Before S. J. Vazifdar, C.J. & Anupinder Singh Grewal, J.

M/S SUNDER MARKETING ASSOCIATES—*Petitioners*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

CWP No.20986 of 2016

June 01, 2017

Constitution of India, 1950 – Arts. 14 and 226 – Mines and Minerals (Development and Regulation) Act, 1957 – S.15 – Specific Relief Act, 1963 – S.20 – Haryana Minor Mineral Concession, Stocking and Transportation of Minerals and Prevention of Illegal Mining Rules, 2012 – Rl.9, 16(1) and (2) – Indian Evidence Act, 1872 – S.115 – Invitation of bids for mining operations – Eligibility challenged – Proposed Auction – Withdrawal of permission granted to participate in the auction – Declaring the lease deed in favour of the petitioners as void by the official respondents – Held, transfer of lease was not permissible for the first 5 years, however the official respondents were entitled to permit the induction of a partner/shareholder to the extent of 49% of the total shareholding of the original leaseholder in accordance with the provision of the 2012 Rules – The petitioner in order to meet the eligibility criteria entered into a joint venture with M/s Karamjit Singh and Co. Pvt. Ltd. having 51% of the shares – Hence, the petitioners were admittedly not qualified at the first instance – The pre-qualification criteria was necessary and imperative, permitting transfer of 51% was contrary to the terms of the invitation as only 49% of the shares could have been transferred – Permitting a transfer of lease after a period of 5 years as one of the conditions was only to ensure that the parties do not submit bids as speculating/trading in licenses/leases – Public Law justifies the cancellation of the contract for violating permission to transfer the lease as it precluded other bidders similarly situated from participating in the commercial venture – It was also held that every pre-qualified party irrespective of whether it participated in the earlier auction or not was entitled to challenge the agreement as the agreement was for 20 years, and hence there was no delay in the present petition – The test is whether the modification in the terms of eligibility was necessitated by the exigencies of the situation or just to enable a party to circumvent the terms and conditions of the NIT.

Held that, the petitioners admittedly are not qualified by

themselves. They do not meet the qualifying score of 60/100. Even the extent of qualification is not adverted to on the record. Clause 8.6 stipulates in considerable detail the manner in which the qualification is to be assessed. Moreover, clause 8.4 requires the evaluation process to be carried out through technical presentations before the committee appointed for the purpose. The committee comprised of the officers and experts constituted by the Government for the purpose. The decision making process did not involve the committee for appraisal of the petitioners' qualification. Considering the nature of the work and the importance of the pre-qualification criteria that was not only necessary but imperative.

(Para 66)

Further held that, the petitioners gave the official respondents the option to either permit the transfer of KJSL's 51% share in the JV to the petitioners or to permit the petitioners to induct a pre-qualified party in place of KJSL is of no consequence. The options were contrary to the terms and conditions of the invitation and to the provisions of law.

(Para 69)

Further held that, Clause 36 at first blush appears to be inapplicable as no lease was executed between the JV and the official respondents. However, the term lease in clause 36 would apply even to cases where the right to obtain the lease had crystallized. A view to the contrary would enable a bidder to transfer its share at will prior to the lease thereby defeating the purpose of Clause 36.

(Para 72)

Further held that, merely because a transfer of lease is permitted after a period of five years it does not indicate that the clause does not contain an essential term of the contract. The clause is obviously inter-alia to ensure that the only persons serious about executing the work bid for it. In other words one of the purposes of this condition is to ensure that the parties do not submit bids for speculating/ trading in licences/leases.

(Para 75)

Further held that, every pre-qualified party irrespective of whether it participated in the earlier auction or not, would be entitled to challenge the agreement dated 05.08.2015. If the challenge is upheld it would entitle the party to participate in the fresh auction, if held. If the pre-qualification norms are reduced as they have been in the petitioners case, there would be even more parties who would be entitled thereby

to participate in them fresh process. By entering into the agreement dated 05.08.2015 the official respondents have precluded several other parties similarly situated as the petitioners from participating in the commercial ventures of the State of Haryana.

(Para 83)

Further held that, the public law principle or issue infact justifies the cancellation of the contract for the permission to transfer the lease and the agreement dated 05.08.2015 in favour of the respondents for they precluded the other bidders similarly situated as the petitioners from participating in the commercial venture of the official respondents. Had the terms of eligibility not been insisted upon others with qualifications similar to those of the petitioners would have been entitled to bid for the mines.

(Para 85)

Further held that, the contention that the petition ought to be allowed and the respondents' objections ought to be rejected on account of delay is also rejected. The entire process between the withdrawal of KJSL and the agreement dated 05.08.2015 was not in public domain. It was purely a bipartite arrangement between the State and a private party namely the petitioners. The process excluded all other parties. This was an agreement for 20 years. Allowing the petition would amount to granting specific performance of the agreement dated 05.08.2015.There was in fact no delay.

(Para 89)

Further held that, this argument, if accepted, would entitle the State and its instrumentalities to act in a most arbitrary manner contrary to every principle that governs such matters. The terms of the public auction and a notice inviting tenders could be flouted by the simple expedient of issuing an LoI on the basis of the terms and conditions of the auction or the NIT and thereafter entering into a contract on totally different criteria, terms and conditions. Once the contract is entered into, the parties would undoubtedly be entitled to agree to some modifications so long as they are bona fide and for the purpose of the proper implementation of the contract which was entered into legally which is not the case before us. For instance there may be several justifiable reasons for extending the date for completion of the contract. There may be a reduction in the scope of the work or an enhancement thereof in accordance with the terms and conditions of the contract/NIT. The test would be whether the modification was necessitated by the exigencies of the situation or whether it was only to

enable a party to circumvent the terms and conditions of the NIT or the public auction. In the present case the LoI was issued. The LoI contemplated and indeed required the execution of the agreement in accordance with the provisions of the law and the terms and conditions of the notice. That admittedly was not the case as the agreement dated 05.08.2015 was entered into with the party that was not qualified.

(Para 95)

Abhishek Manu Singhvi, Senior Advocate
Puneet Bali, Senior Advocate with
Vaibhav Jain, Advocate
and Arun Gupta, Advocate,
for the petitioners.

Lokesh Sinhal, Additional Advocate General, Haryana,
for the respondents-State of Haryana.

Vinod S.Bhardwaj, Advocate
with Jagdeep Singh Rana, Advocate
for respondent No.5.

S.J.VAZIFDAR, CHIEF JUSTICE

(1) Respondent Nos.1 to 4 are the official respondents. Respondent No.2 is the Additional Chief Secretary and Principal Secretary to the Government of Haryana, Department of Mines & Geology; respondent No.3 is the Director General of Mines & Geology, Haryana and respondent No.4 is the Mining Officer, Haryana. Respondent Nos. 5 and 6 are the private respondents who though not participants in the auction held by the official respondents claim to be interested in participating in the auction proposed to be held by the official respondents.

(2) The petitioners seek a writ of certiorari to quash a show cause notice dated 09.08.2016 and an order dated 29.09.2016 by which respondent No.3 withdrew the permission granted in favour of the petitioners by the official respondents to transfer the share of their joint venture partner M/s Karamjeet Singh & Company Ltd. to the petitioners and declared a lease-deed executed on 05.08.2015 in favour of the petitioners by the official respondents to be void. The petitioners have also sought a writ of mandamus directing respondent Nos.1 to 4 to allow them to perform their obligations in accordance with the mining lease dated 05.08.2015.

(3) It would be convenient to preface this judgment with a

summary of the case.

(4) The official respondents put to auction the mining rights on terms and conditions stipulated in a public notice. Transfer of the lease was not permissible for the first five years. However, the official respondents were entitled to permit the induction of a partner/share holder to the extent of 49% of the total share holding of the original lease holder in accordance with the provisions of the 2012 Rules. The official respondents invited bids only from pre-qualified agencies. A detailed criteria for eligibility was stipulated. A bidder was required to obtain 60 out of 100 points to qualify for the bidding process. The eligibility was to be assessed by a committee of experts. The petitioners by themselves were admittedly not qualified. In order to meet the eligibility criteria, they formed a joint venture (JV) with M/s Karamjeet Singh & Company Pvt. Ltd. M/s Karamjeet Singh & Company Pvt. Ltd. had 51% share in the JV. A letter of intent/acceptance was issued by the official respondents in favour of the JV. It was not issued in favour of the petitioners in their independent capacity. For reasons which we will enumerate later, the JV was given an option to rescind the contract. M/s Karamjeet Singh and Company Ltd. decided to rescind the contract and sought a refund of the amount deposited by the JV. The petitioners, however, wanted to implement the contract either by themselves or by the induction of another partner. The official respondents and the JV partners entered into correspondence and after following a considerably detailed procedure including obtaining an opinion of the Advocate General of the State of Haryana, the official respondents agreed to M/s Karamjeet Singh and Company Ltd. transferring their entire 51% shares in favour of the petitioners and a lease/agreement dated 05.08.2015 was entered into between the official respondents and the petitioners. It is this agreement that the petitioners in effect seek enforcement of in this writ petition. The private respondents challenged the same by filing a writ petition. It was not necessary to decide this writ petition as in the meantime the official respondents cancelled the permission to transfer the lease and the lease agreement dated 05.08.2015. It is this decision to cancel the permission and the agreement that is challenged in this writ petition.

(5) This therefore is not a matter merely between the petitioners and the official respondents which can be decided only considering whether the official respondents having entered into the agreement were entitled to cancel it. The rights and contentions of respondent No.5 – the private respondent also fall for consideration. They have

been agitated from the beginning.

(6) We have rejected this writ petition inter-alia on the ground that the agreement which the petitioners seek to enforce by this writ petition was contrary to the provisions of the terms and conditions of the notice inviting tenders, the provisions of law and the principles that govern such matters.

(7) It is necessary to refer to the facts in detail as the petitioners have relied strongly upon the process leading to the agreement dated 05.08.2015 which is now declared void by the impugned order.

(8) The Director General (Mines)-respondent No.3 issued a notice dated 30.11.2013 informing the general public that the minor minerals' mines of 'Stone alongwith associated minor minerals' in the districts mentioned therein would be put to auction for grant of mining leases. Clauses 1 and 36 of the terms and conditions stipulated in the auction notice are as follow:-

> "**1**. Only the authorized person of the Mining agency pre-qualified by the Department will be allowed to participate/offer bids in the auction.
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> **36**. No transfer of lease shall be permissible for a period of first five years of grant of lease. However, on submission of an application, in accordance with the provisions of the Haryana Minor Mineral Concession, Stocking, Transportation of Mineral & Prevention of Illegal Mining Rules, 2012, and after satisfying itself the State Government may allow inducting of other partners /share holders to the extent of forty nine percent of the total shareholding of the original leaseholder."

(9) Prior to the auction notice, the petitioners and M/s Karamjeet Singh & Company Ltd. had formed a Joint Venture (for short 'JV') dated 18.09.2012. The joint venture participated in the auction held on 30.12.2013. It is admitted that the JV was pre-qualified and the petitioners by themselves were not pre-qualified. In other words, the petitioners were not qualified to participate in the auction on their own. The bid of the JV of Rs. 115 crores per annum for the Dadam quarry admeasuring 59.60 hectares being the highest was accepted. The reserve price was Rs.6.25 crores. The official respondents issued a letter dated 03.01.2014 addressed to M/s KJSL Sunder (JV) i.e. the joint venture stating that their bid was accepted under the provisions of the Haryana Minor Mineral Concession,

Stocking, Transportation of Minerals & Prevention of Illegal Mining Rules-2012 (hereinafter referred to as the 2012 Rules). Paragraph 3 (xxv) thereof read as under:-

> "3(xxv): No transfer of lease shall be permissible for a period of first five years of grant of lease. However, on submission of an application, in accordance with the provisions of the Haryana Minor Mineral Concession, Stocking, Transportation or Mineral & Prevention of Illegal Mining Rules, 2012, and after satisfying itself the state government may allow inducting of other partners/share holders to the extent of forty nine percent of the total share holding of the original leaseholder."

(10) In terms of Rule 55(3)(iii) of 2012 Rules, the Joint Venture deposited an aggregate amount of Rs.28.75 crores being 25% of the annual bid amount which constituted the security deposit.

(11) The JV and another party filed Civil Writ Petition Nos. 2599 of 2014 and 26454 of 2014 challenging the grant of a mining lease in favour of the Haryana State Industrial and Infrastructure Development Corporation Ltd. (HSIIDC), a public sector undertaking. The petitioners alleged that the lease in favour of HSIIDC was not disclosed and that the lease seriously prejudiced them as it was granted at a negligible price which would put the HSIIDC at an unfair advantage on account of a higher bargaining power qua the private parties. The lease was also challenged on other grounds. The petition was disposed of by an order and judgment of a Division Bench of this Court dated 04.03.2015 to which one of us (S.J.Vazifdar, C.J.) was a party. Three aspects regarding the writ petition and the judgment must be noted.

(12) It is important first to note that the petitioners challenged the lease in favour of the HSIIDC on the ground that it had been granted contrary to Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 and Rule 9 of the 2012 Rules. It would be convenient to also set out Rules 16 and 50 which were referred to in the case. Section 15 and Rules 9, 16 and 50 insofar as they are relevant read as under:-

> **Section 15**:
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> **15. Power of State Governments to make rules in respect of minor minerals.**—(1) The State Government may, by notification in the Official Gazette, make rules for

regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1-A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

Rule 9:

"**9.** (1) Any minor mineral deposits, where the government decides such areas to be operated under a lease, may be granted on mining lease for a period not less than 10 years but not exceeding 20 years following a competitive bid process as provided under Chapter 7 of these rules:

Provided that the Government may, wherever it deems necessary, pre-qualify the bidders, with the pre-qualification criteria determined upfront, by inviting expressions of interest through a public notice, and limit the bidding process among such pre-qualified bidders.

(emphasis supplied).

Rule 16:

(1) The lessee or contractor shall not assign, sublet, mortgage, or in any other manner transfer the lease or contract or any right, title or interest therein, to any person without prior approval of the government;

(2) When a lease is granted following the system of pre-qualification of lessees, the government may specify a lock-in period within which no transfer of such lease shall be permissible. A lessee may, however, in such cases be permitted to induct other partners/ share holders to the extent of forty nine percent of the total shareholding of the original grantee;

(8) Subject to submission of the transfer application, complete in all respects, the government may allow the transfer of such lease or contract and prescribe such additional conditions, as it may deem appropriate;

(9) The government may refuse to allow such transfer, wherever deemed appropriate, for reasons to be recorded in writing after giving an opportunity of representation to the

applicant;

(3) Rule 50.

(1) Save in the cases specifically mentioned under these rules and where such mineral concessions may be granted on application, all mining leases/ contracts/ permits shall be granted through a transparent process of inviting competitive bids/ open auction, as may be decided by the government.

(2) The government may, in the interest of mineral conservation and scientific mining, pre-qualify the potential bidders, based on an objective assessment criteria determined upfront, by inviting Expressions of Interest through general public notice and restrict the bids among the pre-qualified bidders."

(13) Based on these provisions, it was contended on behalf of the petitioners that the lease/mining rights granted in favour of HSIIDC were illegal being contrary to Rule 9. We will indicate later the importance of this submission made on behalf of the petitioners themselves.

(14) Secondly the submission regarding the mandatory nature of these provisions was accepted so far as private parties are concerned. Paragraphs 21 and 22 of the judgment read as under:-

"21. Mr. Chopra's submission that Rule 9 makes it mandatory for the government to grant any mining lease following a competitive bid process as provided in Chapter 7 of the Rules is well founded. It is not open to the Government to grant the mining lease without inviting bids. This is to avoid avoritism and arbitrariness. It prohibits the grant of leases to operate mines on a pick and choose basis. The intention of the Legislature was also to award the lease in favour of the highest bidder so as to maximize the revenues. This is evident from sub rule (3) of Rule 9 which provides that the highest bid received shall become the annual dead rent payable by the lessee which in turn is subject to an increase at the rate of 25% on completion of each block of three years.

22. The provisions of Rule 9(1) requiring the grant of a lease in favour of the highest bidder is mandatory.

> Normally and in the absence of any special circumstances a lease to operate a mine can be granted only to the highest bidder after inviting bids from the public. The word "may" in Rule 9(1) must be read as "shall" in so far as it relates to the requirement of following a competitive bid process for granting a mining lease. The word "may" qualifies the State Government's right to give the areas to be operated under a lease. It does not compel it to do so or even not to do so. If it decides to give the areas to be operated under a lease it must do so by inviting bids from the public. Rule 9(1) does not authorize the State Government to grant leases on a pick and choose basis. That the State Government may not be bound to grant the lease in favour of the highest bidder is another matter altogether.

(15) The contention on behalf of the petitioners that Rule 9 makes it mandatory for the Government to grant any mining lease following a competitive bid process as provided in Chapter-VII of the Rules was upheld. It was also held that if the State Government decides to give any area to be operated under a lease, it must do so by inviting bids from the public and that the State Government cannot grant such leases on a pick and choose basis. The further findings that this rule does not apply to the State Government or to its instrumentalities such as corporations and companies owned and controlled by it is a different matter. At this stage it is sufficient to keep in mind that this Court upheld the petitioners' contention that if the State Government gives any area to be operated under a lease it must mandatorily to do so by inviting bids from the public. The provisions of Rule 9 are mandatory and must be followed except where the mining is done by the State Government or any of its instrumentalities.

(16) Thirdly, paragraph 54 and 57 of the judgment dealt with the petitioners' alternative plea as under:-

> "54. It is not necessary however to consider this alternative plea raised and relief sought by the petitioners as Mr. Amar Vivek stated that the State of Haryana is willing to refund the entire amount paid by the petitioners with reasonable interest without levying any penalty whatsoever. The statements are accepted. In view thereof, it is not necessary to consider whether on account of the respondents' having failed to disclose the decision to grant a lease in favour of HSIIDC, the petitioners are liable to rescind the contract.

In view of Mr. Amar Vivek's statement that the petitioners would be refunded the entire amount and that no penalty would be imposed upon them is accepted, it is not necessary to consider any further in this writ petition Mr. Chopra's submission regarding the importance of putting third parties to notice of any adverse impact upon their bids.

If the petitioners' alternative submissions are well founded they may well be entitled to further reliefs including damages. For that however they must be relegated to appropriate proceedings. This writ petition is not an appropriate proceeding for computing damages assuming the petitioners are entitled to the same. The petitioners are always at liberty to file appropriate proceedings for recovery of any amounts. Needless to add that such proceedings would be determined on their own merits. It is clarified that this would be in addition to the benefit on account of Mr. Amar Vivek's above statement.

57. In the circumstances, both the writ petitions are dismissed.

However, the statements of Mr. Amar Vivek that the Government of Haryana would refund the amount paid by the petitioners and that no penalty would be imposed on the petitioners if they want to have their contracts cancelled are accepted. The petitioners shall exercise the option to either continue with the contracts or to rescind the same by 30.04.2015. If they choose to rescind the contracts, respondent No.1 shall repay all the amounts paid by the petitioners within eight weeks of the demand. The petitioners are at liberty to adopt appropriate proceedings for recovery of the compensation or damages which would be decided on their own-merits. The statement made on behalf of the respondents that the HSIIDC would not commence the mining operations without complying with the provisions of Section 17-A(2) of the Mines and Minerals (Development and Regulation) Act, 1957, namely, obtaining the approval of the Central Government and issuing the notification in the official gazette is accepted. There shall be no order as to costs."

(17) The JV filed a petition for Special Leave to Appeal (C) Nos. 12623-12624 of 2015 to the Supreme Court which was disposed of by

an order dated 01.05.2015 by extending the time that was granted to the petitioners by this Court for exercising their option till 10.05.2015.

(18) It is from here that the case took a turn which ultimately resulted in the impugned action.

(19) The other joint venture partner i.e. Karamjeet Singh & Company Ltd. (for short 'KJSL') by a letter dated 07.05.2015 addressed to respondent No.2-the Additional Chief Secretary and Principal Secretary to Government of Haryana cancelled the authorization earlier accorded and stated that henceforth its Director one Akbal Singh Bhullar was authorized to sign all the documents, agreements and other necessary documents relating to the refund of the initial auction amount and interest. It must be remembered at this stage that Karamjeet Singh & Company Ltd. (KJSL) was a 51% partner in the joint venture.

(20) By a further letter dated 07.05.2015 KJSL reiterated the decision to rescind the contract, sought the refund of Rs.28.75 crores deposited by the JV together with interest at 18% per annum and reserved the right to claim damages.

(21) On the other hand the petitioners addressed a letter dated 14.05.2015 to the Chief Minister of Haryana purportedly on behalf of the joint venture. They stated that the joint venture never intended rescinding the contract but that some vested interests working as a cartel managed to misguide their joint venture partner KJSL, as a result of which KJSL unilaterally rescinded the contract and sought refund of the amounts deposited. The petitioners stated that they disagreed with the same and undertook to operate the mines on the terms and conditions of the LoI and stated that they had no objection to KJSL surrendering its share. The petitioners placed considerable reliance on paragraph Nos. 9 and 10 of the letter which read as under:-

> "9. In view of above, it is humbly requested that the State may kindly consider to take a reasoned decision in this behalf, we (Sunder Marketing Associates) undertook to operate the area of Dadam mine @ Rs. 115 crore per annum as per terms of grant. Therefore, we will have no objection if the other partner-M/s Karamjeet Singh & Co. Pvt. Ltd. intends to surrender his share.
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> In such an eventuality, State may consider either
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> (i) transfer of 51% shares of Karamjeet Singh & Co. Pvt.

> Ltd. in favour of Sunder Marketing Associates or (ii) permit induction of any of the other pre-qualified mining agency in place of M/s Karamjeet Singh & Co. Pvt. Ltd. subject to condition that we are able to persuade any of pre-qualified agency.
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> 10. State may consider that in case vested interests are allowed to create undesirable dispute at this stage and to keep the Dadam mine also closed for another period of 1 or ½ year, on one hand the State would loose revenue and at the same time, general public will not be able to get construction material. The same will serve purpose of only those persons who could manage to create litigation for Haryana Mining and keep the same stand still so that they could sell their material at high rates to the general public of Haryana. Needless to State here that grant of environmental clearance in favour of KJSL Sunder is in advance stage and likely to be accorded by MoEF any time."

(22) The official respondents were, therefore, faced with a peculiar situation where one of the joint venture partners viz. KJSL had sought to rescind the contract whereas the other viz. the petitioners did not seek to do so and evinced an interest in implementing the same. Moreover, as stated earlier, by the letter dated 07.05.2015 KJSL cancelled the earlier authorization and stated that being a 51% share holder of the JV, its Director was authorized to sign the agreements and other necessary documents relating to the refund of the amounts deposited with interest.

(23) This brings us to the manner in which the official respondents proceeded in the matter.

(24) The Mining Engineer submitted a note dated 25.05.2015.

(25) The note proposed allowing the petitioners to continue with the lease and to allow KJSL to surrender its share and suggested that the surrendered share could either be allowed to be retained by the petitioners or the petitioners may be allowed to induct new partners for the said work. The note, however, suggested taking an opinion of the Advocate General as to the validity of the proposal.

(26) Mr. Bhardwaj, the learned counsel appearing on behalf of the private respondents relied upon paragraph-21 of this note in support of his submission that the auction had not fetched the correct price.

Although we will deal with this submission later, it would be convenient to set-out paragraph-21 at this stage:-

> "It may be worth point out here that the mode of grant of leases through auction amongst the pre-qualified bidders has otherwise not attained success as was expected. Rather it gave room for a few of big giants to form cartel/monopoly and create litigations and ensure mining in Haryana remains closed. The action on the part of many of the pre-qualified bidders had resulted in defeating the fair attempt of the State Government to bring good operators by way of pre-qualification.
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> As a result the Department has already ecommended that the process of auction amongst the pre-qualified bidders be disposed with and all interested parties may be allowed to participate in future auctions even for stone mines."

(27) The higher authorities by an endorsement dated 26.05.2015 decided to seek the opinion of the Advocate General.

(28) The learned Advocate General submitted his opinion dated 28.05.2015. Though an opinion on an issue of fact or of law itself is irrelevant in a Court proceeding and normally cannot and must not be relied upon, we permitted the petitioners to refer to it only to indicate the process that led to the official respondents' initial decision to accept the petitioners' suggestions to permit them to work as per the lease which decision was subsequently recalled by the impugned orders.

(29) The Advocate General opined that the over all interest of the State warranted continuation of the contract by the bidders notwithstanding withdrawal of one of the partners of the joint venture. He, however, suggested that the petitioners must execute an indemnity bond that they were willing to fulfill all the obligations notwithstanding the withdrawal of the other partner and would honour the conditions stipulated in the LoI without seeking any modification or change thereof. He further opined that as one of the partners offered to exit, the execution of the indemnity bond with a forwarding letter by the other existing partner would meet the requirements of the Government to allow "running of the affairs of the joint venture/mining contracts".

(30) The Mining Engineer submitted a further note dated 10.06.2015 which also referred to the opinion of the Advocate General. The note submitted that the over all interest of the State was in continuing the lease for a variety of reasons including for the reason that the environmental clearance had been obtained and at any time the

formal approval of the Ministry of Environment and Forest, Government of India, may be notified and that there may be a loss of revenue if a fresh auction is held. The note also referred to KJSL's representation that the offer of the petitioners ought not to be accepted and stated that the same was not in the interest of the Government. The note made the following proposal:-

> "Accordingly if finds approval, the State Government may be requested to allow transfer of the entire share in favour of M/s Sunder Marketing Associates one of the partners of M/s KJSL Sunder (JV) who intends to continue with the lease/contract. The transfer of share/transfer of lease shall be subject to conditions that:-
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> (i) The partner M/s Sunder Marketing Associates who intends to remain in the lease shall execute the lease deed with the department/State.
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> (ii) M/s Sunder Marketing Associates shall furnish fresh affidavits of all the existing sureties (in place of existing affidavits) that they stand surety for M/s Sunder Marketing Associates in place of M/s KJSL Sunder (JV) and in case any of the existing sureties do not furnish such affidavit M/s Sunder Marketing Associates shall be liable to furnish new surety for such amount.
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> (iii)M/s Sunder Marketing Associates shall also execute an Indemnity Bond with the department that the firm/he will fulfill all the obligations arising from the existing lease and notwithstanding of the withdrawal of one of the partner/he would honour stipulated conditions therein and he alone shall be liable for the running of the lease himself and shall at no stage seek any modification, or change in the conditions thereof.
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> (iv) In addition to this, M/s Sunder Marketing Associates will also be responsible to settle all accounts/issues with outgoing partner M/s Karamjeet Singh & Co. Ltd. and State shall not be responsible for claims if any made by M/s Karamjeet Singh and Company Ltd.
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> (v) The decision to transfer the lease/share in favour of M/s Sunder Marketing Associates one of the JV/consortium be communicated to M/s Karamjeet Singh & Co. Ltd. It may be pointed out here that in case, at any stage, M/s Sunder

> Marketing Associates fails to settle all issues with M/s Karamjeet Singh & Co. Ltd. and any claims with regards to refund of amount qua above said lease, if any, paid by M/s Karamjeet Singh & Co. Ltd. to the consortium are not refunded, appropriate action including cancellation of lease would be initiated against them."

(31) The Senior Mining Engineer by an endorsement of the same date i.e. 10.06.2015 recommended the approval of the Mining Engineer's proposal. This was followed by the following endorsement dated 16.06.2015 of the Principal Secretary to the Chief Minister of Haryana:-

> "Request for refund of amount deposited at the time of auction by one partner and request for Execution of Mining Lease Deed by another partner in respect of Minor Mineral over an area of 55.50 Hectares in village Dadam, Tehsil Tosham, District Bhiwani."

(32) The Director General, Mines and Geology Department, Haryana addressed a letter dated 17.06.2015 to the joint venture partners i.e. the petitioner and KJSL setting out all the facts and stated that considering the same, it had been decided to continue the lease with the petitioners and to allow KJSL to go out of the same and that to avoid any complication the lease may be allowed to be transferred/changed in the petitioners' name subject to the conditions mentioned therein.

(33) The petitioners furnished an undertaking on the terms sought and referred to earlier. KJSL by a letter dated 19.08.2015 enclosed a copy of the resolution of its Board of Directors accepting the petitioners' proposal of settlement and dissolution of the JV and stated that KJSL would cease to operate as a consortium partner of the said JV with immediate effect and that it had no objection to the petitioners continuing with the mining lease solely or alongwith other interested parties.

(34) It is in these circumstances that ultimately a mining lease dated 05.08.2015 was executed between the petitioners and the official respondents which was later annulled by the impugned order.

(35) By a communication dated 03.07.2015 the Ministry of Environment, Forest and Climate Change granted environmental clearance accorded by a letter dated 03.07.2015 to the petitioners. By a letter dated 28.10.2015 addressed to the Joint Venture, the Ministry of

Environment, Forest and Climate Change, transferred the environmental clearance in the name of the petitioners from that of the joint venture subject to certain conditions.

(36) Having obtained the environmental clearance and the transfer thereof in their name, the petitioners started paying royalty w.e.f. 01.11.2015 and started the mining operations. The petitioners' contend that they had been paying monthly installments towards annual dead rent of Rs.9.58 crores regularly and without default, Rs.96 lacs per month to the Rehabilitation and Restoration fund, Rs.3 crores to 3.5 crores towards various statutory/tax dues and Rs. 19.50 lacs per month as tax collected at source. The petitioners have employed about 7000 persons, engaged 350 to 400 crushers and 1300 to 1400 trucks are deployed for transportation.

(37) It is necessary now to refer to the steps taken by respondent Nos.5 and 6 - the private respondents prior to the action of the official respondents impugned in this writ petition.

(38) Respondent No.5 carries on the business of mining. Respondent No.6 is a journalist. These respondents had filed a PIL, which we will refer to shortly. They were, therefore, ordered to be impleaded in this petition. For convenience, we will refer to them as the private respondents. The private respondents by a letter dated 10.03.2016 sought information under the Right to Information Act, 2005 in respect of the matter. This letter is not on record. However, the response thereto by the State Geologist-cum-State Public Information Officer, Department Mines and Geology, Haryana, dated 10.03.2016 refers to the private respondents' application dated 12.01.2016. The information to the private respondents was enclosed under cover of the letter dated 10.03.2016, paragraph-9 whereof reads as under:-

> "One of the case where transfer/change of name was allowed relates to Dadam stone mine. The file relating to said lease has been submitted to the State Government and is not presently available in the office. The copies of required documents can be provided only on receipt of the concerned file."

(39) Thus the private respondents started taking steps to enquire into the matter within a reasonable time of the lease dated 05.08.2016. He was not furnished the documents as is evident from paragraph-9 quoted above.

(40) The private respondents thereafter obtained some of the

documents and ultimately filed Civil Writ Petition No. 9419 of 2016. The petitioners were also parties to this writ petition which was filed as a Public Interest Litigation (PIL) challenging the order permitting the transfer of the share of the lead partner KJSL in favour of the petitioners by the order of the official respondents dated 17.06.2015 and for a direction to the official respondents to conduct a fresh auction of the said mines. They also sought an order for conducting an enquiry into the role of the official respondents alleging that they had committed various illegalities and had violated the law and sought an order under section 21 of the Mines and Minerals (Development and Regulation) Act, 1957 to recover the value of the entire minerals extracted pursuant to the lease.

(41) The petition was disposed of by an order and judgment dated 14.09.2016 by a Division Bench of this Court to which one of us (S.J.Vazifdar, C.J.) was a party. We will come back to this order after referring to the facts that transpired prior thereto.

(42) This brings us to the impugned action which commenced with the notice dated 09.08.2016 and the orders in the proceedings filed upto now.

(43) The notice set out the details of the auction process including that 21 mining agencies were pre-qualified to participate in the auction and the facts that led to the agreement dated 05.08.2015 between the petitioners and the official respondents. The notice also referred to the PIL viz. Civil Writ Petition No. 9419 of 2016 and an interim order passed therein dated 13.05.2016 issuing notice. The notice then states that the official respondents had once again examined the matter and that on a reconsideration of all the issues, the competent authority was of the view that the transfer of the 51% share of the lead partner-KJSL to the petitioners was not in consonance with the provisions of the 2012 Rules and the terms of the auction notice and that, therefore, it was proposed to withdraw the permission for the transfer dated 17.06.2015 with immediate effect. The petitioners were afforded a personal hearing.

(44) The petitioners filed Civil Writ Petition No. 16735 of 2016 challenging this notice which was disposed of vide judgment and order dated 27.08.2016 by a Division Bench of this Court of which one of us (S.J.Vazifdar, C.J.) was a party. It was held that the notice dated 09.08.2016 was infact only to show cause and was not a final decision in the matter. The order referred to the said Civil Writ Petition No. 9419 of 2016 and noted that it would be appropriate, therefore, for the

official respondents to hear the respondent No.5 herein also before passing a final order in respect of the show cause notice. The order concluded by directing that the order of the official respondents, if adverse, to the petitioners, shall not be implemented for a period of two weeks after the service thereof upon them. The petitioners accordingly filed a detailed reply dated 23.08.2016 as also an additional reply dated 02.09.2016 to the show cause notice.

(45) By an order dated 14.09.2016 the said Civil Writ Petition No.9419 of 2016 filed by respondent No.5 was disposed of as it did not survive in view of the aforesaid facts especially the communication dated 09.08.2016. The order referred in turn to our order dated 27.08.2016 in Civil Writ Petition No. 16735 of 2016 which challenged the show cause notice dated 09.08.2016. It recorded Mr. Sinhal's statement that the parties including the petitioners and respondent No.5 herein had been heard and that an order would be passed by 28.09.2016. The petitioners therein i.e. private respondents herein were granted liberty to file a fresh petition not only in respect of the order to be passed pursuant to the show cause notice issued to the petitioners herein but also in respect of other claims in the petition.

(46) Ultimately the show cause notice was disposed of by the impugned order dated 29.09.2016. The order set out the facts and the submissions of the parties. It was held, however, that the petitioners had failed to give a satisfactory response to the issue that as per condition No.36 of the auction notice the dilution of share/induction of new partner/share holders during the first five years was not permissible beyond 49% of the total share holding of the original lease holder. It was held that the lead partner with 51% share having sought to rescind the lease, the other partners namely the petitioners could not have been allowed to run the mine by permitting the transfer of the lead partners share to themselves. The petitioners' request to be permitted to bring a new pre-qualified mining agency was also rejected in view of condition No.36 of the auction notice. The order, however, stated that any action taken by the petitioners and the State Government as per letter dated 17.06.2015 and as per the lease executed pursuant thereto shall remain valid and not have any adverse implication for any of the parties. The petitioners were accordingly directed to stop the mining operations/dispatch of any mineral on the expiry of the period of two weeks from the date of the order.

(47) On 06.10.2016 a Division Bench of this Court issued notice of motion and stayed the implementation of the impugned order dated

27.09.2016. By a further interim order dated 27.10.2016 another Division Bench of this Court to which one of us (S.J.Vazifdar, C.J.) was a party continued the interim order but on the understanding that equities would be adjusted by the Court by way of compensation or otherwise. As the reliefs claimed in the petition are rejected, we have adjusted the equities as stated later.

(48) Dr. Singhvi's case on behalf of the petitioners is as follows:-

(49) The petitioners by their letter dated 14.05.2015 gave the State an option for permitting the petitioners to continue by allowing KJSL to transfer its share to the petitioners or permitting the induction of a pre-qualified partner in KJSL's place. The State duly applied its mind on all the aspects of the case including the operation of clause 36 and in the interest of the State decided to let the petitioners continue as per the agreement dated 05.08.2017.

(50) The impugned order has been passed merely because of a change of opinion on the same set of facts. There are no new facts which necessitated or justified the change of opinion by the State. There was no mis-representation or suppression of the facts by the petitioners. The Government is entitled to a play in the joints and it is in the exercise of this entitlement that the Government entered into the agreement dated 05.08.2015 with the petitioners.

(51) The principle of promissory estoppel applies against the government. The vested right of the petitioner cannot be taken away by way of an executive order. Government cannot take advantage of its own wrong as admittedly the petitioner was never at fault. The impugned order has all the traits of a pre-determined mind.

(52) The primary ground taken in the impugned order is violation of clause 36 of the DNIT which only talks of transfer of lease. In the present case the lease was ultimately executed by the State Government in favour of the petitioners and there was no transfer of KJSL's share after the execution of the lease. Clause 36 does not apply, as it only talks of transfer of lease. In the present case there was no lease executed in name of the JV. Supplementary reasons which are not reflected in the order cannot be taken at the stage in support of the said order.

(53) Clause 36 is not an essential term as it in any event permits the transfer of a lease after a period of five years.

(54) No bidder has challenged the grant of the lease in favour of

the petitioners. Therefore, there is no question of violation of Article 14. Respondent No.5 was not a bidder and therefore has no *locus standi*. There is gross delay as the agreement was entered into on 05.08.2015 and the petitioners have invested crores of rupees towards the implementation of the agreement.

(55) Respondent No.5 at the instance of whom the impugned order has been passed is disqualified as of today.

(56) The benefit to the State is enormous whereas the prejudice to the State is minimal. The government is getting a royalty of Rs. 115 crores per annum against the reserve price of Rs. 6.25 crores. About 5 crores per month of additional revenue is being generated. The government would have to refund the security. Additional 45 crores have been invested by the petitioner by way of capital investment. The Government was saved from facing a suit for damages as the permission for filing of the same was given by this Hon'ble Court vide order dated 04.03.2015. The State would face shortage of construction material in case of closure of the mine in question. Fresh environment clearance will take 1 to 1 ½ years after the fresh bidding process is complete and the State will lose precious revenue to the tune of hundreds of crores in the interregnum.

(57) We will presume for the purpose of this petition that there were no mala fides in the process leading to the agreement dated 05.08.2015, although the private respondents strongly contended that there were.

(58) Although it is admitted that the petitioners were by themselves not qualified to bid for the work it is necessary to see the nature and extent of their disqualification.

(59) It is necessary at the out-set to notice various aspects of the "Invitation of Technical Proposals for Prequalification of Mining Agencies" (hereafter referred to as the Invitation) published by the official respondents. The same stated inter-alia as follows:-

> "**Invitation of technical proposals for pre- qualification of mining agencies stated inter-alia as follows:-**
>
> The Government of Haryana proposes to pre-qualify/shortlist international and national level companies/agencies interested in undertaking mining of Minor Minerals in Haryana in order to ensure that the mining operations in the State are carried out in a scientific

and systematic manner.

Since the mining leases involving use of explosives, blasting and drilling are proposed to be granted following a transparent process of competitive bidding/open auctions, it is proposed to technically pre-qualify the agencies based on their past track record in terms of experience in scientific and systematic mining, qualified manpower to handle the operations (mining engineers, explosives experts etc.), machinery and equipment, financial and technical capacity, observance of environmental safeguards, experience in undertaking restoration, reclamation and rehabilitation measures etc. for participation in the final bid/auction process.

Accordingly, technical proposals are invited from agencies interested in their pre-qualification and intending to participate in the process of mining of Minor Minerals in the selected areas of State of Haryana."

(60) The official respondents, therefore, adopted the system of pre-qualifying agencies and set-out the relevant parameters to determine the suitability of bidders. The importance of pre-qualification is understandable in works such as these. It involves the use of explosives, blasting and drilling and affects the adjacent as well as surrounding areas also. The official respondents' decision to technically pre-qualify the agencies based on their past track record cannot be said to be arbitrary.

(61) It is true that paragraph 21 of the Mining Engineers note dated 25.05.2015 quoted earlier advocated against the system of pre-qualification and suggested that all interested parties be allowed to participate in future auctions. It is, however, for the State as the party inviting bids and not for the Court to decide which system the State ought to adopt. We must proceed on the basis of the system adopted by the State and not the system recommended.

(62) The agencies/bidders' record was to be judged in terms of the experience in scientific and systematic mining, the availability of qualified manpower to handle such operations, machinery and equipment, the financial and technical capacity, observance of environmental safeguards, experience in undertaking restoration, reclamation and rehabilitation measures etc. The parameters are even to a layman justified and reasonable. Indeed they were not questioned

before us as being arbitrary or irrelevant to the work.

(63) It is true that the official respondents prior to executing the agreement dated 05.08.2015 went through several steps. The decision leading to this agreement was considered at several levels. Even assuming that the factors that were taken into consideration while deciding to enter into the agreement are not irrelevant, the decision making process did not take into consideration this crucial aspect of the matter namely the importance of pre-qualification of a bidder keeping in mind the nature of the work.

(64) Even the extent of the qualification of the petitioners was not considered in the process. The following provisions of the said invitation relating to the eligibility of the bidders are important:-

> **"6. Major changes introduced in the State Minor Mineral Concession Rules:-**
>
> The State Government has substituted the "Punjab Minor Mineral Concession Rules, 1964' with the '***Haryana Minor Mineral Concession, Stocking, Transportation of Minerals and Prevention of Illegal Mining Rules, 2012'*** . The revised rules have been published in the State Gazette on 20th June, 2012 and also placed on the State website www.haryana.gov.in. The major highlights of the revised rules are as under:-
>
> - Grant of leases for a minimum period of ten years subject to a maximum of twenty years and the actual period of lease to be decided by the Government upfront in each case.
>
> - Grant of Mining Contracts for a minimum period of seven years subject to a maximum of ten years to be decided upfront by the Government in each case.
>
> **7. Parameters for Technical Evaluation:-**

Sr. No	Parameter	Factors to be considered
1.	Experience in mining	• Type of Mining Major or Minor minerals; • No. of years (mineral wise) • Scale of operations production;

		• Status of requisite environmental clearances including licences for storage/use of explosives; • Use of ICT in management of operations;
2.	Experience in R&R Initiatives and Environmental compliances	• Details/particulars of the mines Rehabilitated in past with specific reference to last 10 years; • Details of the sites rehabilitated;
3.	Corporate Social Responsibility	• Company's initiatives implemented in fulfillment of Corporate Social Responsibility objectives in the areas operated;
4.	Manpower on full-time/regular employment on the rolls of the company	• Number of Experts in the field of Mining; • Number of Experts in the field of Geology; • Number of Experts for use of explosives (as per Mines Act, 1952];
5.	Machinery& equipment: •Owned by the company •Taken on long lease by the Company ; •Temporary hiring by the Company.	Details alongwith make and year of purchase/model of the ; Excavators/excavator cum loaders; Drilling m/c-jack hammer and wagon drill machines; Air compressors; Dumpers; Electronic Weigh bridges; Any other equipment
6.	Turnover	Turnover for last three years.
7.	Profit/loss	Profit/loss statement for the last five years duly certified by the C.A.

8.	Financial resources and Net worth of the company	The availability of Financial recourses and net-worth of the company for raising funds in case of future projects in mining.
9.	Defaults, if any.	Details of the fines/punitive action/ premature termination of leases/contracts, blacklisting by any agencies [information of each of the partners/directors be furnished].

Method of Evaluation

(i) The Technical Proposals shall be examined and evaluated by a Committee of Officers and experts constituted by the Government for the purpose;

(ii) The evaluation process shall be carried out in two phases i.e. scoring based on the written submissions and, thereafter, through technical presentations before the Committee appointed for the purpose. The combined score shall form the basis for pre-qualification;

(iii)The applicant securing a minimum of 60% technical score shall be considered as pre-qualified.

Format for Submission of Proposals

Two printed copies and one electric copy on CD-ROM (in PDF format) of Technical Proposals shall be submitted as per the format described in **'Annexure A'** to this document. Documents shall be in English, with printed copies duly signed on each page by the authorized signatory.

(65) Clause 8.6 of the Invitation was substituted by a corrigendum regarding the invitation of proposals. The same in so far as it is relevant reads as under:-

"Clause 8.6

"The following Corrigendum is being issued in connection with the RFQ for Empanelment of Mining Agencies based on pre-qualification for participation in bids/auctions of Minor Mineral Mining Blocks in Haryana that was released on 18.08.2012.

The Para 8.6 of the RFQ document on the subject noted above shall be substituted as under:-

Sr. No.	Criteria	Allocation of Marks
1.	Mining Staff (Mining Geological/ Expert/Professionals on the regular rolls of the agency at the time its past operations on ongoing activities:-	Max. Marks:15
	(i)Mining engineer having First Class Mines Manager Certificate with minimum experience of 10 years;	04
	(ii)Qualified Geologist with minimum qualification of M.sc. (Geology) and minimum experience of 10 years;	03
	(iii)For two second class Mines Manager certificate holders (1.5 marks each);	03
	(iv)For two qualified blasters (1.5 marks each);	03
	(v)For a qualified Mechanical Engineer	02
2.	Machinery and equipment:	5 (max)
	(i) Excavator (one marks each)	02
	(ii)Dumpers (Minimum 02)	01
	(iii)Wagon Drill Machine (one marks for each	02
3.	Experience in Mining (Major/Minor Minerals)	10 (max)
	(i)More than 20 years	10
	(ii)15 to 20 years	08
	(iii)More than 10 but upto 15 years	06
	(iv)More than 5 but upto 5 years	04
	(v)More than 02 years but upto 5 years	02
4.	Average Annual Turn over computed for the last three contiguous years	10 (max)

	(i) Rs. 5 cr. To Rs. 10 cr. (ii)Above Rs.10cr. but upto Rs. 25 Crore (iii)Above Rs.25 crore but upto Rs.50 crore (iv) More than Rs.50 crore	 3.0 5.0 8.0 10.0
5.	Average Net profit or loss (for the corresponding period of turn over) a)Less than 5% of the turnover b)Above 5% but upto 10% of the turnover c)Above 10% of the turnover **Loss** a)Less than 5% of turnover b)More than 5% of the upto 10% of the turnover c)More than 10% of the turnover	10 (max) 5.0 7.5 10 -5 -7.5 -10
6.	Net-worth of the Applicant company/Agency as on 31st March, 2021; (i)Rs. 5 cr. To 10.00 cr. (ii)More than Rs. 10.00 cr. but upto Rs. 25 cr. (iii)More than Rs. 25 cr. but upto Rs.50 cr. (iv)More than Rs. 50.00 cr.	10 (max) 2.5 5.0 7.5 10.0
7.	Restoration and Rehabilitation works: (5 marks each for one project/site Restored and Rehabilitated in any mining site operated anywhere)	10 (max)

8.	CSR initiatives implemented by the Company and the amount invested year on year basis	5 (max)
9.	Number of mining projects with minimum area of 15 hectare successfully completed; (i)Three projects or more (ii)Two projects (iii)One project	10 (max) 10.0 7.5 5.0
10.	Any black-listing/ pre-mature termination for default on the pat of the company	(-) 5
11.	Assessment by the Committee based on Technical Presentation of the proposal covering (i) Adoption of scientific and systematic mining, safety parameters, site management practices in mining operations (demonstrated in two projects in operation or those operated in the past) and (ii) overall general mining approach presented	15
	Qualifying score:	60/100
Note	In case of pre-qualification only for State Stone Mining, 03 marks assigned for Blasting staff will be awarded on the basis of technique adopted in mining of state stone for which the applicant will have to provide supporting documentation including site photographs.	

A pre-proposal conference was held on 29.08.2012 for empanelment of mining agencies at which clarifications were sought by the mining agencies and furnished by the official respondents. The conference was held in order to clarify the doubts and to elicit response on the terms and conditions in the RFQ for empanelment of mining agencies

based on pre-qualification for participation in bids/auctions of mining blocks that was released on 18.08.2012. Item No.4 of paragraph-2 of the minutes of the meeting which is important reads as under:-

2. The issues raised by the participants during the pre-proposal conference and the response thereto is given hereunder:-

Sr. No.	**Observations made/clarifications sought by the participants**	**Response from the Government**
4.	Whether joint ventures/consortium are permissible. If yes, what are the norms/conditions. What are the norms to be fulfilled by lead member/partner of the joint venture/consortium.	Yes, Joint ventures and consortium and consortium are allowed to participate in empanelment process provided an SPV is created before submission or application. The lead member of the consortium has to fulfill all the technical parameters and should be holding a majority stake (at least 51%) in the SPV. Further , the lead member is not granted the mineral concession after the bid process. Reference to Rule 16 of the Revised Rules was made in this behalf.

(66) As we mentioned earlier, the petitioners admittedly are not qualified by themselves. They do not meet the qualifying score of 60/100. Even the extent of qualification is not adverted to on the record. Clause 8.6 stipulates in considerable detail the manner in which the qualification is to be assessed. Moreover, clause 8.4 requires the evaluation process to be carried out through technical presentations before the committee appointed for the purpose. The committee

comprised of the officers and experts constituted by the Government for the purpose. The decision making process did not involve the committee for appraisal of the petitioners' qualification. Considering the nature of the work and the importance of the prequalification criteria that was not only necessary but imperative.

(67) The decision making process, therefore, was flawed.

(68) There is another infirmity in the decision making process. Although there are comments regarding the financial implications, there does not appear to have been any serious or in-depth study which would indicate that there would be adverse financial implications if fresh tenders were invited. Mr. Bhardwaj's criticism of the decision making process in this regard prima-facie at least is well founded. This is buttressed by the offer and undertaking of respondent No.5 that in the event of fresh bids being invited he would bid an amount not less than Rs. 150 crores per annum. To establish his *bona fides* respondent No.5 has tendered a cheque in the sum of Rs. 15 crores agreeing that in the event of there being any breach of the undertaking the said Rs.15 crores could be appropriated by the official respondents unconditionally in addition to any other action that the official respondents may adopt against the private respondents for the breach of the undertaking including by way of contempt of Court. Indeed if there is breach of the undertaking even without this concession the respondents would be liable for the same.

(69) That the petitioners gave the official respondents the option to either permit the transfer of KJSL's 51% share in the JV to the petitioners or to permit the petitioners to induct a pre-qualified party in place of KJSL is of no consequence. The options were contrary to the terms and conditions of the invitation and to the provisions of law.

(70) It was clarified at the pre-proposal conference held on 29.08.2012 that joint ventures were allowed to participate provided however that the SPV was created prior to the submission of the application. The entire process in the petitioners' case was much later. Moreover only 49% of the share could have been transferred. KJSL, however, transferred its entire 51% share and not 49% of its share. The decision making process did not consider the effect of permitting the transfer of more than 49% of the share by KJSL. If only 49% share was allowed to be transferred, KJSL would have continued to be liable as a partner of the JV jointly and severally with the petitioners and the new partners.

(71) The agreement is also contrary to the provisions of law. It is contrary to Section 15 of the Act read with Rule 9 of the 2012 Rules which mandate leases of 10 years to 20 years to be granted by the Government following a competitive bid process. The provisions have been held to be mandatory by the judgment of this Court dated 04.03.2015 in the petitioners' case, paragraphs 21 and 22 whereof we quoted earlier. The acceptance by this Court of the submissions on behalf of the petitioners in that case are a complete answer against the validity of the agreement dated 05.08.2015 between the petitioners and the official respondents.

(72) Clause 36 at first blush appears to be inapplicable as no lease was executed between the JV and the official respondents. However, the term lease in clause 36 would apply even to cases where the right to obtain the lease had crystallized. A view to the contrary would enable a bidder to transfer its share at will prior to the lease thereby defeating the purpose of Clause 36.

(73) The entire decision making process indicates that the agreement of 05.08.2015 was but a continuation and a part of the original auction process. That being so and the process having been flawed for several reasons, we are unable to enforce the contract in petitioners' favour on the ground that the State was in any event entitled to independently grant a contract of this nature to the petitioners without affording all other parties interested an opportunity of participating in the commercial venture of the State.

(74) If the agreement dated 05.08.2015 is considered to be an independent transaction it makes matters worse for the respondents for that would be contrary to Rules 9, 16(1) (2) (8) (9) and 50 as well.

(75) The contention that clause 36 is not an essential term as it permits the transfer after the period of five years is not well founded. Merely because a transfer of lease is permitted after a period of five years it does not indicate that the clause does not contain an essential term of the contract. The clause is obviously inter-alia to ensure that the only persons serious about executing the work bid for it. In other words one of the purposes of this condition is to ensure that the parties do not submit bids for speculating/ trading in licences/leases.

(76) What the petitioners seek in effect is a decree of specific performance. The least that must be said in favour of the respondents-official and private, is that a relief of this nature ought to be sought not in a writ petition but in a properly constituted action such as a suit or

before an arbitral Tribunal if there be an arbitration agreement. There are several other issues which would also arise in such cases. Even assuming that the petitioners have made out a case, it is not necessary that they would be granted a decree of specific performance of the contract. They may well be granted only the alternate relief of damages in lieu of specific performance. This of course is assuming that they established their case. To allow this writ petition would ultimately amount to precluding the respondents from raising several other contentions which they would otherwise be entitled to in a suit or any other appropriate proceedings.

(77) Mr. Bhardwaj's reliance upon the judgment of the Supreme Court in ***Rishi Kiran Logistics Pvt. Ltd.*** versus ***Board of trustees of Kandla Port Trust and others***[1] is well founded. The Supreme Court held:-

> **"**37**.** The questions before the Supreme Court in *Kisan Sahkari Chini Mills Ltd. case* [(2008) 12 SCC 500] were: (*i*) Whether the High Court was right in concluding/assuming that there was a valid contract? and (*ii*) Whether the High Court was justified in quashing the order of the Secretary (Sugar)? This Court answered the aforesaid questions in the negative and set aside the judgment of the High Court holding that: (SCC pp. 501-02)
>
> "Ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. He would be entitled to the relief of specific performance, if the contract was capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a writ petition under Article 226 of the Constitution, is not available to seek damages for breach of contract or specific performance of contract. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked."
>
> It is clear that the aforesaid case is closest to the facts of the present case.
>
> 38**.** It thus stands crystallized that by way of writ petition

[1] 2015(13) SCC 233

> under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element."

(78) The case before us does not warrant a deviation from the normal principle.

(79) There is no public law principle or issue that warrants the grant of specific performance in this case. The principle of public law in fact warrants the Writ Court to relegate the petitioners to any alternate remedy such as a civil suit. As we mentioned earlier, specific performance is a discretionary relief. It is possible that for the reasons already stated the Court may not grant specific performance even if the petitioners establish a breach on the part of the official respondents. In that event it is hardly possible to compute damages in this petition. Moreover, the grant of specific performance would be contrary to the Act and the Rules.

(80) Dr.Singhvi's reliance upon a judgment of the Supreme Court in ***Manuelsons Hotels Private Limited*** versus ***State of Kerala and others***[2] is not well founded. The facts of that case are entirely different from the facts of the case before us. Moreover, this is not a case merely between the petitioners and the official respondents. The private respondents are also involved. They have specifically challenged the permission to transfer the lease and agreement dated 05.08.2015. Their challenge cannot be overlooked on the ground of principle of promissory estoppel invoked by the petitioners against the official respondents. The correctness of the permission to transfer and the agreement are themselves in question including on the ground that the same were contrary to law and affected the rights of third parties such as respondent No.5 and parties similarly situated.

(81) Mr. Sinhal's justifiably relied upon the following observations of the judgment of the Supreme Court in ***Shri Sidhbali Steels Ltd. and others*** versus ***State of Uttar Pradesh and others***[3]***:-***

> **"33.** Normally, the doctrine of promissory estoppel is being applied against the Government and defence based on executive necessity would not be accepted by the court.

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[2] 2016(6) SCC 766

[3] 2011(3)SCC 193

> However, if it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the Government. Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy in public interest. However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law.
>
> **41.** By virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It would be too narrow a view to accept that chargeability once fixed cannot be altered. Since the charging provision in the Electricity (Supply) Act, 1948 is subject to the State Government's power to issue notification under Section 49 of the Act granting rebate, the State Government, in view of Section 21 of the General Clauses Act, can always withdraw, rescind, add to or modify an exemption notification. No industry can claim as of right that the Government should exercise its power under Section 49 and offer rebate and it is for the Government to decide whether the conditions are such that rebate should be granted or not."

(82) The facts in this case are stronger to refuse the invocation of the principle of promissory estoppel in the petitioners' favour. This is especially as the impugned agreement was contrary to the Act and the Rules, the DNIT and the general principles of law.

(83) Dr. Singhvi's contention that the private respondents have

no locus-standi as they were not the bidders is not well founded. Every pre-qualified party irrespective of whether it participated in the earlier auction or not, would be entitled to challenge the agreement dated 05.08.2015. If the challenge is upheld it would entitle the party to participate in the fresh auction, if held. If the pre-qualification norms are reduced as they have been in the petitioners case, there would be even more parties who would be entitled thereby to participate in the fresh process. By entering into the agreement dated 05.08.2015 the official respondents have precluded several other parties similarly situated as the petitioners from participating in the commercial ventures of the State of Haryana.

(84) In ***Central Coalfields Limited and another*** versus ***SLL-SML (Joint Venture Consortium) and others***[4]**,** the Supreme Court reiterated the ratio of the judgment of the Supreme Court in ***Ramana Dayaram Shetty*** versus ***International Airport Authority of India***[5]**,** that if others were aware that non-fulfillment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender but were prevented from doing so due to the eligibility condition which was relaxed in the case of respondent No.4 therein. This resulted in unequal treatment in favour of respondent No.4 therein which was held to be impermissible. The Supreme Court held:-

> **"35.** It was further held that if others (such as the appellant in *Ramana Dayaram Shetty case* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489]) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 — treatment that was constitutionally impermissible. Expounding on this, it was held: (SCC p. 504, para 10)
>
> "10. … 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

[4] 2016(8) SCC 622
[5] (1979) 3 SCC 489

> interests 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* (emphasis supplied)"

(85) The public law principle or issue infact justifies the cancellation of the contract for the permission to transfer the lease and the agreement dated 05.08.2015 in favour of the respondents for they precluded the other bidders similarly situated as the petitioners from participating in the commercial venture of the official respondents. Had the terms of eligibility not been insisted upon others with qualifications similar to those of the petitioners would have been entitled to bid for the mines.

(86) We referred to the order and judgment dated 14.09.2016 which disposed of the PIL viz. Civil Writ Petition No.9419 of 2016 filed by the private respondents. The private respondents had challenged the order dated 17.06.2015 permitting the transfer of the lease in favour of the petitioners herein and had also sought an order directing the official respondents to invite fresh bids for the allotment of the said mine. That writ petition was not considered on merits in view of the show cause notice dated 09.08.2016 issued to the petitioners herein. The judgment observed that this notice was in respect of the same rights which were the subject matter of the Writ Petition. The Civil Writ Petition No.16735 of 2016 filed by the petitioners herein to challenge the show cause notice dated 09.08.2016 was disposed of by a judgment dated 27.08.2016 which noted the statement on behalf of the official respondents that the show cause notice only reflected a prima-facie view and that a final decision would be taken after the authority considered the response of the petitioners herein and that Civil Writ Petition No.16735 of 2016 was disposed of with certain directions including that the official respondents would take a decision in respect of the show cause notice after hearing the petitioners herein as well as the private respondents herein. The order recorded the statement on behalf of the official respondents that the parties had been heard and that the decision would be communicated to the parties.

(87) In view of the same the order dated 14.09.2016 disposed of Civil Writ Petition No.9419 of 2016 without considering the merits of

the private respondents' contentions. Thus the private respondents' contentions were kept open including at the hearing of the show cause notice and all the parties were granted liberty to file a fresh petition not only in respect of the order to be passed pursuant to the show cause notice but also in respect of other reliefs claimed in Civil Writ Petition No.9419 of 2016 filed by the private respondents. This Court, therefore, has throughout recognized the right of the private respondents herein to challenge the transfer of the lease in favour of the private respondents and the agreement dated 05.08.2015. Had the action of the official respondents impugned in the present writ petition not being taken, it would have been necessary for this Court to consider Civil Writ Petition No.9419 of 2016 filed by the private respondents on merits. This right cannot be extinguished on account of the impugned action. The private respondents cannot be placed in a worse position even after having succeeded and having the agreement between the official respondents and the petitioners rescinded/cancelled.

(88) The submission that the impugned action is based only on a change of opinion is in the facts of this case irrelevant even if well founded. As we mentioned in the summary this is not a matter merely between the petitioners and the official respondents which can be decided only considering whether the official respondents having entered into the agreement were entitled to cancel it. The rights and contentions of respondent No.5 – the private respondent also fall for consideration.

(89) The contention that the petition ought to be allowed and the respondents' objections ought to be rejected on account of delay is also rejected. The entire process between the withdrawal of KJSL and the agreement dated 05.08.2015 was not in public domain. It was purely a bipartite arrangement between the State and a private party namely the petitioners. The process excluded all other parties. This was an agreement for 20 years. Allowing the petition would amount to granting specific performance of the agreement dated 05.08.2015. There was in fact no delay. The private respondents made enquiries under the Right to Information Act, 2005 latest by 12.01.2016. Although this application is not produced, it is referred to in a letter dated 10.03.2016 in reply to the application. This letter is referred to in the said Civil Writ Petition No. 9419 of 2016 filed by the private respondents. We have already set out paragraph-9 of the reply in which the file relating to the lease was stated to have been submitted to the State Government and was not "presently" available in the office of the

Mining Department. It was stated that the copies of the required documents could be received only on receipt of the concerned file. It has not been produced to date. The private respondents filed Civil Writ Petition No. 9419 of 2016 challenging the transfer of the lease to the petitioners. The private respondents' contention can hardly be rejected on the ground of delay. The delay, if any, was only of a few months. That cannot justify a Court in conferring a benefit of this magnitude for a period of 20 years although the petitioners are admittedly and demonstrably unqualified to carry out the work and the agreement is contrary to the Acts and the Rules and the terms of the DNIT.

(90) Dr. Singhvi, also submitted that it would be financially hazardous for the State Government to cancel the contract. The petitioners would claim damages on account of the termination of the contract. The State Government may not realize the same price in a fresh auction. During the period between the cessation of mining by the petitioners and the commencement of mining pursuant to the fresh auction, the State Government would be deprived of royalty etc.

(91) It is for the State Government to assess the financial implications of its decision. It is the best judge of its business/ commercial interests. We do not propose advising the State Government regarding the same. The State Government takes its decisions at its risk. We refrain from speculating about the outcome of the action taken by the State Government in this regard.

(92) The contention that if a fresh auction is held respondent No.5 would be ineligible to participate is not relevant at this stage for the deficiency can always be taken care of by payment of the demand even without prejudice if necessary. The undertaking of respondent No.5 to do so without prejudice to his rights is accepted.

(93) The matter may turn out entirely differently for a variety of reasons and on account of various factors. If indeed the private respondents' allegations of *mala fides* are established in any proceedings, there would be no question of the petitioners being entitled to compensation or damages. If for instance fraud is established in the process leading to the agreement dated 05.08.2015 the fact that the joint venture was absolved of its earlier commitments may not even come to the petitioners' assistance. We hasten to add that these observations are only made to indicate that the entire matter is open between the State Government and the petitioner and therefore, at this stage, it is not even possible for the Court to order refund of the amounts deposited by the joint venture.

(94) Dr. Singhvi submitted that the Government must be allowed some play in the joints. His argument is this. He contended that there is a difference between the pre-contractual stage and post- contractual stage. Any illegality or a modification of the essential terms and conditions cannot be permitted at a pre-contractual stage. However, once the contract is entered into, the Government must be allowed a play in the joints by modifying the contract so long as the same is done bona fide and for the proper execution of the work. In the present case the LoI had already been issued in favour of the JV. The JV was admittedly eligible. It is only thereafter that the terms of eligibility were modified by relaxing the terms in favour of the petitioners.

(95) This argument, if accepted, would entitle the State and its instrumentalities to act in a most arbitrary manner contrary to every principle that governs such matters. The terms of the public auction and a notice inviting tenders could be flouted by the simple expedient of issuing an LoI on the basis of the terms and conditions of the auction or the NIT and thereafter entering into a contract on totally different criteria, terms and conditions. Once the contract is entered into, the parties would undoubtedly be entitled to agree to some modifications so long as they are bona fide and for the purpose of the proper implementation of the contract which was entered into legally which is not the case before us. For instance there may be several justifiable reasons for extending the date for completion of the contract. There may be a reduction in the scope of the work or an enhancement thereof in accordance with the terms and conditions of the contract/NIT. The test would be whether the modification was necessitated by the exigencies of the situation or whether it was only to enable a party to circumvent the terms and conditions of the NIT or the public auction. In the present case the LoI was issued. The LoI contemplated and indeed required the execution of the agreement in accordance with the provisions of the law and the terms and conditions of the notice. That admittedly was not the case as the agreement dated 05.08.2015 was entered into with the party that was not qualified.

(96) The question of the official respondents not being entitled to revoke the permission to transfer the lease and to terminate the agreement dated 05.08.2015 on fresh grounds i.e. grounds other than those mentioned in the show cause notice does not arise in the present case. As stated earlier, the private respondents had challenged the permission to transfer and the agreement by filing Writ Petition No. 9419 of 2016. Moreover, the petitioners had filed Writ Petition

No.16735 of 2016 to challenge the show cause notice. These writ petitions were disposed of by the orders and judgments of this Court in which the official respondents were directed to pass an order after considering all the contentions of all the parties including the private respondents. Thus the official respondents were in any event bound to consider the contentions raised on behalf of the private respondents. The private respondents' petition was not heard on merits in view of the show cause notice and hearing to be afforded to the private respondents before taking a decision thereon. If we accept Dr. Singhvi's submission, it would be necessary to revive the writ petition No.9419 of 2016 filed by the private respondents which would serve no useful purpose and would only delay the matter. We are, therefore, not inclined to exercise our extra ordinary writ jurisdiction on this ground even if it were well founded.

(97) In the circumstances the petition is disposed of by the following order :

(98) The reliefs as claimed in the petition are rejected.

(99) Dr. Singhvi submitted in the alternative that the indemnities and guarantees furnished by the petitioners only for the purpose of and in connection with the agreement dated 05.08.2015 should stand discharged and that the petitioner is at liberty to file appropriate proceedings for damages and compensation. All the rights and contentions of the parties including in this regard are kept open.

(100) Mr. Sinhal's statement that after deducting the amounts the official respondents consider due to them by the petitioners, the official respondents will refund the balance amount, if any, from the amount of Rs. 28.75 crores deposited by the JV to the petitioners and not to KJSL is accepted. This it is clarified is the respondents' statement and not a direction of the Court as KJSL is not before the Court. The fresh tender process shall be completed by 31st August, 2017 and the official respondents shall convey the decision in this regard to the petitioners within four weeks thereafter. Liberty to the parties to apply.

(101) In view of the interim order dated 06.10.2016, the equities are adjusted by directing the petitioners to pay the difference between the higher bid, if any, submitted by the party to whom the mining rights are granted and Rs.115 crores for the period 06.10.2016 till possession of the site is handed over by the petitioners together with interest thereon at the rate of 15% per annum from the date of the

interim order i.e. 06.10.2016 till payment and/or realization. The rights of the official respondents to claim amounts for the earlier period are kept open. The amounts deposited by the JV may be adjusted towards the recovery of this amount. The parties are at liberty to adopt proceedings regarding the balance, if any.

(102) If the bid is lower than Rs.115 crores, the petitioner shall not be entitled to the difference between Rs.115 crores and the lower bid as the petitioners had in any event agreed to do the work at the rate of Rs.115 crores.

(103) Mr. Sinhal's statement that the reserve bid in the fresh auction process shall not be less than Rs.115 crores is accepted.

(104) Mr. Bhardwaj's undertaking on behalf of the private respondent i.e. respondent No.5 that respondent No.5 will place a minimum bid of Rs.150 crores, if fresh tenders are invited or a fresh auction is held, is accepted. The amount of Rs.15 crores sought to be tendered on behalf of respondent No.5 on an earlier occasion shall be deposited with the official respondents by 31.07.2017. In the event of a breach of the undertaking by respondent No.5 to bid a minimum of Rs.150 crores and to implement the contract, if any, this amount shall stand forfeited without further orders in addition to any other remedy that the official respondents may have against respondent No.5 including for contempt of Court for the breach of this undertaking. This is subject to the condition of eligibility in the fresh process not being more onerous to respondent No.5. The undertaking on behalf of respondent No.5 to take care of his ineligibility on account of any payment required by the official respondents without prejudice to his rights to ensure his participation in the fresh auction or tender is accepted.

(105) The interim order will continue upto and including 31st July, 2017 to enable the petitioners to challenge this judgment.

Payel Mehta