

## IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**CWP No. 2748 of 2008**

Reserved on: 2.7.2009

Date of decision: 07.10.2009.

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Reliance Infrastructure Limited

Petitioner

Versus

State of H.P. and others

Respondents.

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### **Coram**

**The Hon'ble Mr. Justice Deepak Gupta, J.**

**The Hon'ble Mr. Justice V.K. Ahuja, J.**

*Whether approved for reporting?*<sup>1</sup> yes

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For the petitioner:

Mr. Rajiv Nayar, Sr. Advocate with M/s  
Ajay Kumar, Rishi Agrawala and  
Akshay Ringe, Advocates.

For the respondent No.1:

Mr. R.K. Bawa, Advocate General with  
Mr. Ankush Sood, Addl. Advocate General

For the respondents No.2 & 3:

Mr. Baldev Singh, Advocate.

For the respondents No. 4 & 5:

Mr. Ranjeet Kumar, Sr. Advocate with M/s  
Vikram Nankani, Ishwar Nankani, Sanjeev  
Bhushan, Virender Thakur and Raj Kumar  
Negi, Advocates.

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### **Per Deepak Gupta, J.**

By means of this writ petition, the petitioner Reliance Infrastructure Limited (here-in-after referred to as RIL) has prayed for the issuance of an appropriate writ for quashing the decision taken by the State of Himachal Pradesh on 25.11.2008 in respect of the two hydro-electric projects, namely, Jangi Thopan and Thopan Powari of 480 MW each alongwith the letter of award in favour of

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<sup>1</sup> *Whether the reporters of the local papers may be allowed to see the Judgment?*

respondent No.4 (M/s Brakel Corporation NV (here-in-after referred to as Brakel). The petitioner has also prayed that respondent No.4 and respondent No.5 M/s Brakel Kinnaur Power Limited (here-in-after referred to as M/s Brakel Kinnaur) be restrained from entering into any other agreement on the basis of the decision dated 25.11.2008. The petitioner also prayed that the aforesaid hydro-electric projects be awarded to them.

**The Factual Matrix:**

The State of Himachal Pradesh issued an advertisement in October, 2005, which was a global invitation inviting bids for implementation of Hydroelectric projects in the State of Himachal Pradesh. The invitation inviting bids provided that the bidders should have strong financial and technical basis with adequate free investible reserves and surpluses necessary for development of the hydro-electric project(s). The bidders were also required to have requisite technical capability. As per this invitation, 50% of the upfront premium was to be paid immediately on the issuance of the letter of award. Last date for submission of bid document was 21.1.2006. The bid documents were issued in November, 2005. The petitioner and respondents both purchased the bid documents. Thereafter on 27.12.2005 the State issued a corrigendum to the notice inviting offers and a further condition was incorporated that the State of Himachal Pradesh shall have the right of equity participation upto 49% in the Hydro Electric Projects on selective basis. The last date for submission of bids was extended upto 16.3.2006. The petitioner as well as respondent No.4 submitted their bids for the Jangi Thopan and Thopan Powari Projects of 480 MW each. Certain queries were raised by the respondent No.2 H.P. State Electricity Board in respect

of the bids and finally the bids of all short-listed bidders were opened on 5.9.2006. Respondent No.4, Brakel, was found to be highest bidder for both the projects. On 16.11.2006, the petitioner offered to match the bid of respondent No.4. On 1<sup>st</sup> December, 2006 letter of intent was issued by the State in favour of respondent No.4 awarding it both the contracts, as it was the highest bidder having bid Rs.36 lacs per megawatt. It was directed to sign the Pre-Implementation Agreement and deposit the upfront premium. On 9.12.2006 Brakel accepted the letter of intent and informed the Government of Himachal Pradesh that they are going through the draft Pre Implementation Agreement (PIA). In the meantime, on 11.12.2006 the State of Himachal Pradesh notified the H.P. Hydro Power Policy. Admittedly, Brakel did not deposit the upfront premium.

On 20.8.2007 the petitioner sent a letter to the Government that it was willing to match the bid of respondent No.4 and that since respondent No.4 had not deposited the upfront premium the projects be awarded to it. Again on 25.9.2007 and 1.11.2007 the petitioner wrote letters on similar lines to the Government. Finally on 17.11.2007 the petitioner filed a civil writ petition in this Court which was numbered as CWP No. 2074 of 2007. The matter was listed before the Court on 13<sup>th</sup> December, 2007 when notice was issued to the State to file its response.

On 7<sup>th</sup> January, 2008 before filing reply to the writ petition, the State issued a show cause notice to Brakel asking it to show cause why allotment of the two projects be not cancelled in view of the fact that respondent No.4 had not paid any up front premium nor taken any steps to implement the projects. On 29.1.2008, respondent No.5 Brakel Kinnaur Pvt. Ltd, on behalf of the respondent No.4 Brakel

Corporation sought to deposit a sum of Rs. 173.43 crores. On 7.3.2008 the petitioner filed an application in CWP No. 2074 of 2007 requesting that the upfront amount be not accepted. An application for amendment of the writ petition was also filed. The matters were heard by this Court on 22.4.2008. Thereafter the State of Himachal Pradesh issued another show cause notice to Brakel directing it to pay interest on the delayed payment of upfront premium. Respondent No.5 then deposited the interest also. On 1.5.2008 counsel for respondents in CWP 2074 of 2007 stated that they will not enter into the pre implementation agreement.

On 3.6.2008 this Court passed the following order in the writ petition:-

“The respondent-State has filed various affidavits during the pendency of this petition. We have noticed the contents of the affidavits filed from time to time by the State. We are of the prima facie opinion that the pleadings are contradictory though they are supposed to be precise and concise besides being consistent. Confronted with this, the learned Advocate General prays for and is granted four weeks time to explain the stand of the State in the present case. Consequently, the State shall take a decision duly supported by reasons. The decision of the State will be placed on record of this case on the affidavit of the Chief Secretary to the Government of Himachal Pradesh. It is clarified that this exercise has been undertaken by the Court to adjudicate upon the case effectively and to arrive at a just conclusion. The decision taken by the State Government will be without prejudice to the rights of all the parties.”

Pursuant to the directions issued by this Court a memorandum was prepared for consideration of the Council of Ministers. Relevant portion of it reads as follows:-

“34. In nutshell, the following important points concerning this Company are required to be noted in this case before proceeding further with any conclusion:

1. Mis-statement of fact that the Company is incorporated on 13.2.2005 when it seems that it was actually incorporated on 13.2.2006.

2. Claim that M/s SNC-Lavalin is an equity partner of 30% made in the bid documents (Pre Contract JV Agreement dated 13.3.2006 supplied by Brakel NV), a fact which is denied by the said company during inquiry.

3. Claim that M/s Standard Bank is an equity partner of 45% made in the bid documents (Pre Contract JV as mentioned above), a claim that is denied and asserted false by the Standard Bank in their response to the SV and ACB.

4. As per Pre Contract JV Agreement dated 13.3.2006 supplied by the Company as clarification, the Company M/s Brakel has no Equity in the Company/JV. The entire equity of the Company is divided to others as SNC Lavalin (30%), M/s Standard Bank (45%), Eco Securities (5%) and Energy Infrastructure Overseas (10%) and M/s Halcrow Consulting the balance (10%). In effect this means that the allottee firm is nothing but a simple name for an association of diverse companies which was sought to be presented as a Joint Venture Company. As is now coming out from the scrutiny of documents submitted as also from the inquiries made, these constituents of the JV never agreed to pay any equity stake in the Joint Venture and all claims made in this regard by Brakel NV seem false.

5. Brakel NV have accepted in their response to the Department of Power (Letter dated 21.5.2008) that they have agreed to transfer 49% equity to M/s Adani Power. This is against the terms of allotment and the clauses of PIA prescribed for signing.

6. While taking shelter behind their Company of Foreign Origin status all the time for delay in payment of Upfront Premium, finally deposited the UFP amount from Indian sources only.

7. Claims of being a Netherlands based company highly doubtful. Company's Incorporation in Curacao, an island (Tax Heaven -?) in the pacific raises serious doubts. Netherlands address is just a P.O. Box Number.

8. Paid up Capital of M/s Brakel Corp. NV is only (one) Dollar at the time of incorporation and at the time of bidding for a project that is likely to cost Rs.6000 crores (\$ 1.5bn).

9. Paid up capital of the Indian company created by M/s Brakel Corporation NV in the name and style of M/s Brakel Kinnaur Power Pvt. Ltd. is INR 1 lakh only. Company registered at ROC Jalandhar (Punjab) on 9.3.2007.

10. There are no common Directors or Promoters in the 2 companies above.

11. Contrary to the claims made in the bid documents, M/s SNC-Lavalin, M/s Standard Bank, M/s Eco Securities and M/s Halcrow Consulting are not partners of share holders in the Indian JV Company M/s Brakel Kinnaur Power Pvt. Ltd.

12. Amount of Upfront Premium deposited under the letter head of Brakel Corp. NV whereas the money has actually come from the account of M/s Brakel Kinnaur Power Ltd. a fact ascertained and admitted by Brakel during our inquiry.

13. Inquiry Report dated 23.5.2008 received from the Income-tax (Inv) department suggests that the Company appears to be a paper company only with no capacity or expertise to develop the Project allotted.

14. Inquiry Report of the Vigilance Department of Himachal Pradesh also suggests that the matter of allotment to this Company needs further probe and a prima facie case under Section 420 is made out in the allotment of this Project to the Company.

15. All claims of Technical and Financial strengths of the company (based on the tie ups made with other companies) at the time of bidding for the projects seems doubtful in view of the denials already received from M/s SNC Lavalin and M/s Standard Bank.”

It would be pertinent to mention that before this Cabinet memorandum was prepared inquiry was conducted both by the Police as well as Income-tax Department. It was on the basis of these enquiries that such preliminary conclusions were arrived at. The following points were put for consideration before the Cabinet:-

“1. Whether the allotment of Jangi-Thopan Powari HEP (960 MW) made in favour of M/s Brakel Corporation NV vide Government letter dated 1.12.2006 may be cancelled?

2. If the (1) above is approved, whether the request dated 25.9.2007 of M/s Reliance Energy for allotment of the project to them on their matching the Upfront Premium amount quoted by M/s Brakel Corp. NV Project be rejected and the project be re-advertised for development in Private Sector on BOOT basis in terms of the present Hydro Power Policy of the State.

3. Whether a case under Section 420 of the IPC may be registered against M/s Brakel Corporation NV as has been

recommended by the State Vigilance and Anti Corruption Bureau in their preliminary Inquiry Report?

4. Whether M/s Brakel Corporation be issued a notice subsequent to cancellation of the allotment as to why the amount of Rs.193.98 crores received from them may not be forfeited to compensate the State Government for the loss caused to it due to the delay that may be caused in the development of the Project? This would, however, not absolve the Company from its liability to compensate the State Government for such losses as may be assessed as a result of appropriate civil proceedings that the State may initiate against the Company.”

On 7<sup>th</sup> July, 2008 the Cabinet took the following decisions:-

- “(i) Show cause notice be issued to M/s Brakel Corporation NV as to why the allotment should not be cancelled for misrepresenting and giving wrong facts to the State Government with regard to its technical and financial competence and the upfront money forfeited for causing loss to the State.
- (ii) The Project will be re-advertised for fresh bids.
- (iii) Vigilance to continue inquiry separately.
- (iv) Action against those who evaluated this project in the HPSEB and Department wrongly.
- (v) A fool proof new system for evaluation of projects be developed for future.”

On the basis of the aforesaid decisions, show cause notice was issued to Brakel on 19<sup>th</sup> July, 2008. In this notice, on the basis of the discreet inquiries conducted and the other material gathered the State leveled serious allegations against Brakel. It was alleged that Brakel had misled the State about the date of its incorporation and about the equity participation of the so called members of the consortium. It was also alleged that Brakel had transferred 49% equity to Adani, which is against the letter of allotment. It was also alleged that there was delay in payment of upfront premium. Other allegations relating to the lack of technical and financial strength of the consortium were also leveled.

On 31<sup>st</sup> July, 2008, CWP 2074 of 2007 came up for hearing when this Court came to the conclusion that the same had become infructuous in view of the decision of the State to issue show cause notice to respondent No.4 to cancel the allotment of the projects in its favour and to re-advertise the same. The relevant portion of the order reads as follows:-

“The petitioner herein has prayed for quashing of Letter of intent issued to respondent No.4 for setting up of Hydro Power Project of 480 MW each at Jangi Thopan and Thopan Powari in District Kinnaur, H.P. and also for a prayer of mandamus that respondents No.1 to 3 i.e. State be directed to issue Letter of Intent in favour of the petitioner.

This Court on 3<sup>rd</sup> June, 2008 had observed that the State Government had filed various contradictory affidavits. The matter was adjourned to enable the State to take a decision and place it on record through an affidavit of the Chief Secretary to the Government of Himachal Pradesh. The said decision was to be without prejudice to the rights of the parties.

Initially the petition was being opposed by the State Government, but however, now the State Government has changed its stand and in view of subsequent decisions so taken by the State Government, it is contended by the learned Advocate General as also learned counsel for the private respondent that the present petition has become infructuous. On the other hand, learned counsel for the petitioner is of the view that keeping in view the orders dated 3.6.2008 and also the averments contained in paras 10 and 11 of the petition, it is not so.

The State Government through affidavit dated 8.7.2008 filed by the Chief Secretary to the Government of Himachal Pradesh as also the affidavit dated 17.7.2008 of Special Secretary, MPP and Power, to the Government of Himachal Pradesh, has now placed on record a decision at the highest level (Cabinet), wherein it has been so decided that a show cause notice be issued to the private respondent No.4 asking as to why the allotment in question be not cancelled for misrepresenting and giving wrong facts to the State Government with regard to its technical and financial competence and also as to why the upfront money be not forfeited. It has also been decided that after the final decision the State shall re-advertise the projects inviting fresh bids. Importantly, the State has clarified

that the Vigilance inquiry against the private respondent shall continue separately and action against erring official for not having correctly evaluated the projects shall be taken.

This decision has not been assailed by any of the parties before us. We do not intend to go into the merits of the matter in view of subsequent developments and are of the considered view that the present writ petition has become infructuous.

Since we have not gone in the merits of the matter and expressed our opinion on the same, it shall always be open for the petitioner to assail any order passed by the State Government of which the petitioner may be aggrieved of.”

Brakel filed reply to the show cause notice on 4.8.2008. Brakel also made written submissions to the Principal Secretary (Power) on 4.10.2008 and 9.10.2008. Another letter was sent by Brakel to the Principal Secretary(Power) on 13.10.2008. In all these letters Brakel was furnishing explanations and replying to the allegations made in the show cause notice. It would be pertinent to mention that Brakel admitted that it had identified Adani Power as a partner for 49% equity. It was also stated that the individual consortium members shall hold shares in Brakel Corporation NV.

In the mean time, the petitioner filed another writ petition being CWP No. 1803 of 2008 in this Court. This case was taken up by the Court on 30<sup>th</sup> October, 2008, in which the following orders were passed:-

”This writ petition is directed against the order dated 7<sup>th</sup> July, 2008 contained in Annexure P-17 of this writ petition, whereby respondent No.1 has decided to call for fresh bids in respect of Jangi Thopan Powari Hydro Electric Project. From the perusal of the impugned order, it is apparent that show cause notice has already been issued to M/s Brakel Corporation NV as to why the allotment should not be cancelled for mis-representing and giving wrong facts to the State Government.

We have heard the learned counsel for the parties. The decision on the reply to the show cause notice to opposite party No.4 is still pending with the State Government. The interest of justice will

suffice if final decision is taken by the State Government expeditiously preferably within a period of eight weeks.

In light of the above, we are of the opinion that at this stage, the petition is premature. Therefore, we grant liberty to the petitioner to challenge any order passed by the State Government in this connection, including condition No.(ii) of impugned order dated 7<sup>th</sup> July, 2008 contained in Annexure P-17 of this writ petition, if it prevails.

With these observations, the petition is disposed of.”

Thereafter, a memorandum was prepared on 1<sup>st</sup> November, 2008 for consideration of the Council of Ministers and one of the items put up for consideration was in respect of the two projects in question. In the said memorandum again similar allegations were made against Brakel and the points put up for consideration of the Council of Ministers were whether allotment of the two projects in favour of Brakel be cancelled; whether the order of cancellation should be in terms of the draft order attached and whether the matter should be referred to the Vigilance Department for further investigation. A draft order had been prepared by the Special Secretary (Power) to the Govt. of H.P in which it was clearly found that there were material irregularities in the bid documents and that equity participation was not there and on various grounds it was recommended that the allotment in favour of Brakel be cancelled.

The Cabinet considered the matter and took a decision which was conveyed by the Secretary(GAD) and reads as follows:-

“While discussing item No.15 regarding Jangi-Thopan Powari Power Project, it was decided to set up a Committee under the Chairmanship of Chief Secretary with following as members.

1. Principal Secretary (Industry)
2. Principal Secretary to Chief Minister
3. Principal Secretary (Power)
4. Principal Secretary (Finance) and
5. Secretary (Law).

The Committee will come up with a proposal so as to decide this issue on merit by taking all aspects into account and place the matter in the next meeting of the Cabinet to be held on 12<sup>th</sup> November, 2008.”

After this Committee was constituted, Brakel sent a letter to the Chief Secretary explaining their position. They also prayed that the Officer Shri Ajay Mittal, who had heard them and was the author of the draft order should not be a member of the Committee reviewing the said draft order. They requested that he should recuse from the said Committee. This is apparent from the letter of Brakel dated November 12, 2008. Whether it was for this reason or for any other reason but the fact is that Shri Ajay Mittal did not take any further part in the proceedings of the Committee. The Committee acceded to the quest of Brakel and gave a personal hearing to the representatives of Brakel. It is not disputed that even the representatives of Adani were present during the course of hearing. Thereafter, the Committee of Secretaries after considering the representation of Brakel came to the following conclusion:-

“6. The Committee of Secretaries after having given this personal hearing to representatives of M/s Brakel and seeking clarifications thereof, internally deliberated extensively on the relevant issues pertaining to this case. The Committee was of the view that the technical bid submitted by M/s Brakel suffered from one serious infirmity to the extent that for purposes of financial strength evaluation, there had been no firm commitment made by Standard Bank of its equity participation in these projects. This was important because the financial marks awarded in favour of the consortium were largely dependent upon the financial strength of this consortium partner i.e. Standard Bank, Material due diligence should have been done at the evaluation stage to obtain a firm commitment from Standard Bank regarding its equity participation, before awarding marks for financial strength. However, the financial strength criteria was evaluated based upon a somewhat vague intent of such

participation by Standard Bank. The Committee of Secretaries viewed this as an infirmity in the evaluation process.

7. However, after going through the relevant record it also came to the notice of the Committee that this infirmity in the evaluation had been consciously over looked by the then Whole Time Members of the HPSEB on the premise that enlarging the competition would be in the interest of the State Govt. for getting better choice of financial bids. This matter was deliberated at great length by the Committee and it came to the conclusion that since suppression of material information by M/s Brakel and its consortium partners cannot be established and since Govt. is legally considered to be perpetual entity, (irrespective of change of political parties) it would therefore be legally difficult to sustain a cancellation now of the allotment already made by the previous Govt.

8. The Committee was thus unanimously of the view that though the evaluation process made by the previous Govt. can be considered to be vitiated on the ground that the lead member (M/s Brakel) of this consortium had no financial strength and the partner of the consortium whose financial strength was used for the bidding purpose had made no definite commitment of its equity participation in projects bid for this aspect having been consciously over looked by the previous Govt. the blame thereof cannot now at this belated stage be laid on M/s Brakel.

9. In light of the above chain of events, the Committee is therefore of the view that allotment already made of these projects to M/s Brakel by the previous Govt. may not stand the test of the legal issues now involved in cancellation at this stage because the blame for infirmity in the financial strength evaluation cannot be attributable to M/s Brakel Corporation NV, based upon the records in the notice of this Committee. It was decided that the proceedings of this Committee's deliberation and conclusion may be placed for further consideration and final decision of the State Council of Ministers."

Thereafter, the matter was placed before the Council of Ministers, which in its meeting held on 25<sup>th</sup> November, 2008 took the following decision:-

"The recommendations of the Committee of Secretaries were perused by the Cabinet and the following was noted in this context by the State Cabinet:-

- (a) The previous Government had created infirmities in the bid document whereby the lead member of the bidding consortium was not required to have any substantial financial standing.
- (b) When M/s Brakel Corporation NV made the tender bid alongwith its consortium partner, the previous government knew that M/s Brakel as the lead partner, did not have any financial strength. Even then, it overlooked this aspect and on the basis of one partner in the consortium i.e. Standard Bank, the financial strength marks were awarded even though no definite commitment of equity participation was made by the Standard Bank.
- (c) Cabinet further noted that the previous Government continuously allowed M/s Brakel to delay the required deposit of Up-Front premium. Further, contrary to the State Policy, the previous Government agreed to subject the proposed implementation Agreement to International Arbitration which was completely against State interest.
- (d) Cabinet noted that the present Government firstly got M/s Brakel to agree that dispute would not be subject to international Arbitrations. Secondly, it imposed penalty of interest on M/s Brakel for delay in payment of the required Up-Front Premium of Rs.173.42 crore. Thus alongwith this Up-Front Premium of Rs.173.42 crore the company was also made to deposit Rs.20.64 crore as interest for delay payment.
- (e) Cabinet further noted the advise of the Law Department and the views of the Committee of the Secretaries that because the previous Government had consciously overlooked the infirmities in the bidding process of M/s Brakel, and because legally a successor Government cannot put the blame for said infirmities now on M/s Brakel, it would now not be legally possible to back out from the allotment made by the previous Government, especially since in the eyes of law the contract has been established with the payment by M/s Brakel of the Up-Front and penal interest imposed by the present Government.
- (f) Keeping in view therefore the specific view of the Law Department and the views of the Committee of Secretaries constituted by the Cabinet in the matter, it was decided not to cancel now the allotment of the project made by the previous Government. However, Cabinet desired that HPSEB would need to change its bid document as well as technical evaluation procedure in future so that it does not allow financial bids to be opened of such parties which cannot display the required financial strength.”

This decision was displayed on the website of the State. Thereafter, the petitioner filed the present writ petition on 10<sup>th</sup> December, 2008 challenging the decision of the Council of Ministers.

**The contentions:**

The petitioner has raised a number of contentions before us. The main contentions are that the tender conditions are required to be strictly adhered to and should not be deviated; the State should act fairly, legitimately and without any discrimination; that since the upfront premium was not paid the allotment should have been cancelled; that firm commitment of equity participation and confirmation of liability/responsibility of each consortium member was an essential feature of the consortium and the failure of the members of the consortium to confirm their participation in the consortium should result in the rejection of the bid; that Brakel had misrepresented various facts which misrepresentation constituted fraud and therefore vitiates all actions and the allotment is bound to be cancelled. It was also alleged that Brakel Corporation NV as per its objects clause could not have bid for a Hydro Power Project. It was further argued that the respondent No.4 had changed the consortium partners without permission of the Government and hence the allotment should have been cancelled. The petitioner also questioned the bonafides of Brakel in interfering with the decision making process of the Government after the Special Secretary (Power) had prepared a draft order of cancellation. According to the petitioner, the respondent-State had gravely erred in holding that they were bound by the decision taken by the previous Government. It was in fact urged that it is the duty of the subsequent Government to rectify the wrongs of the previous Government. Lastly it was

urged that after quashing the decision of the Cabinet and canceling the award of allotment of projects in favour of Brakel the same may be awarded to the petitioner.

On behalf of the respondents, it is urged that the scope of judicial review is limited and this Court cannot sit in appeal over the decision of any authority. It was further urged that if the Government has taken a view, which is a possible and plausible one then this Court should not substitute its opinion for the decision of the government. It was also contended that the Government has the power to relax the tender conditions and since the tender conditions were relaxed even in the case of the petitioner it cannot now challenge the award of the contract in favour of the highest bidder. It was also contended that the decision to award the contract in favour of respondent No.4 has been taken by experts, i.e. the whole time members of the HPSEB on three occasions as well as by the HP Infrastructure Development Board and approved by the Cabinet and as such the same should not be set-aside. It is contended that the draft order has no legal sanctity in the eyes of law and no reliance can be placed on it. It was also contended that the writ petition is barred by the principles of delay and laches and is also barred under the principles of constructive resjudicata.

**Scope of Judicial Review:**

At the outset, we may note that a large number of decisions have been cited before us on the scope of the judicial review. The Apex Court in **Ramana Dayaram Shetty vs. International Airport Authority of India and others, (1979) 3 SCC 489**, was dealing with a matter where the authority had relaxed a tender condition to award a contract in favour of a tenderer who did not fulfil and possess the

requisite qualifications in terms of the tender. The Court held as follows:-

“10..... It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Veteralli v. Saton*, 359 US 535 Law Ed.(Second Series) 1012.

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It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interest of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.”

In **Harminder Singh Arora vs. Union of India and others, (1986) 3 SCC 247**, the Apex Court held that once the Government decides to award a contract on the basis of the bid it must abide by the terms thereof. It must abide by the conditions laid down in the tender document and cannot arbitrarily and capriciously reject or accept a bid.

In **W.B.State Electricity Board vs. Patel Engineering Co. Ltd. and others, (2001) 2 SCC 451**, the tender conditions provided that the price quoted in the bid was unalterable and could not be changed. The tendering authority held that there was some mistake made by the bidder and permitted the bidder to revise the price mentioned in the bid on the ground that there had been a mistake in calculation. The Apex Court held that the tendering authority could

not have permitted any party to change the bid in terms of the conditions stipulated in the bid documents itself and held as follows:-

“24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed which is also in the best public interest”

The Apex Court in **Tata Cellular vs. Union of India, (1994) 6 SCC 651** succinctly laid down the parameters of judicial review in respect of contractual matters and held as follows:-

- “94. The principles deducible from are above are:-
1. The modern trend points to judicial restraint in administrative action.
  2. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
5. The Government must have freedom of contract. In other words a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

In **Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others, (1999) 1 SCC 492**, the Apex Court was dealing with a public interest litigation. It approved the observations made in **Tata Cellular's case (supra)** and laid down the principle that normally stay orders should not be granted in respect of public projects. It also held that the tender conditions could be relaxed in the given circumstances.

In **G.J.Fernandez vs. State of Karnataka and others, (1990) 2 SCC 488**, the Apex Court held that if the tender conditions are interpreted consistently by the State in a particular manner acting bonafide, the Court should not interfere and substitute an interpretation which it considers to be correct. It was held that it is

for the State to decide what is the true interpretation of the tender documents.

The Apex Court in **Monarch Infrastructure Pvt. Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others, (2000) 5 SCC 287** summed up the legal principles relating to judicial review of administrative decisions in contractual matters in the following terms:-

"10.      xxx.                                  xxx.                                  Xxx.

(i)        The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest.

(ii)       The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii)      It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons."

In **Laxmi Sales Corporation vs. Bolangir Trading Co. and others, AIR 2005 SC 1962**, the Apex Court held that where the tenderer was required to produce certain documents including the profit and loss account duly certified by a Chartered Accountant to prove its turnover and financial capability, the documents were mandatorily required to be produced and this condition could not be waived by the State.

In **Reliance Airport Developers (P) Ltd. vs. Airports Authority of India and others, (2006) 10 SCC 1**, the Apex Court was dealing with a case relating to disinvestment and privatization of Delhi and Mumbai airports. The selection process laid down certain criteria to be followed by the State. The final decision was to be taken by the Empowered Group of Ministers (EGOM). The Empowered Group of

Ministers constituted various Committees and considered their recommendations. The Apex Court held that it was within the powers of Empowered Group of Ministers to decide what inputs it can take note of and from which sources these inputs should be obtained.

Thereafter, the Court went on to hold as follows:-

“25. In the multi-tier system in the decision-making process the authority empowered to take a decision can accept the view expressed by one committee in preference to another for plausible reasons. It is not bound to accept the view of any committee. These committees, it needs no emphasis, are constituted to assist the decision-making authority in arriving at the proper decision. It is a matter of discretion of the authority to modify the norms. It is not a case of absolute discretion.”

While dealing with the scope of judicial review, the Apex Court held as follows:-

“56. One of the points that falls for determination-is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (see *State of U.P. v. Renusagar Power Co. (1988) 4 SCC 59 : AIR 1988 SC 1737*). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor de Smith in his classic work *Judicial Review of Administrative Action*, 4th Edn. at pp. 285-87 states the legal position in his own terse' language that the relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it

must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality" and the third "procedural impropriety".

The Court further held as follows:-

“65. In other words, to characterise a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

66. In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself. (See *Indian Rly. Construction Co. Ltd. v. Ajay Kumar*. (2003) 4 SCC 579 : 2003 SCC (L&S) 528.”

In **Siemens Public Communication Networks Pvt. Ltd and another vs. Union of India (UOI) and others, AIR 2009 SC 1204** after considering the entire law the principles laid down in ***Tata Cellular's case*** and ***Reliance Airport Developers Pvt. Ltd.*** were reiterated.

Though a number of other judgements have also been cited, it is not necessary to refer to all the cited judgements. It would suffice to say that the principles laid down in ***Tata Cellular's case and Reliance Airport's case*** still govern the field. The legal proposition is absolutely clear that even in cases relating to contract the State is bound to act fairly. Its decision should not be arbitrary or discriminatory. Its action should be guided by the principles of equity and fair play. The Court has to exercise restraint and cannot sit as a Court of appeal. However, this Court has the jurisdiction and the power to see that the decision making process is fair. This Court not only has the power but in fact has a duty to ensure that the Government acts in a manner which is consistent with the concept of equality which by now is recognized to be one of the features constituting the basic structure of the constitution. Reference in this behalf may be made to **M. Nagaraj & others vs. Union of India and others, (2006) 8 SCC 212**, wherein Justice Kapadia speaking for the Bench held that the concept of equality is the essence of democracy and a basic feature of the Constitution. The following observations are relevant for our purpose:-

“33. From these observations, which are binding on us, the principle which emerges is that “equality” is the essence of democracy and, accordingly a basic feature of the Constitution. ”

There can be no manner of doubt that while taking administrative decisions relating to contractual matters, the Government cannot be put into a straitjacket. It must have the power to negotiate and to ensure that the best deal is available to it. In contractual matters the State is like any other contracting party and therefore, must ensure that in case it is purchasing goods it

purchases the best quality goods at the cheapest price and if it is distributing the assets of the State then it gets the highest price for the same. The State, therefore, has to have some leeway and 'play in the joints' to negotiate in a business like fashion. However, this power of 'play in the joints' must be exercised reasonably and fairly and not in an arbitrary or biased manner. Furthermore, decision of the arbitrator should not be irrational and must be based on the material on record. What this Court has to decide is not whether the decision is right or wrong but whether there is any infirmity in the decision making process. It is in the light of these principles that we propose to examine the various contentions raised by the parties.

**Whether Tender Condition can be relaxed and deviated from:**

The first question which arises for consideration is whether the State is bound by the tender conditions and no deviation is possible.

To appreciate this contention it would be apposite to refer to certain contentions of the bid document.

The opening page of the bid documents shows that it is a document for investigation/implementation of hydro-electric project in Himachal Pradesh and Part-1 of the document is a request for qualification. Any Company or consortium of Companies or a Corporation were entitled to bid. The Conditions of the bid which are extremely relevant for the decision of this case read as follows:-

**"Chapter-1,**

**General Conditions:-**

**A. Applicable for all Projects:**

1. The Bidders should have strong financial and technical base with adequate free investible reserves and surpluses and requisite technical capability necessary for the development of the above Hydro-electric Projects.

Xxx

xxx

xxx

xxx

**C. Applicable for Category-II Projects:**

1. The selection process will be in two stages. In the first stage the interested Companies shall submit Pre-qualification Bids as per the Request for Qualification (RFQ) documents. In the second stage, the Pre-qualified Bidders will be invited to submit Price Bids. In the Price Bids, the Bidders would be required to quote the upfront charges over and above a minimum amount of Rupees Ten lacs (Rs.10,00,000) per Mega Watt capacity of the Project. The quoted Upfront Premium shall be payable in three instalments i.e. 50% amount immediately after allotment of Project, 25% at the time of signing of Implementation Agreement and remaining 25% immediately after Financial Closure.

## Chapter-2

### General Conditions:

1. Eligible Bidders should have a strong financial and technical base with adequate free investible surplus and reserves available for the development of Project.
2. Xxx xxx xxx
3. The Government reserves the right to amend/modify this document or impose additional conditionalities as it may deem fit at any stage. The Government also reserves the right to reject any/all Bids or terminate the Bidding process at any stage without assigning any reason. The Government will not be liable for payment of any damages/compensation whatsoever under such circumstances.

## Chapter-4

### Instructions to Bidders:

- 4.1.2 The indicated information as desired from the Bidders is minimum. The Government reserves the right to request for any additional information. The Government also reserves the right and discretion to select or reject any or all applicants or to reject any selected Bidder at any subsequent stage for mis-declaration or misconduct or on account of failure to sign the Implementation Agreement within the stipulated period. Decision of the Government in this regard shall be final and binding upon the Bidders.
- 4.1.3      Xxx...                      xxx...                      xxx....                                      Xxx...
- 4.1.4 If the Bid is submitted by associate/subsidiary Company and the Bidder wishes to be evaluated on the competence of the group/parent Company then a firm letter of support, from group/parent Company shall have to be enclosed alongwith the Bid.

**4.2. Special instructions for submission of Bids by Consortium formed by more than one Company:**

- a)** Bids submitted by a Consortium should follow the criteria given below:-
- i) The Consortium shall submit a Joint Venture Agreement on legal paper duly notarized. The Joint Venture Agreement should clearly specify the equity component and role of each Consortium member.
  - ii) The lead developer should have controlling interest in the Project.
  - iii) For considering technical experience of a Consortium member, the equity in the Consortium/Joint Venture should not be less than 26%.
  - iv) Any change in the Consortium members will be with the prior approval of Government only.
  - v) The Bids must describe the qualifications, experience and responsibilities of each member of the Consortium and the commitments each member has made or intends to make to the Project in the development, construction and operation stages as well as the equity contribution each member intends to make towards the Project cost.

The Consortium shall also specify the Consortium member who will be responsible for the following:-

- Lead development
  - Co-development
  - Design and detailed engineering
  - Civil Construction
  - Equipment supply
  - Erection and Commissioning
  - Operation and Maintenance.
- vi. The Bidder must designate one or more person(s) to represent the Consortium in its dealings with the Government. The person, will be authorized to perform all tasks, including but not limited to providing information, responding to inquiries and entering into contractual commitments on behalf of the Consortium.
- vii) Each member of the Consortium shall submit a signed letter with the Bid which states that:-
- The Bid carries his concurrence.
  - Each key element of the Bid (including but not limited to, its technical and other components, description of each member's responsibilities and commitments to the Project, the designated person(s) who will represent the Consortium during the negotiation process etc) is agreed to. Any substantive exception or caveat should be addressed in the letter.

- Leader of the Consortium will not be changed during the execution of the Project.
- b)** After the award of the Project any change in the membership of consortium or in the responsibilities or commitments of a Consortium member or equity contribution by Consortium members can be made only with the prior written approval of the Government. The Government reserves the right to reject such requests/proposals from any Consortium, which in the opinion of the Government, adversely affects the Consortium strength. Further, if the successful Bidder changes the composition of the Consortium after signing the Implementation agreement without taking prior approval of the Government, the Implementation Agreement shall be liable to be terminated after affording due opportunity to the Company to explain their action.
- c)** Full pertinent information that may affect the performance or the responsibilities of any Consortium members such as ongoing litigation, financial constraints/problems or any other distress must be disclosed.
- d)** Detailed information as required in the Bid Formats should be submitted for each member of the Consortium.

## **Chapter-6**

### **Bid Formats**

#### **6.2 General.**

**6.2.1** The Bidders shall furnish letter of authorization as per format 1-A.

FORMAT 1-A.

#### **LETTER OF AUTHORISATION.**

Sh. .... residing in..... and presently holding the post of ..... of the ..... Corporation/Consortium, is duly authorized by the ..... Corporation/Consortium to sign and furnish all such information as desired by Govt. of Himachal Pradesh/HPSEB, in respect of this Bid.

	Signature
Witness.	Designation
1.....	Organisation
2.....	Seal.

**6.2.2.** The Bidders shall furnish the information relating to particulars of their Company/Consortium, names and addresses of Lead and Associate Companies, their status, (whether sole

proprietary/partnership/private limited/public sector etc., as per format 1-B (separate format may be submitted for each member of Consortium, as applicable.

Xxx	xxx	xxx	xxx
Xxx	xxx	xxx	xxx

**Note:** In case of Consortium Bidders the information as per Bid formats shall be furnished separately for each constituent of the Consortium.

**Chapter-7**  
**Selection Criteria and Process.**

Xxx	xxx	xxx	xxx
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7.3.1.           **Financial Strength**

          This will be based on assessment of the Bidders regarding their ability to raise equity and debt for the Project and their experience in arranging equity/loans either internally or from capital markets and the financial institutions. In the case of Consortium Bidding, each member will be rated proportional to his proposed equity stake. In the case of loss making members of Consortium zero marking will be given for losses if any suffered by any member of the Consortium.

7.3.2.           **Technical Strength**

          This will be judged on the basis of competence of key personnel proposed to be deployed by the Bidder for the implementation of the Project in the areas of engineering, construction, finance, legal and project management and existing facilities available with the Bidder/Consortium to manage these activities. In lieu of key personnel the Bidder may associate or engage a reputable engineering Company or a firm with the necessary background. An MOU between the Bidder and the Consultant proposed by him/them shall have to be submitted by the Bidder to get the benefit of this weightage.

Xxx	xxx	xxx	xxx
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7.5       The Project will be allotted to the Bidders making the highest Bid. The successful Bidder shall be required to deposit the premium/other amount due within a reasonable period of receiving intimation regarding his Bid being successful. The successful Bidders shall be required to deposit quoted upfront premium amount in three instalments i.e.50% amount immediately after the allotment

of Project, 25% at the time of signing of Implementation Agreement and remaining 25% immediately after Financial Closure.”

Shri Rajiv Nayar, learned Senior counsel appearing for the petitioner submits that the terms and conditions clearly envisaged that in case of a consortium financial details of all the consortium members would be made available. He submits that the tender conditions should be strictly adhered to. On the other hand, Shri R.K.Bawa, learned Advocate General and Shri Ranjeet Kumar, learned senior counsel for the respondents state that as per the bid document, the State had reserved the right to amend or modify the bid document or to impose additional conditionalities. It is submitted that it is the Government which is the best judge to decide as to whom the Contract is to be awarded and that this Court should not sit like a Court of Appeal on the decision of the Government. Shri Ranjeet Kumar, learned senior counsel for respondents No. 4 and 5 has very strenuously contended that the scope of judicial review in contractual matters is limited. He submits that in the present case the whole time members of the Board had thrice called for clarifications and they are experts in the field. He submits that since these experts like the H.P.Infrastructure Development Board have considered the case of the respondents on various occasions and the decision has been taken at the highest level i.e. the Council of Ministers, this Court should not set-aside the same.

The moot question which arises is whether all or any tender conditions were required to be strictly adhered to and no deviation was permissible as alleged by the petitioner.

The bid document itself contains a condition that the State reserves the right to amend or modify the bid document or impose additional conditions. This itself suggest that the Government had the right to change or add condition(s) but in our considered view the Government cannot change the fundamental conditions which go to the root of the bid document. 'Play in the joints' may be permitted and the tender conditions may be modified to permit the parties to add certain documents or provide further information, but the conditions cannot be changed in such a manner that one party is unduly benefited or some other party is discriminated against.

The Apex Court in **B.S.N.Joshi and Sons Ltd. vs. Nair Coal Services Ltd. and others, (2006) 11 SCC 548** has laid down that the conditions in a tender notice can be classified into two categories. The first category is of those conditions which lay down the essential conditions of eligibility and the second category is those which are merely ancillary or subsidiary to the main object. The first category of conditions have to be enforced rigidly and the authority cannot deviate from the same. The second category of conditions may be relaxed, altered or waived. In Para 66, the Apex Court laid down the following legal principles:-

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:-

- (i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- (vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint. “

In the case in hand the basic conditions which in our opinion could not be modified were that the bidder should have a strong financial and technical base with adequate free investible reserves and surpluses and requisite technical capability necessary for development of Hydro Electric Project. In our view this was the core condition. The bidders must have a strong financial background and must possess the technical know how to execute the project. They must also have sufficient funds or be in a position to garner funds from the market and this should be apparent in the documents filed with the bid.

A consortium was permitted to bid for the project. 'Consortium' has not been defined in the bid document but obviously means a bid

by two or more entities acting together. Condition No. 4.2 of the bid document lays down special instruction for bids by consortium. There should be a duly notarized Joint Venture Agreement between the members of the consortium specifying the equity component and role of each member. The lead developer should have controlling interest in the project. Change in the consortium member is allowed only with the prior approval of the Government. It was clearly laid down that the bidder must describe the qualifications, experience and responsibility of each member of the consortium. However, only one member i.e. lead member was to act on behalf of the consortium and deal with the Government. Each member of the consortium was required to sign a letter stating that the bid carries his concurrence and any exception or caveat should be mentioned in the letter. It was clearly laid down that after the allotment of the project no change in the members of consortium or responsibility of the member could be made except with the prior approval of the Government. The letter of authorisation has been quoted here-in-above. Thereafter, there are two extremely important conditions; i.e. 7.3.1 and 7.3.2 quoted here-in-above. The first condition provides that in case of consortium bidding, the financial strength of the consortium would be assessed by assessing the financial strength of each member of the consortium in proportion to his proposed equity stake. Similarly, the technical strength would be judged keeping in view the capability and capacity of the key personnel or the consultant company engaged in the process. In our view these conditions, at least, were the basic conditions of the bid document which could not be altered because they were necessary to assess the financial and

technical strength of the consortium bidder. The aforesaid conditions could not have been waived or relaxed.

**Delay in Payment of Upfront Premium:**

It has also been urged on behalf of the petitioner that one of the most important conditions of the bid was the payment of earnest money or upfront premium which was not paid for more than one year and therefore, the Government should have cancelled letter of allotment made in favour of respondent No.4 and awarded the contract to the petitioner.

Admitted facts are that the bid document required that 50% of the quoted upfront premium should be deposited immediately on the allotment of the project. The letter of award in favour of respondent No.4 was issued on 1.12.2006 and it was expected that the upfront premium should be paid as early as possible. In fact the State wrote to Brakel on 10.1.2007 directing it that the upfront premium be deposited on or before 15.1.2007. On 16.1.2007 Brakel addressed a letter to the Principal Secretary (Power) to the Government of Himachal Pradesh and stated that since it was required to incorporate a Special Purpose Vehicle (SPV) having its head office in Himachal Pradesh, duly registered under the Companies Act, 1956, for implementation of the project it was working towards setting up such a corporation in Cyprus/Mauritius. With regard to payment of upfront premium amount Brakel prayed that funding is required to be brought into the SPV by Brakel or its group companies from outside India for which permission of the RBI was required. Brakel, however, did not commit itself to any time frame. Brakel also expressed certain reservations with regard to the pre implementation agreement (PIA) supplied to it.

On behalf of Brakel it is urged that certain changes were required to be made in the PIA and Brakel was required to take into consideration the Hydro Power Policy, which was notified after the allotment of the project and therefore, there was delay in depositing the upfront premium. Brakel also sent a proposal on 8<sup>th</sup> February, 2007 for combining both the hydro-electric projects. A memorandum dated 18<sup>th</sup> February, 2007 was put for the consideration of the council of ministers as to whether further extension of time should be granted to Brakel for depositing the upfront premium and whether its request for combining both the projects be allowed. On 20<sup>th</sup> February, 2007 a communication was sent to Brakel permitting it to combine both projects into one project. The State of Himachal Pradesh took a decision not to have any equity participation in the project. Brakel was given time upto 15<sup>th</sup> March, 2007 to deposit the upfront premium and sign the PIA. Another letter was sent to Brakel that the PIA must be signed by 27<sup>th</sup> March, 2007.

Brakel Kinnaur Power Limited which is the SPV case was incorporated on 9<sup>th</sup> March, 2007. On 15<sup>th</sup> March, 2007 Brakel addressed another letter to the State Government that it is in the process of arranging funds for depositing the upfront premium. It is important to note that this letter clearly states that there is no commitment on behalf of the Standard Bank Plc to provide finances. Again no commitment was made as to when the amount will be deposited. On 16<sup>th</sup> April, 2007 Brakel sent a communication to the State that since it had received a belated response to its letter dated 16<sup>th</sup> January, 2007, the time for signing the PIA and depositing the upfront premium be extended by eight weeks from 23<sup>rd</sup> April, 2007. On 27<sup>th</sup> July, 2007 the State sent another communication to Brakel

directing it to sign the PIA and deposit the upfront premium. On 1<sup>st</sup> August, 2007 Brakel responded to this letter. Brakel sought amendments in the certain clauses of the PIA and did not deposit the amount of upfront premium. A meeting of the officials of the State as well as representatives of Brakel was held on 7<sup>th</sup> August, 2007 and a draft PIA was finalised and placed for approval before the Council of Ministers. Thereafter, the time to deposit the upfront premium was extended upto 31<sup>st</sup> August, 2007 failing which the project would be cancelled. Again Brakel raised objections with regard to the arbitration clause. It would be pertinent to mention that RBI also granted permission to avail ECB of US\$ 38 million from its foreign equity holder for paying the amount on 5.9.2007. After dealing with the objections of Brakel, another PIA was drafted and finalised and sent to Brakel by the State on 11<sup>th</sup> October, 2007. Brakel was again directed to deposit the upfront premium. On 15<sup>th</sup> October, 2007 Brakel replied that it was ready to sign the PIA and that it would be holding a Board Meeting to deposit the amount. On 12<sup>th</sup> November, 2007 the State again wrote to Brakel to deposit the upfront premium amounting to Rs.173,42,40,000/- alongwith interest w.e.f. 1<sup>st</sup> January, 2007 to the date of deposit. In this letter it was clearly mentioned that the deposit of upfront premium has nothing to do with signing of the PIA. Thereafter, Brakel replied to this letter on 15<sup>th</sup> November, 2007 and stated that deposit of upfront premium should be simultaneous with the execution of the PIA and they should be given sufficient time to do the needful.

Here we may digress a little and mention that Kutehr Hydroelectric Project was advertised by the same advertisement in which the two projects in question were advertised. In that case the

successful bidder was a consortium known as M/s DSC Himal Hydro JV. This consortium did not deposit the upfront premium and finally the project was cancelled on 26.7.2007. The consortium filed a writ petition being CWP No.1184 of 2007 in this Court challenging the cancellation of the letter of allotment in their favour. In that case, M/s DSC Himal Hydro JV specifically alleged that though no extension was granted to them, another company i.e. Brakel Corporation who had also been issued notice to deposit the amount, was granted such extension. In letter dated 16<sup>th</sup> October, 2007 sent by Additional Chief Secretary to Brakel reference to this writ petition was made and it was observed that the High Court had called for the record of Brakel's case also. The State took the stand that the case of DSC Himal Hydro JV and Brakel were not identical since Brakel had to arrange funds from abroad and required RBI permission. The writ petition filed by DSC Himal Hydro Joint Venture was dismissed by a Division Bench of this Court on 24<sup>th</sup> February, 2009. The Court held as follows:-

“The allotment of the project in favour of petitioner No.1 was made on 1.12.2006. The petitioner NO.1 was required to deposit 50% upfront premium within reasonable time starting from 1.12.2006 and sign PIA. There is substance in the submission of learned counsel for respondent NO.4 that even if petitioner No.1 wanted to have some clarifications on PIA there was no escape for petitioner No.1 from depositing 50% upfront premium within reasonable time from the date of allotment of the project on 1.12.2006 in view of clause 7.5, Chapter-7 of the bid document. The petitioner No.1, under the garb of clarifications, delayed the deposit of 50% upfront premium and in fact it was not deposited at all. The petitioner No.1 vide letter dated 14.1.2007 agreed to deposit upfront premium and sign PIA but again did not pay the upfront premium and sign PIA. The petitioner No.1 vide letter dated 14.7.2007 offered to sign ‘mutually agreed’ PIA and pay funds as per the terms of allotment letter. There was no ‘mutually agreed’ PIA, there was only one PIA

which respondent NO.1 asked the petitioner to sign. On 14.7.2007 petitioner No.1 offered to pay the funds in terms of the allotment letter but again did not deposit 50% upfront premium as per allotment letter. The respondent NO.1, in the facts and circumstances of the case, had given more than the required indulgence to petitioner No.1 for depositing 50% upfront premium and sign PIA. The repeated queries of petitioner No.1 regarding deposit of upfront premium and signing of PIA on the basis of issues raised by it were answered and rejected by respondent No.1. The respondent No.1 had given about 8 months to petitioner No.1 from the date of allotment of the project to deposit 50% upfront premium and sign PIA but petitioner No.1 failed on both counts. In these circumstances, the respondent No.1 has rightly cancelled the allotment of project to petitioner No.1”

We are of the considered view that applying the same principle in the present case also the deposit of upfront premium should have been done within a reasonable time of the issuance of letter of allotment and had nothing to do with the signing of the PIA. The upfront premium was required to be deposited within a reasonable time from the date of the allotment of the project. In case the petitioner was interested in the project it could have deposited the upfront premium and sought changes in the PIA. Even otherwise, we are of the considered view that Brakel on one pretext or the other as is apparent from the facts stated above was delaying the deposit of the upfront premium. In fact, it would not be unreasonable to assume that it probably did not have sufficient funds to deposit the upfront premium. The State extended the time to deposit the upfront premium in favour of Brakel time and again. The State may have the power to extend time to deposit the upfront premium but this power has to be exercised fairly and not arbitrarily. It would be pertinent to mention that in its letter of 23<sup>rd</sup> February, 2007 in response to the letter dated 20<sup>th</sup> February, 2007 Brakel had confirmed that it is

mobilizing towards signing the PIA and submitting the upfront premium. At that time no other excuse was raised. On 2<sup>nd</sup> March, 2007 Brakel had informed the State that the British High Commissioner and Dutch Ambassador would be present in Shimla for signing ceremony of the PIA and the entire amount would be deposited. These were clear cut assurances by Brakel to deposit the amount. However, this amount was still not deposited. Even RBI clearance was received on 5<sup>th</sup> September, 2007. The time at best could have been extended till this date and no further. Once they had permission from the RBI and the Government had made major changes in the PIA as suggested by Brakel, the amount of upfront premium should have been deposited within reasonable time, say within two weeks from this date. However, this was also not done.

It would also be pertinent to mention that the excuses set up by Brakel are on the face of it false. Brakel initially sought extension of time on the ground that it required permission of the Reserve Bank of India to avail of ECB and get money from abroad. According to Brakel all the funds were to be brought from outside India. Admittedly, when the amount was deposited the same was deposited after taking loan from M/s Adani, as is apparent from the detailed discussion held here-in-after which shows that on 20<sup>th</sup> January, 2008 Brakel Kinnaur received a sum of Rs.1,73,42,40,000/- from the Adani Group of Companies. No money came from abroad. It is apparent that this was a false excuse set up by Brakel.

In the meantime, the petitioner filed CWP No. 2074 of 2007 whereby it prayed that the allotment of the two projects in favour of Brakel be cancelled and the two projects be awarded to it mainly on the ground that the upfront premium had not been deposited in time.

Notice on this petition was issued on 13.12.2007. Thereafter, notice was issued by the State to Brakel on 7<sup>th</sup> January, 2008 and only then the upfront premium was deposited on 29<sup>th</sup> January, 2008. The delay from September 5 till 29<sup>th</sup> January, 2008 is totally unexplained. It is obvious that if the writ petition had not been filed this upfront premium would not have been deposited even by January, 2008.

On behalf of Brakel, it is contended that the deposit of upfront premium was linked with the PIA and the same could not be deposited since various changes in the PIA were sought and permission from RBI was not received. These contentions cannot be accepted as the signing of the PIA has no concern with the deposit of the upfront premium. This Court has held so in DSC Himal's case *supra*. We cannot accept the contention of Brakel that the signing of the PIA was essential since even according to Brakel without signing the PIA it had invested huge amounts of money for investigative and research purposes and to obtain permission from various authorities. Therefore, this is a major condition of the bid document which in our opinion has been breached by Brakel.

In this behalf reference may be made to **Puravankara Projects Ltd. vs. Hotel Venus International and others, (2007) 10 SCC 33**, wherein the Apex Court after referring to various earlier judgements held that the time for furnishing the bank guarantee in terms of the contract could not have been extended. In para 33 the Court held as follows:-

“33. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.”

Brakel on the one hand was assuring the Government that it was accepting allotment of the project and on the other hand was delaying the payment of the upfront premium. From the correspondence placed on record, it is obvious that Brakel never committed itself to depositing the upfront premium in a particular time frame. It kept hedging in the matter. We are of the considered view that Brakel should have been dealt with in the same manner as M/s DSC Himal Hydro JV. In any event, once the writ petition had been filed any action of the Government in extending the time would be subject to the litigative process.

**Equity Participation in the Consortium:**

The next argument of Shri Nayar is that in the case of bidding by a consortium the confirmation of the equity participation by each member was an essential feature which could not be waived.

Condition 4.2 of the bid documents specifically laid down certain instructions to be followed when the bid is by a consortium formed by more than one company. The consortium was directed to submit a Joint Venture Agreement on legal paper duly notarized. This Joint Venture Agreement was required to clearly specify the equity component and role of each consortium member. The lead developer was required to have controlling interest in the project. For considering the technical experience of the consortium member its equity participation in the consortium/joint venture was required to be not less than 26%.

The Pre Contract Joint Venture Agreement produced by Brakel alongwith its bid is dated 13<sup>th</sup> March, 2006. This is an agreement purported to be signed by Brakel Corporation NV alongwith its

constituent members Energy Infrastructure Overseas Limited (EIOL), Standard Bank, SNC Lavalin International and Eco Securities on the one hand and M/s Halccrow Consulting India Limited on the other hand. Condition No.2 of the agreement lays down that Brakel Corporation NV shall be the lead developer of the project. Condition No.8, which is relevant reads as follows:-

“8. Accordingly the ‘Company’ members, if the Contract is awarded, shall have the following responsibility:-

Sr.No.	Name	Role Responsibility	Proposed Equity
1.	Brakel Corporation NV alongwith its constituent members each of which will tentatively hold the following equity (Energy Infrastructure Overseas Limited (10%), Standard Bank or its affiliate/s (45%), SNC Lavallin International or its affiliate (30%) and Eco Securities (5%).	Lead developer overall responsible for development and finance and operation and maintenance.	Majority holding but not less then 90%.
2.	HALCROW CONSULTING INDIA LTD (in association with Halcrow Group Ltd. Of UK)	Owners Engineer and Technical Consultant preparation of DPR establishment of the project viability, project management and detailed design and engineering.	Balance. “

From the bare perusal of the aforesaid condition, it is apparent that equity of Brakel Corporation NV was divided amongst its constituents in the following manner:-

Energy Infrastructure Overseas Ltd	10%
Standard Bank or its affiliate	45%
SNC Lavalin International or its affiliate	30%
Eco Securities	5%.

The remaining equity of 10% was to be with Halcrow. It is thus obvious that Brakel in its own individual capacity would not have a single share in the entire equity.

It is extremely important to note that this document is not signed by any person on behalf of EIOL, Standard Bank, SNC Lavalin and Eco Securities. The authorized representative of Brakel Corporation NV has signed this document on behalf of the aforesaid Companies. This document is purported to be signed on behalf of Energy Infrastructure Overseas Ltd, Standard Bank, SNC Lavalin International and Eco Securities by a duly authorized person. This could not have been done because we find that none of these entities had either made any commitment of equity participation nor had they authorized any person to make any commitment of such equity participation. The authority letters infact do not authorize either Mr. Dean Gesterkamp or Mr. Anil Wahal to make any commitment of equity in the joint venture or consortium.

In respect of Energy Infrastructure Overseas Limited by the letter of authorisation in format 1-A, Energy Infrastructure Overseas Limited had only authorized Mr. Dean Gesterkamp and Anil Wahal to sign and furnish the information desired by the Government of H.P.

but had not authorized these persons to make any commitment on behalf of Energy Infrastructure Overseas Limited. In the MOU dated 1<sup>st</sup> February, 2006 entered into between M/s Energy Infrastructure Overseas Limited and Brakel NV, M/s Energy Infrastructure Overseas Limited had not made any commitment of equity participation whatsoever. In fact, the agreement provided that EIOl shall participate in the electricity generation projects and a detailed agreement defining the working arrangements between the parties would be prepared in case Brakel is awarded the project. In its letter of February, 2006 on the basis of which MOU is purported to be signed EIOl has clearly stated as follows:-

“Subject to receiving and reviewing specific/detailed information for such project received by us Energy Infrastructure Overseas Limited is prepared to consider equity participation and technical and financing support, again on terms to be agreed”

This cannot be termed to be any commitment of equity participation.

Taking up the matter of Eco Securities, the MOU between Brakel and Eco Securities was entered into on 2<sup>nd</sup> February, 2006. Again Eco Securities has not committed to make any equity participation. It has only agreed to arrange for carbon finance as a carbon arranger. This also cannot be termed to be a commitment of equity participation. In its letter dated February 26, 2006 addressed to Brakel again Eco securities has stated that subject to receiving and reviewing specific detailed information for such projects Eco Securities Group is prepared to consider Carbon Financing support, again on terms to be agreed. This was not a commitment to be a member of consortium or to have a equity participation in the consortium.

SNC Lavalin International incorporated was to be the main technical and financial supporter of Brakel. Therefore, in terms of the bid document, it was to have been minimum of 26% equity in the project. The MOU between SNC Lavalin and Brakel was executed on 7<sup>th</sup> February, 2006. Clause 4 and 6 of which read as follows:-

“4. The proposals, submissions and negotiations contemplated in clauses 3 and 4 shall be in the name of Brakel, nothing herein shall authorize BRAKEL to make proposals, representations, negotiate or incur obligations on behalf of, or however, bind, SNC-Lavalin International Inc.;

5. xxx. Xxx. Xxx.

6. In the event of BRAKEL is successful in securing Project(s), it is agreed that SLII shall provide all design and engineering services including detailed investigations for operation of design, drawings and detailed project report, detailed engineering during execution and be the EPC Contractor for the said Project(s), subject to agreements therefor (with the client, and between the parties) being negotiated to the parties satisfaction and entered into.”

The relevant portion of its letter of authorization of SNC Lavalin International reads thus:-

“Provided however, that this shall not constitute authorisation for Messrs Gesterkamp and Wahal or BRAKEL Corporation NV to make representations or incur obligations on behalf of, or howsoever bind, SNC-Lavalin International Inc.”

It is more than obvious that SNC Lavalin had not made any commitment for equity participation in the project. They had in fact in no uncertain terms had stated that the authorized person had no right to make any commitments on their behalf.

Shri Ranjeet Kumar, Advocate, submits that SNC Lavalin was aware that their equity participation was to be of minimum of 26% and therefore, it can be presumed that they had agreed to participate

to the extent of 26%. We cannot accept such an agreement. When parties, especially international companies want to have equity participation they state so clearly in the documents. In the present case, SNC Lavalin has in no uncertain terms stated that it will consider equity participation only after the award of the contract.

As far as Standard Bank is concerned, it sent a letter on 9<sup>th</sup> March, 2006 confirming its interest to act as arranger for project financing. The Bank in the concluding portion of its letter stated as follow:-

“You will appreciate that at this stage, this letter does not constitute a formal offer of facilities and any such offer remains subject to and conditional upon amongst other things a satisfactory outcome of a full due diligence exercise, agreed legal documentation and the approval of Stand Bank’s credit committee.

We look forward to working with you and your consortium partners in the development of these projects and wish you and your partners every success in the tender process. Dependent on this and the desire for financing facilities, we will apply the appropriate resource to ensure that we can meet Projects timetable and took forward to working with you towards a successful conclusion. Our team is ready to mobilize at short notice and we look forward to advancing the Projects with you and your co-shareholders.

Please do not hesitate to call us should you wish to discuss any aspect of the above.”

This again did not constitute any firm commitment of equity participation by Standard Bank.

From the documents referred to above, it is more than apparent that none of the four companies, i.e. EIOL, Standard Bank, SNC Lavalin or Eco Securities had made any commitment for equity participation. Standard Bank had clearly stated that commitment could be made on his behalf. None of these companies had authorized any person to sign the Joint Venture Agreement on their

behalf. A Joint Venture Agreement on behalf of a company can be signed only by a person duly authorized by it. These Companies had not authorized either Mr. Dean Gesterkap or Mr. Anil Wahal to sign any document on their behalf. They had only been permitted to sign and furnish information required by the Government of H.P. The Joint Venture Agreement was not covered by the letters of authorization. A Joint Venture Agreement should bind the parties and had to be signed by the parties themselves. Furthermore, in the Joint Venture Agreement it was held out that these Companies would have specific equity participation as detailed hereinabove. This had never been committed by any of these companies. The entire basis of the bid, i.e. the Pre Joint Venture Agreement is a document which has not been entered into by the aforesaid companies as members of the consortium. This document has no binding effect on any of these companies. It is not legally enforceable against any of the four Companies and is not worth paper it is written on. We have no doubt that Brakel tried to mislead the State by making firm equity participation on behalf of the four companies which it was not entitled to do.

In the case of a consortium, financial strength of the consortium was to be assessed in proportion to the proposed equity stake of each consortium member. When there was no committed equity stake in the project how could there be any assessment of the financial strength in relation to each member of the consortium. SNC Lavalin International was to be the main technical consultant to the project having minimum of 26% equity participation. As held by us above, it had not committed any equity participation. Therefore, even the technical strength could not have been assessed. These

conditions of the tender documents were unalterable and could not be changed and by by-passing the same the Government has in fact violated the essential tender condition which could not have done.

There were certain conditions of the bid documents which were the core conditions which could not have been relaxed or waived. These related to financial and technical competence of the bidder. In the case of a consortium the bid was to be evaluated on the basis of the financial strength of each of the equity participants. The technical strength of the consortium was to be assessed on the basis of the technical competence of the technical members of the consortium subject to the condition that its equity participation was not less than 26%. Therefore, it was essential that each member of the consortium should have confirmed its equity participation and the role to be played by it. In the present case, except for Halcrow none of the other members had committed to any specific percentage of equity participation. Therefore, there was no way how the whole time members or any other expert body could have assessed the financial strength of the Company. At that stage Adani Power had not even entered the field. The paid up capital of Brakel NV was only 6,000 \$. The paid up capital of Brakel INV was only 1\$. If Standard Bank, EIOL, SNC Lavalin and Eco Securities were not part of the consortium, then on what basis the so called experts have assessed their financial competence. This is something which is not only arbitrary but totally irrational. It is apparent that the decision making authority has waived conditions which could not have been waived and has assessed the financial competence of the bidder without having any material before it. Similarly, since SNC Lavalin did not have 26% equity in the project the technical competence of the

consortium could not have been assessed in terms of the bid document.

It has been urged by Shri Ranjeet Kumar, learned counsel for the respondents, that SNC Lavalin has backed out since it is now a technical partner of the petitioner in some other projects. Even if this be correct, the assessment of the competence of the consortium had to be made on the basis of the members of the consortium members disclosed in the bid or introduced in the consortium after prior approval of the Government and not on the basis of some introduction made through the back door.

**Fraud and Misrepresentation:**

The next contention raised on behalf of the petitioner is that Brakel has misrepresented certain facts and has committed a fraud on the State and such fraud vitiates all action and therefore, the entire bidding process in favour of Brakel should be set-aside. This contention has to be coupled with another contention raised that Brakel Corporation NV was not authorized by the object clause of its Memorandum of Association to enter into the business of Hydro Electric Power Projects.

It would be pertinent to mention that alongwith the bid documents Registration Certification of "Brakel Corporation NV" was purportedly filed. According to this certificate Brakel Corporation was a Company Registered in Curacao on 13<sup>th</sup> Feb, 2005 having a total paid up capital of one U.S.A Dollar. In this certificate the first object of the Company was to invest, manage and act as consultant to Hydro Electric Power Project. During the course of the investigation by the Government, it was found that in fact the Company in question was in fact incorporated on 13<sup>th</sup> February, 2006. This date is very

important since the bid documents were purchased on 13<sup>th</sup> December, 2005. If the Company had not been incorporated in the year 2005 how could it purchase the bid document. Faced with this situation, Brakel Corporation took the plea that by mistake it had attached the Registration Certificate of another company which was in fact registered on 13<sup>th</sup> February, 2006 and now it furnished the Registration Certificate in favour of Brakel Corporation NV which was registered in Curacao on 14<sup>th</sup> May, 1986 having a paid up capital of 6,000 USA Dollars. This is obviously a false explanation. We have perused the original record of the State and we find that when the certificate of Brakel Corporation was filed with the bid the Registration Number on the certificate is shown as 98785 and the date of incorporation is shown as February 13, 2005. On perusal of the documents we find that while filing the Registration Certificate of the Company registered at Sr. No. 98785, the letter 'I' has been erased. This erasure takes place at least at two places. Therefore, it cannot be said to be something which is not deliberate. Similarly, the letter '6' in the year 2006 has been altered and made to appear to read as '2005'. This has been done at three places and therefore, it is obviously a deliberate alteration. Brakel Corporation INV was incorporated after the purchase of the bid documents. By erasing the letter 'I' and altering the figure '6' an impression was given to the State that the Company stood incorporated on February 13, 2005 and the name of the Corporation is Brakel Corporation NV whereas in fact Certificate of Registration No.98785 relates to Brakel Corporation INV which was incorporated on 13<sup>th</sup> February, 2006 after the bid documents were purchased.

It is more than obvious that the second company Brakel Corporation INV was incorporated after the purchase of the bid document. But with a view to mislead the State the objects of this Company were sent with the bid though admittedly the lead member of the consortium is BRAKEL CORPORATION NV and not BRAKEL CORPORATION INV. On behalf of Brakel, it is urged that this was an innocent mistake and nothing much turns on it. We are not in agreement with the same. As per the objects of the Company, Brakel Corporation NV had no right to bid for a Hydro Electric Project. Therefore, the promoters of the said Company set up another company with a virtually identical name and only added the letter 'I' in front of NV. They then made alterations and erasures in the documents supplied to the State which would suggest that the objects were of Brakel NV and not of Brakel INV. This in our considered opinion was a reprehensible act on behalf of Brakel which amounted to acting fraudulently. The paid up capital of Brakel INV is \$ 1 only. All this clearly suggest that the second company was incorporated only with a view to hoodwink the State.

According to the petitioner, the letter of authority purportedly issued on behalf of Standard Bank and bearing the signatures of Mr. Francois Gamet, annexed by Brakel with its bid documents is a forgery and the signatures of Mr. Francois Gamet have been lifted from the letter issued by the Standard Bank dated 9<sup>th</sup> March, 2006 in which the bank had made no commitment towards equity participation. Similarly, it is contended that the letter of authorization in favour of Standard Bank of South Africa to furnish information also bears forged signatures of the aforesaid person since the spelling of his name is different. This Court in writ proceeding cannot decide

this disputed question as to whether the signatures are forged or not. However, it would be pertinent to mention that the State had got conducted a discreet inquiry. During this inquiry an email was addressed by the DIG (State Vigilance and Anti Corruption Bureau) to one Jarodien Fatima of Standard Bank of South Africa enclosing the documents whereby Brakel claimed to have received assurance of Standard Bank to participate and provide 45% equity in the project. Reply to this letter was sent by email and according to this reply the documents enclosed did not appear to be legitimate and it was specifically stated that the authorization letter has not been issued by the Standard Bank. Similarly, SNC Lavalin International also sent a letter that they had never agreed to 30% equity in the joint venture. It is also pertinent to mention that on 16<sup>th</sup> March, 2007 Brakel Corporation sent the Memorandum of Articles of Association to the Principal Secretary (Power) to the Government of Himachal Pradesh but the Memorandum of Article sent were of Brakel INV and not of Brakel NV. On the aforesaid grounds, it is contended that Brakel has acted fraudulently and since the entire contract is based on fraud the same should be set-aside.

Learned counsel for the petitioner has made reference to the judgement of the Apex Court in **Bhaurao Dagdu Paralkar vs. State of Maharashtra and others, (2005) 7 SCC 605**, wherein the Apex Court held as follows:-

“15. ‘Fraud’ is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav case.

16. In Lazarus Estates Ltd. Vs. Beasley, Lord Denning observed at QB pp.712 and 713: (A11 ER p. 345 C)

‘No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.’

In the same judgment Lord Parker, L.J. observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (p.722) These aspects were recently highlighted in State of A.P. v. T.Suryachandra Rao.”

In **Shiv Kant Yadav vs. Indian Oil Corporation and others, (2007) 4 SCC 410**, the Apex Court held that if there is requirement to disclose facts then true and correct facts must be disclosed and in case there is any factual misstatement or declaration the allotment can be cancelled.

In **P.C.Chacko and another vs. Chairman, Life Insurance Corporation, (2008) 1 SCC 321**, the Apex Court held that deliberate misstatement of fact while obtaining the Insurance Policy would mean that the policy has been obtained fraudulently by suppressing facts and vitiate the policy of Insurance.

From the aforesaid discussion it is apparent that Brakel had filed an incorrect Registration Certificate with the bid document. The said certificate contained alterations and erasures which as we have held above were done with a view to fraudulently mislead the Government. It is more than clear that Standard Bank had never committed to 45% equity participation. The Joint Venture Agreement was signed by persons who were not authorized to sign the same. We are clearly of the view that Brakel was guilty of misrepresentation and suppression of material facts. In our view this by itself was sufficient ground to cancel the allotment in favour of Brakel.

**Change of Consortium Members:**

The next contention raised on behalf of the petitioner is that though as per the terms of the bid document consortium partners could not be changed without the prior approval of the Government. Brakel Corporation has sought to introduce Synergics Hydro India Pvt. Ltd. as its technical partner and Adani Power Ltd. as a 49% equity partner and all the original members of the consortium are now no longer members of the said consortium. The bid which was accepted was of a consortium headed by Brakel NV. In the bid documents quoted here-in-above equity was to be distributed as follows:-

Energy Infrastructure Overseas Ltd	10%
Standard Bank or its affiliate	45%
SNC Lavalin International or its affiliate	30%
Eco Securities	5%.
Halcrow Consulting India Ltd.	10%

Thus Brakel NV had no equity participation as per its own document. Now, none of the original equity holders are members of the so called consortium. The pre implementation agreement has been entered into between the State and Brakel Corporation NV and JV partners. However, the JV partners are not the ones who initially formed part of the consortium. Nothing has been placed on record to show that the State ever specifically approved the dropping of any partner and the approval of the new joint venture partners. Approval by the Government cannot be inferred nor can it be oral. Approval has to be in writing and prior to the change being made. After the allotment of the project any change in the consortium members had to be with the written prior approval of the Government. There is not even a letter on record to show that Brakel Corporation NV ever

applied to the State to change the consortium members. Admittedly, Brakel Corporation took huge loans from Adani Power Corporation before depositing the upfront premium. In one letter Brakel has stated that this loan will be converted into equity participation. This itself shows that the equity participation is being changed without taking permission of the Government. There can be no ex-post-facto approval. Once the State has made its position clear in the tender documents as well as in the Hydro Power Policy that members of the consortium could not be changed without prior approval, it was bound to act in accordance with these terms and conditions and could not have given ex-post-facto sanction. Otherwise, the results can be catastrophic. A Company with no financial basis, as in the present case can bid for huge projects claiming to have the support of reputed banks and technical consultants. Once the project is awarded in its favour then it can go fortune hunting in the open market and there will be no difficulty for it to obtain partners in a project which is already allotted to it.

There is another aspect of the matter which we must refer to. After the order was passed in CWP No. 2074 of 2007 notice was issued to Brakel. A discreet inquiry was conducted by the Income-tax Department into the source of funds, whereby respondent No.5 M/s Brakel Kinnaur had deposited the upfront premium. The promoters of this Company are Shri Anil Wahal and Manish Wahal. Anil Wahal is also one of the directors of Brakel Corporation NV. In the discreet inquiry it was found that funds had been transferred to the account of Brakel Kinnaur in the following manner:-

29 <sup>th</sup> Jan. 2008	Rs.60,00,00,000	Cr.	SBTRF08029300033R
29 <sup>th</sup> Jan.2008	Rs. <b>59,43,00,00,000</b>	<b>Cr.</b>	By Gagan Realty (P)

29 <sup>th</sup> Jan.2008	Rs.55,00,00,000	Cr.	By Media Data Pro
29 <sup>th</sup> Jan.2008	Rs. <b>1,73,42,40,000</b>	Cr.	Towards draft.

All these amounts were traced to members of Adani group of Companies.

It is, therefore, apparent that the entire amount of 173,43,40,000/- which was the upfront premium came from Adani Group. This group was never permitted to become a member of the consortium and was not shown as one of the member of the consortium initially. How and in what manner it was introduced as a member of the consortium has not been satisfactorily explained.

As far as prior approval is concerned reference may be made to the judgement of the Apex Court in **Behari Kunj Sahkari Avas Samiti vs. State of Uttar Pradesh and others, (2008) 12 SCC 306**, wherein it held that where prior or previous approval is required no action can be taken without prior or previous approval of the custodian general. The approval of the custodian general is to be taken first and thereafter other action can be taken.

Similarly, in **A. Chowgule and Company Limited vs. Goa Foundation and others, (2008) 12 SCC 646**, while dealing with the term 'prior approval' the Apex Court held as follows:-

"A bare perusal of the aforesaid provisions would show that prior approval is required for the diversion of any forest land and its use for some other purpose. This is further fortified by a look at Rule 4 which provides that every State Government or other authority seeking prior approval under Section 2 of the Act shall submit a proposal to the Central Government in the prescribed form and Rule 6 stipulates that the proposals would be examined by a Committee appointed under Rule 2-A within the parameters and guidelines postulated in Rule 5. There is nothing on record to suggest that this procedure had been adopted. Admittedly, also the approval for 4.44 ha. had been obtained long after the lease deed had been executed on 1.11.1989 and there is no suggestion that even for this limited

area the procedure envisaged under Rules 4, 5 and 6 had been followed. We are, therefore, of the opinion, even assuming that some approval was granted with respect to 4.44 ha of land in the year 1997, it would not amount to prior approval in terms of the Act and the Rules aforequoted.”

In the present case there is no prior approval of the State Government and in our considered opinion Brakel could not have without prior approval virtually changed the membership of the consortium and later waited for ex-post facto sanction of the change.

**What is the value of a Draft Order:-**

After the disposal of CWP No. 2074 of 2007 by this Court Brakel filed replies to the show cause notice. As stated above, the matter was being heard by the Special Secretary (Power) to the Government of Himachal Pradesh, who prepared a detailed draft order, containing reasons wherein a large number of allegations were considered. After considering the contentions of Brakel, the Special Secretary (Power) came to the conclusion that Brakel had misled the State by filing a forged certificate of registration. He also came to the conclusion that Brakel had not been authorized by EIOL, Standard Bank or SNC Lavalin and Eco Securities, to sign the Pre Contract Joint Venture Agreement. According to him, this agreement was signed by Brakel Corporation NV and did not bind the so called constituents of the consortium and was a nullity. In the draft order it was also found that Brakel Corporation NV had no financial capability or resources and that the upfront premium had also been paid after taking a loan from the Adani group of Companies. He also came to the conclusion that despite clarification having been sought from Brakel, Brakel could not satisfy him that any constituent members had actually made any firm commitment for equity participation in the project. The Special

Secretary (power) in his draft order also came to the conclusion that Brakel made a disclosure that Brakel Kinnaur received funds from Adani group of Companies only after the Government had found this out in its discreet inquiry. He found that Brakel had not deposited the upfront premium in time and for these and various other reasons recommended that the allotment of the project be cancelled.

There can be no quarrel with the proposition that this draft order does not bind any party. It was only a draft. However, this draft order was put up for consideration of the Council of Ministers who decided to appoint a five member high powered committee of Secretaries to look into the matter. As mentioned above, the author of this order did not take part in further proceedings. When the Committee of Secretaries met and considered the matter, the draft order was before the Committee of Secretaries. In fairness to the author of the draft order who was not taking part in the proceeding, the Committee of Secretaries should have dealt with the various points raised in the show cause notice and mentioned in the memorandum placed before the Council of Ministers quoted here-in-above and dealt with in the draft order. We are constrained to observe that the Committee of Secretaries dealt with the manner in a very slipshod manner. Even if the draft order was not to be treated like an order, it should have at least been given the status of a noting made by a senior official. Once a senior official had made certain observations the Committee should have dealt with the various points raised in the draft order. Surprisingly, there is no mention of the draft order in the report of the Committee of Secretaries. There is also no reference to the various misrepresentation and suppression of fact made by Brakel and highlighted here-in-above. The serious

allegations leveled against Brakel were not dealt with by the Committee of Secretaries.

The Committee has not dealt with the various allegations made in the show cause notice which were dealt with threadbare in the draft order. Though the draft order may not be binding, the same could not have been treated like a piece of waste paper. In the draft order the Special Secretary (Power) had given number of instances supported by reasons to establish the fact that there was suppression of material facts by Brakel. In fact, in the draft order, the Special Secretary had noted that Brakel was guilty of submitting forged and doctored documents. The Committee has made no reference whatsoever to the draft order, though the draft order formed part of the memorandum placed before the Council of Ministers which decided to constitute the Committee of Secretaries to look into the matter.

Surprisingly, the Committee not only permitted Brakel but also representatives of Adani Power Corporation to appear before it. We fail to understand how the representatives of Adani Group were permitted to appear before the Committee.

The Committee, however, came to the conclusion that no firm commitment had been made by Standard Bank and therefore, appropriate marks could not have been awarded for assessing the financial strength. Surprisingly, the report of the Committee is totally silent in respect of EIOL, SNC Lavalin and Eco Securities. According to the Committee this infirmity in the evaluation had been consciously overlooked by the whole time members of the HPSEB and therefore the Government should follow the decision taken by the earlier

Government. In our considered opinion, this decision of the Committee is erroneous and illegal.

The Committee also came to the conclusion that suppression of material facts by Brakel cannot be established. To say the least this part of the report of the Committee of the Secretaries is totally baseless. The Committee was aware of the detailed draft order prepared by the Principal Secretary (Power). The report of the Committee of the Secretaries has not dealt with any of the allegations relating to suppression and misrepresentation of facts by Brakel. These were very serious allegations which were required to be dealt with by the Committee. In fact, the Committee has just glossed over the matter and not given any findings. We have dealt with the various allegations and found that Brakel was guilty of suppression and misrepresentation of material facts.

The Committee only appears to have been swayed by the fact that since there was a change in the Government the successor Government should not rescind what had been done by the previous Government. This is totally contrary to the law laid down by the Apex Court in **Jitendera Kumar and others vs. State of Haryana and another, (2008) 2 SCC 161**, wherein the Apex Court held as follows:-

“57. There cannot be any doubt in regard to the aforementioned proposition of law but the question herein is whether public interest would be subserved by asking the State to proceed to make appointments. Whereas, on the one hand, an action on the part of the State to interfere with the good work done by the previous Government solely on the basis of change in the regime must be deprecated, there cannot however be any doubt whatsoever that the successor Government cannot blink over the illegalities committed by the previous Government. If illegalities have been committed, the same should be rectified. When there exists a reasonable

apprehension in the mind of the State having regard to the overall situation including the post-haste manner in which actions had been taken , to cause an inquiry to be made and suspend the process of making appointments till the result of such inquiry is obtained, such a decision on its part per se cannot be said to be an act of arbitrariness or unreasonableness.”

From the aforesaid observation it is obvious that if the previous Government has acted illegally and blinked over the illegalities committed, the successor Government was duty bound to rectify such mistakes.

Surprisingly, the Cabinet in its decision has noted that the previous Government created infirmities in the bid documents whereby lead member was not required to have any substantial financial standing. According to the Cabinet this aspect was overlooked and financial marks were awarded to Brakel on the basis of the strength of Standard Bank. Once the Cabinet came to the conclusion that there was no definite commitment of equity participation by Standard Bank the very basis of the assessment of the financial strength was wholly without any evidence and the Government made a grave jurisdictional error in over-looking such a basic lapse in the bid of the petitioner. It would also be important to note that not only Standard Bank but none of the other Companies had committed any specific equity participation and since Brakel had no equity no marks could have been awarded to it for financial strength. The decision of the State on this aspect is wholly illegal.

We may also note that there is nothing on record to show that the previous Government had consciously overlooked the infirmities in the bidding process. When the whole time members and the previous

Government took a decision to award the projects in favour of Brakel they had acted under the assumption that the constituent members of the Consortium had committed specific equity participation. They may have misread the documents but no conscious decision was taken to over look the infirmities. Most of the infirmities in fact came to light after the award of the contract when investigation was carried out by the police and the Income-tax department. When these facts came to light later, it cannot be said that the previous Government had taken any conscious decision. Therefore, the whole basis of the decision of the Government is totally illegal.

**Delay and Laches:**

It is strongly contended on behalf of the respondents that petition is barred on the principles of delay and laches. According to the respondents, they have already invested huge amount of money and therefore, the projects awarded in their favour should not be cancelled. In support of his arguments Shri Ranjeet Kumar, learned senior counsel, has relied upon **Chairman and MD, BPL Ltd. vs. S.P.Gururaja and others, (2003) 8 SCC 567** and **State of Maharashtra vs. Digambar, (1995) 4 SCC 683**. The question of delay has to be decided in the facts of each case and according to us these authorities have no applicability to the present case.

From the facts stated hereinabove, it is apparent that till the first writ petition was filed Brakel itself had not taken any step to deposit the upfront premium. It had also not signed the PIA. Can a Company who delays the deposit of upfront premium by more than one year be permitted to raise the plea of delay and laches? It is obvious that till the first writ petition was filed respondent-Brakel had not changed its position. Any investment made thereafter was

subject to legal proceedings. By the time, the first writ petition was filed the respondent had not even signed the Pre Implementation Agreement and had not deposited the upfront premium. It is only after the said petition was filed that the upfront premium was deposited. The Court passed specific orders that any action taken thereafter would be subject to the result of the writ petition. We are, therefore, of the considered view that there is no delay in filing the present petition since the petition was filed before the respondent deposited the upfront premium or signed the PIA. Assuming for the sake of arguments that there was delay, no prejudice has been caused to the respondent since till the time the first petition was filed virtually no action had been taken by Brakel in furtherance of the Contract. To be fair to the respondents, we may note that Shri Ranjeet Kumar, learned senior counsel has urged that even before the fresh petition was filed the respondents had spent huge amount of money for investigative and research purposes and had also obtained permission from various authorities under the Indian Electricity Act and the Environment Protection Act. We cannot permit the respondents to blow hot and cold at the same time. According to the respondents the PIA could not be signed till the conditions were mutually agreed. The respondents also submit that they were not bound to deposit the upfront premium till the signing of the PIA. If that be so, then how on the basis of the letter of allotment only the respondents made huge investment as claimed by them. The first writ petition was filed before deposit of upfront premium and signing of PIA. During the pendency of this petition the State Government decided to issue show cause notice to the respondent as to why the allotment of projects in its favour be not cancelled. The writ petition

was dismissed as having become infructuous. Thereafter, decision of the show cause notice was only taken on 25<sup>th</sup> November, 2008 and the present writ petition was filed on 10<sup>th</sup> December, 2008. In view of the above discussion we are clearly of the view that there is no delay in filing the present case.

As far as the contention that the respondents have spent huge amount is concerned, all these amounts have been spent after the legal proceedings were initiated in Court. These amounts have been spent by the respondents knowingly well that the legal proceedings are pending. Investment, if any, made has to be at their own risk and therefore, the respondents cannot claim any equity in their favour on this ground.

**Resjudicata:**

It is contended by Shri Ranjeet Kumar that the petition is barred on the principle of resjudicata. The plea of the respondents is that when CWP No.2074 of 2007 was filed the only ground raised by the petitioner was that since the upfront premium has not been paid the letter of allotment in favour of Brakel should be cancelled. This fact is correct. However, it would not be out of place to mention that after the writ petition was filed and certain facts were brought to the notice of the Court the petitioner filed an application for amendment on 7<sup>th</sup> March, 2008 raising a number of additional grounds. This amendment was allowed since it was not opposed by the respondents on 11.4.2008. Thereafter, second amendment application was filed on 22.4.2008 which was allowed on 14.5.2008. Virtually all the grounds raised in this petition were taken in the earlier petition by way of amendment. Thereafter the matter was put up for hearing and on 1.5.2008 counsel for the respondents informed the Court that

pre implementation agreement will not be signed till the next date. It was on 3.6.2008 that this Court itself noticed the inconsistencies in the stand of the State. It was only thereafter show cause notice was issued to the respondents on 8.7.2008. The petition was disposed of as infructuous but liberty was reserved to the petitioner to assail any order passed by the State Government by which the petitioner may be aggrieved of. The second petition filed by the petitioner was disposed of as being premature. Once this Court had permitted the petitioner to amend their writ petition in which similar allegations were made and had also given them the right to challenge the decision taken on the show cause notice by the State Government the respondent cannot now be permitted to raise the plea that the petition should be dismissed on ground of resjudicata. The issues in dispute were never decided on merit in the earlier litigation. All matters were left open and the petitioner was given specific right to challenge the decision of the State Government. We are, therefore, of the considered view that the principle of resjudicata has no applicability to the facts of the present case.

**Relief:-**

It has been strenuously contended on behalf of the petitioner that in case the allotment of the projects in favour of Brakel is cancelled the same may be awarded to the petitioner and reliance has been placed on a number of judgements in this regard. On the other hand it is contended by the respondents that even if the petition is allowed the project should not be awarded in favour of the petitioner.

Each case has to be decided on its own particular facts. Admittedly, in the present case, Brakel was the highest bidder. It

was only after the bid of Brakel was made public that RIL agreed to match its price. The bid process started in the year 2006 and we are now in the year 2009. In the meantime the State has also formulated a new hydro power policy. The State in its decision dated 25<sup>th</sup> November, 2008 has also desired that the HPSEB should change its bid document as well as the evaluation procedure in future.

We are not experts in the field and cannot decide whether the petitioner has the technical and financial competence to execute the projects in question. This is a matter for the State to decide. Therefore, though we are of the view that the allotment of the two projects, namely, Jangi Thopan and Thopan Powari of 480 MW each, which were later combined into one project, made in favour of respondent No.4 has to be cancelled, it is for the State to decide whether to act on the basis of the old notice inviting bids or to invite fresh bids. It is for the State to decide this matter keeping in view the larger public interest i.e. to get the best revenue for the State and also to ensure that the project is executed at the earliest. The State may also take into consideration the conditions laid down in Hydro Power Policy while taking such a decision.

In view of the above discussion, we allow the writ petition and quash the decision of the Council of Ministers dated 25<sup>th</sup> November, 2008 as being arbitrary, illegal and irrational. We also hold that in view of the misrepresentation made by Brakel the allotment of the two projects Jangi Thopan and Thopan Powari of 480 MW each, which were later combined into one project was illegal and is bound to be cancelled. We further hold that for the reasons stated above the allotment of the above said projects in favour of Brakel is liable to be cancelled and accordingly cancel the same. The State is directed

to take fresh decision as to whether it wants to re-advertise the said projects or it wants to act on the basis of the old tender within four weeks from today. The respondents No. 4 and 5 are held liable to pay the costs of the petition, which are assessed at Rs.1 lakh.

**( Deepak Gupta ), J.**

**7<sup>th</sup> October, 2009**  
TM

**( V.K.Ahuja ), J.**