10 Lakhs SCOSTA based smart cards in a period of two years, as is mandated under clause 12 (i) (7).

137. Insofar as the eligibility prescribed under clause 12 (i) (5) is concerned, it is submitted that the documents submitted by L1 pertaining to satisfaction relates to supply of RFID cards to the Gujarat State Road Transport Corporation. The said project relates to issue of bus pass to Gujarat State Road Transport Corporation and not pertaining to project executed for Transport Department. It

is the primary submission of the learned senior counsel that the project has been executed for Transport Corporation and not for the Government, viz., Transport Department and, therefore, the said project cannot be taken into consideration for inferring that L1 consortium has satisfied the eligibility criteria as prescribed under clause 12 (i) (5). It is the further submission of the learned counsel for the petitioner that for the purpose of bus pass, RFID cards are only used, though the terminology used in the said contract shows RFID/Smart Card based pass system. It is the submission of the learned senior counsel that the term RFID stands for "Radio Frequency Identification", which is the system used to authenticate the user of the card and it does not relate to storage of data, as is the case in smart cards. Bus Pass system does not pertain to storage of data, but relates only to authentication and, therefore, the execution of a RFID based bus pass system cannot be said to be a smart card issued, as is required in the present case. The eligibility criteria pertains to execution of project for supply and personalisation of smart cards. The above RFID cards supplied, by no stretch of imagination could be termed to be a project for supply and personalisation of smart cards for Transport Department. Clauses 12 (1) (5), 12 (i) (6) and 12 (i) (7) having not been satisfied by L1 consortium in stricto senso, the view of the Technical Evaluation Committee to the effect that L1 consortium has satisfied the eligibility criteria as prescribed under clause 12, is *per se* illegal and unsustainable in law. None of the above conditions as contemplated in the NIT having been satisfied, the approval of the technical bid of L1 consortium can only be termed to be for ulterior purposes and not in the spirit of the tender and keeping the interest of the exchequer and the public at heart and, therefore, the Technical Evaluation Committee's view that L1 consortium has satisfied the eligibility criteria prescribed under clause 12 of the NIT deserves to be set aside.

138. While it is the categorical submission of the learned senior counsel for the appellants/L1 consortium that they have satisfied the eligibility criteria as prescribed under clauses 12 (i) (5) to (7), based on which the Technical Evaluation Committee has approved the technical bid of L1 consortium, it is submitted by the learned Advocate General that the Technical Evaluation Committee, after satisfying itself with all the documents produced by L1 consortium has approved the technical bid of L1 consortium. It is the submission of the learned Advocate General that in some of the States the Driving Licence/Registration Certificate project is implemented directly by the Transport Department, while in certain other states, such project is implemented through certain other companies, like M/s. Zylog Systems and M/s.United Telecom Ltd., who in turn entrust manufacture of the smart cards to the respective vendors. In essence, the manufacturing activity is carried on by the persons to whom the purchase order is placed by the contractor. L1 consortium having manufactured and supplied cards to RTO's office for execution of the project, be it as contractor or sub-contractor,

fully satisfies the eligibility criteria as prescribed under Section 12 (i) (6) of the NIT. It is the further submission of the learned Advocate General that implementation of Driving Licence Project can only be done in RTO Office and, therefore, the smart cards manufactured by one of the members of the L1 consortium, if delivered at the RTO Office, it can only be inferred that it is for a driving licence/registration certificate project and not otherwise. In a nutshell, it is submitted by the learned Advocate General that the destination of the SCOSTA based Smart Cards decides the nature of the smart cards and in the case on hand, the destination of the cards being RTO's office, it can safely be concluded that the same is for a Driving Licence/Registration Certificate project. It is further submitted by the learned Advocate General that the project implemented by L1 consortium to Gujarat State Road Transport Corporation for issuance of RFID/Smart Cards was also technically found to be satisfactory as the project related only to supply and personalisation of smart cards. In that sense, the card that has been supplied to GSRTC is a card personalised per individual and, therefore, it cannot be said that the eligibility criteria is lacking in respect of L1 consortium.

139. The relevant clauses, viz., clauses 12 (i) (5) to 12 (i) (7) have been extracted supra, which dovetails the projects that should have been executed for the purpose of satisfying the eligibility criteria prescribed in the NIT. While clause 12 (i) (5) deals with execution of one project for supply and personalisation of

smart cards in ID Domain for Transport Department, clause 12 (i) (6) relates to supply of SCOSTA based smart cards manufactured from its own manufacturing units in India for at least one Driving Licence / Registration Certificates projects in any one of the States in India and clause 12 (i) (7) prescribes experience of minimum supply of 10 Lakhs SCOSTA based smart cards in a period of two years.

140. Though it is the contention of the petitioner that L1 consortium does not fulfill the above prescribed criteria, a bare perusal of the documents, which has been filed with the typed set of documents, clearly shows that while the purchase order has been placed by either by M/s.Zylog Systems Ltd. or M/s.United Telecoms Ltd., on M/s.M-Tech Innovations for the supply of smart cards, the fact remains that the purchase order mandates the manufacturer to deliver the cards at the RTO's Office, either in the State of Karnataka or Pune, as the case may be. Though the purchase order placed by M/s.Zylog Systems merely specify the cards as Smart Cards, however, the purchase order placed by M/s.United Telecoms relate to SCOSTA based smart cards. In this scenario, the SCOSTA specification is of much importance so as to understand the usage of the said card in the specified field, so as to enable this Court to come to a conclusion whether the cards for which purchase orders have been placed by M/s.Zylog Systems and M/s.United Telecoms Ltd., would pertain to Driving Licence/Registration Certificate Project.

141. Clause (1) (b) of Section II of the NIT, which prescribes the guidelines and instructions to bidders on the tender conditions, prescribes that for the purpose of inter-operability of smart card based driving licences and registration certificates across the country, the standard specifications of SCOSTA, which has been developed by NIC, New Delhi, has been prescribed. The term SCOSTA stands for *"Smart Card Operating System for Transport Applications"*. The significance, as could be ascertained for SCOSTA from the above expansion clearly portrays that the particular type of card is primarily intended for transport applications and that be the case, it cannot be inferred otherwise that the Transport Department would use the card otherwise than for Driving Licence/Registration Certificates. That being the case, it would be wholly unsafe to accept the stand of the petitioner that the cards have not been supplied for Driving Licence/Registration Certificate Project. Further, the record also reveals that M-Tech Innovations has supplied quite a large quantity of cards, which has been taken into account by the Technical Evaluation Committee to come to the conclusion that L1 consortium has satisfied clause 12 (i) (7). That being the case, it would not be justified on the part of this Court to inject its mind into that of the Technical Evaluation Committee to ascertain whether clause 12 (i) (7) stands complied or not. As has been held in a catena of decisions, this Court cannot substitute its views to that of the Technical Experts unless the opinion arrived at by the Technical Experts is perverse and is

blatantly wrong, which warrants interference at the hands of this Court. The record reveals that the Technical Evaluation Committee has taken into consideration all the materials placed before it to come to the conclusion that L1 consortium has satisfied clause 12 (i) (6) and 12 (i) (7) and, therefore, this Court sees no reason to differ with the said opinion arrived at by the Technical Evaluation Committee.

142. Insofar as satisfaction of clause 12 (i) (5) is concerned relating to execution of at least one project for supply and personalisation of Smart Cards in ID Domain for Transport Department, though it is contended that the project has not been executed for the Transport Department, as the agreement has been entered into with the Gujarat State Road Transport Corporation and that the Corporation is not a Department within the meaning of a Government Department, however, it is trite law that the Transport Corporation is a Government owned entity, which is not disputed and for all practical purposes, it falls squarely within the meaning of Government Organisation. Further, all the Transport Corporations in a State come within the umbrella of the Transport Department of the Government and, therefore, the Transport Corporation is an allied entity of the Government and, therefore, it is also a Government entity. Further, all the acts of the Transport Corporation squarely falls within the searching eyes of the Transport Department and the control of the activities and

other allied matters is vested with the Government on which there can be no two different views. Such being the case, executing a project for the Transport Corporation would, for all practical purpose, be deemed to be a project executed for the Transport Department. Therefore, the contention relating to non-execution of a project for the Transport Department cannot be sustained. Further, the project, which has been executed by M-Tech Innovations to Gujarat State Road Transport Corporation relates to RFID/Smart Card Bus Pass Project. The terminology used is RFID/Smart Card, as is evident from the agreement entered into between the parties. Such being the case, it cannot be singled out that the agreement is only for RFID based card and it is not a smart card. When the Technical Evaluation Committee, after satisfying itself, has accepted that the project pertains to issuance of RFID/Smart Card, as held supra, injecting the view of this Court by entertaining a doubt by singling out the project as a project for RFID card would be wholly unjust and it would be against the views expressed by the experts. Therefore, this Court refrains to substitute its views to that of the Technical Evaluation Committee and, therefore, the contention that there is non-compliance of clause 12 (i) (5) also deserves to be rejected.

CAN THE UNSUCCESSFUL BIDDER CHALLENGE THE AWARD OF CONTRACT:

143. The unsuccessful bidder at the technical stage has challenged the award of contract in favour of L1 consortium on the above grounds, which has

already been answered by this Court. However, the point that needs to be decided is *"whether an unsuccessful bidder, who does not meet the eligibility criteria, and whose technical bid has been rejected by technical experts, can challenge the award of contract to the successful bidder on the ground that its financial bid offers much lower price"?*

144. The learned senior counsel appearing for the unsuccessful bidder contended that on mere technicalities the bid of the unsuccessful bidder having been rejected, it is entitled to claim its place in the evaluation of price bid and in that process, it is fully entitled to challenge the award of contract to L1 consortium on the ground that its bid offers better price than L1 consortium and for mala fide intentions, the technical bid of the petitioner has been rejected. Controverting the said stand of the unsuccessful bidder, learned senior counsel appearing for L1 consortium submitted that the bid of the petitioner having been rejected, it does not have any *locus standi* to question the next stage of the process, i.e., evaluation of price bid. Only when the petitioner has fallen within the zone of consideration for its price bid to be evaluated, does it have right to question the award and in the absence of same, the unsuccessful bidder cannot challenge the award of contract to the successful bidder. Reliance was placed on the decision of the Bombay High Court in ***Reliance Infrastructure Ltd. & Ors. - Vs – Maharashtra State Road Development Corporation Ltd. & Ors. (2011 (1) Mh. L.J. 443)***, wherein

the Division Bench held as under :-

> *"15. .... The plea which was urged before the Court at the hearing was that if the financial bid of the petitioners were to be opened, it would be found to be more favourable, in terms of the period of concession, than the bid which has been accepted. The submission is lacking in substance. Such an argument would have been open to a bidder who is found to be eligible and who had a grievance about the award of the contract. A bidder who does not meet the eligibility criteria, cannot complain of the award of the contract on the ground that its financial bid offers better terms. The question of comparing financial bids arises as between bidders who are eligible. The bid submitted by the petitioners was non-responsive since the petitioners did not fulfil the conditions of eligibility. There is hence no merit in the submission."*

145. A perusal of the said decision, extracted supra, discloses that a bidder who does not meet the eligibility criteria, cannot complain of the award of contract to another bidder, on the ground that its financial bid offers better terms. Similar is the circumstance projected in the present petition as well. It is the contention of the petitioners that its technical bid was rejected particularly to confer benefit on L1 consortium as the price quoted by L1 consortium is almost twice the price quoted by the unsuccessful bidder.

146. Though such a submission looks attractive on the face of it, however,

the same cannot be acceded to for the simple reason that the question of comparison of price arises only when two entities are similarly placed and fall within the zone of consideration to the next stage. However, in the case on hand, the petitioner's bid was rejected even at the initial technical evaluation stage. Therefore, there was no movement of the petitioner to the next stage in the evaluation process and it ceases to have any *locus* when the evaluation is done at the next stage, viz., evaluation of price bid. That being the case, the petitioner cannot claim that its financial bid offers more better terms than the bid of L1 consortium and, therefore, its bid should be accepted and contract awarded to it. Further, the question of comparison of financial bids arises as between bidders, who are eligible and similarly placed. The petitioner not being eligible and not equally placed along with L1 consortium, the question of comparison of the bids of two unequal entities would be nothing but making mockery of the whole tender process. Therefore, the abovesaid contention is liable to be rejected.

<u>VALIDITY OF PERIOD OF BIDS – RULE 26 - FULFILMENT :</u>

147. It is contended by M/s.Madras Security Printers, who qualified as L2 in the price bid that Rule 26 prescribes a time limit of 180 days for finalisation of tenders. Rule 26 (1) prescribes that the evaluation of tenders and award of contract to be completed within the prescribed period, the maximum outer limit including all extensions being 180 days. However, the present tender process was

not completed for more than three years and, therefore, for non-compliance of Rule 26, the whole tender process has to be scrapped and fresh tenders have to be called for. It is further submitted on behalf of L2 that prices were quoted way back in 2010 and in the present day, the prices in the electronic segment has drastically dropped down and, therefore, continuing with the present tender would cast a huge and unnecessary financial burden on the exchequer. For all the above reasons, the tender process needs to be scrapped.

148. The above contentions are countered by the learned senior counsel for L1 consortium stating that the validity has been extended from time to time and nowhere there is lacuna, in that the validity has not been extended and, therefore, when there is extension and the delay having occasioned due to multiple proceedings before this Court at the instance of one party or the other, the same should not enure on the debit side of L1 consortium. It is submitted that the time period during which delay occasioned due to pendency of litigations should be excluded for the purpose of enforcing Rule 26. It is further submitted by the learned senior counsel for L1 consortium that the submission relating to drop in the prices of electronic commodities, though is attractive, but the same is unacceptable for the reason that the other overheads such as provision of space, cost of labour, consumables, etc., have increased manifold and, therefore, in all probability, the cost would only bound to increase and the decrease, as suggested

by L2, is a rainbow in the sky and is merely an optical illusion and not a reality.

149. Learned Advocate General appearing for the respondent authorities, on the basis of records, submitted before the Court that the validity was in force till 7.12.2012 and, thereafter, the same has been extended by another six months at the instance of L1 consortium during which time the contract has been awarded in favour of L1 and, therefore, there is no period during which the validity was not extended and, hence, the contention of L2 that the validity having not been extended and hit by Rule 26 is wholly unsustainable.

150. There is no second opinion that the Rules framed have to be followed in letter and spirit and even the very many orders passed by this Court clearly show that the respondent authorities, through the learned Advocate General, have undertaken that the Act and the Rules will be followed throughout the tender process. Such being the case, when the learned Advocate General, on a scrutiny of the records produced by the respondent authorities has, before the Bar, submitted that the validity has been extended by another six months from 7.12.2012 during which period the contract has been awarded in favour of L1 consortium, this Court is bound to accept the said statement made across the Bar and not to doubt the veracity of the statement, as doubting the veracity of the said statement would be nothing but doubting the words of the top most law

officer of the Government, viz., the Advocate General. It has been time and again held that the statement made by the learned Advocate General across the Bar have to be deemed as statements made by the Government on affidavit. Further, records have also been placed before the Court to show that the validity has been extended till June, 2013, before which time the contract has been awarded in favour of L1 consortium Therefore, this Court accepts that the validity of the bids stood extended till the award of contract to L1. L2, having not produced any proof to show that the validity has not been extended, mere oral submissions before the Court cannot partake the character of proof and, therefore, the said contention is liable to be dismissed.

151. With regard to the contention that prices of electronic commodities have fallen down and, therefore, price quoted in the year 2010 are on the higher side and, therefore, a fresh tender has to be called so as to have clarity in the current market prices is concerned, which fact has also been highlighted in the letter written by the Transport Commissioner, though such a submission is advanced, no material whatsoever has been placed before the Court to suggest that the prices of not only the electronic commodity, but procurement and final product in a project of this nature has come down. Mere assertion that prices of electronic commodities have come down would in no way be sufficient for this Court to quash the whole tender process, that too at this far length of time,

almost seven years from the NIT. Further the submission of the learned senior counsel for L1 that prices have escalated in respect of cost of labour, establishment, consumables, etc., cannot also be lightly brushed aside, as inflation has taken a toll on almost all walks of life and has not spared any commodity. Therefore, at this distant point of time, quashing the tender on the mere contention before the Court relating to decrease in price of chips for smart cards, would be detrimental to the whole process, which has been dragged this long at the instance of all the parties to the *lis.* Therefore, the above contention is also liable to be rejected.

<u>PRICE REDUCTION – OFFERED BY L2 – LEGALITY OVER CONCLUDED CONTRACT</u> :

152. It is the further contention of L2 that while L1 was called for price negotiation, L2 was not called and, therefore, he was precluded from having an opportunity to offer his price in the negotiation process. In that regard, it is submitted by L2 that a letter was written by L2 to the respondent authorities informing them that if the contract as a whole is awarded to them, it is willing to execute the project at Rs.55/= per card. However, it is contended that a reply was written by the respondent authorities that if L2, who is executing the pilot project for the same project in three districts, is willing to do the pilot project at the rate of Rs.55/= then his case may be considered. It is the contention of L2 that the pilot project relates to a concluded contract, which cannot be altered and,

therefore, dangling the present project before its eyes for reducing the price of the card in the pilot project is impermissible.

153. Per contra, learned Advocate General appearing for the respondent authorities while submitted that a letter of that nature was addressed by L2 to which such a reply was sent by the respondent authorities, further added that in reply to the same, L2 had written that the cost of executing/issuing the smart card in the pilot project has increased and the cost is around Rs.195/= and, therefore, sought for enhancement. It is the submission of the learned Advocate General that when L2 itself submits that the cost of smart cards has increased, its present contention that the cost has come down is very much against its own stand in the letter. Further it is the submission of the learned Advocate General that negotiation is at the discretion of the authority and that too with the successful bidder and the other persons, who had lost the bid cannot claim a stake for negotiation. It is the further submission of the learned Advocate General that if such a negotiation process with each and every bidder, who had partaken in the price bid is conducted, there would be no end to the whole process and that the meaning of a tender itself would get defeated as the negotiation would be nothing but allowing a horse trading activity between the various bidders.

154. It is the further submission of the learned Advocate General that in

consonance with Section 10 (3) r/w 10 (2) of the Act, the lowest tenderer was called for negotiations, that too for multiple sittings and the rate was reduced by more than Rs.96 Crores and after careful analysis of the whole episode along with the prevailing market conditions with reference to the price of smart card, the tender was finalised and, therefore, it cannot be said to be a sham act on the part of the respondent authorities.

155. At the outset, it has to be mentioned that in a concluded contract, it is not permissible to make any changes unless it is agreed by both the parties. By the same stretch, it is also not open to the respondent authorities to ask the executor of a project, which has culminated into a contract, to have the rate of the said project reduced for the purpose of considering his case for another project. But, it is equally not right of the executor of the said project, having quoted the amount and accepted the contract, to ask for enhancement of the rate on the respondent authorities asking for reduction. Therefore, the action of both L2 and the respondent authorities are mutually exclusive and, therefore, fault cannot be fastened on a single entity. Therefore, there is no requirement to dwell much into this aspect of the matter, though it does not have the approval of law.

156. However, as is borne out by the records, in consonance with Sections 10 (2) and 10 (3) of the Act, L1 was called for negotiations, the respondent

authorities having felt that the quoted amount by L1 consortium is on the higher side and subsequent to the said negotiations, the rate has been brought down substantially by around Rs.96 Crores. Therefore, it cannot be said that the negotiation is an eye wash transaction, the rates having substantially fallen down. However, the contention of L2 that he was not called for negotiation is beyond acceptance. Though he was successful in the technical bid, in the price bid, L2 was not successful and, therefore, the negotiations were carried on with the lowest bidder, viz., L1 consortium. The procedure adopted by the authorities in negotiating with the lowest bidder for reduction of price is the right approach, which is prescribed under the Act. Had any negotiations taken place between L2 and the respondent authorities, the same would not only be unlawful, but would also lead to horse trading, which is impermissible in the matter of award of contract. Therefore, the contention of L2 that it was not called for negotiation of price cannot be sustained.

NON-ADHERENCE TO CLAUSE 27 (h) & (i) / RULE 29 (2) (d) (iv) RELATING TO REDUCTION OF TAX COMPONENT IN ARRIVING AT LOWEST QUOTED PRICE :

157. It is the contention of L2 that though clauses 27 (h) & (i) of NIT and so also Rules 29 (2) (iii) & (iv) of the Rules mandate excluding the tax component from the bid amount to arrive at the lowest bid, however, the same has not been done while arriving at the lowest amount. Had the said clauses and rules been

followed, L2 would have swapped places with L1 and, therefore, would have landed with the contract. Non-compliance with the said clauses and rules hits at the award of contract and, therefore, the same is liable to be quashed.

158. However, it is submitted by the learned Advocate General that tax component relates not to the manufacturing place, but the place at which the bidder is going to bill the Government. In the case on hand, the lead bidder is within the State and the bill on the Government is going to be from within the State and, therefore, exclusion/inclusion of tax component on L1 does not arise.

159. To answer the above contention, a cursory perusal of the relevant clause prescribes that the tax component would stand excluded for bidders, who are within the State and included for bidders who are outside the State. However, the Rules, more especially Rule 29 (2) (d) (iv) prescribes that where the tenderers are both from the State of Tamil Nadu as well as from outside the State of Tamil Nadu, the Value Added Tax levied under Tamil Nadu Value Added Tax Act, 2006, shall be excluded for the evaluation of the price.

160. It is unceremoniously clear from the above that there is a slight discrepancy between the rules and the clauses inserted in the tender document. The rules having statutory force, definitely has an overriding effect on the clauses

inserted in the tender document. It is trite that the clauses in the tender document should be in consonance with the Act and the Rules and any clause which is in contravention of the Act and the Rules, the Act and Rules will prevail over the same. In such view of the matter, as is clearly envisioned in Rule 29 (2) (d) (iv) of the rules, where the tenderers are both from the State of Tamil Nadu as well as from outside the State of Tamil Nadu, the Value Added Tax levied under Tamil Nadu Value Added Tax Act, 2006, shall be excluded for the evaluation of the price. Therefore, the act of the respondent authorities in following the statutory provision, viz., Rule 29 (2) (d) (iv) in the evaluation of price, could, by no stretch of imagination, be termed as against the spirit of the tender document. Further, the submission of the learned Advocate General to the effect that the place of raising the bill on the Government assumes importance for the purpose of computation of tax carries weight. In the case on hand, the billing to be made on the Government being within the State, no tax component would stand attached, which needs inclusion/exclusion as per the terms of the contract. Therefore, the above contention relating to exclusion/inclusion of tax component for the purpose of arriving at the lowest price, deserves to be rejected.

LETTER OF TRANSPORT COMMISSIONER – VIS-A-VIS – OPINION OF ADVOCATE GENERAL :

161. It is the contention of the learned counsel for L2 that initially the then

Transport Commissioner had opined that the approval of the Government having not been obtained and that certain clauses in the tender document tried to curtail wider participation and, thereby, competitive rates are not forthcoming, requested whether the tender process could be cancelled and a fresh tender floated. Such being the case, when the Transport Commissioner himself has opined that the tender process needs to be cancelled and fresh tender needs to be floated so as to have wider participation, the respondent authorities carrying on the present tender to its logical conclusion smacks of mala fide intent and, therefore, the same needs to be interfered in exercise of judicial discretion under Article 226 of the Constitution.

162. Controverting the above submission, it is submitted by the learned Advocate General that subsequent to the said letter, another letter with similar queries was addressed to the learned Advocate General for opinion by the Transport Commissioner, which was referred by the office of the learned Advocate General to the learned Addl. Advocate General, who has given his legal opinion opining that the tender process may be taken to its logical conclusion as the present scenario does not call for any cancellation of the tender process. The Government had also given the go-by to the Transport Commissioner either to accept or reject the tender exercising his discretion. In such view of the matter, the discretion having been vested with the Transport Commissioner, the tender

process was taken to its logical conclusion. Therefore, the contention that the tender was concluded with mala fide intent is a mere imagination on the part of L2 and the said submission deserves to be rejected.

163. From a perusal of the documents available on record, it is evident that the then Transport Commissioner had written a letter, which queries were reiterated by the next incumbent in office requesting the learned Advocate General to give his legal opinion so as to proceed further in the matter. In response to the said query, the learned Addl. Advocate General has given his opinion opining that the tender may be taken to its logical conclusion and finalisation of the tender be be made, if necessary, after carrying on further price negotiation. Therefore, it clearly shows that the learned Addl. Advocate General, after analysing all the records and other documents placed before him, has come to the conclusion that the matter need not be precipitated further and that the project may be finalised as there being no records which go to show that all is not well with the tender process. It is also borne out by record that the Principal Secretary to Government had addressed the Transport Commissioner leaving the discretion to the Transport Commissioner to decide on the tender process, whether to continue with it or to call for fresh tender. Therefore, on all counts, discretion having been vested with the Transport Commissioner, the Transport Commissioner, exercising his discretion, after taking into account all the materials

and documents available before him and taking cue from the legal opinion offered by the learned Addl. Advocate General, had exercised his discretion to go ahead with the tender process, the same cannot be said to be a mala fide exercise. In the above backdrop, it cannot also be said that the Transport Commissioner has overstepped his limit in finalising the tender, when the Government itself has given him the powers to decide on the fate of the tenders. The present Transport Commissioner cannot be said to have brushed aside his predecessor's view and taken an arbitrary decision. In fact, he has acted on the advise of his superiors and taken a concious decision, which cannot be said to be arbitrary, discriminatory or mala fide and in violation of principles of natural justice. Therefore, the contention of L2 that the act of the Transport Commissioner is vitiated by bias and is arbitrary cannot be sustained.

SATISFACTORY QUALIFICATION OF L1 CONSORTIUM AS PER TENDER DOCUMENT :

164. Learned senior counsel appearing for the unsuccessful bidder submitted that very many qualifications that are crucial for approving the technical bid have not been properly taken note of by the Tender Evaluation Committee and, therefore, the approval of L1 consortium as having qualified in the technical bid is wholly unsustainable and liable to be interfered with, which contention has been refuted by the learned senior counsel appearing for L1

consortium as also the learned Advocate General.

165. In this regard, the discussion made above would amply show that approving the technical qualification of the bidders as also the conditions imposed in the tender document is clearly within the realm of the Tender Inviting Authority and the Tender Evaluation Committee. The Court cannot substitute its view to that of the experts in the particular field, be it technical or financial, and come to a different conclusion. Only where it is shown that the action of the respondent authorities is mala fide, arbitrary, discriminatory and against the principles of natural justice to unduly confer some benefit on a particular individual, the Court can interfere in the said matter. The Evaluation Committee on a comprehensive analysis of the technical documents placed before it has come to the decision that L1 consortium has satisfied all the tender conditions and, therefore, is eligible to go to the next stage, i.e., price bid stage, this Court, sitting under Article 226 of the Constitution, when not being shown that such action is mala fide, arbitrary, discriminatory or against the principles of natural justice in order to confer benefit on L1 consortium, will desist itself from interfering with the said decision arrived at by the Tender Evaluation Committee.

JUDICIAL REVIEW IN CONTRACTUAL MATTERS :

166. Barring all the above submissions made above, it was contended by

the learned senior counsel for the petitioners that this Court, in exercise of its inherent jurisdiction under Article 226 of the Constitution, to set right the wrongful arbitrary act of the respondent authorities in not adhering to the rules and provisions prescribed under the clauses, can invoke the powers of judicial review and set right the malady. In support of the said submission that judicial review is permissible in the contract domain, authorities were referred to.

167. In the case of ***Mahabir Auto Stores & Ors. - Vs – Indian Oil Corporation & Ors. (1990 (3) SCC 752)***, the Supreme Court, while considering the executive power of the State or its instrumentality in entering into contract under Article 298 of the Constitution, held that review is open on the ground of *'malice in law'*. It further held that judicial review will depend on nature of right involved in the facts and circumstances of the case. For better appreciation, the relevant portion of the decision is extracted hereunder :-

> *"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar [(1977) 3 SCC 457] . It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as*

contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal v. State of Bihar [(1977) 3 SCC 457] at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not *entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : 1974 SCC (L&S) 165], Maneka Gandhi v. Union of India [(1978) 1 SCC 248] , Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258], R.D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293] . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.*

13. The existence of the power of judicial review however depends upon the nature and right involved in the facts and circumstances of the particular case. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action."

168. In the case of ***Michigan Rubber (India) Ltd. - Vs – State of Karnataka& Ors. (2012 (8) SCC 752)***, the Supreme Court, taking into consideration the various decisions on the subject relating to judicial review in relation to Government contracts and auction and the power of the Court to review the said decisions, held as under :-

> *10. This Court, in a series of decisions, considered similar conditions incorporated in the tender documents and also the scope and judicial review of administrative actions. The scope and the approach to be adopted in the process of such review have been settled by a long line of decisions of this Court. Since the principle of law is settled and well recognised by now, we may refer to some of the decisions only to recapitulate the relevant tests applicable and approach of this Court in such matters.*
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> *11. In Tata Cellular v. Union of India [(1994) 6 SCC 651] this Court emphasised the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other, and observed: (SCC pp. 687-88, para 94)*
>
> > *"(1) The modern trend points to judicial restraint in administrative action.*
> >
> > *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
> >
> > *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own*

decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. …

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle[Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

(emphasis in original)

12. In Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492] this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties except where there is substantial public interest involved and in cases where the transaction is mala fide.

13. In Union of India v. International Trading Co. [(2003) 5

SCC 437] this Court, in similar circumstances, held as under: (SCC pp. 445 & 447, paras 15-16 & 22-23)

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

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be *informed by reason and it follows that an act uninformed by reason is per se arbitrary.*

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

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See Parbhani Transport Coop. Society Ltd. v. RTA [AIR 1960 SC 801], Shree Meenakshi Mills Ltd. v. Union of India [(1974) 1 SCC

468], Hari Chand Sarda v. Mizo District Council [AIR 1967 SC 829] and Krishnan Kakkanth v. Govt. of Kerala [(1997) 9 SCC 495] .)"

14. In Jespar I. Slong v. State of Meghalaya [(2004) 11 SCC 485] this Court, in para 17, held as under: (SCC p. 494)

"17. … fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable."

15. In Assn. of Registration Plates v. Union of India [(2005) 1 SCC 679] a similar issue was considered by a Bench of three Judges. In that case, the dispute was about the terms and conditions of notices inviting tenders (NITs) for supply of high security registration plates for motor vehicles. The tenders had been issued by various State Governments on the guidelines circulated by the Central Government for implementing the provisions of the Motor Vehicles Act, 1988 and the newly amended Central Motor Vehicles Rules, 1989. The main grievance of the appellant therein was that all notices inviting tenders (NITs) which were issued by various State Governments, contained conditions which were tailored to favour companies having foreign collaboration. Their further grievance was that the tender conditions were discriminatory as per Article 14 of the Constitution and were being aimed at excluding indigenous manufacturers from the tender process. It was also contended that in all the cases, the work of supply of high security registration plates for all existing vehicles and new vehicles was *being entrusted to a single licence plates manufacturer in a State or a region and for a long period of 15 years, thus creating monopoly in favour of selected bidders to the complete exclusion of all others in the field.*

16. The further contention advanced in Assn. of Registration Plates case [(2005) 1 SCC 679] was that creation of monopoly in favour of a few parties having connection with foreign concerns is violative of the fundamental right of trade under Article 19(1)(g) and discriminatory under Article 14 of the Constitution. It was also pointed out that in the name of implementing the amended Rule 50 of the Motor Vehicles Rules, 1989, the States are imposing conditions in the tender that would take away the existing rights of the manufacturers of plates in India.

17. On the condition laid down for prescribed minimum turnover of business, the challenge made on behalf of the petitioners in Assn. of Registration Plates case[(2005) 1 SCC 679] was that fixing such high turnover for such a new business is only for the purpose of advancing the business interests of a group of companies having foreign links and support. That it was impossible for any indigenous manufacturer of security plates to have a turnover of approximately Rs 12.5 crores from the high security registration plates which were sought to be introduced in India for the first time and the implementation of the project has not yet started in any of the States.

18. On behalf of the Union of India, the State authorities and the counsel appearing for the contesting manufacturers, in their replies, have tried to justify the manner and implementation of *the policy contained in Rule 50 of the Motor Vehicles Rules. On behalf of the Union of India, the learned ASG submitted that under Rule 50 read with the Statutory Order of 2001 issued under Section 109(3) of the Motor Vehicles Act, the State Governments are legally competent to formulate an appropriate policy for choosing a sole or more manufacturers in order to fulfil the object of affixation of security plates. The Scheme contained in Rule 50 read with the Statutory Order of 2001 leaves it to the discretion of the State concerned to even choose a single manufacturer for the entire State or more than one manufacturer regionwise. It was pointed out that such a selection cannot be said to confer any monopoly right by the State on any private individual or concern. He further pointed out that the tender conditions were formulated taking into account the public interest consideration and aspects of high security.*

19. While considering the above submissions, the three-Judge Bench held as under: (Assn. of Registration Plates case [(2005) 1 SCC 679] , SCC pp. 698-701, paras 38-40 & 43-44)

> *"38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers*

under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and the State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing *stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.*

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43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been *firmly established from various decisions of this Court, cited at the Bar [**Ed.**: Reference may be made to the decisions in Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617; Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd., (1997) 1 SCC 738; Krishnan Kakkanth v. Govt. of Kerala, (1997) 9 SCC 495; Ugar Sugar Works Ltd. v. Delhi Admn., (2001) 3 SCC 635; Sterling Computers Ltd. v. M&N Publications Ltd., (1993) 1 SCC 445; Union of India v. Dinesh Engg. Corpn., (2001) 8 SCC 491.] is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.*

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

After observing so, this Court dismissed all the writ petitions directly filed in this Court and transferred to this Court from the High Courts.

20. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [(2006) 10 SCC 1] this Court held that while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest.

21. In Jagdish Mandal v. State of Orissa [(2007) 14 SCC 517] the following conclusion is relevant: (SCC pp. 531-32, para 22)

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary*

grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

22. The same principles have been reiterated in a recent decision of this Court in Tejas Constructions & Infrastructure (P)

Ltd. v. Municipal Council, Sendhwa [(2012) 6 SCC 464] .

23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

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

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

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

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

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

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

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

169. In the above cited decisions relating to judicial review, the Supreme Court in ***Tata Cellular – Vs – Union of India (1994 (6) SCC 651)*** has formulated the principles in which judicial review is permissible and also cautioned the Courts to enforce judicial restraint while exercising powers of judicial review in contractual matters relating to exercise of powers by the Government bodies and has enumerated six principles, which are gospel for the Courts below and which has to be followed in letter in spirit so that there is no judicial over-reach.

170. Similarly, in *Michigan Rubber case (supra)*, after discussing the various case laws on the subject, the Supreme Court has conceptualised the questions that should be posed by the Court to itself while entering into the arena of judicial

review.

171. All the authorities on the above subject relating to judicial review in respect of contractual matters involving Government bodies, have highlighted that the important points to be decided before reviewing the matter is as to whether the process adopted or the decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that it is possible for the court to express that no responsible authority acting reasonably in accordance with the relevant law could have acted in such a manner and whether public interest stands affected. If the answer to the above queries are in the negative, interference under Article 226 should be dropped.

172. Based on the queries put forth by the Supreme Court, the case on hand requires this Court only to answer whether there the answer to the questions formulated by the Supreme Court is in the affirmative or not.

173. Even at the outset it can safely be said that the answer cannot be answered in the affirmative. As discussed above, neither any mala fide has been attributed to the tender conditions nor has it been submitted that the tender conditions are framed to favour a particular tenderer. All the tenderers, with

open eyes, participated in the tender process. The Tender Evaluation Committee has given reasons for reaching the conclusion either for accepting or rejecting the tenders. No mala fides have been attributed to the Tender Evaluation Committee, as a whole, or individually. The decision making process also has not been said to be arbitrary or discriminatory or that the principles of natural justice have been violated. The ground that has been urged before us is purely legal, which this Court has answered above and the same not being in the realm of the experts in other fields. The Evaluation Committee in all earnestness has gone into each and every aspect of the tender conditions in detail with regard to each and every tenderer and has given its expert opinion. The opinion has been given by experts in their respective fields. That being the case, it is against the well accepted judicial precedents that the Court should not enter into the arena of experts by importing its view to that of the experts and it is always better left to the experts to decide in that particular sphere.

174. Therefore, looked at in any angle, there being no categorical allegation of mala fide intention, arbitrariness or discriminatory tactics adopted in the whole of the tender process, the decisions having been taken by experts judiciously appraising the technical as well as financial aspects in the matter and after getting the necessary legal opinion from the top most legal officer of the Government, this Court categorically holds that judicial review in such a scenario is not

warranted in the facts and circumstances of the case.

175. For all the foregoing discussions, this Court finds no substance in any of the contentions advanced by the petitioners and, accordingly, the writ petitions deserve to be dismissed and, accordingly, all the writ petitions are dismissed. Consequent therewith, all the writ appeals are allowed and the interim order passed by the learned single Judge is liable to be set aside and, accordingly, the same is set aside. However, in the facts and circumstances of the case, there shall be no order as to costs.

(H.G.R.J.) **(T.K.R.J.)**

23.08.2017

Index : Yes

Internet : Yes

GLN

To

1. The Secretary to Government
   Transport Department
   Secretariat, Chennai – 9.

2. The Transport Commissioner
   Ezhilagam, Chepauk
   Chennai – 5.

HULUVADI G.RAMESH, J.
AND
RMT. TEEKAA RAMAN, J.

GLN

COMMON
PRE-DELIVERY JUDGMENT IN
W.P. NO.16971 OF 2013
W.P.NO. 10911 OF 2012
W.A. NOS. 1976, 1618 &
1631 OF 2013

Pronounced on

23.08.2017