

(1999) 08 AP CK 0013

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2040 of 1999

S. Kireetendranath Reddy

APPELLANT

Vs

A.P. TRANSCO, Vidyut Soudha, Hyderabad and another

RESPONDENT

Date of Decision : 17-08-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Motor Vehicles Act, 1939 — Section 47

Partnership Act, 1932 — Section 18, 19, 21, 22, 23

Citation : (1999) 5 ALD 398 : (1999) 5 ALT 47

Hon'ble Judges : S.R. Nayak, J

Bench : Single Bench

Advocate : Mr. C.V. Nagarjuna Reddy, for the Appellant; Mr. K.N. Jwala, SC for APSEB, for the Respondent

Judgement

1. The question that falls for consideration in this case is whether the Management of the Transmission Corporation of Andhra Pradesh Limited, for short, "the TRANSCO" is justified and acted legally in seeking to disqualify the petitioner at the threshold of the awarding of the work contracts covered by package No.WB/APSEB/TR/RS-20 on the ground that the petitioner lacks the prescribed experience.

2. The facts that led to the filing of the writ petition be stated briefly as under:

The petitioner and one Sri P. Radha Krishna Reddy, hereinafter referred to as "PRR", for the sake of brevity, constituted a partnership firm in the name and style of M/s. Aditya Transmission on 20-11-1991 with equal shares. The partnership firm was involved in the execution of the work of erection of the transmission lines mainly of Andhra Pradesh State Electricity Board, for short "APSEB", the predecessor of the TRANSCO which came into being in the place of APSEB with effect from 1-2-1999. Due to some personal problems and inconvenience experienced by the partners, the firm was dissolved with effect from 3-10-1997, and in that regard, an agreement for dissolution of partnership

was executed between the partners on 4-8-1997 at Hyderabad. Till the firm was dissolved with effect from 3-10-1997, the partners in the name of the firm executed as many as nine transmission lines with APSEB. Both the partners jointly and actively involved in the execution of the works, gained rich experience and high degree of efficiency in the execution of transmission line works. After the dissolution of the firm, the petitioner and PRR have not entered into any partnership agreements with any other agency or person. Though one of the clauses in the Dissolution Deed authorised PRR to carry out the business of the firm by admitting any third person of his choice into the firm, PRR has not admitted any other person as partner of the firm. However, PRR is carrying on his business in the name and style of M/s. Aditya Transmission, as a proprietary concern.

3. The second respondent herein, the Chief Engineer (Transmission), A.P. TRANSCO called for tenders for award of transmission line works in the year 1998. The petitioner submitted his tenders for the works under Lot 1 and Lot 2. In respect of the work under Lot 2, viz., Lilo to 220 KV Gachibowli sub-station from Chandrayangutta to Shapur Nagar 220 KV DC line, the petitioner's bid was the lowest. PRR had also applied for award of the Contract for the works under Lot 2. Although the petitioner's bid was the lowest as regards Lot 2 work, PRR was awarded the contract. However, the petitioner did not assail the action of the respondents in awarding the work contract under Lot 2 in favour of PRR. While so, the second respondent again issued tender notification IFB dated 5-10-1998 inviting scaled bids from the eligible persons for the erection of the transmission lines and sub-station works mentioned in the Annexure in respect of four Lots under the project called Andhra Pradesh Power Sector Restructuring Project approved by the World Bank vide Package No.WB/APSEB/TR/RS-20. The works are mentioned in the Annexure to the Tender Notification under four Lots. The petitioner submitted his tenders for the works under Lots 1 and 4. It appears that certain others have also filed their tenders. PRR has also filed his tender in respect of the work under Lot 4.

4. The petitioner on coming to know that the respondents sought to disqualify him at the threshold in the award of the work contracts on the ground that he lacks qualification and experience, filed this writ petition praying for a writ of mandamus declaring the action of the respondents in seeking to disqualify the petitioner in the award of the work contracts covered by Package No.WB/APSEB/TR/RS-20, as illegal, arbitrary and discriminatory and for a consequential direction to the respondents to consider the petitioner's bids in respect of Lots 1 and 4 treating the petitioner as a duly qualified tenderer.

5. This Court while issuing "rule nisi" on 4-2-1999 issued an ad interim direction in WPMP No.2490 of 1999 directing the respondents to await further orders from the Court for finalisation of the contract. The said interim direction subsists.

6. On service of notice, the respondents have filed their counter affidavit and it is sworn to by the second respondent. In the counter affidavit, it is contended that

the experience and turnover etc. of the Firm Aditya Transmission cannot be given to all the partners and as per the Deed of Dissolution of partnership firm, that experience and turnover etc., of the firm can be extended only to PRR; as per Clause 4.5 (B) under (C), the petitioner has failed to indicate the available credit facilities for the works under Lot 1 and Lot 4; there is no turnover in the name of the petitioner and therefore he is not qualified to apply for the award of the contracts; the writ petition is liable to be dismissed in limine as it is totally premature inasmuch as no final decision is taken by the respondents as to whom the work contracts should be awarded; the High Court under Article 226 cannot act as an appellate authority and go into the merits of the decision, and since the petitioner has not attributed any ulterior motive, favouritism, mala fide to the respondents, the Court's interference is not warranted.

7. The petitioner has filed reply affidavit to the counter affidavit. In the reply affidavit, the petitioner has reiterated the same contentions taken in the main affidavit filed in support of the writ petition and refuted the allegations of the respondents relating to the credit facilities, solvency and financial capacity possessed by the petitioner.

8. I have heard Sri C. V. Nagarjuna Reddy, learned Counsel for the petitioner and Sri K.N. Jwala, learned Standing Counsel for APTRANSCO quite extensively.

9. Sri C. V. Nagarjuna Reddy, learned Counsel for the petitioner contended that it is well settled that a partnership firm is a compendious form of partners and it has no independent legal existence; afortiori the experience of the firm is nothing but the experience of its partners who are involved in the execution of the works carried out in the name of the firm; it is indisputable from the Certificate issued by the 2nd respondent himself that the petitioner as an equal partner of the dissolved firm executed as many as nine works of similar nature and in that view of the matter, the respondents while considering the experience of the petitioner are bound to take into account the above nine works executed in the name of the firm, and the refusal of the respondents to consider these works to the credit of the petitioner is wholly irrational and arbitrary. Alternatively, the learned Counsel contended that the petitioner and PRR are similarly circumstanced in every aspect before and after the dissolution of the firm, and they being equals cannot be treated by the respondents unequally and that the impugned action of the respondent smacks of arbitrariness and tantamounts to invidious discrimination.

10. On the other hand, Sri K.N. Jwala, learned Standing Counsel for the TRANSCO contended that the petitioner and PRR are not equals after the dissolution of the firm. The learned Counsel would contend that the petitioner lacks prescribed work experience as a prime contractor. The learned Standing Counsel would draw the attention of the Court to the covenants (2) and (9) in the Deed of Dissolution of the partnership firm and maintain that the goodwill of the firm was given exclusively to PRR; and the experience of the firm forms inalienable part of the goodwill of the firm. The learned Standing Counsel would also contend that since the respondents have not yet taken final decision as to

whom the contracts should be awarded, the instant writ petition is premature and misconceived. The learned Standing Counsel also contended that no ground is made out for interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, and this Court cannot sit on judgment over the opinion formed by the Officers of the TRANSCO who are supposed to be the experts on the subject-matters of the contracts.

11. Although the tenders were opened on 29-12-1998, they are not yet finalised by virtue of the interim direction issued by this Court on 4-2-1999 in WPMP No.2490 of 1999. Who should be awarded the work contracts after considering and appreciating the relative merits and the qualifications of the applicants is very much within the domain of the power and discretion of the respondents. That stage is not yet reached. But, as reflected in the counter-affidavit, the respondents want to disqualify the petitioner at the threshold of the consideration of the tenders primarily on the ground that the experience gained by the petitioner as a partner of the firm M/s. Aditya Transmission is not his individual experience to qualify himself for applying for the award of the contracts. There is no controversy between the parties that the petitioner does not have any independent work-experience except his experience as a partner of the firm. Therefore, the only question that arises for consideration and decision, at this stage, is whether the respondents are justified and legally acted in disqualifying the petitioner on the above ground. The learned Counsel too did not address any argument relating to the other qualifications, though in the counter-affidavit, it is alleged that the petitioner has not indicated the available credit facilities for the works under Lot 1 and Lot 4.

12. The second respondent issued tender notification IFB dated 5-10-1998 inviting sealed bids for the erection of the transmission lines and sub-station works for 4 Lots, viz., Lot 1, Lot 2, Lot 3 and Lot 4, the details of which are set out in the Annexure to the tender notification, The tender notification reads thus:

Andhra Pradesh State Electricity Board

A.P. Power Sector Restructuring Project

Invitation for Bids under National Competitive Bidding

IFB Date: 5th October 1998

1. The Government of India has applied for a loan from the International Bank for Reconstruction and Development towards the cost of A.P. Power Sector Restructuring Project. It is intended that part of the proceeds of this loan will be applied to eligible payments under the contract for execution of the works covered under this invitation. Bidding is also open to all Bidders from eligible source countries as defined in the IBRD guidelines for procurement. Besides bidders registered with other State Governments. Government of India, State and Central Government Undertakings are eligible to bid for the works. Bidders are advised to note the minimum qualification criteria specified in Clause 4 of the

Instructions to Bidders to qualify for the award of the contract.

2. The APSE Board invites sealed bids for the erection of the Transmission lines and substation works mentioned in the annexure. The bidders may submit bids for any or all lots mentioned under each package in the annexure and each lot in the package will be evaluated separately.

3. A complete set of bidding documents for each package may be purchased by interested bidders on submission of a written application to "The Chief Engineer/ Transmission, APSE Board, Vidyut Soudha, Khairatabad, Hyderabad-500082" and upon payment of a non-refundable fee of Rs.2,000/- on all working days as indicated against each package from 11.00 Hrs to 16.00 Hrs. The payment towards cost of bidding documents may be made by banker's cheque or demand draft in favour of the Pay Officer, APSEB, Vidyut Soudha, Hyderabad-500 082, payable at Hyderabad. Payment in any other form (i.e.) by cheques, money orders etc., will not be accepted. Bidding documents requested by mail will be dispatched by speed post. The APSEB will not be responsible for delay in delivery if any or non-receipt of the same. The bid documents will be available for sale as mentioned in the Annexure till a day prior to bid closing date of that package.

4. Bids must be accompanied by security for the amount specified for the work in the annexure enclosed, payable at Hyderabad and drawn in favour of "Pay Officer, APSEB, Vidyut Soudha, Hyderabad-500 082". Bid security will have to be in any of the forms as specified in the bidding document and shall have to be valid for 45 days beyond the validity of the Bid.

5. Bids must be addressed and delivered to the Superintending Engineer/ Purchases/Room No.120/1st Floor/ Vidyut Soudha/Hyderabad-500 082 on or before the time and date indicated against each package. The bids will be opened in the presence of bidder's representatives who choose to attend at the time and date as indicated against each package at the Office of the Chief Engineer/ Transmission, APSE Board, Hyderabad. The bidder's representative should produce letter of authorisation before attending the bid opening.

6. Other details can be seen from the bidding documents.

From the reading of the tender notification, it cannot be said that the invitation is only to the corporate bodies and the firms and not to the individuals. However, Sri K.N. Jwala, learned Standing Counsel for TRANSCO meekly submitted that the invitation in the tender notification seems to restrict it to the corporate bodies and firms only. This submission is based on the genitive "its" occurring in Clause 4.5A of the tender document. That clause states that, each bidder in "its" name should satisfy the prescribed "annual financial turnover" and the "minimum quantity of work". A Bidder may be a natural person or an association of natural persons like a partnership firm or a legal person like a Company or a Corporation etc. Simply because in Clause 4.5A, the genitive "its" is used, it cannot be said that the invitation is not to the individuals. The hollowness of the submission of the learned Standing Counsel can be seen by giving an example. Suppose,

Clause 4.5A were to contain the genitive "his" in the place of the genitive "its", could it have been said that the invitation was restricted only to natural persons? The answer should be emphatic "no". There is no need to dilate this aspect further because it is not and it cannot be the case of the respondents that the invitation is restricted to the Corporate bodies, firms and other legal persons only. I say this because, the respondents admittedly on an earlier occasion awarded the contract to PRR, an individual in pursuance of the tender notification containing the very same genitive "its" in the tender document. In the instant case also, as reflected in the counter-affidavit, the respondents do not seek to disqualify either the petitioner or PRR on that count. In the counter, nowhere it is claimed that the subject contracts cannot be awarded to individuals like the petitioner and PRR. Therefore, I hold, that the invitation to offer bids is not restricted to the corporate bodies, companies and other forms of legal persons etc., and that even individuals like the petitioner and PRR can apply for the award of the contracts.

13. When the State and the instrumentalities of the State proceed to award work contracts or service contracts, every eligible person is entitled to apply and to be considered for the award of the contracts. The equality clause in Article 14 of the Constitution of India guarantees that right. But, that right is not an unqualified right. The applicant for the award of the contract should possess the prescribed eligibilities, and if he does not possess those eligibilities, it will be very much within the power of the State and the instrumentality of the State to refuse to consider his application and disqualify him from consideration. In the instant case, the petitioner is sought to be disqualified from consideration for want of work experience in him as specified in clause 4.4 of the tender document. There is no controversy between the parties that if the respondents were to take into account the experience gained by the petitioner as a partner of the dissolved firm as his experience, he would satisfy the minimum annual financial turnover as well as the minimum quantity of work and thereby he would qualify himself for applying for the award of the contracts. But, the respondents would tell the petitioner that his experience as a partner of the dissolved firm is not "his" experience, but the firm's experience, and these two experiences are distinct and separate and that they cannot be equated. Therefore, the question is whether the respondents are right in taking the above stand to disqualify the petitioner from consideration.

14. The word "experience" is not a legal precept. Experience is a concrete facet of the real life as contrasted with the ideal or imaginary life, and it is a state of being engaged in a particular study or work. In the fields of trade and commerce, business and contracts, applied technology, experience means a special skill or knowledge possessed by a person in a particular discipline of Science, Technology, profession or business by reason of special study and involvement. In either case, experience is always personal, concrete and attributable to a person, whether natural or legal. In legal parlance and in adjudication of the legal rights and obligations of the partners of a firm in a Court of law, attributing

experience to a no-person like a firm never arises.

15. In the context of the right to apply and to be considered for the award of the contracts and that right being dependent upon the experience-qualification of the person who applies for the award of the contracts, the person who asserts that right should possess the experience and he cannot make use of somebody's experience for his entitlement. In the factual context of this case, two subsidiary questions arise, namely, whether experience can be attributed to a firm, and if so, whether such experience of the firm can be independent of the experience of the partners who form it. If either of the two questions is answered negatively, the gainer of the experience will be the partners only, and not the firm.

16. Legal rights and legal duties cannot be conceived without the holder of the rights and the duties, and the holder, in legal theory, is the "person". In Salmond on Jurisprudence (11th Edition) at pages 350-351, it is stated thus:

"So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.

Persons as so defined are of two kinds, distinguishable as natural and legal. A natural person is a human being. Legal persons are beings, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings".

It is nobody's case that a firm is a natural person. If so, is it a legal person? A legal person is any subject-matter other than a human being to which the law attributes personality. If the firm is not a legal personality, then, it is incapable of having rights or duties. The same analogy leads to the conclusion that if the firm does not have the personality, no experience can be attributed to it, it being a no-person; a no-person, in legal parlance and theory, cannot have any experience. A no-person like a beast is capable of experience, in fact, but its experience is not an experience in the eyes of law because no personality is attributed to it. Any subject-matter other than a human being to which the law does not attribute personality cannot experience even in fact also, because it lacks natural senses to perceive anything. This can be said about the legal persons also but, since the law attributes rights and duties fictionally to a legal person, experience can also be attributed to a legal person if any of the rights of the legal person depends upon the experience it has gained through its human agency. But similar treatment cannot be extended to a no-legal person.

17. Section 4 of the Indian Partnership Act, 1932, defines the terms "partnership", "partners", "firm" and "firm-name". It reads:

"4. Definition of "partnership":--"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

"Partner", "firm" and the "firm-name":--Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business carried on called the "firm-name".

18. It is well settled that a firm is not a legal entity, but is only a collective or compendious name for all partners. It is neither a legal entity nor a person. A firm has no legal existence apart from its partners. A firm-name is really a description of the individuals who compose it. The essential characteristic of a firm is that each partner is a representative of the other partners. Each of the partners is an agent and a principal. He is an agent in so far as he can bind the other partners by his acts within the scope of the partnership business and he is principal to the extent that he is bound by the acts of the other partners. The liabilities of the firm can be enforced against each of the partners personally.

Story observes:

"Every partner is in contemplation of law the general and accredited agent of the partnership or as it sometimes expressed, each partner is "proe pasitues negotis societatis", and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts, on account of the partnership; he may draw, sign, endorse, accept, transfer, negotiate cheques and other negotiable paper in the name and on account of the partnership".

Lord Lindley on relationship of partners observes:

"A member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds him by what he does for the firm provided he keeps within the limits of his authority".

19. The Judicial Committee of the Privy Council, in *Bank of Australasia v. Breillat*, (1847) 6 Moo (PC) 152, dealing with the question that fell for decision in that case whether the act of the first defendant in borrowing the money from the plaintiff for the partnership business was an act necessary for or usually done in, carrying on business of such a partnership as that of which the first defendant was a member, observed thus:

"Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is "proepositus negotis societatis", and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects of the partnership".

20. The Supreme Court in *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, has observed that partnership is merely an association of persons for carrying on the business of partnership and in law the firm-name is a compendious method of describing the partners. In *Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others*, the Supreme Court while considering Order XXX of the CPC observed that the legal fiction must not be carried too far and it is for some purposes that the law has extended a limited personality to a firm which is not a legal entity.

21. Chapter IV of the Partnership Act deals with the relations of partners to third parties. Section 18 provides that a partner is the agent of the firm for the purpose of the business of the firm. Section 19 deals with the implied authority of partners as agents of the firm and provides that subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried by the firm, binds the firm. Section 21 deals with a partner's authority in an emergency and provides that a partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm. Section 22 deals with the mode of doing an act to bind the firm and provides that an act done or instrument executed by a partner or other person shall be done or executed in the firm name, in order to bind the firm. Section 23 deals with the effect of admission by a partner and provides that admission or representation made by a partner concerning the affairs of the firm is evidence against the firm. Section 24 deals with the effect of notice to acting partner and provides that notice to acting partner is notice to the firm. Section 25 makes the liability of the partners for acts of one another as joint and several. Section 26 deals with the liability of the firm for wrongful acts of a partner and makes the firm liable for wrongful acts or omissions of partners while acting in the ordinary course of the business of a firm, or done with the authority of partners. Section 27 deals with the liability of the firm for misapplication of money by partners. Section 28 deals with the principle of "holding out".

22. An examination of the above propositions of law and the authorities clearly goes to show that a partner when he acts in all matters which are within the scope and objects of the partnership, he steps into the shoes of the firm, which is a personified person but not a legal person in popular language, and binds all other partners, who compose it by his acts. Artifice of speech devised for compendious expression is extensively used in popular language to personify even no-persons as persons. For example, we speak of the estate of a deceased person, a team of players, a group of students, a public meeting, and a Bench of Judges as if they were themselves persons though they are not. Similarly, we speak of a firm as a person distinct from the individual persons. Undoubtedly, all legal personality involves personification, but all personification need not necessarily involve legal personality. Salmond's the following observation is apposite:

"..... legal personality is not reached until the law recognises, over and above the associated individuals, a single entity which in a manner represents them, but is not identical with them."

23. Since a firm does not have its own distinct and separate personality apart from the personality of partners who compose it, no experience can be attributed to it in law, and the so called personified experience of a firm, in reality, is nothing but the experience of the partners who compose it. Looking at the issue involved in this case in the above premise of law, it should be held that the experience gained by the petitioner and PRR as partners of the dissolved firm M/s. Aditya Transmission in executing nine items of works of the APSEB is, in reality, their own experience. Alternatively, it may be seen, as pointed out supra, that experience is something personal, concrete, permanent and it goes with the experienced man, wherever he is. Experience gained in particular relation is not and cannot be lost with the cessation of the said relationship, and even after the cessation of the relationship, the experience will remain with the experienced man. Any contrary view will be against humanity and reality and it will defeat both logic and reason. If at all experience can be lost, it can be lost only by the experienced man himself, of course, involuntarily, due to his physical and mental deterioration and imbalances. Experience cannot be snatched away by anyone else. Experience of the experienced man disappears with the extinction of the experienced man, and not before that. It may also be relevant to notice that from the same subject of experience, more than one can gain experience. For example, if a particular work-contract involving application of technology and science is executed jointly by a group often technocrats/scientists, each one of them acquires the experience. In such case, though in popular language, the experience is attributed to the personified group of technocrats/scientists, in reality, that experience is the experience of the technocrats/scientists who composed the group, and that experience is the individual experience of each member of the group.

24. Let us now have a look at the case-law having bearing on the point involved in this case. In Mohd. Hafeez Khan Vs. State Transport Appellate Tribunal, Gwalior and Others, , the question whether the bad operational record of a partnership firm is a relevant fact when any of the partners of the firm applies for a grant of permit u/s 47 of the Motor Vehicles Act, 1939, fell for decision before the Full Bench of the Madhya Pradesh High Court. Dealing with that question, the Full Bench observed in para (11) of the judgment as under:

"If as a fact it is known that the business was being carried on by one or more of the partners acting for all, and the performance had been unsatisfactory, we find no reason as to why the bad operational record of that firm could not be taken into consideration if those or any of them who in fact had been carrying on the business acting for all apply for a permit. Such person or persons have no escape from the past bad operational record of the firm."

25. I am in respectable agreement with the above opinion of the Full Bench of

Madhya Pradesh High Court. The case on hand is of a reverse situation, but, logic and rationality mandate and conclude that if bad record of a firm is a disqualification for its partner to apply for grant of a permit, good record of a firm is a qualification for its partner to apply for grant of the permit. In the contextual matrix of this case, and applying the above ratio, it should be held that the good experience of the petitioner gained by him as a partner of the firm is a relevant consideration to consider his tenders, and if a relevant consideration is left out from the decision-making, the decision becomes invalid on that count itself.

26. In *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , the question whether the authority, i.e., the Department of Telecommunications, Telecom District, Hyderabad should have taken into consideration the experience of the constituents of New Horizons Limited (NHL) which is described as "in the nature of a partnership between the Indian Group of Companies and the Singapore-based Company" by the Supreme Court in para 38 of the judgment, directly fell for consideration. In that case, the Department of Telecommunications, Telecom District, Hyderabad published an advertisement in various newspapers on 22-4-1993 inviting sealed tenders from the competent agencies for printing, binding and supply of specified number of telephone directories in English in three annual issues commencing from 1993. Five persons including NHL and M/s. M&N Publication Limited (respondent 4 therein) submitted their tenders. The Telecom Department after processing the tenders ultimately accepted the offer of the fourth respondent therein and rejected the tender of NHL. When that action was assailed before the Delhi High Court, it was contended by the Telecom Department that the tender of NHL was not considered because the NHL did not submit any evidence to show that they have in their name undertaken compiling, printing and supply of telephone directories for large telephone systems with the capacity of more than 50,000 lines. It was also contended on behalf of the Telecom Department that NHL was converted into a joint venture company in 1992 and have no experience whatsoever in their own name for compiling, printing and supply of telephone directories of telephone system of more than 50,000 lines capacity. On behalf of NHL, it was urged that NHL was fully eligible and met the criteria as laid down in the tender document and was competent to compile, print and supply telephone directories as per the invitation of tender and in that connection NHL placed reliance on the experience of foreign collaborator/ equity-holder and the experience of the major Indian equity share-holders, viz., TPI and LMI who owned the most well-equipped modern printing and binding facilities and had executed the work for the parties who had been awarded contract earlier for telephone directories for metropolitan cities of Delhi and Bombay. It was also submitted that these facilities were available to NHL to execute the work in question and that all these facts were clearly brought out in the tender document submitted by it, but the respondent-Telecom Department ignored the same and awarded the contract to respondent No.4 on extraneous consideration.

27. The Delhi High Court proceeded on the assumption that the share-holders of NHL have all the experience in compiling and printing telephone directories, but has observed that it is not at all job requirement. The High Court held that the experience of a share-holder cannot be the experience of the Company nor is NHL the agent of its share-holders. The Delhi High Court ultimately dismissed the writ petition filed by NHL. The matter was carried to the Supreme Court by NHL.

28. The Supreme Court, while reviewing the validity of the decision of the Delhi High Court and noticing rival contentions, was pleased to observe in para 23 thus:

"..... the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise the situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of business of the company form a new company after leaving it. The new company though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field."

29. The Supreme Court in the same paragraph further observed as under:

"The terms and conditions of such a document have to be construed from the stand point of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company".

30. Therefore, we find a clear ratio in the judgment of the Supreme Court

delivered in the NHL's case (supra) that the experience of a constituent of a legal person like an incorporated company or even that of a partner of a firm should be taken to be the experience of the company or the firm, as the case may be, for the purpose of consideration of the tenders, and what is material is whether the applicant for award of the contract has persons with experience and not the name which the applicant bears. Adverting to the facts of this case, it may be noted that the petitioner and PRR are equally experienced natural persons and they have gained experience as the partners of the firm. The mere fact that the petitioner has applied in his own name and PRR has applied in the name of his proprietorship concern, called Aditya Transmission does not make any difference between the two in law or on facts.

31. However, Mr. K.N. Jwala, learned Standing Counsel for TRANSCO, placing reliance on the three unreported judgments of this Court, contended that the ratio of the judgment of the Supreme Court in NHL's case (supra) is not applicable to the facts of this case. The three decisions are : (i) M/s. Dharani Contractors and Builders v. The Superintending Engineer, Irrigation and Command Area Development Department, Writ Appeal No.1220 of 1998, dated 29-7-1998; (ii) M/s. Thulasi Constructions v. The Chief Engineer, Minor Irrigation, Hyderabad and others, Writ Petition No.23525 of 1998, dated 5-11-1998; and (iii) M/s. Tulasi Constructions v. The Chief Engineer, Minor Irrigation, Hyderabad, Writ Appeal No. 1964 of 1998, dated 28-12-1998.

32. In Writ Appeal No.1220 of 1998 (cited supra), the appellant filed Writ Petition No.20930 of 1998 questioning the action of the respondent in refusing to issue tender schedules in respect of the work mentioned in item No. 1 of the tender Notice No.7 of 1998-99, dated 6-7-1998. One of the conditions in the tender notice was that "the intending applicants in the same name and style having good experience in executing as original agency in similar works under State/Central Government with an annual turnover of not less than Rs.46 lakhs for a group of works in any one year of preceding five years and out of which, turnover on a single work should not be less than Rs.23 lakhs, only are eligible for tender". Tender schedules were not issued to the petitioner for the reason that the experience certificate furnished by it did not pertain to the same name and style of the petitioner-firm. The experience certificate furnished by the petitioner was the one issued to the Managing partner of the petitioner-firm as an individual by the Divisional Engineer, Gauge Conversion, South Central Railway. It was the case of the petitioner-firm that the Managing partner of the firm formed a new firm by inducting some other partners under the name and style "Sri Dharani Contractors and Builders" and that it intended to submit the tender. The learned single Judge dismissed the writ petition at the admission stage. While assailing the validity of the order of the learned single Judge before the Division Bench, it was contended that the experience of a partner or Managing partner of the firm cannot be ignored having regard to the judgment of the Supreme Court in NHL's case (supra). However, this contention put-forth on behalf of the petitioner-appellant was not acceptable to the Division Bench. The

Division Bench while rejecting the above contention observed thus:

"But, in that case, the language similar to the condition extracted above, is not found. The emphasis in condition No.1 is that the experience should relate to the works done by the applicant "in the same name and style". Obviously, that condition is not satisfied. Whether or not such condition is constitutionally valid does not arise for consideration in the present case."

33. In Writ Petition No.23525 of 1998 (supra), the petitioner was a registered partnership firm. In that case also, the respondent-authorities refused to consider the tender submitted by the petitioner on the ground that the tenderer-partnership firm did not furnish the requisite experience certificate in the name and style of the firm. But, the experience certificate issued to the Managing partner was produced. It was contended on behalf of the petitioner that the experience of the Managing partner had to be treated as the experience of the firm, and therefore, the refusal to consider the tender of the petitioner-firm was illegal. The petitioner placed reliance on the judgment of the Supreme Court in NHL's case (supra). The respondents therein placed reliance on the judgment of the Division Bench in Writ Appeal No.1220 of 1998 noted supra. The learned single Judge was of the opinion that the condition prescribed in the tender schedule is different from the tender condition incorporated in the tender document in NHL's case (supra). So opining and placing reliance on the judgment of the Division Bench of this Court in WA No.1220 of 1998, the learned single Judge dismissed the writ petition by his Order dated 5-11-1998. The validity of this order was assailed before the Division Bench in Writ Appeal No.1964 of 1998 (supra). Before the Division Bench, the petitioner-appellant placed reliance on the judgment of the Supreme Court in NHL's case (supra). The Division Bench accorded its approval to the view taken by the learned single Judge, and placing reliance on the earlier judgment of the Division Bench of this Court in Writ Appeal No.1220 of 1998, it dismissed the writ appeal.

34. If I may say so with respect, a totally artificial distinction is sought to be made in all these three judgments of this Court between the "experience of a tenderer" and "the experience of such tenderer in particular name and style" without the support of reasons, theoretical or case-law-wise and without stating what is the ratio of the judgment of the Supreme Court in NHL's case (supra). The distinction made by this Court, in the ultimate analysis, is rooted in the difference in the names that the tenderers bore. It is not the Court's opinion that a particular experience of the tenderer without "name and style" is/can be different from that particular experience of such tenderer with "name and style" quality-wise or quantity-wise. The experience of the tenderer, in both the situations, is common and not distinguishable by applying any rational, test or standard. If so, the magic wand, "name and style" should make the difference. The question is whether it makes it? In order to answer this question, we should know what is a "name"? The word "name", as a noun, is that by which a person or thing is known. In other words, "name" is the designation of an individual

person, or a firm or a corporation and it is the distinctive characterisation in words by which one is known and distinguished from others. "Name" is not a legal percept nor "name" as such can be equated with the person who bears it. The name is only an identification device meant for identifying a person from others, and this device is invariably used by mankind not only in respect of natural persons and legal persons but also in respect of no-persons like animals, plants and non-living things. As stated above, experience, in legal parlance, can be attributed to persons only, whether they are natural or legal, and not to anyone else. The "name" as such does not denote the experience of the person who bears it. The change of the name in no way affects the experience of the person who bore that name. Therefore, the consideration of the name of the applicant for award of the contract is irrational, and that cannot be a valid basis for any distinction in law. There is no necessity for the Court to dilate this aspect further because I find that from the language employed in the tender document in NHL's case (supra) and the two above cases decided by this Court relating to the experience that the tenderer should possess, no qualitative distinction can be made. In NHL's case (supra), tender notification prescribed that "tenderer should have the experience". In the above noted cases decided by this Court, the tender notifications prescribed that tenderer should have good experience in the "same name and style". In the instant case, the tender notification prescribes that the tenderer "in its name" should have the prescribed minimum work-experience. Whether these expressions, "in its name" or "in his name" and "in the same name and style" make any difference? They do not. Strictly speaking, these phrases were used as genitive only, to express the relationship with the possessor of the experience, i.e., the tenderers. The phrase "in the same name and style", in the context of the subject-matter, only means the experience of the tenderer having executed certain minimum quantum of work as a prime contractor and not as a deputy or a servant of the contractor. In all the above cases decided by the Supreme Court and this Court, the tenderers did not have the experience of having executed the prescribed minimum quantum of work in their own names and styles. MIL too in its name did not have the prescribed experience. Nevertheless, the Supreme Court opined that the authorities ought to have taken into account the experience of its various constituents, namely, TPI, LMI, WML as well as IIPN.

35. The Division Bench of this Court in WA No. 1964 of 1998 has raised an additional question while dismissing the writ appeal. The Division Bench has observed thus:

"Apart from this, immediately after accepting the firm's tender if the Managing partner with experience etc., retires from the firm as partner what would be the effect of it was also not come up for consideration in NHL's case."

36. The above hypothetical question was not addressed to the Supreme Court in NHL's case (supra) as correctly pointed out by the Division Bench. But, the Division Bench having raised that question allowed it to remain unanswered. The

Division Bench has not expressed its opinion, either expressly or impliedly, on the question as to what would be the effect of retirement of an experienced partner after the acceptance of the firm's tender. Since the Division Bench has not opined on the question, I trust, there is no bar for the "Court below" to answer that question. Should it be noted that the Courts, generally speaking, do not decide hypothetical questions, and they decide only the existing or apprehended disputes at present. The question posed by the Division Bench, it is trite, is hypothetical question, and therefore, the Court need not, and according to certain binding authorities shall not, decide such hypothetical question. Secondly, if one contends that with the retirement of the sole experienced partner, the firm becomes the experienceless and since such a contingency cannot be ruled out, the tenderer-firm should be disqualified from consideration for award of contracts, the same thing can be said even where the tenderer-firm consists of experienced partners who have gained experience, in the "name and style" of that firm. If those experienced partners retire and inexperienced persons come in as the partners of that firm, the firm will be experienceless. Therefore, the question is whether it is permissible for the authorities to disqualify a person who fulfills the prescribed eligibilities at present from consideration on the ground or grounds of future possibility of incurring disabilities/ disqualifications in the premise of various imponderables. It is not for the Court to speculate uncertain future events and ground its decision on such speculation. Every conceivable right including the supreme right to life may be lost under certain circumstances. Therefore, even the right to apply and to be considered may also be lost in future by the person who at present has the right to apply and to be considered, but that possibility cannot be a ground for the Court to deny the relief. In the result and for the foregoing reasons and with respect, I hold that the opinions of this Court delivered in the above three unreported judgments are not good law for they are quite contrary to the ratio of the decision of the Supreme Court in NHL's case (supra).

37. This takes us to the contention of the learned Standing Counsel for the respondents that the petitioner lacks prescribed work-experience as prime contractor. This contention has no legs to stand thereby meaning that it has no factual matrix to stand. It is not the contention of the learned Standing Counsel for the respondents that the petitioner's experience is of a deputy's experience or that of a subcontractor's experience. No doubt, Clause 4.5 A(b) of the tender document speaks about the experience of a prime contractor. To my mind, this phrase "prime contractor" is used in contradiction with the phrase "subcontractor's experience" which expression is found in Clause 4.6 of the tender document. Clause 4.6 of the tender document states that subcontractor's experience shall not be taken into account in determining the bidder's compliance with the qualifying criteria except to the extent stated in Clause 4.5 A. It is not and cannot be the case of the respondent that the petitioner was a sub-contractor under the prime contractor i.e., the firm. Such a relationship cannot be conceived at all in law between the firm and its partners

for the reasons already stated by me above. Although nine items of contracts were secured in the name of the firm from the APSEB, the petitioner and PRR being the agents of the firm were the prime contractors and they cannot be treated as sub-contractors under the firm.

38. The alternative contention of the learned Counsel for the petitioner that the action of the respondents in disqualifying the petitioner from consideration but not doing so in the case of PRR tantamounts to invidious discrimination eminently deserves acceptance by the Court. Although the petitioner and PRR stand on the same footing after the dissolution of the firm with effect from 3-10-1997, curiously, the respondents, as already pointed out supra, awarded the previous works to PRR despite the fact that the offer made by the petitioner was the lowest. However, it is the contention of the learned Standing Counsel for the respondents that the petitioner and PRR cannot be treated as equals. Elaborating this contention, the learned Standing Counsel would contend that the petitioner, in unequivocal terms, has relinquished his rights in the goodwill of the firm in favour of PRR, and since the goodwill consists of the experience of the firm, the petitioner and PRR cannot be "treated as equals.

39. The above contention of the learned Standing Counsel in my considered opinion, is not well-founded. u/s 14 of the Indian Partnership Act, goodwill of the business is the property of the firm, The term "goodwill" is nowhere defined in the Indian Partnership Act or the repealed provisions of the Indian Contract Act. "Goodwill" is a thing which is very easy to describe but very difficult to define. According to Lord Lindley, the term "goodwill" can hardly be said to have any precise signification and it is generally said to denote the benefits arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and reputation and improve them. In other words, goodwill of a firm is an advantage which is acquired by a business beyond the mere value of the capital stock, fund or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers. Lord Herschell described the term "goodwill" as follows:

"It is the advantage which a person gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried on for some time previously."

40. According to Halsbury, goodwill seems to be that species of connection in trade which includes customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable which may be preserved (atleast to some extent) if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed. It is well settled that on the dissolution of partnership, every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners. Even assuming that the experience can be an aspect of the goodwill of the firm, there

is nothing on record to show that PRR is given goodwill of the firm to his exclusive benefit. Firstly, no covenant either in the partnership deed dated 20-11-1991 or in the deed of dissolution dated 4-8-1997 provides that the goodwill be given to PRR exclusively. Secondly, the permission to PRR to use the name of the firm for his proprietary concern and the reservation of the liberty to PRR to continue the firm by co-opting a person as his partner under the terms of the deed of dissolution cannot be equated to the parting of goodwill of the firm exclusively in favour of PRR. Thirdly, goodwill of the firm is not yet sold and therefore with the dissolution of the firm, goodwill of the firm is wholly lost. Be that as it may, in the instant writ petition, the Court is not called upon to decide who between the two partners is entitled to goodwill of the firm, it being a part of the assets of the dissolved firm.

41. As pointed out supra, the petitioner and PRR, after dissolution of the firm, stand on equal footing. Equals should be treated alike is a constitutional creed flowing from the equality clause in Article 14 of the Constitution of India. Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed. Since the guarantee of equal protection embraces the entire realm of State action, it could 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 quotas, giving jobs etc. In other words, the State action must not be arbitrary but must be based on some valid principle which itself not be irrational or discriminatory. In the instant case, though the petitioner and PRR are equals within the contemplation of Article 14 of the Constitution, they are treated differently by the respondents. In other words, the action of the respondents in so doing tantamounts to invidious discrimination.

42. It is true, as contended by the learned Standing Counsel for the respondents, that High Court cannot act as an appellate authority while undertaking judicial review of administrative actions under Article 226 of the Constitution. It is repeatedly held and reiterated by the Supreme Court and the High Courts that the judicial review is not against the decision as such, but against the decision-making. In the instant case, the decision as to who should be awarded the subject contracts is not yet taken by the respondents. The petitioner approached this Court at a stage when he apprehended that the respondents would disqualify him at the threshold of consideration on the ground that he lacks work-experience. The apprehension of the petitioner is well-founded and the counter-affidavit filed by the respondents clearly reflects that position. The impugned action apparently suffers from two vices noted above and those vices are the valid and permissible grounds for the Court to invoke its extraordinary, discretionary power under Article 226 of the Constitution to review administrative actions. The State, the statutory authorities and the instrumentalities of the State are governed by the Mandate of Article 14 of the Constitution which

excludes arbitrariness, in their action and requires them to act fairly and reasonably in the matter of awarding contracts or in parting with their largesse and they cannot act arbitrarily at their sweet will and like a private individual, but their action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. Since in this case the Court has found that the exclusion of the petitioner from consideration for awarding the contracts is totally irrational and arbitrary, a valid ground is made out for interference by this Court under Article 226 of the Constitution.

43. In the result, and for the foregoing reasons, I allow this writ petition and declare that the action of the respondents in seeking to disqualify the petitioner at the threshold of the consideration of his tenders on the ground that he lacks the prescribed work-experience is unjustified on facts and invalid in law. A direction shall issue to the respondents not to disqualify the petitioner from consideration for the award of contracts in respect of LOT-1 and LOT-4 covered by the package No.WB/APSEB/TR/RS-20 solely on the ground that the petitioner lacks the prescribed work-experience. Now, the respondents may proceed further to process the tenders and finalise the same in accordance with law and in the light of this judgment and after consideration of the relative merits and the qualifications of the tenderers in all other respects. No costs.