
(1995) 11 CAL CK 0026
In the Calcutta High Court
Case No : Civil Order No. 12654 (W) of 1995

Seababrata Bose Associates (P) Ltd.	Vs	APPELLANT
State of West Bengal		RESPONDENT

Date of Decision : 30-11-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1996) 1 ILR (Cal) 58

Hon'ble Judges : Nikhil Nath Bhattacharjee, J

Bench : Single Bench

Advocate : Joyanta Mitra and Moloy Kumar Ghosh, for the Appellant; P.K. Mukherjee, Prasanta Banerjee, Ahin Chowdhury and Utpal Bose, for the Respondent

Final Decision : Allowed

Judgement

Nikhil Nath Bhattacharjee, J.—In this application under Article 226 of the Constitution of India, the subject-matter of challenge is the pre-selection and short listing of eligible tenderers pursuant to the notice inviting tender for design and construction of a 10 million gallon per day (MGD) water treatment plant for supply-of water to Durgapur Notified Area. The Petitioners have prayed for issue of writs of mandamus directing the Respondent authorities to reject the tender of M/s. Subhas Project & Marketing Ltd., to accept the tender of the writ Petitioners and for an order of injunction restraining the Respondent authorities from accepting tender submitted in response to the said notice, of any person, company or firm not having the requisite technical qualification.

2. On the factual aspect it appears that on June 22, 1994, the Government of West Bengal through the Superintending Engineer, R.C.F.A., W/S Circle, P.H. Engineering Directorate issued the notice inviting tender being No. 4/94-95 for design and construction of a 10 MGO water treatment plant for the water supply scheme of Durgapur notified area at Angatpur D.V.C. canal. The notice was for pre-qualification selection and short listing of bona fide tenderers having the

requisite qualification. It was stated that only firms and contractors selected through this pre-qualification selection were eligible to submit technical and commercial offers for the above work. It was made clear that only those firms/contractors who had designed and constructed at least one 10 MGD drinking water plant during the last five years and had maintained and operated the same for a period of at least one year were eligible for participation in the technical and commercial bid. The intending participants were directed to submit in their respective letter head in support of their eligibility the following particulars:

1. The participants must have executed work of similar nature with all components amounting to Rs. 2.50 crores and above in a single contract within last five years.
 2. A completion, commissioning and successful performance certificate issued by the competent authority for construction of at least one 10 MGO water treatment plant.
 3. A list of water treatment plant constructed and installed by them including details of work value, performance.
 4. Particulars of ownership, partnership or board of directors pertaining to the organisation/company/ firm along with copies of deeds, registration etc.
 5. Financial status of the participating companies/ firms/contractors and financial capability with copies of Banker's certificates.
 6. Name and particulars of the collaborators, if proposed, for the design and construction of civil, mechanical, electrical works in the plant and their supporting experience in such field, etc.
3. The said particulars were to be submitted in a sealed cover by 3 p.m. on July 22, 1994.
4. On July 14, 1994, the writ Petitioners submitted their particulars as mentioned in the N.I.T. dated June 22, 1994.
5. By corrigendum notices the last date of receipt of the applications for the pre-bid selection was extended from time to time. However, it was made clear in the said notices that "other terms and conditions would remain unchanged".
6. By a letter dated October 3, 1994, the Respondent No. 2 informed the Petitioners that considering their credentials they had been selected to purchase details of tender documents for the purpose of submitting offers for. technical and commercial bids for the entire job within the prescribed time schedule.
7. On October 31, 1994 the Respondent No. 3 informed the Petitioners that tender documents for the subject work would be available upto November 7, 1994 on. payment of a price of Rs. 1500 and extra charge of Rs. 450 for purchase of relevant drawings.

8. On November 3, 1994, by a corrigendum notice addressed to the writ

Petitioners and 5 others (excluding Respondent no".4.) Respondent No. 2 informed that the tender documents for the said work, would be available upto November 16, 1994 all other conditions remaining the same.

9. On November 11, 1994 Respondent No. 3 informed the Petitioners and other 5 tenderers excluding Respondent No. 4 that the last date for purchase of tender documents was extended upto November 24, 1994 in lieu of November 16, 1994 and that other conditions would remain in tact.

10. On November 23, 1994 the six tenderers and Respondent No. 4 and another were informed that as the tender papers in connection with the above work could not be finalised, date of issue of the papers was deferred for an indefinite period.

11. On December 29, 1994 the Respondent No. 3 informed eight tenderers including the writ Petitioners and the Respondent No. 4 that tender documents for the said work would be available during the period from January 3, 1995 to January 6, 1995.

12. On February 22, 1995 a pre-bid conference was held under the Chairmanship of the Respondent No. 2 and by a letter dated February 23, 1995 the Petitioners were" furnished with a copy of the minutes of the said pre-bid conference. Certain technicalities which had been agreed upon were noted in the said minutes. The list of members present in the pre-bid conference as annexed to the said intimation shows that the Petitioners as also the Respondent No. 4 were represented in the said conference.

13. On March 13, 1995 the Petitioners submitted their tender in respect of the technical aspect of the said work along with the earnest money of Rs. 20,000 and other relevant documents.

14. On April 18, 1995 Respondent No. 2 informed the writ Petitioners that all tenderers were required to submit a revised? commercial bid adhering strictly to the technical specification, design criteria and schedule of work enclosed therewith. The fresh commercial bid was to be submitted in a separate sealed cover which would be opened on May 17, 1995.

15. On May 16, 1995, the writ Petitioners submitted their revised commercial bid relating to the said work to the Respondent No. 2.

16. The writ Petitioners" representative attended the opening of the tender on May 17, 1995 and it came, to light that Respondent No. 4 submitted the lowest tender and Petitioner No. 1 submitted the second lowest tender.

17. It is the Petitioners" case that the tender of M/s. Subhas Projects and Marketing Ltd. (Respondent No. 4) could not at all be considered as the said tenderer had not qualified in the pre-bid selection. Representations were submitted to the Minister-in-Charge and to the Secretary of the Department and ultimately this writ petition was filed and an interim order obtained from this Court to the effect that the tenders could not be opened and if already opened,

no contract could be awarded on the basis of tenders submitted by the tenderers until further orders. It was also ordered by this Court that M/s. Subhas Projects & Marketing Ltd. was to be made" a party Respondent and an amendment in the cause title was to be effected. Accordingly M/s Subhas Project & Marketing Ltd. was added as Respondent No. 4.

18. By a subsequent supplementary affidavit dated July 27, 1995, the Petitioners disclosed a confidential letter dated September 13, 1994, written by the Chief Engineer, R.C.F.A. water supply circle which is very important and the sheet-anchor of the writ Petitioners" case. The relevant portion of the said letter is quoted below:

CONFIDENTIAL GOVERNMENT OF WEST BENGAL DIRECTORATE OF PUBLIC HEALTH ENGINEERING 1, K.S. Roy Road, 6th Floor, Calcutta--1 No. 17549 Calcutta, the 30.9.1994 To: The Superintending Engineer, RCFA Water Supply Circle, P.H. Engineering Directorate Sub.: Pre-qualification for Water Treatment Plant at Durgapur Ref.: Your memo, No. 1539 dated 25.8.94.

It is seen that out of 13 Applicants you have decided on 8 clear-out cases and sent 5 others for my advice. My observations given below might guide you in arriving of final short listing.

The criteria of qualification that the intending tenderer should have successfully executed and maintained at least one 10 MGD plant during last five years is rather harsh. The draft was approved by me no doubt. But strict adherence to the condition, it now appears would deny permission to several renowned and resourceful firms. We should rely more on the technical and financial capability and past experience rather than on the 10 MGD and 5 years aspects which may be marginally relaxed only in otherwise deserving cases. After all, clarifier, filter beds pumps and some other units will not be presently constructed to their ultimate to capacity but will be executed in module to be multiplied or extended in future after completion of the present scheme in hand.

The credentials, of the Applicants in question are to be examined in the above light.

1.

2.

3.

4. Subhas Projects: They have a very wide range of activities of which water management and engineering is one.. They have executed numerous challenging and technically highly difficult water supply units. Their credential reveal that they have done big contracts for intake, transmission, pumping machinery, electric equipments of such magnitude and value which fulfill our requirement of individual components. Minimum capacity of treatment plant constructed by them is 6 MGD in Assam but this Was based on tube well, not surface water. In

Mizoram, they have constructed two water supply schemes with surface water which are marvelous examples of technical expertise and workmanship. We have inspected them. Though hydraulic capacity to 2 to 3 MGD, the situation and condition there, are manifold difficult than those at Durgapur. They are accredited as a leading turnkey contractor. Their resources monetary and technical manpower are superb and capability unquestionable. They deserves special consideration.

5.

I hope you will examine the above observation and take your decision as NIT authority. This letter may be produced along with other papers to the tender selection committee at the time of acceptance of the tender.

The comparative statement is returned.

Encl.: Comparative statement.

S.N, Ghosh Chief Engineer Northern Zone P.H.E. Directorate.

19. Both the Respondents No. 1 to 3 and responds No. 4 contest this writ application by affirming affidavit It is the case of the Respondent No. 1 to 3 that the writ Petitioners were aware at least from August 4, 19 when in presence of their representative sealed cove containing the offers regarding pre-selection were defined that the Respondent No. 4 was one of the applecarts who had submitted pre-qualification application being considered. It has been stated that the applications containing pre-selecti6n offers comprised voluminous papers and documents required a long tit for detailed scrutiny, that the job in respect of which qualifications applications had been called for involve a very high cost worth Rs. 4.5 crores, that the policy the Government at all material times is to find out t fittest firm/contractor from amongst the Applicants will be financially and technically suitable for the that to ensure strict observance of such a policy which scrutinising the applications the Respondent No. 2 had sit with each of the Applicants or their representative individually to get clarifications of the information furnished, that upon a thorough probe into the matter initially six Applicants including the writ Petitioners that excluding Respondent No. 4 were permitted by him October 3, 1994 to purchase tender papers, the thereafter on October 21, 1994 two more application were permitted to purchase tender papers, and that the out of the total 13 number of pre-qualifications Applicants cants eight Applicants including Respondent No. 4 we short listed. It has further been stated that of the Applicants three were disqualified, five were found have satisfied the eligibility norms of construction of MGD water treatment" plants while five were found have constructed water treatment plant of capacity below 10 MGD. In such circumstances Respondent no sought for advice of the Chief Engineer and, the Chief Engineer having regard to the requirement of the Durgapur Notified Area Authority relaxed the condition of 10 MGD, and also five years aspect in order to allow more participants to participate in tender with the object of fair and competitive rates in-public interest. Accordingly, it is submitted

that the memo dated September 3, 1994 which has been disclosed by the writ Petitioners by a Supplementary Affidavit and quoted above was addressed to the Respondent No. 2 for final selection. In view of the said guide lines of the Chief Engineer, it is alleged the process of selection of pre-qualified Applicants for short listing was finalised and the said eight Applicants were allowed to purchase tender documents. It is also stated that on March 14, 1995 all the tender documents in so far technical bid is concerned were opened in presence of the participants and upon scrutiny of the technical bids it was found that there were wide variations amongst the tenderers as regards design and drawing of the project concerned and it was apprehended that there would be cost and rate variation in the commercial bid. Therefore, all the participants were invited to attend a post bid conference on April 12, 1995 in order to evolve an agreed design criteria. Accordingly, the agreed design criteria was evolved which was duly communicated to the participants calling upon them to submit fresh commercial bid in sealed cover by May 17, 1995. Fresh commercial bids were submitted by the six participants including the Petitioners and Respondent No. 4 and on opening the tender papers it was found that the Respondent No. 4 was the first lowest tenderer and the writ Petitioners were the second lowest tenderer, the difference being approximately Rs. 19 lakhs. The first lowest, the second lowest and the third lowest tenders were then forwarded to the tender selection committee for taking final decision. It has been asserted that since August 4, 1994 the writ Petitioners were in the know of Respondent No. 4's actively participating at all stages, yet they did not make any protest whatsoever against any of the alleged short-comings of the Respondent No. 4, for which alone the writ Petitioner is liable to be dismissed.

20. Respondent No. 4's case as sought to be made out in their affidavit-in-opposition is that all material times they have adequate experience of having completed and successfully designed and constructed 10 MGD drinking water treatment plant for the Gauhati Municipal Corporation as would be evident from the documents marked Ex. B and C series annexed to the affidavit. It has been asserted that they had all the necessary qualifications to pass the eligibility test and all particulars with regard thereto were duly submitted to the concerned authorities. It is also their case that from the minutes of the pre-bid conference it would appear that their representatives along with all the other participants duly attended the said conference and that it was in the knowledge of the writ Petitioners that they were in the run along with all others but no objection was raised by the writ Petitioners that they had not the minimum qualification for participation in the final bidding.

From the aforesaid factual background the following points emerge:

- 1) The tender selection process consists of two parts - the pre-selection bid and those who are successful in the pre-selection are to compete for the final selection.
- 2) The minimum eligibility test for the pre-selection is (i) design and construction

of a 10 MGD water treatment plant during the last five years, and (ii) maintenance and operation of the same for at least one year.

3) The writ Petitioners passed the said test as they were informed by the letter dated October 3, 1994 that considering their credentials they had been allowed to purchase details of the tender document for submission of technical and commercial bids.

4) Corrigendum notices dated July 18, 1994, November 3, 1994 and November 11, 1994 add passed to six contractors but not to Respondent No. 4 go to show that whereas the date of submission of the tender was extended from time to time, other conditions as to eligibility mentioned in the NIT remained unchanged.

5) It was only November 23, 1994 that Respondent No. 4 figures as an addressee for the first time in this process of pre-bid selection. It was intimated that as the tender papers relating to the work could not be finalised the date of issue of the tender papers was deferred for an indefinite period.

6) Meanwhile the confidential letter dated September 30, 1994 of the Chief Engineer to the NIT authority had been issued.

7) It appears from the said letter of the Chief Engineer, relevant portion quoted above, that eulogistic appreciation) about the credentials of Respondent No. 4 had been showered.. While the minimum qualification is design, construction and maintenance of a 10 MGD surface water treatment plant this contractor Respondent No. 4 had constructed a 6 MGD plant based on tubewell at Assam and that at Mizoram they had constructed two water supply schemes of surface water of capacity 2 to 3 MGD which "are marvelous examples of technical expertise and workmanship". The Chief Engineer inspected the plant. "Their resources - monetary and technical manpower are superb and capability unquestionably. They deserve special consideration", the Chief Engineer wrote. Obviously the basic minimum qualification is given a go by and the NIT authority which is subordinate to the Chief Engineer is almost directed to give special consideration to the case of Respondent No. 4 in spite of the fact that the Respondent No. 4 had not the minimum qualification. What is alarming is that this Chief Engineer took all the pains to inspect the water "supply plants constructed by Respondent No. 4 at Mizoram but did not feel necessary to inspect any other project said to have been completed by any other contractor who failed to pass the preliminary test. The Respondent No. 4 with their affidavit-in-opposition dated August 14, 1995, submitted a certificate dated June 28, 1995 purported to have been signed by an Additional Chief Engineer, water works, Gauhati Municipal Corporation which shows that M/s. Subhas Capital City Ltd., an associate company of Respondent No. 4 executed the project of water treatment plant at Paribazar, Gauhati having a total capacity of 10 MGD for Gauhati Municipal Corporation. How Subhas . Capital City Ltd. is an associate company of M/s. Subhas Project & Marketing Ltd. (Respondent No. 4) is an enigma. Surely this certificate of June 28, 1955 signed on 18/7 could not have been the basis of

Chief Engineer's appreciation. This certificate again does not show when the project was completed and whether maintenance and operation for at least" one year have been satisfactorily done by this company. The certificate submitted by Respondent No. 4 which is dated November 28, 1995 and in the pad of Respondent No. 4 does not indicate design, erection or maintenance of any water treatment plant done by the Respondent No. 4. Other certificate submitted by the Respondent No. 4 are likewise of little help to elevate Respondent No. 4 to the status of having the minimum qualification as (aid down in the NIT. Annexure D to the affidavit-in-opposition of Respondent No. 4 which is a letter dated November 16, 1994 addressed to them by the Respondent No. 2 shows that "considering their credential submitted later to this office" they were selected to purchase details of tender documents. This leaves one to speculate what were the documents .and when submitted and also whether in their own right of by way of enjoying relaxation of minimum qualification they had been so selected.

21. In this connection it is also significant to note that e Chief Engineer after making the observations and. commendation in favour of Respondent No. 4 in his said deferential letter dated September 30, 1994 adds "this latter may be produced along with other papers to the under selection committee at, the" time of acceptance of The Tender". The pre-bid conference was held on February 22, 1994, on April 18, 1995 all tenderers were reacted to submit revised commercial bids adhering richly to the technical specification and design criteria for before May 16, 1995. On May 17, 1995 the final doers were opened in presence of the representatives: the tenderers. It is the practice and procedure that the first three lowest tenders are to be submitted before the tender selection committee. Therefore, long before the submission of the revised final tenders, the Chief engineer knew that the offer of the Respondent No. 4 could be at least within the first three lowest tenders and hence would be produced before the tender section committee. It is needless to point out the entire under process suffered from the virus of bias and artisan spirit. Without having the minimum qualification) participate in the final bidding, the Respondent No. 4 was selected for the final bidding. This is illegal, a tarry, discriminatory and devoid of natural justice.

22. Mr. P.K. Mukherjee and Mr. Ahin ChowdhI Learned Counsels, appearing for Respondent No. 1 t(and Respondent No. 4 respectively argued strenuous that the letter dated September 30, 1994 of the Cr Engineer does not disclose any bias but having region to the wordings of the letter viz., "marvelous example of technical expertise and workmanship", "their sources - monetary and technical manpower are sups and capability unquestionable" so much so that "tr deserve special consideration", I wonder if this is i the discloser of arbitrariness, biasness and favorites how else the said elements could be manifest.

23. It has also been argued on behalf of t Respondents that the Petitioner was in the know it Respondent No. 4 was being considered from the vi beginning but they did not raise any objection. V\\ Petitioners do not appear to have any occasion to know that Respondent No. 4 was being considered as there w no

such indication in the Corrigendum Notice dated J. 18, 1994, November 3, 1994 and November 11, 1994. In the affidavit-in-opposition dated August 14, 1994 submitted on behalf of the Respondent No. 1 to 3 it has been stated categorically in para. 10 p. 8 that the Respondent No. 2 "sat with each of the Applicants or the representatives individually" in the pre-bid conference and that being so, it can hardly be argued that the writ Petitioners were "aware that the Respondent No. 4 has been in the run from before the pre-bid conference.

24. It has also been argued on behalf of the Respondents Nos. 1 to 3 as also Respondent No. 4 the pre-condition for participation in the final bid having been relaxed by the Chief Engineer by his letter dated September 30, 1994, all the tenderers got equal opportunity to participate with the relaxed condition and that there cannot be any grievance on the part of the writ Petitioners if in public interest the minimum qualification is relaxed. But the so-called relaxation was intimated to the NIT authority for special consideration in favour of Respondent No. 4 only in a confidential letter. The relaxation was not notified to enable others who could not participate because of the "stringent" and "harsh" condition to join the bidding and thus the same cannot be treated as relaxation of the condition generally. It is a relaxation, if at all, only in favor of Respondent No. 4 who "deserves special consideration", which is patently discriminatory and violative of the equality clause.

25. Mr. Joyanta Mitra, Learned Counsel assisted by Mr. Moloy Kumar Ghosh, Learned Counsel appearing for the writ Petitioners submitted that once a norm or standard is laid down for submission of tenders the NIT authority is bound to conform to the said standard or norm, if the standard or norm is reasonable and nondiscriminatory. In this connection he placed his reliance to a Supreme Court decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, In this case the tender notice stated in clear terms that sealed tender were invited from registered second class hoteliers having at least five years experience for putting up and running a second class restaurant and snack bars at the said Airport for a period of three years. The Supreme Court on a construction of the notice inviting tender held that as only persons running a registered second class hotel or restaurant and having at least five years' experience as such was eligible to submit a tender, the condition of eligibility was not satisfied by any person who did not have five years' experience of running a second class hotel or restaurant. The qualification laid down being pre-requisite the authority was not entitled to accept tender of any person who did not fulfill the requisite qualification. In para. 34 of the said decision the Supreme Court observed - admittedly, the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a second class restaurant should be awarded was laid down, the first Respondent was not entitled to depart from it and to award the contract to the fourth Respondent who did not satisfy the condition of eligibility prescribed by the standard or norm.

26. In *United India Periodicals Pvt. Ltd. v. M. and N. Publications Ltd.* (1993) 1

S.C.C. 446 referred to on behalf of the writ Petitioners the Apex Court laid down that State action in commercial/contractual transaction with private parties must be in consonance with Article 14 and if the decision making process of public authority is influenced by extraneous consideration in that event the decision would be vitiated even though there is no bias. It was laid down that though Court cannot act as an Appellate Authority but if the decision making process is violative of Article 14 Court can strike down the decision and action taken pursuant thereto.

27. Mr. Mitter also placed his reliance on *M/s. G. J. Fernandez Vs. State of Karnataka and others*, wherein the Apex Court held that if the minimum qualifying requirements for intending tenderers and information and documents in support thereof to be furnished along with the application for issue of blank tender book prescribed in a separate paragraph of notification inviting tenders, both the conditions are to be read harmoniously and so read it should follow that apart from possessing the minimum qualifying requirements the documents are essentially required in assessing whether an Applicant fulfils the mandatory requirements, otherwise the intending tenderer should be excluded from consideration. The minimum qualifying requirements should be strictly observed by the State in case of all the intending tenderers.

28. In *Tata Cellular Vs. Union of India*, it was laid down that the principles of judicial review would apply to exercise of contractual powers by the Government in order to prevent arbitrariness or favoritism, though, however, there are inherent limitations in exercise of that power of judicial review. The limitation may be because Government being, the guardian of finances of the State is expected to protect the financial interest of the State and has accordingly the right to refuse the lowest or any other tender but the principles laid down in Article 14 of the Constitution have to be kept in view in accepting or refusing a tender. There would not be any question of infringement of Article 14 if the Government tries to get the best person or the best quotation, the right to choose being not considered to be an arbitrary power. However, if the said power is exercised for any collateral purpose the exercise of that power would be struck down. The judicial review is concerned with reviewing not the merits of the decision but the decision making process- itself. It is thus different from an appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision, particularly when the Court is heard equipped to do so, where the selection or rejection is arbitrary certainly the Court would interfere. It is not of the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is there. It is only concerned with the manner in which the decision has been taken. The extent of the duty to act fairly may vary from case to case. The grounds upon which an administrative action is subject to control by judicial review, in short can be classified as illegality irrationality and procedural impropriety. Irrationality may occur in respect of a decision which is outrageous in its defiance of logic or accepted moral standards. Irrationality may have too other facets viz., (i) where

facts taken as a whole could not logically warrant the conclusion of the decision maker. If the weight of facts pointing to one course of action is overwhelming, then the decision in other way cannot be upheld, (ii) a 'decision' would be regarded as unreasonable if it is impartial and unequal-in its operation as between different classes.

29. In paras. 151 to 155 of the said judgment relied upon by Mr. Mitter, the Supreme Court interfered with the decision on the ground of arbitrariness and violation of the principles of natural justice, to set right the decision making process but did not disturb the other selection since judicial review is not an appeal from the decision and Court would not substitute its own decision and also as quashing may involve heavy administrative burden and lead to delay and increase in expenditure. In the result it was held that Bharati Cellular's claim based on Talkland's experience being incorrect would have to be excluded and claim of others were to be considered on a factual basis as on January 20, 1992 in the light of the observations made.

30. In the instant case the minimum requirements for anticipation in the final bidding were the experience of design and construction of a 10 MGD water treatment) land during the last five years and maintaining and operating the same for a period of at least one year which were not fulfilled by the Respondent No. 4 who was, low ever, allowed to participate on some extraneous consideration disclosing arbitrariness, bias and favoritism thereby widely departing from the norms laid down and notified. Whereas the Chief Engineer stated that -respondent No. 4 had the experience of design and construction of a 6 MGD plant the company has submitted certificate which shows that M/s. Subhas Capital City Ltd. an associate company of Respondent No. 4 has executed the project of a plant for 10 MGD without disclosing how the said company was associated with Respondent No. 4 and when was the execution done. This certificate is dated long after the decision was taken that Respondent No. 4 was" eligible to participate in the final bidding. In view of the decision of the Supreme Court referred to above, there has been a gross infirmity in the decision making process showing bias, arbitrariness and favoritism violative of the equality principles enshrined in Article 14 of the Constitution and hence the said decision enabling Respondent No. 4 to participate in the final bidding is liable to be struck down.

31. Mr. P.K. Mukherjee assisted by Mr. Prasanta Banerjee, learned Advocates, appearing for the State Respondent No. 1 to 3 and Mr. Ahin Choudhury assisted by Mr. Utpal Bose, learned Advocates, for Respondent No. 4 argued that no unfairness could be spelt out in Chief Engineer's recommendation in favour of Respondent No. 4 which he made only after inspection of the project executed by the Respondent No. 4. Mr. Chowdhury in particular placed his reliance on the observations of the Supreme Court as made in para. 15 in the case of G.J. Fernandez v. State of Karnataka (Supra) wherein the Supreme Court held that the conditions and stipulations in a tender notice may have two types of

consequences - first the NIT authority has the right to punctiliously and rigidly enforce them and secondly, it is not that deviation from the guide lines cannot at all be made in any situation but that any deviation if made should not result in arbitrariness or discrimination. "It comes in for application where the non-conformity with,, or relaxation from, the prescribed standard results in some substantial prejudice or injustice to any of the parties involved or to public interest in general". Quoting the said observation, Mr. Chowdhury argued that the relaxation or non-conformity has resulted in substantial prejudice or injustice to the writ Petitioners or to public in general is not pleaded or proved. On the other hand, he pointed out, the result is substantial gain to public exchequer as the difference in the total expenditure between the tenders of the Respondent No. 4, the lowest bidder and the writ Petitioners, the second lowest, is 19 lakhs.

32. It, however, appears that Mr. Chowdhury omitted the following subsequent lines of the said para. 15 namely "For example, in this very case, the K.P.C. made some changes in the time frame originally prescribed. These changes affected all intending Applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxation were extended to some but denied to others". In the instant case the so-called relaxation was not notified and made applicable to all intending bidders and thereby discrimination, was perpetrated. The so-called relaxation- made in favour of one is arbitrary and discriminatory and done in a manner which is unfair and unacceptable. This has also resulted in substantial pre-justice to the writ Petitioners, for had not the so-called relaxation been made, they would have been the 1st lowest bidder. Then again, difference in total expenditure as per the tenders cannot be any ground as when certain experience is the pre-requisite, allotment of the work to another not having the minimum experience may result in the whole project being made a bungle thereby the very purpose being frustrated wasting public money.

33. The learned Advocates for the Respondents referring to several paragraphs in the Tata Cellular case [4> judgment argued that if the relaxation is made with the motivation of providing best possible service at minimum possible rate, such action is to be treated as bona fide. But in the instant case no such motive is forthcoming,* particularly when the Chief Engineer in his exuberance to uphold candidature of Respondent No. 4 asks the deviation to be made in respect of a particular tenderer given special? consideration.

34. Mr. Mukherjee for the State Respondents No. 1 to 3 also referred to the Supreme Court decision in New Horizons Ltd. v. Union of India (1995) 1 S.C.C. 476 wherein at para.23 it has been observed that the" terms of an offer .of a tenderer should be first considered and if found suitable then only its credential and ability to perform the work should be determined from the practical point of view. But this observation was made where a tenderer itself had no experience but it was a joint venture and the joint venture with 40 per cent share capital being owned by a foreign company which had the necessary experience, in that

event the Court held that by lifting the veil it should be determined whether the joint venture has the necessary experience and resources. Non-consideration of such an offer and acceptance of an offer of another-much lower in amount as royalty held arbitrary and irrational. In the instant case this question would seldom arise as M/s. Subhas Capital City Ltd. has not been proved to be either a joint venture or an associate company or had adequate experience on the date of the offer.

35. The learned Advocate also argued that there should be a certain measure of "free play in the joints" for an administrative body functioning in an administrative sphere as laid down in *Ramana Dayaram Shetty v. International Airport Authority of India* (Supra) and *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir* (1984) S.C.C. 1; *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, ; *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , and *Union of India and others Vs. Hindustan Development Corpn. and others*, . But the free play in the joints" would not mean a free play to indulge in arbitrariness or favoritism infringing Article 14 of the Constitution. I must confess, I am unable to persuade myself to accepting the contentions of the learned Advocates appearing for the Respondents.

36. To conclude. Upon considering the facts, circumstances and points of law involved in the instant case I am of the firm view that deviation from the norms set down and notified could not be made arbitrarily in favour of one tenderer in a hush manner in order to able it to participate in the final bidding. Indeed such tide cannot be shown to any party who did not inform to the standard or norm. If deviation was to have been made it was to have been made generally by public notice and not by relying on dubious papers and sing on personal knowledge of inspection in a partial plant. There can be no doubt that the decision taking process has been vitiated by arbitrariness, fairness, discrimination and infringement of fundamental rights as enshrined in the equality clause in Article 14 the Constitution and must be set right.

37. The writ, application succeeds. The tender submitted by the Respondent No. 4 M/s. Subhas Project & marketing Ltd. in response to the notice inviting tender earring No. 4/94-95 dated June 22, 1994 is set aside. As e decision making process is not otherwise changed, the same is not disturbed, particularly because lashing the entire process would entail heavy administrative burden and expenditure. The NIT authority shall reconsider the final selection barring the tender of Respondent No. 4 on factual basis as on May 17, 1995 accordance with law.

38. Appropriate writs of mandamus be issued accordingly. There shall be no order as to cost.