
(1995) 03 DEL CK 0078

In the Delhi High Court

Case No : C.W.P. No's. 3774 of 1992 and 924 of 1993

Eider Electronics Industries Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-03-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1995) 58 DLT 29

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : G.L. Sanghi, R.K. Kapoor and Raj Kumar Garg, for the Appellant; S.K Mahajan, Beenakshaw and B.S. Nagra for Respondents No 1 to 3, Arun Jetley, Senior Advocate and Pallavi Shroff, for Respondent No. 10, Kumkum Sen and Ranjan Dutt for Respondent No. 11, for the Respondent

Final Decision : Allowed

Judgement

C.M. Nayar, J.—The present judgment will dispose of two writ petitions, Civil Writ Nos. 3774/92 and 924/93 filed by the petitioner Companies impugning their non-selection by rejection of tender which they had submitted for the grant of license for providing Radio Paging Services for 27 selected cities in India. The companies, which were short-listed, are respondents 6 to 24. The petitioners have prayed for quashing the list of such Companies.

2. The Department of Tele-communications, Government of India, invited tenders from Indian companies for providing Radio Paging Services for 27 selected cities in the country, with a view to license the operation of such venture. The tender notice is filed as Annexure P-1 to the writ petition. It was so provided in the said notice that the intending tendered shall obtain copy of the tender documents containing conditions along with relevant specifications from the office of the respondents at Sanchar Bhawan, New Delhi. The documents could be obtained from June 1, 1992 to July 24, 1992 and the due date for submission of the tender was July 31, 1992, which was also the date for opening of the tender. The

respondents i.e. Department of Tele-communications proposed the date of opening of the tender from July 31, 1992 to July 15, 1992 and, it is contended, the same was done without amending the bid documents, although Clause 5.2 of the tender only permitted extension of the date of opening of the tender and did not envisage the proponing of the date for opening tender. The proponement of the date, however, did not cause any prejudice to the petitioners as they were not adversely affected and had submitted their papers before the revised date for opening of the tender.

3. The petitioners hold an industrial license and, it is stated, is a large scale manufacturing base for manufacturing of Radio Paging Systems in India and has the technology and foreign collaborations with the leading companies in the world. The tender documents, which have been filed as Annexure P.2 to the writ petition, lay down the criteria as well as certain conditions for award of ultimate contract. Reference may be made to certain conditions. The eligibility of bidders is determined by Clause 1 of Section II of the General Conditions, as incorporated in the tender notice and the same reads as follows:

"1. Eligible Bidders:--This invitation for bid is open to all the companies registered, as "Indian Company" up to the date of submission of the bid.

A company registered in India under the Companies Act will be eligible to bid. license to run the service will be issued to the bidder company if selected. Following documents are required to be submitted along with the bid.

(a) Copy of the Certificate of registration from the Registrar of Companies.

(b) Articles and Memorandum of Association of the Indian Company.

(c) If any foreign partner is proposed, then

(i) Copy of the agreement between the Indian and the foreign partner,

(ii) Approval of Government of India for the Terms of foreign collaboration, if already taken, otherwise copy of the application submitted to the Competent Authority of Government of India, in this regard together with the proof of submission.

(d) Record of the past performance/experience in the service area for which the bid is submitted."

The reading of the above conditions indicates that the tender could be submitted by a Company registered in India and license to run the service would be issued, if selected. It is further stated that it is not necessary to have any foreign partner but in case, any foreign partner is proposed then the qualifications, as laid down in condition 1 (c) & (d) have to be complied with.

4. The other conditions, which are relevant for disposal of the present writ petitions, are Clause 8.2 (Tender Evaluation) in Section II and Clause 14 (Indigenous production) in Section III. The technical specifications are

incorporated in Section IV of the tender documents. These may be reproduced as follows:

"8.2 Tender Evaluation:--The bids will be technically and commercially evaluated giving due consideration to their conformity to the technical specifications, commercial and eligibility conditions. The successful bidders shall be short-listed. Thereafter, a short-term limited tender for the financial offer shall be issued to those bidders who are found technically and commercially acceptable.

The financial offer shall be opened on a pre-intimated date in the presence of the representatives of the short-listed bidders.

8.3 Clarification of Bids:--To assist in the examination, evaluation and comparison of bids the Telecom Authority or its representative may, at its discretion ask the bidder for the clarification of its bid. The request for clarification and the response shall be in writing."

14. Indigenous Production:

14.1. The tendered will provide the plans for indigenous production of Radio Paging equipment such as pagers, Base station equipment etc. in India from the date of the grant of the license.

14.2. The use of indigenously manufactured equipment in the provision of service will be given weightage for issue of license. If the equipment have to be initially imported, their indigenisation programs may be clearly indicated.

14.3. Import of any equipment will be governed by prevailing Government of India policy on the subject.

15. The tendered will also provide the following information :

- (i) Documentary proof of the registration of the company in India.
- (ii) Name of the foreign collaborators, if any.
- (iii) Reference of supply record of Radio Paging Systems (if the prospective operator happens to be a equipment supplier also) and past operating experience and performance thereof in the field of Radio Paging Services.
- (iv) Annual turn over during 1990-91 of
 - (a) Indian company
 - (b) Collaborator
 - (v) Banker's Name
 - (vi) Working capital of the company
 - (vii) Present field of operation
 - (viii) Approximate cost of the total system and net work (location wise for which

offer submitted)

(ix) Any other information considered useful for evaluation."

5. The petitioners submitted its proposal for grant of franchise license for operating city-wise Radio Paging Services. There were 83 proposals which were received in this regard. The petitioners fulfilled all the conditions, mentioned in the tender documents as well as were holding an industrial license with two consortium partners i.e. Samsung of Korea and Star Paging of Hong Kong. Samsung is the fourteenth largest company in the world operating city-wise Radio Paging System in Hong Kong. It is contended that Star Paging are the second largest Paging Service Operators in the world operating Radio Paging Service in the city of Hong Kong.

6. The Reserve Bank of India has approved the foreign collaboration Agreement with Star Paging System of Hong Kong and the sanction of the Reserve Bank of India is already granted. The respective Agreements with Star Paging System of Hong Kong and Samsung of Korea are filed as Annexure P-5 to the Writ Petition. Clause 10 of the first Agreement reads as follows:

"Eider & Star shall discuss & finalise by mutual consultations the arrangement concerning Equity Holdings, Charges for services, Sharing of Profits, day-to-day management and, such other matters that may arise after the licenses are obtained by Eider or Eider Group Companies for various cities of India, the best interest of the consortia."

The petitioners, accordingly, fulfilled all the conditions and the terms of eligibility and qualified for being short-listed for consideration for the ultimate award of the license. The impugned notice, is filed as Annexure P.12, and is a newspaper report, as published in The Hindustan Times dated October 14, 1992 giving the names of the companies, which have been short-listed for selection for Radio Paging Service. The name of the petitioners did not figure in this list and it is argued that the petitioners were excluded by an arbitrary exercise of power. None of the short-listed companies had any experience in indigenisation programme and only one was manufacturing the machinery, which was required for the system. The name of the petitioners has been excluded in an arbitrary, malafide and discriminatory manner and aggrieved by the same, the present writ petitions have been filed.

7. The petitioners have also contended that they had submitted all the relevant documents, as required along with their bid. The certificate of registration from the Registrar of Companies, Articles and Memorandum of Association, copy of the Agreement between the Indian and the foreign partners (Agreement with Star Paging Ltd., Hong Kong and Samsung of Korea), proof of the Agreement and the terms of foreign collaboration, the sanction of the Reserve Bank of India in this regard and record of the past experience in the service area of the foreign collaborators were submitted. The learned Counsel for the petitioners has, accordingly, contended that they were duly qualified and were entitled to be

shortlisted.

8. The respondent-Government has filed the counter affidavit to the writ petition wherein it is reiterated that since none of the Indian companies have experience in this kind of Radio Paging Service, the experience will necessarily apply to a foreign partner having experience in the operation of the service. The experience of the foreign partner will accrue to the Indian bidder company if there is a firm commitment and tie up with equity participation. The tendered were merely required to submit a plan for indigenous production with their bids and the averment of the petitioner that indigenous production was a mandatory condition and it was inevitable to have foreign manufacturing collaboration was not correct.

9. The learned Counsel for the respondent Union of India, Mr. S.K. Mahajan has argued that the venture was for the operation of Radio Paging Systems in the specified towns in India and the only ground on which the petitioners have not been selected is that the foreign companies with whom they entered into Collaboration Agreement had no equity participation. The equity participation to the minimum extent of 25 per cent is a precondition for the grant of license. The entire criteria cannot be laid down in the tender notice or the conditions. The Tender Evaluation Committee is at liberty to formulate criteria, which may be fair, just and equitable. The only condition is that such criteria must be uniformly applied to each and every tendered and no discrimination in the present case has been indicated by the petitioners. He has further reiterated that all the short-listed and selected companies have foreign collaborators with equity participation of 25 per cent or more.

10. The learned Counsel for respondent No.10 Mr. Arun Jaitely has supported the contentions of the Counsel for the Union of India and has argued that the tender in question was merely for operation of the Radio Paging Service and not for the manufacture of the equipment, which may be required to be used. The experience in manufacture of the equipment is of no great relevance. The only provision with regard to manufacturing is that the tendered will be asked as per Clause 14 to provide plans for indigenous production after the grant of license to them. It is also not denied that no Indian company has experience in the matter of providing Radio Paging Service in India. Thus, the partnership with a foreign collaborator has become inevitable. The process of short-listing of 83 companies is not exclusion for consideration. All the companies were duly considered and the short-listing has been done on the basis of such consideration. The criteria adopted by the Government is just, fair and reasonable and the equity participation of 25 per cent or more as on the date of submission of the tender was one of the considerations. The said criteria was uniformly applied in case of all bidders.

11. The record has been produced before me by the respondent/Union of India. The report of the Evaluation Committee has also been brought to my notice. The relevant portions of the report may be reproduced as follows:

"Report of the Tender Evaluation Committee on Radio Paging Service.

1.0 The Department of Telecommunications invited tenders from Indian companies with a view to license the operation of Radio Paging Service in 27 urban areas of the country. The tender document includes technical specification, commercial conditions and a Section on financial conditions. The tendered were asked to give their compliance on technical and commercial conditions and give their views on financial conditions. The tenders were opened on 15.7.92 . In all 83 bids were received. The list of bidders along with the cities for which the bid has been given, is at Annexure I.

1.1 A Tender Evaluation Committee was constituted vide letter No. 44-113 /92-MMC dated 15.7.92 (Annexure II) for short listing the offers on the basis of tender document No. 44-113/92-MMC and the clarifications issued under letter No. 44-113/92-MMC dated 30.6.92. By a letter dated 17.7.92, the Committee was asked to submit its report by 31.7.92 (Annex.III). In view of the fact that a large number of offers had been received, it was not possible for the Committee to complete its work by this date. The Committee Therefore requested vide letter dated 28.7.92 (Annex IV) for extension of time by three weeks for submitting the report.

1.2 A note from Member (S) (Annexure V) was received by the Committee on 12.8.92 indicating that the criteria used for short listing by the High Power Selection Committee in the Cellular Tender may be kept in view by the Tender Evaluation Committee for the Paging Tender. The note also enclosed relevant extracts from the report of the High Power Selection Committee.

1.3 Since a large number of offers had to be evaluated the Committee took the assistance of S/Shri Vinoo Goyal, Director (MR) and D. Swaminathan, Director (ML), of TCHQ and of Shri Ashok Kumar, Director (TM) of TEC.

1.4 On a preliminary examination of the various offers, the Committee asked for clarifications from two bidders namely M/s Arya Communications & Electronics Services Pvt. Ltd. Bombay & M/s Stone India Ltd., New Delhi, with regard to the experience of their collaborators in the operation of Radio Paging Service.

2.0 Eligibility Criteria

2.1 The Committee examined the bids with regard to eligibility as per criteria given in para 1 of Section II of NIT and subsequent clarifications issued by the Department on 30.6.92, reproduced below.

"Company registered in India under the Companies Act will be eligible to bid. license to run the service will be issued to the bidder company if selected. Following documents are required to be submitted along with the bid.

(a) Copy of the Certificate of Registration from the Registrar of Companies.

(b) Articles and Memorandum of Association of the Indian Company

(c) If any foreign partner is proposed, then

(i) Copy of the agreement between the Indian and the foreign partner,

(ii) Approval of Government of India for the Terms of foreign collaboration, if already taken, otherwise copy of the application submitted to the Competent Authority of Government of India, in this regard together with the proof of submission.

(d) Record of the past performance/experience in the service area for which the bid is submitted.

No relaxation of any kind from the conditions as laid down in these clauses is allowed."

2.2 With regard to Clause (c) (ii) in para 1 of Section II mentioned at para 2.1 above, the Committee decided that an application to SIA/RBI/ FIPB would meet the requirement with regard to submission of application to the Competent Authority of the Government of India.

2.3 As regards Clause (d) of para 1, Section II, mentioned at para 2.1 above, the Committee has adopted the following criteria taking into consideration the guidelines laid down in the report of the High Power Selection Committee for the evaluation of Cellular tender (para 15 (i) and 15(ii) of the extracts at Annexure V).

(i) Since none of the Indian companies have experience of operating a Radio Paging Service, this would necessarily apply to the foreign collaborator. Foreign companies who have experience of operating a Paging System and who have developed a reasonable sized network would be taken as meeting this criteria. Since a large number of bidders have not indicated the time period since they have been operating the service, the minimum requirement of 5 years of experience has not been considered essential for short-listing.

(ii) The experience of the foreign collaborator would accrue to the Indian bidder company if there is a firm commitment and tie up by the foreign collaborator in the form of joint venture with a significant (25% or more) equity participation.

3.0 For the purpose of short listing the bids the Committee decided to adopt the following criteria.

(1) The bidders should satisfy the eligibility conditions as mentioned in para 2.0 above.

(2) The bidders should have given a clause by clause compliance against Section III, IV and V as required under Clause 7 of Section II of bid document.

(3) The Committee noted that a number of companies had entered comments/ reservations etc. to Commercial Conditions as indicated in Annexure VII. In case of few companies certain compliance to technical parameters as indicated in Annexure VIII have not been furnished categorically. Since, almost all the

bidders have offered standard equipments, the technical deviations were considered not significant for the purpose of short listing. The Committee recommends that an unequivocal compliance to all the parameters in Sections III and IV of the bid document be made a condition while inviting the financial bid.

(4) As regards para 14 of Section III of the bid document, dealing with indigenous production, the Committee notes that indigenous production facilities are already being set up by three companies for the pagers and atleast one company for other components of the system. In addition, the Committee also notes that one more foreign manufacturer has plans to set up indigenous manufacturing facilities. Hence in view of the indigenous production capacity likely to be available the Committee did not take this parameter as an essential condition for short listing."

There were 83 bidders in all. 19 bidders were short-listed and the remaining 64 were rejected as they did not specify one or more of the criteria listed above.

12. The criteria used for short-listing by the High Power Selection Committee in the Cellular tender which was also subject matter of final decision by the Supreme Court in Tata Cellular Vs. Union of India, was required to be kept in view by the Tender Evaluation Committee formed for short-listing in the present case. In brief the Committee drew up the following criteria as is indicated from the following extract from the report of the Selection Committee:

"14.Coming to the short list of companies recommended by the Tender Evaluation Committee of DoT, the Selection Committee felt that the considerations which have weighed with it should be incorporated into a set of consistent criteria which can then be applied to all the tendering companies across the board.

15. The Committee, Therefore, drew up the following criteria:

(i) The experience of the bidding company. Since none of the Indian companies have any experience of operating a cellular service, this would necessarily apply to the foreign collaborator. Also since GSM technology is only now beginning to come into commercial operation, the Committee decided to consider foreign companies who have experience of operating a cellular system of at least 5 years and who have developed a reasonable sized network (25,000-25,000 subscribers)

(ii) For the same reasons as above (lack of experience of Indian companies), the Committee decided to short list those offers which had a firm commitment and tie up in the form of a joint venture with a significant equity participation of the foreign collaborators.

(iii) Compliance with the technical standards and specifications as laid down by Dot in the tender invitation offers to be accompanied by engineering plans which clearly demonstrate the seriousness and the interest of the collaborator.

(iv) The Committee noted that almost all the companies had entered various

caveats/reservations/exceptions to the commercial conditions of the tender and that it would not be possible to make an across the board comparison of these stipulations.

The Committee Therefore recommended that unequivocal compliance with the commercial parameters be made a condition in inviting the financial bid."

The petitioner company was held not to be qualified for short-listing in view of the lack of past performance/services in the operation of paging services and for no equity participation of the foreign collaborators.

13, The learned Counsel for both the parties have relied heavily on the judgment of the Supreme Court in *Tata Cellular v. Union of India*, (supra). Mr. G.L. Sanghi, learned Counsel for the petitioners has contended that one of the essential conditions for short-listing was contained in Clause 14 of the tender documents which dealt with indigenous production. 14.1 lays down that the tendered will provide the plan for indigenous production for Radio Paging equipment, such as, pager based station equipment etc. in India from the date of grant of the license. 14.2 lays down that the use of indigenously manufactured equipment in the provision of service will be given weightage for issue of license. If the equipment have to be initially imported, their indigenisation programs may be clearly indicated. The petitioner is the only company which has set up a plant for indigenous production for the pagers and for the components of the system. The non consideration of this criteria which is the essential condition as laid down in the tender documents is arbitrary and erroneous and the entire short-listing of the bidders is tainted and has to be set aside in view of the settled law as laid down by the Supreme Court in the above judgment. It has been next argued that the condition of equity participation of 25 per cent or more was not prescribed by the tender documents and, Therefore, amounts to a hidden criteria which was not disclosed earlier and it cannot be applied for elimination by the Tender Evaluation Committee. It is an admitted case that the foreign collaborators of the petitioners have no equity participation yet and the only question now arises whether the condition of 25 per cent or more in the form of such participation can be postulated as a hidden criteria and whether the same amounts to arbitrary discrimination on the basis the petitioners have been Disqualified.

14. The question, Therefore, arises as to whether the petitioners should have been thrown out at the outset as ineligible. The eligible criteria as advertised did not make out mandatory for a foreign partner to be inducted. Therefore, the equity contribution of a foreign collaborator was of no consequence. In any case, the petitioners have filed copies of the Agreement with the foreign partners which have the approval of the Reserve Bank of India.

15. Mr. Sanghi has then referred to the judgment of the Supreme Court in *Tata Cellular v. Union of India* (supra) and in particular to the arguments as raised in that case and the law as laid down by the judgment. Paragraphs 68, 69 and 70 read as follows:

68. Having regard to the above arguments we propose to deal with the matter from the following five aspects:

1. The scope of judicial review in matters of this kind.
2. Whether the selection is vitiated by arbitrariness?--(a) regarding financial projection, and (b) regarding rental.
3. Bias of Mr. Nair--Whether affected the selection?
4. Whether the Apex Committee has been bypassed?
5. Evolving of hidden criteria--whether valid?

69. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:

1. It must be unconditional
2. Must be made at the proper place
3. Must conform to the terms of obligation
4. Must be made at the proper time
5. Must be made in the proper form
6. The person by whom the tender is made must be able and willing to perform his obligations
7. There must be reasonable opportunity for inspection
8. Tender must be made to the proper person
9. It must be of full amount

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Paragraph 77 of the judgment defines the duty of the Court and reads as follows:

"77. The duty of the Court is to confine itself to the question of legality. Its

concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or.
5. Abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness

(iii) Procedural impropriety

The above are only the broad grounds that it does not rule out additions of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex. Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the Court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

The conclusions are stated in paragraph 94 which may be reproduced as follows:

"The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

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

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

16. The next question, which was considered and is relevant for resolving the present controversy between the parties is with regard to the hidden criteria such as 25 per cent equity participation of a foreign collaborator. The relevant paragraph in this regard is 125 which reiterates the proposition that in a technical matter where the Government of India is embarking upon new communication scheme with advance technology all the criteria cannot be postulated in the beginning itself. The said paragraph may be reproduced as follows:

"125. We are not in a position to accept the contentions of Mr. Harish Salve that these criteria were evolved as tailor-made to suit some other bidders and knock off others. In a technical matter like this where the Government of India is embarking upon new communication scheme with advance technology all the criteria cannot be postulated in the beginning itself. Where the Committee of Experts thought certain criteria have to be evolved in order to subserve the interest of the scheme it is not necessary to have all of them set out in the beginning itself. However, the important question remains after the evolution of the criteria whether they have been uniformly and properly applied, as urged by Mr. Ashoke Sen."

17. The Counsel for the respondents has then cited the judgment of the Supreme Court in *New Horizons Limited and Anr. v. Union of India and Others* arising out of SLP (C) Nos. 731-32 of 1994 decided on November 9, 1994 to reiterate the proposition that the formulation of the criteria with regard to equity participation by the Tender Evaluation Committee is relevant and no fault can be found with the same. It is argued that the petitioner company may have a foreign collaborator and entered into an agreement but there is no firm commitment of any equity participation by such a collaborator and the Committee was quite correct in formulating the same, particularly in view of the fact that no Indian company was equipped nor had the expertise of operating Radio Paging Service. The concept of joint venture is explained in that judgment and the following paragraphs may be cited in this regard:

"The expression 'joint venture' is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein

all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary); Sixth Edition, p. 839). According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 17, Vol 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, Chemicals, electronic, atomic fields. (Black's Law Dictionary; Sixth Edition, p. 342). Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China etc. (see; Jacques Buhart: Joint Ventures in East Asia - Legal Issues (1991). There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counter parts and contribute towards capital and technical know how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

On Behalf of the respondents reliance has been placed on the decision of the Delhi High Court in Paharpur Cooling Towers Limited and another Vs. Bangaigaon Refinery and PetroChemicals Limited and others, , wherein it has been held that the expression "tendered should possess such experience" would mean the experience of the tendered itself and not that of its collaborator. It has been pointed out that SLP (C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated January 28, 1994. It has been urged that on the same logic the experience of a shareholder would not be included within the expression "experience of the tendered". We fail to appreciate the relevance of this judgment. There can be no comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture."

18. Mr. Mahajan, learned Counsel for Union of India has placed strong reliance on the observations in the judgment, as mentioned above to state that the Tender Evaluation Committee has correctly formulated the criteria of 25 per cent equity participation by a foreign collaborator as the foreign partner on that basis will have stake in the successful operation of the Radio Paging System. The petitioner was not considered for short-listing though it had entered into a technical collaboration agreement with a foreign collaborator.

19. The sole question, which now arises for consideration is as to whether the

criteria as laid down by the Tender Evaluation Committee, subsequent to the submissions of the tender by the tendered, was arbitrary, irrational and illegal. The Supreme Court in the case of *Tata Cellular v. Union of India* (supra) has clearly reiterated the view that all the criteria cannot be postulated in the beginning itself, particularly when the Government of India is embarking upon new communication scheme with advance technology. There is no dispute about this proposition. The question, however, arises as to whether the petitioners could be excluded from short-listing on the basis of this sole criteria when the same was not even mentioned in the Tender Documents. The facts of the present case would indicate that the eligible criteria in the Tender documents did not hold it necessary to have even a foreign partner. The tender could be submitted by a Company registered in India under the Companies Act and they were held eligible to bid. In case a foreign partner was proposed then the following documents were to be submitted to the Government:

- (a) Copy of the Agreement between the Indian and foreign partner;
- (b) Approval of Government of India for the terms of foreign collaboration etc.;
- (c) Record of past performance/experience in the service area for which the bid was submitted.

These conditions did not at any time lay down that a foreign collaborator must have equity participation of 25 percent or more. The petitioners in the present case have entered into foreign collaborate on agreement with Samsung of Korea and Star Paging of Hong Kong and the same is evident from the respective Agreements which are placed on record. The petitioners, Therefore, have entered into a collaboration agreement with foreign partners and the same are duly approved by the Reserve Bank of India. Clause 10 of the agreement with Star Paging further provides for discussion and finalisation by mutual consultations for Equity Holdings, charge for services, sharing of profits and other matters etc. that may arise after the licenses are obtained by the petitioners. The petitioners, accordingly, had a firm commitment with foreign collaborator like any other company which has been short-listed. The further condition of 25 per cent equity participation of a foreign partner was not considered mandatory for the submission of the tender and the same was imposed subsequently when it was found that no Indian Company had the experience in the field. The imposition of this condition in the preliminary stage for short-listing may have led to serious consequences for the tendered in case of ultimate rejection. Take for instance the tendered who was not selected or even short listed had tied up for equity participation for operating city wide Radio Paging System in this country, and the Government of India did not grant license in the field, there would have been serious financial and contractual implications for the tendered. The respondent could have asked the petitioners as to whether their foreign partner was willing to contribute any equity participation to the extent indicated by the Committee at the subsequent stage. Therefore, the imposition of this condition in the beginning itself seems rather irrational and arbitrary.

20. The Tender Evaluation Committee, while considering the condition with regard to indigenous production as contained in paragraph 14 of Section III of the Tender Document, deal with the same as follows:

"The Committee notes that indigenous production facilities are already being set up by three companies for the pagers and atleast one company for other components of the system. In addition, the Committee also notes that one more foreign manufacturer has plans to set up indigenous manufacturing facilities. Hence in view of the indigenous production capacity likely to be available the Committee did not take this parameter as an essential condition for short listing."

21. The essential condition for indigenous production has been given a go-by by Evaluation Committee and it is stated before me that none of the short-listed tendered were qualified in this regard. The condition of 25 per cent equity participation of a foreign partner, cannot be appreciated in the beginning itself as a mandatory requirement for short listing. The Evaluation Committee in its report states in paragraph 1.4 that it asked for clarifications from two bidders, namely M/s. Arya Communications and Electronics Services Pvt. Ltd, Bombay and M/s. Stone India Ltd., New Delhi with regard to the experience of their collaborators in the operation of Radio Paging Service. The respondent-Government could have done the same thing in the case of the petitioners and clarified about the equity participation by their foreign partners. Therefore, the initial condition of imposition of equity participation of 25% or more to reject the tender of the petitioners from short listing seems arbitrary, irrational and without any basis, particularly in view of the fact that the petitioners were possessed with foreign collaboration agreements as well as the sanction of the Reserve Bank of India in this regard. The judgment of the Supreme Court in *New Horizons Limited and Another v. Union of India and Ors.* does discuss the distinction of a foreign partner with and without equity participation. The observations cannot be held applicable to the facts of the present case where the foreign partners would have a stake in the business provided an appropriate license was granted in favor of the petitioners. The same judgment discusses the role of the State in the matters of entering into a contract and the fairness which is required in such matters. The following paragraph may be reproduced in this regard:

"At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, Therefore, insist that while dealing with the public,

whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere (See *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, ; *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, ; *Sterling Computers Ltd. v. M/s. M&N Publications Ltd. and Another (supra)*; *Union of India v. Hindustan Development Corporation*, 1983 (3) SCC 499."

22. In view of the above, I would hold that the petitioners were wrongly excluded from consideration for short-listing merely on the ground that their foreign partner did not have 25 per cent or more of equity participation in the joint venture.

23. The question now arises as to what relief the petitioners shall be entitled. The other tendered who were not short-listed have not approached this Court and impugned the action of the Government. The challenge is only made by the petitioners in the present writ petitions. I am quite conscious of the fact that quashing of decisions may impose heavy administrative burden on the Administration and lead to increased and unbudgeted expenditure as correctly analysed by the judgment of the Supreme Court in *Tata Cellular's* case. I am, Therefore, not inclined to quash the entire selection. The selection will hold good as no challenge has been made to the same except by the petitioners. The petitioners shall, however, be considered for short-listing without taking into account the criteria of 25 per cent equity participation of the foreign partner in the joint venture in the first instance. The respondents shall, however, be at liberty to impose this condition in case the petitioners are held eligible for grant of license. The writ petition is allowed in the above terms. There will be no order as to costs.