
(2002) 06 AP CK 0086
In the Andhra Pradesh High Court
Case No : WA No. 317 of 2002

Neelambar Ropeways

APPELLANT

Vs

Andhra Pradesh Tourism Development Corporation Limited,
Hyderabad and Another

RESPONDENT

Date of Decision : 04-06-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 4 ALD 16 : (2002) 5 ALT 228

Hon'ble Judges : S.R.K. Prasad, J;S.R. Nayak, J

Bench : Division Bench

Advocate : M.R.K. Choudhary, for the Appellant; Ramesh Ranganathan, A.A.G. and S. Ravi, Advocatefor Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

S.R Nayak, J.—M/s. Neelambar Ropeways, a registered partnership firm, being aggrieved by the order of a learned single Judge of this Court in WP No.26047 of 2001, dated 18-2-2002 has filed this writ appeal. The appellant was the petitioner in the writ petition. The appellant herein filed the above writ petition praying for writ of mandamus declaring the refusal of the Andhra Pradesh Tourism Development Corporation Limited, the 1st respondent herein to consider the bid of the appellant submitted pursuant to Bid No.APTDCL/TVZ Projects/RW/2001, dated 9-4-2001, as illegal and arbitrary and for a consequential direction to the 1st respondent to consider the bid of the petitioner. The said writ petition by the order impugned in the writ appeal is dismissed by the learned single Judge.

2. The relevant background facts leading to the filing of the writ petition are as follows: The I st respondent-Corporation floated an open tender for selection of an investor for design, finance, construction operation, maintenance and marketing of Aerial Ropeway at Timpati Visitors Zone, Tirupati, India vide Bid NoAPTDCL/TVZ. Projects/RW/2001. The estimated value of the work is Rs.78

crores. The appellant attended the Pre-Bid Conference held on 29-5-2001 and submitted its bid on 20-8-2001 for consideration of the respondent-Corporation. The 1st respondent-Corporation sought certain clarifications by its letter dated 10-10-2001 and the appellant by its letter dated 22-10-2001 submitted the clarifications to the 1st respondent. However, the appellant-firm was disqualified from consideration on the ground that it did not qualify as per the minimum eligibility criteria stipulated in the Request for Proposal (RFP) document and hence the petitioner's bid was not considered in further stages. Hence the appellant filed the writ petition seeking the relief already noticed above.

3. The case of the appellant-petitioner as set out in the affidavit filed in support of the writ petition be briefly summarised as under: The petitioner-firm is a member of the consortium consisting of the petitioner-firm, i.e., M/s. Neelambar Ropeways, Hyderabad, as Lead Consortium Member (LCM) holding 80% equities; M/s. Damodar Ropeways and Construction (P) Limited, Kolkata as a member holding 20% equity with operational strength and will be responsible for O & M of the Ropeways taking assistance from M/s. Garaventa of Switzerland as a member of the first seven years. M/s. Garaventa of Switzerland is an internationally reputed company which manufactures, erects and creates the facility of Ropeways which fact has been acknowledged by the respondent-Corporation in their eligibility criteria. The petitioner-firm is the Lead Consortium Member registered in India especially for Ropeways Projects and it consists of Mr. M. Prasad and Mr. M.J. Patal as the partners with 50% of holding and they are promoters of Lead Consortium Member and both of them individually hold more than 26% in the Lead Consortium Member in accordance with the definition of "Promoter" under Clause 3.16 RFP. M/s. West African Cements SA (WACEM SA) is the affiliate of LCM. For the purpose of evaluation of financial capability to aggregate the strength of "Affiliate" with LCM, Promoter of the LCM should hold not less than 26% of the voting securities in the "Affiliate Company" either directly or indirectly as the relevant entity is a company within the meaning of clause 3.1 of the bid document. The petitioner complied with all the prescribed conditions and the petitioner is entitled to be considered for the bid. The respondent-Corporation opened Cover No.1 for considering the eligibility criteria of the bidders in the fray. Cover No.1 deals with (a) minimum eligibility criteria which consists of the financial strength, (b) technical skill and (c) commercial skill. The 1st respondent has not taken any decision to open Cover No.2 or Cover No.3 which deal with "evaluation of business proposal and financial bid". Although the petitioner submitted all the clarifications with documentary proof and was expecting that the 1st respondent would write to the petitioner asking it to participate in the opening of technical bid i.e., Cover No.2, the petitioner did not hear anything from the 1st respondent till the date of presentation of the writ petition.

4. The writ petition was opposed by the 1st respondent Corporation which was the sole respondent in the writ petition by filing a counter-affidavit. The material averments in the counter-affidavit are as follows: The appellant-petitioner did not

qualify as per the minimum eligibility criteria stipulated in the RFP document and hence the petitioner's bid was not considered in the further stages. The 1st respondent did ensure that the entire process is objective, transparent and fair. The bidding and evaluation process was stipulated clearly in the RFP document and the same was adhered to scrupulously. The petitioner has never questioned or complained about bidding procedure. Ample opportunity was given to all the bidders including the petitioner to seek any clarifications with respect to bid documents. The petitioner without raising any query about the structure of financial eligibility with respect to the involvement of Family Trust "JT 484" and without any kind of communication from the 1st respondent Corporation or their consultant wrongly assumed it to be accepted. The 1st respondent on consideration of all information including the additional information supplied by the petitioner found that the petitioner failed to establish that it is fulfilling the Minimum Eligibility Criteria regarding the financial and technical capability requirements of Cover No. 1 Evaluation. The petitioner, for the purpose of meeting the eligibility criteria, placed reliance on West African Cement S.A. (WACEM, for short) as an affiliate (as defined in RFP), which is said to be a company constituted under the laws of Republic of Togo, West Africa. The petitioner claims that Mr. M.J. Patel has more than 26% interest in the petitioner-firm as partner and hence he is a "promoter" within the meaning of the term RFP and that Mr. Patel was settler of an irrevocable family trust refereed to as "JT 484", but the information provided by the petitioner did not validate WACEM to be an affiliate of the petitioner as per the RFP definitions. The Trust Deed, which was asked for, was not in full form and few pages after the first page were missing and the legal opinion of a Lawyer in Togo dated 18-10-2001 produced in support of the petitioner's claim states that M/s. Kenelm Limited is an investment holding company wholly owned by the family trust and Mr. M.J. Patel is the sole settlor of the trust. Mr. M.J. Patel is the sole representative to exercise the 37% of voting securities in M/s. West African Cement S.A., Lome Togo, West Africa, as per the letter AC/EC dated 2nd August 2001 at Isle of Man which is attached to this." The legal opinion from Togo was totally silent as to the reasoning by which Mr. Patel could be stated to be holding by himself 37% of voting securities in WACEM and therefore WACEM cannot be treated as an affiliate within the meaning of the RFP. The certificates furnished by the petitioner for substantiating the petitioner's technical experience of having "commissioned or supplied atleast five detachable Ropeway Systems operating with Gondolas" do not mention whether the Ropeway Systems demonstrated are detachable or not and this information was essentially for qualifying in the Technical Eligibility Criteria and was so stipulated clearly in the RFP document. In that view of the matter, the petitioner also did not qualify on the count of technical eligibility.

5. The learned single Judge on consideration of the pleadings of the parties and rival contentions urged before him and also bearing in mind the scope of judicial review of the governmental action in awarding work contracts, dismissed the writ

petition having opined that the procedure adopted by the 1st respondent Corporation was transparent, fair and free from bias and that the Court cannot assume the role of an appellate authority to sit in judgment over the decision of the 1st respondent-Corporation in disqualifying the petitioner from consideration after the opening of Cover No. 1 and that the refusal of the 1st respondent-Corporation to consider the bid of the petitioner at later stages is neither arbitrary nor unreasonable. Hence, this writ appeal by the unsuccessful writ petitioner.

6. We have heard Sri M.R.K. Choudhary, learned senior Counsel for the appellant and Sri Ramesh Ranganatham, learned Additional Advocate-General who appeared for the Andhra Pradesh Tourism Development Corporation and Sri S. Ravi, learned Counsel who appeared for Balaji Tourism (India) Limited the 2nd respondent in the writ appeal. The 2nd respondent was not a party to the writ petition and it is stated that the 2nd respondent was awarded the subject contract after the disposal of the writ petition. In that view of the matter, the 2nd respondent was impleaded as respondent No. 2 vide order of the Court dated 14-3-2002 made in WAMP No.658 of 2002.

7. Mr. M.R.K. Choudhary, contended that the learned single Judge has seriously erred in law in refusing to decide whether WACEM is an affiliate of the petitioner or not by observing that the Court lacks expertise. Mr. Choudhary contends that the said question being a mixed question of fact and law, certainly, it is open, nay, the duty of the Court to decide such question on merits, particularly in the context of the specific plea of the petitioner that the 1st respondent- Corporation wrongly held that WACEM is not an affiliate of the petitioner. Mr. Choudhary also contended that though the petitioner furnished all relevant information and particulars sought by the 1st respondent Corporation, the 1st respondent Corporation has failed to consider those materials and information and therefore the decision of the 1st respondent to disqualify the petitioner-company suffers from vice of non-application of mind. Mr. Choudhary would maintain that WACEM is the affiliate of the petitioner and, therefore, there was no justification for the 1st respondent to disqualify the petitioner. Further Mr. Choudhary would contend that the technical eligibility of M/s. Garaventa of Switzerland is not considered by the 1st respondent on an untenable ground that the user certificates do not indicate the Ropeway concerned is with detachable grips. Mr. Choudhary would point out that the letter issued by M/s. Garaventa of Switzerland clarifies the position stating that the user certificate indicates SWISS code for detachable grips. Mr. Choudhary would conclude by contending that disqualification of the petitioner from consideration is not bona fide and it is vitiated by legal mala fide.

8. Sri Ramesh Ranganatham, learned Additional Advocate-General while supporting the action of the 1st respondent-Corporation in disqualifying the petitioner-appellant from consideration on the grounds of non-fulfillment of technical and financial capabilities, would highlight the self-restrained limitations imposed on themselves by the Constitutional Courts in interfering with the

State's action in the matter of awarding contracts particularly where it involves advanced science and technology. The learned Additional Advocate-General drawing attention of the Court to the averments in the counter-affidavit filed on behalf of the corporation, would maintain that the disqualification of the petitioner from consideration at Cover (b) and Cover (c) stages cannot be said to be arbitrary or unreasonable. The reasons assigned by the 1st respondent-Corporation to hold that WACEM is not an affiliate of the petitioner firm and that the opinion of the Corporation that the certificates produced by the petitioner do not show that the petitioner has had experience in commissioning or supplying at least five detachable Ropeway Systems operating with Gondolas, cannot be said to be perverse or based on no materials or evidence. The learned Additional Advocate-General would point out and highlight that the bidding process were time bound and any delay in the process would lead to loss of interest in the bid from the other bidders. The learned Additional Advocate-General would also contend that a trust in the Indian Law is not a Company and, therefore, the "holding of a trust" cannot be equated to a holding of a company and, therefore, only on that ground the petitioner's claim is liable to be rejected. Alternatively, the learned Additional Advocate-General would contend that the share of Mr. M. J. Patel is indeterminate in terms of the Trust Deed and, therefore, it cannot be taken into account.

9. Sri S. Ravi, learned Counsel appearing for the 2nd respondent would support the order of the learned single Judge and would maintain that no ground is made out to interfere with the discretionary order made by the learned single Judge. Sri S.Ravi, would contend that the definition of "Affiliate" requires that in the case of indirect holding, the voting securities held in that Company should be through a chain of other companies and that in the instant case, this basic requirement is not satisfied inasmuch as the very first link is a Trust and not a Company.

10. Before dealing with the contentions, few important conditions about the scheme of opening of the tenders as well as evaluation of the same and the eligibility criteria needs to be noticed. Chapter 3 of Bid Document Volume 1 defines various definitions used in the bid documents.

Sub-clause 3.1 defines the expression "affiliate" as follows:

"For a Bidding Firm/Company or a Financially Significant Consortium Member, only those entities would be "affiliate (s)", eligible for evaluation in which the Promoters) of the Bidding Firm/Company/ Financially Significant Consortium Member hold (s) not less than 26% of the voting securities, either directly or indirectly, in case the relevant entry is a company. Holding an indirect stake in a company implies a stake held in the company through a claim of other companies, in which event, the percentage holding would be considered on proportionate terms."

Sub-clause 3.9 defines the expression "facility" as follows:

"The facility consists of the land to be given under a licence to operate" arrangement and entire ropeway system including the Gondolas, drive, captive power plant to be created as per the terms of agreement."

Sub-clause 3.12 defines the expression "Lead Consortium Members (LCM)" as follows:

"In case of a Bidding Consortium, the Lead Consortium Member (LCM) shall be that Consortium Member vested with the prime responsibility of developing the Project and holding not less than a 26% equity stake in the Bidding Consortium (Financially Significant Consortium Member). In the event of more than one Financially Significant Consortium Member, the Consortium Member holding the highest equity stake would be the Lead Consortium Member (and would require to be declared as such in the MOU to be entered into between the Consortium Members as per the form presented in Exhibit (1). In the event of two or more Financially Significant Consortium Members holding the highest equal equity stake, then the Bidding Consortium shall clearly indicate in the MOU which of these is to be considered the Lead.

It is understood that the LCM shall be the authorised representative of the Bidding Consortium and shall be liable to Andhra Pradesh Tourism Development Corporation Limited (APTDC) for all the obligations under the Licence Agreement.

The Lead Consortium Member may be a Proprietorship or a Partnership of a company-private limited or a public limited."

Sub-clause 3.13 defines the expression "Lead Promoter" as follows:

"In the event of more than one promoter of the Bidding Company/Lead Consortium Member being eligible for financial capability evaluation, that Promoter having the highest stake in the Bidding Company/Lead Consortium Member is to be designated the Lead Promoter of that Bidding Company/ Lead consortium Member.

The land promoter shall necessarily be a Proprietorship or a Partnership or a company - private limited or public limited."

Sub-clause 3.16 defines the expression "Promoter" as follows:

"For a Bidding Firm/Company or a Financially Significant Consortium Member, only those entities would be "Promoter (s)" eligible for evaluation who hold (s) not less than 26% of the voting securities, either directly or indirectly, in the Bidding Company/Financially Significant Consortium Member, in case the Bidding Company/ Financially Significant Consortium Member is a company. Holding an indirect stake in a company implies a stake held in the company through a chain of other companies, in which event, the percentage holding would be considered on proportionate terms."

Chapter 5 of Bid Document, Volume I deals with description of the "selection

process" as follows:

"5. / Selection Process :--The submission of Bids by interested parties in response to the request for proposal should be in three separate sealed covers as indicated below:

Cover 1: Companies with Minimum Eligibility criteria

Cover 2: Business proposal

Cover 3: Financial Bid

The Bids received would be subject to a responsiveness check followed by a step-wise evaluation procedure as described below:

Responsiveness of Bid:--The Bids submitted by Bidders shall be initially scrutinized to establish "Responsiveness". A Bid may be deemed "Non-responsive" if it does not satisfy any of the following conditions:

It is not received by the due date specified in Section 5.6

It does not include sufficient information for it to be evaluated and/or is not in the formats specified.

It is not signed and/or sealed in the manner and to the extent indicated in Section 6 of the RFP document.

It is not accompanied by a valid Bid Security as specified in Section 6.8.6.

The Bids of "Responsive" Bidders shall be evaluated in the following three steps:

"5.3 Step 1 (Cover I) - Compliance with Minimum Eligibility Criteria:

In the first step. APTDCL will evaluate the information submitted by the Bidder in Cover 1 of the Bid. Only Bidders meeting the minimum eligibility criteria shall be considered for the subsequent steps. APTDCL on demand will return unopened the Cover 2 of the bid, viz: the Financial, Technical, Commercial and Managerial capability and cover 3 i.e., financial bid to the Bidders who do not meet the minimum eligibility criteria.

The minimum eligibility and the format for the information to be submitted in Cover 1 are detailed in Section 7.2 of the Document.

"5.4 Step 2 (Cover 2) - Evaluation of Business Proposal :--The Evaluation of the Business Proposal and the information to be submitted are detailed in Section 8 of the Document. Bidders Business proposals are found acceptable shall be deemed technically sufficient i.e.. Technically Evaluated Responsive Bidders who would be eligible for the next stage of the selection process. APTECL on demand will return unopened the Financial Bids (Cover 3) to the Bidders whose business proposals are not found acceptable.

"5.5 Step 3 (Cover 3) - Financial Bid:--The evaluation criteria for assessment of

the Final Financial Bids are described in Section 9. The format for the Financial Bid is specified in Exhibit 9. A ranked list of Bidders based on the results of the evaluation, as detailed in Section 9 of the Document, would be presented. The top ranked Bidder will be designated the Successful Bidder.

(c) Chapter 7 deals with Evaluation of Minimum Eligibility Criteria (Cover 1)

"7.1 Objective of Evaluating Minimum Eligibility Criteria :

The objective of the minimum eligibility criteria is to short list Bidders who have:

1. The Financial strengths necessary to contribute and/or arrange the funds required/to execute the project in the desired time frame.
2. The technical skills necessary to design, construct, operate, and maintain the Facility as per the Principles of Good Industry Practice.
3. The Commercial skills necessary to market the Facility and successfully develop business.

"7.2. Minimum Eligibility Criteria:-

7.2.1 Eligibility Criteria for Bidding Proprietorship, Partnership and Corporate entities (public or private limited company registered under the Companies Act, 1956 or equivalent international Law) would be eligible to bid for the Project.

7.2.2 Eligibility Criteria for Financial Capability.

The Bidding Company or for a Bidding Consortium, the Lead Consortium Member satisfying any three out of the four eligibility criteria for financial capability specified below would be considered as meeting Eligibility Criteria for Financial Capability. The Bidding Company or for a Bidding Consortium, the lead Consortium Member, shall have the option to aggregate the strengths of its promoters, subsidiaries and affiliates for consideration, however the maximum number of entities whose strengths shall be aggregated is restricted to ten only. The onus to demonstrate the relationship as Promoter/Affiliate/Subsidiary with the Bidding Company/ Consortium Leader for the purpose of aggregation rests with the Building/bidding Company/Consortium Leader for the purpose of aggregation rests with the Bidding Company/Consortium Leader for the purpose of aggregation rests with the Bidding Company/Consortium Leader. The four eligibility criteria are:

1. Tangible Net worth not less than Rs.3,500 lakhs as per the latest audited financial statement.
2. Annual turnover not less than Rs.2,000 lakhs as per the latest audited financial statement.
3. Net tangible assets not less than Rs.7,000 lakhs as per the latest audited financial statement,

4. Net Profit not less than Rs.100 lakhs as per the latest audited financial statement or average annual net profit of the last three financial years not less than Rs.100 lakhs.

7.2.3 Eligibility Criteria for Technical Experience The Bidding Firm/Company or for a Bidding Consortium any Member Company, would be required to submit the details of their experience. The firm whose technical details are submitted for consideration shall have an agreement with the consortium for providing specialized equipment, technology, design, technical assistance in implementation and being responsible for successful ropeway implementation, for at least the first two years of operations. The bidding firm would be considered as meeting Eligibility Criteria for technical experience, if they meet the eligibility criteria specified below.

1. Should have commissioned or supplied.

a. Atleast one passenger ropeway of capital cost not less man Rs.2,500 lakhs.

b. Atleast 5 detachable ropeway systems operating with gondolas.

c. Atleast one passengers" rope way for a minimum length of 3 K.Ms.

d. Atleast one passengers" rope way with a capacity to transport 1000 passenger per hour in one direction.

e. Atleast one of the passengers rope way should have complied the standards specified in anyone.

(i) Swiss Ropeway Standards

(ii) OIATF Standards

(iii) CEN Standards.

7.2.4. Eligibility Criteria for Operation Experience The Bidding Firm/Company or for a Bidding Consortium any Member Company, would be required to submit the details of their experience. They would be considered as meeting eligibility criteria for operational experience, if they meet any of the three eligibility criteria specified below:

1. Should be currently

a. Operating 3 (Three) Passengers Ropeway Systems with Gondolas.

b. Operating one Passenger Ropeway System with an operating capacity to transport 500 passengers per hour in one direction.

c. Operating one passenger ropeway system with a minimum legth at 1 KM

d. Having rope way (with gondolas) operation experience of more than 5 years.

The Bidding Firm/Company or a Bidding Consortium that is not able to exhibit its strength to meet the minimum eligibility criteria for operational experience, shall

be permitted to have an management contract (in writing) with a company possession the minimum operation experience specified for minimum of seven years for entire ropeway operations.

(d) Chapter 8 deals with Evaluation of Business Proposal (Cover 2)."

11. Opposing the writ petition, it is specifically contended by the 1st respondent-Corporation that the petitioner did not qualify as per the Minimum Eligibility criteria stipulated in the RFP document and that is the reason why the petitioner's bid was not considered in the future stages. The petitioner has been disqualified from consideration both on the ground of non-fulfilment of technical capability as well as non-fulfilment of financial capability. The learned single Judge has found sustenance in the plea taken by the 1st respondent-Corporation. In that view of the matter, the only question that arises for our consideration and decision is whether the opinion formed by the 1st respondent-Corporation to disqualify the petitioner is perverse or based on some satisfactory substantive materials. A brief chronology of events in the bidding and evaluation process may throw some light in the decision-making. It is as follows: Firstly, advertisement and sale of RFP and other bid documents; queries and clarifications sought by the bidders; pre-bid meeting for interaction between the bidders and APTDCL/its consultants; pre-bid clarifications document containing answers to bidders' queries circulated to all bidders; addendum to RFP and other Bid documents making amendments to the RFP and other Bid documents circulated to all bidders; submission of Bids; opening of Cover No.1 in presence of all Bidders; additional information requested from the Bidders; Evaluation of eligibility and short-listing of eligible bidders; opening of Covers No 2; Evaluation of business proposal and short listing of qualified Bidders; Opening of Covers No.3 in the presence of qualified Bidders; Lastly, the selection of the Bidder quoting the highest financial Bid from among the Technically Evaluated Responsive Bidders. The procedure envisaged includes submission of bids by interested parties in response to the RFP in three sealed covers which are as follows: Cover 1: Compliance with Minimum Eligibility Criteria; Cover 2: Business Proposal; Cover 3: Financial Bid. Under the procedure, the first step is to evaluate the information submitted by the bidder in Cover No.1 of the Bid. Only the bidders meeting the minimum eligibility criteria are considered for the subsequent steps. It is the case of the 1st respondent-Corporation that following submission of bids by the bidders, certain information gaps were noticed in the bids and, therefore, the Corporation, in order to give a fair chance to the bidders and in its discretion asked for a additional information from the bidders including from the petitioner through its letter dated 10-10-2001. It is the further case of the 1st respondent-Corporation that on perusing the original and additional information submitted by the petitioner, it found that the petitioner failed to demonstrate their fulfilling the minimum eligibility criteria regarding the financial and technical capability requirements of Cover 1 evaluation.

12. Since, the 1st respondent-Corporation has disqualified the petitioner-firm

both on the ground of non-fulfilment of technical capability as well as on the ground of non-fulfilment of financial capability of the minimum eligibility criteria, it becomes necessary for us to see whether the disqualification of the petitioner on those two counts is justified or not, and whether there is some substantive material before the 1st respondent-Corporation to form the opinion which ultimately led to the disqualification of the petitioner. According to the 1st respondent-Corporation, the petitioner was disqualified for non-fulfilment of technical capability requirement of cover 1 evaluation, because, the certificates produced by the petitioner for substantiating the petitioner's technical expertise of having commissioned or supplied atleast five detachable ropeway systems operating with Gondolas do not mention whether the ropeway system demonstrated are detachable or not, and according to the 1st respondent-Corporation, this information as to whether the ropeway systems demonstrated are detachable or not is an essential information for qualifying in the technical eligibility criteria as clearly stipulated in the RFP document. It is a fact that the certificates produced by the petitioner for substantiating the petitioner's technical expertise do not explicitly state that the ropeway systems demonstrated are detachable. However, it is the contention of Mr. M.R.K. Chowdhary that in the certificates from the User Agencies produced by the petitioner, while giving clarification, the expression "Kb8" is used and "Kb" is a technical expression which refers to detachable Gondolas as per Swiss code and, therefore, no other meaning can be given to this expression "Kb" except the English translation of detachable gondolas. According to Mr. M.R.K Chowdhary, the plea taken by the 1st respondent-Corporation to disqualify the petitioner for non-fulfilment of technical capability is too much technical if not hyper-technical. Of course, the above submission of Mr. M.R.K. Chowdhary reflects exactly what is stated in paragraph 10 of the reply affidavit dated 2-1-2002 sworn to by Mr. M. Prasad, the Managing Partner of the petitioner-Company. Even assuming that what is stated in para 10 of the reply affidavit is correct, even then, that will not come as an aid in support of the case of the petitioner. Firstly, such an explanation was not offered by the petitioner when the 1st respondent-Corporation sought clarification vide its letter dated 10-10-2001. It is trite, it is the burden of the petitioner to satisfactorily demonstrate that it fulfilled the prescribed minimum eligibility criteria, both as regards technical capability and financial capability. It is too much for the petitioner to expect the Corporation to cause a roving enquiry or investigation to find out whether the petitioner-bidder does possess the minimum eligibility criteria or not. Since, admittedly, the certificates produced by the petitioner for substantiating its technical expertise of having commissioned or supplied at least five detachable ropeway systems with gondolas do not mention that the ropeway systems demonstrated are detachable and despite the fact that the Corporation afforded an opportunity to the petitioner, though it was not obligated to do so, at the earliest point of time by issuing letters dated 10-10-2001, the petitioner, for the reasons best known to it, did not come forward with the kind of explanation which it chose to offer at a belated stage by filing reply affidavit to the counter-affidavit. In that view of the

matter, no exception can be taken to the action of the 1st respondent-Corporation in disqualifying the petitioner from consideration on the ground of non-fulfilment of technical capability. It also needs to be emphasised that even the plea now taken in para 10 of the reply affidavit referred to above remains as a plea only and nothing is placed before the Court which could clinchingly support that plea.

13. This takes us to the next question whether the 1st respondent-Corporation is justified in disqualifying the petitioner on the ground of non-fulfilment of financial capability. The petitioner, for the purpose of meeting the minimum eligibility for financial capability, claimed that West African Cement SA (WACEM) is an "affiliate" as defined in RFP document. According to the petitioner WACEM is a company constituted under the laws of Republic of Togo, West Africa and that the petitioner claimed that Mr. M.J Patel has more than 26% interest as partner and hence he is a "promoter*" as defined in RFP document. It is also claimed by the petitioner that Mr. Patel was settler of an irrevocable family trust referred to as "JT-484" created in the Island of Jersey on 4-7-1978, that KENELM Limited is an investment company wholly owned by the trust JT 484 and that KENELM Limited holds 37% in WACEM. Therefore, it is quite clear that the financial capability of the petitioner's bidding consortium was dependent on WACEM being admitted as an "affiliate" of the petitioner. In that context, understandably, the 1st respondent-Corporation, in order to examine the petitioner's claim, requested the petitioner to submit legal opinion and also to produce copies of the relevant documents such as the trust deed. According to the 1st respondent-Corporation, the information made available by the petitioner do not validate WACEM to be an "affiliate" of the petitioner as per RFP definitions. No doubt, the petitioner has submitted legal opinion of a lawyer in Togo dated 18-10-2001 in support of his claim. The legal opinion of the lawyer in Togo dated 18-10-2001 reads as follows:

"M/s. Kenelm Limited is an investment holding company wholly owned by the family trust and Mr, M.J. Patel is the sole settler of the trust. Mr. M.J. Patel is the sole representative to exercise the 37% of voting securities in M/s. West African Cement S.A. Lome, Togo, West Africa, as per the letter AC/ EC dated 2-8-2001 at Isle of Man which is attached to this."

The above statement is merely an exact replica of the statement made by the trustees in their letter dated 2-8-2001. Further, quite curiously the above letter of the lawyer in Togo is totally silent as to the reasoning by which Mr. M.J. Patel could be stated to be holding by himself 37% of voting securities in WACEM. It needs to be noticed that the definition of "affiliate" in the RFP is clear and unambiguous and it only conceives of affiliate entities in which the promoter has the prescribed minimum stake. The trustees dated 2-8-2001 merely stated that Mr. Patel is the sole representative to exercise 37% voting securities in WACEM. It does not state that Mr. Patel by himself holds or owns 37% voting securities in WACEM nor does it clarify the extent of Mr. Patel's beneficial entitlement in the trust or the holding in KENELM Limited. Merely because KENELM Limited is wholly

owned by the family trust JT-484, from that it does not follow that Mr. Pate! individually has 100% holding, beneficial or otherwise, in KENELEM Limited, since there are many other beneficiaries and also in view of the wide discretion granted to the trustees as per the clauses of the trust deed JT 484. It is the case of the 1st respondent-Corporation that the trust deed in its entirety was not produced when demanded. Be that as it may, the following clauses of the trust deed which have a bearing in the decision-making on the claim of the petitioner that WACEM is an "affiliate" of the petitioner, also do not support the claim of the petitioner.

. Clause 3 reads as follows:

"The trustees shall stand possessed of the trust fund upon trust as to investments or property other than money in their absolute discretion either to permit the same to remain as invested or to sell or convert into money all or any of such investments or property and upon trust as to money with the like discretion to invest the same in their names or under their control in any of the investments hereinafter authorised with power of the like discretion from time to time to vary or transpose any such investments for others of a nature hereinafter authorised."

Clause 5 reads as follows:

"The trustees shall stand possessed of the trust fund and the income thereof upon the trust following that is to say (A) Upon trust during the trust period to pay appropriate or apply the whole or such part of the income of the trust fund as the trustees may in their discretion think fit to or for the maintenance or otherwise for the benefit of all or such one or more exclusive of the others or other of the beneficiaries from time to time in existence in such shares and proportions if more than one and generally in such manner as the trustees shall in their absolute discretion think fit....."

Clause 6(A) reads as follows:

"Notwithstanding the trusts and provisions hereinbefore declared and contained the trustees may subject as hereinafter provided at any times or time during the trust period if in their absolute discretion they shall so think fit; (i) Raise any sums or sum out of the capital of the trust fund and pay or apply the same to or for the benefit of all or any one or more exclusive of the others or other of the beneficiaries and in such respective amounts if more than one and generally in such manner as the trustees shall in their like discretion think fit; (iv) form a company or companies all or part of the capital and undistributed income of the trust fund and the cost and expenses of forming such a company shall be a charge on and the shares thereof form part of the trust fund."

Clause 8(A) reads as follows:

".....the trustees shall have the same full and unrestricted powers of making and changing investments of such money as if they were absolutely and beneficially entitled thereto."

Clause 8(D) reads as follows:

"The trustees shall have power to make any such investment as is mentioned in the said paragraph (8) notwithstanding that the making thereof may affect or alter inter-se the interests of the persons respectively interested in capital and income hereunder."

Clause 9(g) (i) reads as follows:

"to vote upon or in respect of any shares securities bonds notes or other evidence or interest in or obligation of any corporation trust association or concern whether or not affecting the security or the apparent security of the trust fund or the purchase or sale or lease of the assets of any such corporation trust association or concern."

14. A close and careful reading of the clauses of the trust deed makes it very clear that the trust deed does not give Mr. Patel sole or effective control over the trust funds and that the trustees have very wide discretion in the Management/ Investment, application and disbursement of the trust funds. It also shows that the trust deed does not fix the shares of each beneficiary either in absolute terms or proportionately. It is also relevant to notice that it is more than 20 years since the trust was constituted and the documents produced by the petitioner do not show the present number of beneficiaries. It is also relevant to notice that the extent of Mr. Patel's Indirect beneficial interest in KENELM Limited remains indeterminate for his interest in the trust funds itself is in determinate and consequently, it is not possible to determine the extent of Mr. Patel's WACEM. The trust deed also shows that the voting rights of the trust are controlled by trustees and not by Mr. Patel. Further, the definition of affiliate in RFP does not include the relatives of "promoter". In that view of the matter, from the information provided by the Consortium, it is not possible to conclude that Mr. M.J. Patel holds either beneficially or interest indirectly, the entire voting securities in KENELM Limited, which is said to be an investment holding company wholly owned by the family trust JT 484. Furthermore, the definition of "affiliate" requires that in the case of indirect holding, the voting securities held in the company should through the chain of other companies. The petitioner does not satisfy this requirement also, because, the very first link is a trust and not a company.

15. A holding of the voting securities in a trust cannot be equated to a holding of the voting securities in a company in order to satisfy the definition of the term "Affiliate", as defined in the Bid Document. It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. The Court, must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless, distorted and futile or reduce to silence any

part of the document and make it altogether inapplicable. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the question as to whether the 4th respondent therein was eligible to submit tender in response to the tender notice inviting tenders from registered II Class hoteliers having at least five years experience for putting up and running a II Class restaurant and two snack bars at the Airport for a period of three years. It was clear from paragraph (1) of the notice that tenders were invited only from registered II Class hoteliers having at least five years experience. It is only if a person was a registered II Class hotelier having at least five years experience that he could, on the terms of paragraph (1) of the notice, submit a tender. Paragraph (1) of the notice prescribed a condition of eligibility which had to be satisfied by every person submitting a tender and if, in a given case, a person submitting a tender did not satisfy this condition, his tender was not eligible to be considered. In that case, it is true that terms and conditions of the tender form did not prescribe that the tenderer must be a registered II Class hotelier having at least five years experience nor was any such stipulation to be found in the form of the agreement annexed to the tender but the notice inviting tenders published in the newspapers clearly stipulated that tenders may be submitted only by registered II Class hoteliers having atleast five years experience and that tender notice was also included amongst the documents handed over to the prospective tenderers when they applied for tender forms. In the context of that case, the question that arose before the Supreme Court for consideration was, what is the meaning of the expression "registered II Class hotelier", What category of persons fall within the meaning of that description? Resolution of those questions became necessary in order to decide whether the 4th respondent therein was eligible for submitting tender. In dealing with that question, the Apex Court held:

"7.It is true that the phraseology used by 1st respondent to express its intention was rather inapt but it is obvious from the context that the expression "registered II Class hotelier" was loosely used to denote a person conducting or running a II Class hotel or restaurant. It may be ungrammatical but it does not offend common sense to describe a person running a registered II grade hotel as a registered II grade hotelier. This meaning is quite reasonable and does not do any violence to the language and makes sense of the provision contained in paragraph (1) of the notice. We must, in the circumstances, hold that, on a proper construction, what paragraph (1) of the notice required was that only a person running a registered II Class hotel or restaurant and having at least 5 years" experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have give years" experience of running a II Class hotel or restaurant. The test of eligibility laid down was an objective; test and not a subjective one. What the "condition of eligibility required was that the person submitting a tender must have 5 years" experience of running a II Class hotel as this would ensure by an objective test that he was capable of running a II class restaurant and it should not be left to 1st respondent to decide in its

subjective discretion that the person tendering was capable of running such a restaurant. If, therefore, a person submitting a tender did not have at least 5 years" experience of running a II Class hotel, he was not eligible to submit the tender and it would not avail him to say that though he did not satisfy this condition, he was otherwise capable of running a II Class restaurant and should, therefore, be considered....."

The above observations of the Apex Court would support the contention of the learned Additional Advocate-General that holding in a trust cannot be equated to a holding in a Company and on that count itself, the petitioner's claim had to be rejected. A "trust" in Indian Law is not a Company. In AL. PR. Ranganathan Chettiar Vs. AL. PR. AL. Periakaruppan Chettiar, Apex Court held that trusteeship is a position which is to be imputed to a person on clear and conclusive evidence of transfer of ownership on account of confidence reposed, and on such liability having been accepted by the alleged trustee. In Tulsidas Kilachand Vs. The Commissioner of Income Tax, Bombay City I, , the assessee made a declaration of trust in favour of his wife. According to the declaration, he held certain shares of certain companies upon trust to pay the income thereof to his wife for a period of 7 years from the date thereof or her death (whichever event might be earlier) and it was further declared that the trust was not revocable. The Supreme Court rejecting the contention that there was no transfer at all, was pleased to hold:

"Il...,.....The shares were previously held by Mr. Tulsidas Kilachand for himself. After the declaration of trust of by him, they were held by him not in his personal capacity but as a trustee. No doubt, under Sections 5 and 6 of the Indian Trust Act if the declarer of the trust is himself the trustee also, there is no need that he must transfer the property to himself as trustee; but the law implies that such a transfer has been made by him, and no overt act except a declaration of trust is necessary. The capacity of the declarer of trust and his capacity as trustee are different and after the declaration of trust, he holds the assets as a trustee....."

The underlined portion of the observation of the Apex Court is an authority to state that the property held by Mr. M.J. Patel as trustee cannot be treated as the property held by Mr. M.J. Patel in his individual capacity. Secondly, Mr. Patel's share in the Trust is also indeterminate having regard to the Clauses 2(1)(c)(v) and (vi) of the Trust Deed. Further, Clause 3 of the Trust Deed declares that the Trustees shall stand possessed of the Trust Fund upon Trust as to investments or property other than money in their absolute discretion. The above provisions in the Trust Deed read with provisions of Clause 5(AXB)(C) and Clause 6(A) (ii) and (iv) and 6(D) make it very clear that the share of Mr. Patel is indeterminate and, therefore, there is no evidence to show that he holds 5% share. Thus, looking from any angle, it is not possible to hold that WACEM is an "Affiliate" of the petitioner.

16. The law relating to award of contracts by the State, its authorities and bodies acting as instrumentalities and agencies of the State has been settled by a

catena of decisions of the Supreme Court, and to mention few are the decisions in *R.D. Shelly v. International Airport Authority* (1979) 3 SCC 488, *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, , *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , *Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, , *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , and *M/s, Monarch Infrastructure Private Limited v. Commissioner, Ulhasnagar Municipal Corporation and others* 2000 (4) Sup 34.

17. The Supreme Court in *Air India Limited v. Cochin International, Airport Limited and others* 2000 (1) Scale 346, has summarized the principles governing the award of contracts by the State and its instrumentalities in the following words:

".....The aware of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

It is quite often held and reiterated by the Supreme Court and the High Courts that the judicial review is essentially against the decision-making not against the decision as such. The Supreme Court in *H.B. Gandhi v. GopiNath and Sons* 1992 Sup. (2) SCC 312, in para 8 observed:

"Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not

to ensure that the authority after according fair treatment reaches, on a matter which it is authorized by law to decide, a conclusion which is correct in the eyes of a Court, judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decisions making process but also on the correctness of the decision itself.

18. The Supreme Court in *Tata Cellular Vs. Union of India*, , dealing with the principles governing power of judicial review of the exercise of contractual powers by the State, State authorities and instrumentalities of the State held:

"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 favouritism. 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 a 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.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

The Supreme Court further observed:

"Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

However, it is well settled that since the guarantee of equal protection enshrined in Article 14 of the Constitution embraces the entire realm of "State action", it would extend not only when an individual is discriminated against in the matter of exercise of his rights or in the matter of imposing liabilities upon him, but also in the matter of granting privileges, e.g., granting licences for entering into any

business, inviting tenders for entering into a contract relating to Government business, or issuing quotes, giving jobs and in all these cases, the principle is that there should be no discrimination between one person and another if their position or circumstance is the same. In other words, the State's action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discretionary.

19. It is well settled that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an action in violation of them. Every activity of Government has a public element in it and must, therefore, be informed with reason and guided by public interest. If the Government awards contract or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The public authority cannot exercise its discretion arbitrarily in the matter of giving contracts to a party on its sweet will and pleasure.

20. What follows from the above discussion is that though the Courts cannot review the decision of the authorities on merit in awarding contracts, the Court can examine decision making process and interfere with the decision if it is found vitiated by mala fides, unreasonableness, arbitrariness and prejudice to public interest. In the instant case, we do not find any of these four factors which would vitiate the decision of the 1st respondent in awarding the contract to the 2nd respondent. As noticed above, disqualification of the petitioner-appellant from consideration beyond Cover No.1 stage on the grounds of non-fulfilment of technical capability and non-fulfilment of financial capability is fully justified and the opinion formed by the 1st respondent-Corporation is based on proper appreciation of the relevant materials placed before it. We are of the considered opinion that the factors and circumstances and the materials which the 1st respondent-Corporation has taken into account in the decision-making are quite germane and relevant and, the ultimate decision taken by it is intended to subserve the interest of the Corporation as well as the public interest. This Court while exercising the power of judicial review under Article 226 cannot act like an appellant authority sitting in judgment over the decision taken by the experts in the field and interfere with the decision on merit lightly. We also do not find any merit in the contention of Mr. M.R.K. Choudhary that in awarding the contract to the 2nd respondent, the 1st respondent-Corporation has acted mala fide and in a hotchpotch manner in order to favour the 2nd respondent. We do not find anything in the records which would even remotely suggest that the 1st respondent-Corporation was actuated by any extraneous or collateral considerations in awarding the contract to the 2nd respondent and in disqualifying the petitioner. Added to this, the pleading as regards mala fide is scanty and as vague as it could be. This is not a case where any mala fides have been alleged and proved against any of the officers of the 1st respondent-Corporation who are involved in the decision-making culminating in the award of

the contract in favour of the 2nd respondent. Lastly it needs to be emphasised that the contract in question is a time-bound contract and it is intended to facilitate the smooth and timely transportation of the pilgrims visiting the world renowned shrine situate at the imposing Tirumala Mountain Ranges. Any intervention by the Court at this stage would delay the execution of the project and such delay would undoubtedly be prejudicial to the public interest. The following observations of this Court in *Giridhari Lal Constructions Pvt. Ltd., Punjab Vs. Union of India*, , are quite apposite:

".....The Court before it interferes with the award of the contract should satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The Court must also take into account, the highest cost involved in interfering with the award of the contract due to escalation price of the inputs and whether the public would stand to benefit by incurring such higher costs. Since we find the decision of the Ministry of Defence is based on a detailed consideration of the need, viability, financing and cost effectiveness of the proposed project and the urgency and time saving factors, we do not find any substantive ground to interfere with the award of the contract in favour of the 5th respondent....."

21. In the result and for the foregoing reasons, we hold that there is no merit in any of the contentions advanced by the learned senior Counsel for the appellant, and we do not find any irrationality or arbitrariness or unreasonableness in the action of the 1st respondent-Corporation in awarding the contract in favour of the 2nd respondent and in disqualifying the petitioner. We also find that by awarding the contract to the 2nd respondent, no public interest is sacrificed. The writ appeal, is, therefore, dismissed as devoid of merit with no order as to costs.