

**IN THE COURT OF SH. ARUN BHARDWAJ,
SPECIAL JUDGE (PC ACT) (CBI), COAL BLOCK CASES-01,
ROUSE AVENUE DISTRICT COURT, NEW DELHI.**

CNR No. DLCT11-001316-2019

Case No. CBI/318/2019 (Old CC No. 11/18)

RC No. 220 2015 E 0003

Branch: CBI/EOU-IV/EO-II/New Delhi

U/s. 120-B r/w 420 IPC and 13 (2) r/w 13 (1) (d) PC Act.

CBI

Through: **Sh. Sanjay Kumar**, Ld. DLA for CBI with
Sh. Jairaj Katiyar, Inspector of Police, CBI
EOU-IV, New Delhi/IO of the case (from
09.05.2016 onwards).

Versus

M/S. SUNIL HI-TECH ENGINEERS LIMITED AND ORS.

... ACCUSED

Through: **Ms. Honey Satpal**, Ld. Counsel for Sh. Avil
Menezes, the Liquidator of the Corporate
Debtor A-1 M/s Sunil HI-Tech Engineers
Limited.

Sh. Vijay Kumar Aggarwal, Ld. Counsel
for A-2.

Sh. Vikram Hegde and **Sh. Shri Singh**,
Ld. Counsels for A-3 and A-4.

Sh. Rajeev Singh, Ld. Counsel for A-5.

Sh. Amit Band and **Sh. Pankaj Kapoor**,
Ld. Counsels for A-6.

Sr. No.	Description	Page
1.	Introduction of five allegations made in chargesheet.	4-7
2.	Part 1 of First allegation – Opaque selection of Financial Consultant.	7-12
	Submissions of Accused	12-16
	Rebuttal	16-24
	Decision of the Court	24-28
	Part 2 of First Allegation – Exorbitant fee of Financial Consultant.	28-30
	Submissions of Accused	30-33
	Rebuttal	33-35
	Response of Accused	35-38
	Decision of the Court	38-43
	Part 3 of First Allegation – Appointment of Financial Consultant without approval of State of Maharashtra.	43-44
	Submissions of Accused	44-49
	Rebuttal	-
	Decision of the Court	49-52
3.	Second Allegation – Declaring technically ineligible bidders as eligible.	52-61
	Submissions of A-6	61-63
	Submissions of A-5	63-68
	Submissions of A-3 &A-4	68-73
	Submissions of A-2	73-85
	Decision of the Court	85-99

4.	Third Allegation – Proposing deviation from the terms and conditions of bid documents while drafting J.V. Agreement	99-107
	Submissions of A-6 Avinash Warjekar	107-112
	Submissions of A-5 D.G. Philip	112-116
	Submissions of A-3 and A-4	116-120
	Submissions of A-2	120-124
	Decision of the Court	124-141
5.	Fourth Allegation – Transfer/sale/pledge of shares by JV Partner.	141-147
	Submissions of A-2	147-153
	Decision of the Court	153-170
6.	Fifth Allegation – Conspiracy.	171-173
	Submissions of A-3 and A-4	173-177
	Decision of the Court	178-179
7.	Conclusion	179-181
8.	Observations qua H-1 bidder for Agarzari and Warora Coal Blocks	181-182

ORDER ON CHARGE

1. **Facts of the case:** Accused No. 1 in this case is M/s. Sunil Hi-Tech Engineers Ltd. (M/s SHEL) who is under liquidation through Liquidator Sh. Avil Menezes, Accused No. 2 is Sunil Ratnakar Gutte, the then Director of Accused No. 1 company, Accused No. 3 is M/s. aXYKno Capital Services Private Ltd (Financial Consultant), Accused No. 4. is R. Ramakrishnan, the then Chief Executive Officer/Director of Accused No. 3 company, Accused No. 5 is Dominic Gabriel Philip, IAS, who was the Managing Director of Maharashtra State Mining Corporation Ltd (MSMCL), a Government of Maharashtra Undertaking from 13.09.2007 to 26.02.2009 and Accused No. 6 is Avinash Manohar Rao Warjekar, who was the Chairman of MSMCL from 11.12.2006 to 28.06.2010.
2. In the year 2006, the Ministry of Coal had allocated four coal blocks namely (i) Warora, with estimated reserves of 73 million MT Coal, (ii) Agarzari, with estimated reserves of 137 million MT Coal, (iii) Marki-Zari-Jamni-Adkoli, the smallest coal block with estimated reserves of just 20 million MT Coal and (iv) Gare-Palma II, with estimated reserves of 175 million MT Coal to Maharashtra State Mining Corporation Ltd. (MSMCL).
3. Since MSMCL had no financial wherewithal to carry out mining, it required a reputed Joint Venture Partner (JVP) for this purpose.

4. Same procedure was followed for selecting the Financial Consultant for all the aforesaid four coal blocks and same Financial Consultant was appointed for all the aforesaid four coal blocks. Same procedure was followed for selecting the Joint Venture Partners (JVPs) for all the aforesaid four coal blocks and same procedure was followed for execution of Joint Venture Agreements (JVAs) for all the three coal blocks (only three JVAs were executed as the bid of H-1 bidder for the fourth coal block namely Gare-Palma II was not accepted by High Power Committee) but prosecution in this case is restricted to appointment of Financial Consultant, selection of Joint Venture Partner and execution of Joint Venture Agreement for Marki-Zari-Jamni-Adkoli coal block (Adkoli Coal Block) only which was the smallest of all the four coal blocks.
5. The chargesheet contains five allegations.
6. The **first allegation** is for (i) appointing M/s aXYKno Capital Services Private Limited as the Financial Consultant for MSMCL whereas the said company was not suitable to be appointed as financial expert and procedure followed to appoint it was opaque and not fair, (ii) the Financial Consultant was appointed without permission of the Government of Maharashtra and (iii) at an exorbitant cost.
7. The **second allegation** is declaring A-1 M/s. Sunil Hi-Tech Engineers Ltd technically eligible and thereby paving the way for opening of its commercial bid whereas it was not technically eligible as it was not having requisite three years mining

experience required by the tender conditions.

8. The **third allegation** is for deviating from the terms and conditions of the tender documents and for making provisions in Joint Venture Agreement permitting transfer/pledge of shares by Joint Venture Partner i.e. A-1 M/s. Sunil Hi-Tech Engineers Ltd. in Special Purpose Vehicle (SPV).
9. The **fourth allegation** is for transfer and pledge of shares by M/s. Sunil Hi-Tech Engineers Ltd and M/s SHEL Investment Consultancy Pvt. Limited respectively in SPV M/s Sunil Hi-Tech Energy Limited in violation of terms and conditions of bid documents/the Joint Venture Agreement, in favour of M/s. Jaypee Development Corporation Ltd (JDCL).
10. The **fifth allegation** against the accused persons is for entering into a criminal conspiracy with the object of cheating MSMCL by securing appointment of A-3 M/s aXYKno Capital Services Private Limited as Financial Consultant for MSMCL, at an exorbitant cost, in an opaque manner, despite the fact that the said company was ineligible to be appointed as Financial Consultant, awarding the tender in favour of M/s Sunil Hi-Tech Engineers Ltd as Joint Venture Partner to carry out, survey, exploration and mining activities in the Adkoli Coal Block despite the fact that M/s SHEL was ineligible to bid, permitting sale/pledge of shares in the Joint Venture Agreement contrary to the terms and conditions of the bid documents and sale and pledge of shares of M/s Sunil Hi-Tech Engineers Ltd and M/s SHEL Investment Consultancy Pvt. Ltd. respectively in favour

of M/s Jaypee Development Corporation Ltd., contrary to the bid documents/JV Agreement and thereby making exorbitant profits running into several crores.

11. **First Allegation:** (i) Appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant: According to CBI, in the Minutes of the 160th Meeting of the Board of Directors of MSMCL held on 22.12.2006 under the Chairmanship of A-6 Avinash Manohar Rao Warjekar, **D-41, Page 369 @ 372, PDF 5072 @ 5075**, under the Agenda Item No. 8 “Appointment of Financial Consultant”, it was recorded that in MSMCL, the post of General Manager (Finance) had fallen vacant in 1989 after retirement of the incumbent and thereafter the said post remained vacant and was not filled up in view of stated closure of MSMCL and consequently the post lapsed. Thereafter, the Accounts and Finance functions were performed by the Accounts Officer Class-I on deputation from Maharashtra Finance and Accounts Services. His initial tenure of four years expired in September 2005 and the extended tenure of one year also expired in September 2006 following which he was repatriated to his parent department. The Minutes recorded that the need for a Financial Consultant was felt in MSMCL for performing functions of General Manager (Finance) till the approval of Government for filling of the post of General Manager (Finance). The Minutes further recorded that MSMCL had explored taking the services of State Industrial Investment Corporation of Maharashtra (SICOM) and their services were offered initially at Rs. 15 lakhs and later on

it was reduced to Rs. 5 lakhs per assignment/project. The Board of Directors were of the opinion that a consultant can be engaged by paying him Rs.25,000/- per month which will be better proposition than engaging the services of SICOM. Therefore, it was resolved to engage a Financial Consultant or Professional Financial Consulting Firm on monthly or assignment basis to advise the Corporation on various subjects including parameters for tendering and its evaluation.

12. The process to appoint the Financial Consultant had to be scrapped twice as none of the applicants was found suitable.
13. First advertisement was given on 31.12.2006 in various newspapers to appoint Financial Consultant/Firm for carrying out (i) accounts outsourcing, (ii) preparation of business model and bid management.
14. On 06.01.2007, six participants including one M/s Sanjeev Naidu and Associates made presentations of profiles but the Committee of Experts of Financial Advisors observed that none of the candidates was suitable for carrying out the works of bid management and preparation of business model. The post of financial advisor was re-advertised, **D-80, Page 11, PDF 6107**.
15. Now, the date of 15.01.2007 was fixed for presentations by applicant firms, **D-80, Page 3, PDF 6099**. Four Consultants/ Firms including M/s Sanjeev Naidu and Associates, Nagpur in consortium with M/s Credit Innovative Strategies India Private Limited (CISIL) (later on, named as M/s aXYKno Capital Services Private Limited), gave presentations and were

interviewed by the expert panel comprising of experts from different fields.

16. Out of seven experts, one member withdrew as he was a medical doctor looking after health and safety.
17. Out of the remaining six experts, three experts B.C. Bhartia, CA, Arun Goel, Deputy Director of Finance, M/s Mineral Exploration Corporation, Nagpur and D.A. Meshram, Accounts Officer of MSMCL supported M/s Sanjeev Naidu and Associates in consortium with CISIL, Nagpur.
18. Sh. Bhartia had the opinion that M/s Sanjeev Naidu and Associates in association with CISIL, Nagpur appears to be most competent for giving the assignment.
19. Sh. Goel was of the opinion that M/s Sanjeev Naidu and Associates in consortium with CISIL, Nagpur seeing the tie-up of their association with international brands, can do the job for MSMC. They have the required exposure in valuation of industry. Other firms are not found suitable on grounds of experience.
20. Sh. D.A. Meshram, Accounts Officer of MSMCL was of the view that out of four consultants only M/s Sanjeev Naidu and Associates in consortium with CISIL can be able to evaluate the proposals financially. He was also of the view that the rates quoted by M/s Sanjeev Naidu and Associates in consortium with CISIL appear to be the lowest since rates quoted by M/s Kothari Rathi and Associates are not clear and as such their rates cannot be considered.

21. The other three experts, Sh. V.K. Jain, Company Affairs Consultants, MSMC, Nagpur, Sh. Sushil Bahel, Deputy Controller of Finance, Sh. R. Srinivasan, AAO, M/s Jawaharlal Nehru Aluminum Research Development and Design Centre, Nagpur did not find any of the firms suitable.
22. The then Managing Director of MSMCL Sh. Atul Pansare, IAS was of the view that though panel's majority was in favour of CISIL – M/s Sanjeev Naidu and Associates for NAV and NPV, the whole advertisement be re-tendered as for bids management for coal only one party i.e., Feedback Venture, reputed one appeared. He directed that now advertisement be given with scope of work or call pre-tender meeting where presentation by MSMCL should be given explaining scope of work. After giving one week, parties will give their presentations of price quote to MSMCL. He directed to prepare a draft for advertisement for four tasks, (A) NAV, NPV, (B) Bid management for (i) procurement of services, (ii) mining and value addition in JV for (a) Coal, (b) Non-coal, **D-80, Page 21, PDF 6117.**
23. Therefore, the Board of Directors of MSMCL in its 161st meeting held on 23.03.2007 in Item No. 9: Status of two Coal Blocks already allotted to MSMCL, **D-41, Page 394, PDF 5097** decided to scrap the offers received from the parties for the appointment of Financial Consultant on the ground that there were some lacunae in those offers.

24. According to CBI, in October 2007, an advertisement was purportedly issued inviting the interested parties to attend walk in interviews for selection of the Financial Consultant.
25. In this purportedly conducted interview, M/s aXYKno Capital Services Private Limited was found to be most suitable firm.
26. However, during investigation, the records of the interview and decisions taken were not found in the official documents of MSMCL.
27. Prosecution is relying on statement of PW 26 P.Y. Tembhare, General Manager (Operation), MSMCL, who has stated that no document or details regarding walk-in interview conducted in October, 2007 for selection of Financial Consultant are available in the office records of MSMCL. Basis of selection of M/s aXYKno Capital Services Private Limited is also not available in office records, **Para 3, PDF 268**.
28. The IO of the case, vide letter dt. 22.02.2018, **D-81, PDF 6120** had called for the details of walk-in interview for selection of Financial Consultant but the response given by MSMCL vide letter dt. 23.02.2018, **D-82, PDF 6121** is that there is no file available in the office of MSMCL which contains documents such as advertisement for walk in interview conducted on 16.10.2007 for selection of Financial Consultant, number of parties participated, their names, offers, terms and conditions, proceedings of the interviews and decisions.
29. In response to another letter dated 19.04.2018 written by the Investigating Officer to the MSMCL seeking details of walk-in

interview, **D-97 PDF 6161**, the response of MSMCL vide letter dated 26.04.2018 remained the same, **D-98, PDF 6165**.

30. As per CBI, absence of any records in MSMCL regarding selection of M/s aXYKno Capital Services Private Limited. shows opaqueness in selection of the said consultant.

31. **Submissions of Accused:** However, it is submitted on behalf of the accused Nos. 3 and 4 that in the Supplementary Agenda for the 164th Board Meeting of MSMCL, Item No. 3: Appointment of Financial Consultant, it is recorded that:

“Interview was conducted to appointment (sic) Financial Consultant on 16/10/07 and M/s CISIL was selected for account outsourcing and bid management...”.

32. This agenda has been received by A-3 under RTI Act and the submission on behalf of A-3 is that the same is of sterling quality and therefore worthy of credit at this stage of charge also.

33. Further, they have submitted that vide letter dated 14.12.2007, issued under signatures of PW-32 Parmeshwar Puranmal Soni, General Managar (Operations), M/s aXYKno Capital Services Private Limited was informed that it has been appointed as Financial Advisor and their engagement is for one year on monthly remuneration of Rs.30,000/- per month, **D-107, Page 5, PDF 6205**. The Reference of the letter is:

“Walk-in Interview held at MSMC's registered office on 16.12.2007”

34. This letter mentions that:

“With reference to the presentation of your firm in the Walk-in

Interview on 16/10/07, MSMC has accepted your offer and pleased to assign the work of Financial Consultancy Service, Bid Management and Account Outsourcing to your firm for a period of one year...”

35. Further, the accused have submitted that it is recorded in the Minutes of 164th Meeting of Board of Directors of MSMCL held on 29.12.2007 that:

“The Board was informed that as per approval of the Board in its 163rd Board Meeting, interview was conducted in October 2007 to initiate the procedure of appointment of Financial Consultant and other officials. M/s CISIL was selected to promote accounts service along with financial consultancy in that interview”.

36. The accused have strongly relied on the statement of PW-32 Sh. Parmeshwar Puranmal Soni, who had retired as Deputy Manager (Geology) from MSMCL, Nagpur on 31.10.2007 and was again engaged on contractual basis as General Manager (Operations), who has stated in his statement u/s 161 Cr.P.C. that:

“MSMC got published advertisement in newspapers inviting interested parties to attend walk-in-interview. About 7-8 parties participated. *The Management Committee consisting of Sh. D. G. Phillipe, the then MD of MSMCL, Sh. Avinash Warjekar, the then Chairman of MSMCL and myself conducted the interview in the office of MSMCL, Udyog Bhawan, Nagpur.* I do not remember the day and date of the interview conducted. Sh. R. Ramkrishnan of M/s CISIL / M/s aXYKno Capital Services Ltd., Level-3, Leela Vista, WHC Road, Bajaj Nagar Square, Nagpur also attended the interview and he was the last candidate in the interview. The committee found Sh. R. Ramkrishnan most suitable and competent and he was selected as the Financial Consultant.”

37. The accused have submitted that the above recorded statement of own PW of CBI is sufficient to prove that A-3 was selected as Financial Consultant after walk-in-interviews were conducted in MSMCL.

38. So far as non-availability of the records pertaining to walk-in-interviews conducted on 16.10.2007 is concerned, as per accused No. 5, the rented office of MSMCL at Udyog Bhawan was vacated sometime in the year 2015 when MSMCL acquired its own office and the premises which were previously occupied by MSMCL were later on occupied by Nagpur Metro Rail and as per letters dated 13.04.2015 and 23.04.2015 written by Officer on Special Duty, Nagpur Metro Rail Corporation Limited to the Managing Director MSMCL, requests were made to lift files lying in Strong Room and cabins of Udyog Bhawan, Civil Lines, Nagpur.
39. It is the submission of the accused that these letters show that some records of MSMCL were left in the earlier premises and CBI has not conducted investigation in this regard. The accused have submitted that they have received letters written by Nagpur Metro Rail through RTI which are of sterling quality and therefore worthy of credit at the stage of charge also.
40. Ld. Counsels for the A-3 and A-4 have referred to **M.E. Shivalingamurthy versus CBI, Bengaluru**, (2020) 2 SCC 768, where legal principles applicable in regard to an application seeking discharge have been summarized by the Hon'ble Supreme Court as under:

“LEGAL PRINCIPLES APPLICABLE IN REGARD TO AN APPLICATION SEEKING DISCHARGE

17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., *P. Vijayan vs. State of Kerala and another*, (2010) 2 SCC 398 and discern the following principles:

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

17.2. The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, “cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial”.

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.PC [See State of J&K vs. Sudershan Chakkar and another, (1995 4 SCC 181)]. The expression, “the record of the case”, used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police [See State of Orissa vs. Debendra Nath Padhi, (2005) 1 SCC 568]”.

41. Reliance is also placed by the Ld. counsels of A 3 and A 4 on **Sanjay Kumar Rai vs. State of Uttar Pradesh & Anr.**, 2021 SCC Online SC 367, where the Hon'ble Supreme Court has held that:

“17. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The Court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. [Union of India vs. Prafulla Kumar Samal,(1979) 3 SCC 4]. Likewise, the court has sufficient discretion to order further investigation in appropriate cases, if need be.”

42. Reliance is also placed on **Kanchan Kumar vs. The State of Bihar**, Crl. Appeal No. 1562/22 decided by the Hon'ble Supreme Court on 14.09.2022 to submit that though undertaking a roving inquiry at the stage of charge is not permissible but a simple and necessary inquiry for a proper adjudication of an application for discharge is required.

43. **Rebuttal by CBI:** The Ld. DLA for CBI Sh. Sanjay Kumar submitted that at the earlier occasions i.e., on 15.01.2007 when interviews were conducted pursuant to 2nd advertisement, the then Managing Director of M/s MSMCL had not favoured selection of M/s Sanjeev Naidu and Associates in consortium of CISIL as financial consultant, **D-103, Page 20 PDF 6193.**

44. He has referred to the application for discharge filed by A-5 Sh. D.G. Philip, where he has mentioned at Page 29 Para 33 that:

“Therefore, an advertisement was issued on website of MSMCL and the 4 previous partners interviewed earlier by the expert panel of MSMCL were informed telephonically, inviting them to remain

present in the office of MSMCL on 16.10.2007 for a walk-in-interview for selection of financial consultant.”

45. The submission of CBI is that asking (i) M/s Sanjeev Naidu and Associates in consortium with CISIL, Nagpur, (ii) M/s Kothari Rathi and Associates, Nagpur, (iii) M/s Feedback Ventures, Nagpur and (iv) M/s Shah Bahati Chandak and Company, Nagpur telephonically to join the walk-in-interview shows the conspiracy.
46. The Ld. DLA Sh. Sanjay Kumar has argued that M/s CISIL had no experience of consultancy in mining affairs. He has referred to the advertisement calling for presentations by prospective financial consultants on 06.01.2007 in the office of MSMC to show the requirements from the financial consultants. The advertisement is as under, **D-315, Page 111, PDF 10854:**

“MAHARASHTRA STATE MINING CORPORATION LIMITED

(A Government of Maharashtra Undertaking)

Udyog bhvan, 3rd Floor, Civil Lines, Nagpur – 440001

Ph – 0712-2565051-53, Fax – 0714-2565054

Website: www.msmc.gov.in

APPOINTMENT OF FINANCIAL CONSULTANT/FIRM.

MSMC is fully owned Government Company engaged in **mining** of different industrial minerals, and trading the same to the consumer industries. MSMC have vision to form Joint Venture Company and/or form Joint Venture to develop the metal mines and Coal blocks with **Maharashtra** and outside of **Maharashtra State**. MSMC also desires to set up plant for value-addition product, power generation plant through Joint Venture.

MSMC wants to appoint **financial consultant**/firm for following work.

1. **Accounts outsourcing:**

Maintenance of accounts of the **corporation** on computer and

carryout Internal Audit, Tenure of the contract will be 3 years.

2. **Business Model:**

- a. To prepare business model for MSMC.
- b. To estimate the NOV & NPV of the **corporation** on the basis of the mineral wealth of **corporation**. The job will be on turn key basis.

3. **Bid Management:**

To prepare tender documents/Expression of Interest of evaluation of the same, preparation of draft agreement and MoU.

Interested parties may submit their offer for all the three points (Point No. 1,2&3 above) or they may submit their offer for any one job of the above also.

Party have to quote the rate in the following pattern.

- i) Accounts Sourcing: On monthly basis.
- ii) Business Model: On turnkey basis.
- iii) Bid Management: On assignment basis.

Party will required to bring the details of the their company viz Company Profile, previous experience, list of clients, qualified personnel, etc. Firm will be required to give their presentation on 6th January, 2007 at MSMC's registered office at 11.00 a.m.

MSMC reserves the right to accept or reject any or all the offers without assigning any reason.

MANAGING DIRECTOR”

47. Reliance is also placed on second advertisement inviting presentations on 15.01.2007 in the office of MSMCL, **D-315, Page 49, PDF 10791**, which is as under:

“MAHARASHTRA STATE MINING CORPORATION LIMITED

(A Government of Maharashtra Undertaking)

Udyog bhvan, 3rd Floor, Civil Lines, Nagpur – 440001

Ph – 0712-2565051-53, Fax – 0714-2565054

Website: www.msmc.gov.in

APPOINTMENT OF FINANCIAL CONSULTANT/FIRM.

MSMC is fully owned Government Company engaged in **mining** of different industrial minerals, and trading the same to the consumer industries. MSMC have vision to form Joint Venture Company and/or form Joint Venture to develop the metal mines and Coal blocks with **Maharashtra** and outside of **Maharashtra State**. MSMC also desires to set up plant for value-addition product, power generation plant through Joint Venture.

MSMC wants to appoint **financial consultant**/firm for following work.

1. **Business Model:**

- a. To prepare business model for MSMC.
- b. To estimate the NAV & NPV of the **corporation** on the basis of the mineral wealth of **corporation**. The job will be on turn key basis.

2. **Bid Management:**

To prepare tender documents/Expression of Interest, evaluation of the same, preparation of draft agreement and MoU for

- 2.1) J.V. for value addition and **Mining** of minerals &
- 2.2) Procurement of machinery, stationery etc and services.

Interested parties may submit their offer for all the three points (Point No. 1, 2.1 & 2.2 above) or they may submit their offer for any one job of the above also.

Party have to quote the rate in the following pattern.

- i) Business Model: On turnkey basis.
- ii) Bid Management: On assignment basis.

Party will required to bring the details of the their company viz Company Profile, previous experience, list of clients, qualified personnel, etc. Firm will be required to give their presentation on 15th January, 2007 at MSMC's registered office at 10.30 a.m.

MSMC reserves the right to accept or reject any or all the offers without assigning any reason.

MANAGING DIRECTOR”

48. To submit that the selected financial consultant had no experience in mining, reliance is placed on Certificate of Incorporation of Credit Innovative Strategies India Private Limited dated 09.01.2006, **D-353, Page 2, PDF 11520**. Reliance is also placed on Memorandum of Association of aXYKno Capital Services Private Limited to show that the said company had no experience in mining, **D-325, Page 24, PDF 11145**.
49. It is submitted that the first assignment of CISIL was as Financial Consultant of MSMC in consortium with Sanjeev Naidu and Associates in 2007, **D-329, Page 3, PDF 11208**.
50. To show criminal conspiracy amongst the two public servants and A-3 aXYKno Capital Services Private Limited and A-4 R. Ramakrishnan, it is submitted that several documents were seized from the office of aXYKno which would not have been available with it but for conspiracy. These documents are minutes of 164th meeting of Board of Directors of MSMCL held on 29.12.2007 in which letter dt. 26.12.2007 pertaining to issue of payment to M/s CISIL was discussed, **D-311, Page 29, PDF 10650**. The other documents seized were letter dt. 17.07.2007 and 24.07.2007 from IDFC and addressed to the then Managing Director Sh. A.K. Zade informing that IDFC does not accept advisory assignments mid-course as they have not been involved in the bid process management from the inception stage, **D-315, Page 6, PDF 10748** and **D-315, Page 7, PDF 10749** respectively. Another letter dt. 18.07.2007 addressed by the then Managing Director of MSMCL Sh. A.K. Zade to the

Managing Director and CEO of Infrastructure Development and Finance Corporation (in Marathi) was also seized during said search, **D-315, Page 11, PDF 10753**. Another letter dt. 10.07.2007 written by Sh. Kulkarni of Government of Maharashtra to the MD, MSMCL (in Marathi) was also seized during the said search, **D-315, Page 12, PDF 10754**. Letter dt. 10.07.2007 written by Dr. Avinash Warjekar, Chairman, MSMCL to the Minister for Industries, Government of Maharashtra, Mumbai was also seized from the office of Financial Consultant, **D-315, Page 15, PDF 10757**. The offer letter dt. 06.01.2007 from Sanjeev Naidu and Associates addressed to MD, MSMCL was also seized during that search, **PDF 10793**. Another letter dt. 08.01.2007 from Sanjeev Naidu and Associates was also seized at that time, **D-315, Page 53, PDF 10795**. Another letter dt. 08.01.2007 written by Kothari Rathi and Associates to the MD, MSMCL making final offer for accounts outsourcing was also seized at that time, **D-315, Page 56, PDF 10798**. The noting of MSMCL dt. 08.01.2007 for re-advertising the post of Financial Consultant was also seized from the office of financial consultant, **D-315, Page 59-A, PDF 10802**. The opinion of financial experts about the four applicants namely M/s Feedback Ventures, Hyderabad; M/s Shah Baheti Chandak and Company, Nagpur; M/s Kothari Rathi and Associates, Nagpur and M/s Sanjeev Naidu and Associates in consortium with CISIL, Nagpur was also seized during that search, **D-315, Page 63, PDF 10806**.

51. The submission of Ld. DLA is that the Financial Consultant was not supposed to have all these documents in his office and availability of these documents with him is suggestive of conspiracy between Financial Consultant and A-5 D.G. Philip and A-6 Dr. Avinash Warjekar. However, in response to the query of the court, the Ld. DLA for CBI candidly admitted that there is nothing on record to show when these documents had come in the possession of A-3 M/s aXYKno.
52. Submissions of the Ld. Counsels for the accused, in response to arguments in rejoinder by CBI are that suspicion/doubts of conspiracy as alleged by CBI cannot form the basis of an order framing charge, Para 10, **Union of India vs. Prafulla Kumar Samal and Anr.**, (1979) 3 SCC 4. These observations are as under:

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section

227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

53. They have submitted that photocopies were admittedly recovered in 2015 i.e., seven years after occurrence of the alleged offence and hence it would be incorrect to even prima facie presume that A-3/A-4 had knowledge of these documents in 2007-08 (the time period of alleged conspiracy). They have submitted that there cannot be any criminal conspiracy in appointment of A-3 company because the said letters are prior to A-5's joining as MD of M/s MSMCL. They have submitted that even according to prosecution, CBI does not have knowledge as to when and at what stage these documents of M/s MSMCL came into the possession of A-3 company. There is nothing on record to remotely indicate that A-3/A-4 had knowledge about the official documents in 2007-08. It is the submission of the accused that the allegations of CBI are based on surmises, conjectures, assumptions and presuppositions which have no place in the eyes of law as per the well recognized magazine i.e., “Post Hoc Ergo Propter Hoc” which means “because of this, that”. They have placed reliance on Vinod Tamchandra Ghosalkar vs. Manisha Ashok Chaudhary, 2019 SCC Online Bombay 455, Para 40, Sanjay Kumar Rai vs. State of Uttar Pradesh, 2021 SCC Online SC 367, Para 16-17,

The State by S.P. through SPE CBI vs. Uttamchand Bohra, Criminal Appeal No. 1590 of 2021 – Supree Court dated 09.12.2021, Paragraph 21, Dilwar Babu Kurane vs. State of Maharashtra, (2002) 2 SCC 135, Para 12-14, Yogesh vs. State of Maharashtra (2008) 10 SCC 394 and Pushpendra Kumar Sinha vs. State of Jharkhand, 2022 SCC Online 1069.

54. **Decision of the Court:** In the considered opinion of this court, the statement of PW-32 Parmeshwar Puranmal Soni, the then Deputy Manager (Geology), MSMCL is very important for deciding whether there was any opaqueness in the appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant of MSMCL. He has categorically stated that he was one of the members of the Committee which conducted interviews alongwith A-6 Avinash Warjekar and A-5 D.G. Philip. This is an important statement in favour of the accused.
55. Version of PW-32 is relied on by CBI otherwise he would have been an accused.
56. PW-32 has owned up letter dated 14.12.2007 written to M/s aXYKno Capital Services Private Limited appointing the said company as Financial Consultant to MSMCL.
57. In this letter, there is clear reference to the interviews conducted on 16.10.2007.
58. The factum of conducting walk-in-interviews on 16.10.2017 is also borne out from the minutes of the 164th Board Meeting of MSMCL.

59. PW-26, P.Y. Tambhare in his statement recorded on 16.06.2015 has stated that the record showing conducting of interview in October, 2007 for appointment of Financial Consultant wherein M/s CISIL was selected is not available in MSMCL office.
60. However, when on 15.07.2015 statement u/s 161 of Cr.P.C. of PW-32 Parmeshwar Puranmal Soni, General Manager (Operations) was recorded, he stated that he was one of the Members of the Managing Committee which conducted interviews for selecting Financial Consultant with A-6 Avinash Warjekar and A-5 D.G. Philip. He was not asked at that time that if he had conducted the interviews, why its records are not available in MSMCL.
61. Statement of PW-32 Parmeshwar Puranmal Soni, General Manager (Operations) was also recorded on 13.10.2015, 24.02.2016, 18.03.2016, 09.08.2016 and 09.09.2016 but he was not asked about the records of the interview. If such a query was raised, he might have given the explanation.
62. Now, during arguments, it was informed that the said Sh. Soni is no more.
63. Nobody could have anticipated in the year 2007 that after more than a decade, a criminal case will be registered and therefore the accused should falsely add about the walk-in-interviews conducted on 16.10.2007 in the appointment letter dated 14.12.2007/ Minutes dated 29.12.2007.
64. Therefore, without even referring to Supplementary Agenda and other letters of Nagpur Metro received by the accused persons

under RTI Act, this court is of the view that M/s aXYKno Capital Services Private Limited was appointed after a walk-in-interview was conducted in MSMCL by A-6 Ashwani Warjekar, A-5 D.G. Philip and PW-32 P.P. Soni.

65. It is to be noted here that even earlier also, according to Sh. Atul Pansare, IAS, MD, MSMCL, majority of experts while examining the offers of four applicant companies, had opined in favour of M/s aXYKno Capital Services Private Limited for appointment as Financial Consultant, **D-80, Page 21, PDF 6117**. The Managing Director had called for fresh advertisement as according to him only one reputed company had applied for bid management. He had not made any adverse remarks against the financial consultant M/s aXYKNo Capital Services Private Limited. So, there is nothing unnatural/unusual in appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant of MSMCL as earlier also, at least three financial experts were in its favour and the Accounts Officer of MSMCL had found its rates to be the lowest.
66. Regarding rebuttal arguments of CBI, so far as calling the earlier four applicants telephonically for the walk in interview is concerned (referred by Ld. DLA not from chargesheet but from submissions of the accused), this does not show any special treatment to M/s aXYKno Capital Services Private Limited as besides calling the said company, three other companies were also invited and it is not CBI's case that telephonic invitation was sent to M/s aXYKno Capital Services Private Limited only.

67. The submission of CBI that the financial consultant should have been an expert in mining also is not borne out from the two advertisements referred above where the emphasis was on financial expertise. The advertisement itself mentioned that “MSMC wants to appoint Financial Consultant/Firm for following work...”. Perusal of the advertisement calling for interviews on 15.01.2007 shows that the emphasis was on Financial Consultancy by providing business model, estimate, the NAV and NPV of the Corporation on the basis of mineral wealth and manage the bid. There is no material to show that the Financial Consultant was lagging in Financial Consultancy.
68. In the documents seized from the office of M/s aXYKno Capital Services Private Limited in the year 2015, there are letters written by the predecessor of A-5 D.G. Phillip also. However, the Ld DLA for CBI fairly stated that there is no evidence as to when M/s aXYKno Capital Services Private Limited came into possession of those documents. Some of the letters which were found are those letters which were written by Sanjeev Naidu, who later on became the consortium partner of M/s CISIL. Having possession of the letters written by the company which had later on become a consortium partner of M/s CISIL is neither surprising nor suspicious. Moreover, as submitted by CBI, as it can't be said when these documents came in the possession of M/s aXYKno Capital Services Private Limited, nothing can be inferred against M/s aXYKno Capital Services Private Limited only upon seizure of these documents from its office during search in 2015 whereas, his

tenure as Financial Consultant had ended in January, 2009.

69. Therefore, this Court is of the opinion that there is no material on record to show grave suspicion that M/s aXYKno Capital Services Private Limited was selected in an opaque manner and without any walk-in-interviews being conducted on 16.10.2007.
70. (ii) Whether M/s aXYKno Capital Services Private Limited was given exorbitant money? The submission on behalf of CBI in this regard is that MSMCL had approached SICOM Ltd., a Maharashtra State PSU, earlier for seeking financial consultancy and SICOM had earlier demanded a fee of Rs.15,00,000/- but later on reduced it to Rs.5,00,000/- per assignment. This fee was considered to be very high by MSMCL and it was decided to appoint a Financial Consultant on contract basis at a fee of Rs.25,000/- per month. However, M/s aXYKno Capital Services Private Limited who was engaged as Financial Consultant for this purpose was given a sum of Rs.1.57 Crores.
71. CBI has submitted that vide letter dated 14.12.2007, M/s aXYKno Capital Services Private Limited was informed that their engagement is for one year, on monthly remuneration of Rs.30,000/- per month, **D-107, Page 5, PDF 6205.**
72. However, M/s aXYKno Capital Services Private Limited vide its letter dated 26.12.2007 addressed to MSMCL pointed out that the fee quoted for bid management and structuring the tender document was quoted at 1% of the bid value, **D-107, Page 8, PDF 6208.**

73. During 164th meeting of Board of Directors of MSMCL held on 29.12.2007, **D-42, Page 448, PDF 5157**, it was recorded in the minutes that:

“... As per approval of the Board in its 163rd meeting, interview was conducted in October 2007 to initiate the procedure of appointment of Financial Consultant and other officials. M/s CISIL was selected to provide accounts service along with financial consultancy in that interview.”

74. It was also recorded that:

“In anticipation of Government approval, the offer letter to CISIL has been given so that the tender documents for coal block can be prepared.”

75. So far as increase of payment of remuneration to M/s aXYKno Capital Services Private Limited is concerned, it was recorded that:

“The issue of payment was discussed in detail with General Manager and Chairman and it was decided that after return of Managing Director from Election Duty at Ballia, Uttar Pradesh, the issue will be discussed and finalized.”

76. According to CBI, no record is available to show the discussion between the Managing Director and Chairman of MSMCL for arriving at the terms and conditions of appointment of M/s aXYKno Capital Services Private Limited.

77. However, the request of M/s aXYKno Capital Services Private Limited was acceded to by MSMCL and vide its letter dated 18.01.2008 signed by D.G. Philip it was accepted that the consultant will be given 1% of the bid value or Rs.25,00,000/- whichever is less from successful bidders subject to the condition that the amount to be paid will not be less than Rs. 5 lakhs. It was also agreed that fee paid by the bidders for

purchase of bid documents shall be shared between MSMCL and M/s aXYKno Capital Services Private Limited in the ratio of 1/3rd: 2/3rd, **D-107, Page 3-4, PDF 6203.**

78. PW 26 T.Y. Tambhare, General Manager (Operations), MSMCL in his statement dated 26.02.2018 has stated that how letter dt. 26.12.2007 of M/s aXYKno Capital Services Private Limited was processed is not found anywhere in official records. He has also stated that M/s aXYKno Capital Services Private Limited was given a total sum of Rs. 1.57 Crores for preparation of tender documents, scrutiny of offer bid and to provide financial consultancy and bid management services, **PDF 335.**
79. These are the allegations of CBI for submitting that the public servants showed undue favour to M/s aXYKno Capital Services Private Limited by paying an astronomical sum of Rs.1.57 Crores.
80. **Submissions of the Accused:** On the other hand, the submissions on behalf of the accused are that it is fallacious to allege that M/s aXYKno Capital Services Private Limited was given exorbitant fees.
81. They have pointed out that CBI is trying to give an impression that as if for Adkoli Coal Block only, the Financial Consultant M/s aXYKno Capital Services Private Ltd. was given a sum of Rs.1.57 Crores. However, the fact is that this payment was for all the four coal blocks namely i) Warora ii) Agarzari iii) Marki-Zari-Jamni-Adkoli and iv) Gare Palma-II which were allocated by MoC in favour of MSMCL.

82. It is further pointed out that so far as Adkoli Coal Block is concerned, price of each bid document was Rs.50,000/-, **D-455, PDF 14104** and 30 such bid documents were sold, **D-55, PDF 5810** and therefore Rs.15,00,000/- were received by MSMCL by sale of those bid documents. Therefore, a sum of Rs.10,00,000/- i.e., 2/3rd of the cost of tender documents was received by M/s aXYKno Capital Services Private Ltd.
83. It is further submitted that the Ld. Counsel for A-3 and A-4 that M/s aXYKno Capital Services Private Ltd. had received Rs.25,00,000/- as their consultancy charges as one of the conditions of their offer was that they will be receiving 1% of the bid amount or Rs.25,00,000/- whichever is less. Thus calculated, M/s aXYKno Capital Services Private Ltd. received a sum of Rs.35 lacs for bid management and financial services rendered to M/s MSMCL for Adkoli Coal Block.
84. It is further submitted that it has always been the case of M/s aXYKno Capital Services Private Ltd. that they had asked for Rs.10,000/- or 1% of tender value whichever is more TA, Tax, DA con. extra for bid management and Rs.24.50 Lakhs + Tax, TA, con. extra for business model, **D-79, Page 15, PDF 6111**.
85. Further, their submission is that the offer of SICOM and offer of M/s aXYKno Capital Services Private Ltd. are incomparable as the offer of former was for one month's engagement for preparing draft tender document for single mine whereas the offer of later was for one year and for (a) Aid in preparation of Tender Documents/Expression of Interest/Joint Venture

Agreement; (b) Scrutinizing/Operating of Financial bids of the bidders; (c) Providing Financial Consultancy & Bid management with deal structuring; and (d) Accounts outsourcing.

86. Further, fee of SICOM was to be paid irrespective of outcome/benefit to M/s MSMCL and the fee of M/s aXYKno Capital Services Pvt. Ltd. was (a) contingent upon the bid process becoming successful leading to selection of JV Partner; (b) Further, the fees had to be paid only out of the sale proceeds of the Tender Document (which had to be recovered from the JV Partner without any cost/implication to M/s MSMC); (c) Fees based on Success (Contingent) – 1% or Rs.25,00,000/- whichever is less – was to be paid strictly from successful bidders; and (d) Fee had to be paid only from the sale proceeds of tender documents that too only 2/3rd of the total.
87. It is the submission of the accused that the value of subject matter pertaining to SICOM was just Rs.25,00,000/- whereas total value of assignments of M/s aXYKno Capital Services Pvt. Ltd. had fetched Rs.700 crores i.e., more than 2800 times than in the case of SICOM. It is their submission that the difference in magnitude of work offered to SICOM and to M/s aXYKno makes their offers/fees incomparable.
88. It is also the submission of the accused that the majority panel of experts which had examined the offer of M/s aXYKno Capital Services Pvt. Ltd. earlier (which was 1% of tender value for bid management services and Rs.24.50 Lakhs + taxes +

expenses for business model, **D-79, Page 15, PDF 6111**) had found the same to be the lowest, **D-79, Page 21, PDF 6117**. The accused have submitted that offer given to them in letter dated 14.12.2007 was not in accordance with their previous offer made on 15.01.2007 and that is why they had addressed letter dated 26.12.2007 to MSMCL pointing out terms of their services offered to MSMCL.

89. The accused have submitted that earlier MSMCL had tried to find a Joint Venture Partner and had signed MoU with a company but the MoU had to be canceled later on. It is their submission that in case the fee of the Financial Consultant was not made contingent on successfully finding a Joint Venture Partner, MSMCL would have lost the fee given to the Financial Consultant without any gain to MSMCL.
90. **Rebuttal by CBI:** It is submitted on behalf of CBI that in the initial letter which was issued to the Financial Consultant i.e., Letter dated 14.12.2007, all the assignments which were to be carried out by the Financial Consultant were mentioned in detail and the offer was just Rs.30,000/- per month for financial consultancy service, bid management and account outsourcing, **D-32, PDF 3947**. He submitted that in the letter dated 26.12.2007 given by the Financial Consultant to the MD, MSMCL, Nagpur the Financial Consultant had requested for fee for bid management and structuring the tender document at 1% of bid value. Moreover, the consultant was ready to negotiate the same for mutual decision, **D-331, PDF 11219**. He submitted that A-5 D.G. Philip, in his letter dated 18.01.2008,

D-32, Page 6, PDF 3951 besides agreeing to payment of 1% of bid value or Rs.25,00,000/- whichever is less for Financial Consultancy and Bid Management services with deal structuring, he also gave a concession by offering sharing of process fees in the ratio of 1/3rd : 2/3rd respectively by MSMC and Financial Consultant from each bidder for deciding the highest or lowest eligible bidder by scrutinizing the offer bids. He submitted that neither in letter dated 26.12.2007 nor in earlier offer of the Financial Consultant, **D-79, Page 15, PDF 6111**, there was any request for sharing the process fees in the ratio of 1/3rd : 2/3rd between MSMC and Financial Consultant but still such a sharing was permitted and this in itself is sufficient to show conspiracy and criminal misconduct by public servants. It is further submitted on behalf of CBI that one Draft JV Agreement was prepared by the Financial Consultant common for all the three coal blocks and considering this, the payments made to him were exorbitant. He referred to the offer of M/s Kothari Rathi & Associates, Nagpur, **D-315, Page 57, PDF 10799** and **D-79, Page 15, PDF 6111** to submit that MSMCL had received offer which was far less in comparison to the demand by the Financial Consultant and still the said firm was not selected resulting in financial loss to MSMCL. He has referred to **D-337, Page 1, PDF 11239** which is a chart showing all the payments made to M/s aXYKno Capital Services Limited by MSMCL. Reliance is also placed on **D-32, Page 193, PDF 4140** which is letter dated 22.12.2008 written by A-5 D.G. Philip to M/s aXYKno Capital Services Limited

mentioning therein that the successful bidders have objected to the payment of Rs.25,00,000/- per bid for drafting of JV Agreement as they are of the opinion that this is very high amount and any legal expert or advocate can prepare this Draft JV Agreement for not more than Rs.35,000/-. He asked the Financial Consultant that unless successful bidders agree to get the JV Agreement drafted by him and take his financial consultancy and bid management services, the amount requested by him cannot be paid. He was therefore requested to first obtain the consent from the successful bidders and he was told that only thereafter his request for payment of bill will be considered. It is submitted on behalf of CBI that even the successful bidders had found the fee called for by the Financial Consultant exorbitant. Reference is made to letter dated 16.06.2016, **D-64, PDF 6023** written by the General Manager (Operation) to the Investigating Officer of the case giving details of payments totaling Rs.1,57,21,734/- to M/s aXYKno Capital Services Limited.

91. In response to the rebuttal arguments of CBI, Sh. Shri Singh the Ld. Counsel for A-3 M/s aXYKno Capital Services Limited and A-4 R. Ramakrishna referred to **D-44, Page 20, PDF 5303** to submit that clause XVI (2) of the bid documents had provided that:

“All charges for preparing the JV agreement and SPV including legal fee, stamp fee shall be borne by the Selected Bidder.”

92. He referred to the Schedule 3 of the Joint Venture Agreement dated 21.11.2009, **D-61, Page 46, PDF 5892**, as per which M/s.

Sunil Hi-Tech Engineers Ltd had agreed to Pre-incorporation Contracts/Agreements, including advisory for transaction structuring and drafting of JV agreement dated 18.01.2008 by M/s. M/s aXYKno Capital Services Limited the contract value of which was Rs. 25 lakhs. He referred to **D-79, Page 15, PDF 6111** where the offer of M/s CISIL, Nagpur for bid management for services was “Rs.10,000/ - or 1% of tender value, whichever is more TA, tax, DA con. Extra” and submitted that in case this offer of M/s. CISIL, Nagpur was accepted, MSMCL would have paid more than Rs. 1.40 crores considering the tender value, but in lieu of that the financial consultant settled for sharing the price of tender documents in the ratio of 1/3rd: 2/3rd between MSMCL and itself. As per this understanding, the financial consultant only got Rs.10 lakhs as against Rs. 1.40 Crores which it quoted at the time of earlier advertisement. This was sought to be clarified by presenting the facts in a tabular form as under:

Heads	Original Quote of A-3 Company [E. Page 6111]	Appointment letter [E. Page 10648]
Bid Management for services	1% of Tender Value Rs.1.46 crores for Adkoli Coal Block alone.	2/3rd of sale proceeds of tender document. Rs.5.80 Lakhs
Business Model	24.50 Lakhs + taxes for Adkoli Coal Block alone.	1% of the Bid value but capped at Rs.25 Lakhs.
Total	Rs.1.70 crores + taxes (Fixed to be paid by M/s MSMCL for Adkoli Coal Block alone)	Rs.30.8 Lakhs (Not paid out of the pocket of M/s MSMCL)

93. It was further submitted that the rates quoted by M/s. CISIL, Nagpur were the lowest rates as noted by the accounts officer of MSMCL. To show the extraordinary services rendered by M/s aXYKno Capital Services Limited, the learned counsel referred

to letter dated 20.01.2007 written by the then Managing Director of MSMCL to the Secretary (Industries), Government of Maharashtra **D-152, Page 41, PDF 7396**, mentioning therein that MSMCL had decided to develop the coal block through joint venture and had invited expression of interest to form joint venture with private entrepreneurs and in response to expression of interest of 38 captive coal blocks, only one party namely M/s. Sainik Mining and Allied Services, New Delhi had submitted its offer for 8 coal blocks for power generation. He submitted that as is evident from **D-35, Page 5, PDF 4649**, 131 bid documents were sold, which is evidence of successful efforts put in by M/s aXYKno Capital Services Limited. He further submitted that for the Adkoli coal block, bid documents worth Rs. 15 lakhs were sold and the sale price was shared by MSMCL and M/s aXYKno Capital Services Limited in the ratio of 1/3rd : 2/3rd and M/s aXYKno Capital Services Limited had received Rs.10 lakhs from the sale of the documents of Adkoli coal block.

94. To show the efforts put in by the financial consultant, reference was made to Mine Valuation for Adkoli coal block prepared by the financial consultant for Financial Year 2009 to Financial Year 2031, **D-31, Page 49, PDF 3641**.
95. The accused have submitted that vide letter dated 05.02.2009, M/s MSMCL had communicated to Principal Secretary (Industries), Government of Maharashtra, Mumbai about appointment and remuneration of A-3 company, **PDF 7999**. The letter had mentioned that:

“As per the appointment condition of M/s Axykno, the Consultant who prepared all the above tender document bids an amount equal to 2/3rd of the sale proceeds to be received from the sales of tender documents is to be paid to him for the services rendered, and accordingly as per the appointment condition, an amount of Rs.1,25,66,999/- from the sale proceeds received from sale of tender forms has been paid to M/s Axykno Capital Pvt. Ltd., the Consultant till date for services rendered.” [E Page 7999]

96. **Decision of the Court:** This court has considered the submissions made on behalf of CBI and submissions made on behalf of the accused persons.
97. To show that exorbitant fees of Rs.1.57 Crores was paid to Financial Consultant M/s aXYKno Capital Services Pvt. Ltd., CBI has sought to make a comparison with the offer given by SICOM.
98. It is to be noted that M/s aXYKno Capital Services Pvt. Ltd. was not given this fee for Adkoli Coal Block only but it was the fees for preparing the bid documents, scrutiny of financial aspects of the bids, drafting of Joint Venture Agreements with the successful bidders for all other blocks also namely (i) Warora, (ii) Agarzari, (iii) Marki-Zari-Jamni-Adkoli and (iv) Gare-Palma-II Coal Block.
99. For Adkoli coal block, the fee that was given to Financial Consultant is Rs.35 lakhs and not Rs.1.57 Crores.
100. Further, the offer of SICOM is not on record. CBI has only relied upon the minutes of the Board Meetings of M/s MSMCL wherein such discussions have taken place regarding the fees and scope of work of M/s SICOM. The comparison is solely based on the discussions noted in the minutes of 158th to 161st

Board Meetings of M/s MSMCL. During investigation, CBI has not collected scope of work of SICOM, terms and conditions offered to M/s SICOM, which mines were the subject matter of that offer (whether major or minor mineral or any other mineral), tenure of the work, number of mines for which services were sought by M/s MSMCL and value of the mines in which services were sought by M/s MSMCL. If this material was on record, only then it would have been possible to find out whether there can be any prima facie comparison between the offer of M/s SICOM and M/s aXYKno Capital Services Private Limited. There is no request made by CBI either to SICOM or MSMCL to produce the said offer. CBI could have and should have brought on record the offer by SICOM, if it had to base its allegations by comparing offer of SICOM and terms of M/s aXYKno Capital Services Private Limited.

101. From the available matter on record, this court is of the view that scope of work and offer of SICOM and scope of work and offer of M/s aXYKno Capital Services Private Limited are not comparable.
102. It is noted earlier that at least half of the experts had earlier found M/s aXYKno Capital Services Private Limited to be suitable for appointment as Financial Consultant and according to the Accounts Officer of MSMCL, the rates offered by M/s aXYKno Capital Services Private Limited were the lowest.
103. At that time, A-5 D.G. Philip was not even in the picture.
104. As noted earlier also, statement of Sh. P.Y. Tembhare, General

Manager (Operations) of MSMCL was recorded u/s 161 Cr.P.C. on 16.06.2015 and he has stated that no record (Board Minute Book or any other file) showing the decision of M/s MSMCL on charging of fee 1% as asked by M/s aXYKno Capital Services Private Limited vide their letter dated 26.12.2007 is available.

105. Statement of PW-32 Parmeshwar Puranmal Soni, General Manager (Operations) was recorded u/s 161 Cr.P.C. on 15.07.2015 i.e., after recording the statement of PW-26 Sh. P.Y. Tembhare. PW-32 was the General Manager (Operations) at the time D.G. Philip, MD had written letter dated 18.01.2008 conveying M/s aXYKno Capital Services Private Limited revised fee payable for financial consultancy. PW-32 would have been the best person to explain about the records in this regard. Neither on 15.07.2015 nor on other dates when the statement of PW-32 was recorded i.e., on 13.10.2015, 24.02.2016, 18.03.2016, 09.08.2016 and 09.09.2016, the witness was asked about records showing the decision of M/s MSMCL on charging of fee by M/s aXYKno Capital Services Private Limited. PW-32 in his statement recorded on 09.09.2016 has also stated that M/s aXYKno, as per the letter dated 18.01.2008 was entitled to a payment equivalent to 1% of the bid value or Rs.25,00,000/- whichever is less for taking care of the financial and bid management. Apart from the above, they are also eligible for sharing the process fee for scrutinizing the offer bids received in the ratio of 2:3 and 1:3 with MSMC.

106. Now, it is informed during arguments that PW-32 Parmeshwar Puranmal Soni is no more.
107. At the stage of charge, this court has only to see whether there is material on record to prima facie show that the fee paid to the Financial Consultant was exorbitant. This court is otherwise not expert to review the quantum of the fee of the Financial Consultant for the duties assigned to it by MSMCL.
108. It is already noted that offer of SICOM is not available on record to compare scope of work offered to SICOM and scope of work performed by M/s aXYKno Capital Services Private Limited.
109. It is already recorded that the payment of Rs.1.57 Crore to the Financial Consultant was for financial consultancy, preparation of bid documents, checking the financial bids and drafting four Joint Venture Agreements for all the four coal blocks and so far as Adkoli Coal Block is concerned, the payments were Rs.35 lakhs.
110. These payments are in tune with the offer given earlier by M/s aXYKno Capital Services Private Limited and these rates were considered by team of experts. None of the experts had stated that the fee quoted by the Financial Consultant was exorbitant. Three experts had found M/s aXYKno Capital Services Private Limited unsuitable for the job and other three experts had found it suitable. The then Accounts Officer of MSMCL Sh. D.A. Meshram had found the rates to be the lowest. Sh. Atul Pansare, the then MD, MSMCL had found that the majority of

experts were in favour of M/s aXYKno Capital Services Private Limited but had scrapped the entire process for the reason that there was some lacuna in those offers. At no stage, anyone questioned the fees as exorbitant. Rather, it was found to be the lowest by the then Accounts Officer of MSMCL Sh. D.A. Meshram. So far as rates quotes by M/s Kothari Rathi and Associates are concerned, it was noted by the Accounts of MSMCL that these rates are not clear and therefore, cannot be taken into consideration. Perusal of fees quoted by M/s Feedback Ventures and M/s Shah Bahati Chandak and Company also shows that the fees quoted by M/s aXYKno was not exorbitant rather it was the lowest. Therefore, in the considered opinion of this court, there is no material to prima facie make an opinion that the Financial Consultant was given exorbitant fee by MSMCL.

111. So far as sharing of proceeds of sale of bid documents is concerned, it has been made clear by Ld. Counsel for the accused that the offer of M/s Sanjeev Naidu and Associates in consortium with CISIL was Rs. 10,000/- or 1% of tender value whichever is more TA, tax, DA con. Extra for bid management for services. This offer was negotiated and reduced to sharing the proceeds of sale of bid documents in the ratio of 1/3rd : 2/3rd between MSMCL and the financial consultant. As a result of this arrangement the financial consultant has received Rs. 10 lakhs otherwise as per this offer the amount payable by M/s MSMCL would have been Rs. 1.4 crores. So far as reliance by CBI on letter dated 22.12.2008 written by A-5 D.G. Philip is

concerned, its answer can be found in three letters dated 20.12.2008 written by all the three successful bidders including M/s SHEL agreeing with the terms regarding services and remuneration payable to M/s aXYKno as mentioned in letter dated 18.01.2008 appointing M/s aXYKno as Financial Consultant, **PDF 10616, 4007 and 4055**. Therefore, in the opinion of this Court, in the facts and circumstances of the case, there is nothing on the record to show that the payment of Rs.35 lakhs in favour of the Financial Consultant for Adkoli Coal Block was an exorbitant offer. Business related to the other three coal blocks namely Warora, Agarzari and Gare Palma-II are not subject matter of present charge-sheet.

112. (iii) Whether the appointment of M/s aXYKno Capital Services Private Limited was bad as it was without permission of State of Maharashtra? According to CBI, so far as the State of Maharashtra is concerned, its views regarding appointment of Financial Consultant by MSMCL are reflected in the letter dated 23/25.01.2007 written by Sh. V.K. Jairath, Principal Secretary (Industry), Government of Maharashtra, **D-144, Page 30, PDF 6983**.
113. In this letter, MSMCL was informed that the expenditure made on the Honorarium paid to the Advisors could be justified only when they have achieved targets of works assigned to them. MSMCL was directed to submit information about Advisors appointed by MSMCL, purpose of their appointment and how much expenditure was incurred on them. Further, it was directed that action being taken for appointing financial advisor

be stayed and no further step be taken without prior permission of the Government of Maharashtra.

114. Further, according to CBI, MSMCL, vide its letter dt. 01.02.2007 requested the Government of Maharashtra to reconsider its decision divesting MSMCL powers for appointment of Advisors, **D-144, Page-32, PDF 6985**.
115. MSMCL vide letter dt. 26.07.2007 written by Sh. A.K. Zade, MD, MSMCL to the Principal Secretary (Industries), Industries, Energy and Labour Department, Mantralaya, Mumbai requested for an early approval for appointment of Financial Consultant to MSMCL. It was requested that in the alternative, the Government may form a committee consisting of representatives of Government of Maharashtra from Industries Department, Finance Department, Mining Department and from MSMC to finalize the parameters for the bids, scrutinize the bids, short list the parties for request for proposal (RFP), call the RFPs and finalize the parties for entering into MoU/JV with the selected parties, **D-152, Page 84, PDF 7443**.
116. Prosecution is relying on statement of PW 14 Sh. V.S. Kulkarni, the then Under Secretary (Mining), Department of Industry, Energy and Labour, Government of Maharashtra who has stated that Government of Maharashtra had not given any approval to MSMCL for appointment of Financial Consultant, **PDF 203**.
117. **Submissions of the Accused:** On the other hand, the submissions of the accused are that MSMCL is a separate legal entity and a Government Company governed by its

Memorandum of Association and Articles of Association approved by the Governor of Maharashtra and Government of Maharashtra, **D-152, Page 121 PDF 7500**. It is their submission that sub clause 27 of Clause B of the Memorandum of Association permitted M/s MSMCL to appoint Consultants. The said clause is as under:

“To employ and pay experts, Indian or Foreign consultants and other persons in connection with the prospecting, mining and exploitation of all kinds of minerals in respect of areas that the corporation will acquire for the purposes of mining and for executing several schemes of the company.”

118. Reliance is also placed on sub clause 19 of the Articles of Association authorizing the Board of Directors to enter into contracts for the purposes of the company.
119. The accused are relying on minutes of the 166th Board meeting of MSMCL, **D-41, Page 460, PDF 5163**, approving the minutes of 165th Board meeting dt. 07.02.2008, **D-41, Page 457, PDF 5160**, thereby once again ratifying the appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant. They have laid emphasis on the fact that this meeting was attended by Smt. Malini Shankar, IAS, Development Commissioner (Industries), Director-Government of Maharashtra representative on the Board of M/s MSMCL and other government nominees had attended this Board Meeting. During this meeting, the minutes of the 165th Board meeting were approved in which item no. 9 was appointment of M/s CISIL as Financial Consultant and Bid Management Service Provider.

120. The accused have also relied on the minutes of 167th Board meeting which noted appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant and Bid Management Service Provider, **D-42, Page 86, PDF 5260**. According to the accused, this meeting was again attended by Smt. Malini Shankar, Development Commissioner, IAS (Industries Department) – A Government of Maharashtra representative on the Board (belonging to same department as V.K. Jairath, as it is his own department).
121. The accused have also relied on letter dated 13.06.2008, **D-55, Page 143, PDF 5749** which was addressed to the Principal Secretary (Industries), Industry, Energy and Labour Department, Government of Maharashtra, Mantralaya, Mumbai-32 and in this letter it was mentioned that:
- “The tender bids were duly prepared in consultation with Financial Consultant, M/s aXYKno Capital Services Private Limited, Nagpur, appointed for this purpose and approved by the Board of Directors of MSMC, Nagpur in its Board Meeting”.
122. A copy of this letter was also submitted to the Personal Secretary to the Minister of Industry, Mantralaya, Mumbai for information with a request to bring the above proposal to the notice of the Minister for granting his convenient time, date and place of meeting so that the high-power committee meeting can be convened to decide and approve the H-1 Bids of four coal blocks for mining.
123. The accused have also placed reliance on letter dated 05.02.2009 written by A-5 D.G. Philip to Principal Secretary (Industries), Industries, Energy and Labour Department,

Mantralaya, Mumbai who was also a member of High-Power Committee informing payment and appointment of A-3 M/s aXYKno Capital Services Private Limited, **D-153, Page 400, PDF 7999**. It was mentioned in this letter that the tender was prepared in consultation with M/s aXYKno Capital Services Private Limited, the consultant and was approved by the Board of Directors and the Board resolved to invite tender bids for formation of Joint Venture Company to produce power. In this letter, the payments given to the Financial Consultant were also mentioned. It was mentioned that in all, an amount of Rs.200.50 Lakhs was received from the sale of tendered documents for mining of coal and setting up of thermal power plant. As per the appointment condition of M/s aXYKno Capital Services Private Limited, the consultant who prepared all the above tender documents bids, an amount equal to 2/3rd of the sale proceeds to be received on sale of tender documents is to be paid to him for the services rendered, and accordingly as per the appointment condition, an amount of Rs.1,25,66,999/- from the sale proceeds received from sale of tender forms has been paid to M/s aXYKno Capital Services Private Limited, the consultant till date for services rendered.

124. The accused have also submitted that the Financial Consultant M/s aXYKno Capital Services Private Limited was appointed for a period of one year vide letter dated 18.01.2008 and its term had come to an end on 17.01.2009 but the Financial Consultant was requested to make presentation in the meeting convened by the Chief Minister of Maharashtra regarding

formation of Joint Venture Committee with MSMCL for development of coal blocks allotted to it. It is submitted that this meeting dated 04.05.2009 was attended by the Chief Minister of Maharashtra, Additional Chief Secretary, Government of Maharashtra, Secretary Finance, Government of Maharashtra, Secretary Forest, Government of Maharashtra, Director (Industries), Government of Maharashtra, Director of Geology and Mining, Government of Maharashtra and PW-22 Sh. P.P. Soni, General Manager (Operations), MSMC, Nagpur. In the minutes of this meeting, **D-155, Page 50-51, PDF 8216-8217**, it is recorded that:

“Presentation was made by the Consultant of MSMC Mr. Ramkrishnan and Mrs. Hidal whereby the Consultant highlighted the important points. In these minutes, the presence of Ramkrishnan is recorded as representing M/s aXYKno Capital Services Private Limited, Nagpur.”

125. The accused have also referred to Minutes of Meeting of High-Power Committee held on 04.05.2009 under the Chairmanship of Chief Minister for Joint Venture Agreement in respect of the coal blocks allotted to M/s MSMCL under the Government Dispensation Scheme of Ministry of Coal, **D-137, Page 4-6, PDF 6826**. This meeting was also attended by Chief Under Secretary (Forests) Revenue and Forest Department, Principal Secretary (Financial), Principal Secretary (Industries), Additional Director (Industries), Director, Directorate of Geology and Mining, Nagpur, General Manager (Operations), MSMCL and MD, MSMCL. The minutes of this meeting commenced by recording that:

“Meeting commenced with due presentation of Financial Advisor appointed by the Corporation. The said presentation briefed the due procedure adopted and fixed parameters for the selection of H-1 Bidder for formation of Joint Venture Partner with private industrialists to develop Adkoli, Varora and Agarzari Coal blocks dispensed to Corporation. The presentation also briefed the salient features of Joint Venture Agreement.”

126. Therefore, the submissions of the accused are that MSMCL was within its rights, as per its Memorandum of Association and Articles of Association to appoint Financial Consultant and it was in the knowledge of the all concerned up to the Chief Minister chairing the High-Power Committee meeting about the involvement and active participation of M/s aXYKno Capital Services Private Limited, Nagpur as Financial Consultant of MSMCL which constitutes deemed approval.
127. **Decision of the Court:** This court has considered the material available on record to find out whether there is strong suspicion which can form the basis for drawing up a charge and refusing the discharge of the accused.
128. As noted above, M/s MSMCL is a separate legal entity and also a government company governed by its Memorandum of Association and Articles of Association approved by Governor of Maharashtra and Government of Maharashtra. Sub-clause 27 of Clause B of its Memorandum of Association enables it to employ and pay experts, Indian or Foreign Consultants and other persons, in connection with the prospecting, mining and exploiting of all kinds of minerals in respect of areas that the corporation will acquire for purposes of mining and for executing several schemes of the company, **D-152, Page 122,**

PDF 7502. Sub-clause 19 of its Articles of Association authorizes the Board of Directors to enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts, deeds and things in the name and on behalf of the company as they may consider expedient for and in relation to any of the matters aforesaid or otherwise for the purposes of the company, **D-152, Page 130, PDF 7518.**

129. Therefore, the company was within its rights to appoint Financial Consultants. More so because the post of General Manager (Finance) had lapsed in MSMCL and there was no Financial Consultant to guide MSMCL after allocation of four coal blocks by Ministry of Coal in favour of MSMCL. Preparing bid documents, scrutiny of financial bids assisting in declaring the successful bidder, drafting Joint Venture Agreements are complex matters. MSMCL had no financial capacity for handling the bidding and running a joint venture company. Though the final decision for approving the H-1 Bidder was with High-Power Committee but before the matter reached High-Power Committee, several complex financial intricacies had to be unraveled. Therefore, for timely mining of the coal blocks, need for a Financial Consultant was imminent.
130. The objections of Sh. V.K. Jairath, Principal Secretary (Industry), Government of Maharashtra as reflected in letter dated 23/25.01.2007, **D-144, Page 30, PDF 6983** were that the expenditure made on the honorarium paid to the advisors could be justified only when they have achieved targets of work

assigned to them. The objection was not to the appointment of Financial Consultant *per-se* but the objection was that the consultants be paid only when they have achieved targets of work assigned to them.

131. In this case, payments were made to the consultant on receiving sale proceeds of the bid documents from bidders. Therefore, to that extent they had achieved targets of work assigned to them.
132. Moreover, the 166th and 167th Board Meetings of MSMCL were attended by Smt. Malini Shankar, Development Commissioner, IAS (Industries Department) – A Government of Maharashtra Representative on the Board, **D-41, Page 460, PDF 5163** and **D-42, Page 86, PDF 5260**. During these meetings, appointment of M/s aXYKno Capital Services Private Limited was ratified. Smt. Shankar and Sh. Jairath were both from Industry Department.
133. The Principal Secretary (Industries), Industry, Energy and Labour Department, Government of Maharashtra was informed vide letter dated 16.05.2008 about payment and appointment of M/s aXYKno Capital Services Private Limited as Financial Consultant without there being any objection from the side of Government of Maharashtra, **D-55, Page 4, PDF 5760**.
134. The Principal Secretary (Industries), Industry, Energy and Labour Department, Government of Maharashtra was again informed vide letter dated 13.06.2008 about appointment of M/s aXYKno Capital Services Private Limited, **D-55, Page 1, PDF 5749**.

135. Not only this, the Financial Consultant had made presentations in the meeting convened by the Chief Minister on 04.05.2009, **D-155, Page 50-51, PDF 8216-8217.**
136. The Financial Consultant had made presentations before the High-Power Committee also where all the officers of highest echelons of State of Maharashtra were present, **D-137, Page 46, PDF 6825.**
137. Therefore, it is clear that the appointment of Financial Consultant was deemed ratified. Therefore, in the considered opinion of this court, there is no strong suspicion for framing the charge that the Financial Consultant namely M/s aXYKno Capital Services Private Limited was appointed contrary to the directions of State of Maharashtra.
138. **Second allegation: Declaring technically ineligible M/s SHEL as eligible** – The allegations of CBI are that during 165th Board Meeting of MSMCL held on 07.02.2008, the terms and conditions of the bid documents prepared by M/s aXYKno Capital Services Private Limited were discussed, finalized and approved **D-41, Page 456 PDF 5159.** Therefore, A-4 R. Ramakrishnan, A-5 D.G. Philip and A-6 Avinash Warjekar were well aware of the minimum eligibility criteria laid down in the bid documents.
139. A tender notice was published by MSMCL on 13.02.2008 and 14.02.2008 in various newspapers **D-465, Page 1-2, PDF 14130.**
140. One of the technical requirements of the bid was:

“The bidders should have been in operation for more than 3 years and should have minimum 3 years’ experience in actual mining of open cast or underground mines including survey and exploration and should be making profits in each of the immediately preceding three financial years **D-34, Page 9, PDF 4605.**”

141. It was mentioned in the bid document that the proposals/offers shall be submitted in the office of M/s aXYKno Capital Services Private Limited, a private Financial Consultant and not in the office of M/s. MSMCL **D-34, Page 15, PDF 4611.**
142. The bid documents of A-1 M/s SHEL are at **D-28 PDF 2611.** At **PDF 2930** are the details of key personnels of M/s SHEL. Sh. Vinod Kumar and Sh. Pradeep Kumar are shown as Survey Officers. According to Prosecution, these Survey Officers were not statutorily qualified which was the requirement of bid documents, para 4 (c), **D-34, PDF 4605.**
143. It is submitted that unsigned tabulation sheet in the handwriting of D.G. Philip was found in **D-33, page 58-60, PDF 4337-4339** which shows that with regard to the bidder Sunil Hi-Tech Engineering Ltd. at serial No. 10, following observations were made:

“Sunil Hi Tech + SB Engineering.

- 10] a) Does not have actual mining experience.
b) He is only an engineer and sub-contractor.
c) He has only experience of civil construction in Mine.
d) Does not have lease or sublease in his name.
e) Does not have experience of survey and exploration – No documentary proof of 3rd party.

HENCE NOT ELIGIBLE”

144. According to **D-5, Page 3, PDF 710** which is the report of Handwriting Expert, the aforesaid noting is in the handwriting of D.G. Philip, the then Managing Director of MSMCL.
145. During search at the premises of M/s aXYKno Capital Services Private Limited on 31.03.2015, a copy of this spread sheet was found, the search list is **D-310** and copy of this sheet is at **D-313, PDF 10614** and **10731** respectively. It was argued on behalf of CBI that it shows that it was in the knowledge of A-4 R. Ramakrishnan that M/s SHEL is technically ineligible to bid for the tender.
146. Reliance is placed on statement of PW18 S.S. Sharma, Dy. G.M., MECL, PW 19 Sh. U.S. Singh Sr. Manager (Mining), MECL and PW 20 P. Ranganatheeswar Dy. Director General of Mines Safety (HQ), Directorate General of Mines Safety, Dhanbad to show that the bidder Sunil Hi-Tech Engineering Ltd. was not technically eligible either individually or in consortium with M/s SBEA.
147. PW-18 has stated that actual mining means wining of minerals from below ground is actual mining i.e., production of coal/minerals. He has stated that apart from other requirements, the bidder was required to have experience in survey and exploration. He has stated that the credentials of SHEL show that it was not having any experience in mining activity and its entire experience relates to structural and boiler construction. He has stated that SBEA (consortium partner of SHEL) also required specialized knowledge of survey and exploration

which was one of the essential conditions of the bid. He has stated that completion certificate dt. 25.04.2004 issued by M/s Monnet Ispat Limited and certificate 01.09.2004 issued by M/s Shakti Kumar M. Sanchati are not pertaining to actual mining experiences including survey and exploration as laid down in bid documents. He has stated that as per credentials of SHEL and SBEA, SHEL was not technically qualified. He has stated that certificate dt. 01.10.2000 issued by M/s Anish Ahmed Khan pertains to the year 1999-2000 i.e., about 08 years back from the date of publication of tender notice and as such should not be considered for qualifying requirement.

148. In the statement of PW 80 M.S. Bhasin, Partner of M/s SB Engineering Associates recorded on 20.10.2016, he has stated that:

“...My firm was never engaged in actual mining i.e., production of coal”.

149. Clause 9 Para 4 (c) of the bid document, **D 34, Page 9 PDF 4605** provided that:

“The Bidder shall have adequate manpower consisting of statutory competent and qualified and experienced persons, engineers, geologists to successfully complete the mining activities and also to engineer, design, supervise and test and commission the Coal mining company successfully.”

150. With regard to list of key personnels provided by SHEL, **D 28, Page 319, PDF 2930**, PW 80 Mahinder Singh Bhasin, the partner of SB Engineering has stated that:

“... there is no person in the list who is mining engineer. Further academic qualification showing qualification of any of the key personal is not attached with the bid. My kind attention is invited towards list of two surveyors attached with bid. On being asked I

state that they are not DGMS certified surveyor.”

151. Reliance is also placed on statement of PW 18 Sh. S.S. Sharma, Dy. General Manager (Exploration, MECL) who has stated that:

“The key personnel as mentioned in the bid document are not academically qualified in accordance with bid conditions. (a) No person is found qualified with academic qualification in mining engineering (Degree/Diploma) as well as with statutory certification by DGMS to work in the mine. (b) No person is found with statutory competency certificate to work as mine surveyor. (c) Only one person namely S.S. Kulkarni, General Manager, Geology is found with suitable qualification to work as a Geologist.”

152. Reliance is also placed on statement of PW-20 P. Ranganatheeswar in this regard.

153. It is to be noted that besides SHEL, seven other bidders for Adkoli Coal Block were also not found to be qualified on technical parameters.

154. The bidder at serial No. 1 Midst Integrated Ltd had not qualified as it was “Not in profit”, “Not in > 3 Yr operation”, “losses after taxes.”

155. The bidder at serial No. 4 21st Century Infrastructure had also not qualified.

156. The bidder at serial No. 8 Divya Dealer Ltd had not qualified as “Documentary (sic) of Mining Experience not available.”

157. The bidder at serial No. 9 Jayaswal Neco industries Ltd had also not qualified.

158. The bidder at serial No. 11 Bhatia International Ltd had not qualified.

159. The bidder at serial No. 12 Ricon Infrastructure Ltd had not

qualified as “Mining Experience proof not attached”, “Only hiring of HEMM.”

160. The 8th bidder at serial No. 13 which had not qualified was Gopani Iron and Power (I) Private Ltd for the reason “(1) Mining Experience proof not provided and (2) Commercial bid is openly given not in sealed envelope.”
161. According to PW 18 Sh. S.S. Sharma, Dy. General Manager (Exploration), MSMCL, **PDF 241**, PW 19 Sh. U.S. Singh, Senior Manager (Mining), MECL and PW 20 Sh. P. Ranganatheeswar, Dy. Director (General) of Mines Safety (HQ), DGMS, Dhanbad, Jharkhand M/s SHEL as consortium of M/s SB Engineering Association was not eligible as it was not in operation for more than three years, was not having minimum three years’ experience in actual mining of opencast or underground mine including survey and exploration and was not making profits in each of the immediately preceding three financial years.
162. As per the chargesheet, out of 13 bidders, only bid of one M/s Gopani Iron and Power Limited was rejected on technical grounds and other bids were declared technically qualified.
163. However, there is no record to show such qualification/disqualification. There is nothing to show how Sunil Hi-Tech Engineering Ltd which was found ineligible by D.G. Philip, had technically qualified. There is nothing to show how other seven bidders which were found to be ineligible were declared qualified.

164. Commercial bids were opened on 10.04.2008 and Sunil Hi-Tech Engineering Ltd was found to be the highest bidder as they offered highest sweat money payable to MSMCL. It is alleged that this meeting was attended by A-4 R. Ramakrishnan also and he too kept silent regarding ineligibility of M/s SHEL, **D-45, Page 1-8, PDF 5332-5339.**
165. It is submitted on behalf of CBI that even in the 167th Board Meeting of MSMCL held on 24.04.2008, **D-42, Page 84, PDF 5261** when decision to recommend H-1 was taken, there is no justification or deliberation as to how and why certain bidders including M/s. SHEL who were earlier considered ineligible subsequently became eligible on the technical requirement. This meeting was also attended by A-4 R. Ramakrishnan.
166. Vide letter dt. 16.05.2008, A-5 D.G. Phillip requested the Principal Secretary (Industries), Industries, Energy and Labour Dept. Government of Maharashtra, Mantralaya, Mumbai for moving the Chairman of the High-Power Committee for convening High-Power Committee meeting for approval of the said Committee to competitive H-1 bids received for mining of four coal blocks enclosing therewith bid document for Joint Venture for carrying out survey, exploration and Mining activities at four coal blocks allocated to MSMCL, **D-534, Page 170, PDF 20637.**
167. Again, the proposal dated 13.06.2008, **D-153, Page 112, PDF 7699** was sent by A-5 D.G. Philip to the Principal Secretary, Department of Industry, Government of Maharashtra for

obtaining approval of H-1 bidder in respect of coal blocks including Adkoli Coal Block.

168. Vide letter dt. 24.08.2008, A-5 D.G. Phillip replied to the queries raised by Sh. Vijay Kumar Aggarwal, Additional Chief Secretary (Finance) and Member of the High-Power Committee, Government of Maharashtra, **D-153, Page 205, PDF 7799.**
169. Vide letter dated 23.01.2009, A-5 D.G. Phillip sent draft Joint Venture Agreement to the Principal Secretary (Industries), State of Maharashtra, **D-140, Page 28-29, PDF 6922.**
170. It is to be noted here that the role of A-5 D.G. Phillip came to an end on 26.02.2009 as he retired from the service on the said date.
171. This proposal was processed in the file of Department of Industry, Government of Maharashtra and considered in the High-Power Committee meetings held from time to time.
172. The High-Power Committee in the meeting held on 04.05.2009 recommended selection of H-1 bidder along with the draft JV Agreement and proposed that a proposal be submitted to the Infrastructural Committee of the Cabinet for approval, **D-155, Page 50-51, PDF 8216-8217.** In this meeting, presentation was made by A-4 R. Ramakrishnan but he concealed that A-1 M/s SHEL was technically ineligible to bid for the tender.
173. Subsequently, matter was placed before Infrastructural Committee of Government of Maharashtra which approved the

proposal relating to selection of H-1 bidders and formation of Joint Venture Company with respective Joint Venture (JV) partners. The committee also approved the proposed draft JV agreement.

174. The Department of Industry, Government of Maharashtra vide letter dated 01.08.2009 conveyed the decision taken by Infrastructural Committee on 18.06.2009 to the MD, M/s. MSMCL, **D-135, PDF 6806.**
175. After receiving approval of Government of Maharashtra, Niranjana Kumar Sudhanshu, the then MD, MSMCL issued letter of intent dated 03.08.2009 to M/s. SHEL, **D-29, Page 271-272, PDF 3312-3313.**
176. Prosecution is relying on statement of PW 12 Azeez M. Khan, who was Principal Secretary (Industry) in the Industries, Energy and Labour Department, Government of Maharashtra who has stated that neither D.G. Philip nor the then Chairman, MSMCL Sh. Warjekar nor the Financial Consultant nor any other representative of MSMCL ever disclosed to the High-Powered Committee at any point of time about the ineligibility of Sunil Hi-Tech Engineers regarding technical qualifying requirements, **PDF 180.**
177. So far as second allegation is concerned, the chargesheet concludes submitting that A-5 D.G. Philip, the then MD, despite knowing that M/s. SHEL was not meeting the technical criteria and had noted his conclusion in the technical evaluation sheet, in criminal conspiracy with A-6 Avinash Warjekar, the

then Chairman M/s. MSMCL, A-2 Sunil Ratnakar Gutte, Director, A-1 M/s. SHEL and A-4 R. Ramakrishnan, Financial Consultant, A-3 M/s aXYKno Capital Services Private Limited, with a view to cause undue pecuniary advantage to SHEL qualified it technically and also six other bidders who were earlier not found as technically eligible.

178. **The submissions of A-6 Avinash Warjekar**: The submissions of A-6 Avinash Warjekar are that as per CBI's case, A-5 D.G. Philip had noted that several bidders besides M/s SHEL were technically ineligible (apatra), **D-36, PDF 4657** and without there being any justification available on record, all of them were declared technically eligible (patra) paving the way for opening of their financial bids.
179. His further submissions are that not only with regard to Adkoli coal block but for other coal blocks also, bidders which according to A-5 D.G. Philip were technically ineligible were declared technically eligible.
180. He has submitted that for Agarzari coal block, not only M/s Adani Enterprises Limited was declared ineligible by A-5 D.G. Philip but there were several other bidders who, according to A-5 D.G. Philip were technically ineligible, **D-35, PDF 4656**. However, all of them were declared technically eligible later on and their financial bids were opened and M/s Adani Enterprises Limited was the successful bidder.
181. He has submitted that for Warora coal block also, 9 out of 14 bidders were, according to A-5 D.G. Philip, ineligible, **D-33**,

PDF 4341. However, later on commercial bids of all the ineligible bidders (except two) were opened **D-36, PDF 4657.**

182. He has further submitted that for the evaluation of the bids for selection of Joint Venture Partners, the Government of Maharashtra had empowered the Managing Director, M/s MSMCL to scrutinize the bids received by M/s MSMCL from administrative and financial view point. The Managing Director was directed to prepare a comparative chart and submit it to the High-Power Committee, **D-143, PDF 7041-7015.**
183. It is further submitted that although there is no Term of Reference (ToR), Scope of Work, Report/Findings of the Tender Committee but the records of the case show that on 14.03.2008, during the meeting of Tender Committee, 38 technical bids from 20 parties for 3 coal blocks namely Agarzari, Warora and Adkoli coal blocks were opened in the presence of all the bidders, **D-33, PDF 4503.** The Tender Committee had checked only the names of parties, EMDs submitted, date of DDs in the presence of all the bidders **D-33, PDF 4504.** It was informed to the bidders that the technical bids will be analyzed and examined properly at a later stage, **D-33, PDF 4504.**
184. Reliance is placed on statements of PW-29 and PW-32 (Members of the Tender Committee) and statements of PW-93 to PW-100 (Representatives of the bidders present during the opening of technical bids) to show that technical bids were not scrutinized on 14.03.2008.

185. Further, reference is made to **D-36, Page 195 PDF 4650** which are the minutes of Management Committee dated 10.04.2008. At page 199, the minutes record that:
- “The Managing Director then openly announced the names of the parties who were technically qualified and disqualified and the reasons for their disqualifications...”.
186. The case of A-6 Avinash Warjekar is that the High-Power Committee had directed and empowered MD, MSMCL to scrutinize bids from administrative and financial view point. Tender committee had only checked names of parties, EMDs submitted, date of DDs in the presence of the bidders. Final scrutiny was made by A-5 D.G. Philip which is clear from his handmade note and it is A-5 D.G. Philip who had declared the results of technical evaluation on 10.04.2008 in the meeting of Management Committee.
187. **Submissions of A-5 D.G. Philip:** The submissions of A-5 D.G. Philip are that time limit mentioned by MoC in the milestone chart had already crossed and it was, therefore, necessary to expedite and complete the process of coal mining activities to avoid cancellation of the coal blocks by MoC, GoI, New Delhi. He has stated that with regard to Agarzari and Warora coal blocks, there was an apprehension of forfeiture of bank guarantee of Rs.13 Crores in case the time limits were not honored.
188. So far as the allegations that A-5 D.G. Philip declared M/s. SHEL as technically eligible whereas the said company was technically ineligible are concerned, the submissions of the

accused are as under:

“4. The Managing Director while examining the technical bid document submitted by M/s. Sunil Hitech observed that M/s Sunil Hitech has submitted technical bid document in consortium with M/s. SB Engineering Associates as he did not have the required mining experience of 3 years or more with own self or standalone. It is pertinent to mention here that on examination of the same, it reveals that M/s. Sunil Hitech had submitted the documents of experience of M/s. SB Engineering Associates pertaining to its mining operations with the technical bid documents, but did not submit with it any document or memorandum of understanding or agreement with M/s. SB Engineering and Associates, in support of proving that consortium exists between them. In absence of any MOU or agreement between them, it cannot be held that M/s. SB Engineering Associates consented or permitted and allowed M/s. Sunil Hitech to use the experience of M/s. SB Engineering Associates, of the work done of mining operations in consortium with M/s. Sunil Hitech. Therefore, M/s. Sunil Hitech is considered as an independent competing bidder without the consortium experience of M/s. SB Engineering and Associates. The said company was not eligible technically as it was not having mining experience for 3 years. These observations are noted by the Managing Director in his own handwriting in the file of Jamni Jhari Adkoli Coal Block which are as follows: -

“Sunil High Tech + S.B. Engineering”

- a) Does not have actual mining experience.
- b) Is only an engineer and subcontractor.
- c) he has only experience of civil construction and mines.
- d) Does not have lease or sublease in his name.
- e) Does not have experience of survey and exploration.

5. ...

6. That as per GOM in industry department dt. 30-04-1994, pertaining to the guidance procedures be followed regarding two envelope system, it is clear that in the technical bid envelope, if any shortcoming is found or supporting documents are not attached to them permission to submit or furnish such documents can be given to the bidder, up to the time of opening of their commercial bid offers, so that the best competitive offers are received. It is pertinent to mention here that in accordance with the above resolution and the terms and conditions of the tender bid documents M/s. Sunil Hitech and other bidders who were found technically ineligible due to some shortcomings in their technical bid

documents were informed telephonically that to become eligible technically they should clear their shortcomings/lacunas by submitting their positive documents.

7. That as informed telephonically by MSMCL, M/s. Sunil Hitech after learning of his ineligibility submitted MOU with M/s. SB Engineering Associates allowing him M/s. Sunil Hitech to use his experience of mining for the purpose of winning Joint Venture Partnership. M/s. Sunil Hitech also made his presentation on dt. 10-04-2008 before the management committee of MSMCL, before opening of the commercial bids.

8. The management committee after verification of the documents of consortium of MOU/agreement with M/s. SB Engineering Associates and the presentation made by M/s. Sunil Hitech and other bidders on 10-04-2008 unanimously and finally decided that M/s. Sunil Hitech in consortium with partner SB Engineering Associates is technically eligible for opening of their commercial bids, as the shortcoming/lacunas of non-submission of consortium MOU/agreement were removed and cleared resulting in existence of consortium between SB Engineering and Associates to use SB Engineering Associates experience of mining of more than 3 years. Besides the above was also decided by the management committee that since MSMCL is a mining company with mining experience of more than 30 years of winning of minerals from various mines including underground, the criteria of having compulsory minimum 3 years of experience of the bidders to become eligible for opening of their commercial bids, is not of much importance or essential but can be relaxed for all bidders for the success of coal block mining as MSMCL has already sufficient mining experience, but finance. MSMCL being financially weak, what is essentially needed by MSMCL to further continue and survive its existence and succeed in all its future operations, is to have or generate sufficient financial resources by means of competitive tender bid procedure and to obtain highest offer of sweat money that is likely to be offered by competitive bidders per metric ton of the geological reserves of the coal blocks. With this concept and decision of the management committee and the Board of Directors of MSMCL including the Financial Consultant M/s. aXYKno, the concept of sweat money was introduced in the competitive tender bids. Due to the above reasons the criteria of minimum of 3 years of mining experience was relaxed and not pressed for all bidders, who were found financially fit and eligible and fulfilling the financial criteria. So accordingly, out of 13 competitive bidders, 12 bidders except one were found to be financially fit and eligible for opening of their commercial bid. Therefore, the management committee decided to qualify and open the commercial bids of all 12 bidders out JamniJhari Adkoli coal

blocks, after observing their presentation on 10-04-2008 before opening of their commercial bids.”

189. The allegations in para 16.4.29 of the chargesheet are that:

“The last date for submission of bids was 14.03.08. In the bid documents submitted by M/s. SHEL, it is revealed that the bid was submitted through a forwarding letter dated 13.03.08 in a spiral bound book. However, there is a MOU dated 14.03.08 between M/s. SHEL and M/s. SBEA for describing the role of both the parties regarding development of Adkoli coal block... The said MOU was not part of spiral-bound book containing bid, but it was attached with the said book through a stapler pin. It is relevant to mention that the bid was to be submitted till 14.03.08 by 1.00 p.m., the technical bids were to be opened at 4.00 p.m. on 14.03.08. Before that it is difficult to assume that M/s. SHEL entered into a MOU with M/s. SB Engineering Associates, got it documented on the stamp paper which was duly notarized and then submitted in the office of M/s MSCL before 1 PM”.

190. The submissions of the accused in this regard are:

“11. It is pertinent to mention herein that the allegation of prosecution that the proposal dated 13-06-2008 was devoid of crucial details and shortcoming as mentioned in the previous para are as below and is replied accordingly to prove that there are no shortcomings in it.

a) The consortium MOU dated 14-03-2008 was not part of the spiral-bound book submitted in the sealed technical envelope of technical bid by M/s. Sunil Hitech, which was opened on 14-04-2008 at 4 PM by MSMCL for scrutiny of technical bids submitted by the bidders. But the bid was submitted by M/s. Sunil Hitech through a forwarding letter dated 13-04-2008.

b) The consortium MOU was attached with the said spiral-bound book through a pin. As the consortium MOU is dated 14-03-2008, it did not exist prior to its execution dated 14-03-2008 and therefore cannot be attached with the bid document, which in turn is forwarded on date 13-04-2008 (sic, 13-03-2008) by a forwarding letter dated 13-04-2008 (sic, 13-03-2008) to be put up in the sealed tender box. Therefore, prosecution reasoned that it is difficult that M/s Sunil Hitech entered into MOU with M/s. SB engineering associates, got it documented on stamp paper which was duly notarised and then submitted in the office of MSMCL before 1 PM on 14-04-2008 (sic,14.03.2008).

...

13. That the Prosecution has completely failed to take into consideration that mining activities and experience of M/s SB engineering associates are not considered and which makes M/s Sunil Hi Tech eligible technically in consortium with its partner M/s SB Engineering and Associates. Moreover, M/s SB Engineering Associates has the experience of mining activities as it has worked with various organizations for mining activities. The experience of consortium partner M/s SB Engineering Associates is also considered the experience of the other partner M/s Sunil Hi Tech for purpose of executing the job of exploitation and mining of coal block jointly by both the partners. [D-28, P-1, E-2623].

191. To show that M/s. SB Engineering Associates had the experience of mining activities, the accused has placed reliance on **D-28, Page 12, PDF 2623**. Annexure 2-Bidders Experience Information (Last 5 Years) details as under:

S.No	Name of Organization whose Project undertaken	Details of Tasks undertaken with value in Rs.	Date of commencement	Date of Completion whether within the time limit specified in the project or not	Bonus penalty incurred if any
1.	Sunflag Iron and Steel Co. Ltd.	Open excavation, construction of RCC Box and drivage of a pair of inclined Shaft. Valued at Rs.35127325.00 for their mine at Belgaon Distt Chandrapur.	Apr-07	Likely completion by March 2008 End	NONE
2.	Sunflag Iron and Steel Co. Ltd.	Construction of Air Shaft and Fan house Building. Valued at Rs.4572675.00 for their mine at Belgaon, Distt. Chandrapur	May-07	70	NONE
3.	B.T. Patil & Sons Belgaon Construction Pvt. Ltd.	Construction of 2 Nos. 1200 m Internal Diameter Shafts for Tunnel work at Ghodazari Right Bank Canal project valued at Rs.12078892.00	Jun-07	Jan-08	NONE
4.	Shaktikumar M Sancheti Ltd.	Construction of Air Shaft and Fan house Building for Western Coal Fields Ltd. Ballapur Area, at Sasti mine. Valued at Rs.8341103.00	Mar-04	Dec-05	NONE
5.	Shaktikumar M Sancheti Ltd.	Open excavation, construction of RCC Box and drivage of a pair of Inclined Shaft. Valued at Rs.35127325.00 for Momet Ispat Ltd.	Apr-03	Jun-04	NONE

192. Therefore, the submission of A-5 D.G. Philip is that M/s Sunil Hi-Tech was given a chance to file the required consortium MoU/Agreement before opening of commercial bids and after receiving its MoU with SBEA, SHEL had become technically eligible and that is why its bid was opened. It is also his case that the criteria of minimum of three years of mining experience was relaxed and not pressed for all bidders, who were financially fit and eligible and fulfilled the financial criteria.
193. **Submissions of A-3 M/s aXYKno Capital Services Private Limited and A-4 R. Ramakrishnan:** So far as A-3 and A-4 are concerned, they have relied on Office Memorandum dated 25.11.2002 issued by Central Vigilance Commission on the subject of appointment of consultants where in Para 4, page 10 it is provided that:
- “The role of the consultant should be of advisory and recommendatory and final authority and responsibility should be with the departmental officers only.”
194. This court, in the case of CBI versus M/s. LANCO Infratech Ltd and Ors., CC No. CBI/34/2021, RC No. 220-2015-E0012 had the occasion to note that this circular was relied on by CBI in the said charge sheet for giving relief to this very accused i.e. M/s aXYKno Capital Services Private Limited. The circular is, therefore, of sterling quality and the accused can rely upon the same at the stage of charge also.
195. Next, the accused have relied on letter dated 25.01.2007 written by Maharashtra Government to the Managing Director of MSMCL, **D-144, Page 31, PDF 6987** as per which MSMCL

was directed that MSMCL should not take any decision on expression of interest invited by them and those records be sent to Industry Department.

196. The accused have relied on letter dated 01.09.2007, **D-144, Page 61, PDF 7014** as per which the Government of Maharashtra had issued a resolution and constituted a high-power committee to scrutinize bids received under Expression of Interest, to examine financial matters as mentioned under the introduction in the context of coal blocks allocated to MSMC, in order to make MoU and establish Joint Venture for mineral development after MD MSMCL has scrutinized the bids from an administrative and financial viewpoint and prepared a comparative chart. MD MSMC was Member Secretary of this committee.

197. It is the submission of the accused that they were appointed as Financial Consultant, **D-311, Page 31, PDF 10648:**

“To scrutinize the offer bids received by sharing the process fees in the ratio of 1/3:2/3 respectively by MSMCL, Nagpur and M/s aXYKno Capital Services Private Limited (CISIL) from each bidder for deciding the highest or lowest eligible bidder”.

198. It is further submitted by the accused that the proposal had to comprise of two parts viz. of technical and commercial bids (Cover-1 and Cover-2 respectively) to be submitted in the office of M/s aXYKno Capital Services Pvt. Ltd., **D-44, PDF 5301.**

199. It is further submitted that a corrigendum was issued by MD MSMCL providing that the complete tenders be submitted at the registered office of MSMCL in the sealed tender box kept

for the purpose, **D-33, PDF 4529**.

200. The accused has relied on **D-33, Page 223, PDF 4506** which are the minutes of the meeting of the tender committee held on 14.03.2008. In this meeting, only the DDs for EMD submitted by different parties with the name of the party, amount of DD, DD number were checked and it was decided that the technical bids will be analyzed and examined at the level of the Tender Committee itself.
201. The accused has relied on the statement of PW-32 and PW-27 to submit that the Tender Committee was constituted by verbal instructions and not by any written order. Further, they have stated that they have not conducted any technical evaluation of the bids. Technical evaluation appears to have been carried out by the MD between 15.03.2008 to 07.04.2008.
202. It is further submitted that Patra/Apatra (Eligible/Ineligible) sheet is in the handwriting of A-5 D.G. Philip, **D-33, Page 58-61, PDF-4340-4343**. They have further submitted that according to **D-310, PDF 10614**, Search List, photocopy of Patra Sheet in the handwriting of A-5 D.G. Philip was found in the office of M/s aXYKno Capital Services Private Limited which is relied on by CBI to show knowledge of A-3 and A-4 about technical ineligibility of M/s SHEL. They have submitted that this document was seized only in 2015 (not in 2008). Mere recovery from the office of A-3 does not prima facie indicate contemporaneous knowledge of technical ineligibility.

203. Those bidders who were found technically qualified were informed to appear in the office of M/s. aXYKno Capital Services Private Limited for presentation on 10.04.2008, **D-369, Page 224, PDF 11833**. The accused have further submitted that the Management Committee opened the commercial bids of all the technically qualified bidders on 10.04.2008, **D-36, Page 1-9, PDF 4650**. It is the submission of the accused that the record of proceedings dated 10.04.2008 makes it clear that the list of successful technical bidders was announced in the meeting by the MD himself.
204. There is no material to suggest that A-3 and A-4 were aware of the list of successful bidders prior to 10.04.2008. It is further submitted that evaluation of technical bids was beyond the scope of work contracted by A-3 and A-4.
205. It is their submission that there is no material to show that technical bids were evaluated by management committee. They have further submitted that there is no mention about M/s. SHEL and other 6 bidders being technically disqualified. Reliance is placed on statement of PW-27 and PW-28 to submit that the management committee did not discuss ineligibility in the light of comment of A-5. The accused have submitted that 167th Board Meeting Item No. 3 – Board discussed in detail and approved to send a proposal to HPC, **D-42, Page 87, PDF 5261**. The accused have submitted that on 13.06.2008, **D-153, Page 106, PDF 7693**, the proposal was sent by A-5-MD to High-Power Committee as per the procedure prescribed in the Government Resolution.

206. On 22.07.2008, **D-145, Page 37, PDF 7079**, the HPC was reconstituted and procedure changed with respect to scrutiny of bids but the process of opening the technical bids and financial bids was already completed.
207. The submission of the accused is that CBI is alleging that A-3 suppressed the effect of ineligibility of Sunil Hi-tech from the High-Power Committee in its presentation made on 04.05.2009, **D-137, Page 4, PDF 6825**. The submissions of the accused in this regard are that there is nothing on record to suggest A-3 and A-4 were aware or having knowledge of ineligibility or eligibility of A-1 during the time when the process was being carried out by M/s. MSMCL.
208. A-3 had no mandate to scrutinize or comment on technical ineligibility of A-1 or any bidder. When the Board of MSMCL, i.e., the employer of A-3 had finalized the selection of Joint Venture Partner, A-3 had no reason to doubt it or highlight it at any time.
209. The presentation before High-Power Committee was not about eligibility or ineligibility at all but regarding accounting and taxation impact on joint venture company.
210. The accused have relied on **Pimpri Chinchwad New Township Development Authority vs. Vishnudev Cooperative Housing Society & Ors.**, Civil Appeal No. 7649 of 2018, decided by the Hon'ble Supreme Court on 03.08.2018, where it is held in para 50 that: -

“So long as the decision based on internal deliberation is not

approved and communicated by the competent authority as per the procedure prescribed in that behalf to the person concerned, such noting does not create any right in favour of the person concerned nor it partake the nature of any legal order so as to enable the person concerned to claim any benefit of any such internal deliberation. Such noting (s) or/and deliberation (s) are always capable of being changed or/and amended or/and withdrawn by the competent authority.”

211. The accused have also relied on **Sethi Auto Service Station and Another versus Delhi Development Authority and Others**, (2009) 1 SCC 180 where in paragraph 14 the Hon’ble Supreme Court has held that:

“... it is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the Department and for the benefit of the final decision-making authority stop needless to at that internal noting so not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.”

212. **Submissions on behalf of A-2 Sunil Ratnakar Gutte:** - This accused has filed (i) an application under Section 218 of Cr.P.C. praying for separation of their trial from the trial of other accused persons, (ii) application u/s 156(3) r/w 173(8) of Cr.P.C. for directions of this court for conducting further investigation in the matter and (iii) application u/s 227 r/w Section 239 of Cr.P.C. seeking discharge.

213. So far as declaring the consortium of M/s SHEL and M/s SBEA technically eligible is concerned, it is submitted that the note written by D.G. Philip which is relied on by CBI to say that the consortium of two concerns was not technically qualified, was

not an official note and was not reflective of views of MSMCL on technical expertise of A-1 company in consortium with M/s SBEA.

214. It is submitted that the bid of A-1 company was approved by Government of Maharashtra after it was processed by qualified and experienced person.
215. The accused have relied on reply given by MSMCL to Government of Maharashtra which is received by the accused under RTI Act to submit that according to MSMCL, the consortium of SHEL and SBEA was technically qualified.
216. Reliance is placed on definition of 'Mine' as defined in the Mine Act, 1952 which is as under: -

“mine” means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes: -

- (i) all borings, bore holes, oil wells and accessory crude conditioning plants, including the pipe conveying mineral oil within the oilfields;
- (ii) all shafts, in or adjacent to and belonging to a mine, where in the course of being sunk or not;
- (iii) all levels and inclined planes in the course of being driven;
- (iv) all opencast workings;
- (v) all conveyors or aerial ropeways provided for the bringing into or removal from a mine of minerals or other articles or for the removal of refuse therefrom;
- (vi) all adits, levels, planes, machinery works, railways, tramways and sidings in or adjacent to and belonging to a mine;
- (vii) all protective works being carried out in or adjacent to a mine;
- (viii) all workshop and store situated within the precincts of

a mine and the same management and used primarily for the purposes connected with that mine or a number of mines under the same management;

(ix) all power stations, transformer sub-stations converter stations: rectifier stations and accumulator storage stations for supplying electricity solely or mainly for the purpose of working the mine or a number of mines under the same management;

(x) any premises for the time being used for depositing sand or other material for use in a mine or for depositing refuse from a mine or in which any operations in connection with such and refuse or other material is being carried on, being premises exclusively occupied by the owner of the mine;

(xi) any premises in or adjacent to and belonging to a mine or which any process ancillary to the getting, dressing or operation for sale of minerals or of coke is being carried on.”

217. They have further relied on definition of “Mining Operations” as per Section 3(d) of MMDR Act, 1957, which is defined as:

“any operation undertaken for the purpose of winning any mineral”.

218. The accused have relied on Completion Certificate given to them by Monnet Ispat Limited dated 25.08.2004 and Certificate given by M/s Anish Ahmad Khan dated 01.10.2000, **D-28, PDF 2938 onwards.**

219. The accused have also relied on **D-588, Page 1, PDF 8564** which is letter dated 26.12.2017 written by Mahinder Singh Bhasin of S.B. Engineering Associates to the IO of the case stating therein that the said firm has been carrying out actual mining activities since 1993 i.e., open caste and underground mining including survey and exploration along with other projects. In this letter, the said Sh. Bhasin has referred to Certificate given by M/s Anish Ahmad Khan for the work of

Western Coalfields Limited and Certificates given by Shantikumar M. Sancheti for the work of Western Coalfields Limited and Southeastern Coalfields Limited as also for Mannat Ispat Limited. In this letter, he has stated that his firm has experience of actual mining work and operation.

220. It is further submitted by the accused that CBI did not conduct any investigation from the organizations/persons who had issued these certificates and merely relied on government officers who had no knowledge of the precise nature of work carried out by M/s SHEL and thereby confirmed to CBI's view of 'actual mining'.
221. It is submitted on behalf of the accused that 8 of the 11 applicants for the Agarzari coal block were declared Apatra/ineligible to form the JV company as per the unsigned sheet, D-33, **Page 54, PDF 4333**. One of the Apatra/ineligible company was Indu Projects Ltd (Hyderabad) with regard to which A-5 D.G. Philip had made a hand note that (1) No experience of actual mining, (2) No lease of ore in name of the consortium, (3) Only experience of removal of over burden by consortium partner who is a contractor, (4) Company is basically an infrastructure company with no experience of mining. It has engaged staff on its establishment which has working experience of mining-Hence Not Eligible.
222. The alleged Apatra/ineligible bidders, as per the list included M/s. Adani Enterprises Ltd which was finally made the JV partner for the development of the Agarzari coal block. This

company was declared Apatra/ineligible as mining experience proof was not provided by it with its bid documents. However, there is no allegation on either M/s. Adani Enterprises Ltd or on the public servants or the consultant to have conspired or cheated in order to get M/s. Adani Enterprises Ltd selected as the JV partner of M/s MSMCL for the development of the Agarzari coal block.

223. Similarly, it is submitted that so far as Warora coal block is concerned, 10 out of the 15 applicants were declared Apatra/ineligible to form the JV company as per the unsigned sheet, **D-33, Page 62, PDF 4341**. But bids of 12 bidders were opened.
224. Coming to the coal block in question namely Adkoli coal block, it is submitted that out of 13 applicants 8 were declared Apatra/ineligible to form the JV company as per the unsigned sheet, **D-33, Page 58, PDF 4337**. But bids of 12 bidders were opened.
225. It is submitted that so far as these three coal blocks are concerned, in the details of bids sent by M/s. MSMCL to the Principal Secretary it was informed that out of 38 bids, 33 were eligible/patra. It is submitted that it shows the alleged unsigned note of A-5 D.G. Philip was never considered while forwarding the names of the technically qualified companies to the Principal Secretary and it is also not the case of the CBI that the companies which were technically unqualified and were considered technically qualified by A-5 D.G. Philip which

included M/s. Adani Enterprises Ltd which was made JV partner for the Agarzari coal block had all conspired with the Financial Consultant and the government officials in order to get the coal block allocated. It is submitted that CBI has only focused on the accused herein.

226. It is also the submission of the accused that reliance of CBI on the aforesaid note creates a dire circumstance that all the bidders who were declared ineligible as per undated note of A-5 D.G. Philip were later qualified only in pursuance of a criminal conspiracy with A-3, A-4, A-5 and A-6 and only those bidders (for four coal blocks) who were not finally considered to be eligible were not in conspiracy with the co-accused persons. It is submitted that if it is the case of the CBI, then it ought to have had arrayed as accused all the bidders who were Apatra/ineligible as per the note of A-5 D.G. Philip but whose commercial bids were opened. It is submitted that any conclusion reached on the basis of alleged hand written note of A-5 D.G. Philip is meaningless unless the circumstances surrounding the note are investigated in full. It is also the submission of the accused that CBI has carried out its investigation without the benefit of a number of records and without carrying out any searches in the office of M/s. MSMCL.

227. The accused have submitted that the note of A-5 D.G. Philip is not the only note on record regarding eligibility/ineligibility of the bidders. The accused have pointed out another similar note which is available at **D-36, Page 17, PDF 4666**. It is submitted

that this note is a part of the file pertaining to minutes of the meeting of the Management Committee held on 10.04.2008 at the office of M/s. MSMCL. The accused have submitted that in the aforesaid note, Accused No. 1 Company has been declared technically eligible and the non-eligible parties are separately listed with reasons for their disqualification. The said note is as under:

ADKOLI – PRELIMINARY SUMMARY

Sr. No.	Bidder Name	EMD	Financially Qualified	Technically Qualified	Reason for Technical Disqualification
1	Midest Integrated Ltd.	Yes	Yes	No	Technical Qualification requires that the company should be making profits in each of the immediately 3 preceding financial years. The company Mideast Integrated Limited is not satisfying this criteria.
2	Sunflag Iron & Steel	Yes	Yes	Yes	
3	Gupta Coal India Ltd.	Yes	Yes	Yes	
4	21st Century Infrastructure	Yes	Yes	Yes	
5	BLA Industries Pvt Ltd	Yes	Yes	No	As per Technical Qualification criteria, the company must have 3 years mining experience. The company 'BLA Industries Limited' Have stated that they have the required experience but no document have been submitted to substantiate the claim.
6	Sainik Mining & Allied Services	Yes	Yes	Yes	The company is technically qualified except for the non-submission of manpower details
7	Balasore Alloys Ltd	Yes	Yes	Yes	
8	Divya Dealer ltd	Yes	Yes	Yes	
9	Jayaswal Neco Industries Ltd	Yes	Yes	No	Technical Qualification requires that the company should be making profits in each of the immediately 3 preceding financial years. The consortium partner M/s Guru Meher Construction is not satisfying this criteria. Also as per Technical Qualification criteria, the company must have three mining experience. The company 'M/s Guru Meher Constructions' have stated that they have the required experience but no document have been submitted to substantiate the claim.
10	Sunil Hi Tech Engineering Ltd	Yes	Yes	Yes	
11	Bhatia International Ltd.	Yes	Yes	Yes	B/s sheet of mining partner not provided. But CA certificate has been provided that the company is making profits for the last 3 years
12	Ricon Infrastructure Ltd	Yes	Yes	Yes	
13	Gopani Iron & Power (I) pvt Ltd	Yes	Yes	No	As per Technical Qualification criteria, the company must have 3 years mining experience. The company 'M/s Gehra Minerals' have not submitted documents to validate the mining experience.
	Total	13	13	9	

228. Accused have submitted that the alleged 1st note in the handwriting of A-5 D.G. Philip nowhere appears to be a point of consideration before the Management Committee, however,

the 2nd note referred above is found in the file of the Management Committee Meeting. It is the case of the accused that the CBI left out this crucial piece of information while formulating the chargesheet. Referring to para 16.4.24 and 16.4.26 of the chargesheet it is submitted that while concluding the results of its investigation, CBI has not even recognised the existence of the aforesaid note as it is recorded in the chargesheet that:

“The only indication of the technical evaluation having been carried out, as is noticed in the files received from M/s. MSMCL, is an unsigned tabulation sheet, which tabulate the offers of technical bids submitted by all the 13 bidders in respect of Adkoli coal block.”

229. Further, the chargesheet records:

“That there is no other record (except tabulation sheet as mentioned in preceding bearers) regarding the technical evaluation carried out by M/s. MSMCL...”

230. It is the submission of the accused that clearly the 2nd note was not considered by CBI at the time of forming its opinion which is apparent from a reading of the chargesheet.

231. It is submitted on behalf of the accused that even though CBI has alleged that a conspiracy was hatched for treatment of the Accused No. 1 Company as technically qualified, it is apparent that it was not just this company which was alleged to be “Ineligible/Apatra” as per the undated and unsigned note of A-5 D.G. Philip and which was later treated as technically eligible. The accused have submitted that from the investigation carried out by CBI, no special case is made out that any favours were granted to the Accused No. 1 Company in particular by way of

curtailing the competition, or changing terms of tender document to narrow it down to suit the Accused No. 1 Company, and even at the time of deciding the technical eligibility, any bias or arbitrariness was shown so as to favour the Accused No. 1 Company specifically. The accused have pointed out that the Adkoli coal block was the smallest of coal blocks on offer with very less coal reserves in comparison to other coal blocks. The accused have submitted that M/s. MSMCL was the best judge of the terms of the contract, having floated the bid document, still, in its factual reply, the Managing Director, M/s. MSMCL has stated that the Accused No. 1 Company was technically qualified and there was nothing arbitrary to qualify the said company. The accused have submitted that there is no allegation that they attended any meeting or wrote any letter or made any misrepresentation or forgery or undertook any other desperate measure subsequent to having found that it is technically unqualified. The accused have referred to para 16.4.33 of the chargesheet where the allegation is that with a view to technically qualify Accused No. 1 Company, 6 other companies were also made a technically eligible. The submission of the accused is that merely getting made technically eligible could not have made the Accused No.1 Company the Joint Venture Partner as it was only the highest of the technically qualified bidders which could have been made the partner for the Joint Venture Company. The accused have submitted that it is not the case of the CBI that the commercial bid of the Accused No. 1 Company (which was the

highest for the Adkoli coal block) was rigged in any manner. Therefore, it is submitted that according to CBI's case any of the other 6 allegedly ineligible bidders could have had hatched the alleged conspiracy and the Accused No. 1 Company could have got benefited from the same. If 6 other bidders were made qualified only in order to accommodate the Accused No. 1 Company, it could have only had increased the competition of the Accused No. 1 Company at the time of opening of commercial bids. The accused have submitted that even if the case of CBI is that 6 other bidders were made eligible only to get the Accused No. 1 Company made technically eligible, the same does not explain on what basis the bidders who were "Apatra" as per the unsigned and undated note of A-5 D.G. Philip were made eligible for the other 2 coal blocks i.e., the Agarzari (including the H-1 bidder for the Agarzari coal block, M/s. Adani Enterprises Ltd) and Warora coal blocks. The accused have submitted that by going as per the CBI's hypothesis it could have equally been the case that in order to qualify M/s. Adani Enterprises Ltd, the allegedly ineligible bidders for all the 4 coal blocks were made technically qualified.

232. It is the submission of the accused that the very fact that 21 of the alleged "Apatra" bidders came to be treated as technically qualified goes against the grain of the allegation of conspiracy between the Accused No. 1 Company and the co-accused. It is submitted that from amongst the alleged Apatra companies whose bids were opened, CBI has chosen to file a case only

against Accused No. 1 Company for reasons which are not clear from its final report. It is submitted that the prima facie opinion can only be that the technical qualification of the bidders did not involve any bias, arbitrariness or favouritism.

233. To counter the opinion of the Investigating Officer who has filed this chargesheet, the accused have relied on statement of R. Parthasarthy, Dy. SP, CBI (PW-1, at serial No. 130) who had conducted the Preliminary Enquiry and had submitted the enquiry report. He had recommended registration of a regular case against unknown officers of M/s MSMCL, M/s Sunil Hi-Tech Engineers Ltd and M/s aXYKno Capital Services Ltd and had stated that however, the following points may come in the successful prosecution:

“1. On the day when M/s Sunil Hitech Engineers Ltd. was treated as technically qualified, despite their not meeting the important bid condition, the price bids of none of the bidders was opened.

2. In the absence of the knowledge of price bid of the bidders, attributing the motive that the tender committee intended to favour one bidder in particular would be difficult.

3. There is no corresponding wrongful loss caused to M/s MSMCL due to the act of omission and commission on the part of the members of the tender committee. On the contrary by taking a call on M/s Sunil Hitech Engineers Ltd., by default, a substantial amount of loss which would have been caused to MSMCL, has been averted. M/s Sunil Hitech Engineers Ltd. has quoted the highest upfront sweat money of Rs.36.06 + Re. 1 = Rs.37.06 per tone of the geological reserve as against Rs.31/- quoted by H-2 bidder.”

234. The accused have referred to para 16.4.11, 16.4.12, 16.4.13, 16.4.14, 16.4.15, 16.4.16 to show that it is the CBI's case that it was unable to find various records, deliberations, notings and

information from the files of M/s. MSMCL. The accused have submitted that letters were written by Nagpur Metro to M/s MSMCL to lift its files left in the strong room of the old premises at Udyog Bhawan but the fact of shifting of the office of M/s. MSMCL and the fate of the files left at the old office premises of M/s. MSMCL is nowhere revealed from the statements and documents relied upon by the CBI. The accused have submitted that CBI never even carried out any searches at the office premises of M/s. MSMCL, either old or new. In fact, the files from M/s. MSMCL were acquired through production cum Seizure memo's and seized at the office of CBI at New Delhi. It is the submission of the accused that before reaching the conclusion that "No records could be found", CBI did not even bother to look for them and this conclusion was arrived at from the office of CBI itself. It is their say that CBI's incomplete investigation with respect to documents of M/s. MSMCL cannot be held to be circumstance against the accused persons. It is the submission of the accused that he being a private person does not have the means or ability to produce documents from the government files and CBI ought to have made sincere attempts to locate the whereabouts of the necessary files. Reference is made to para-14.11 of the CBI Manual which requires the IO to acquaint himself with the facts, rules and regulations and the procedures followed including well-established and approved conventions, if any, as regards working of the organization with which investigation or enquiries are related and should ascertain all possible

explanations likely to be offered in defence as well as any defects or irregularities in procedure, which may be desired to be produced in evidence. The accused have submitted that the prosecution was able to find out the materials which favoured its case such as the alleged note of A-5 D.G. Philip and letter of increase in remuneration of M/s. aXYKno but nothing to corroborate the same by way of notings etc. It is the submission of the accused that M/s. MSMCL had called for presentations of the technically qualified bidders vide letter dated 07.04.2008, **D-369, Page 224, PDF 11833** and as is evident from the aforesaid letter, the company had also submitted their presentations in hard copy/soft copy along with collaterals for the project like business plan report. They have submitted that neither of the aforesaid documents which are crucial to the present case have been brought on record by CBI. It is the submission of the accused that the requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. It is the submission of the accused that DGMS certification was not at all a condition as per the tender document and the definition of “actual mining” as claimed by CBI was not an “essential condition” of the tender documents.

235. **Decision of the Court:** The Government of Maharashtra vide letter dated 01.09.2007 had directed the Managing Director, MSMC to scrutinize the bids received with reference to

Expression of Interest for the coal blocks from administrative and financial viewpoints and should prepare comparative chart, **PDF 7037**.

236. The bids in this case, as is the normal procedure, comprised of technical bids and financial bids. The last date for submission of the bids was 14.03.2008.
237. During investigation, it has not come on record what were the Terms of Reference (ToR), Scope of Work, report/Findings of the Tender Committee.
238. However, at **D-33, PDF 4503** are the minutes of the meeting of the Tender Committee held on 14.03.2008 which show that the same was attended by A-6 Avinash Warjekar, Chairman, MSMC, Nagpur, A-5 D.G. Philip, IAS, Managing Director, MSMC, Nagpur, P.P. Soni, General Manager, MSMC, Nagpur, P.B. Lalwani, Accounts Officer, MSMC, Nagpur and R. Ramkrishnan, representing M/s aXYKno Services Private Ltd. (Financial Consultants).
239. It is recorded in the minutes that for 3 coal blocks, 38 bids were received. The bid submitted by one M/s Indiabull was rejected as it was not received within the time-limit prescribed for submission of the tender documents.
240. The minutes record that the representatives of the bidders requested the Tender Committee that the technical scrutiny will take longer time, only the DDs for EMD submitted by different parties with the name of the party, amount of DD, vide DD No. etc should be announced only and the other technical details be

examined and compared at the level of the Tender Committee itself.

241. This suggestion of the representatives was accepted and the name of the party and the name of the coal block for which the bid was received, amount of EMD submitted, vide DD No. and date etc were announced for the information of all present.
242. The bidders were informed that the technical bids will be analyzed and examined properly. The bidders were also told that they will have to give presentation in hard and soft copies on any positive points, the party may decide and commercial bids will be opened as soon as the time-limit given for presentation is over.
243. PW 29 P.B. Lalwani was the Assistant Manager (Audit) and MSMCL during 2008. He was shown as one of the members of the Technical Committee. He has stated that he had not seen the technical bids of the bidders. He has stated that he had not participated in the technical evaluation of the bids for Adkoli coal block and does not know who and how the technical bids were evaluated and who were the qualified/disqualified bidders or the said coal block.
244. PW 32 Parameshwar Puranmal Soni, General Manager, MSMCL, who is also shown as one of the members of the technical committee, has stated that the tender documents were kept by D.G. Philip as he was looking after all such activity. He was not called for evaluation of the technical bids so he did not participate in the evaluation of the technical bids. He has also

stated that he does not know how and who has examined the technical bids and who has prepared the analysis report technical bids. He has stated that he has not seen any such analysis report and he was not present at the time of the opening of the price bids.

245. The representatives of the bidders, PW-93 – PW-100 have also stated that the technical bids were not evaluated on 14.03.2008.
246. Who declared technical eligibility/ineligibility of various bidders for the different coal blocks?
247. This is made known from the minutes of the Management Committee meeting held on 10.04.2008, **D-36, Page 195, PDF 4650**. At page 199, it records that:

“The Managing Director, then openly announced the names of the parties who were technically qualified and disqualified and the reasons for their disqualifications. He also informed all present that the commercial bids of the parties, who did not fulfill the technical criteria is rejected and their commercial bids would not be opened. Accordingly, a remark to the effect on the commercial envelope of disqualified parties were taken that they being technically disqualified their envelopes are not opened...”

248. The minutes do not record that technical evaluation of the bids was by the Technical Committee.
249. Therefore, according to the material available on record, it is clear that it is the Managing Director, who was given the responsibility by Government of Maharashtra to scrutinize the bids received by M/s. MSMCL from administrative and financial viewpoint. The Managing Director was directed to prepare comparative chart and submit to the High-Power Committee. The members of Technical Committee, who are

prosecution witnesses namely, PW-29 and PW-32 have also stated that they had no role in technical evaluation of the bids. The representatives of the bidders, PW-93 – PW-100, have also stated that the bids were not technically evaluated on 14.03.2008 and on that date only the names of parties, EMDs submitted, date of DDs only were noted.

250. In the comparative chart which was prepared after technical evaluation of bids, eligible (patra)/ineligible (apatra) is also noted in the handwriting of A-5 D.G. Philip.
251. Therefore, technical evaluation of the bids was conducted by A-5 D.G. Philip and the role of A-6 Avinash Warjekar is ruled out in technical evaluation of bids.
252. So far as A-3 M/s. aXYKno Capital Services Private Ltd and A-4 R. Ramakrishnan concerned, they have relied on Office Memorandum dated 25.11.2002, issued by Central Vigilance Commission on the subject of appointment of consultants where in Para 4, page 10 it is provided that:
- “The role of the consultant should be of advisory and recommendatory and final authority and responsibility should be with the departmental officers only.”
253. This court, in the case of CBI versus M/s. LANCO Infratech Ltd and Ors, had the occasion to note that this circular was relied on by CBI in the said charge sheet for giving relief to this very accused i.e., M/s aXYKno Captial Services Private Limited. The circular is, therefore, of sterling quality and the accused can rely upon the same at the stage of charge also. Assuming for the sake of argument that A-3 M/s. aXYKno

Capital Services Private Ltd and A-4 R. Ramakrishnan had any role to play in technical evaluation of the bids, their role was advisory and recommendatory and final authority and responsibility was with A-5 D.G. Philip. Moreover, Financial Consultant cannot be expected to evaluate the bids technically. Since there is nothing to show knowledge to A3 and A4 about the technical ineligibility of M/s. Sunil Hi-Tech engineering Ltd, so there is no question of concealing this fact from the High-Power Committee by A3 and A4. Further, the presentation before the High-Power Committee was not about eligibility or ineligibility but regarding accounting and taxation impact on joint venture company.

254. Moreover, internal noting is always capable of being changed or amended or withdrawn (supra, Pimpri Chinchwad New Township Development Authority and Sethi Auto Service Station). This is what that happened in the case in hand as the noting made by A-5 D.G. Philip declaring bidders technically eligible (patra)/ineligible (apatra) were modified vis-à-vis M/s. Sunil Hi-Tech Engineering Ltd before opening of financial bids which is reflected from the note **D-36, Page 17, PDF 4666**. In this note it is recorded that M/s. Sunil Hi-Tech Engineering Ltd had provided the EMD and was technically and financially qualified and the column for recording reasons for technical disqualification is blank.
255. Therefore, no culpability can be imputed upon A-3 and A-4, for declaring M/s. Sunil Hi-Tech Engineering Ltd technically qualified.

256. Next, the court will examine the allegations against A-5 D.G. Philip that he had found M/s. Sunil Hi-Tech Engineering Ltd technically ineligible (apatra) but still he declared it technically eligible and opened its financial bid.
257. The case of A-5 is that in the bid submitted by M/s. Sunil Hi-Tech Engineering Ltd. reliance was placed on experience of SB Engineering Associate for the last 5 years and reliance is also placed on manpower available with SB Engineering Associate, **D-28, Page 12, PDF 2623 and Page 36, PDF 2647**. However, there was no Memorandum of Understanding filed with the bid document to enable M/s. Sunil Hi-Tech Engineering Ltd take the benefit of experience and manpower of SB Engineering Associate. At that stage, in the absence of Memorandum of Understanding between M/s. Sunil Hi-Tech Engineering Ltd and SB Engineering Associate, A-5 D.G. Philip had noted against M/s. Sunil Hi-Tech Engineering Ltd that it was technically ineligible.
258. The accused has relied on directions issued by Government of Maharashtra, Industry Department dated 30.04.1994 pertaining to the guideline procedures to be followed regarding two envelope system to submit that in the technical bid envelope, if any shortcoming is found or supporting documents are not attached then permission to submit or furnish such documents can be given to the bidder up to the time of opening of their commercial bid offers so that the best competitive offers are received.

259. The accused has submitted that in accordance with the above resolution and the terms and conditions of the tender bid document M/s. Sunil Hi-Tech Engineering Ltd and other bidders were found technically ineligible due to some shortcomings in their technical bid documents were informed technically that they become eligible, technically they should clear their shortcomings/lacking asked by submitting their positive documents.
260. It is the submission of the accused that M/s. Sunil Hi-Tech Engineering Ltd after learning of his ineligibility submitted MOU with M/s. SB Engineering Associates, so that it could use its experience of mining for the purpose of winning Joint Venture Partnership.
261. On receiving the MOU, according to A-5 D.G. Philip, M/s. SHEL could take the benefit of mining experience of M/s. SBEA and, therefore, became eligible, technically. Before opening of financial bids, M/s. SHEL was found to be technically eligible is evident from **D-36, Page 17, PDF 4666**, which is another note found in the same file in which minutes of Management Committee meeting dated 10.04.2008 were placed.
262. This submission of the accused is persuasive because it is one of the allegations in chargesheet that last date for submission of bids was 14.03.2008. The bid of M/s. SHEL was submitted with the forwarding letter dated 13.03.2008 in a spiral-bound book. However, MOU dated 14.03.08 between M/s. SHEL and M/s.

SBEA is attached with the spiral-bound book with a stapler pin. The allegations in the chargesheet are that the bid was to be submitted till 14.03.2008 by 1.00 pm, the technical bids were to be opened at 4.00 pm on 14.03.2008. Before that, it is difficult to assume that M/s. SHEL entered into a MOU with M/s. SBEA, got it documented on the stamp paper which was duly notarized and submitted in the office of M/s. MSMCL before 1 PM.

263. Therefore, the insinuation is that by interpolation M/s. SHEL was permitted to include MOU with M/s. SBEA after the last date of submitting the bids was over.
264. However, it is own case of A-5 that the consortium MOU dated 14.03.2008 was not part of the spiral-bound book submitted in the sealed technical envelope of technical bid by M/s. SHEL which was opened on 14.03.2008 at 4 PM by MSMCL for scrutiny of technical bids were submitted by the bidders. It is the case of A-5 that bid of M/s SHEL was submitted with forwarding letter dated 13.03.2008 and consortium MOU is dated 14.03.2008, and therefore could not have been attached with the bid document which were submitted with forwarding letter dated 13.03.2008.
265. A-5 thus explains in what circumstances M/s. SHEL was earlier declared ineligible. A-5 has explained that in the bid documents reliance was placed on mining experience and workforce of M/s SBEA but no MOU was enclosed in bid documents to allow M/s. SHEL take the benefit of experience and manpower of

M/s. SBEA. M/s. SHEL was permitted to place on record its MOU with M/s. SBEA and that is how MOU dated 14.03.2008 came to be part of tender documents of M/s. SHEL. After taking into consideration the mining experience of M/s SBEA, M/s. SHEL was declared technically eligible which is evident from the chart available in the file containing the minutes of Management Committee dated 10.04.08, **D-36, Page 17, PDF 4666.**

266. A-5 D.G. Philip has given explanation why initially he had formed an opinion that M/s SHEL was technically ineligible and why the said company was later on declared eligible.
267. The question is whether M/s SHEL was technically eligible?
268. According to A-5, he had relied on **D-28, Page 12, PDF 2623** which is Annexure 2-Bidder's Experience Information (Last 5 Years) for coming to a conclusion that M/s SHEL was technically qualified for the bid.
269. A perusal of this Annexure shows that the 1st task undertaken is open excavation, construction of RCC box and drivage of a pair of inclined shafts. The 2nd task undertaken is construction of air shaft and FanHouse building. The 3rd task undertaken is construction of 2 numbers of 1200 m Internal Diameter Shafts for tunnel work. The 4th task undertaken is construction of Air Shaft and FanHouse building. The 5th task undertaken is open excavation, construction of RCC box and drivage of a pair of inclined shafts.

270. The submission of the accused is that the definition of Mining in the Mine Act, 1952, is a detailed definition which takes into account the aforesaid tasks undertaken by the consortium partner of M/s SHEL.
271. They have further relied on definition of “Mining Operations” as per Section 3(d) of MMDR Act, 1957, which is defined as “any operation undertaken for the purpose of winning any mineral”.
272. The expression used in the tender is Actual Mining. According to prosecution witnesses (PW-18), Actual Mining means winning of minerals from below the ground i.e., production of coal/minerals. However, this clarificatory definition of mining is not provided in the tender documents where the expression used is only actual mining without any clarification that actual mining shall mean winning of minerals from below the ground i.e., production of coal/minerals. Therefore, the submission of the accused is that the five tasks undertaken by M/s SBEA will be covered with the experience of mining.
273. However, the bid documents also require that the bidder should have experience in survey and exploration. From the five tasks undertaken by M/s. SBEA, it appears that none of the tasks covers survey and exploration.
274. The further submissions of A-5 D.G. Philip are that MSMCL had mining experience of more than 30 years of winning minerals from various mines including underground. Therefore, the criteria of having compulsory minimum 3 years of

experience of the bidders to become eligible for opening of the commercial bids, was not of much importance or essential and was relaxed for all bidders for the success of coal block mining as MSMCL had already sufficient mining experience, but finance. For this reason, the criteria of minimum of 3 years of mining experience was relaxed and not pressed for all bidders who were found financially fit and eligible and fulfilling the financial criteria. So, accordingly out of 13 competitive bidders, 12 bidders except one were found to be technically fit and eligible for opening of their commercial bid. It is also the submission of the accused that there is nothing illegal or wrong or invalid in modifying the original terms and conditions mentioned in the tender bid documents published.

275. This argument of the accused is problematic for him and difficult for the court to accept.
276. For Adkoli coal block, there were 13 bidders. According to the chart prepared by A-5 D.G. Philip, 8 of them were ineligible and 5 were eligible, technically. It was not that none of the bidders was technically eligible, and to make the bid successful all the ineligible bidders were declared eligible. This is without stating that in a bid where there is no technically successful bidder, the financial bids of all the bidders can be opened. There was no justification for A-5 to open the bids of technically ineligible bidders, including M/s. SHEL.
277. Here, at the stage of charge, the action of A-5 raises serious suspicion that he as a public servant obtained for ineligible

bidders, including M/s SHEL valuable thing/pecuniary advantage without any public interest. The valuable thing in this case is clearing ineligible bidders eligible technically enabling them to clear first round of the bid and go to the second round of financial bid. This is without any public interest because for Adkoli coal block there were 5 technically eligible bidders and therefore there is no justification for declaring 7 more bidders technically eligible, though they were technically ineligible. The accused have pointed out that not only for Adkoli coal block, but even for Agarzari coal block also ineligible bidders were declared eligible. One of the ineligible bidders namely Adani was awarded the contract as it was the H-1, after opening its financial bid. This court is of the view that opening bids of ineligible bidders for Adkoli coal block is a separate offence and opening bids of ineligible bidders for Warora coal block and Agarzari Coal Block are separate offences. This chargesheet is dealing with Adkoli Coal Block, therefore, the charge will be confined to declaring ineligible bidders for Adkoli Coal block as technically eligible. There is no investigation regarding selection of Joint Venture Partner for Warora/Agarzari Coal Block. Selection of ineligible bidder as Joint Venture Partner for Warora/Agarzari Coal Block would be a separate offence regarding which this court cannot give directions for further investigation, though the investigating agency will be at liberty (rather under a duty) to investigate the selection of Joint Venture Partner in Agarzari and Warora Coal Block as well.

278. While forming the opinion that charge under Section 13(1)(d) of the Prevention of Corruption Act, 1988, is to be framed against A-5 D.G. Philip, this court is conscious of the statement made by Sh. R. Parthasarthy, Dy. SP, CBI (PW-1; unrelieved statement at Serial No. 130), who has stated that “There is no corresponding wrongful loss caused to M/s. MSMCL due to the act of omission and commission on the part of the members of the tender committee. On the contrary, by taking a call on M/s. Sunil Hi-Tech Engineers Ltd, by default, a substantial amount of loss which would have been caused to MSMCL has been averted. M/s. Sunil Hi-Tech Engineers Ltd has quoted the highest upper front to sweat money of Rs. 36.06 + Rs.1 = Rs. 37.06 per ton of the geological reserves as against Rs. 31/- quoted by H-2 bidder”.
279. Public functionaries, while dealing with money matters, cannot change the terms and conditions proposed in the bid. In case, it was made known to the public that the conditions for mining required in the bid will be relaxed, there is a possibility that some bidders may have offered even more than the offer of M/s. Sunil Hi-Tech Engineers Ltd.
280. Therefore, so far as 2nd allegation in the chargesheet, declaring technically ineligible bidders as eligible is concerned, charge is to be framed against A-5 D.G. Philip under section 13 (1) (d) of the Prevention of Corruption Act, 1988. Although by relaxing the conditions for technical requirements, M/s. SHEL was awarded the tender being H-1, but nothing can be read into this because this relaxation was for all the 7 ineligible bidders and

not peculiar to M/s. SHEL alone and to win the contract, the financial bid had to be the highest for which there was no certainty. In the absence of any allegation in the chargesheet, it is only in the domain of surmises and conjectures, that after declaring eligible, the technically ineligible bid of M/s SHEL, its financial bid was rigged to make him H-1. Therefore, for 2nd allegation made in the chargesheet, charge as mentioned above, can only be framed against A-5 D.G. Philip.

281. **Third allegation:** The 3rd allegation against the accused is that in violation of conditions of the bid documents, the terms and conditions of the Joint Venture Agreement were modified allowing JVP to transfer/pledge its shares which was otherwise prohibited in the bid document.
282. In the 165th Board meeting of the Board of Directors held on 07.02.2008, **D-41, PDF 5156**, at Point 8, the draft terms and conditions of the bids were discussed point wise by the Directors.
283. Therefore, A-6 Sh. Avinash Manohar Warjekar and A-5 Sh. D.G. Philip were aware of the terms and conditions of the bid documents **D-41, PDF 5161**.
284. In the bid document under section 4 (Special Conditions of JV Agreement SPV) under clause XVI (1), **D-44, Page 29, PDF 5312**, it was clearly mentioned that:

“JV partner shall not sell his shareholding or create any third-party rights in the SPV for the term of the JV agreement.”

285. In sub-clause (2) of clause XVI of the bid document **D-44, Page 29, PDF 5312**, it was further mentioned that:

“JV partner shall not pledge, mortgage or lien mark the shareholding or any rights in the SPV to any 3rd party, lender or any entity whatsoever.”

286. Vide letter dated 07.01.2009, the General Manager of MSMCL called upon M/s. aXYKno to submit draft Joint Venture Agreement, **D-32, Page 178, PDF 4125**.

287. The 1st draft of JV Agreement was provided by M/s. aXYKno vide their letter dated 12.01.2009, **D-32, Page 126-174, PDF 4073-4121**.

288. Sub-clause 12.2 of clause 12 of this proposed JV Agreement provided that:

“Party No. 2 i.e., M/s. SHEL shall not pledge, mortgage or lien mark the shareholding or any rights in the Joint Venture Company (JVC) to any 3rd party, lender or any entity whatsoever except as provided in this agreement.”

289. Sub-clause 12.3.1 of clause 12 of JV agreement also provided that:

“Either party agrees not to sell any of its shares, any rights related to its shares or any of its pre-emptive rights to new shares or other securities in JVC, not to agree to do any of such things.”

290. However, the Clause 12.4 of the Final JV Agreement executed on 21.11.2009, **D-61, PDF 5876** now provided for share transfers to third party:

12.4 Share Transfers to Third Party

12.4.1 If at any time during the term of this Agreement either party (provided the JVC remains a government company) desires to assign or transfer its equity shares in the JVC to a Party

excluding to its Affiliate, all the following mandatory conditions.

12.4.1.1 The Party intending to transfer all or part his/its share shall first offer the shares to the Other Party;

12.4.1.2 Such offer shall be made by notice in writing setting out the number of shares being offered. The said offer shall limit the time within which, if the offer is not accepted, it shall be deemed to have been declined provided that the time fixed in the said notice shall not be less than 60 days. Within the time stipulated in such notice, the other Party shall be entitled to accept the said offer at a price to be mutually agreed between the Parties. In the event such agreement cannot be reached within a reasonable time, the Fair Value of such shares shall be referred to an Independent Advisor who shall be mutually appointed by the Parties. Within 60 days from the determination of the fair value of such shares by the Independent Advisor, the other Party shall be entitled to purchase such shares at the fair value determined. If such shares are not purchased within the stipulated time or the other Party declines the offer to purchase or does not communicate its acceptance within the prescribed time periods, the Party desiring to transfer all his/its shares may dispose such shares to a third Party.

291. Sub-clause 12.3.2 of clause 12 of JV agreement provided that:

“Each party may transfer all or any of its shares to any of its affiliates subject to such affiliate accepting all of the obligations of the transferring party under this agreement and the transferring party remaining jointly and severally liable with its transferee affiliate in respect of the provisions of this agreement.”

292. It is the allegation of CBI that with a view to cause undue pecuniary advantage to M/s. SHEL with whom M/s. aXYKno had substantial business and financial dealings even prior to the bidding stage of Adkoli coal block, clauses were inserted in the JV agreement to suit M/s. SHEL.

293. The 172nd Meeting of the Board of Directors of M/s. MSMCL held on 21.01.09 was attended by Avinash Warjekar, the then Chairman, M/s. MSMCL, D.G. Philip, the then MD, M/s. MSMCL and others before sending the draft JV agreement to

the Department of Industries, Government of Maharashtra for approval and various clauses of draft JV Agreement were discussed in the presence of the bidders or their representatives and based on that draft JV agreement was finalized and approved by the Board, **D-42, PDF 7255**.

294. Clause 12.3.3 of the Joint Venture Agreement executed on 21.11.2009 provided that:

“Party No. 2 may transfer its shares to an SPV for the specific purpose of carrying on the business as per this agreement. The Party No. 2 will be required to the Deed of Adherence as per Schedule-2. It will however be mandatory for the Party No. 2 to maintain at least 51% share in the SPV at all times during the period of the agreement. In case of consortium, the consortium partners should have a minimum cash equity holding of 5% in the SPV, **D-61, Page 30, PDF 5876**.”

295. As noted earlier, vide letter dated 16.05.2008, A-5 D.G. Phillip requested the Principal Secretary (Industries), Industries, Energy and Labour Dept. Government of Maharashtra, Mantralaya, Mumbai for moving the Chairman of the High-Power Committee for convening High-Power Committee meeting for approval of the said Committee to competitive H-1 bids received for mining of four coal blocks enclosing therewith bid document for Joint Venture for carrying out survey, exploration and Mining activities at four coal blocks allocated to MSMCL, **D-534, Page 170, PDF 20637**.

296. Proposal dated 13.06.2008, **D-153, Page 112, PDF 7699** was sent by D.G. Philip to the Principal Secretary, Department of Industry, Government of Maharashtra for obtaining approval of H-1 bidder in respect of coal blocks including Adkoli Coal

Block. The tender bid documents and terms and conditions were enclosed with the proposal as Annexure-1.

297. PW 14 Sh. V.S. Kulkarni has also stated that as per records, along with proposal dated 13.06.2008 under signatures of D.G. Phillip, Annexure-1 enclosed were the bid documents in respect of four coal blocks including Adkoli coal block.
298. Vide letter dated 24.08.2008, A-5 D.G. Phillip replied to the queries raised by Sh. Vijay Kumar Aggarwal, Additional Chief Secretary (Finance) and Member of the High-Power Committee, Government of Maharashtra, **D- 153, Page 205, PDF 7799.**
299. The response of D.G. Philip, MD, M/s. MSMCL was:
- “The following precautions have been taken to protect the interest of MSMC:-
- i) ...
 - ii) ...
 - iii) ...
 - iv) clause-xvi of section 4 (1) clarifies that JV partner shall not sell the shareholding or create any third-party rights in the JV company for the purpose of the JV agreement,
 - v) clause-xvi of section 4 (2) clarified that JV partner shall not pledge, mortgage or lien mark the shareholding or any rights in the JV company to any 3rd party, lender or any entity whatsoever.”
300. Vide letter dated 23.01.2009, A-5 D.G. Phillip sent draft Joint Venture Agreement to the Principal Secretary (Industries), State of Maharashtra, **D-534, Page 65, PDF 20525.**

301. On 26.02.2009, A-5 D.G. Phillip addressed a letter to the Principal Secretary (Industries) enclosing therewith the say of MSMC's Consultant M/s aXYKno regarding the Joint Venture Draft Agreement submitted to the High-Power Committee for formation of Joint Venture Company with the H-1 Bidders of all the four coal blocks including Adkoli Coal Block, **D-153, Page 30, PDF 7559.**
302. It is to be noted here that the role of A-5 D.G. Phillip came to an end on 26.02.2009 as he retired from the service on the said date.
303. The High-Power Committee on 04.05.2009 recommended selection of H-1 bidder along with the draft JV Agreement and proposed that a proposal be submitted to the Infrastructural Committee of the Cabinet for approval, **D-137, Page 4-6, PDF 6825.**
304. Subsequently, matter was placed before Infrastructural Committee of Government of Maharashtra which approved the proposal relating to selection of H-1 bidders and formation of Joint Venture Company with respective Joint Venture (JV) partners. The committee also approved the proposed draft JV agreement. The terms and conditions of the Joint Venture Agreement were thoroughly considered during the Ministers' Infrastructure Committee at the Chamber of Hon'ble Chief Minister on 18.06.2009 is evident from the fact that while approving formation of Joint Venture Company and its proposed Draft Joint Venture for the development, use and sale

of mineral (coal) from the coal blocks allocated to M/s MCL, the Minister's Infrastructure Committee also made suggestions for incorporating several clauses in the Joint Venture Agreement and one of the clauses which was directed to be included in the Joint Venture Agreement was:-

“3) (a) As per the Corporation's first right of refusal on the sale of 51% coal in JV Company, corporation shall provide coal to the power plant of Maharashtra Airport Development Company and various other projects of the State Government, subject to the following terms and conditions: -

1) Central Government has prescribed the end use of coal. Suitable approval from the central government must be obtained for required change in the end use of coal.

2) The coal shall be provided coal on the prescribed rate decided by Joint Venture after following the due procedure.

(b) Out of the three directors so appointed by the corporation on the Board of Joint Venture Company, the state government shall nominate a senior government official as state representative director.”

305. The Department of Industry, Government of Maharashtra vide letter dated 01.08.2009 conveyed the decision taken by Infrastructural Committee on 18.06.2009 to the MD, M/s. MSMCL, **D-135, PDF 6806.**

306. After receiving approval of Government of Maharashtra, Niranjana Kumar Sudhanshu, the then MD, MSMCL issued letter of intent dated 03.08.2009 to M/s. SHEL, **D-29, Page 271, PDF 3312.**

307. CBI is relying on statement of PW-26 P. Y. Tembhare, General Manager, MSMCL who has stated that:

“On being shown all the relevant files of MSMCL handed over to CBI till date and on being asked as to whether there is any document in the file which gives an indication as to when and under what circumstances the clause relating to non-sale of shares as mentioned in the bid document, got modified in the final JV agreement signed on 21.11.2009 (as indicated in subclause 12.3.2 and 12.3.3) of the JV agreement, I state that from the perusal of the files of MSMCL shown to me, there is nothing to indicate as to how, when and under whose authority, these clauses got inserted in the JV agreement. It is pertinent to mention here that in the bid document there was no condition about the transferability of shares and the only condition that existed was about non sale of the shareholding or the pledge.”

308. Reliance is also placed on statement of PW 32 PP Soni, the then Assistant Manager of MSMCL who has also stated that:

“... there is nothing to indicate as to how, when and under whose authority, these clauses got inserted in the JV agreement. It is pertinent to mention here that in the bid document there was no condition about the transferability of shares and the only condition that existed was about non-sale of the shareholding or the pledge.”

309. Reliance is placed on statement of PW-61 Suresh Kewalramani who has stated that 1st draft of JV agreement was prepared in accordance with condition mentioned in the bid documents. Later on, certain clauses of Joint Venture Agreement were changed after discussions with MSMCL and the bidders. He has stated that R. Ramakrishnan was mainly associated with the change that took place subsequent to preparation of 1st draft Joint Venture Agreement.

310. Reliance is also placed on statement of PW-26 P.Y. Tembhare who has stated that M/s. SHEL or its affiliates do not appear to have complied with the conditions contained in para 12.4 (12.4.1, 12.4.1.1 and 12.4.1.2) before the transfer/sale of its shares to M/s. Jaypee Development Corporation.

311. This is the third count suggested by CBI for framing the charge under section 13(1)(d) of the Prevention of Corruption Act, 1988 against both the public servants and under section 120B and 120B read with section 13(1)(d) of the Prevention of Corruption Act, 1988 against all the accused.
312. **Submissions of A-6 Avinash Warjekar**: The accused has referred to letter dated 20.08.2006 from MoC to MD, MCMCL conveying the in-principle approval of the Central Government to the working of Adkoli Coal Block by M/s MSMCL subject to conditions mentioned therein. Milestone Chart was enclosed with this letter which was to be followed by M/s MSMCL, **D-7, Page 511, PDF 1240**. He has also referred to letter dated 25.01.2007 from Government of Maharashtra addressed to MD, MSMCL directing that the Corporation should not take any decision on the expression of interest invited by the Corporation and all records about it be sent to Industry Department, **D-144, PDF 6987**. The accused have referred to **D-144, PDF 7016** which is OM dated 01.09.2007 of Government of Maharashtra, constituting high-level committee to scrutinize bids received under Expression of Interest, examine financial matters, in order to make MOU and establishing Joint Venture for mineral development. The OM prescribes that the MD of MSMCL should scrutinize the bids received with reference to Expression of Interest invited at present and may be invited hereinafter for the coal blocks, from administrative and financial viewpoints and should prepare comparative chart. It was directed that based on the above-mentioned comparative chart, MD, MSMCL in

consultation with CEO, MIDC, Mumbai shall prepare draft MOU/JV. It was directed that the action taken be put up before the committee and on the basis of decision of the committee, MD, MSMCL, Nagpur, shall take up further action. The accused have referred to **D-41, Page 453, PDF 5156**, which are the minutes of the 165th Board meeting held on 07.02.2008. He has referred to Item No. 8 – Approval to calling off expression of interest for exploitation of all four coal blocks allotted to MSMCL, terms and conditions of the tender documents for entering into MOU for formation of JV company through Public-Private Partnership. He has referred to **D-44, Page 29, PDF 5284** bid document for joint venture for carrying out survey, exploration and mining activities at Marki-Zari-Jamni-Adkoli near Wani Yavatmal District Maharashtra State. He has pointed out at **PDF 2611, D-28**, the bid documents submitted by M/s. SHEL. He has referred to **D-41, Page 464, PDF 5167**, which are the minutes of the 166th Board Meeting held on 12.03.2008 where at item No. 3 – Amendment to be made if any, in terms and conditions of tender documents, it is recorded that condition of coal washing should be amended and relaxed and corrigendum be issued accordingly. The accused has referred to **D-140, Page 13, PDF 6907**, which are the minutes of Meeting of High-Powered Committee held on 01.08.2008 where information was called by HPC on 13 points mentioned in the minutes. The accused have also referred to **D-31, Page 77, PDF 3669**, which is reply given by A-5 D.G. Philip to the queries raised by Vijay Kumar Aggarwal, Additional Chief

Secretary (Finance) and member of the High-Power Committee, Government of Maharashtra. The reply to Para 2.3 is referred to, which is as under:-

“Incomplete bid Documents – The bid document in general has covered all major points and the terms and conditions for formation of a JV company for exploitation of coal block. Section 4 of the bid document specify special condition of JV agreement and Special Purpose Vehicle (J.V. Company). It clearly lays down the responsibility/obligations of the JV partner. Copy of Section 3 and Section 4 is enclosed at Annexure II for perusal. Any other issues regarding exploitation of coal with specific details required, if any, will be discussed with the JV Partner and mutually agreed terms and conditions will be incorporated in the JV Agreement for exploitation of coal block. This JV Agreement will cover all the issues and points which are not covered in the bid document. The draft terms and conditions of the JV Agreement will be got approved by the Government of Maharashtra before executing the same so that the JV Agreement is exhaustive and covers all the points in the interest of MSMC and Government of Maharashtra.”

313. The accused has referred to **D-140, PDF 6902** which are the minutes of High-Power Committee meeting held on 20.11.2008 in which MSMCL was directed to prepare a draft of joint venture company, and after the same is examined/scrutinized by each member of the committee, the same shall be discussed in the next meeting. He has also referred to **D-148, PDF 7273**, Subject No. 6: The status of tenders invited to form JV partnership on private. The minutes record that:

“The progress made in respect of coal blocks by high level committee established for the purpose, has been brought to the notice of Board of Director. Managing Director informed the Board that MSMCL is prepared a draft agreement, and it is enclosed herewith. Three private entrepreneurs, who have been selected, were asked to submit a draft agreement. Out of that, draft has not yet been received in respect of M/s. Sunil Hitech, Nagpur, Gupta Coal, Nagpur. After discussions, it is decided that all entrepreneurs should be given chance again to submit draft. Since M/s. aXYKno

Capitals are appointed as Financial Consultant to MSMC, this company should obtain draft agreements from entrepreneurs/partners and take their meeting to hear their say and to prepare final draft of agreement and submitted to the Managing Director, MSMC. Then Managing Director should take meeting of all partners, Financial Consultant and representative of MSMC; and discuss the same to finalize terms and conditions and the agreement; and revised draft should be placed before Board of Directors for their consideration after its General Body meeting on 22.12.2008 and the action should be taken to approve it after due discussions. The resolution to that effect has been passed.”

314. The accused have referred to letter dated 31.01.2009 written by A-5 D.G. Philip to the Principal Secretary (Industries), Industries, Energy and Labour Department, Mumbai with reference to meeting of High-Power Committee held on 30.01.2009 enclosing therewith detailed comparative note with say of MSMCL pertaining to the draft JV Agreements, **D-30, Page 57, PDF 3649**. With regard to Issue at Sr. No. 10 raised by M/s Adani Enterprises Ltd. vide their letter dated 21.01.2009, the comments given by A-5 D.G. Philip are: -

“The J.V.A. being finalized by the Board should be in agreement with us before submitting it to the High-Power Committee.

Comment

The Joint Venture Partners were issued the copy of draft Joint Venture Agreement prepared by the MSMC. A copy was also issued to the consultant M/s Axykno, who in turn had discussions and deliberations with all the Joint Venture Partners and prepared a revised draft in consultations with the J.V. Partners. This revised draft was put up before the Board of Directors for approval. The Board of MSMC, also invited the Joint Venture Partners, heard their say, discussed with them and then finally prepared the final draft to be sent to the High-Power Committee for consideration and approval. It means that their say was heard and considered. It is not necessary that all the say of the Joint Venture Partners which is not in conformity with the tender documents terms and conditions should be incorporated in the Joint Venture Agreement. The Board in its joint intellectual capacity has considered all the aspects of the say of the J.V. partners and has incorporated all those that are in conformity with the tender terms and conditions. Those aspects that

are not in conformity with the tender documents were not incorporated in the Joint Venture Agreement. However, the High-Power Committee may like to consider the say of the J.V. Partner and take suitable decision as seem fit (Emphasis Supplied).”

315. The accused has drawn attention of the court to **D-153, Page 371, PDF 7968** which is letter dated 28.01.2009 written by Adani Enterprises Limited to the Chief Minister of Government of Maharashtra, Mumbai. In this letter, it was mentioned that Draft Joint Venture Agreement (JVA) was prepared and submitted to the Board by its consultant aXYKno Capital Services Ltd. The company mentioned that they were also heard by the Board on 21.01.2009. It was mentioned that there have been wide scale changes in the draft JVA submitted to the Chief Minister with respect to the one which was discussed by them on 21.01.2009. One of the major differences pointed out by Adani Enterprises Ltd was as under:

As per MSMC Draft of JVA	As per AEL Draft of JVA
Clause 12.2 Party No. 2 shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any 3 rd party, lender or any entity whatsoever.	This should be subject to clause 6.4.1 (e).

316. The learned counsel has also pointed out, **D-158, Page 49, PDF 8401**, which is letter dated 21.01.2009 written by M/s. Sunil Hi-Tech Engineers Ltd to the Managing Director, MSMCL, Nagpur, requesting to add more points to the draft JV Agreement. In this letter, there is no request for permission to the Joint Venture Partner for mortgage, lien or pledge of shareholding or any rights in JVC to any 3rd party, lender or any entity whatsoever. Such a request was made only by Adani Enterprises Ltd. Similarly, in letter dated 22.01.09 written by

Gupta Coal (India) Ltd to the Chairman/Managing Director of MSMCL, **D-158, Page 51, PDF 8403**, there is no request seeking permission for lien marking, pledge or mortgage of shareholding.

317. **Arguments of A-5 D.G. Philip:-**

“16. The GOM vide its GR dated 22.07.2008 has recognised the high-power committee of GOM besides Minister industry and its other members. The Chairman of MSMCL is also incorporated as a member of the high-power committee and the Managing Director of the MSMCL was made member Secretary of the high-power committee with the direction that:

a) MSMCL after the examination of the offers received under expression of interest and its approval by the BOD, with its recommendations will send the entire details with justification to the high-power committee.

b) The high-power committee besides approval to the MSMCL proposal will also give direction for entering into MOU/Agreement with the eligible bidders/industrialist, **D-30, P-70, PDF-3421**.

17. That in its meeting dated 01.08.2008, the high-power committee under the chairmanship of Shri Ashok Chauvan, industry Minister, after detail and prolonged discussion decided to call additional information and clarification from MSMCL on 13 points. The high-power committee for discussing the proposal of MSMCL also called Shri Ramakrishnan Iyer of M/s. aXYKno Capital Services Pvt. Ltd. and discussed with him. The additional chief secretary finance also suggested in the meeting that MSMCL should make computer power point presentation before the High-Power Committee on the proposal of MSMCL, to enable the High-Power Committee to take decision to which industry minister also agreed and directed that the 13 issues asked to be replied by MSMCL should be given in writing to MSMCL. Clarification of the same to be submitted to the principal secretary industry by MSMCL and the principal secretary after its discussion and detailed scrutiny should submit the same to the High-Power Committee. D-31, P-295, E- 3891].

18. Therefore, it is much clear that the Govt in High-Power Committee approved the appointment of Financial Consultant M/s aXYKno and therefore recognized its services and called him to participate in the high-power committee meetings. Moreover, the

next meeting of High-Power Committee was held on 20-11-2008, in which after discussion, it was decided that tentatively there was no objection in giving approval to the proposal of Jamnijhari adkoli, agarzari and warora coal blocks. But unless MSMCL draft of terms and conditions, nature of capital investment, formation of Joint Venture Partners agreement/MOU and raising of joint venture company is ready, it will not be possible for the High-Power Committee to finalise the recommendation of MSMCL. Therefore, MSMCL should take action accordingly, as per above direction within 10 days and prepare the draft of Joint Venture Partner agreement/MOU and the creation of joint venture company and send it to each of the members of High-Power Committee and the High-Power Committee will take decision after scrutinising and examination of the same within 10 day time in the next meeting.

19. That the Managing Director MSMCL vide letter dt. 13-06-2008 sent a proposal to GOM in industry department which was attached with and contained the original tender bid document for formation of joint venture, wherein, at page no 29, para XVI(1) it was clearly mentioned at sub clause(2) that JV partner shall not sell his share holdings or create any third party rights in the SPV for the terms of the JV agreement, nor it shall pledge, mortgage or lien mark the share holding or any rights in SPV to any third party, lender or any entity whatsoever. The Govt. in industry department had seen and examined the above terms and conditions of the tender bid document stating that JV partner shall not sell, pledge, mortgage, or lien mark the share holding or any right in the SPV to any third party, lender or entity whatsoever and was fully aware of the conditions that prevented sale of share or share holdings in the SPV. The GOM in the industry department could have easily incorporated the above conditions of non transfer or sale of share or share holdings by the JV partner to any third party but the GOM consciously did not agree or approve of the non transfer of shares in the SPV by any of the Joint Venture Partner but instead decided and directed MSMCL to prepare fresh terms and conditions of Joint Venture Agreement in consultation with the selected Joint Venture Partner bidders with MSMCL. The GOM had considered the following reasons to do so: [D-153, P-113,E- 7700]

a) The Selected bidders of the coal block had made a representation to the industry minister Shri. Ashok Chauvan, in writing, requesting that the draft terms and conditions of the tender bid documents published needs to be modified as they do not agree with the same. [D-575, P-369, E-7966- 7981]

b) As the JV partners are required to give and expend on 51% cashless equity to MSMCL and also to incur all expenditures i.e. upto removal of coal from the coal blocks

and it sales to the consumer a huge sum of expenditure is required to be incurred by the Joint Venture Partner together with payment of sweat money to MSMCL. For funding such huge expenditure it is necessary to arrange for the funds by various means such as through loan, mortgage of assets in SPV, sale of joint partners shares/equity, and raising of debentures. So that funds required for commencing of the mining activities are collected and can be expended on various items like exploration, manpower, machineries etc for exploitation of coal block and mining of coal from the coal mines.

c) Contributing of 51% of equity in favour of MSMCL.

20. That the GOM in industry department including the minister industry Shri Ashok Chauhan considered the representation made by the 4 selected bidders and heard their say of disagreement with certain terms and conditions of tender bid document, prepared and published on dt. 01-04-2008, with EOI and directed MSMCL to submit fresh draft of Joint Venture Agreement in discussion with the selected bidders and submit the same to the High-Power Committee for according its approval and thereafter its execution with the selected Joint Venture Partner. [D-576, P-58, E-8224]

21. The BOD in its 172nd meeting dt. 21-01-2009, at item no 12, discussed various clauses of the Joint Venture Agreement published in tender bid document of EOI, in presence of the selected bidders heard their say with regard to modifications suggested by them in the original tender bid documents terms and conditions and approved and finalised some suggestions made by the bidder pertaining to the transfer of their shares/share holding to their affiliates or third parties subject to condition that the SPV company i.e. M/s Adkoli natural resources Itd shall always remain a government company i.e. MSMCL one of its partner and a govt. undertaking shall always hold 51% or more of the shares of SPV company. The proceedings state that before sending the draft agreement to principal secretary industry GOM, for its approval, various clauses of the draft JV agreement were discussed in the presence of the bidders and their representative and the outcome of that decision, the draft JV agreement has been modified and finalised and thereafter approved by the BOD. The modified JV agreement was submitted to the High-Power Committee vide letter dt. 23-01-2008 for its final approval. [D-525, P-25, E-5199]

22. The Terms and conditions mentioned in the tender bid document published is the say of MSMCL which is to help the bidding firms to understand what MSMCL likely expecting from the bidders while getting the Joint Venture Agreement prepared and finalised. But the terms and conditions mentioned in the original

terms and conditions of the bid document are not final nor mandatory. Being one sided it is not an agreement at all therefore there is no restriction in any law for changing the draft tender conditions of the tender bid, because it is only a suggestive draft, one sided not mutually agreed to. There is no consent of the other party nor mutually agreed upon. There is no contract between the parties at all. Therefore, it cannot be imposed or made mandatory thus there is no restriction on the publishing authority of tender i.e. MSMCL for changing the terms and conditions of draft mentioned in the tender document.

23. That the company law also does not prohibit a partner firm/company to sell its part of shareholding in the firm or company to any third party. For collecting capital fund or expanding business of the company the partners of the company have the right to sell its share holdings to its affiliates or third party, to enable the company/firm to raise funds necessary for running/expansion of the company. No Law takes away this right to sell companies share to its affiliates or third parties and raise debentures for the betterment/ development of the company/firm.

24. That the conditions of coal block allotment also does not restrict the sale of share to third party. The allotment condition of coal block is that the SPV company shall always be a Govt. company that is holding minimum 51% of shares in the SPV. This condition is not at all breached by the Joint Venture Partners i.e. M/s Sunil Hitech and MSMCL.

25. Thus, there is nothing illegal or wrong or invalid in modifying the original terms and conditions mentioned in the tender bid documents published. Allowing SPV partner to sell his share is in order and with the object of achieving the result of entering into agreement with the selected H1 bidder so that the selected HI bidder enters into a mutually agreed terms and conditions of the Joint Venture Agreement, which is necessary for the formation of SPV of MSMCL. The H1 bidder by fulfilling its duties and responsibilities to contribute and incur all the expenditures needed for development and exploitation of Jamnighari adkoli coal block. As MSMCL, financially was not in a position to incur all the expenditure, all by itself, which is needed for development of coal blocks, it was necessary to have financially sound partner.

26. That if the selected HI partner is not allowed or permitted to collect and secure funds for development of mine by selling or pledging its shares in the SPV or securing debentures subject to the restrictive condition, then the SPV shall always remain a Govt. Company with 51% share with the MSMCL. So subject to this condition the other partner can in/turn sell 49% of its share to its

affiliates or third party. Even after disposing of 49% share of the Joint Venture Partner Sunil Hi tech, the SPV company i.e. Adkoli natural resources limited shall always remain a govt. company. Therefore, the original term conditions of the bid document published was modified and mutually agreed upon and thereafter with the sanction of the GOM was executed in the interest of both the parties.”

318. **Arguments on behalf of A-3 M/s aXYKno Capital Services Private Limited and A-4 R. Ramakrishnan Iyer:** These accused have submitted that their role was limited to providing assistance to M/s MSMCL in preparation of Draft Joint Venture Agreement. Reference is made to **D-311, Page 31, PDF 10648** which is letter dated 18.01.2008 from M/s MSMCL to M/s aXYKno Capital Services Pvt. Ltd. appointing it as Financial Consultant “To aid in preparation of the tender documents/Expression of Interest/and JV agreements.”
319. The accused have relied on CVC Circular dated 25.11.2009 to submit that the role of consultant is only advisory and recommendatory in nature.
320. The accused have submitted that the Government of Maharashtra on 22.07.2008 after the scrutiny/evaluation of the bids, reconstituted the high-power committee vide G.R. dated 22.07.2008 and laid down the procedure with respect to the Joint Venture Agreement as follows –
- “2). Besides the above proposal, the committee will also specify regarding memorandum of understanding to be done with the eligible entrepreneur, **D-119, Page 85, PDF 6427.**”
321. The accused have submitted that on 01.12.2008 MSMCL directed all the 3 bidders to submit draft JVA in response to which M/s Adani Enterprises Ltd submitted a draft JVA, **D-369,**

Page 190, PDF 11797.

322. The accused have further submitted that in the 171st Board Meeting held on 15.12.2008, **D-148, Page 31, PDF 7273**, it is recorded in the minutes at Subject No. 6 that only Adani Enterprises Ltd had submitted a draft and M/s Sunil Hi-Tech Engineers Limited and Gupta Coal have failed to give the draft.
323. The minutes also records that MSMCL has prepared a Draft Agreement.
324. It is the submission of the accused that this draft was not prepared by them as it is noted in the minutes that M/s aXYKno Capital was called upon to prepare a separate JV agreement in consultation with successful bidders. To corroborate this, the accused have referred to **D-31, Page 62, PDF 3654**, which are the comments prepared and submitted by MD of MSMCL in response to the queries of the Hi Power Committee. The response was “The Joint Venture Partners were issued the copy of draft Joint Venture Agreement prepared by MSMC. A copy was also issued to consultant M/s aXYKno ...”
325. The accused have taken the draft JV Agreement issued by M/s MSMCL through RTI to show that it does not restrict sale/transfer of shares in contravention to the terms and conditions of the bid document as there is no clause restricting sale/transfer of shares. The accused have submitted that this is not a draft prepared by them.
326. The accused have submitted that according to statement of PW-61 Sh. Suresh Kewalramni, the then Vice President of M/s

aXYKno Capital Services Pvt. Ltd., **Page 406-408, PDF 540** the first draft of JV agreement was prepared by M/s aXYKno Capital Services Pvt. Ltd. strictly in accordance with conditions mentioned in bid document and was submitted to MSMCL.

327. The accused have referred to **D-32 Page 175 PDF 4103** where Clause 12.2 was:

“Notwithstanding anything contained herein, a Party shall not sell any Equity Shares held by it in the JVC.”

328. Further, proposed Clause 12.3 was:

“AEL shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any third party, lender or any entity whatsoever.”

329. The submission of the accused is that it shows there was no violation/deviation from the bid documents. The accused have submitted that they had given last and final draft JV agreement after discussions with selected JV partners as per the directions of Board of M/s MSMCL along with their letter dt. 19.01.2009, **D-31 Page 125 PDF 4072**. The accused have submitted that this letter has remarks/noting of the then MD, M/s MSMCL:

“Please put up this draft agreement before the Board on 21.01.2009 for discussion and approval.”

330. The accused have submitted that this draft they have got through RTI from M/s MSMCL and Clause 12.2 of the same provides that:

“Notwithstanding anything contained herein, a Party shall not sell any Equity Shares held by it in the JVC.”

331. Clause 12.3 again provided that:

“SPV shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any third party, lender or any entity whatsoever.”

332. The accused have submitted that after providing draft venture agreement, their term came to an end as the same was, according to letter dated 14.12.2007, for a period of one year, **D-107, Page 5, PDF 6205.**

333. The accused have referred to letter dated 23.01.2009, written by A-5 D.G. Philip to the Principal Secretary (Industries), Government of Maharashtra, attaching the draft JVA finalized by the Board, **D-140, Page 28, PDF 6922.** The letter mentioned that:

“The draft was finalized after a deep discussion with the JV partners in the meeting of Board of Directors of the Corporation on 21.01.2009.”

334. The accused have submitted that the draft JV agreement attached with aforementioned letter dated 23.01.2009 of A-5-MD, M/s. MSMCL (relied upon by the prosecution) contains sale/pledge/transfer of shares clause, **D-158, PDF 8382.** Clause 6.4.1 **Reserved Matters** provided that pledge of shares by SHEL in JVC Company in favour of any third party, lender or any other entity whatsoever will be subject to the approval of one Director nominated by MSMC and one Director nominated by SHEL. Clause 12.4 dealt with **Shares Transfers** to third party.

335. The accused have submitted that the records of the court clearly show that the High-Power Committee, Government of Maharashtra held various meetings to discuss the clauses/terms

and conditions of the Joint Venture Agreement. After detailed discussions amongst themselves, the JVA went through various changes/modifications and was finally put up for approval on 04.05.2009. The details of meetings of High-Power Committee are point out at **D-160, Page 2, PDF 8411**.

336. The accused have submitted that the Joint Venture Agreement was approved by the high-power committee on 04.05.2009, **D-137, Page 4, PDF 6825**. Further, the Joint Venture Agreement was approved by the Cabinet Committee on 18.06.2009 and was executed between M/s. MSMCL and M/s SHEL on **21.11.2009, D-61, PDF 5847**. This Joint Venture Agreement allowed transfer of shares by JVC to an SPV, pledge of shares in the JVC by either party and allowed sale of shares by either party in the JVC to the 3rd party. The accused have submitted that their services were not taken to executed the Joint Venture Agreement between the selected Joint Venture Partners and A-3 had already completed its tenure of one year in January 2009, whereas the Joint Venture Agreement was executed 10 months after completion of service of A-3-M/s. aXYKno Capital Services Pvt. Ltd.
337. **Arguments on behalf of A-2 Sunil Ratnakar Gutte:** The accused has argued that draft JV agreements were called from H-1 bidders (M/s. Adani Enterprises Ltd, M/s. Sunil Hi-Tech and M/s. Gupta coal Ltd) for the three coal blocks allocated to M/s. MSMCL. However, out of the three, only M/s Adani Enterprises Ltd submitted the draft agreement, which is noted in the minutes of the 172nd Meeting of the Board of M/s.

MSMCL dated 15.12.2008, **D-148, Page 31, PDF 7273.**

338. Next, the accused has relied on letter written by M/s. Adani Enterprises Ltd dated 28.01.2009, **D-153, PDF 7968** to the Chief Minister of Maharashtra, requesting that the pledge/transfer of shares be permitted. The accused has submitted that as per MSMC draft, at clause 12.2, it was provided that the Party No. 2 shall not pledge, mortgage or lienmark the shareholding or any rights in the JVC to any third party, lender or any entity whatsoever.
339. However, as per the request of M/s. Adani Enterprises Ltd, it was suggested that the aforesaid clause be made subject to clause 6.4.1 (e), **D-158, PDF 8378**, which provided that:

“6.4.1. **Reserved Matters.** The following important and vital matters in relation to JVC and subsidiaries of JVC will be subject to the approval of at least one (1) Director nominated by MSMC and at least (1) Director nominated by SHEL. These include but are not limited to the following actions by the JVC/Party No. 2:

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) Pledge of shares by SHEL in JVC company in favour of any 3rd party, lender or any other entity whatsoever.”

340. It is submitted by the accused that the clause 12.2 of the Joint Venture Agreement finally executed by the parties, **D-61, PDF 5857**, now provided that:

“12.2 Party No.2 shall not pledge, mortgage or lienmark the shareholding or any rights in the JVC to any 3rd party, lender or any entity whatsoever except as provided in this agreement.”

341. It is submitted that it shows the request of M/s. Adani Enterprises Ltd was accepted by M/s. MSMCL and they allowed the pledge, mortgage or lien on their shareholdings as per the provisions of the draft Joint Venture Agreement.
342. It is submitted that it was M/s. Adani Enterprises Ltd., which suggested changes to the JV draft in respect of pledge/mortgage, whereas no such clause had been proposed by or on behalf of Accused No. 1 Company.
343. The accused have submitted that CBI has not brought on record the final Joint Venture Agreement executed between M/s. MSMCL and H-1 bidders of Agarzari and Warora coal blocks and in the absence of these agreements, it is not established whether the changes in the Joint Venture Agreement vis-à-vis conditions in the bid document were made for accused No. 1 company only or for all the three JV partners and whether the Accused No. 1 Company was only a beneficiary of the action of another i.e., M/s. Adani Enterprises Limited.
344. It is submitted by the accused that the “MSMC draft of the JVA” referred in the letter of M/s. Adani Enterprises Ltd dated 28.08.2009 addressed to the Chief Minister of Maharashtra is required to be on record to establish the truth of the matter since the alleged changes were made to the said draft and only after approval of these changes by the Government of Maharashtra, the Joint Venture Agreement was finalized.

345. The accused have submitted that CBI ought to have brought on record JV agreements for Agarzari and Warora coal blocks enclosed with letter dated 19.01.2009 by M/s. aXYKno to D.G. Philip, the then MD, MSMCL, draft JV Agreement circulated to the Board members of M/s. MSMCL with Agenda of 172nd Board Meeting referred in the minutes of the 172nd meeting of the Board of directors and revised draft of Joint Venture Agreement and presentations submitted by M/s. MSMCL to the Government of Maharashtra.
346. The accused have submitted that in the Joint Venture Agreement signed between Accused No. 1 Company and M/s. MSMCL various changes were made which were heavily in favour of M/s MSMCL which are contrary to any allegation of alleged conspiracy for change of terms in favour of any particular bidder or all the bidders.
347. The accused have submitted that the minutes of the meeting of the high-power committee under the chairmanship of the Chief Minister for Joint Venture Agreement in respect of the coal block allotted to MSMCL dated 04.05.2009, **D-146, Page 10, PDF 7165** referred to “directives” issued by the high-power committee during the meeting held on 30.01.2009, but those minutes are not on record.
348. The accused have submitted that before the issuance of the letter of intent, at least four meetings were conveyed by the high-power committee of the Government of Maharashtra wherein the matter of the Joint Venture Agreement was

discussed and various directions were issued in this regard. It is submitted that CBI has not brought on record what all changes were made to the draft Joint Venture Agreement in the meetings of the high-power committee before finally approving the Joint Venture Agreement.

349. **Decision of the Court:** - Vide OM dated 01.09.2007, **D-144, Page 64, PDF 7017**, the Government of Maharashtra had constituted High Level Committee to scrutinize bids received under Expression of Interest, examine financial matters in order to make MOU and establishing Joint Venture for mineral development. The procedure provided for was:

“1) Managing Director MSMC should scrutinize the bids received with reference to Expression of Interest invited at present and may be invited hereinafter for the Coal Blocks, from administrative and financial view points; and should prepare comparative chart.

2) *Based on the above-mentioned comparative chart, Managing Director MSMC in consultation with CEO, MIDC, Andheri, Mumbai or any other Officer directed by the Government, should prepare draft MOU/JV.*

3) The action taken as above may be put up before the Committee. After that the decision may be taken by Committee and based on that, Managing Director, MSMC Nagpur should take up further action.”

350. Therefore, initially the responsibility for preparing the draft MOU/JV was given by the Government of Maharashtra to the MD, MSMCL.

351. Later on, the High-Power Committee in its meeting held on 20.11.2008, directed MSMCL to prepare draft of Joint Venture Company in respect of three coal blocks, **D-140, Page 8, PDF 6902**. Therefore, the draft Joint Venture Agreement was to be

provided by MSMCL to the High-Power Committee for its approval.

352. After selecting the H-1 Bidder for Adkoli Coal Block, the successful bidder M/s Sunil Hi-Tech Engineering Limited was called upon by MSMCL vide its letter dated 01.12.2008 to submit the Draft Agreement and Share Holder's Agreement for further necessary action, **D-369, Page 190, PDF 11797**. Similar request was also made to Adani Enterprises Ltd. and Gupta Coal, Nagpur, who were the successful bidders for Agarzari and Warora coal blocks respectively.
353. Pursuant to this letter of MSMCL, only Adani Enterprises Ltd had given a draft Joint Venture Agreement for the consideration of MSMCL, **D-738, Page 42@56, PDF 25486**. Clause 7.3 (e) of the same permitted pledge of shares of the joint venture company in contravention to the terms and conditions of the bid documents, clause XVI (2).
354. The 171st Board Meeting of MSMC took place on 15.12.2008, **D-148, Page 27, PDF 7273**. This meeting was attended by A-6 Sh. Avinash Warjekar, A-5 Sh. D.G. Philip, Sh. V.S. Savakhande and Sh. A.M. Pophare, the later two being the Directors of MSMCL. Except Sh. V.S. Savakhande , the other three persons namely A-6 Sh. Avinash Warjekar, A-5 Sh. D.G. Philip, and Sh. A.M. Pophare, were also present during 165th Board Meeting of MSMCL held on 07.02.2008 when the terms and conditions of the bid document were finalized. These three persons knew the terms and conditions of the bid document and

therefore also knew that in terms and conditions of the Joint Venture Agreement, there cannot be any variation in comparison to the terms and conditions of the bid document. In the minutes of 171st Board Meeting, under the head of Subject No. 6: The status of tenders invited for form J.V. Partnership on private basis in the context of Coal Blocks allotted to MSMC, it was recorded that:

“The progress, made in respect of Coal Blocks by High Level Committee established for the purpose, has been brought to the notice of Board of Director. Managing Director informed the Board that MSMC has prepared a draft agreement and it is enclosed herewith. Three private entrepreneurs, who have been selected, were asked to submit draft agreement. Out of that, draft has not yet been received in respect of M/s Sunil Hitech, Nagpur and Gupta Coal Nagpur. After discussions, it is decided that all entrepreneurs should be given chance again to submit draft. Since M/s Axino Capitals are appointed as Financial Consultant to MSMC, this company should obtain draft agreements from entrepreneurs/partners and take their meeting to hear their say and to prepare final draft of agreement and submit it to the managing Director, MSMC. Then Managing Director should take meeting of all partners, Financial Consultant and representative of MSMC; and discuss the same to finalise terms and conditions and the agreement; and revised draft should be placed before Board of Directors for their consideration after its General Body meeting on 22.12.2008. And the action should be taken to approve it after due discussions. The resolution that effect has been passed (emphasis supplied).”

355. The three successful bidders for the three coal blocks were M/s Sunil Hi-Tech Engineering Limited, Gupta Coal, Nagpur and Adani Enterprises Limited. The minutes show that M/s Sunil Hi-Tech Engineering Limited and Gupta Coal, Nagpur had not given any draft Joint Venture Agreement in spite of specific request of MSMCL to them and only Adani Enterprises Limited had taken interest in the matter and had given its draft Joint Venture Agreement for consideration of MSMC.

356. The draft JV Agreement mentioned in the Minutes of 171st Board Meeting is placed on record by Ld. Counsels for A-3 and A-4 after obtaining the same from MSMCL under RTI Act. A perusal of the same shows that it had provided for no restriction on sale or pledge of shares by Joint Venture Partner.
357. On the contrary clause 7.3 of this draft Joint Venture Agreement permitted pledge of shares by AEL in JVC company in favour any 3rd party, lender or any other entity whatsoever, subject to the approval of at least one (1) Director nominated by the MSMC and at least (1) Director nominated by AEL.
358. This is despite the fact that the bid documents, **D-34, Page 29, PDF 4625** in clause **XVI Responsibility of JV partner** had provided that (1) JV partner shall not sell his shareholding or create any third-party rights in the SPV for the term of the JV agreement. (2) JV partner shall not pledge, mortgage or lien Mark the shareholding or any rights in the SPV to any third party, lender or any entity whatsoever.
359. The omission of clauses restricting sale/pledge of shares by the Joint Venture Partner in the draft Joint Venture Agreement is therefore incriminating circumstance against A-5 Sh. D.G. Philip and A-6 Sh. Avinash Warjekar. Inclusion of Clause 7.3 **Board Reserves Matters** permitting pledge of shares by AEL in JVC company in favour of any third party, lender or any other entity whatsoever subject to approval of atleast one Director nominated by MSMC and atleast one Director nominated by AEL is incriminating circumstance against A-5

Sh. D.G. Philip and A-6 Sh. Avinash Warjekar. This Draft Joint Venture Agreement was proposed by MSMCL before the proposed draft of Financial Consultant and proposed draft of Adani Enterprises Ltd. were submitted to MSMCL.

360. A-5 D.G. Philip was specifically aware of the fact that those aspects which are not in conformity with the tender documents cannot be incorporated in the Joint Venture Agreement. This is evident from his letter dated 31.01.2009 addressed to the Principal Secretary (Industries), Industries, Energy and Labor Department, Mumbai, **D-31, Page 62, PDF 3654** and he had himself mentioned that:

“... Those aspects that are not in conformity with the tender documents were not incorporated in the Joint Venture Agreement...”

361. In response to the minutes of the 171st Board meeting, the Financial Consultant gave its 1st draft of the Joint Venture Agreement with its email dated 19.12.2008, **D-738, Page 130, PDF 25560**. According to this draft, pledge of shares in the JVC was not permitted in as much as it was not containing any clause like clause 7.3 proposed by MSMCL and Adani Enterprises Limited permitting pledge of shares by JV partner in JVC company in favour of any third party, lender or any entity whatsoever with the approval of one director nominated by MSMC and one director nominated by AEL.
362. Such clause being Clause no. 6.4.1, **D-158, PDF 8378**, was also proposed in the draft JV Agreement submitted by A-5 D.G. Philip with his letter dated 23.01.2009 to the Principal Secretary

(Industries), Government of Maharashtra which is available at **D-140, Page 28, PDF 6922.**

363. Such clause being Clause no. 6.4.1 is also available in the JV Agreement which was finally executed on 21.11.2009 between MSMCL and M/s SHEL, **D-61, PDF 5847.**

364. However, the Financial Consultant did not recommend any such clause in the first draft submitted by it to MSMCL. Rather, the consultant proposed Clause 12.3 providing that:

“AEL shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any third party, lender or any entity whatsoever.”

365. The Financial Consultant also added a non obstante clause, being clause no. 12.2 providing that:

“Notwithstanding anything contained herein, a party shall not sell any Equity Shares held by it in the JVC.”

366. The consultant therefore prohibited sale of shares in the JVC.

367. The Financial Consultant gave its 2nd draft of the Joint Venture Agreement with its letter dated 12.01.2009, **D-32, Page 175, PDF 4122.** The draft MOU/Joint Venture Agreement given by the Financial Consultant, **D-32, Page 156, PDF 4103** clearly provided in Clause 12 SHAREHOLDING AND TRANSFERS that:

“12.2. Notwithstanding anything contained herein, a Party shall not sell any Equity Shares held by it in the JVC.

12.3. AEL shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any 3rd party, lender or any entity whatsoever.”

368. This rules out any criminal conspiracy by the Financial Consultant in deviating from bid documents to provide for sale/pledging of shares by Joint Venture Partner.
369. Thereafter, 3rd draft was given by the Financial Consultant on 19.01.09, **D-32, Page 125, PDF 4072**. This draft is also taken by A-3 and A-4 from MSMCL through RTI Act. Clause 12 of this draft dealing with SHAREHOLDING AND TRANSFERS provides that:
- “12.2. Notwithstanding anything contained herein, a Party shall not sell any Equity Shares held by it in the JVC.
- 12.3. SPV shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any 3rd party, lender or any entity whatsoever.”
370. It shows that in none of the drafts prepared by the Financial Consultant, there was any provision for sale or pledge of shares by the Joint Venture Partner in the SPV. Rather, he was emphatic that party to Joint Venture Company shall not sell equity shares in Joint Venture Company and SPV shall not pledge/mortgage/lien mark to shareholding or any rights in Joint Venture Company to any third-party/lender or any entity whatsoever.
371. On the letter dated 19.01.2009 of Financial Consultant providing its 3rd and last draft, A-5 Sh. D.G. Philip had put up a note:
- “Please put up the draft agreement before the Board on 21.01.09 for discussion and approval”.
372. The tenure of Financial Consultant was for one year and came to an end on 19.01.2009 on submission of the last and final

draft Joint Venture Agreement.

373. On 21.01.2009, Adani Enterprises Limited addressed a letter to A-6 Dr. Avinash Warjekar where one of the points brought to his notice for consideration was:

“The JVA being finalized by the Board should be in agreement with us before submitting it to the High-Power Committee”, **D-158, Page 48, PDF 8400.**

374. On the same date, SHEL had also written a letter to the Managing Director, MSMCL for adding certain points in the draft JV agreement but it did not make any request for provision for sale or pledge of shares by JV partner in JV company, **D-158, Page 49, PDF 8401.**

375. The draft given by the Financial Consultant was discussed with the Joint Venture Partners in the 172nd Board Meeting held on 21.01.2009. A-6 Sh. Avinash Warjekar, A-5 Sh. D.G. Philip and Sh. Anil Pophare were the same members of the Board of Directors over also present during 165th Board Meeting, when bid conditions were decided. In the minutes, Item No. 12, **D-148, Page 22, PDF 7264**, recorded that:

“Subject No. 12: Regarding making joint venture Project agreement at earlier selected rate for mining of coal from Agarzari, Warora, Zari-Jamni-Adkoli Coal Block.

The High-Level Committee has given approval to make agreement in principle with the partner selected for Coal Blocks of Agarzari, Warora, Zari-Jamni-Adkoli for mining of Coal and has informed to prepare joint venture Project agreement and send it to government for final sanction. In this context, the draft agreement was sent to M/s. Axino Capitals, the consultant of MSMC. It has discussed with the concerned partners and prepared a draft of the agreement and submitted the same to this office. This draft has been placed before the Board for consideration. All the concerned partners were called for discussions and Managing Director requested the Board,

to finalise the draft agreement by discussing with them, before sending it to the government. After that Board invited the consultant of the MSMC and the representatives of all other partners and went through parawise text of the draft and discussing with partners and making necessary amendments, the draft has been finalised and it has been unanimously approved. On the issues on which opinion of Board deferred with partner joint venture, note has been prepared on those issues which is as follows:

It was decided by the Board that copy of the finalised agreement to draft as above, and information on the points which there was no concurrence with the partners and resolution was passed accordingly.”

376. The minutes of the 173rd Board Meeting, **Subject No. 13: Progress in respect of joint venture Project agreement of Agarzari, Warora & Marki-Zari-Jamni-Adkoli Coal Blocks, D-42, PDF 7252** record that:

“Draft agreement which was finalized by the Board in respect of development of Agarzari, Warora & Marki-Zari-Jamni-Adkoli Coal Blocks, has been finalized by making discussion with Joint Venture Partners in the 172nd Board meeting; and the said draft was submitted to High-Level Committee for scrutiny. This subject was discussed on 13th February, 2008 at Mumbai. Before Finalizing This Draft, Some Issues Were Raised by M/s. Gupta Coal, Adani Enterprises and M/s. Sunil Hitech for its amendment. Therefore, High-Level Committee directed, Managing Director to obtain Comments of Financial Adviser and then it should be submitted to the high-level committee.

Accordingly, Adviser of MSMC M/s. Axino Capitals has prepared its comments and the same was placed before the Board, for the approval. Detailed discussions have been done in Board’s meeting, when Shri Ramakrishna of M/s. Axino Capitals was also present. After detailed discussions, the comments have been approved with some amendments and resolution was passed to place it before High-Level Committee. The amended draft of comments is enclosed as annexure.”

377. On 23.01.2009, A-5 D.G. Philip addressed a letter to the Principal Secretary, Industries and enclosed therewith a draft Joint Venture Agreement after deep discussions with three H-1s, **D-127, Page 5, PDF, 6698**. The draft Joint Venture Agreement

now permitted sale and transfer of shares, **D-158, Page 8354, 8381 and 8382**. The Draft Joint Venture Agreement in Clause 12.4 provided for Share Transfers to 3rd Party. Clause 12.5 now provided for Consequences of Sale of Shares in contravention of the Agreement. However, so far as pledging of shares is concerned, Clause 12.2, provided that:

“Party No. 2 shall not pledge, mortgage or lienmark the shareholding or any rights in the JVC to any 3rd party, lender or any entity whatsoever.”

378. Simultaneously, clause 6.4.1 **Reserved Matters** permitted pledge of shares by SHEL in JVC company in favour of any third party, lender or any other entity whatsoever with the approval of one director nominated by MSMCL and one director nominated by SHEL.

379. On 28.01.2009, M/s. Adani Enterprises addressed a letter to the Chief Minister of State of Maharashtra, **D-153, PDF 7968@7975**, mentioning in para 5 of the said letter that:

“We would also like to bring to your notice that there have been widescale changes in the Draft JVA submitted to you with respect to the 1 which was discussed by us on 21st January, 2009, the same is detailed in **Annexure ‘B’**.”

380. One of the major differences pointed out by Adani Enterprises Limited was as under:

As per MSMC Draft of JVA	As per AEL Draft of JVA
Clause 12.2 Party No. 2 shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any 3 rd party, lender or any entity whatsoever.	This should be subject to clause 6.4.1 (e).

381. At the meeting of High-Power Committee held on 30.01.2009 Chief Minister had directed that proposal regarding the draft Joint Venture Agreement should be resubmitted for consideration to the High-Power Committee to resolve the views of different departments. This is available in the minutes of the meeting held on 09.04.2009 under Chairmanship of Chief Secretary regarding formation of JVs with Maharashtra State Mining Cooperation, Nagpur for development of coal blocks available at **D-155, Page 58, PDF 8224**.
382. In the letter dated 31.01.2009 written by A-5 D.G. Philip to the Principal Secretary (Industries), Industries, Energy and Labour Department, Mumbai with reference to meeting of High-Power Committee held on 30.01.2009 **PDF 3652** with regard to Issue at Sr. No. 10 raised by Adani Enterprises, the comments given by A-5 D.G. Philip were: -

“The J.V.A. being finalized by the Board should be in agreement with us before submitting it to the High-Power Committee (issue raised by Adani Enterprises).

Comment

The Joint Venture Partners were issued the copy of draft Joint Venture Agreement prepared by the MSMC. A copy was also issued to the consultant M/s Axykno, who in turn had discussions and deliberations with all the Joint Venture Partners and prepared a revised draft in consultations with the J.V. Partners. This revised draft was put up before the Board of Directors for approval. The Board of MSMC, also invited the Joint Venture Partners, heard their say, discussed with them and then finally prepared the final draft to be sent to the High-Power Committee for consideration and approval. It means that their say was heard and considered. It is not necessary that all the say of the Joint Venture Partners which is not in conformity with the tender documents terms and conditions should be incorporated in the Joint Venture Agreement. The Board in its joint intellectual capacity has considered all the aspects of the say of the J.V. partners and has incorporated all those that are in

conformity with the tender terms and conditions. Those aspects that are not in conformity with the tender documents were not incorporated in the Joint Venture Agreement. However, the High-Power Committee may like to consider the say of the J.V. Partner and take suitable decision as seem fit (Emphasis Supplied).”

383. It is to be noted here that the tenure of A-5 Sh. D.G. Philip in MSMCL came to an end on 26.02.2009.
384. Thereafter, meeting was held on 9th April, 2009 under chairmanship of Chief Secretary regarding formation of JVs with Maharashtra State Mining Corporation, Nagpur for development of coal blocks. **D-155, Page 58, PDF 8224.**
385. Thereafter, in the meeting of High-Power Committee held on 04.05.2009 draft Joint Venture Agreement was approved, **D-137, Page 4, PDF 6825**, and it was directed to be placed before the infrastructure committee. The same was approved by the infrastructure committee in its meeting held on 18.06.2009, **D-165, PDF 6808** and was executed between MSMCL and M/s. Sunil Hi-Tech on 21.11.2009, **D-61, PDF 5847**. It now permitted in clause 6.4.1 (e) Pledge of Shares by SHEL in JVC Company in favour of any third party, lender or any other entity whatsoever subject to approval of at least one Director nominated by MSMCL and one Director nominated by SHEL and Clause 12.2 permitted pledging of shares, subject to the provisions of this agreement.
386. Considering the manner in which the Joint Venture Agreement was finalized permitting sale as well as pledge of shares shows that A-5 Sh. D.G. Philip and A-6 Sh. Avinash Warjurkar knew too well the terms and conditions of the bid documents

prohibiting sale/pledge of shares. In spite of that, the very first draft proposed by MSMCL in 171st Board Meeting held on 15.12.2008 in Clause 7.3 permitted pledge of shares of Joint Venture Company subject to approval of one Director nominated by MSMCL and one Director nominated by Joint Venture Partner in contravention to the terms and conditions of the bid documents and made no restriction for sale/transfer of shares. Once, they themselves had proposed a Draft Joint Venture Agreement omitting prohibition of sale or pledge of shares and providing for pledge of shares with the approval of one Director of MSMCL and one Director of Joint Venture Partner, it was obvious that they would not have pointed out the terms and conditions of the bid documents prohibiting sale or pledge of shares in the Joint Venture Company to the HPC/Infrastructure Committee. The draft JV Agreement submitted by A-5 D.G. Philip with his letter dated 23.01.2009 also provided pledging of shares in Clause 6.4.1 and transfer of shares in Clause 12.4.

387. The Financial Advisor thrice in his draft Joint Venture Agreements sought to propose prohibition in sale or pledge of shares in Joint Venture Company which was not accepted by the Board of Directors of MSMCL.
388. Even before Adani Enterprises Limited sent its letter dated 28.01.2009 to the Chief Minister of State of Maharashtra seeking for pledge of shares subject to Clause 6.4.1 (e), the Board of Directors of MSMCL in its 172nd Board Meeting held on 21.01.2009 had discussed parawise the draft with all the

concerned partners (i.e., successful bidders) and made amendments and had got it unanimously approved. This draft permitted pledge of shares as well as sale of shares of the Joint Venture Company whereas according to bid documents neither sale nor pledge was permissible.

389. In case any other Director of MSMCL had knowledge of the bid documents but gave approval for Joint Venture Agreement permitting sale and pledge of shares in Joint Venture Company, he may also be summoned to face trial once evidence in that regard comes on record.
390. Similarly, in case it comes on record during trial that any other officer of State of Maharashtra including Members of the High Power Committee/Infrastructure Committee had knowledge of the bid documents restricting sale/pledge of shares of JVC and still approved JVA permitting sale/pledge of shares of JVC, he/they may also be summoned during trial once such evidence comes on record.
391. The Joint Venture Agreement was executed when Sh. N.K. Sudhanshu was the Managing Director of MSMCL. Certain changes were made in the Joint Venture Agreement even after its approval by HPC and Infrastructure Committee. One of the changes introduced was to add Clause 12.3.3 which provided that:

“It will however be mandatory for Party no. 2 to maintain atleast 51% in the SPV at the times during the period of the agreement in case of consortium, the consortium partner should have minimum of 5% holding in the SPV.”

392. This is not any incriminating circumstance against Sh. N.K. Sudhanshu as it only protected the interests of MSMCL.
393. The other change introduced by him was in Clause 12.2 in which words were added at the end "... except as otherwise provided in this agreement".
394. This addition is only clarificatory in nature because pledging of shares was otherwise provided in Clause 6.4.1 (e) in the proposed JV Agreement submitted by A-5 D.G. Philip to State of Maharashtra and which was approved by HPC and Cabinet Committee.
395. Another change introduced by him is in Clause 12.3.2 in which the proposed change that "The methodology undertaken by the party for transfer of shares shall be vetted by the JVC."
396. Earlier, this had to be vetted by the JV Partner. So, this is another improvement in JV Agreement which was favourable to MSMCL and therefore from these changes in Joint Venture Agreement, no criminality can be imputed upon Sh. N.K. Sudhanshu.
397. Moreover, these changes were approved by Government of Maharashtra which is evident from letter dated 23.10.2009 of Sh. V.S. Kulkarni, Secretary, Government of Maharashtra, **D-369, Page 125.**
398. The conclusion of this discussion is that the Financial Advisor was not in conspiracy with either A-5 D.G. Philip or A-6 Avinash Warjekar or A-1 M/s SHEL or A-2 Sh. Sunil Ratnakar

Gutte because in all the three drafts submitted by him, he had clearly proposed provisions prohibiting sale/pledge of shares in JVC which would not have been the conduct of a co-conspirator.

399. Whether A-1 M/s SHEL was in conspiracy with A-5 D.G. Philip and A-6 Avinash Warjekar for proposing the Draft Joint Venture Agreement without restricting sale and pledge of shares.
400. The records have shown that A-1 M/s SHEL did not submit any proposed Joint Venture Agreement containing provisions for sale/pledge of shares in JVC inspite of request of MSMCL to give its draft. M/s SHEL had written a letter dated 21.01.2009 to MSMCL but had not requested for permission to sell the share or pledge the shares in JVC.
401. These aspects initially give an impression that M/s SHEL had evinced no interest in securing right to sell/pledge shares in the Joint Venture Company. However, considering the entirety of the facts and circumstances of the case, at the stage of charge, it is noticed that M/s SHEL had no need to submit any Draft Joint Venture Agreement enabling sale/pledge of shares in Joint Venture Company because in the very first draft proposed by MSMCL, independent of the opinion of its Financial Consultant, there was no restriction in sale/pledge of shares in JVC. Rather, Clause 7.3 permitted pledge of shares with the approval of one Director of MSMCL and one Director of Joint Venture Partner. Therefore, when the draft proposed by

MSMCL itself was deviating from bid documents being silent on restrictions on sale/pledge of shares and permitted pledge of shares conditionally, there was no occasion for SHEL to give its draft as it was being benefited by the draft of MSMCL itself. Where the public servant commits criminal misconduct punishable u/s 13(1)(d) of PC Act, 1988, the private person who is beneficiary of such misconduct is liable to be charged for the offence of criminal conspiracy with the public servants for securing valuable thing or pecuniary advantage, ***Surender Mohan Kotwal vs. State of Himachal Pradesh, (2018) 15 SCC 349, Surender Mohan Kotwal vs. State of Himachal Pradesh, (2020) 19 SCC 784 and State of M.P. vs. Yogendra Singh Jadon, 2020 (12) SCC 588.***

402. The submission of A-5 D.G. Philip that the terms and conditions mentioned in the bid documents are not final or mandatory, is noted to be rejected. The submissions of A-5 D.G. Philip that there was no restriction on MSMCL for changing the terms and conditions of the tender document (while proposing JVA) is his own understanding of the administrative law and the said understanding has no backing of law as indeed there cannot be any justification to give go-by to the tender conditions while formulating JVA with successful bidders. As A-5 D.G. Philip and A-6 Avinash Warjekar had full knowledge of the bid conditions as the tender document was vetted by them during 165th Board Meeting of MSMCL and it is they who first proposed JVA permitting conditional pledge of shares and JVA which was silent on sale of shares, and later on submitted draft

JVA to the Government of Maharashtra which conditionally permitted JV Partner to pledge shares and also permitted sale of shares to third party, they are liable to be charged for the offence u/s 13(1)(d) of PC Act, 1988 and the beneficiary M/s SHEL and both the public servants are liable to be charged for the offence u/s 120B r/w Section 13(1)(d) of P.C. Act, 1988. Whether A-1 M/s SHEL is to be charged or not for the reason that it is under liquidation will be discussed in the later part of the order.

403. **Fourth Allegation:** - According to the chargesheet, M/s. SB Engineering Associates which was the consortium partner of M/s SHEL at the time of bidding and on whose sole credentials of mining experience, the bidder M/s. SHEL was shown to have qualified in the bid technically, withdrew from the consortium on payment of their share of equity capital as consortium partner.
404. According to PW-80 Sh. M.S. Bhasin, Partner of M/s S.B. Engineering Associates, Nagpur, Sunil Gutte, Director of M/s Sunil Hi-Tech Engineers Ltd., vide letter dated 21.12.2009 had informed that a JV Agreement has been executed between M/s MSMC and M/s Sunil Hi-Tech Engineers Ltd. and as per this agreement M/s Sunil Hi-Tech Engineers Ltd. was to hold 49% equity in the SPV and as per para 12.3.3 of the JV Agreement, it has been agreed that the consortium member shall hold 5% equity of the JV partner. Sunil Gutte informed that they have already paid Rs.18.65 Crores to MSMC and requested PW-80 to contribute 5% of Rs.18.65 Crore which was Rs.93 Lacs as

initial subscription amount.

405. However, PW-80 vide letter dated 26.02.2010 refused to contribute 5% of the equity as required and informed that this condition was not the subject matter of MoU dated 14.03.2008 executed between M/s Sunil Hi-Tech Engineers Ltd. and S.B. Engineering Associates. PW-80 wrote in the said letter that he wished to continue as consortium member without making any investment.
406. PW-80 vide letter dated 02.07.2010 asked M/s Sunil Hi-Tech Engineers Ltd. that M/s MSMC has imposed a post tender condition to hold 5% equity by the consortium member. This condition was not mentioned in the tender of MSMC and it was not mentioned in the MoU dated 14.03.2008. As PW-80 was not capable of investing and paying the required equity of 5%, he decided to withdraw himself from the consortium membership and requested M/s Sunil Hi-Tech Engineers Ltd. to relieve him from the role and responsibility of the consortium membership of MoU dated 14.03.2008.
407. M/s. MSMC Adkoli Natural Resources Ltd (a JV company between M/s. MSMCL and M/s. SHEL, as per clause 1 of JV agreement) was incorporated on 18.02.2010 with the Registrar of Companies, Maharashtra at Mumbai. In this JV company, the shareholding of MSMCL was 51% and shareholding of Sunil Hi-Tech Engineers Ltd. was 49%.
408. M/s. Sunil Hi-Tech Energy Pvt. Ltd (SPV as per clause 12.3.3 of JV Agreement) was incorporated on 07.02.2008 with

Registrar of Companies, Maharashtra at Mumbai. 49% shareholding of Sunil Hi-Tech Engineers Ltd. in JV Company M/s MSMCL Adkoli Natural Resources Ltd. was transferred into SPV namely M/s Sunil Hi-Tech Energy Pvt. Ltd.

409. The bifurcation of 49% of shareholding of Sunil Hi-Tech Engineers Ltd. was in the ratio of 37.95% shares in SPV were held by M/s SHEL Investment Consultancy Pvt. Ltd. (M/s SHEL affiliate) and 62.05% shares in SPV were held by M/s Sunil Hi-Tech Engineers Ltd.
410. M/s. SHEL Investment Consultancy Private Ltd, an affiliate of M/s. SHEL (as per clause 12.3.2 of JV agreement) was incorporated on 20.08.2009 with the Registrar of Companies, Maharashtra at Mumbai.
411. M/s. Gangakhed Sugar and Energy Private Ltd was incorporated on 28.09.2007 with Registrar of Companies, Maharashtra at Mumbai.
412. M/s. Jaypee Development Corporation Ltd (a division of Jaypee Infra-Ventures, erstwhile Jayprakash Power Ventures Ltd) was incorporated on 05.12.2007 with the Registrar of Companies Delhi. JPDCL is wholly-owned subsidiary of Jaypee Infra-Ventures.
413. A Share Purchase Agreement dated 21.04.2001 was executed between M/s. SHEL, M/s. Sunil Hi-Tech Energy Private Ltd and M/s. Jaypee Development Corporation Ltd as per which M/s SHEL had sold 91,72,800 shares held by it in M/s. Sunil Hi-Tech Energy Private Ltd constituting 49% of the total equity

at a consideration of Rs. 15 Crores to M/s. JDCL, **D 373, Page 65-88, PDF 12066-12091**. This amount was paid by M/s. JDCL into parts i.e., Rs. 5 crore was given on 05.11.2009 prior to execution of JV agreement, **D 172, Page 1, PDF 12069-12093** and remaining 10 crores was paid on 21.04.2011 **D 173, Page 3, PDF 8447**.

414. A Debenture Subscription Agreement dated 31.03.2010 was executed between M/s. SHEL Investments Consultancy Private Ltd and M/s Jaypee Development Corporation Ltd according to which M/s. SHEL Investments Consultancy Private Ltd in order to raise funds for its business requirements, issued 1200 convertible debentures having a face value of Rs. 1 lakh each. M/s Jaypee Development Corporation Ltd agreed to subscribe such debentures at a consideration of Rs. 12 crores and this amount was paid on 21.04.2011, **D 373, Page 48, PDF 12050**.
415. Further, a Share Pledge Agreement dated 21.04.11 was executed between M/s. SHEL Investments Consultancy Private Ltd and M/s Jaypee Development Corporation Ltd according to which M/s. SHEL Investments Consultancy Private Ltd which was holding 71,04,240 shares of SPV company namely M/s. Sunil Hi-Tech Energy Private Ltd, equal to 37.95% of the total equity was pledged to M/s. JDCL along with all rights including voting rights as a security towards subscription of 1200 optionally convertible debentures of Rs. 1 lakh each for a total consideration of Rs. 12 lakhs, **D 373, Page 1-13, PDF 11997-12011**.

416. According to the chargesheet, this share Pledge agreement was against the provisions of JV Agreement.
417. With the execution of Share Purchase Agreement dated 21.04.2011 and Share Pledge Agreement dated 21.04.2011, M/s Sunil Hi-Tech Engineers Ltd. was left with 13.05% share only which is violation of sub clause 12.3.3 of clause 12 of JV Agreement (i.e. Party No. 2 to maintain atleast 51% of shares in the SPV at all times.).
418. As is noted earlier, as per the bid documents, Section 4 (Special Conditions of JV Agreement SPV) under Clause XVI (1), JV partner was not permitted to sell his shareholding or create any third-party rights in the SPV for the terms of the JV Agreement, **D-44, Page 29, PDF 5315.**
419. Moreover, sub-clause (2) of Clause XVI of bid documents had provided that JV partner shall not pledge, mortgage or lien mark the share holding or any rights in the SPV to any third party, lender or any entity whatsoever.
420. By entering into Share Purchase Agreement dated 21.04.2011, **D-373**, M/s Sunil Hi-Tech Engineers Ltd. violated the bid conditions.
421. Moreover, Sub-Clause 12.3.3 of Clause 12 of JV Agreement dated 21.11.2009 provided that Party No. 2 could transfer its shares to an SPV for the specific purpose of carrying on the business as per this agreement but it was mandatory for party no. 2 to maintain atleast 51% share in the SPV at all times during the period of the agreement. In this case, Party No. 2

was only maintaining 13.05% shares in the SPV as against 51% shares.

422. Moreover, in case of consortium, the consortium partner should have a minimum cash equity holding of 5% in the SPV. However, as is evident from the statement of PW-80, the consortium partner M/s S.B. Engineering Associates had walked out of consortium and was not holding any equity in the SPV.

423. Moreover, Clause 12.4.1.1 of the Joint Venture Agreement provided that the party intending to transfer all or part of his/its share shall first offer the shares to the other party. According to Clause 12.5, in the event of acquisition of shares in a manner not specifically permitted by this agreement, the remaining party had the right to purchase all such shares at lower of (i) the fair value – 10% thereof or (ii) the apparent consideration paid therefore. It was also provided that the failure of the remaining party to purchase the default shares shall not validate the transfer of shares and such transfer shall remain null and void,
D-60, Page 31.

424. In Terms of Clause 3.8 A of JV Agreement, following amount was received by MSMCL from SHEL: -

Srl. No.	Date of Payment	Amount in Rs.	Remarks
1	28.04.2008	11,25,00,000/-	15% of Sweat Money Paid
2	18.08.2009	7,40,00,000/-	10% of Sweat Money Paid
3	15.03.2010 to 27.04.2011	42,72,085/-	Amount spent by M/s. MSMCL and later on reimbursed by M/s SHEL.
4	29.07.2010 to 31.03.2014	9,62,14,574/-	Amount received as interest on deferred sweat money
	Total	28,69,86,659/-	

425. Following amount was received by M/s. SHEL and its subsidiary/associates from M/s. JDCL on account of purchase of shares, subscription to the debentures and unsecured loan: -

Srl. No.	Date of Payment	Amount in Rs.	Remarks
1	05.11.2009 to 21.04.2011	15,00,00,000/-	On account of sale of 91, 72,000 shares of SPV i.e., M/s. Sunil Hitech Energy Private Ltd
2	21.04.2011	12,00,00,000/-	Issue of 1200 debentures by M/s. SHEL affiliate i.e., M/s. SHEL Investment Consultancy (P) Ltd
3	23.05.2011 to 26.05.2015	12,99,58,000/-	Unsecured loan on account of payment of interest on deferred sweat money able to M/s MSMCL.
	Total	39,99,58,000/-	

426. According to chargesheet, M/s. JDCL had also purchased 35 lakhs shares of M/s Gangakhed Sugar and Energy Private Ltd subsidiary of M/s SHEL at face value of Rs. 10/-with premium of Rs.90/-per share (total value Rs. 100/-per share) for Rs. 35 Crores.

427. Therefore, in total Rs.74,99,58,000 was received by M/s SHEL from M/s. JDCL on account of purchase of shares, issuance of Debentures and unsecured loans.

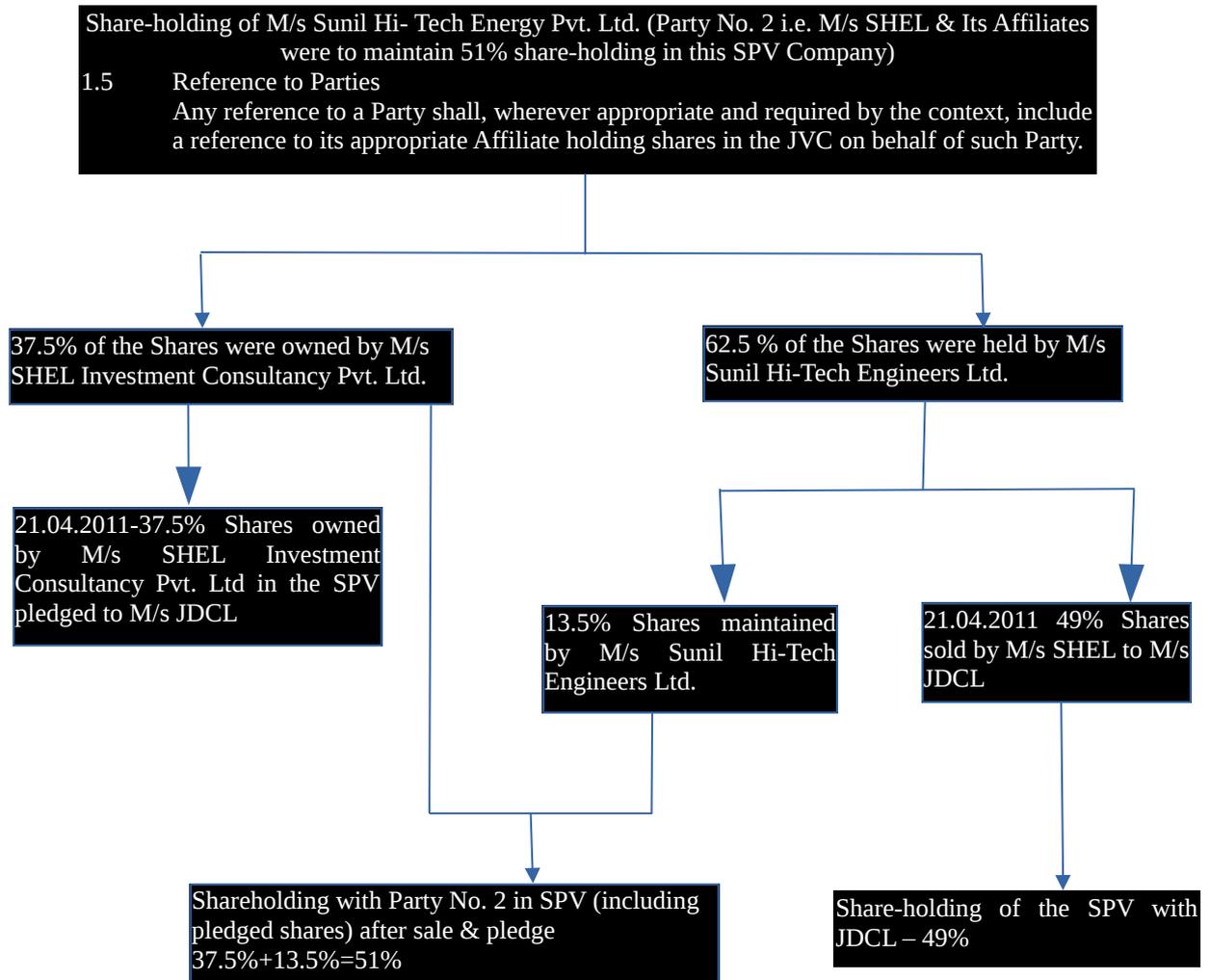
428. **Submissions of A-2 Sh. Sunil Ratnakar Gutte:** The Ld. Counsel for the accused has filed chronology, representation and note on changes in shareholdings of the JV company M/s MSMCL Adkoli Natural Resources and SPV M/s Sunil Hi-Tech Energy Private Limited.

429. The submissions of the accused are that on 18.02.2010, JVC MSMC Adkoli Natural Resources Limited was formed with 51:49 shareholding between the two JV partners, **D-61 E Page**

5847. The shares owned by M/s MSMCL in this JVC were 51 per cent and shares owned by M/s Sunil Hi-Tech Engineers Limited were 49 per cent.

430. On 25.02.2010, 49 per cent shareholding of M/s SHEL in the JVC was transferred to SPV M/s Sunil Hi-Tech Energy Private Limited in compliance of clause 12.3.3 of the JVA, **D-67 E Page 5876.** The submission of the accused is that the shareholding of both the JV partners remained constant at 51:49. There was no change of shareholding or pledge/mortgage/lien of the shares of the JVC.
431. He has submitted that 37.5 per cent of the shares of SPV M/s Sunil Hi-Tech Energy Limited were owned by M/s SHEL Investment Consultancy Private Limited and 62.5 per cent of shares of SPV M/s Sunil Hi-Tech Energy Limited were held by M/s Sunil Hi-Tech Engineers Limited.
432. M/s Sunil Hi-Tech Engineers Limited sold 49 per cent shares to M/s JDCL. As a result, 13.5 per cent shares remained with M/s Sunil Hi-Tech Engineers Limited.
433. So far as M/s SHEL Investment Consultancy Private limited is concerned, all 37.5 per cent shares owned by it were pledged to M/s JDCL.
434. The submission of the accused is that the shareholding of Party No. 2 i.e., M/s Sunil Hi-Tech Engineers Limited in SPV after sale and pledge (including pledged shares) remained 51 per cent i.e., 37.5 per cent shares + 13.5 per cent shares = 51 per cent shares in SPV.

435. It is his submission that the shareholding in SPV M/s Sunil Hi-Tech Energy Private Limited was divided in the ratio of 51:49 between Party No. 2 (M/s SHEL with its affiliate) and M/s JDCL which was permitted as per JVC. The flow of shares is shown in following tabulated manner:



436. It is the submission of the accused that M/s SHEL Investment Consultancy Private Limited which was a step down subsidiary of M/s SHEL, pledged its own shares 37.95 per cent in the SPV (M/s Sunil Hi-Tech Energy Private Limited) and not in the JVC (M/s MSMC Adkoli Natural Resources Limited). It is his submission that there was no restriction in the JVA with respect

to pledge of shares by M/s SHEL Investment Consultancy Private Limited which is a private company. It is his submission that pledging of shares in the JVC was allowed in the JVA but the same were never pledged. The JVA did not restrict pledging of shares by M/s SHEL Investment Consultancy. It is his submission that as the accused has not breached any condition of JVA, he cannot be prosecuted.

437. It is submitted by the accused that the JVA itself provided for consequence of sale of shares in contravention of the JVA and the same in no manner suggests any criminal act on the part of accused no. 1 company. Reliance is placed on clause 12.5 of the **JVA Consequences of sale of shares in contravention of the Agreement.**

12.5 Consequences of Sale of Shares in contravention of the Agreement.

If any person purports to acquire any of the Shares, or any interest therein, in a manner not specifically permitted by this Agreement (the "Default Shares"), whether by operation of law or by voluntary act or otherwise, the Remaining Party or any person(s) nominated by the Remaining Party shall have the right, but not the obligation, to purchase any or all of the Default Shares, purported to have been thus acquired, at lower of (i) the Fair Value minus 10% (ten) thereof, or (ii) the apparent consideration paid thereof. However, the failure of the Remaining Party to purchase the Default Shares at lower of the Fair Value minus 10% (ten) thereof or the apparent consideration paid therefore shall not be deemed or construed to validate the purported transfer of the Default Shares in violation of this Agreement, which purported transfer shall be null and void. As used in this Clause 12.7 "Fair Value" shall mean Fair Value of Shares in question determined by an independent advisor selected by the Board. Fair Value so determined shall be final, conclusive, and binding on the JVC, the Parties and the person(s) purporting to have acquired the Default Shares in violation of this Agreement, and their respective successors in interest.

438. It is submitted that even the sale in the present case was not in contravention of the JVA and was done with prior intimation and approval of MSMCL.
439. The accused has relied on minutes of 181st meeting of Board of Directors of MSMCL held on 23.12.2010, **D-78, PDF 6056**, where under resolution No. 9, it was resolved that the transfer of 49 per cent (including 5 per cent of technical partner) equity shares in SPV – Sunil Hi-Tech Energy Private Limited by Sunil Hi-Tech Engineers Limited to Jaypee Group be approved subject to the condition that the transferor and transferee company shall execute necessary undertakings, deed of adherence and subject to the verification of the technical competency of the transferee company by the Managing Director. It was also resolved that Managing Director of the Corporation is authorized to do all necessary acts, deeds and things to give effect to the above resolution.
440. So far as pledge of shares is concerned, the submissions of the accused are:

4.12 The pledge of shares was done in accordance with the JV Agreement.

4.12.3 That, the CBI in the present matter has sought to allege irregularities in the sale/pledge of shares by the Accused No.1 Company and its affiliates. Towards the same, the CBI has made various allegations, as stated herein-below.

16.4.55 Thus, it may be seen from the facts mentioned above that M/s SHEL even prior to execution of JV Agreement was not only in contact with M/s Jaypee group to off load its 49% equity (for Rs. 15 crores) in the SPV but also executed a Term Sheet and taken advance of Rs. 5 Crore. Further, pledge of 71,04,240 shares (for Rs. 12 crores) of M/s SHEPL in favour of M/s JDCL with all rights including voting rights is contrary to the terms and conditions of bid document (clause XVI, sub clause 2) as well as

JV Agreement (clause 12.2 of). It revealed that majority control of the SPV Company i.e. M/s Sunil Hi-tech Energy Private Limited stood transferred to M/s JDCL/Jaypee group by M/s SHEL or its associates with all rights including voting rights by virtue of sale & pledging of shares.

4.12.4 That, as per clause 12.2 of the Joint Venture Agreement, the Party No. 2 could not pledge, mortgage or lien mark its shareholding or any rights **in the Joint Venture Company** (i.e. the Joint Venture Company M/s MSMC Adkoli Natural Resources Ltd.) to any third party, lender or entity whatsoever (except as provided in the Agreement).

12.2 Party No. 2 shall not pledge, mortgage or lien mark the shareholding or any rights in the JVC to any third party, lender or any entity whatsoever except as provided in this agreement.

4.12.5 However, the aforesaid clause was never breached and the Share-holding of the JVC Company M/s MSMCL Adkoli Natural Resources Ltd. remained 51:49 between M/s MSMCL and M/s SHEL, as stipulated in the Joint Venture Agreement, and the same is evidenced from the records of RoC which form part of the Prosecution's own relied upon documents (Ref. **D-21, E-Page 2234**, annual return of JVC MSMC Adkoli Natural Resources Ltd.):

V. Details of shares / Debentures Held at Date of AGM *			
Ledger Folio of share / Debenture Holder			
Share / Debenture Holder's Name	MAYARA SUTRA	STATE MINING	EDCO LTD
Father's / Husband's Name			
Type of Share / Debenture	1	1 - Equity, 2 - Preference Shares, 3 - Debentures, 4 - Stock	
Number of Shares / Debentures Held / Stock, if any	5100	Amount per Share (In Rs.)	75
Ledger Folio of share / Debenture Holder			
Share / Debenture Holder's Name	SUNIL	HITECH ENERGY	PRIVATE LTD
Father's / Husband's Name			
Type of Share / Debenture	1	1 - Equity, 2 - Preference Shares, 3 - Debentures, 4 - Stock	
Number of Shares / Debentures Held / Stock, if any	4900	Amount per Share (In Rs.)	10

4.12.6 Clearly, the CBI's reliance on the aforesaid clause of the JVA is misplaced and the same has no relevance to the case presented by the CBI.

441. The accused has submitted that pledging of shares will not be an offence u/s 420 of IPC because even if it is presumed that the Accused No. 1 company made a misrepresentation of sale/pledge of shares, the same was post facto to the allocation and does not induce the delivery of any property. It is also

submitted that Accused No. 3, Accused No. 4, Accused No. 5 and Accused No. 6 had already left M/s MSMCL when sale/pledge of shares was made. The accused have given the details of events in this regard in para 4.14.4 of their submissions as under:

Sl. No.	Date	Event
1	17.01.2009	M/s aXYKno ceases to be Financial Consultant to M/s MSMCL
2	26.02.2009	A-5 Sh. D.G. Philip ceases to be MD, M/s MSMCL
3	21.11.2009	A Joint Venture Agreement was executed between M/s SHEL and M/s MSMCL which permitted the JV Partner to transfer its shares to its affiliates. On behalf of M/s MSMCL, PW-36 Sh. N.K. Sudhanshu signed the Joint Venture Agreement
4	28.06.2010	A-6 Sh. Avinash Warjekar ceased to be Chairman of the Board of M/s MSMCL.
5	23.12.2010	PW-41 Sh. Sanjay Mukherjee, MD, M/s MSMCL chaired the 181 st Meeting of the Board of M/s MSMCL wherein the Board members accorded their approval to the sale of 49% shares in the SPV, M/s SHEPL after having taken legal opinion from advocates of M/s MSMCL in this regard.
6	21.04.2011	Share Purchase Agreement executed between Accused No. 1 Company, Sunil Hi-Tech Energy Pvt. Ltd and M/s Jaypee Development Corporation Ltd.
7	21.04.2011	Share Pledge Agreement executed between SHEL Investment Consultancy Pvt. Ltd. and the Accused No. 1 Company and M/s Jaypee Development Corporation Ltd.
8	21.04.2011	Two Special Power of Attorneys also executed in terms of the Share Pledge Agreement.

442. The accused has submitted that the accused persons had no common purpose or intent in the sale/pledge of shares both of which even were subsequent to the disassociation of the Accused No. 3 Financial Consultant, its Director A-4, A-5 Managing Director and A-6 Chairman.

443. **Decision of the Court:** The bid on behalf of M/s. Sunil Hi-Tech Engineers Ltd was submitted by Satish Kulkarni, G.M.

(Geology), **D-28, PDF 2611.**

444. A-2 Sh. Sunil Ratnakar Gutte had written letter dated 21.01.2009 to the Managing Director, MSMCL but he did not request for permission to sell the shares of Joint Venture Partner in joint venture company and did not ask for permission to pledge the shares of Joint Venture Partner in the joint venture company, **D-158, PDF 8401.**
445. Joint Venture Agreement was executed on 21.11.2009, **D-61, PDF 5876** and is signed by Vijay R. Gutte, Director (Finance), M/s Sunil Hi-Tech Engineers Limited.
446. Sale of shares by Joint Venture Partner in the joint venture company was permitted by the Joint Venture Agreement. The ratio of shares of MSMCL and M/s. Sunil Hi-Tech Engineers Ltd in the joint venture company was 51:49.
447. However, on 31.10.2009 i.e., even before the execution of JVA, a Term Sheet was signed between M/s. Sunil Hi-Tech Engineers Ltd (signed by Ratnakar Gutte) and Jaiprakash Associates Ltd., **D-275, PDF 10128-10132.** This Term Sheet provided the indicative terms and conditions to form the basis of discussions for the proposed acquisition of shares of Sunil Hi-Tech Energy Private Ltd by Jaiprakash Associates Ltd or its associates or affiliates or nominees. The term sheet provided that M/s. Sunil Hi-Tech Energy Private Ltd is a private limited company owned/to be owned by Sunil Hi-Tech Engineers Ltd. The company will be a special purpose vehicle formed as holding/investment company to hold 49% stake of the joint

venture company to be incorporated in joint venture with MSMCL. The term sheet noted that considering the requirement of MSMCL stipulated in the draft Joint Venture Agreement provided that in case a special purpose vehicle of SHEL is made a joint venture party (instead of SHEL itself) in the JVC, SHEL shall continue to hold at least 51% share in the special purpose vehicle at all times during the period of the JVA, the acquirer, Jaiprakash Associates Ltd intends to acquire equity shares having a face value of Rs. 10 each (Rs. Ten only) from the promoters representing 49% of the equity share capital of the company. The purchase consideration towards acquiring 49% of the paid-up share capital of the company was fixed as Rs. 15 crores. On 05.11.2009, a sum of Rs. 5 crores was credited by Jaiprakash Industries Ltd in the account of M/s Sunil Hi-tech Engineers Ltd, **D-172, PDF 8443**.

448. As noted above, the Joint Venture Agreement permitted formation of Special Purpose Vehicle SPV by the Joint Venture Partner. The condition was that M/s. Sunil Hi-Tech Engineering Ltd, had to maintain 51% shareholding in the SPV, **D-61, PDF 5876**.
449. On 18.02.2010, a deed of adherence was executed between M/s. MSMCL, M/s. Sunil Hi-Tech Engineers Ltd and M/s. Sunil Hi-Tech Energy Private Ltd whereby 49% shareholding of M/s. Sunil Hi-Tech Engineers Ltd, in joint venture company was transferred in favour of M/s. Sunil Hi-Tech Energy Private Ltd, the SPV, **D-369, Page 121, PDF 11728**. This deed of adherence is signed by Sunil Ratnakar Gutte on behalf of M/s Sunil Hi-

Tech Engineers Ltd.

450. 37.5% of the shares of the SPV M/s. Sunil Hi-Tech Energy Private Ltd were owned by M/s. SHEL Investment Consultancy Private Ltd and 62.5% of the shares were held by M/s. Sunil Hi-Tech Engineers Ltd.
451. On 23.03.2010, another deed of adherence was executed between Sunil Hi-Tech Engineers Limited (as existing shareholder), SHEL Investment Consultancy Services Limited (as new shareholder) Sunil Hi-Tech Energy Private (as the company) MSMCL and MSMC Adkoli Natural Resources Limited (as Joint Venture Company). This deed recorded that the existing share holder has entered into a Joint Venture Agreement with MSMC relating to development and operation of Adkoli Coal Block through Joint Venture Company, MSMC Adkoli Natural Resources Limited. It also recorded that the existing shareholder and company have entered into a Deed of Adherence with MSMC on 25.02.2010 wherein all the rights and obligations of the existing shareholder as the JV Partner of MSMC are transferred to the company (being a SPV of the existing shareholder) as permitted under Clause 12.3.3 and Clause 14.4 of the Agreement. This Deed also recorded that the company being SPV promoted by the existing shareholder, the existing shareholder has to maintain atleast 51% shareholding in the SPV at all times during the period of the Agreement as per Clause 12.3.3 and MSMC vide its letter dated 30.03.2010 has permitted existing shareholder to hold such 51% shares in the company along with its affiliate companies. The Deed

recorded that the new shareholder proposes to purchase 71,04,240 shares of the company from existing shareholder Sunil HI-tech Engineers Limited for a value of Rs.17 each aggregating to Rs.12,07,72,080/- (Rupees Twelve Crores Seven Lakhs Seventy Two Thousand and Eighty Only). The Deed records confirmation by new shareholder that it has been supplied with a copy of JV Agreement and Deed of Adherence dated 25.02.2010 executed between existing shareholder and MSMC. The Deed records that the new shareholder (SHEL Investments Consultancy Pvt. Ltd.) undertakes to the existing shareholder and the company to be bound by the JV Agreement and Deed of Adherence in all respects as if the new shareholder was a party to the Deed and to observe and perform all the provisions and obligations of the Agreement and Deed to the extent applicable to it. This Deed was signed on behalf of Sunil HI-Tech Engineers Ltd. by its Director Vijay R. Gutte, SHEL Investments Consultancy Pvt. Ltd. by its Director Ratnakar M. Gutte, Sunil Hi-Tech Energy Pvt. Ltd. by its Director Sunil Ratnakar Gutte, MSMCL by its Managing Director and MSMCL Adkoli Natural Resources Ltd. by its Director, **D-62, Page 17, PDF 5918.**

452. In the 181st Meeting of the Board of Directors of MSMCL held on 23.12.2010, **D-78, PDF 6059**, it was resolved that the transfer of 49% (including 5% shares of Technical Partner) equity shares in SPV-Sunil Hi-Tech Energy Private Ltd by Sunil Hi-Tech Engineers Ltd to Jaypee group be approved, subject to the condition that the transfer and transferee company shall

execute necessary undertaking, deed of adherence and subject to the verification of the technical competency of the transferee company by the Managing Director.

453. On 21.04.2011, 49% shares of M/s Sunil Hi-Tech Engineers Ltd were sold to M/s. JDCL, **D-373, PDF 12066-12091**. The share purchase agreement was signed by Ratnakar Gutte on behalf of Sunil Hi-Tech Engineers Ltd.
454. On 21.04.2011, Share Pledge Agreement was also executed between M/s. SHEL Investment Consultancy Private Ltd (SHEL Affiliate) and M/s. Jaypee Development Corporation Ltd, **D-373, PDF in 11994-12008**. As per this agreement, M/s. SHEL Investment Consultancy Private Ltd, which was holding 71, 04, 240 shares of SPV M/s Sunil Hi-Tech Energy Private Ltd, equal to 37.95% of the total equity were pledged to M/s. JDCL along with all rights, including voting rights as a security towards the subscription of 1200, optionally convertible debentures of Rs. 1 lakh each for a total consideration of Rs. 12 Crores. This agreement is signed by Ratnakar Gutte on behalf of Sunil Hi-Tech Engineers Ltd.
455. From the terms and conditions of the Joint Venture Agreement and the minutes of the 181st meeting of the Board of Directors of MSMCL held on 23.12.2010, it is evident that Joint Venture Partner was permitted to sell 49% of its shareholding in SPV which was sold by M/s. Sunil Hi-Tech Engineers Ltd in M/s. Sunil Hi-Tech Energy Private Ltd. To that extent, there was no illegality as the sale was permitted by the Joint Venture

Agreement. However, charge is already ordered to be framed against A-5 D.G. Philip and A-6 Avinash Warjekar for criminal misconduct for proposing sale of shares in Draft Joint Venture Agreement submitted to State of Maharashtra and charge is also ordered to be framed against A-1 M/s Sunil Hi-Tech Engineers Ltd., A-5 D.G. Philip and A-6 Avinash Warjekar u/s 120-B r/w Section 13(1)(d) of P.C. Act, 1988.

456. However, so far as Pledge of shares is concerned, the same was not in terms of Clause 6.4.1 (e) of the Joint Venture Agreement in as much as it was not with the approval of one director of MSMCL and one director of M/s Sunil Hi-Tech Engineers Ltd.
457. The submission of the accused that it was not in violation of Joint Venture Agreement is not correct. The submission of the accused that only in the Joint Venture Agreement, pledging of shares of Joint Venture Partner in joint venture company was provided in clause 6.4.1(e) and there was no provision prohibiting pledge of shares of SPV is not correct submission. In the deed of adherence dated 25.02.2010, Sunil Hi-Tech Energy Private Ltd had confirmed that it has been supplied with a copy of the Joint Venture Agreement. It had undertaken to abide by the agreement in all respects as if it was a party to the agreement and named in it as the existing shareholder and to observe and perform all the provisions and obligations of the agreement applicable to or binding on the existing shareholder (Sunil Hi-Tech Engineers Ltd.) under the agreement, insofar as they fall to be observed or performed on or after the date of this deed. Therefore, the SPV Sunil Hi-Tech Energy Private Ltd.,

being bound by the Joint Venture Agreement in all respects could not have sold its shares resulting in reduction of shareholding of Sunil Hi-Tech engineers Ltd to less than 51% in SPV. Moreover, the pledging, if any, could have been permissible only by following recourse to clause 6.4.1(e) of the Joint Venture Agreement, i.e., by the approval of one director of MSMCL and one director of Sunil Hi-Tech engineers Ltd.

458. Similarly, the affiliate company M/s SHEL Investments Consultancy Pvt. Limited had also undertaken in the Deed of Adherence dated 30.03.2010 to be bound by the JV Agreement and Deed of Adherence dated 25.02.2010 referred above in all respect as if it was a party to the Deed and to observe and perform all the provisions and obligations of the Agreement and Deed to the extent applicable to it, **D-62, Page 17, PDF 5918**.
459. The pledging of the shares by the affiliate M/s SHEL Investments Consultancy Pvt. Ltd. in the SPV M/s Sunil HI-Tech Energy Pvt. Ltd. without following recourse to clause 6.4.1(e) of the Joint Venture Agreement, i.e., by the approval of one director of MSMCL and one director of Sunil Hi-Tech engineers Ltd will come under section 420 of IPC in as much as Sunil Hi-Tech Engineers Ltd had entered into Joint Venture Agreement with MSMCL promising not to pledge its shares except by following the procedure provided for in clause 6.4.1 (e) of the Joint Venture Agreement. This promise was binding on SPV Sunil Hi-Tech Engineers Ltd. by virtue of deed of adherence dated 25.02.2010. This promise was binding on affiliate M/s SHEL Investment Consultancy Pvt. Limited also

by virtue of Deed of Adherence dated 30.03.2010. MSMCL would not have entered into Joint Venture Agreement with Sunil Hi-Tech Engineers Ltd, if it was not induced to believe that Sunil Hi-Tech Engineers Ltd or its SPV Sunil Hi-Tech Energy Ltd or affiliate SHEL Investment Consultancy Pvt. Limited holding shares in SPV M/s Sunil Hi-Tech Energy Pvt. Limited will not pledge shares without following recourse to clause 6.4.1 (e) of the Joint Venture Agreement. In the definition of “Dishonestly”, under section 24 of IPC, there may be wrongful gain to one person or wrongful loss to another person. In this case, the pledging of the shares resulted in wrongful gain to Sunil Hi-Tech Engineering Ltd. in as much as the definition of affiliates, according to the Joint Venture Agreement means any other person that is controlled by either party to the JV Agreement. Therefore, for pledging of shares by M/s SHEL Investment Consultancy Pvt. Limited which is affiliate of M/s Sunil HI-Tech Engineers Limited and thereby cheating MSMCL, Charge under section 420 of IPC is to be framed against M/s. Sunil Hi-Tech Engineers Ltd. The intention to cheat from the beginning is evident in this case in as much as SHEL had signed term sheet agreeing to sell 49% of its shares in SPV in favour of Jaypee Corporation even before it entered into Joint Venture Agreement with MSMCL. It had no intention to carry out the mining of the Adkoli Block is evident from the fact that it had received Rs.5 Crores even before the signing of Joint Venture Agreement from Jaypee Associates. It pledged its shares with voting rights in favour of Jaypee Associates without

approval of one Director of MSMCL and one Director of JVP in contravention to the terms and conditions of the JV Agreement. Though the JV Agreement provides for civil consequences for violating the terms and conditions especially sale of shares but it will not save the company from prosecution for cheating. The consequences will be civil as well criminal in the facts and the circumstances of this case.

460. The next question is whether charge under section 420 of IPC can also be framed against Sunil Ratnakar Gutte?
461. The learned counsel for the accused has submitted that the law is well settled that the director cannot be prosecuted unless and until the director has committed or omitted any specific act or the statute provides for vicarious liability for the offence committed by the company. It is his submission that the offence under section 420 of IPC does not attract vicarious liability of the directors. Reliance is placed on **Sunil Bharti Mittal vs. CBI**, (2015) 4 SCC 609.
462. There are three documents which need to be discussed here. One is letter sent on 21.01.2009 to MSMCL under signatures of Sunil Ratnakar Gutte requesting certain changes in the Joint Venture Agreement, second the Deed of Adherence dated 23.03.2010 signed by him which shows that he knew that SPV Sunil Hi-Tech Engineers Ltd. and SHEL Investment Consultancy Services Limited were bound by all the obligations in Joint Venture Agreement upon Sunil Hi-Tech Energy Ltd. The third document is Minutes of the Meeting of the Board of

Directors of Sunil Hi-Tech Engineers Limited held on 30.01.2010, **PDF 12652 @ 12665** authorizing Sunil R. Gutte and other Directors to sign and execute Share Purchase Agreements, Share Holders Agreements, all other documents ... Share Pledge Agreement ... as may be required from time to time by the company. However, there is no other specific omission or commission on his part vis-à-vis pledge of shares by M/s SHEL Investment Consultancy Pvt. Limited. Share Pledge Agreement on behalf of M/s SHEL Investment Consultancy Pvt. Limited is signed by Ratnakar Gutte. The Minutes of the Board Meeting approving pledge of shares showing presence of Sunil Ratnakar Gutte are not on record. Therefore, in the absence of vicarious liability of the directors and in the absence of any specific role attributed against Sunil Ratnakar Gutte in pledging of shares, he cannot be charged merely being a Director of Sunil Hi-Tech Energy Ltd. or Sunil Hi-Tech Engineers Ltd. or M/s SHEL Investment Consultancy Pvt. Limited.

463. However, it is made clear that during trial as and when evidence comes on record showing culpability of any Director of SHEL in pledge of shares, he may be summoned at that stage.
464. Next is the stage to discuss the submissions of Official Liquidator.
465. The OL has mentioned in the application that A-1 Sunil Hi-Tech Engineers Ltd. (Corporate Debtor) is undergoing liquidation under provisions of Insolvency and Bankruptcy

Code, 2016 pursuant to the orders of the National Company Law Tribunal, Mumbai dated 25.06.2019. He has also mentioned that under Section 34 of the Code, he is exercising all the powers of the Board of Directors, key managerial personnel and the partners of the corporate debtor and is representing the corporate debtor before this Court u/s 35(k) of the Code. The liquidator has relied on Section 32A which was inserted in the Code by the Insolvency and Bankruptcy Code (amendment) Act, 2020 which is as under:

"32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge of, or

responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, **or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—**

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person;

or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—For the purposes of this sub-section, it is hereby clarified that —

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfills the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and

(2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

466. The Ld. Counsel for the OL has referred to the judgment of the Hon'ble Supreme Court in the case of **Manish Kumar vs Union of India and another** (2021) 5 SCC 1 upholding the Constitutionality of Section 32A of the Code. She has also referred to **Tata Steel BSL Limited and Another vs Union of India and Another**, 2020 SCC Online Del 1985, where the prosecution of the corporate debtor by serious fraud investigation office was quashed because its management was taken over by new promoters not connected with previous management. She has also relied on **Nitin Jain Liquidator PSL Limited vs ED** MANU/DE/3563/2021, where the ED was restrained from taking any coercive action against Liquidation Estate of the corporate debtor or the corpus gathered by the liquidator in terms of the sale of liquidation assets as approved by the adjudication authority under IBC as the corporate debtor was recommended to be liquidated. She has also relied on **Dewan Housing Finance Corporation Limited vs Union of India**, 2021 SCC Online Bombay 3926, where petitioner DHFL was discharged from case filed by CBI as the said management of the said company had changed with the approval of resolution plan in regard to corporate debtor having been approved by the adjudicating authority u/s 31 of IBC. She has also relied on **Rajiv Chakraborty Resolution Professional of EIEL vs Directorate of Enforcement**, 2022 SCC Online Del

3703, where the petitioner Resolution Professional was not precluded from seeking release of the provisionally attached properties in accordance with law. Therefore, the submissions of the liquidator are that since the assets of the company are under liquidation under the provisions of Chapter-III of Part-II of IBC, no action be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor.

467. On the query of the Court, a note is filed on the update of liquidation process of M/s Sunil Hi-Tech Engineers Limited. As per the note, till 11.05.2023 claims worth Rs. 2284.67 crores have been admitted and a sum of Rs.80,13,64,353/- has been received by 30 E-auctions in accordance with the Provisions of I&B Code and Regulations therein. It is further mentioned in the note that Bank guarantees amounting to INR 94,43,60,003/- issued by financial creditors on behalf of SHEL were returned during the liquidation process and the same is a recovery to the financial creditors against the claims filed by them. There are outstanding bank guarantees amounting to INR 117,67,97,629/- as on date.

468. With regard to unsold assets of SHEL, the note mentions:

- SHEL has certain immovable/movable assets, contract receivables, GST input credit, fixed deposits marked as lien against outstanding bank guarantees, arbitration/litigation claims etc. The last e-auction scheduled on 6th March 2023 for sale of SHEL as a going concern; at a reserve price of INR 24,60,00,000/- failed as no bids were received. The Asset Sale Committee of SHEL comprising of top 6 secured creditors in the meeting held on 08th May 2023

discussed to reduce the reserve price from INR 24,60,00,000/- to INR 23,00,00,000/- for sale of SHEL as going concern subject to confirmation of the same in the next Asset Sale Committee meeting.

- The Asset Sale Committee had decided to assign the Arbitration matters and ongoing litigations on a recovery sharing ratio between the secured creditors and successful bidders (net of costs) on receipt of proceeds. In the last e-auction scheduled on 06th March 2023, over and above the reserve price of INR 24,60,00,000/-, the recovery sharing ratio of 60:40 was offered for arbitration matters, 50:50 for litigation for Preferential and Fraudulent transactions and 70:30 for other litigations. The recovery ratio for the forthcoming e-auction shall be discussed and finalized in the next Asset Sale Committee meeting.

469. Therefore, it is the submission of the OL that the corporate debtor in this case be discharged as no action can be taken against its property in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered by sale of liquidation assets under the Provisions of Chapter-III of Part-II of the Code to a person. She has referred to the explanation to Section 32-A of the Code, where action against the property of the corporate debtor in relation to an offence includes attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor.

470. On the other hand, Sh. Sanjay Kumar, Ld. DLA for CBI has relied upon **Ajay Kumar Radhey Shyam Goenka vs Tourism Finance Corporation of India Limited**, CrI. A. No. 172/2003 decided by the Hon'ble Supreme Court on 15.03.2023, where it is held that the nature of proceedings which have to be kept in abeyance u/s 14 of the IBC do not include criminal

proceedings. Referring to Section 178, priority of payment of debts, he has submitted that in the event of conviction of A-1 M/s Sunil Hi-Tech Engineers Limited, fine imposed upon it will be Government dues and hence recoverable from the assets of the said company.

471. In the opinion of this Court, Section 32-A has been introduced in the Code by the Legislature with the clear intention to make the corporate insolvency resolution process favourable to the creditors and for optimum recovery once the resolution plan results in the change in the management or control of the corporate debtor who was not a promoter or in the management or control of the corporate debtor or a related party of such a person. The amendment introduced in the Code by inserting Section 32-A has made it clear that no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporator, where such property is covered under a resolution plan approved by the adjudicating authority u/s 31, which results in the change in control of the corporate debtor, or sale of liquidation assets under the provisions of Chapter-III of Part-II of the Code to a person, who was not a promoter or in the management or control of the corporate debtor or a related party of such a person. An action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor. However, the law

does not bar an action against the property of any person against whom such an action may be taken under such law as may be applicable. It is not in dispute that vide orders dated 25.06.2019 NCLT, Mumbai Bench has ordered to liquidate the corporate debtor and a liquidator has been appointed for this purpose. Framing of charge will serve no purpose as action against property of corporate debtor like attachment, seizure, retention or confiscation cannot be taken even if it is convicted in this case. Rather, keeping the proceedings pending against corporate debtor by framing the charge against it may adversely affect the value of its assets under liquidation. Therefore, considering the letter and spirit behind introduction of Section 32-A in the Code and considering that liquidator is liquidating the assets of A-1 M/s Sunil Hi-Tech Engineers Limited, it is directed that no charge is to be framed against the said company. At this stage, this Court is adding the caution that in case incriminating evidence surfaces against any person other than this company, who being director or principal officer of the company by his specific omission or commission has committed any offence, the Court may summon him for trial as per the provision of Section 319 of Cr. PC. Therefore, while on merit it is held that M/s Sunil Hi-Tech Engineers Ltd. is liable to be charged for the offence of cheating u/s 420 of IPC as well as for criminal conspiracy with the two public servants but considering that its management is now under control of official liquidator and its assets are being liquidated for the benefit of the creditors, the said company is discharged in the case.

472. **Fifth Allegation of conspiracy:** According to charge sheet, M/s. SHEL even prior to execution of JV Agreement was not only in contact with M/s. Jaypee group to offload its 49% equity (for Rs. 15 crores) in the SPV but also executed a Term Sheet and taken advance of Rs. 5 crores, **D-275, Page 1-5, PDF 10131-10135.**
473. Further, Pledge of 71, 04, 240 shares (for Rs. 12 crores) of M/s SHEL Investment Consultancy Private Limited in favour of M/s JDCL with all rights including voting rights is contrary to the terms and conditions of the bid document (clause xvi, sub-clause 2) as well as JV Agreement (clause 12.2). Therefore, majority control of the SPV company i.e., M/s. Sunil Hi-Tech Energy Private Ltd stood transferred to M/s JDCL/Jaypee group by M/s. SHEL or its associates with all rights including voting rights by virtue of sale and pledging of shares.
474. It is further mentioned in the charge sheet that since 2005 M/s. SHEL and its subsidiary/associates (i.e., prior to start of tender process by M/s. MSMCL in respect of Adkoli coal block) till 2011-12 had engaged M/s. aXYKno for Debt and Equity Syndication, Auditing, Project Advisory and due diligence for acquisition of projects in Sugar, Engineering and Energy Sector. During the period 2005-2012, M/s. SHEL had paid substantial amount to M/s. aXKYno on account of services provided. Thus, it is evident that M/s. SHEL had substantial business dealings with M/s. aXYKno even prior to and also after the start of tender process for Adkoli Coal Block.

475. It is further mentioned in the charge sheet that M/s. aXYKno had also business dealings with Jaiprakash Associates and M/s. JDCL during the period 2008-2014 and had provided services relating to strategic advisory for scaling up in natural resource and energy sector etc and received substantial amount as payments from them.
476. The charge sheet further mentions that Martin Philip, son of D.G. Philip, the then MD of M/s. MSMCL on recommendation of R. Ramakrishnan was in M/s. aXYKno as Analyst with effect from 01.01.09 to 31.07.10. It is alleged that during the period he was on leave for about nine months. During the period amount was paid towards monthly salary to Sh. Martin Philip by M/s aXYKno.
477. It is further mentioned that M/s. SHEL and its subsidiary during the period 2009-2015 executed several contract-works relating to fabrication of supply of boilers column etc. in various Power/Cement Plants of Jaypee and received substantial amount as payments from Jaypee group.
478. It is also alleged that travel expenses of Avinash Warjekar, the then chairman of M/s. MSMCL during the period were paid by M/s. SHEL.
479. The charge sheet mentions that M/s. SHEL did not offer any work to SBEA for developing the coal block, despite the fact that they qualified in the bidding process only on the basis of experience of SBEA. This contention was further corroborated as according to officials of M/s. MSMCL, M/s. SHEL and M/s.

SBEA were not having any expertise in survey and exploration and other development activities.

480. **Submissions of the accused:** The accused no. 3 and 4 have submitted they had booked a ticket for A-6 Avinash Warjekar for the sake of convenience only and not as a kick back to the Chairman. They have submitted that they had raised a debit note, **D-346, Page 17, PDF 11502** on M/s MSMCL and got the expenses incurred for booking of the said ticket reimbursed from MSMCL on 19.06.2008, **D-346, Page 10, PDF 11495**. It is submitted that the debit note clearly mentions that the same is for “Travelling expenses in reference to official work of MSMC”.
481. Regarding appointment of Martin Philip, son of A-5 D.G. Philip by M/s aXYKno., it is submitted that during 2008-2013, M/s aXYKno was growing/expanding and was continuously recruiting professionals purely based on their experience, CVs and by conducting interviews. During that time, the company had engaged more than 30 professionals and one of them was Mr. Martin. He was given no special treatment as during probation period, he was given no incentives, Diwali bonus, commitment bonus, leave encashment and any leave taken by him was treated as unpaid leave. It is submitted that as per the CV, Mr. Martin was expecting salary of Rs.12,000/- to Rs.15,000/- per month but he was engaged for a salary of Rs.10,000/- only per month. It is submitted that during the leave period he was given no salary as per policy of the company. Mr. Martin Philip had tendered his resignation in July 2010 as he

had got a better job with higher salary. The submission of the accused is that from the above it can be seen no special favour was shown to Mr. Martin Philip, who was treated like an ordinary employee in the company.

482. The accused have submitted that so far as their business dealings with Jay Prakash Associates and M/s JDCL during 2008-2014 is concerned, the same has no bearing on the case as M/s Jaypee has not been arrayed as an accused by CBI in this case. Moreover, M/s Jaypee was not a participant or bidder in the bidding process adopted by M/s MSMCL. Neither A-3 nor A-4 were signatories to the term sheet dated 31.10.2009 executed between SHEL and Jaypee group. They have submitted that their assignment had come to an end in JPCL in January 2009 and there was no extension or defect liability period mentioned in their appointment letter dt. 18.01.2008, therefore, there is no question of any impropriety.

483. These accused have submitted that the allegation against them is that they had attended high powered committee meetings but concealed from the HPC that M/s SHEL was ineligible and therefore conspired in cheating and dishonestly inducing Government of Maharashtra to give its approval for selection of SHEL as Joint Venture Partner.

484. The accused have referred to the Circular dated 25.11.2002 issued Government of India, Central Vigilance Commission where it is provided in para 4 that:

“The role of the Consultants should be advisory and

recommendatory and final authority and responsibility should be with the departmental officers only”.

485. They have submitted that not even a single agenda of the High Powered Committee is on record. There is nothing on record to show that the agenda of the HPC was circulated or in knowledge of A-3 and A-4. It is their submission that A-3 was neither appointed by Government of Maharashtra nor by the High Powered Committee for advising them for coal blocks. They have submitted that their role before the HPC can be best understood from the minutes of HPC dated 01.08.2008, **D-127, Page 14, PDF 6707 @ 6709 (Marathi)** whose English translation is:

“During the detailed discussions on the terms and conditions, R. Ramakrishnan was called before the Committee.”

486. It is their submission that only when there were certain clarifications to be sought, the members of HPC used to call A-3 consultant inside the meeting room/chamber of HPC.

487. They have referred to the presentations made before HPC by MSMCL, **D-153, Page 41, PDF 8200** to show that the question of ineligibility/eligibility of M/s SHEL was never under the consideration of HPC. They have submitted that they had no knowledge about ineligibility/eligibility of M/s SHEL or any other bidder and they were not capable of or having authority or power to comment upon ineligibility or eligibility of M/s SHEL or any other bidder.

488. These accused have specifically referred to allegations made against them in para 16.4.35 and 16.4.56 of the charge-sheet

which are as under:-

“That R Ramakrishnan, Financial Consultant, M/s a'XYKno who prepared the bid documents as well as the JV Agreement in consultation with M/s MSMCL officials during the period when Shri DG Philip and Shri Aviniash Warjekar were MD & Chairman of M/s SHEL with who M/s a'XYKno had substantial business & financial dealing even prior to the bidding stage of Adkoli coal block, had inserted clauses in the JV Agreement to suit M/S SHEL of which Shri Sunil Ratnakar Gutte was Director. In the process, the JV Agreement was prepared in such a way that it caused undue pecuniary advantage to M/s SHEL.”

“That since 2005 M/s SHEL and its subsidiary/Associates (i.e. prior to start of tender process by M/S MSMCL in respect of Adkoli Coal Block) till 2011-12 had engaged M/s a'XYKno for Debt & Equity Syndication, Auditing, Project Advisory and due diligence for acquisition of projects in Sugar, Engineering and Energy Sector. During the period 2005-2012, M/s SHEL had paid substantial amount to M/s a'XYKno on account of services provided aforesaid. Thus, it is evident that M/S SHEL had substantial business dealings with M/s a'XYKno even prior to and also after the start of tender process for Adkoli Coal Block.”

489. The accused have submitted that as many as 164 bidders had purchased bid documents, **D-155, Page 46, PDF 8210**. As per them, the charge-sheet alleges that M/s Sunil Hi-Tech Limited was not fulfilling the technical evaluation criteria as per bid documents in as much as it did not have the actual mining experience in open cast or underground mining operations either on standalone basis (Para 16.3.5, Page 10 of the charge-sheet). It is their submission that the scope of work of A-3 was aid in preparation of bid document and according to charge-sheet M/s SHEL does not qualify on standalone basis as per the bid conditions. It is their submission that it shows that A-3 has not favoured or given any undue advantage to A-1 in qualifying as a Joint Venture Partner and hence no *mens rea* or *actus reus* is attributable to A-3/A-4. They have referred to **PDF 5482 @**

5312, bid document dated 14.02.2008, Clause XVI, dealing with Responsibility of JV partner which are as under:

“(1) JV Partner shall not sell his shareholding or create any third-party rights in the SPV for the term of the JV agreement.

(2) JV Partner shall not pledge, mortgage or lien mark the shareholding or any rights in the SPV to any third party, lender or any entity what-so-ever.”

490. It is the submission of A-3 and A-4 that these clauses show their bonafide conduct and intent as they did not allow any bidder, including M/s SHEL to transfer/sell or pledge the shares to third parties.
491. They have submitted that they had prepared the draft bid document as well as the Draft Joint Venture Agreement which prohibited sale/transfer/pledge of shares to third party which shows bonafide intent of A-3 and A-4. They have submitted that there is no allegation against them that they received financial consideration for advising A-1 in the tender of MSMCL for Adkoli Coal Block. They have referred to the statement of PW-64 Sh. Yash Verma, CA and PW-72 Sh. Abhay Upadhaye, CA to show that no witness has remotely indicated that A-3 and A-4 received any consideration from A-1 with regard to Adkoli Coal Block. They have relied on the observations of the Hon'ble Supreme Court in the case of **Parveen Sonu vs. State of Haryana** which is judgment dated 07.12.2021, in Crl. Appeal No. 1571/2021 “A few bits here and a few bits there on which prosecution relies cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy”.

492. **Decision of the Court:** The most favourable aspect for ruling out any possibility of framing charge for criminal conspiracy against A-3 and A-4 is that they have not helped A-1 M/s SHEL either by any omission or commission. They aided MSMCL in framing of bid documents as per which A-1 M/s SHEL was ineligible to bid. They did not try to frame terms and conditions of the bid document which would have made M/s SHEL technically eligible. The bid documents strictly prohibited sale/transfer/pledge of shares in favour of third party by the JV Partner. They never deviated from their stand in proposed JV Agreements prohibiting sale/transfer/pledge of shares in favour of third party by the JV Partner. These were the two spheres where M/s SHEL needed their help the most but rather than proposing favourable clauses, the terms and conditions proposed in the bid document were detrimental to the interest of M/s SHEL. In the three draft JV Agreements proposed by the Financial Consultant, they never budged from forcefully prohibiting sale or pledge of shares by the JV Partner.

493. So far as giving employment to the son of D.G. Philip is concerned, the language of the charge-sheet tends to give an impression that Mr. Martin Philip was on leave for nine months but he was given salary during that time. The para 16.4.58 of the charge-sheet states that:

“That Shri Martin Philip, son of Shri DG Philip, the then MD, M/s MSMCL on recommendation of Shri R. Ramakrishnan worked in M/s aXYKno as Analyst with effect from 01.01.09 to 31.07.10. During the period he was on leave for about 9 Months. During the period amount was paid towards monthly salary to Shri Martin Philip by M/s aXYKno”.

494. However, the statement of account of Mr. Martin Philip, **D-237, PDF 8851-8864** with Bank of India, Nagpur Branch shows that A-3 M/s aXYKno had not paid the salary to Mr. Martin Philip during his leave of nine months. Moreover, the employment was given in January, 2009 when the tenure of M/s aXYKno with MSMCL had come to an end and in February, 2009, D.G. Philip had also demitted his office in MSMCL.

495. Some quid pro quo is sought to be shown by purchase of air tickets for A-6 Avinash Warjekar by the Financial Consultant A-3 M/s aXYKno. However, a debit note was raised with regard to the ticket, **D-346, Page 10, PDF 11502** and the said amount was received by M/s aXYKno which is evident from Bank Statement, **PDF 11495**, which rules out any conspiracy.

496. Conclusion:

(i) **A-1 SHEL** - There is sufficient material to frame charge against A-1 SHEL under Section 120-B of IPC r/w 420 IPC r/w 13(1)(d) of PC Act, 1988 for entering into criminal conspiracy with the public servants A-5 D.G. Philip and A-6 Avinash Warjekar for proposing the JV Agreement in such a manner which enabled A-1 SHEL to sell its shares in SPV M/s Sunil Hi-Tech Energy Pvt. Limited and pledge shares of its affiliate M/s SHEL Investment Consultancy Pvt. Ltd. in M/s Sunil Hi-Tech Energy Pvt. Limited. There is sufficient material to frame charge against A-1 SHEL u/s 420 of IPC for cheating MSMCL by pledging its shares without following the procedure provided in para 6.4.1 (e) of the JV Agreement. However, as A-1 SHEL

is under liquidation, the said company is discharged u/s 32A of the Insolvency and Bankruptcy Code, 2016.

(ii) **A-2 Sunil Ratnakar Gutte** – Admittedly, he is one of the Directors of M/s Sunil Hi-Tech Engineers Ltd., M/s Sunil Hi-Tech Energy Pvt. Ltd. and M/s SHEL Investment Consultancy Pvt. Limited but no specific commission or omission is attributable to him in the pledging of shares of M/s SHEL Investment Consultancy Pvt. Limited in favour of M/s JDCL and in the absence of vicarious liability, this accused is also discharged. However, during trial when evidence comes on record against other director(s) inculcating them for the pledging of shares of M/s SHEL Investment Consultancy Pvt. Limited in favour of M/s JDCL, he/they may be summoned u/s 319 of Cr.P.C. to face the trial for criminal conspiracy as well as cheating.

(iii & iv) **A-3 M/s aXYKno and A-4 R. Ramakrishnan** - A-3 M/s aXYKno and A-4 R. Ramakrishnan are discharged.

(v) **A-5 D.G. Philip** - A-5 D.G. Philip shall be charged u/s 13(1)(d) of P.C. Act on two counts, first, declaring technically ineligible bidders including M/s SHEL as eligible, second, for proposing clauses in JV Agreement permitting sale/transfer/pledge of shares by JV Partner contrary to terms and conditions of bid documents. However, during trial if incriminatory evidence comes on record inculcating other directors of MSMCL/Members of HPC/infrastructure committee or any other officer of Government of Maharashtra for incorporating

clauses in JV Agreement permitting sale/transfer/pledge of shares by JV Partner knowing the terms and conditions of the bid documents, he/they may also be summoned u/s 319 of Cr.P.C. Charge is also directed to be framed against A-5 D.G. Philip for the offence of criminal conspiracy along with A-6 Avinash Warjekar for incorporating clauses in JV Agreement permitting sale/transfer/pledge of shares by JV Partner contrary to the bid documents.

(vi) **A-6 Avinash Warjekar** - Charge u/s 13(1)(d) of P.C. Act shall be framed against A-6 Avinash Warjekar for proposing clauses in JV Agreement permitting sale/transfer/pledge of shares by JV Partner and for the offence of criminal conspiracy along with A-5 D.G. Philip for proposing clauses in JV Agreement permitting sale/transfer/pledge of shares by JV Partner.

497. **Observations qua H-1 bidder for Agarzari Coal Block and H-1 bidder Warora Coal Block:** So far as deviation from the terms and conditions of the bid documents restraining sale/transfer/pledge of shares in the JV Agreements are concerned, the actions of A-5 D.G. Philip and A-6 Avinash Warjekar helped H-1 bidders of Agarzari and Warora Coal Blocks as much as they helped H-1 bidder of Adkoli. Rather, the benefit to H-1 bidders of Agarzari and Warora Coal Blocks would have been more in as much as estimated reserves of Agarzari Coal Block were 137 million MT, estimated reserves of Warora Coal Block were 73 million MT and the estimated reserves of Adkoli Coal Block were just 20 million MT. It is not

known whether these two companies had also sold/transferred/pledged their shares contrary to the bid documents or not. Investigation would be required to find out whether they also benefited by dilution of the terms and conditions of bid documents by providing sale/transfer/pledge of shares by JV Partner in their JV Agreements or not. The accused in this case have pressed hard for orders of this court for further investigation in that regard. However, this court is of the view that giving benefit, if any, to H-1 bidders of Agarzari Coal Block and Warora Coal Block, contrary to the terms and conditions of bid documents would be separate and independent offence for which further investigation cannot be directed in this case which is restricted to offences pertaining to Adkoli Coal Block only. It is for the Investigating Agency to decide regarding investigations into JV Agreements of H-1 bidders of Agarzari and Warora Coal Blocks.

498. List on **07.07.2023** for framing the formal charges against D.G. Philip (now A-1) and Avinash Warjekar (now A-2).

Announced in open court today

**Arun Bhardwaj,
Special Judge (PC Act),
CBI, Coal Block Cases-01,
RADC, Delhi/25.05.2023**