CASE NO.:
Appeal (civil) 2227 of 2008

PETITIONER:
S.S. & Company

RESPONDENT:
Orissa Mining Corporation Limited

DATE OF JUDGMENT: 28/03/2008

BENCH:
H.K.Sema & Aftab Alam

JUDGMENT:
J U D G M E N T
[arising out of SLP (C) NO.12003/2007]
WITH

CIVIL APPEAL NO. 2228 OF 2008
[@ SLP (C) NO.12008/2007]

M/s.Faridabad Gurgaon Minerals ...Appellant

Versus

Orissa Mining Corporation Limited ...Respondent

REPORTABLE

AFTAB ALAM, J.

Leave granted in both the matters.

These two appeals, taken together for the sake of convenience, question the validity of two different clauses in the eligibility criteria in a Notice Inviting Tenders (NIT), issued by the respondent-Orissa Mining Corporation Limited (hereinafter referred to as \021the Corporation\022). The appellants in the two appeals make a grievance that the two clauses were designed to exclude them from consideration. They first went to the High Court of Orissa challenging the validity of the clauses and the rejection of their respective tenders on that basis. M/s. S.S. & Company challenged the validity of Clause 8(i) of the NIT in W.P.(C) No.7001/2007, (giving rise to SLP (C) No.12003/2007). M/s.Faridabad Gurgaon Minerals challenged Clause 8(vii) of the NIT in W.P. (C) No.7002/2007, (giving rise to SLP (C) No.12008/2007). A Division Bench of the High Court by separate judgments, dated July 12, 2007 dismissed both the writ petitions. The judgments of the High Court are brought in appeal before this Court.

The appellants in each of the two appeals are proprietorship firms owned and controlled by a father and son duo and the controversy in the two cases relates to the grant of contract for raising, calibration and transport of iron ores at Daitari Iron Ore Mines of the respondent-Corporation.

The Corporation issued NIT No.16 on November 11, 2004 for grant of contract for raising, calibration and transport of iron ore at Daitari mines for a three year period. Here, it may be noted that in NIT 16 sub-clauses (i) and (vi) of Clause 8 relating to eligibility criteria were

as follows:-
\0238. The eligibility criteria of the tenderers shall be as follows:-

Only such tenderers who fulfil the following eligibility criteria shall participate in the tender:-

(i) The agency must have successfully executed similar work (as mentioned in NIT/raising work(s) of ore/minerals) for a minimum amount of 30% in case of a single work or 50% in case of two works of the value of work shown in column No.5 of NIT in any one financial year during the last three years including 2003-04.

(vi) Any agency who is already executing similar and identical work in any mine will not be allowed to take up the second work in the same mine and such agency will not be allowed to participate in the tender. However, if the work of the said agency is due to end within six months of the date of issue of this NIT and there is no possibility that the work tendered for and the existing work in hand will operate concurrently, this restriction will not be applicable to the concerned agency.\024

(The above quoted clauses in their amended form are now the subject matter of controversy).

In response to NIT 16, dated November 11, 2004, M/s.Faridabad Gurgaon Minerals (FGM) was the successful bidder and by letter, dated January 29, 2005 issued by the Corporation it was awarded the work \021initially for a period of one year for a quantity of 12.00 lakh MT.\022 on rates as indicated in that letter. In that letter, it was further stipulated that the awardee might be considered for extension for second and third year working subject to satisfactory performance in the preceding year(s) based on the terms and conditions mentioned in the tender schedule. The first year period of the contract commenced from February 25, 2005 and came to end on February 24, 2006. The parties are also in agreement that the contract was extended for the second year, i.e., upto February 24, 2007 but as regards the third year, the two sides are in serious dispute. The Corporation takes the stand that the appellant was given work for the third year as well and the work period would come to end on February 24, 2008. The appellant FGM, however, maintains that its work in Daitari Mines under NIT 16 came to end on June 30, 2007.

Even while the contract awarded to FGM under NIT 16 was subsisting, the Corporation issued NIT No.65 on July 7, 2006 for grant of another similar contract for raising, calibration and transport of iron

ores from Daitari Iron Ore Mines. FGM was not eligible to take part in the tender process in view of the bar of clause 8(vi) but M/s.S.S. & Company (SSC), the other appellant before the court gave its tender for the work under NIT 65. For some reasons, however, its tender was not accepted and it took the matter before the Orissa High Court. During the pendency of the writ petition, the Corporation cancelled NIT 65 and issued NIT 75, dated November 18, 2006 for the same work. This rendered the writ petition filed by SSC infructuous and it was withdrawn. NIT 75 had a similar fate. The tender made by SSC was not accepted. The dispute was taken to the Orissa High Court but the Corporation cancelled NIT 75 thus rendering the writ petition infructuous. Here, it may be noted that both NITs 65 & 75 had clauses 8(i) and 8 (vi) exactly in the same terms as in the earlier NIT 16, dated November 11, 2004 (which have been reproduced above).

After cancellation of NIT 75, the Corporation issued NIT 85, dated May 25, 2007 which is the subject-matter of the controversy in the two cases. NIT 85 had the two clauses 8 (i) and 8 (vii) in slightly amended forms as follows:-

\0238.The eligibility criteria of the tenderers shall be as follows:

Only such tenderers who fulfil the following eligibility criteria shall participate in the tender:-

(i) The agency must have successfully executed similar work (as mentioned in NIT/raising work(s) of ore/minerals excluding Minor Mineral) for a minimum amount of 30% in case of a single work or 50% in case of two works of the value of work shown in column No.5 of Sl. No.2 of NIT in any one financial year during the last three years including 2006-07.

(vii) The agency who is already executing the work in a mine of OMC Ltd. will not be allowed to take up the second work in the same mine and such Agency will not be allowed to participate in the tender.\024

It is thus to be seen that in sub-clause (i) the words \021excluding Minor Mineral\022 was added to the portion in parenthesis, making it explicitly clear that raising of Minor Mineral would not be acceptable as experience in \021similar work\022. Likewise, in sub-clause (vii), the overlapping margin of six months was done away with and as a result the tenderer was required not to have any pre-existing work in Daitari Mines on the last date for submission of tender (11.06.2007).

SSC was hit by sub-clause (i) and FGM that was working in Daitari Mines on the basis of the previous contract, by sub-clause (vii). Both the appellants fancied that the two sub-clauses were specially tailored with the sole intent and purpose to exclude them from consideration. They, accordingly, went to the High Court making loud protests and alleging mala fide.

FGM filed Writ Petition (C) No.7002 of 2007,

before the High Court stating that the overlapping margin of six months for a pre-existing contract to work in the same mine was dropped from NIT 85 of 2007 with the mala fide intent to exclude it from consideration. It was submitted that on May 25, 2007, the date on which the notice was issued and on June 11, 2007, the last date for submission of tenders in response to the notice, the appellant alone was working in Daitari Mines and the sub-clause was only aimed to exclude it from participating in the tender process. It was also pointed out that previously three successive notices allowed the margin of six months and there was no reason to do away with the margin period. It was further contended that the amendment in the sub-clause, disallowing anyone with a pre-existing contract in the same mine to participate in the tender process was arbitrary as it would serve no purposes, much less any reasonable one.

The High Court by a well reasoned judgment and order negatived all contentions raised by the appellant and dismissed the writ petition. It held and found that the appellant completely failed to establish any mala fides and in paragraph 20 of the judgment observed as follows :
\023Insofar as question of malice or bias is concerned, no case is made out in the writ petition. Though some vague allegations are scattered in the writ petition in different paragraphs, there is no serious pleading of malice or mala fide or bias against the authorities of the Corporation.\024

On merits, the High Court held that there was a perfectly good reason for doing away with the six months\022 margin for a pre-existing contract in the same mine.

The High Court also took note of the case of the respondent-Corporation that by communication, dated February 21, 2007, the period of the appellant\022s contract was extended upto February 24, 2008. According to the Corporation, the letter made it clear that the contract was extended for the third year too and the appellant was awarded the work of raising 20.00 lakh metric tons of Ore from February 25, 2007 to February 24, 2008 on the terms and conditions as provided in the agreement. Since the appellant would be working the mines till February 24, 2008, it could not take part in the tender process even if the six months margin was still there. The High Court accepted the case of the respondent-Corporation in this regard and cited it as one more reason for taking the view that there was no substance in the appellant\022s grievances.

Mr.Mehta, learned counsel for the appellant FGM, submitted that the letter dated February 21, 2007 (referred to in the High Court judgment) could not be taken as extension of the contract for the third year under NIT 16.

The letter, dated February 21, 2007 was written in response to the appellant\022s request for renewal/extension of the contract for the third year and it conveyed the Corporation\022s decision to award the work to the appellant for the third year

extension with effect from February 25, 2007 to February 24, 2008 under the same terms and conditions of the agreement. This letter was followed by another letter, dated May 25, 2007 (which according to Mr.Mehta was overlooked by the High Court). By this letter the Corporation awarded the work to the apppellant \021though partly, to be precise from February 25, 2007 to June 30, 2007\022 indicating the target (of extraction) to be achieved and the work value as per the rate under the tender schedule. The letter was described as the \021letter of intent\022 and it asked the appellant to make certain deposits by June 30, 2007 for drawing up the agreement for the third year period of the contract. In paragraph 7 of the letter it was clearly stipulated that all other terms and conditions indicated in the tender schedule would remain unchanged and would apply mutatis mutandis.

Mr.Mehta submitted that this letter was simply a work order and neither this letter nor the earlier one of February 21, 2007 could mean the extension of the contract under NIT 16 for the third year. Learned counsel referred to Annexures P-8 and P-9 which are copies of agreement No.4/2005-2006 and agreement No.4/2006-2007 for the periods February 25, 2005 to February 24, 2006 and February 25, 2006 to February 24, 2007 respectively. Learned counsel submitted that unlike the two previous years no formal agreement was drawn up for the third year of the contract period from February 25, 2007 to February 24, 2008 and, therefore, the High Court was clearly in error in accepting the claim of the Corporation that the appellant\022s contract under NIT 16 was extended for the third year period and it would be subsisting till February 24, 2008.

In our view, the submission is quite mis-conceived. The materials on record plainly indicate that the appellant was trying to find ways to get out of the contract for the third year period because the rates under the tender schedule were no longer profitable to it. We were shown the Corporation\022s letter, dated June 29, 2007 by which it was pointed out to the appellant that according to the terms of the tender the contract was for a period of three years and it would expire on February 24, 2008. It was further stated in the letter that the appellant had badly defaulted on the production target for the first quarter of 2007-2008 and in terms of clause 1.8 of the tender schedule it was asked to clarify its final stand and to indicate its production plan for the remaining tender period i.e. till February 24, 2008. To the Corporation\022s letter, the appellant gave a highly evasive reply by its letter of July 4, 2007. Alluding to Writ Petition (C) No.7002/2007 it stated that the matter was sub-judice before the High Court and on that plea it declined to enter into any correspondence on the issue raised by the Corporation. It is to be noted here that the Writ Petition arose from a controversy relating to the eligibility clause in NIT 85/2007 and it had nothing to do with the production targets under NIT 16/2004.

Be that as it may, suffice it to note that on the appellant\022s request for renewal/extension of the

contract the Corporation had taken the decision to award the work in its favour for the third year extension with effect from February 25, 2007 to February 24, 2008 (vide letter dated February 21, 2007). In pursuance of the decision the Corporation further issued the letter dated May 25, 2007 asking the appellant to make the required deposits by June 30, 2007 for drawing up the agreement for the third year under the contract. It is thus manifest that, according to the Corporation, the appellant-company had the right to work the mine till February 24, 2008 and on its own showing it was actually engaged in working the mine till June 30, 2007.

Here, it is to be noted that sub-clause (vii) of clause 8 is aimed at preventing the same party from executing two different works in the same mine at the same time. The clause does not even refer to a formal contract and if someone should be working the mine, may be on the basis of a work order issued by the Corporation, that in itself might be sufficient, in certain circumstances to attract clause 8(vii), even in the absence of a formally drawn up contract. Seen thus, the whole issue as to whether or not a formal contract for the third year of the tender period was drawn up in favour of the appellant would appear to be of no relevance. The fact of the matter is that the appellant on its own showing was working the mine upto June 30, 2007. Further, in view of the decision of the Corporation it had the right to be there upto February 24, 2008. Therefore, the High Court was not incorrect in observing that the appellant would have been barred from taking part in the tender process even if the six months margin was retained in the eligibility clause.

Furthermore, the question whether the appellant had the right to stay in the mine till February 24, 2008 or its work there came to end on June 30, 2007 has relevance only on the issue of mala fide. Otherwise, it is always open to the Corporation to issue a tender notice, at any time, according to its needs, and to introduce an eligibility clause in the tender notice or to delete from it any pre-existing one as it might best serve its purpose. Hence, the controversy with regard to the outer limit of the appellant\022s presence in the mine on the basis of the earlier contract under NIT 16 has no relevance sans the allegation of mala fide.

Now, we will proceed to examine the case of the appellant in this regard. On behalf of the appellant, it is alleged that the overlapping margin of six months in clause 8(vii) was dropped with the sole intent to keep it out of the tender process. In support of the allegation three arguments are advanced on its behalf. One is that on May 25, 2007, (when NIT 85 was issued) and on June 11, 2007 (the last date for submission of tender) the appellant alone was working the mine. The appellant\022s work in the mine, according to its assertion would have come to end on June 30, 2007. The eligibility clause was, therefore, so tailored as to render it disqualified by 19 days. The second argument is that the change in clause 8(vii) was made for the first time. In the earlier tender

notices the same eligibility clause allowed a margin period of six months but it was done away with in order to exclude the appellant who had only 19 days presence left in the mine. The third argument advanced on behalf of the appellant is that the deletion of the six months margin is otherwise completely arbitrary and it serves no reasonable purpose.

The first two circumstances are woefully inadequate to bring home the grave charge of mala fide and the High Court was quite right in holding that the appellant completely failed to establish its case in that regard. It is axiomatic that the Corporation is the best judge of its interests and needs and it is always open to it to suitably modify or change the eligibility criteria so as to best serve its purposes. Whenever a change is introduced in the eligibility criteria either by introducing some new conditions or restricting or altogether doing away with certain previous concessions it might hurt the interests of someone or the other but for that reason the change(s) made in the eligibility criteria cannot be labelled as mala fide. The first two arguments advanced on behalf of the appellant thus completely fail to show any mala fide and we now proceed to examine the third argument advanced on its behalf.

As noted above, on behalf of the appellant it is contended that dropping away of the six months margin does not serve any purpose whatsoever but it only ensured the appellant\022s exclusion.

On the other hand, the Corporation gives a very reasonable and valid explanation for the change made in the eligibility clause. In paragraph 4 of counter-affidavit filed by the Corporation it is stated as follows :

\023That the above condition was included in the Tender Notice because if an agency which is working at a particular rate in a particular mine is allowed to operate at a different and higher rate under a different Contract but in the same mine there is every possibility of the said agency claiming payment in respect of the work done under the earlier contract at rates stipulated under the new Contract. In other words, the same agency will operate in the same mine with two different rates for similar work i.e. Raising, Calibration and Transportation of Iron Ore and fines and there is every possibility of mixing up the Ores which would be raised and transported at two different rates.\024

We find that the explanation given by the Corporation is perfectly reasonable and if any illustration is needed it is to be found in the facts of the case in hand itself.

The appellant was given the three years\022 contract under NIT 16 at the following rates :

\023ACCEPTED RATE

S. No.	Rate per MT in Rs.

Description of work	1st Year	2nd Year	3rd Year
1. Drilling, blasting, excavation, transport of ROM to Dry Screening Plant/Crushing & Screening Plant, crushing and screening of ROM to 10-30/10-40mm CLO and 10mm fines.	67.01	70.00	75.00
2. Transport of 10-30/10-40mm CLO and fines from Dry Screening Plant/Crushing and Screening Plant to			
a) Baliparbat Stockyard	30.80	35.20	
b) Daitari Railway siding	31.80	36.20	
	33.46	39.18	

There was no escalation clause in the contract and from the record it is manifest that the rates on which the appellant\022s tender was accepted were no longer profitable for it, at least in third year, and the appellant was not at all interested in carrying on the work for the third year on the rates given in the tender schedule. In paragraph 2 of the Corporation\022s counter-affidavit it is stated that the appellant had completely failed to meet the production target and it was badly in default. The relevant extract from paragraph 2 of the affidavit is as follows :

\023However, the respondent (sic) could not achieve the target under said contract as indicated hereunder :

Period	Target Quantity	Achieved Quantity (Quantity in MT)
1st Year	12.00 lakh	03.75 lakh
2nd Year	20.00 lakh	13.05 lakh
3rd Year	09.22 lakh (Upto 19th July, 07)	01.16 lakh

Since 19th July, 2007, the Petitioner has virtually stopped the work on the ground that the rates are low even though there is no escalation clause in the Contract and the Petitioner is bound to complete the contract at the contracted rates. The non-achievement of the target by the Petitioner has resulted in a loss in terms of sales revenue to the tune of Rs.115.90 crore.\024

In its rejoinder affidavit the appellant has sought to give explanation for not being able to meet the targets during the first and the second year of the contract period. It has not given any explanation for the third year and has gone on to compare its performance with another contender M/s.Arun Udyog. Any comparison with M/s.Arun Udyog is besides the issue. What is relevant here is that the appellant was hugely in default and yet it was insisting on taking part in NIT No.85/2007. In the aforesaid circumstances the consequences of the appellant getting the contract under NIT 85/2007 would have been two-fold : one, that it would operate the same mine at the same time under two different contracts with widely different rates and the other, that it would be charging much higher rates for extraction of ores that it was obliged to extract at much lower rates under the previous contract. The Corporation can hardly be faulted for protecting itself against entering into such a bargain with anyone.

Thus, on a careful consideration, we are fully satisfied that doing away with the six months margin in clause 8(vii) was not arbitrary or unreasonable, nor it had any mala fide intent.

For the reasons discussed above, we find no merit in the appellant\022s (FGM\022s) case.The High Court has taken a perfectly correct view of the matter and it warrants no interference by this Court.

M/s. S.S.& Company (SSC)

Mr. R.F. Nariman, learned senior counsel appearing for the SSC also began his submissions by alleging, that the amendment in clause 8(i) of NIT 85 by insertion of the words \023excluding minor minerals\024 was mala fide: its sole purpose was to exclude SSC and to unduly favour another bidder, namely, M/s. Arun Udyog Ltd. In support of the plea of mala fide Mr. Nariman advanced three arguments. Learned counsel stated that though being the lowest bidder in response to the earlier two NITs 65 and 75, SSC was not awarded the work because the concerned officials in the Corporation wanted to give it to Arun Udyog whose bids were much higher than the appellant. When the appellant took the matter arising from NITs 65 and 75 to the High Court, on each occasion the bid process was aborted in the middle and finally NIT

85 was issued with the offending amendment. He next submitted that the amendment made in the clause was a one time exclusionary measure: it was not there in the earlier NITs and it is unlikely to find place in the future NITs. He also submitted that the impugned amendment in clause 8(i) of NIT 85 was made at the instance of the Managing Director and without the prior approval of the Corporation\022s Board of Directors.

The Corporation strongly denied that the object of the amendment in clause 8(i) of the NIT was to disqualify the appellant and thereby help Arun Udyog in securing the contract. In the counter affidavit filed in the High Court on its behalf it was pointed out that the appellant\022s technical bid in response to NIT75 was rejected because it had no past experience of similar work as required under the NIT. Thereafter the price bid of the technically qualified tenderer, i.e., M/s. Arun Udyog Ltd. was opened on 18.11.2006. But the Corporation decided to cancel NIT75 and to issue a fresh NIT so that it may have more competitive bids for consideration. M/s. Arun Udyog Ltd. was not given the work under NIT75 even though the appellant was out of reckoning.

However, the High Court, even without referring to the averments made in the Corporation\022s affidavit, declined to entertain the appellant\022s allegation that M/s. Arun Udyog Ltd. was being shown undue favour and the appellant was sought to be ousted to favour that company observing as follows:

\023In paragraph 17 of the writ petition there are some allegations that the opposite party wants to favour and award the tender to one M/s.Arun Udyog Limited. Since M/s.Arun Udyog Limited is not impleaded in this writ petition the allegations against it cannot be taken into consideration.\024

The second and the third allegations in support of the plea of mala fide were also rebutted by the Corporation by filing before the High Court an affidavit sworn by the Addl. General Manager (Mining). The High Court took note of the averments made in that affidavit in paragraph 8 of its judgment as follows:

\023Another affidavit dated 2.7.2007 was also filed by the Additional General Manager (Mining) of the Corporation. It has been stated therein that the Corporation in a year floats about 120 nos. of tenders to undertake mining and related activities in different minerals with widely varying conditions and the Board of Directors lays down the general guidelines for preparing the special terms and conditions for different types of words. In this connection, the broad guidelines of special terms and conditions were approved by the Board of Directors on 11.6.2007. It has been stated in the said affidavit that the same is general guidelines and incorporation of any other

condition appropriate for different work can be made. It has also been stated in the said affidavit that in future in the eligibility criteria the word \021excluding minor mineral\022 will be included while floating NIT if the nature of work demands for the same. It was also stated in the affidavit filed by the Managing Director that Tender Notice No.85 dated 25.5.2007 was issued after its clauses were recommended by the Managing Director of the Corporation vide notes dated 15.5.2007 were duly approved by the Chairman of OMC.\024

The High Court thus brushed aside the plea of mala fide raised by the appellant.

We are in complete agreement with the view taken by the High Court. As a matter of fact, for rejecting the allegation that the impugned amendment was introduced in clause 8(i) of the NIT at the instance of the Managing Director, without obtaining prior approval of the Board of Directors we need not even go to the rebuttal affidavit filed by the Addl. General Manager. The Board of Directors is the apex policy making body. It may lay down broad guidelines but it is impossible to conceive that all the NITs (over a hundred in number) issued by the Corporation for different purposes every year should come before it for consideration and approval of their respective clauses or any amendment proposed in any clause in any of the NITs. [We fail to see any good reason why the matter should not be finalized by the Managing Director or, depending upon the nature of the contract, even at some lower level]. The normal work of any organization or government department would be seriously hampered if every tendering party would claim the right to raise objection that one or the other clause in a NIT or any amendment introduced in any of its clauses did not have the prior sanction of the highest policy making body of the organization. In this case particularly there is no occasion to go into that question as there is neither any material to suggest, even remotely, that the Managing Director harboured any malice against the appellant nor is the Managing director made a party to this case in his personal capacity.

This brings us to consider Mr.Nariman\022s submissions on the substance of the amendment in the clause in question. Here we may observe, in fairness to the counsel, that though raising the allegation of mala fide with some vehemence in the beginning, as he proceeded with the submissions, he completely shifted the focus and argued mainly on the merits of the change introduced in clause 8 (i) of the NIT. He assailed it as wholly unreasonable, arbitrary and as serving no purpose. Mr. Nariman contended that the distinction between minor and major minerals was illusory and hence, the exclusion of any past experience of working any minor minerals was quite unreasonable and arbitrary and it had no relation to the object that was claimed to be achieved. Learned counsel elaborately referred to various provisions of the

Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1960. He referred to the long title, the preamble and section 2 of the Act and submitted that from the latter provisions of the Act it would be evident that the control of the Union over the regulation of mines and minerals was cent per cent. He then referred to section 3 clauses (a) and (e), sections 4 to 13, 14, 15 and sub-section 3 of Section 15 of the Act. He also referred to rule 17 of the Rules that provides that sand was not to be treated as minor mineral when used for certain specified purposes. In light of the provisions of the Act and the Rules, learned counsel submitted that the distinction between major and minor minerals did not depend upon hardness or softness or the technology of excavation. Illustrating the point learned counsel submitted that quartz and granite though, minor minerals being so notified under Section 3(e) of the Act, are very hard substances and on the other hand gypsum, talc and china clay, though major minerals are relatively much softer substances. Further referring to rule 17, learned counsel submitted that whether a substance was major mineral or minor mineral depended on its end user. In case, sand was used for any of the purposes specified in rule 17 of the Mineral Concessions Rules it would qualify as major mineral and in that event any past experience in excavating/lifting sand would not be hit by the impugned exclusionary amendment in clause 8(i) of the NIT.

Mr. Nariman also referred to the decision of this Court in D.K. Trivedi & Sons & Ors. Vs. State of Gujarat & Ors. [1996 Suppl. SCC 20 paras 29 and 30]. He submitted that in view of the statutory scheme of the Act as explained in the decision in D.K.Trivedi the distinction sought to be made between major and minor minerals and the exclusion of any past experience in the excavation of minor mineral was wholly untenable and unfounded.

Mr. Nariman also cited before us some decisions dealing with the scope of judicial review in matters of grant of contract by public bodies but we see no need to mention those decisions here.

Mr. P.P.Rao and Dr. R.Dhawan, senior advocates appearing for the Corporation in the two cases strongly refuted the submissions made on behalf of the appellant. Mr. Rao submitted that in light of the past experience the Corporation felt the need to introduce the amendment as a measure of quality control. He referred to the Corporation\022s affidavit filed before the High Court where it is stated:

\023Iron ore being too hard, drilling and blasting and strict quality control measures will be essential which cannot be compared with mining of \023minor minerals\024. To bring required expertise for undertaking efficient iron ore mining, the above change in eligibility criteria has been made.\024

Mr. Rao further submitted that the amendment was fully in accord with the guidelines laid down by the

Board of Directors and it was wrong to say that it was introduced at the instance of the Managing Director. In support of the submission he referred to several documents but it is not necessary to advert to them in view of the discussions made above.

Mr. Rao also submitted that the appellant\022s turn over for the past years was far below the requirement of the NIT and on that score also the appellant was not eligible to take part in the bid.

Dr. Dhawan submitted that as in the case of FGM, once the plea of mala fide is held to be unfounded, practically nothing remains of the appellant\022s challenge to the substance of the amendment. Learned counsel controverted the submission made on behalf of the appellant and contended that the distinction between minor and major minerals is a statutory distinction of far reaching significance. He submitted that both the Statute and case law recognized the differences between minor and major minerals. He referred to paragraph 22 of the decision in D.K. Trivedi where it was observed as follows:

\023\005\005..It is pertinent to note that the term \023minor minerals\024 came to be defined in a statute for the first time by clause (e) of Section 3 of the 1957 Act. In addition to the minor minerals mentioned in the said clause (e), boulder; shingle; chalcedony pebbles used for ball mill purposes only; limeshell, kankar and limestone used in kilns for manufacture of lime used as building material; murrum; brick-earth; Fuller\022s earth; bentonite; road metal; reh-matti; slate and shale when used as, building material; marble; stone used for making household utensils; quartzite and sandstone when used for purposes of building or for making road metal and household utensils; and saltpetre, have been declared to be minor minerals by various notifications issued by the Central Government\005..\024

He also referred to paragraph 33 of the decision where it was observed as follows:

\023\005\005..As seen from the definition of minor minerals given in clause (e) of Section 3, they are minerals which are mostly used in local areas and for local purposes while minerals other than minor minerals are those which are necessary for industrial development on a national scale and for the economy of the country. That is why matters relating to minor minerals have been left by Parliament to the State Governments while reserving matters relating to minerals other than minor minerals to the Central Government. Sections 13, 14 and 15 fall in the group of sections which is headed \023Rules for regulating the grant of prospecting licenses and mining leases\024. These three sections have to be read together\005\005.\024

(Emphasis added)

In light of the above, Dr. Dhawan submitted that there is a fundamental difference between minor and major minerals in regard to their use. Minor minerals like sand were extracted and consumed locally. On the other hand, major minerals were essential for the industrial development and the economic growth of the country. This vast difference in their purpose and use was naturally reflected in their relative importance and the nature of mining. Learned counsel submitted that the importance of iron ore could not be over-stated. The production and consumption of steel (the source of which is iron ore) is one of the indices of economic growth of a country. Iron ore, apart from being required for production of iron and steel at the national level, was also exported to international markets. Its extraction, therefore, apart from other things, requires to be carried out under far stricter quality control measures. It would be, therefore, wholly inappropriate to compare the mining of iron ore with the lifting and excavation of sand or other minor minerals.

We find substance in Dr. Dhawan\022s submission and we are unable to accept the arguments advanced on behalf of the appellant that any distinction between minor and major minerals was illusory and the amendment in the clause in question, based on the distinction between the two, was arbitrary and did not serve any purpose.

We have noted the submissions of the two sides and have also said that on the issue whether there are any differences between minor and major minerals we are inclined to accept the position taken by Dr. Dhawan. But we think that in the context of the case an elaborate analysis of the provisions of the MM (R&D) Act and Mineral Concession Rules to bring out the distinction between minor and major minerals is quite misconceived. We think it would be a mistake to see the NIT through the prism of the Act and the Rules. The NIT should not be viewed in the highly pedantic and legalistic manner as suggested by Mr. Nariman but it should be read and understood for what it is. It is a notice issued by the Corporation which is engaged in the business of mining. The Corporation owns a number of mines and wishes to give the work of raising, calibration and transport of iron ores from its mines on contract to an outside agency. It would be truism to say that the Corporation knows best the exact nature of its work and it is the best judge to say what is and what is not comparable to it. The expression \023excluding minor minerals\024 used in the eligibility must, therefore, be viewed as commonly understood in the mining/industrial and commercial world. What the clause intends to convey is that the extraction of iron ore requires certain degree of technical expertise and competence and in order to have the required degree of competence the bidder must have some past experience of similar kind of work, clarifying further that working of minor minerals would not be accepted as qualifying experience/sufficient expertise for the purpose of the NIT. The distinction between minor and major

minerals is well-known to the mining/industrial and commercial world and anyone engaged in the business would know what the eligibility clause in the NIT demands without referring to the statute and case law and any abstruse arguments based thereon.

There is yet another reason, weightier than the previous ones, for rejecting the appellant\022s challenge to the amendment made in the eligibility clause. A grievance against the amendment, either based on the plea of mala fide or on the substance of the amendment can only be raised by someone whose position gets adversely affected by the amendment. The basic question therefore is how far the appellant can be said to be affected by the amendment in actual terms. Clause 8(i) is simply the well known and the well established experience clause. In its unamended form as contained in NITs 65 and 75 it required the bidder to have some past experience of the work under contract. In other words, the bidder was required to have successfully executed in the past some work similar in nature to the one being the subject matter of the contract. In NIT 85, which is for raising, calibration and transport of iron ore the clause in question stipulated that the tenderer must have past experience of similar work and made it further clear that working of minor mineral would not be accepted as similar in nature to the work under the NIT. It is thus manifest that the insertion of the words \023exclude mine and mineral\024 does not bring about any alteration or change in the basic experience clause. It simply makes it clear and explicit that the working of any minor mineral is not the same as raising, calibration and transport of iron ore at Daitari Mines. It may be noted here that in the affidavit filed before the High Court on behalf of the Corporation it was stated as follows:

\023Some changes in the eligibility criteria of NIT No.85 in comparison to NIT No.75 have been approved. In clause 3(i) \023excluding minor minerals\024 has been added in the 2nd line of the clause after the word minerals. Iron ore being too hard, drilling and blasting and strict quality control measures will be essential which cannot be compared with mining of \023minor minerals\024. To bring required expertise for undertaking efficient iron ore mining, the above change in eligibility criteria has been made.\024

Let us now examine how far the petitioner SSC can feel aggrieved by what it describes as amendment in the clause in question. The appellant\022s own statement in regard to its experience is to be found at Annexure P-1 in which it gives description of five different kinds of work. The works at Sl.Nos.1 and 2 are described as follows:

\023Drilling, Blasting, Excavation, Loading and transportation of Sand and Lumps deploying HEMM from the leasehold area of Faridabad Yamuna Sand Mines of M/s. S.S. & Company (M/s. SSC)\024.

The other three works related to handling of materials like Rock Phosphate, Gypsum, Copper Concentrate, flux, slag and material handling work at Zinc Smelter Plant.

On the basis of the appellant\022s own statement submitted along with the tender documents, the Technical Committee in its report dated June 11, 2007, noted as follows :

\023M/s.S.S.& Co. has submitted experience certificate for working in Yamuna Sand Quarry in the district of Faridabad and other minor minerals including handling in the Plant. As per the eligibility criteria of NIT under clause 8(i) the experience of the agency is not at par with the eligibility of NIT.\024

We are unable to see any error much less any unreasonableness in the view taken by the Technical Committee and in rejecting the appellant\022s tender on that basis. It does not require much imagination to hold that the work of lifting of sand from a riverbed or a sand quarry is not similar in nature to the work of raising, calibration and transport of iron ore.

It is significant to note here that the appellant\022s tender in response to NIT75 that did not contain the expressions \023excluding minor mineral\024 was also rejected at the stage of technical bid since it did not satisfy the eligibility clause of having previously done some work similar in nature to the work under contract.

It is thus evident to us that the appellant-SSC did not satisfy the eligibility criteria with regard to past experience even in terms of the unamended clause 8(i). Had the appellant been qualified in terms of the unamended clause and faced exclusion only as a result of the amendment in the criterion it might have been open to it to assail the introduction of the amendment. But that is not the case here. As noted above, the appellant was liable to be excluded, and was in fact excluded, even under the unamended clause 8(i) and, therefore, all arguments either based on mala fide or on the substance of the amendment lose all their relevance.

Thus on a careful consideration of all the materials produced before the court and the submissions advanced by the two sides we find no merit in the case of SSC either.

Both the appeals are accordingly rejected but with no order as to costs.