
(2002) 08 GAU CK 0024
In the Gauhati High Court
Case No : Writ Petition (C) No. 4 (SH) of 2002

S.K. Rai and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 1 ARBLR 250 : (2002) 3 GLR 512 : (2002) 3 GLT 463

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : R. Hussain, for the Appellant; S.C. Shyam, Add. CGSC, for the Respondent

Judgement

I.A. Ansari, J.—By the present application made under Article 226 of the Constitution of India, the petitioners have approached this Court with prayer, inter alia, to issue appropriate writ/writs setting aside the allotment order/Order of acceptance of tender, in question, issued by the respondent No. 5 in favour of the respondent No. 6 and directing the official respondents to award the said contract to the petitioner.

2. In a short compass, petitioners' case may be put as follows : The petitioner No. 1 is a reputed carriage contractor registered under the Partnership Act with petitioner No. 2 as its managing partner. The petitioner No. 1 is also a registered carriage contractor under different government departments including Telecom Department. The respondent No. 2, namely, Bharat Sanchar Nigam Limited (in short, BSNL), functions under the control and supervision of respondent No. 1, namely, Union of India. The respondent No. 6 is a limited company incorporated under the Companies Act. On 21.09.2001, the official respondents invited tender, on behalf of the Chief General Manager, BSNL, for handling the transportation of telecom stores by motor vehicles for North-East Telecom Circle, for a period of one year vide Tender notice No. Eng/S-249/NIT/ 2001-2002/31 dated 21.09.2001 (Annexure II to the writ petition), the last date for receipt of the

tender and for opening of the same having been fixed on 19.10.2001. After duly fulfilling all the terms and conditions of the Notice Inviting Tender (in short, NIT), the petitioners submitted their tender along with all relevant documents and earnest money of Rs. 2,45,000 in the shape of Bank Draft. On 20.10.2001, the tenders were opened in the office of the respondent No. 2 in presence of the tenderers and it was discovered that only the petitioner No, 1 and respondent No. 6 had participated in the tender process. The rates quoted by the private respondent No. 6 were found to be lower than the rates quoted by the petitioners. On the date of opening of the tender, it was found that the respondent No. 6 had not fulfilled the eligibility criteria mentioned in clause Nos. 6.7 and 7.5 of the NIT inasmuch as this respondent had not produced, contrary to the requirements of Clause 6.7, any document to show ownership of requisite number and types of vehicles to show that they are capable of handling the transportation work nor had the respondent No. 6 produced any certificate in proof of their having handled similar nature of work in the past with BSNL as was required by clause No. 7.5. Moreover, the Income Tax Clearance Certificate was also not produced by the said respondent. This apart, the respondent No. 6 is basically a finance company and is not engaged in the business of transportation of goods. The petitioners, therefore, raised objection before the authorities concerned against considering respondent No. 6 for allotment of work. On 23.10.2001, the petitioners submitted representations, in this regard, to the respondents through fax and reiterated their stand that the respondent No. 6 had not fulfilled the terms and conditions of the tender and though the rates quoted by respondent No. 6 were lower, the said rates were not workable. In fact, the rates quoted by the petitioners were found to be lower than the approved rate of the last preceding two years by 22 percent. On 20.11.2001 and 27.11.2001, the respondent No. 4 directed the petitioners to produce some documents, in original, before the Tender Evaluation Committee for verification of the same vide letters dated 20.11.2001 and 27.11.2001 (Annexure-VII and VIII respectively) and accordingly, the petitioners produced the required documents, in original, before the said Committee. However, the respondent Nos. 1 to 5 arbitrarily, unreasonably, with ulterior motives and in accordance with their secret understanding with the respondent No. 6, on 31.12.2001, accepted the tender of respondent No. 6. The official respondents, accordingly, entered into an agreement with the respondent No. 6, on 15.01.2002, making the said agreement effective from 16.01.2002.

3. The respondent Nos. 1 to 5 have contested this case by filing their affidavit-in-opposition, their case being, briefly stated, thus : The Tender Committee opened the tender, on 22.10.2001, instead of 19.10.2001, because a bandh was called by the Students' Union in Shillong and the opening of the tender had to be shifted to the next working day. As per the decision reached by the Tender Evaluation Committee (in short, TEC), in its first sitting held, on 19.11.2001, the respondent No. 4 issued a letter, dated 20.11.2001, to the petitioners as well as respondent No. 6 asking them to produce some original documents for

verification of genuineness of their claims. The respondent No. 4, again, issued, on 27.11.2001, another letter to the petitioners asking them to submit additional documents as the TEC was not satisfied with the documents submitted earlier by the petitioners. After this exercise, both the respondent No. 6 as well as the petitioners were found to have fulfilled mandatory conditions of tender documents and both of them were, therefore, considered eligible for evaluation. Since the rate quoted by private respondent was 2.60 per unit as against Rs. 3.195 per unit quoted by the petitioners, the offer of respondent No. 6 was approved and, accordingly, a contract agreement has been entered into between the parties, on 15.01.2002, awarding the contract to the respondent No. 6 with effect from 16.01.2002. The requirement of previous experience of working with BSNL was not a mandatory condition, it was, rather, a general condition and though the respondent No. 6 had not worked with BSNL, they had the experience of working with Steel Authority of India Ltd., which is, same as BSNL, a Government, of India undertaking. The private respondent had furnished, in terms of the mandatory requirements of Clause 7.5 of the NIT, necessary documentary proof of ownership of requisite number of vehicles at the time of opening of the tender, but as the TEC wanted to verify the ownership certificate of one of the vehicles bearing registration No. AS-01 E-7675, the respondent No. 6 was directed to produce the original documents thereof and upon production of the requisite documents by respondent No. 6, the same were found to be in order. The acceptance of the tender and awarding of the contract to the respondent No. 6 by the respondents Nos. 1 to 5 were perfectly in conformity with the tender documents and in accordance with law. In fact, the petitioners were the ones, who had tried to influence the recommendations of the TEC and decision of the authority concerned by putting political pressure on them through the President, Bharatiya Janata Party (BJP) state unit, Arunachal Pradesh, whose letter is placed as Annexure- (R) 7.

4. As far as the private respondent, namely, respondent No. 6 is concerned, they too have filed their affidavit-in-opposition, their case being, in brief, thus: The petitioner No. 1 is not a reputed contractor and it is not a registered firm. The respondent No. 6 submitted all the requisite documents at the time of opening of the tenders including Income Tax Clearance Certificate, though, later on, some additional documents were asked for by the official respondents from the respondent No. 6. The respondent No. 6 had fulfilled all the mandatory requirements of the tender document and since their rate was found to be lower than the rate quoted by the petitioner No. 1, the official respondents committed no illegality and did not act arbitrarily in accepting the offer of respondent No. 6 and in finalizing the contract work with them.

4A. Before proceeding any further, it needs to be mentioned that by Order, dated 29.01.2002, passed in this case, the respondents were directed not to give effect to the letter of acceptance of tender and the agreement under challenge in this writ petition.

5. I have carefully perused the materials on record. I have heard Mr. R. Hussain, learned counsel for the petitioners, and Mr. S.C Shyam, learned Addl. CGSC, appearing on behalf of respondent Nos. 1 to 5. I have also heard Mr. R.K. Jain, learned counsel appearing on behalf of respondent No. 6.

6. In the case at hand, submits Mr. Hussain, though mandatorily required by Clause 6.7 of the NIT, the private respondents No. 6 did not give proof of ownership of the requisite number of vehicles and they gave proof of only one vehicle bearing registration No. AS-01 E 7675. This fact becomes evident, contends Mr. Hussain, from a bare reading of para 3 (vii) of the affidavit-in-opposition filed by the official respondents.

7. It is also submitted by Mr. Hussain that contrary to what was required by Clause 7.5 of the NIT, the respondent No. 6 did not, admittedly, furnish certificate/proof, regarding their past experience of having handled similar type of work with BSNL or with any other Government of India undertaking. This fact is proved, points out Mr. Hussain, not only from the materials on record, but also from the balance sheet of the respondent No. 6 for the financial year 2000-2001 placed as Annexure V by the petitioners. Drawing attention of this Court to the Annexure V to the writ petition, Mr. Hussain has submitted that this document, which is the balance sheet of the respondent No. 6, shows that during the financial year 2000-2001, that is, with effect from 31.03.2000 to 31.03.2001, the respondent No. 6 did not earn or spend any money on any carriage contract. This balance sheet shows that unlike the petitioners, the respondent No. 6 is not, contends Mr. Hussain, a professional carriage contractor. It is further submitted by Mr. Hussain that despite the fact that the tender papers submitted by respondent No. 6 were, thus, defective and liable for rejection, the official respondents accepted the same ignoring the claim of the petitioner, whose papers were completely in order.

8. Mr. Hussain has also pointed out that as per the memorandum of association of respondent No. 6, respondent No. 6 is merely a financier for vehicles and its memorandum of association did not permit any business of transportation or carriage by the respondent No. 6. This fact too shows, contends Mr. Hussain, that the respondent No. 6 was not qualified to participate in the tender process and yet their defective tender papers were accepted and the petitioners offer was rejected, though the offer of the petitioners was lower than the approved rate of the last preceding two years by 22 per cent.

9. Controverting the above submissions made on behalf of the petitioners, learned Addl. CGSC has submitted that on opening of the tender papers, it was found that only two persons, viz., the petitioners and the respondent No. 6 had participated in the tender process. The respondent No. 6 had submitted registration certificate of adequate number of vehicles and though they had no experience of working with BSNL, respondent No. 6 had produced the experience certificate of working with the Steel Authority of India Limited (SAIL), which is also a Govt. of India undertaking.

10. Only in respect of vehicle No. AS-01-E-7675 aforementioned, points out the learned Addl. CGSC, the page showing transfer of ownership in the name of the respondent No. 6 was not available with the documents submitted in respect of the said vehicle and it was for this reason that the TEC had asked the respondent No. 6 to produce the relevant papers, in original, and upon production thereof, by the respondent No. 6, the TEC found the same in order.

11. As far as the petitioners are concerned, even their papers, according to learned Addl. CGSC, were not found in order inasmuch as out of the two partnership deeds that they had produced, the latter deed was not found registered with the competent authority and upon being asked to rectify this defect, the petitioners produced requisite partnership deed.

12. It is also worth noticing, submits learned Addl. CGSC, that the petitioners tried to influence the official respondents by putting political pressure on them with the help of a letter, dated 09.11.2001 (Annexure R-7 to the affidavit-in-opposition of the official respondents) sent to the respondent No. 3 by president of the BJP, Arunachal Pradesh, requesting the latter to allot the carriage work to the petitioners. This fact was, contends learned Addl. CGSC, sufficient to disqualify the petitioners from being considered for appointment as carriage contractor.

13. Learned Addl. CGSC has further submitted that since all the papers submitted by respondent No. 6 were found to be in order and their bid was lower than that of the other participant Their lower bid was, therefore, accepted by official respondents and this can, in no way, be said to be illegal, arbitrary and/or unjustified. The allegation that the respondent No. 6 have been awarded the contract as a result of secret understanding between the respondent No. 6 and other official respondents is, contends learned Addl. CGSC, completely incorrect and baseless. Learned Addl. CGSC has contended that the contract entered and between the parties was essentially a commercial transaction and the official respondents did what was necessary to save as much money for their department as was possible by entering into contract with the respondent No. 6. Such a transaction cannot be objected to by the learned Addl. CGSC. Support for this submission is sought to be derived by the learned Addl. CGSC from the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,

14. As far as Mr. R.K. Jain, learned counsel appearing on behalf of respondent No. 6, is concerned, he has submitted that the respondent No. 6 submitted all the papers essential for acceptance of their bid and since a query was raised in respect of only one vehicle, the same was also met by production of necessary document, in original, by the respondent No. 6 and when the respondent No. 6 was the lowest bidder and the contract, in question, was basically a commercial transaction, the official respondents committed no wrong in accepting the lowest bid of respondent No. 6, particularly, when the rates quoted by the petitioners were very high and when, as it appears from the pleadings of the official respondents, the petitioners had tried to put political influence for obtaining the

contract. It is also pointed out by Mr. Jain that since the petitioners are not entitled to receive the contract, they cannot raise objection to the contract of carriage that has been entered into by the respondents. In support of his submission that since in a commercial transactions, the consideration is essentially to save money as much as possible or to earn money as much as possible, the respondents were free to settle the bid with the respondent No. 6, who was the lowest bidder, Mr. Jain has referred to BALCO Employees Union (Regd.) Vs. Union of India and Others, and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

15. Upon hearing learned counsel for the parties and on perusal of the materials on record, what emerges as undisputed facts are that the petitioners and respondent No. 6 were the only ones, who had participated in the tender process initiated on the basis of the NIT issued by the official respondents, on 21-09-2001, for handling and transporting telecom stores by motor vehicles for North East Telecom Circle for a period of one year. The rate quoted by the petitioner for carrying out the said carriage contract was Rs. 3.195 per unit, which was lower than the approved rate of the last preceding two years by 22 per cent, but the rate quoted by the respondent No. 6 was still lower inasmuch as the rate quoted by the latter was Rs. 2.60 per unit as against petitioners' offer of Rs. 3.195 per unit. The Tender Evaluation Committee (in short, TEC), in its first sitting held, on, 19-11-2001, sought for some information from the petitioners as well as the respondent No. 6. As both the tenders were found to have fulfilled, according to the TEC, mandatory conditions of the NIT, both were treated eligible for evaluation. Since the rate quoted by private respondent was Rs. 2.60 per unit as against Rs. 3.195 per unit quoted by the petitioner and the contract to be awarded was basically a commercial transaction, the respondent No. 6 received the approval of the official respondents and accordingly, the contract agreement was entered into between the parties.

16. The question, which, now, arises for consideration is whether the respondent No. 6, whom official respondents, eventually, selected for awarding the carriage contract work, had satisfied the conditions of the NIT and was eligible for consideration ?

17. My quest for an answer to the above question brings me to Annexure 3 to the writ petition, which, admittedly, embodied the terms and conditions of a valid tender. It is, to my mind, apposite to quote those portions of these terms and conditions, which are relevant for the purpose of disposal of the present writ petition. The relevant portions are, therefore, reproduced below:

"6. Rejection of the Tender ;

6.1 Any one or more of the following actions/commissions are likely to cause summary rejection of the bid :-

6.7 Any Tender without the documentary proof of ownership of requisite number and type of vehicle.

7. General.

7.5 The contractor has to furnish certificates/credentials for past experience of similar type of works done with BSNL."

18. A combined reading of Clauses 6 and 7, quoted above, clearly shows that Clause 6.1 states, "Any one or more of the following actions/omissions are likely to cause summary rejection of the bid." A cursory . glance at the words used in Clause 6.1 conveys an impression as if the actions/omissions in submitting tender may not make the official respondents summarily reject the bid. This reading of Clause 6.1 will be completely unrealistic and fallacious, for, if such liberal and unrestricted interpretation is attributed to Clause 6.1, then, none of the conditions of the NIT, in question, can be said to be essential conditions, which will, in turn, render terms and conditions contained in the NIT wholly meaningless. Realising this, even the respondents have not contended before me that none of the terms and conditions of the NIT, in question, was essential condition.

19. In fact, even the respondents agree that the terms and conditions imposed by Clause 6.7 are essential conditions for making a bidder eligible for consideration. It, therefore, logically follows that a tender, without documentary proof of ownership of requisite number and types of vehicle, would be invalid. As regards Clause 7.5, while the petitioners insist that the requirement contained in this Clause too was mandatory, the respondents assert that the same was a general condition. According to the Clause 7.5, the contractor has to furnish certificates/credentials of past experience of similar type of work done with the BSNL. The respondents insist that this was a general condition and could have been relaxed.

20. In short, if I may reiterate, even according to the case of the respondents, as far as conditions under Clause 6.7 are concerned, the same are essential and form condition precedent for making the bid of a tenderer valid and/or eligible for consideration.

21. In the above backdrop, let me, now, consider as to how the official respondents have dealt with the above two conditions, while assessing the suitability of the tender offer made by the respondent No. 6.

22. While considering the above aspect of the matter, it is worth noticing that as per the agreement (Annexure III of the NIT), which is required to be executed by a tenderer after his/their bid is accepted/ approved, shows that this agreement contains the terms and conditions of the contract. Clause No. 8 of this agreement reads as under:

"The contractor shall possess in his own name in good condition, at least, 8 trucks, 5 of them 10 MT, one 5 MT and one 3 MT capacity and one light commercial vehicle for transportation of stores."

23. According to the petitioners, though they had fulfilled all the preconditions

mentioned in the NIT, they were ignored and the respondent No. 6, who had not fulfilled the eligibility criteria mentioned under Clauses No. 6.7 and 7.5 of the NIT, was awarded the contract.

23A. What is, at this stage, essential to note is that Clause 6.7 of the NIT states that any tender without documentary proof of ownership of requisite number and type of vehicle is likely to be rejected. This Clause is, however, silent as to how many vehicles and what types of vehicles a tenderer shall own and produce proof of ownership thereof. Since the NIT is silent in this regard, the documents enclosed with the NIT are to be scrutinized to ascertain the number and types of vehicles, which a tenderer is required to own. My quest for an answer to this question brings me to the proforma agreement (Annexure III to the NIT) which is required to be executed by a tenderer if his/their bid is accepted. It is the Clause 8 of the said agreement, which I find, lays down the number of vehicles and types of vehicles, which a tenderer must own.

23B. Thus, though Clause 6.7 does not give the number and type of vehicles required to be owned by the tenderer, Clause 8 of the proforma agreement gives the number and types of vehicles required to be owned by the tenderer.

24. A bare reading of what have been quoted above shows that the conditions embodied in Clause No. 6.7 of the NIT and Clause No. 8 of the final agreement cannot be read in isolation and the realistic approach will be to read both these conditions together and when the same are so read, it clearly reflects that the tenderer was required to submit, besides other requisite papers, the documentary proof of ownership of, at least, 8 (eight) trucks, 5 (five) of them being of 10 MT, one of them being of 5 MT, one of them being of 3 MT capacity and one light commercial vehicle, all standing in the name of the tenderer, the vehicles shall be in good condition and usable for the purpose of transportation of stores. The impression that these conditions are essential gets strengthen from the fact that Clause No. 8 makes provision for penalty to be imposed on the contractor if the contractor is unable to produce the truck, when called upon to do so, inasmuch as Clause No, 8 aforementioned further reads as follows :

"The BSNL may penalize the contractor to the extent of Rs. 500 per truck per day for delay of each day, if the contractor fails to produce the lorries, when called upon to do so."

24.A. Normally, the terms and conditions finally embodied in the agreement (executed by the parties after the tender is, with or without negotiations, accepted) cannot be co-jointly read along with the terms and conditions of the NIT. However, in the case at hand, since the proforma agreement (Annexure III to the NIT) forms an integral and inseparable part of the NIT, both these documents are to be read together and if they are so read, it becomes transparent that Clause 6.7 is an essential condition of the NIT. This impression gets further strengthened from the fact that the whole scheme of the tender shows that if the offer of the tenderer is accepted, then, the tenderer concerned

will have to execute an agreement as contained in Annexure III and since Clause 8 of the agreement fixes the number and types of vehicles to be owned by the tenderer and provides for penalty if the tenderer fails to produce the vehicle asked for, it leaves no room for doubt that this part of the NIT is non-negotiable and apparently the tenderer must own the number and types of vehicle mentioned in Clause 8 of the said agreement.

24.B. It is also worth noticing that Clause 6.7 of the NIT uses the words "documentary proof of ownership". This means that the tenderer has to own the vehicles and it is, not sufficient if he is merely in a position to "provide" the requisite vehicles.

25. Coupled with the above, even the respondents have not, if I may repeat, disputed that the conditions contained in Clause 6.7 of the NIT read with Clause 8 of the proposed agreement were essential conditions.

26. What is, now, of utmost importance to note is that on receiving the rates from the two participants, as indicated above, the official respondents prepared a comparative statement of the tender documents, which is reproduced below :

Sl. No. Earnest Money

Vehicle ownership

Name of Bidder	Amount	Draft Bank	10 MT	5 MT	3 MT	Owner	Past Experience	IT Clearance	Rate quoted	Remarks
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27. In the context of the admitted facts, even a glance on the comparative statement will reveal that while the petitioners had produced ownership documents of as many as 13 (thirteen) vehicles, 9 (nine) of them being of 10 MT trucks (as against the required number of 8), 1 (one) of 5 MT truck, 1 (one) of 3 MT truck, 1 (one) of 1 MT truck and 1 (one) of a pick-up, the respondent No. 6 had produced documents of ownership of only 8 trucks, all of them being of 10 MT. In other words, the respondents No. 3 had no truck of 5 MT and/or of 3 MT and/or no light commercial vehicle as was required by Clause No. 8 aforementioned. Out of these eight 10 MT trucks, since the respondent No. 6 had not submitted the transfer certificate in respect of one truck, namely, truck No. AS 01 E 7675, this document was called for and, later on, examined by the TEC.

28. Contrary to the above glaringly noticeable facts on record, the official respondents have contended that the respondent No. 6 had finished the documentary proof of ownership of requisite number of vehicles at the time of opening of tender and it was only in respect of ownership certificate of vehicle No. AS-01-E-7675, which had to be verified with the original registration book. Even the respondent. No. 6, while replying to the above aspect of the matter, submitted, in para No. 8 of their affidavit, that the respondent No. 6 had submitted all the documents at the time of opening of the tender. This respondent, however, while replying to the averments made in para 7 of the writ petition to the effect that the respondent No. 6 had failed to produce the

documents to show ownership of requisite number and type of vehicle, merely asserted that they had submitted all the document "at the time of opening of the tender" and this respondent appears to have, thus, intelligently avoided asserting specifically that they had, indeed," produced documents of ownership of not only requisite number, but also of the requisite types of vehicle.

29. What, thus, transpires from the above discussion is that on the one hand, the official respondents, while maintaining that the conditions, laid down under Clause 6.7 read with Clause No. 8 aforementioned were essential conditions, assert incorrectly/falsefully that the respondent No. 6 had submitted documents of ownership of requisite number (and type) of vehicles.

30. Let me, now, turn to the condition No. 7.5 of the NIT. The corroborative statement, reproduced at para 29 above, shows that the respondent No. 6 had produced the certificate of past experience. While dealing with this aspect of the matter, it is worth emphasizing that the official respondents contend that the same was not an essential requirement and only a general condition. How the respondents have dealt with this aspect of the matter is of great significance. In this regard, the official respondents have asserted, as indicated above, that though the respondent No. 6 had not worked with BSNL, they had the experience of working with SAIL, which is also a Government of India undertaking.

31. Contrary to what the official respondents have boldly asserted, the private respondent No. 6 has, curiously enough, shied away from asserting, on oath, in their affidavit, that they had the experience of working with SAIL; rather, they rest contented by merely asserting, in para 13 of their affidavit, that they had vast experience in transportation of materials and that they had fulfilled "all-the conditions offender".

32. There is, as I notice and mention hereinbelow, definite reason why the respondent No. 6 shied away from asserting that they had worked with BSNL. The reason is that they had never worked for BSNL inasmuch as the record, provided before this Court by official respondents in order to show what they had worked with SAIL, reveals that the private respondent No. 6 had submitted to the official respondents a letter, dated 04.10.2001, issued by Vikram Bharathari Steel Private Limited addressed to the private respondent No. 6 in the form of a certificate. This letter states to the effect to that the respondent No. 6 had worked for Vikram Bharathari Steel Private Limited and transported their materials from Bokaro to the godowns of the said firm at Mandi, Gobindgarh (Punjab). Similarly the other letter, dated 25.10.2001, issued by Raara Supply Company, which is relied upon by the respondents, states to the effect that the respondent No. 6 had transported materials from BOKARO to the said Company's godown at Mandi. The materials, so transported, is said to be actually meant for SAIL. A close reading of these letters shows that the respondent No. 6 contrary to what official respondents have boldly asserted and the respondent No. 6 have never worked, directly for SAIL and that they had, at best, worked, according to these letters/certificates, as a mere agent of the said

firms/companies. It was, therefore, wholly incorrect on the part of the respondents to contend that though the respondent No. 6 had not worked with BSNL (as required under Clause 7.5), they had the experience of working with SAIL, which is a Govt. of India undertaking.

33. Moreover, the petitioners have submitted, vide Annexure V to the writ petition, a copy of the balance sheet containing profit and loss account of the respondent No. 6 for the year ending on 31.3.2001. This admitted document clearly shows that no income was derived by the respondent No. 6 for carrying on any transportation work in their own name during the said financial year, that is, between 01.04.2000 and 31.03.2001. In fact, the balance sheet shows that the source of income derived by respondent No. 6 during the year 2000-2001, was from interest only. Thus, the balance sheet belies the assertions of the respondents that the respondent No. 6 had worked as carriage contractor for SAIL. The petitioners have, therefore, some substance, when they contend that the respondent No. 6, contrary to what letters dated 4.10.2001 and 25.10.2001 indicate, did not execute any contract work of transportation of materials.

34. Since the so-called experience certificates submitted by the respondent No. 6 were not issued by any authority of SAIL and the same were merely letters exchanged between two private firms/ companies, no weightage can/could have been attached to these documents, particularly, in the face of the clear materials on record (as reflected from Annexure V] that respondent No. 6 had never dealt with, or carried on, any transportation work.

35. What, thus, emerges is that though the memorandum of association of respondent No. 6 does enable them, I notice, to do business of transportation and carriage, the question, which remains to be answered is as to whether the respondent No. 6 ever carried out any such work ? Though the respondents have asserted that they did carry out carriage contract works for SAIL, the materials on record indicate otherwise inasmuch as the documents produced by the respondent No. 6 show that they had carried on the transportation work during the month of October, 2001, but their balance sheet is completely silent in this regard.

36. Situated thus, one cannot readily ignore and/or hurriedly brush aside the petitioners' allegations that the respondent No. 6 had no experience of having carried out transportation work and/or carriage contract.

37. Thus, and contrary to what the comparative statement shows, the respondent No. 6 had failed to produce any document of past experience of having worked with any Government undertaking for transportation of stores. This inference, gets reinforced from the letter, dated 17.11.2001, addressed to Shri K.W.R. Nongrum, maintained by the official respondents in their relevant records. The relevant portion of the letter reads thus :

"That Sir, we can also provide 3 MT/5 MT capacity trucks for transportation of Telecom Stores. The R.C. Books & Other relevant documents of the aforesaid

trucks would be submitted as and when such documents are required by the Department.

That, we did not carried out the transportation works of any Govt. Departments so far. However, we have carried out the transportation jobs of the Private parties. In support of our say, we can also provide the authentication certificates or credential certificates to this effect for favour of your kind perusal and ready reference." (emphasis is added)

38. The letter, dated 17.11.2001, aforementioned clearly shows that the respondent No. 6 did not "own", (and could only provide) contrary to the requirements contained in Clause 6.7, any 3 (three) MT and/ or 5 MT capacity trucks and they had never carried out, on their own, any transportation work for any department of the Government and they admitted to have worked only for private parties and they undertook to provide necessary certificate in this regard. This shows that till 17.11.2001, the respondent No. 6 had not submitted any document of their past experience of having worked with SAIL.

39. I may also pause here to point out that though the official respondents have contended, at para 3 (XIII) of their affidavit, that the tender had been evaluated and finalized purely on technical ground, it is clear from the NIT and the materials on record that the present contract work of transportation did not involve any high technical assessment and what was required was only to know/ assess/ascertain if the bidder had his own requisite number and type of vehicles in order to prove his capacity to undertake the carriage contract, in question, and past experience of having worked with BSNL in order to prove that they had the experience of having carried on transportation work of the Government undertakings.

40. The respondent No. 6 had failed to satisfy both the aforementioned requirements, yet they were chosen for the contract work on the ground that they were the lowest bidder, though the materials on record do not reveal that any assessment was made that the offer given by respondent No. 6 was economically feasible/viable. Far from this, it is obvious that if the store is to be carried in a truck of 10 MT instead of 3 MT truck, it will not be economically viable inasmuch as it will be costlier to carry materials in a truck of 10 MT instead of 3 MT. Such an obvious anomaly in the assessment could not have occurred, had the official respondents not been predetermined, as alleged, to award the contract to the respondent No. 6 ignoring the essential requirements. In the context of these disquieting features, the fact that the condition of light motor vehicle was also not fulfilled by the respondent No. 6 is also of great relevance and indicative of blatantly biased approach to the whole matter by the official respondents. Though viability of a proposal may not be too deeply judged by Court yet the fact remains that the official respondents appear to have ignored all essential and general requirements in favour of the respondent No. 6 merely by taking resort to the fact that they were the lowest bidder, though, according to the settled position of law, lowest bid can become a ground for

consideration only when the bidder satisfies all essential conditions of the NIT and becomes eligible for consideration.

41. It needs to be borne in mind that price is merely one of the various factors, which is required to be taken into consideration, in the context of the whole facts and circumstances of a contract work and the settled position of law is that a lowest bidder does not have any inherent right to claim the contract work. Though the respondents have contended that the contract work allotted to respondent No. 6 was basically a commercial transaction, it does not appear to be so. The present one was merely transportation work of the stores of BSNL and BSNL was not, with the help of this transportation work, earning profits. What they were aiming at was that the materials should be carried by the contractor in accordance with their demand/ requirement and that the least that they were to pay for this purpose was better. Thus, though the lower bid of respondent No. 6 could have been a ground for consideration, the fact remains that the official respondents could not have bent essential as well as general conditions of the NIT to give the contract work to respondent No. 6 merely on the ground of their lower bid and ignore the fact that the respondent No. 6 had failed to show any experience of having carried out similar kind of work with any Government of India undertakings in the past and they had, as per essential requirements of the NIT, failed to prove ownership of requisite number and types of vehicles required. The official respondents have, thus, appear to have bent conditions of the NIT to suit the respondent No. 6, which was highly arbitrary and manifestly capricious.

42. In their affidavit-in-reply to the rejoinder affidavit of the petitioners, the respondent No. 1 to 5 averred, at para 6 (iii) as under :

"That with regard to the statement made in paragraph 11, the respondents beg to state that the private respondent No. 6 is having experience with the Steel Authority of India, a Govt. of India Undertaking, which can be categorized same as BSNL. However, previous experience with BSNL was not a mandatory condition but only a general condition. The Tender Evaluation Committee recommended to award the contract to private respondent No. 6 as lowest bidder and was for the interest of the Organisation and to prevent additional expenditure which will benefit the BSNL, a commercial Organisation. The Tender Evaluation Committee has not relaxed any terms and conditions of the Tender. The allegation of the petitioner is baseless." (emphasis is added)

43. At para 6 (iv) of the said affidavit-in-reply the official respondents further averred as under :

"That with regard to the statement made in paragraph 15, the respondents beg to state that respondent No. 6 has fulfilled all terms and conditions of Tender and the respondent No. 6 was found eligible, as such nothing vitiating can be attributed." (emphasis is supplied)

44. Thus, paragraph No. 6(iii) above-mentioned asserts that the TEC did not relax any terms and conditions of the tender. This is wholly incorrect inasmuch as

respondent No. 6 neither owned requisite number and types of vehicles nor could they submit requisite certificate of past experience, yet they were awarded the contract. Similarly, the assertion of the respondents that the respondent No. 6 had fulfilled "all the terms and conditions of the tender notice", is, again, manifestly an incorrect assertion. Though the official respondents claimed to have accepted the offer of respondent No. 6 in the interest of the organization, they have failed to show as to why they had to banned essential conditions of the NIT and yet they have tried to wriggle out of the situation by asserting that the respondent No. 6 had fulfilled "all the terms and conditions of the Tender", which is, as already indicated hereinbefore, is wholly incorrect. Since the official respondents are Government instrumentalities, they have to maintain transparency and adherence to the essential conditions of the NIT; otherwise, the confidence of general public in the fairness of the work of the Govt. of India undertakings will be vigorously shaken. On the basis of the lower rate quoted by respondent No. 6, the contract could not have been awarded ignoring essential conditions of the NIT. The evaluation made by the TEC, therefore, does not appear to be bona fide.

45. It may be noted that though the official respondents submit in their affidavit that the petitioners had tried to influence recommendation of TEC by putting political pressure, the fact remains that the contract was declined to be allotted to the petitioner not on the ground that they were trying to put political pressure, but on the ground that the respondent No. 6 was the lowest bidder.

46. A writ Court's power of judicial interference in matters of grant of contract by government and its instrumentalities has developed over the last two decades by pronouncements of the Apex Court in a series of decisions. It is, no doubt, true that in *Air India Ltd. (supra)*, relied upon by official respondents, shows that award of contract is essentially a commercial transaction and in arriving at a commercial decision, the State can choose its own method, which cannot be questioned, it can fix its own terms of invitation to tender and this is not open to judicial scrutiny, it can enter into negotiation before finally deciding to accept one of the offers made to it, price need not always be the sole criterion for awarding a contract, it is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation, it may not accept the offer even though it happens to be the highest or the lowest. There is, however, a rider attached, in this very decision, to such wide powers of the State in dealing with contracts. Lest the State and its instrumentalities go wayward and become unbridled, the Apex Court has also laid down in this very case that the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standard and procedures laid down by them and cannot depart from them arbitrarily and though their decision is not amenable to judicial review, the Court can examine the decision-making process and interfere with the same if it is found to be violated by mala fide, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have, lays the Apex Court in *Air India Ltd. (Supra)* the public duty to be fair to all concerned.

47. In the case at hand, the respondents appear to have not only relaxed but, in fact, ignored the essential standard and norms, which they had themselves chosen to fix under the NIT. No such relaxation of the essential conditions was, in the facts and circumstances of the case, permissible. It is settled position of law that though a decision taken for granting contract may not be amenable to judicial review, the decision making process can be examined and can be interfered with if the same is found to have vitiated by mala fide, unreasonableness and arbitrariness.

48. In the case at hand, the respondents have arbitrarily ignored the essential conditions of the NIT and insisted on awarding the contract on the sole criterion that the rate quoted by the respondent No. 6 was the lowest, though price cannot be the sole criteria for awarding contract and even with regard to the price, I have already indicated above, that the respondents had not been able to explain as to how in the absence of requisite number and type of vehicles, the respondent No. 6 was considered capable of executing the contract at the rate offered by them. If the price becomes the sole criterion, then, all norms and procedures will have to be given a complete go-by, which is neither desirable nor permitted by law.

49. The law laid down in *Raunaq International Ltd.* (supra), which is relied upon by the official respondents, do not fit into the facts and circumstances of the present case inasmuch as this decision shows that relaxation of condition is permissible, provided it can be justified on the basis of the materials on record, whereas in the instant case, the official respondents claim that no relaxation was granted by them and falsely assert that the conditions were complied with by the respondent No. 6.

50. In fact, the case of *Rounaq International Ltd.* (supra) shows that the ability of the tenderer to execute the work or to deliver the goods or services as per specification is also one of the essential conditions and in this regard, past experience of the tenderers is, undoubtedly, of great relevance. In the case at hand, apart from the fact that the past experience of the tenderer is engulfed under the thick cloud of suspicion, the ability of the tenderer is also open to challenge inasmuch as they do not have, according to the conditions of the NIT, requisite number and types of vehicles required for execution of the contract.

51. As far as the case of *Balco Employees Union (Regd.)* (supra) is concerned, the same does not help the case of the respondents, when they do not say that they relaxed the conditions of the NIT; rather, they as indicated above, falsely project as if the essential conditions were fully satisfied by the private respondents.

52. Normally, tender of each party must be considered on the basis of the conditions specified in the NIT and no departure, unless permitted by any clause of the conditions, can be entertained. However, when the conditions are not relaxed and it is projected that the conditions have been satisfied, whereas the

conditions are, in fact, not satisfied at all, one can have no conclusion other than the one that the authority awarding contract either acted mala fide or irrationally and/or arbitrarily. In the case at hand, the official respondents deny that they had relaxed the conditions of the NIT. What they assert is that the respondent No. 6 had produced documentary proof of required number (and type) of vehicles and coupled with this, they had the experience of having worked with SAIL, which, is a Govt. of India undertaking. Both these explanations offered are, as indicated above, falsified by the materials on record.

53. Situated thus, the only conclusion, which is irresistible to reach, and I consciously reach, is that the official respondents have deliberately favoured the respondent No. 6 on the pretext that essential conditions of the NIT were satisfied, whereas it was not so.

54. In fact, the law laid down in *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, , squarely covers the case at hand inasmuch as dealing with the concept of lowest bid, the Apex Court taking into consideration the landmark Judgment in *Tata Cellular Case AIR 1996 SC* lays down as follows:

"The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest, the requirements of compliance with the rules and conditions cannot be ignored." (emphasis is supplied)

55. In *W.B. Electricity Board (supra)*, it has been clearly held that the question of awarding contract to the lowest tenderer can arise only when all things are equal. In the case at hand, the private respondents had failed to satisfy the conditions of the NIT, as mentioned above, on both the counts, namely, that they had the adequate infrastructure as was, even according to official respondents, essential for execution of the contract and that they also had past experience, which they, in fact lacked. When the petitioner and the respondent No. 6 were put in such unequal positions, awarding of contract to respondent No. 6 merely on the ground of lowest bid was highly improper, particularly, when it is not claimed by the official respondents that they had relaxed the condition of the NIT in favour of the respondent No. 6.

56. In *Sterling Computers Ltd. (1993) SCC 445* it has been held that there is

nothing paradoxical in imposing legal limits on such authorities by courts even in contractual matters, because the whole concept of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good.

57. What emerges, in short, from the above discussion is that the respondent No. 6 did not satisfy the essential conditions of the NIT inasmuch as it neither owned requisite number and type of vehicles required for execution of the contract in terms of Clause 6.7 of the NIT read with Clause 8 of the proposed agreement nor did it have past experience of working for transportation of goods/stores with any Government of India Undertaking in terms of Clause 7.1 of the NIT. The respondent No. 6 was, therefore, not eligible at all for being considered, far less if for being awarded the contract. If such brazen violation of norms and arbitrary decision-making process are allowed to go unchecked, it will vigorously shake confidence of the general public in the ability of the Court's to make the State and its instrumentalities function in accordance with law. Casualty of such an unpleasant situation will, undoubtedly, be rule of law and the cause of justice, which a writ Court must not permit.

58. What crystalises from the above discussion is that the fact that tenderers bid is lowest cannot, itself, be a ground for awarding him the contract by ignoring and/or waiving the essential conditions embodied in the NIT. In other words, the authority entrusted with the responsibility of awarding the contract cannot start processing the tender documents from the standpoint of lowest bid. For being considered, a bidder must be eligible for consideration and for becoming eligible, bidder must satisfy the essential conditions of the NIT. In the case at hand, it is crystal clear that the respondent No. 6 did not satisfy essential conditions of the NIT and was, therefore, not eligible for consideration unless the conditions were relaxed. In this regard, consistent stand of the official respondents is that the conditions of the NIT, essential as well as general, were not relaxed. Viewed from this angle, the respondent No. 6 was not even eligible for consideration, far less entitled to receive the contract, but even then, they have been awarded the contract on the ground of their bid being the lowest.

59. Though, as indicated above, awarding of contract being basically a commercial transaction, Courts will not readily interfere unless overwhelming public interest so demand. The Apex Court has laid down in *Sterling Computers Ltd.* (Supra), as indicated above, that it is not paradoxical to impose legal limits on the discretionary exercise of powers by Government and its instrumentalities for contractual matters inasmuch as whole concept of unfettered discretion is inappropriate to a public authority. When the official respondents as instrumentalities of the State awards contract to a person who is not even eligible for consideration, public interest is adversely affected and if it is ignored or allowed to go unchecked, it will shake vigorously the confidence of public in the ability of the Courts to ensure that the State and its instrumentalities function in accordance with law.

59 A. When the official respondents, as instrumentalities of the State, award the contract to a person, who was not even eligible for consideration, and tried to mislead the Court by saying that all the essential conditions of the NIT were fulfilled by the private respondent No. 6, though it was not so, and though the official respondents further attempted to mislead the Court by saying that they did not relax the essential conditions of the NIT, which is also untrue, public interest demands that the Court shall not remain a mute spectator to such acts of arbitrariness and unethical conduct. It is the duty of the Court to retain confidence of the public in the ability of the Courts to ensure that the State and its instrumentalities function subject to the rule of law. Lest this confidence is lost, this writ Court has to move into the picture in the interest of the public and set aside the wrong sought to be done by the respondents.

60. Situated thus, I have no hesitation in my mind that the present one is the one of most appropriate cases, which requires this Court to interfere with and set aside, in the public interest and in order to maintain rule of law, the contract awarded to the respondent No. 6.

61. Though the writ petitioners have sought for writ/writs directing the official respondents to award the contract to the writ petitioner, suffice it to mention here that it is not for the Court to direct as to who should be awarded the contract. The judicial review in contractual matters remains confined only to an examination of the fact whether the decision-making process in favour of awarded of a contract deserves interference or not. In this regard, for the reasons indicated hereinabove, the award of the contract stands vitiated and cannot be allowed to stand good on record.

62. In the result and for the reasons discussed above, this writ petition partly succeeds. The acceptance of the tender bid of the respondent No. 6 (Annexure X to the writ petition) as well as agreement entered into, on 15.01.2002, between respondent No. 6 and the official respondents is set aside and quashed.

63. With the above observations and directions, this writ petition shall stand disposed of.

64. No order as to costs.