

(1994) 07 SC CK 0008

In the Supreme Court Of India

Case No : Civil Appeal No"s. 4947-50 of 1994.

Tata Cellular

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-07-1994

Acts Referred:

U.K. Telecommunications Act, 1984 — Section 7
Code Of Criminal Procedure, 1973 — Section 482
Indian Telegraphs Act, 1885 — Section 3(6)
Constitution Of India, 1950 — Article 14, 136, 226
Code Of Civil Procedure, 1908 — Order 59 Rule 3(2)

Citation : AIR 1996 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp

Hon'ble Judges : M. N. Venkatachaliah, C.J.;S. Mohan, J;M. M. Punchhi, J

Bench : Full Bench

Advocate : Soli J. Sorabjee, M.H. Baing, Ashok Sen, Harish N. Salve and Gulam Vahanvati, for the Appellant; D.P. Gupta, Solicitor General, A.B. Divan, K. Parasaran, K.K. Venugopal and G. Ramaswamy, for the Respondent

Final Decision : Dismissed

Judgement

S. Mohan, J.—Leave granted.

2. All these appeals can be dealt with under a common judgment since one and same issue requires to be decided. The brief facts are as under :

The Department of Telecommunications, Government of India, invited tenders from Indian Companies with a view to license the operation of Cellular Mobile Telephone Service' in four metropolitan cities of India, namely, Delhi, Bombay, Calcutta and Madras. Cellular mobile telephone means a telecommunication system which allows two ways telecommunication between a mobile or stationary telephone to another mobile or stationary unit at a location. It may be within or outside the city including subscriber-cum-dialing and international subscriber-cum-dialing calls. The last date for submission of tender was 31.3.92. The tender process was in two stages. First stage involved technical evaluation and the

second involved financial evaluation. Those who were short-listed at the first stage were invited for the second stage.

3. 30 bidders participated initially at the first stage. The first tender Evaluation Committee was constituted consisting of senior officers of the Department of Telecommunication.

4. A Telecom Commission was constituted on 6.4.89 comprising of a Chairman and four full-time Members :

1. Member (Production)
2. Member (Service)
3. Member (Technology)
4. Member (Finance)

5. It short-listed 16 companies, 12 of which were eligible without any defect. However, in the case of 4 the Committee recommended condonation of certain defects. Those four were :

1. BPL Systems and Projects Limited
2. Mobile Telecommunication Limited
3. Mobile Telecom Services
4. Indian Telecom Limited

6. Between 19th of May, 1992 and 27 of May, 1992 the recommendations were submitted to the Telecom Commission, the matter came up for discussion among the members of the Commission. On 27.5.92 the Telecom Commission accepted the recommendations of the Technical Evaluation Committee. The Chairman recommended that the short-list of bidders, the recommendations of the Tender Evaluation Committee and the proposal for financial bids be placed before the selection Committee at the earliest.

7. It requires to be noted, at this stage, that a Selection Committee also described as Apex/High-powered Committee comprising of the Principal Secretary to the Prime Minister and three other Secretaries to the Government of India had been set up by the Minister for Final evaluation of the bid.

8. Mr. B.R. Nair, a Member (Budget) of Telecom Commission came to be appointed as Member (Services) on 29.5.92. It appears the Selection Committee met a number of times and discussed the matter with the Minister. He submitted an interim report on 16th July, 1992. During this time the Committee not only de novo exercised but also modified the short-list prepared by the Technical Evaluation Committee and approved 14 companies. The Selection Committee also met the representatives of equipment manufacturers for the selection of the licensees. On 20th July, 1992, the revised financial bid and the short-list

approved by the Telecom Commission were put up before the Minister for approval. On 24.7.92, further meetings of the Selection Committee were held and the financial bid document was revised. On 28.7.92, the Selection Committee submitted its final report. Two bidders, namely, M/s. Ashok Leyland Ltd. and M/s. Yam Organics Ltd. were dropped from out of the short-list of 16 bidders. On 29.7.92, Mr. Nair was appointed as Director General of Telecommunications. He was authorised to exercise all powers of Telecom Authority u/s 3 of the Telegraph Act. The Minister approved the issue of financial bids with modification to the short-listed companies as recommended by the Selection Committee on 29.7.92. The approval took place on 30.7.92.

9. On 30.7.92, the financial tenders were issued. It contained seven criteria which had been approved by the Selection Committee. However, no marks were earmarked for any of the criteria. 17.8.92 was the cut-off date for financial bid document. On this date the bids received from 14 companies were opened and read out to the bidders, who were present. As per the conditions, the quoted rental ceiling and the cities for which the bids were made, was read out.

10. Another Departmental Tender Evaluation Committee consisting of senior officers examined the financial bids of the 14 short-listed companies. It adopted some parameter and devised the marking system which was not done by the Selection Committee. On 2.9.92 the second Tender Evaluation Committee submitted its recommendations. However, the matter was referred back to it for a fresh gradation on the basis of 21.75 per cent interest rate in respect of 13 per cent rate which it had earlier adopted. On 7.9.92 the recommendations were re-submitted. The Adviser (Operation) recommended only 4 operators based on the evaluation and financial bids. Bharti Cellular was recommended as a first choice for all the four cities. BPL as the second choice for both Delhi and Bombay, Tata Cellular and Skycell as second choice for Calcutta and Madras. This was done since in his view no other bidder qualified for licence. On 10.9.92 the Chairman of the Tender Evaluation Committee directed that all the documents and recommendations be sent to the Selection Committee for its consideration and for making final recommendations to the Government. When the file was put up to the Minister on 9.10.92 he made three important notings:

1. In view of the time taken by the High powered Committee the selection process be completed by Dot internally;
2. Only one party may be granted licence for one city; and
3. The actual selection of the licensee should be made primarily on the consideration of rentals and the marks obtained in respect of foreign exchange inflow and outflow criterion and experience of the licensee.

11. On 9.10.92, in accordance with this note, a list of 8 short- listed companies was prepared. The reasons for rejection of the 6 companies were recorded. The Chairman, in his final recommendation, made on 9.10.92 noted that Bharti Cellular, Modi Telecom and Mobile Telecom did not fulfill the conditions provided

in Clause 2.4.7 of Chapter II of the financial bid which requires that foreign exchange requirement be met by foreign collaborator. With regard to rejection of 6 bidders Sterling Cellular was rejected because some investigation against them was pending because some investigation against them was pending before the C.B.I. However, the Minister reversed that decision as to the exclusion of Sterling Cellular and Indian Telecom limited from the list of finally approved bidders and directed that the same be considered.

12. On 10.10.92, the list was recast. Sterling Cellular was provisionally selected for the city of Madras. On 12.10.92, the selected bidders were notified of their provisional selection subject to the acceptance of rentals and other terms as might be advised.

13. It is under these circumstances, four writ petitions were preferred bearing C.W.P. Nos. 4030, 4031, 4032 and 163 of 1992. The petitioners were:

1. India Telecomp (Petitioner in C.W.P. No. 4030 of 1992)
2. Adino Telecom Limited (Petitioner in C.W.P. No. 4031 of 1992)
3. Kanazia Digital System (Petitioner in C.W.P. No. 4032 of 1992)
4. Hutchison Max Telecom Private Limited (Petitioner in C.W.P. No. 163/92)

14. It was urged before the High Court of Delhi that the decision of the Government in selecting eight parties, two for each of the cities, was bad on the following grounds:

- (i) bias
- (ii) invoking certain hidden criteria
- (iii) irrelevant considerations
- (iv) by-passing the Selection Committee
- (v) selecting otherwise underqualified parties.
- (vi) marketing system which was evaluated by the second Technical Evaluation Committee for grading various bidders.

15. So manipulated thereby a criterion was evolved which was tailor-made to knock out the petitioners before the High Court or resulting in knocking out of the petitioner in the case of India Telecomp Limited and Adino Telecom Limited. Hutchison Max Telecom Private Limited urged that it was that highest in the gradation. Its bid was not considered for a technical and flimsy reason; in that, the compliance statement required to be furnished with the bids was not complete. Kanazia Digital System contended that its technical bid was left out on certain wrong premise.

16. Lengthy arguments were advanced before the High Court. On a consideration of those arguments the writ petitions of Adino Telecom and Kanazia Digital

System were dismissed. C.W.P. 4030 of 1992 filed by India Telecomp was allowed. A mandamus was issued to consider afresh the grant of licence to the petitioner therein, after evaluating marks for the rental on the basis the figures of deposits from subscribers given for Delhi and Bombay were accumulated. Similarly, C.W.P. 163 of 1992 in which the petitioner was M/s. Hutchison Max Telecom Private Limited, was allowed. A direction was issued to reconsider the case of the petitioner, on the basis the compliance filed by it, as it was in order. To that extent, the order, granting licence to 8 parties (2 for each of the cities) was set aside. This judgment was pronounced on 26.2.93.

17. After the judgment of the Delhi Court, the matter was reconsidered in the light of the said judgment. A revised list of Provisionally selected bidders was prepared on 27.8.93. That is as follows:

Position as on 12.10.92 Position as on 27.8.93
Bombay Bombay Bharti Cellular
Hutchison Max BPL Projects & Systems Bharti Cellular
Delhi India Telecomp Ltd.
BPL Projects & Systems Tata Cellular Pvt. Ltd.
Sterling Cellular Ltd.
Calcutta Calcutta Mobile Telecom Ltd.
India Telecomp Ltd.
Usha Martin Telecom
Usha Martin Telecom
Madras Madras Skycell Mobile Telecom Ltd.
Sterling Cellular Ltd.
Skycell
18. It could be seen from the above that Tata Cellular which was originally selected for Delhi has been left out. Therefore, it has preferred SLP (Civil) Nos. 14191-94 of 1993.

19. M/s. Hutchison Max Private Limited has apprehended that if the judgment of the Delhi High Court is not accepted it is likely to be displaced from the provisional selection list for Delhi.

20. Indian Telecom Private Limited preferred SLP (C) No. 17809/93. India Telecomp preferred SLP (C) No. 14266 of 1993.

21. Mr. Soli J. Sorabjee, learned Counsel for the appellant, Tata Cellular, argues that this is a two staged tender. In the first stage, the evaluation had to be made on the basis of technical and commercial considerations. The bidders short-listed at the first stage would then compete in the second stage, namely, the financial bid. Chapter II contains general conditions framed into the bid. In paragraph 2.4.7 the financial projection of the proposed cellular mobile service was prescribed. The notes mentioned three criteria:

- (i) Entire foreign exchange requirement shall be met by the foreign collaborator.
- (ii) Minimum reliance of Indian public financial institutions will be preferred.
- (iii) Debt equity ratio should not be more than 2:1.

22. It is borne out by records that out of the seven criteria in evaluating the financial bid, six parameters alone were taken into consideration. For rental parameter the evaluation committee took into account the equity rental ceiling, security deposits installation and other charges indicated in the bid which were the same in the case of all the bidders. This was done in order to arrive at an

equated or effective figure of monthly rental for each bidder. It is not open to the Committee to totally ignore this criterion when the Chairman's note dated 9.10.92 specifically states that the companies would be asked to comply with the conditions of financial bid in Clause 2.4.7 of Chapter II while granting licences.

23. When this is the position, strangely, the appellant is informed as follows:

Ministry of Communication (Telecom Commission) New Delhi-110001

No./92-TM Dated : 27.8.93 To

Kind attention :

Subject : Tender No. 44-21/91-MMC(FIN) for franchise for cellular mobile telephone service for Bombay, Delhi, Calcutta and Madras.

Sir,

Kindly refer letter of even No. dated 12.10.92 informing you that you have provisionally selected for franchise for providing cellular mobile telephones service at on a non- exclusive basis.

2. The matter has been reconsidered in the light of the judgment delivered by the High Court of Delhi in this case. M/s. have now been provisionally selected for franchise for providing cellular mobile telephone service at in place of on a non- exclusive basis. The other franchise selected for is M/s. with M/s. of as their foreign partner.

3. The details of the rental, deposits and other terms fixed for the franchise will be intimated to you shortly.

4. Kindly get necessary formalities completed by 30.9.93.

Your faithfully'

(S.K. Garg) DDG (TM)

24. The second ground of attack is bias. In that, Mr. B.R. Nair, Member of Production in the Telecom Commission, who was appointed as Member (Service) on 29th May, 1992, participated. From the Advisor the file went to Member (Service). The note of Mr. Nair is dated 21st May, 1992. He agreed with the recommendation of T.E.C. that four firms which had some deficiencies should be included in the short-list. They were B.P.L. Systems and Projects, Mobile Telecom, Mobile Communications and Indian Cellular Therefore, B.P.L. was approved by Mr. Nair. Admittedly, Mr. Nair's son is employed in B.P.L. Systems and Projects.

25. The High Court in dealing with the allegations of bias made against Mr. Nair held:

Nexus of father and son in the chain of decision making process is too remote to be of any consequence. It is quite interesting to note that of the four companies

which were having some deficiencies in their tender documents in the first stage and were recommended for consideration by the first TEC, three companies including BPL made it to the final list of eight. Plea of bias is not alleged in the selection of other two companies. In the circumstances it is not possible for us to hold any allegation of bias made against Nair.

The High Court concluded:

We do not think in a case like this the mere fact that Nair was part of the machinery to fact that Nair was part of the machinery to make selection was enough to show that there could be reasonable suspicion or real likelihood of bias in favour of BPL.

26. This finding is wrong, Mr. Nair's participation from the beginning would constitute bias. In support of this submission, the learned Counsel relies on *Manak Lal v. Dr. Prem Chand* [1957] and particularly the passage occurring at page 587, *J. Mohapatra and Co. and Another Vs. State of Orissa and Another*, and *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*,

27. The English decisions on this aspect which will support the contention are:

Metropolitan v. Lennon and Ors. (1986) 3 AER 304.

28. In law, there is no degree of bias.

29. Even otherwise in the implementation of the Judgment of the High Court of Delhi, if this appellant is to be eliminated, it ought to have been afforded an opportunity,. Had that been done it would have pointed out several factors, namely, the omission to consider relevant material, namely, parameter seven, the prejudice cause by the award of marks after the bids were opened. The Dot was obliged to disclose the maximum marks for each criterion at the threshold of the financial bid in the interest of transparency and to ensure a non-arbitrary selection.

30. In the case of most of the bidders the foreign exchange is not met by the foreign collaborator. In the case of India Telecomp the debt equity ratio is 1:1. Their total project cost is stated to be Rs. 101 crores. This means Rs. 50.50 crores represent equity and the other Rs.50.50 crores represent external commercial borrowing. In this case, the entire foreign exchange is not met by the foreign collaborator. Therefore, there is a breach of the fundamental condition of the bid. This would constitute a disqualification which is a bar at the threshold. Had this Condition been strictly applied Bharti Cellular, Modi Telecom, Mobile communications, Hutchison Max, Skycell Communication would have been eliminated. Likewise, Sterling Cellular also did not fulfil this Condition.

31. It was a mandatory condition that a foreign collaborator indicated at the first stage of tender, could not be changed thereafter. Inter alia, on the strength of credentials of foreign collaborators the bid is considered. If a change is allowed it would amount to technical violation of the bid. Yet in the case of BPL one of its

foreign collaborators, namely, McCaw Cellular withdrew from the collaboration. In spite of this, the breach was disregarded. The bidder had to furnish proof that he had obtained the approval of foreign collaboration or filed application before the competent authority. BPL had not even filed an application before the competent authority yet its tender was considered and approved. On the very same ground, while Ashok Leyland had been disqualified, equally, it should have been applied to BPL.

32. Sterling Cellular had been rejected at various stages of consideration on the ground that there was criminal complaint/investigation pending against it. The Minister had also agreed but reversed that decision on the last day and directed its consideration for inclusion in Madras on the purported ground that Madras was the least popular of the stations and that if any delay is caused due to complications on account of CBI investigation would have the least adverse effect for lack of competition. The High Court noted that no material had been brought on record to show that there was any complaint against Sterling Cellular. But, factually, to the knowledge of the DOT, a criminal case stood registered against Sterling Cellular in June, 1993, before making the final selection. The DOT, instead of rejecting Sterling Cellular on that ground, upgraded it from Madras to Delhi in disregard of the decision of the Minister.

33. Any foreign collaboration has to be approved by an inter-ministerial committee called FIPB. No proposal for foreign collaboration could be evaluated by the TEC without receiving the approval from the FIPB. Even under the tender documents the bidders were required to show that they had applied for such approval.

34. Having regard to all these, the selection is vitiated by arbitrariness or unfairness.

35. Mr. Harish Salve, learned Counsel, appearing for India Telecomp attacks the selection as arbitrary on the following three grounds :

1. By-passing the Apex Committee and entrusting to a Committee which did not follow the norms.
2. Certain hidden criteria which were not disclosed earlier, were applied not as parameters, but for elimination.
3. There are five glaring errors in the selection. One such is, in the case of Sterling Cellular. It supports its bid on the strength of the foreign exchange that may be obtained from foreign tourists. This is something incomprehensible.

36. Elaborating these points it is urged that after short-listing, in the selection committee did not select at all. The counter affidavit filed on behalf of the Government of India does not mention that there was a delay by Apex Committee, as held by the High Court. On the contrary, the facts disclose there was no delay whatever.

37. Two hidden criteria were postulated. (i) Persons having less than one lakh experience will not be considered. (ii) If two bidders have the same collaborator in relation to foreign exchange that bid will not be considered. These criteria were evolved after 18th August, 1992. When one looks at the conditions of tender, paragraph 2.2.1 talks of subscriber's capacity. That does not mention about the nature of experience. Equally, paragraph 2.4.5 makes no mention about one foreign collaborator for each bidder. In the case of Bharti Cellular it was having only eighty one thousand lines. The criterion of 80 thousand GSM was prescribed only to favour Bharti Cellular.

38. If no change of foreign collaborator is allowed at the stage of financial assessment after the technical committee has passed its bid, in the case to permit such a change to BPL, is clearly arbitrary.

39. Indian Telecom was excluded because it has the same foreign collaborator, namely Telecom Malayasia. However, in the case of Bharti Cellular, that test was not applied. Its collaborator is Talkland Vodaphone. The same Vodaphone has been the collaborator with Mobile Telecom. This would amount to adopting double standards.

40. As against BPL the attack is as under:

1. BPL did not apply to SIA/FIPB but to Reserve Bank of India (RBI).
2. The foreign collaborator was changed in the middle, as submitted above, inasmuch as McCaw Cellular withdrew. The joint venture is gone when McCaw was given up.
3. Mr. Nair was biased in favour of BPL.
4. Total marks awarded are five. The idea is indigenous equipment whereas what has been done by BPL is to quote higher custom duty.

41. In so far as Sterling Cellular is preferred for Delhi that again is arbitrary. There is a C.B.I. Inquiry pending against it. Secondly, the foreign exchange is sought to be procured by international roaming and it is awarded 10 marks out of 10.

42. Mr. Ashok Sen, learned Counsel, appearing for the Indian Telecom submits, firstly, the limits of judicial review in the matter of this kind will have to be examined. Such limits could be gathered from *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*, which lay down the methods reaching conclusion.

43. Generally speaking in entering into contracts, the public authority is not like a private person. The question to be asked is have the guidelines been laid down, if so laid down, have they been observed? In this case, Indian Telecom was originally allotted Delhi. By reason of reconsideration pursuant to the judgment of the High Court of Delhi, it has now been allotted Calcutta. The is wrong.

44. In Clause 7 of the General Conditions it is stipulated that there can be no change of foreign collaborator. In Clause 13, a certificate requires to be produced. In number of cases no such certificate has been produced, Paragraph 2.4.5 of Chapter II of General Conditions lays down one of the parameter is the experience of foreign operating partner. In the case of Bharti Cellular, SFR Finance Company has no experience. Talkland's sole function is service. Therefore, its experience should not have been added. In paragraph 1.4 the nature of services is listed. These are not the services offered by Talkland. Hutchison Max did not produce any certificate; likewise Bharti Cellular.

45. The argument on behalf of Ashok Leyland, petitioner in Transferred Case No. 49 of 1993 is that it was an eligible bidder but has never communicated the reason as to why it came to be rejected. On 29.9.92, the Committee records that reasons must be given. Yet no reasons are furnished to the petitioner. Even though the Tender Evaluation Committee held that petitioner to be qualified yet its bid had been rejected without communicating any reason whatever. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, this Court has held that there is an obligation to communicate the reasons.

46. Mr. Koura, learned Counsel appearing for the Bharti Cellular, in opposing the arguments advanced on behalf of the appellants, submits that service operation should not be read in a narrow sense. In telephone industry there could be operation as well as service. while defining the Service, relying on paragraph 2.1 is wrong because services are defined in paragraph 1.4 whereas paragraph 2.1 refers only to obligations of licensee.

47. Besides, the services are also essential, they should be regarded as a part of operation.

48. Mr. G. Ramaswami, learned Counsel, appearing for skycell states that his client has been awarded Madras City. It is submitted that in the absence of mala fides the individual marking system should not have been interfered with as far as foreign exchange is concerned. In the case of his client regarding the foreign exchange sourcing, inflow is more than the outflow.

49. Mr. Anil B. Divan Learned counsel, appearing for Mobile Telecom Services submits that thought this respondent supports the judgment of the High Court, in so far as it is allowed the writ petition filed by Hutchison Max, the Same ought to be reconsidered. The bid of Hutchison Max was rejected since it had filed an incomplete compliance report. The High court has chosen to accept the bid of Hutchison Max on four grounds:

1. The approach of the Department was hypertechnical.
2. Compliance statement is akin to verification in a pleading. It cannot be placed on a higher pedestal than verification.
3. The Department ought to have allowed rectification since it was purely a mistake unintentionally made.

4. Inasmuch as the Department had allowed a favourable treatment in the case of Indian Telecom Private Limited and Tata Cellular the same treatment ought to have been accorded to hutchison Max as well. These findings are attacked on the following grounds :

The tender documents both technical and commercial bid as well as the financial bid clearly lay down the manner of compliance. Clause as of the technical bid states, in the even of the compliance report not be enclosed with the offer, the offer shall not be considered. Equally, in relation to financial bid, Chapter I states that any offer received after the due date and time shall be rejected, the various other clauses also postulate a strict compliance. If, therefore, the bid is incomplete the offer ought to have been rejected. Hence, there is no question of the Department of Telecommunication condoning the defect. If the view of the High Court is to prevail it would amount to allowing a post-tender modification on a select basis, that is, on the basis whether the mistake was intentional or unintentional. Where the Department has chosen to reject, the High Court cannot sit in judgment. To state it is like verification of pleading is to overlook that the pleadings are governed by the CPC which permits amendments of pleadings as well as the verification. That is not the case here. The comparison with Indian Telecom and Tata Cellular is also incorrect. In the case of Indian Telecom there is an unconditional compliance. Only in the covering letter a view has been expressed about the economic viability of the services and bidders' preference. Hence, it cannot be contended that the bid was conditional, in any manner. Similarly, Tata cellular was not accompanied in this regard.

50. The allegation against this respondent that the foreign exchange requirement has not been met is incorrect. The documents filed by the respondent clearly show that there is a surplus of approximately three crore rupees, available from the foreign collaborator, in the first year. The allegation of India Telecomp that the bidder was responding on the basis of one party per City and the proposal for licence for a period of 20 to 25 years is factually incorrect. Equally, to state that this respondent quoted a lower customs duty and thereby got higher marks is incorrect. The financial bid of the respondent shows that this had taken customs duty at 95 per cent for the first year when the backlog of the equipment is to be imported. For the subsequent years, the projection was made on a reduced customs duty in view of the announced policy of the Government to reduce customs duty and to bring them in line with international levels.

51. The argument that there is a common collaborator of Bharti Cellular and Mobile Telecom Services proceeds on the footing that Bharti cellular is collaborating with Talkland. That Talkland has a service privately in agreement with Vodaphone group. Thus Vodaphone is the common foreign collaborator of Bharti Cellular and Mobile Telecom. This is not correct. Mobile Telecom has its foreign partner for the purpose of setting up a leading cellular network cooperator of U.K. Namely, Vodaphone. Vodaphone as network operator is the owner of Vodaphone Cellular network. It is responsible for the setting up of the

network in U.K. where cellular network operator can also be a service provider. Vodaphone has been issued a licence as a cellular network operator u/s 7 of the U.K. Telecommunications Act of 1984. It is known as a public telecommunication operator. Vodaphone has about 30 service providers in U.K. including Talkland. It has no equity in Talkland. There are no common Directors on the boards of two companies. Vodaphone is the foreign Collaborator of Mobile Telecom. It has no collaboration agreement with Bharti Cellular. In regard to Bharti cellular it has only a collaboration agreement with Talkland which is a mere service provider.

52. Arguing on behalf of Sterling Cellular Mr. K. Parasaran, learned Counsel submits that the technical competency and capacity to execute the contract by this respondent with its joint venture partner is not in doubt. Sterling Cellular was short-listed by Technical Evaluation Committee itself. It was amongst the 12 tenders short-listed in the first list. The joint venture collaborator of Sterling, namely Cellular Communication is a reputed international company having large scale operation in U.S.A. As regards the foreign exchange inflow and outflow it is submitted that Sterling Cellular has projected its stand that the foreign exchange inflow will be from foreign tourists and business travellers visiting the city of Delhi. The expression "international roaming" has been used in relation to such foreign tourists and business travellers. Internationally, cellular phones are used by two categories of persons, (1) subscribers residing in the city who would use the phone on a permanent basis, (2) the tourists and business travellers visiting the city who would use the phone on a temporary basis. Inasmuch as the foreign tourists and foreign business travellers make the payment in foreign currency it will be a source of foreign exchange. What is required under the tender condition is the projection of foreign exchange inflow and outflow relating to the cellular phone contract. This means inflow in foreign exchange as a result of the operation of cellular phone system. Hence, the earning from tourists and business travellers is a very relevant consideration. Like this respondent, Hutchison Max selected for the Bombay City also projected for the foreign exchange opening by the use of cellular phone by tourists and business travellers. The argument that the foreign tourists and business travellers are not likely to use cellular telephone is not correct since the calls made through the cellular telephones are not only cheaper but also available as a 24 hours companion. That, of course, is a greater facility. In the note made by the Minister it has been mentioned that the respondent has undertaken to be bound by conditions contained in the tender documents to the effect that the entire foreign exchange requirement shall be met by the foreign collaborator. In fact, the foreign collaborator has also confirmed this.

53. As regards the allegation of CBI inquire, it is submitted that the learned Judges of the High Court perused the note of the Chairman Telecom Commission. It was only after this the Court held that there were no strictures against holding company of S.C.L by the name Sterling Computers Limited, in *M&N Publication Limited v. M.T.N.L. and Ors.* (1992) 4 D.L.T. 24. It was further held that it appears to have been punished for no sin of it. There was no CBI inquiry on the

date of the above judgment. It was after the judgment dated 10th July, 1993, the FIR was filed which has been allowed to be proceeded with by way of directions in petition u/s 482 of the Criminal Procedure Code. This Court in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, has laid down that pending investigation black listing cannot be permitted. The said ratio will apply to this case.

54. Mr. K.K. Venugopal, learned Counsel appearing for Hutchison Max submits that this respondent was rejected by the committee. That was questioned in the Writ Petition. The High Court directed reconsideration of its bid. With regard to compliance statement it was stated that the company agrees to fully comply with all paragraphs of Chapter II of the General Conditions and Chapter V; Tariffs of Document No.44-21/91-MMC(FIN) without any deviation and reservation. No doubt, there is a failure, in the first instance, to state about compliance with Chapters II and IV. This is an accidental omission. It amounts to a clerical error as laid down in *Moffett Hodgkins v. City of Rochester* 178 U.S. 1108. If it is a mistake in relation to non-essential or collateral matter it could always be condoned. The Privy Council in *Mohammad Ejaz Hussain v. Mohammad Iftikhar Husain* AIR (1932) PC 78 has held that it is always a matter of form and not of substance. Other argument is advanced that there is a defect in the compliance statement.

55. The alternate submission is the question of error does not arise since the compliance statement was filed on 11.9.92 while the contract came to be awarded only on 12.10.92. In such a case the question would be what is the scope of judicial review? The Court could interfere in the following three categories of cases :

1. Quasi-judicial
2. Administrative, for example, price fixing
3. Award of contracts

56. Here, the matter is technical in relation to award of contract. Judicial review does not mean the court should take over the contracting powers.

57. The parameters for interference in such matter would be:

- (i) Mala fide
- (ii) Bias
- (iii) Arbitrariness to the extent of perversity.

58. If none of these is present, the court should not interfere. It must be left to the authorities. The contrary arguments advanced on behalf of the appellants against this respondent are not tenable.

59. Mr. F.S. Nariman, learned Counsel appearing for BPL in the foremost argues by way of preliminary submissions that three questions will arise at the threshold.

(a) The scope and ambit of judicial review with regard to decisions bona fide arrived at in tender cases (pre contract).

(b) The applicability of judicial review in these cases.

(c) The interference under Article 136 of the Constitution where the power of judicial review has been exercised by the High Court under Article 226.

60. It is submitted that the reasonableness in administrative law means to distinguish between proper use or improper use of power. The test is not the court's own standard of reasonableness. This Court has reiterated this proposition in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, There is a possibility of fallibility inherent in all fact- findings. To insist upon a strict compliance with each and every tender document is not the law. This Court upheld that waiver of technical, literal compliance of the tender conditions in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, In the present case, the shortlisting, at the first stage, the allotment of cities at the second stage and the selection of franchisees qua cities at the third stage were after evaluating the financial bid by a collectivity of persons at different level. Therefore, possibility of elimination of arbitrariness is conceived in the system itself. Further, the High Court has analysed properly and come to the proper conclusion. That being so, this Court will not interfere by exercising its powers under Article 136 of the Constitution of India. The argument about hidden criteria would not affect or benefit this respondent directly or indirectly. Even otherwise, the hidden criteria cannot be impugned. There is no mention of any particular criterion on the basis of which the selection was to be made. At the second stage what was required to be kept in mind were the parameters mentioned in paragraph 2.4. The criteria for selection to each of the four cities had to be provided inter alia because the tenderers did not tender for one city alone but for more than one. The allegation of bias on the part of Mr. Nair is without substance. It is submitted, Whenever disqualification on the ground of personal involvement is alleged:

(i) the person involved (for example related) must be the decision-maker;

(ii) there must be sufficient nexus between the decision-maker and the party complaining in order to justify the real likelihood of bias.

61. After a decision is reached the standard of proof of bias is higher as laid down in *Vassiliades v. Vassiliades* and *Anr.* AIR (1945) PC 38. This decision has been referred to by this Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, . The learned Counsel after referring to the relevant case law submits that cases of bias and ostensible bias had to be regarded in the light of their own circumstances. In this case Mr. Subhash Nair is only one of the officers in B.P.L., which has over 5500 employees and 89 officers of his rank in 27 offices all over India. Mr. Nair was not the decision-maker at all. He was one of the recommending authorities. His involvement in the approval and selection of the tender was indispensable. He was originally the Member (Services) on 29.5.92.

Thereafter he became Director General, Telecommunications by a Notification issued on 28.7.92 by the President of India. As such, he was to exercise all powers of Telegraph Authority under General 3(6) of the Act. Therefore, the High Court was right in applying the doctrine of necessity. This doctrine has come up for discussion in Charan Lal Sahu Vs. Union of India,

62. Whatever it may be, Indian Telecom cannot take the point of bias. It took the chance and benefit of being short-listed despite the knowledge of Mr. Nair's involvement. Equally, Tata Cellular did not raise the allegation of bias in the High Court. In fact, it opposed the plea of bias.

63. No doubt, this respondent dropped McCaw as a foreign collaborator. That does not amount to change where one out of two or three collaborators is dropped. This foreign collaborator was required as Condition No. 7 only in financial bid documents not in tender documents. This respondent submitted financial bid on 17.8.92 showing only two of the collaboratOrs. McCaw was not shown as that was already dropped out. Therefore, the High Court rightly held that McCaw was not taken into consideration in awarding marks for foreign partners' experience. The object of the first stage was not to allot the franchise but to short-list the parties.

64. The learned Solicitor General produced the copies of the relevant documents in the file and took us through the same. It is submitted, after outlining the process of evaluation in the second stage six parameters were adopted by the Committee consisting of Telecom experts who are none other than the senior officers of the Department of Telecommunications. The parameters are as follows:

1. Quoted rental ceiling
2. Project financing plan
3. Foreign Exchange inflow and outflow
4. Project's plan for cellular equipment within the country including the tie-up with the proposed Indian manufacturers.
5. Experience of foreign operating partner and
6. Financial strength of parameters/partner companies.

65. These parameters were assigned marks. The evaluation report including the ranking arrived at by the tender evaluation committee was then put up to the Telecom Commission for further consideration and selection. Due to technical considerations not more than two bidders per city could be accommodated. Paragraph 14 of the bid conditions provided that each bidder must further a declaration in a specified form to the bid documents. The declaration given by Hutchison Max was complete. However, its bid had to be rejected on merits in spite of securing high marks.

66. M/s. India Telecomp secured the second place for Calcutta. In as much as

they had the same foreign partner as Usha Martin which secured a higher place than India Telecomp, it was rejected and the choice went to the next bidder in the marking list. After the above considerations were taken into account, the remaining companies were selected which led to the writ petition. Pursuant to the High Court directions the matter was reconsidered and selections have been made as was done earlier.

67. The principal objection of the Union of India is that the High Court was not justified in scrutinizing the tendering process in such detail. The minute examination is unwarranted because the High Court cannot constitute itself the selecting authority. However, no appeal is preferred, as otherwise, it would have further delayed the introduction of very valuable communication facility in this country. Beyond that, it has no particular interest as to who is selected. However, it becomes necessary to answer the allegations made about the actual selection and whether there was any bias on the part of the selection committee. The selection process was dictated by the exigencies of the situation.

68. It is a question, as to what one could settle for, in the given circumstances. The Government was embarking upon a totally new technology project, for the first time. At that stage, it was impossible to predict what kind of response will there be. Therefore, it is impossible to predicate the cut-off limits which could be set or which conditions have to be relaxed or softened. The allegation of bias, it is held, must be a case of reasonable possibility or likelihood of bias. In this case, there is no such reasonable likelihood. Mr. B.R. Nair was not influenced directly, or, in any other manner, subtle or otherwise. He did not, in fact, participate in any of the significant or crucial stages in the selection process. Even otherwise, the relationship is not such as to give a reasonable apprehension of bias. In support of this argument reliance is placed on *Manak Lal (Supra)* and *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, . As regards the parameter in relation to project financing it was kept in view by taking into account the estimated number of subscribers, installation charges, monthly rental, any other charges etc. They were included in the competition. The other parameters of the bidders were treated on the same footing as regards this parameter is concerned. Concerning rental, it was specifically averred in the counter before the High Court that the other charges had also been included calculating quoted rental.

69. It is not correct to contend that Talkland's experience is not relevant. In the United Kingdom the operation of Mobile Cellular System is handled by the network cooperator and a proper service provider, acting together. The licensee is required to perform the combined functions of a network operator as well as service provider. The duties and functions of a licensee are not limited to making available to services as defined. In fact, the principal obligation of the licensee is expressed generally in paragraph 2.1.1. A reading of the other clauses makes it clear that it is incumbent upon the licensee to provide service. Therefore, the experiences of a network operator and the service provider are both important

and relevant.

70. In the case of Bharti Cellular the attack is that the cut-off came to be reduced to 80, 000 subscribers to accommodate it. Bharti Cellular mentioned in its tender, as on 31.12.91 The name of S.F.R. France which had 80,000 subscribers. By 31.12.91, it would have got increased to more than one lakh. In August 1992, when the bids were submitted S.F.R.'s line of experience could reasonably be expected to be more than one lakh. S.F.R. France had a G.S.M. Licence. Having regard to these facts, it would not be an unreasonable estimate, for the experts, to conclude that Bharti Cellular was having experience of over one lakh lines.

71. It is alleged that the debt/equity ratio of Skycell has not been properly taken. Skycell ratio was 1.5 and was correctly assigned 3 marks.

72. Tata Cellular alleges that Bharti Cellular, Mobile Telecom, Sterling and Skycell have breached note (ii) under Para 2.4. which provides that minimum reliance on Indian Public Financial Institutions will be preferred. The bid proforma made distinction between loans from Public Financial Institutions and Banks. The criticism of Tata confuses this requirement with loan from Banks, the criterion, it is submitted, was correctly applied.

73. In the evaluation of process open market purchase was left out of consideration.

74. Since Skycell bid for Madras Showed that they had projected their operations in Madras for initial years, would be below profitable levels. In such a case, no dividend would have to be paid to the foreign collaboratOrs. Accordingly, it was concluded that the foreign exchange inflow position was better.

75. International roaming is a relevant consideration. From the tender document it will be clear that it provides for facility of roaming to visitOrs. Roaming facility for a tourist is available in the G.S.M. system. Even if this conditions had been relaxed in favour of certain bidders, there is nothing wrong. Reliance is placed on G.J. Fernandez v. State of Kamataka [1992] 2 SCC 488, paragraph 18.

76. With regard to the foreign collaborator of B.P.L. there was no change. French Telecom is one of the foremost in the world in this technology. It remained as foreign collaborator of B.P.L. Dropping out of McCaw did not violate the bid conditions which were really aimed at preventing a new and, therefore, unknown collaborator being introduced at the financial bid stage. The second Technical Evaluation Committee did not see this as a violation. In any event, where the judgment of the High Court had been given effect to and a proper evaluation has been done no interference is warranted.

77. Mr. Soli J. Sorabjee, learned Counsel, in his reply, would submit that as regards the scope of judicial review the American cases cited by Mr. K.K. Venugopal would not apply. As laid down in State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, judicial review is confined to

decision- making process. This being an administrative action the scope of judicial review could be gathered from Council of Civil Service Union v. Minister for the Civil Service (1985) 1 A C 374. In Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977) AC 1014 the law has been stated as to when subjective satisfaction could be interfered with under judicial review. This Court also had occasion to deal with similar contracts and stated the law relating to judicial review in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, Then again, in Union of India and others Vs. Hindustan Development Corpn. and others,

78. The point against Hutchison Max is, the defect in its tender, came to be pointed out, requiring it to comply with the same. In view of the defect Hutchison Max came to be excluded.

79. Mr. Nair's participation from the beginning would constitute bias in law.

80. Mr. Ashok Sen, in his reply would stated that in the case of Hutchison Max the mistake was committed in the offer with regard to compliance statement. The principle of bias, as laid down in The King v. Essex Justices (Sizer and Ors.) Exparte Perkins [1927] 2 K.B. 475, would apply. Similar passage occurs in be Smith's Constitutional and Administrative Law (Fourth Edition) page 268.

81. Mr. Harish Salve, in reply, would urge that the hidden criteria were evolved in relation to common foreign collaborator. This shows that there was lack of candour on the part of the Union. It is mentioned that Talkland and take into consideration. It is not so, as seen from the file. The conditions were tailor-made to suit Bharti Cellular and BPL.

82. Mr. K.K. Venugopal would urge that the rule relating to judicial review would not be applied here because it is one of selection by an administrative process.

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

1. The scope of judicial review in matters of this Kind.

2. Whether the selection is vitiated by arbitrariness?:

(a) regarding financial projection and

(b) regarding rental.

3. Bias of Mr. Nair - whether affected the selection?

4. Whether the Apex Committee has been bypassed? 5. Evolving of hidden criteria - whether valid?

point 1 - Scope of Judicial Review:

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

tender :

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

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

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

87. Lord Scarman in *Nottinghamshire county Council v. Secretary of State for the Environment* [1986] AC 240 proclaimed :

Judicial review' is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficent power.

88. Commenting upon this Michael Supperstone and James Goudie in their work on *Judicial Review*" (1992 Edition) at page 16 say:

If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and

therefore to be treated as an idiosyncratic aberration, it he as received the endorsement of the law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the New Zealand Court of Appeal in *Butcher v. Petrocorp, exploration Ltd.* 18 March 1991.

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

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

91. In *Chief Constable of the North Wales Police v. Evans* [1992] 3 All ER 141 Lord Brightman said :

Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial Review is concerned, not with the decision, with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC Ord 53 in the following terms;

This remedy, vastly increased in the extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities are their powers in a proper manner, (p. 1160)

R v. Panel take-overs and Mergers, ex p Datafin plc, Sir John Donaldson MR commented : 'an application for judicial review is not an appeal'. In *Inrho plc v. Secretary of State for Trade and*

Industry, Lord Keith said; 'Judicial review is a protection and not a weapon. It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In *Re Amin*, Lord Fraser observed that :

Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made (1) Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

92. In *R v. Penfold* on Take overs and Mergers, *ex p Guinness plc* [1990] 1 QB 146 Lord Donaldson MR. referred to the Judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the courts is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

93. The duty of the court is to confine itself to the question of legality. Its concern should be:

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

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

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

(ii) Irrationality, namely, *Wednesbury* unreasonableness, (iii) Procedural impropriety.

95. The above are only the broad grounds but it does not rule out additional of further grounds in courts of time. As a matter of fact, in *R v. Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of nature and degree which requires its intervention".

96. What is this charming principle of *Wednesbury* unreasonableness? Is it a magical formula? In *Re: v. Askew* [1768] 4 2168, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They

gained greater value two centuries later :

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is trusted to the College of Physician: and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, can did and unprejudiced; not arbitrary, capiricious, or biassed; much less, warped by resentment, or personal dislike.

97. To quote again, Michael Supperstone and James Goudie; in their work 'Judicial Review (1992 Edition) it is observed at pages 119 to 121 as under:

The assertion of a claim to examine the reasonableness been done by a public authority inevitably led to differences of judicial opinion as to the circumstances in which the court should intervene. These difference of opinion were resolved in two landmark cases which confined the circumstances for intervention to narrow limits. In *Kruse v. Johnson* a specially constituted divisional court had to consider the validity of a byelaw made by a local authority. In the leading judgment of Lord Russell of Killowen CJ the approach to he adopted by the court was set out. Such byelaws ought to be 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they would be reasonably administered. they could be held invalid if unreasonable: where for instance byelaws were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the rights of citizens as could find no justification in the minds of reasonable men. Lord Russell emphasised that a byelaws is not unreasonable just because particular judges might think it went further than was prudent or necessary or convenient.

In 1947 the Court of Appeal confirmed a similar approach for the review of executive discretion generally in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*. This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that 'no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not'. In an extempore judgment, Lord Greene M.R. drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review. (At page 229, where it was said that the dismissal of a teacher for having red hair (cited by Warrington LJ in *Short v. Poole Corporation* [1926] Ch 66 as an example of a 'frivolous and foolish reason') was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described a being done in bad faith; see also *R v. Tower Hamlets London Borough council, exp Chetnik Developments Ltd.* [1988] AC 858, *supra*, He summarised the principles as follows :

The Court is entitled to investigate the action of the local authority with a view to

seeing whether or not they have taken into account matter which they ought not to have taken into account, or, conversely, have refused to take into account 01 neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, as concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them.

This summary by Lord Greene has been applied in countless subsequent cases.

The modern statement of the principle is found in a passage in the speech of lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*:

By "irrationality" I mean that can now be succinctly referred to as "Wednesbury unreasonableness" *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 233. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.

98. At this stage, *The Supreme Court Practice 1993 Volume 1 Pages 849-850*, may be quoted:

4. Wednesbury principle - A decision of a Public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it (*Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, per Lord Green M.R.)

99. Two other facts of irrationality may be mentioned.

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the 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 a decision the other way, cannot be upheld. Thus, in *Emma Hotels Ltd. v. Secretary of the State of Environment* [1980] 41 P & CR 255, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not in incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson LJ said that he could not see on what basis the Secretary

of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in *R v. Barnet London Borough Council, exp Johnson* [1989] 88 LGR 73 the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.

100. Bernard Schwartz in *Administrative Law Second Edition* page 584 has this to say:

If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. "It makes judicial review of administrative orders a hopeless formality for the litigant.... It reduces the judicial process in such cases to a mere feint.

Two overriding considerations have combined to narrow the scope of review. The first is that of deference to the administrative expert. In Chief Justice Neely's words, "I have very few illusions about my own limitations as a judge and from those limitations I generalize to the inherent limitations of all appellate courts reviewing rate cases. It must be remembered that this Court sees approximately 1, 262 cases a year with five judges. I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect judges intelligently to review a 5,000 page record addressing the intricacies of public utility operation." It is not the function of a judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinized by the non-expert judge. The alternative is for the court to overrule the agency on technical matters where all the advantages of expertise lie with the agencies. If a Court were to review fully the decision of a body such as a state board of medical examiners "it would find itself wandering amid the mazes of therapeutics of boggling at the mysteries of the pharmacopoeia." Such a situation as a state court expressed it many years ago "is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question."

The second consideration leading to narrow review that of calendar pressure. In practical terms it may be the more important consideration. More than any theory of limited review it is the pressure of the judicial calendar combined with

the elephantine bulk of the record in so many review proceedings which leads to perfunctory affirmance of the vast majority of agency decision.

101. A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction :

Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter: See *Healey v. Minister of Health* [1955] 1 QB 221. But nevertheless, the courts will, if called upon act in a supervisory capacity. They will see that the decision-making body acts fairly: see in *re H.K. (an Infant)* [1967] 2 QB 617 and *Reg. v. Gaining Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v. Minister of Pensions and National Insurance* [1963] 1 W.L.R. 186. And if the decision-making body has gone wrong in its interpretation they can set its order aside: see *Ashbridge Investments Ltd. v. Minister of House and Local Government* [1965] 1 W.L.R. 1320. (I know of some expressions to the contrary but they are not correct. If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: See *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then again the courts will interfere: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere: see *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v. Campbell* [1925] A.C. 228. In exercising these powers, the courts will take into account any reason which the body may give for its decisions. If it gives no reasons - in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly: see *Padfield's case* (A.C. 997, 1007 @ 1061).

102. We may usefully refer to *Administrative Law Rethinking Judicial Control of Bureaucracy* by Christopher F. Edley, JR (1990) Edn.) At page 96 it is stated thus :

A great deal of administrative law boils down to the scope of review problem; defining what degree of deference a court will accord an agency's findings, conclusions, and choices, including choice of procedures. It is misleading to speak of a "doctrine", or "the law", of scope of review. It is instead just a big problem, that is addressed piecemeal by a large collection of doctrines. Kenneth Culp Davis has offered a condensed summary of the subject : "Courts usually substitute (their own) judgment on the kind of questions of law that are within their special competence, but on other question they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction.

103. In *Universal Camera Corporation v. NLRB* 340 US 474 at 488, Justice Frankfurter stated :

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work. Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. there are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem the use of undefined defining terms.

104. An innovative approach is made by Clive Lewis as to why the courts should be slow in quashing administrative (in his *Judicial Remedies in Public Law* 1992 Edition at pages 294-95). The illuminating passage reads as under :

The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and lead to increased ad unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the court' remedial discretion and any prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decision were quashed. Judges may differ in the importance they attach to the disruption that quashing a decision will cause. They may also be influenced by the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct.

The current approach is best exemplified by *R. v. Monopolies and Mergers Commission, ex p. Argyll Group* [1986] 1 W.L.R. 763.

105. Sir John Donaldson M.R. in *R. v. Monopolies Commission, Ex p. Argyll Plc. (C.A.)* [1986] 1 WLR 736, observed thus :

We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration. I cannot catalogue then-all, but, in the present context, would draw attention to a few which are relevant.

Good public administration is concerned with substance rather than form.

...Good public administration is concerned with speed of decision, particular in the final field.

...Good public administration requires a proper consideration of the public interest. In this context, the Secretary of State is the guardian of the public interest.

...Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or judicial persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned.

...Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.

106. We may now look at some of the pronouncements of this Court including the authorities cited by Mr. Ashok Sen.

107. *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, was a case in which the Court was concerned with the award of a contract for show of sponsored TV serial. At page 92 in paragraphs 5 and 6 it was held thus :

It is well settled that there should be fair play in action in a situation like the present one, as was observed by this Court in *Ram and Shyam Company Vs. State of Haryana and Others*, It is also well settled that the authorities like the Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*,

While, as mentioned hereinbefore, fairplay in action in matters like the present one is an essential requirement, similarly, however, 'free play in the joints', is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere as the present one. Judged

from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.

108. In *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, the concept of reasonableness in administrative law came to be dealt with elaborately by one of us, Venkatachaliah, J. (as he then was). In paragraphs 37 to 46 the Court observed thus :

It was urged that the basic concept of the manner of the development of the real estate and disposal of occupancy right were visited by unreasonableness. It is a truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out :

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority'....

In the arguments there is some general misapprehension of the scope of the "reasonableness" test in administrative law. By whose standards of reasonableness that a matter is to be decided? Some phrases which pass from one branch of law to another - as did the expressions 'void' and 'voidable' from private law areas to public law situations - carry over with them meanings that may be inapposite in the changed context. Some such thing has happened to the word "reasonable", "reasonableness" etc. In *Tiller v. Atlantic Coast Line Rail Road Company* justice frankfurter said :

A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas.

Different contexts in which the operation of "reasonableness" as test of validity operates must be kept distinguished. For instance as the arguments in the present case invoke, the administrative law test of 'reasonableness' as the touchstone of validity of the impugned resolutions is different from the test of the 'reasonable man' familiar to the law of torts, whom English law figuratively identifies as the "man on the Clapham omnibus". In the latter case the standards of the 'reasonable man', to the extent a reasonable man' is court's creation, is in

a manner of saying, a mere transferred epithet Lord Radcliffe observed : (All ER p.160)

By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself....

See *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] 2 All ER 145.

Yet another area of reasonableness which must be distinguished is the constitutional standards of reasonableness; of the restrictions on the fundamental rights of which the court of judicial review is the arbiter.

The administrative law test of reasonableness is not by the standards of the "reasonable man" of the torts law. Prof. Wade says:

This is not therefore the standard of 'the man on the Clapham omnibus'. It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called 'Wednesbury unreasonableness' after the new famous case in which Lord Greene, M.R. expounded it.

Referring to the doctrine of unreasonableness, Prof. Wade says in *Administration Law* (supra):

The point to note is that a thing is not unreasonable in the legal sense merely because the Court thinks it is unwise.

109. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, it was observed thus:

In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'.

110. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, this Court observed thus :

...In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters

they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

111. In *Union of India and others Vs. Hindustan Development Corpn. and others*, this Court held thus:

...the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In *Erusian Equipment and Chemicals Ltd. v. State of W.B.* this Court observed as under:

When the Government is trading with the public, 'the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions'. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure.

The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an

administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

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

112. Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

Point No. 2 : Whether the selection is vitiated by arbitrariness?:

113. Mr. Soli J. Sorabjee, learned Counsel appearing for Tata Cellular argued that there are clear instances of arbitrariness.

114. Criterion No. 2.4.7 has been totally ignored and excluded. This has been so admitted. No marks have been awarded on this scope under this criterion.

115. Note II of the same General conditions 2.4.7 says minimum reliance on Indian Public financial institutions will be preferred. This requirement has been breached by Bharti Cellular, Mobile Telecom, Sterling Cellular and Skycell Communication. They have borrowed from commercial banks 4.87 per cent, 43.48 per cent and 34.41 per cent respectively. This criterion carries 8 marks. In spite of the borrowing they have been awarded 6, 8 (full marks), 5 and 7 respectively. The company, Tata Cellular, which had not borrowed at all from the commercial banks, has been awarded only 4 marks. It requires to be noted that borrowing from commercial banks was prohibited by Reserve Bank of India.

116. Then again, one of the prescribed criterion is 2.4.6 which carries 12 marks, namely, the financial strength of the partner company. The annual turnover from Tata Cellular, from Indian parameter was 12, 000 crores and annual turnover of their foreign parameters was 51,000 crores yet what has been awarded is only 9 marks. As against this Hutchison Max has only an annual turnover of 75 crores and rupees 6,600 crores of foreign parameter yet it has been awarded 12 marks. Equally, Sterling Cellular was turnover according to its bid document was 77 crores; the foreign parameter is unknown, it has also been awarded 9 marks.

117. The cut-off date for financial bid document was fixed as 17.8.92. To examine and evaluate the same a committee was set up. The committee adopted some parameters and devised a marking system, it is under:

Parameter	Total Marks	Rental	50	Project Financing	8	Foreign Exchange inflow/ outflow	10	Purchase plan for Cellular equipment within the country including tie-ups with the proposed Indian manufacturers	5	Experience	15	Financial strength	12
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Note : No marks were allotted for the seventh criterion of financial projections of Cellular Mobile Service.

118. The report of the Tender Evaluation Committee on this aspect states as under:

One of the parameters is about the financial projection. The Committee discussed about the reliability of financial projections made by the bidders and came to the conclusion that it is not possible for them to verify the reliability of the projections which are based on individual postulations about the number of subscribers, traffic, tariff, financial structure etc. For this purpose we have to go by the data furnished by the bidders at its face value. In any case the financial data, having relevance to evaluation of the tender have well been covered under various parameters.

119. Annexure I to the Report of the said Committee shows the manner the parameters and their weightage were given to each criterion. The debt/equity ratio is 1.5 for city of Bombay. It has been rightly assigned 3 marks.

120. The bid proforma of Bharti Cellular, Mobile Telecom, Sterling Cellular and Skycell indicates minimum reliance on financial institutions. It has also made distinction between loans from public financial institutions and banks. Therefore, there is a confusion on the part of Tata Cellular about this requirement with loans from the banks.

121. Records reveal that in the case of India Telecomp while awarding marks care was taken to exclude the open market projects and foreign exchange from the evaluation process.

122. As regards Skycell they had projected their operation in Madras for initial years which would be below profitable levels. Therefore, no dividend would have been paid to their foreign collaborators participating in the equity of company. The foreign exchange inflow position in their case was considered to be better. The markings came to be awarded on the same basis as in the case of all the bidders. The foreign collaborators of Skycell, B.P.L. Systems and Projects, Usha Martin, Bharti Cellular and Tata Cellular specifically undertook to cover the foreign exchange funding by equity and loans. International roaming has been correctly taken into consideration. As submitted by the learned Solicitor General roaming is defined in paragraph 1.3.1.2 of N.I.T. as follows :

Roaming: This feature shall enable a subscriber to communicate in a cellular system other than its home registered one.

123. Paragraph 1.3.1.18 talks of home location registered.

124. Paragraph 1.3.1.19 deals with Visitor Location Register (VLR) which says as follows:

Visitor location register (VLR) : shall be able to store the following information. Their functions shall also include data retrieval, data collection, update of data entry, once PLMNs are established.

- The IMSI

- The mobile Station International ISDN number
- The Mobile Station Roaming number, if allocated at location updating.
- The temporary Mobile Station Identity, if applicable
- the location area where the mobile station has been registered.
- supplementary service parameters.
- any other information needed for management of mobile station.

125. All these paragraphs will clearly establish that the system provides for facility of roaming to visitOrs. International roaming in G.S.M. is well-accepted technique.

126. GSM is defined as a Global System for Mobile communications. The GSM specifications are highly standarized. This means that the systems that are designed as per GSM specifications will be compatible with each other and, therefore, can be easily connected together from day one.

127. Roaming in GSM Cellular mobile systems means that a subscriber belonging to one operator can use his telephone to receive and make calls while he is in the area of another operator automatically. When a subscriber goes into the area of another operator, who has a roaming agreement with his another operator, the details of the subscriber available in the HLR (Home Location Register) of the home MSC (Mobile Switching center) are obtained by the visitor MSC and placed in the VLR (Visitor Location Register). The subscriber can originate and receive calls without feeling any difference. The roaming can be easily extended internationally and is already being done in parts of Europe. Since the systems are compatible, all that is required is an agreement between the operators for revenue sharing etc.

128. Thus, we find the argument that paragraph 2.4.7, namely, the financial projection of the proposed Cellular Mobile Cellular and the 7th criterion having been left out of consideration cannot be accepted.

Point No. 3 Bias of Mr. Nair - Whether affects the selection?

129. In Black's Law Dictionary Sixth Edition at page 162 bias defined as under:

Inclination; bent; prepossession; a pre-conceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. State ex rel. Mitchell v. Sage Stores Co. 157 Kan. 622.

130. The rule of bias is founded on the well-known maxim Nemo judex non

cause sua: no person can be a judge in his own cause.

131. De Smith's Constitutional and Administrative Law New Edition at page 583 states as follows:

First, an adjudicator must not have any direct financial or proprietary interest in the outcome of the proceedings. Secondly, he must not be reasonably suspected, or show a real likelihood, of bias.

132. In the instant case, the first aspect of the matter does not arise. As regards the second, the law is as stated by De Smith's Constitutional and Administrative Law New Edition at page 584-85 :

If an adjudicator is likely to be biased he is also disqualified from acting. Likelihood of bias may arise from a number of causes: membership of an organisation or authority that is a party to the proceedings; partisanship expressed in extra-judicial pronouncements; the fact of appearing as a witness for a party to the proceedings; personal animosity or friendship towards a party; family relationship with a party; professional or commercial relationship with a party; and so on. The categories of situations potentially giving rise to a likelihood of bias are not closed.

...How should the test of disqualification for likelihood of bias be formulated?... A more common formulation of the test is: Would a member of the public, looking at the situation as a whole, reasonably suspect that a member of the adjudicating body would be biased? Another common formulation is: Is there in fact a real likelihood of bias? There is no need, on either formulation, to prove actual bias; indeed, the courts may refuse to entertain submissions designed to establish the actual bias of a member of an independent tribunal, on the ground that such an inquiry would be unseemly. In practice the test of 'reasonable suspicion' and 'real likelihood' of bias will generally lead to the same result. Seldom indeed will one find a situation in which reasonable persons adequately apprised of the facts will reasonably suspect bias but a court reviewing the facts will hold that there was no real likelihood of bias. Neither formulation is concerned wholly with appearances or wholly with objective reality. In ninety-nine cases out of a hundred it is enough for the court to ask itself whether a reasonable person viewing the facts would think that there was substantial possibility of bias.

133. Geoffrey A Flick in his work on Natural Justice (Principles and Practical Application) 1979 Edition at 118-120 states :

PERSONAL INVOLVEMENT

Whenever a decision-maker becomes personally involved with one of the parties there arises the suspicion that a determination may not be reached exclusively on the merits of the case as discussed at the hearing. Unlike allegations of bias by reason of the pecuniary interest of the decision-maker however, allegations of bias founded upon a personal involvement will only result in disqualification

where there is a real likelihood that a hearing will not be fair: de Smith at 232-37; David @ 12.02.

The most obvious group of cases calling for scrutiny are those in which one of the parties has close ties of kinship with the decision-maker. A chairman of county commissioners, therefore, cannot hear a petition to build a new road which was intended to pass over land belonging to his brother-in-law; nor can a member of a zoning commission determine his wife's application for a change in zoning from residential to business: *Low v. Town of Madison* 60 A 2d 774. In the last cited case the court was concerned with both the family sentiment that was present and with the opportunity for the wife to have what in reality a private hearing before the board with her husband acting as advocate: see 778. But not all family relationships will disqualify and, by way of contrast, on the circumstances of one particular case it was said that a board of adjustment could decide an application by a company for permission to develop a free parking area despite the fact that an employee of the company was the wife of one board member and the fact that a third or fourth cousin of another board member was the president of the company: *Moody v. City of University Park* 278 SW 2d 912 (Dt Civ App Tex 1955).

...

Disqualification on the basis of personal involvement is not, of course, limited to the above two situations but may result whenever there is a sufficient nexus between the decisionmaker and a party to justify the appearance that this nexus may influence the decision reached: of *R. v. Altrincham Justices, Ex parte Pennington* (1975) QB 549. Street CJ has stated the law in this respect in yet another New South Wales decision: *Ex Parte Burnett, Re Wurth* (1955) 72 WN (NSW) 457. The last cited case involved a former officer of the Department of Education who later sat as a member of the Public Service Board inquiring into alleged false and scandalous allegations made by a teacher against various persons, including the officer in question, and during the course of his judgment street CJ observed:

Where bias arises not from (pecuniary) interest, the officer must have so conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons.

Put in other words, the issue is not merely whether justice has in fact been done, but whether it has manifestly and undoubtedly been seen to be done. It may, therefore, be improper for the clerk of the court to act as a solicitor for a party. Similarly, it may be unwise for a headmaster to sit in judgment upon a case involving a former pupil who had been adversely criticised in a detailed staff report signed by the headmaster some three months previously even where the existence of the report has been forgotten: *R. v. Abingdon Justices, Ex Parte Cousins* (1964) 108 Sol. J. 840.

134. The leading cases on bias may now be seen.

135. In *R v. Camborne Justices, Ex parte Pearce* (1954) 2 All ER 850 it was held:

In *R v. Essex, jj. Ex P. Perkins* (9) Avory, J., said (1927) 2 K.B. 488:

We have here to determine, however, or not there might appear to be a reasonable likelihood of his being biased.

And SWIFT, J., said (*ibid.*, 490):

It is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiased. As LORD HEWART, C.J., said in *R v. Sussex JJ. Ex p. McCarthy* [1924] 1 K.B. 259 : 'Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' might a reasonable man suppose that there had here been such an interference with the course of justice?

In *R v. Salford Assessment Committee, Ex p. Ogden* (10) SLESSER, L. J. [1937] 2 All E.R. 103 and LUXMOORE, J. (*ibid.*, 108) applied the "reasonable likelihood" test, while GREENE, L.J. (*ibid.*, 107) dissented only on the inference to be drawn from the facts. In *Cattle v. Cattle* (11) SIR BOYD MERRIMAN, P. [1939] 2 All E.R. 541 asked himself the question whether the party complaining.

...might reasonably have formed the impression that Mr. Browning (the Chairman of the bench) could not give this case in unbiased hearing.

Bucknill, J., said (*ibid.*):

The test which we have to apply is whether or not a reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice....

In the judgment of this Court the right test is that prescribed by BLACKBURN, J.L.R. 1 Q.B. 233 in *R v. Rand* (1), namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceedings a real likelihood of bias must be shown. This court is, further, of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In the present case, for example, the facts relied on in the applicant's statement under R.S.C. Order 59, Rule 3(2), of the grounds of his application might create a more sinister impression that the full facts as found by this Court, all or most of which would have been available to the applicant had he pursued his inquiries or learned that Mr. Thomas was a member of the Cornwall County Council and none of these further facts was disputed at the hearing of this motion. The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of LORD HEWART, C.J., in *R v. Sussex JJ. Ex p. McCarthy* [1924] 1 K.B. 259 that it is.

Of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

136. In *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and Ors.* [1968] 3 All E.R. 304 it was held thus:

...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: See *R v. Huggins* (8); *R v. Sunderland justices* (9), per Vaughan Williams, L. J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v. Camborne Justices, Ex P. Pearce* (10); *R v. Nailsworth Justices, Ex.P. Birds* (11). There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking : "The judge was biased

137. In *R v. Liverpool City Justices, ex parte Topping* [1983] 1 All ER 490 it was observed:

In the past there has also been a conflict of view as to the way in which that test should be applied. Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias? (For a discussion on the cases, see de Smith's *Judicial Review of Administrative Action* (4th edn. 1980) pp 262- 264 and H W R Wade, *Administrative Law* (5th edn, 1982) pp 430-432.) We accept the view of Cross LJ, expressed in *Hannam v. Bradford City Council* (1970) 2 All ER 690, (1970) 1WLR 937, that there is really little if any difference between the two tests:

If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias. Of course, someone else with inside knowledge of the character of the members in question might say: "Although things don't look very well, in fact there is no real likelihood of bias." But that would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased.

We conclude that the test to be applied can conveniently be expressed by slightly adapting in words of Lord Widgery, C.J. in a test which he laid down in *R. v. Uxbridge Justices, ex p. Burbridge* (1972) Times 21 June and referred to by him in *R v. Mclean, ex p. Aikens* [1974] 139 JP 261 : would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that fair trial for the applicant as not possible?

138. In *University College of Swansea v. Cornelius* [1988] I.C.R. 735 holds:

Cases of bias and ostensible bias had to be regarded in the light of their own circumstances. The circumstances of this case could have no relevance to other cases.

139. The Indian Law can be gathered from the following rulings:

In *Manak Lal v. Dr. Prem Chand* [1955] SCR 575 it was held thus:

But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. "The principle", says Halsbury, "nemo debet esse iudex in causa propria sua precludes a justice, who is interest in the subject-matter of a dispute, from acting as a justice therein". In our opinion, there is and can be no doubt about the validity of this principle and we are prepared to assume that this principle applies not only to the justices as mentioned by Halsbury but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of parties.

140. In *J. Mohapatra and Co. and Another Vs. State of Orissa and Another*, it was observed thus:

It is no answer to say that an author-member is only one of the members of the Assessment Sub-Committee and that the ultimate decision rests with the State Government which may reject any book out of the list of approved books. A similar argument was rejected by this Court in *Kraipak's* case. The State Government would normally be guided by the list approved by the Assessment Sub-Committee. Further, to say that such author-member is only one of the members of the Assessment Sub-Committee is to overlook the fact that the author-member can subtly influence the minds of the other members against selecting books by other authors in preference to his own. It can also be that books by some of the other members may also have been submitted for selection and there can be between them in quid pro quo or, in other words, you see that my book is selected and in return I will do the same for you. In either case, when a book of an author-member comes up for consideration, the other members would feel themselves embarrassed in frankly discussing its merits. Such author-member may also be a person holding a high official position whom the other

members may not want to displease. It can be that the other members may not be influenced by the fact that the book which they are considering for approval was written by one of their members. Whether they were so influenced or not is, however, a matter impossible to determine. It is not, therefore, the actual bias in favour or the author-member that is material but the possibility of such bias. All these considerations require that an author-member should not be a member of any such committee or sub-committee.

141. In *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, this Court emphasised the reasonable likelihood of bias thus :

This Court emphasised that it was not necessary to established bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. The likelihood of bias may arise on account of proprietary interest or on account of personal reasons, such as, hostility to one party or personal friendship or family relationship with the other. Where reasonable likelihood of bias is alleged on the ground of relationship, the question would always be as to how close is the degree of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

142. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, the law was stated by one of us, Venkatachaliah, J. (as he then was) as under :

As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him.

143. Reference was made therein to a dictum laid down by Justice Frankfurter in *Public Utilities Commission of the District of Columbia v. Pollack* 343 US 451 which is reproduced as under :

The judicial process demands that a judge move within the frame work of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings or which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges rescue themselves. They do not sit in judgment....

144. In *International Airports Authority of India Vs. K.D. Bali and Anr*, this Court

observed thus:

Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what are the parameter by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the administration of quasi-justice as are involved in the adjudicatory process before the arbitrates. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show what, even if there was misconduct on his part, the award was unaffected by it, and was reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russel on Arbitration, 18th Edition, page 378 and observations of Justice Edition, page 378 and observations of Justice Boyd in *Re Brien and Brien. Lord O' Brien in King (De Vosci) v. Justice of Queen's Country* observed as follows :

By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter of suspicion rested on reasonable grounds - was reasonably generated - but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision.

(Emphasis supplied)

145. In *Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc.*, this Court observed thus:

But the effects and consequences of non-compliance may alter with situational variations and particularities, illustrating a 'flexible use of discretionary remedies to meet novel legal situations'. "One motive" says Prof. Wade "for holding administrative acts to be voidable where according to principle they are void may be a desire to extend the discretionary powers of the Court". As observed by Lord Reid in *Wiseman v. Borneman* natural justice should degenerate into a set of hard and fast rules. There should be a circumstantial flexibility.

146. In the light of this let us find out whether bias has been established?

147. The Report of the Tender Evaluation Committee was made on 16.5.92. In that Committee Mr. B.R. Nair was a party. As seen above, the offer of the four companies did not fully satisfy the criteria. Their cases were recommended to be considered for condonation. The four companies are:

1. BPL Systems and Projects
2. Mobile Communication India private Limited
3. Mobile Telecom Service limited and
4. Indian Telecom private Limited.

148. Mr. B.R. Nair, Member (Production) made the following note:

I agree with the recommendations of the Evaluation Committee that the four firms must be in paragraph 3 of Page 1/N should be included in the short-list. Thus, there would 14 companies in the short-list instead of 16 recommended by adviser (O).

149. On 8th of September, 1992, Mr. Nair, as Member of the Committee, agreed to a noting that only three companies, Bharti Cellular, BPL Systems and Projects and Skycell qualified for selection. After further discussion, 8 companies came to selected and the note was accordingly put up on 9.10.92. This recommendation is agreed to by Mr. Nair.

150. According to Mr. Harish Salve, the very presence of Mr. Nair itself will amount to bias.

151. In the case, as noted above, the crucial test is whether there was a real likelihood of bias. As to how Mr. R. Satish Kumar, the son of Mr. B.R. Nair, came to be appointed in BPL Systems and Projects is explained in the additional affidavit filed on behalf of BPL Systems & Projects Ltd. Respondent No. 10, by Mr. S. Sunder Rao, Corporate Personnel Manager of BPL Group of Companies, including respondent No. 10 company. The relevant portion is extracted as under :

With regard to the selection and appointment of Shri R. Satish Kumar I state as follows:

That the respondent No. 10 company desired to employ certain manager and executives as follows :

- (i) Sr. Manager, (Push Button Telephone) for New Delhi, Bangalore and Bombay.
- (ii) Manager (Communications) for Madras, Calcutta and Bangalore.
- (iii) Territory Manager (Sales) for Delhi, Hyderabad and Madras.
- (iv) Sales Executives for Delhi, Madras, Kanpur Chandigarh, Baroda, Kochhi, Calcutta, Bhopal, Poona and Coimbatore.

These posts were advertised for in several newspapers as follows:

- (i) The Times of India, Delhi and Bombay Editions, (ii) The Hindustan Times, Delhi Edition, (iii) Statesman, Calcutta Edition, (iv) The Hindu, All India Edition, (v) Deccan Herald, Bangalore.

These advertisement appeared between 26th August, 1991 and 29th August, 1991. The eligibility conditions for the candidates was specified and with regard to the post of Territory Manager (Sales) it was mentioned that the candidates should be an Electronics/ Electrical Engineer with 5/6 years experience of office automation products, Computer, Telecom equipments, etc....

In response to advertisement Shri R. Satish Kumar applied for the post of Territory Manager (Sales) vide his letter dated 28th August, 1991 enclosing thereby his bio-data....

As per practice of the Respondent Company the bio-data of all the applicants were scrutinised by the Personnel Department and thereafter by the Asst. General Manager of the Respondent Company. Thereafter the short-listed candidates were called for interview on various dates. Shri Satish Kumar was called for an interview on 6th September, 1991. Two other candidates were also interviewed for this post. Shri Satish Kumar was interviewed by the Senior Officer of the company including myself. At the conclusion of the interview as per practice, an internal assessment form was filled by the interviewers....

On the basis of the said interview Shri Satish Kumar was selected and a letter dated 21st October, 1991 was addressed to him offering him the said post. Shri Satish Kumar was required to report for duty on or before 2nd December 1991 at Bangalore. Shri Satish Kumar however requested for some time to enable him to handover the charge in his previous company and this was agreed to by the company. Shri Satish Kumar accordingly joined respondent No. 10 on 6th January, 1992....

I state and submit that Shri Satish Kumar was selected by respondent No. 10 company in the normal course and the selection was purely on merit.

152. It is to be seen that Mr. Satish Nair is only one of the officers in BPL Systems and Projects, which has over 5500 employees in 27 offices all over India. There are 89 officers of his rank.

153. Mr. B.R. Nair was not a decision-maker at all. He was one of the recommending authorities. As Director General of Communication as well as Telecom Authority his involvement in the approval and selection of tender was indispensable. He came to be appointed as member (Services) on 29.5.92. By virtue of the Notification dated 28.7.92 Mr. B.R. Nair became the Director General of Telecommunication. As such, he could exercise all the powers u/s 3(6) of the Indian Telegraphs Act of 1885. Such a Telecom Authority has the right to grant cellular operating licences to the successful party and also reject any bids without assigning any reason. Registration fees, security deposit and other financial charges shall be fixed by the licensor in consultation with the Telecom Authority. This is what is stated in the financial bid. Therefore, Mr. B.R. Nair could not dissociate himself from the decision-making process. It is under these circumstances the High Court rightly applied the doctrine of necessity. This Court in Charan Lal Sahu Vs. Union of India, dealt with this doctrine which is stated as

follows :

The question whether there is scope for the Union of India being responsible or liable as joint tort-feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature, the learned Attorney General was right in contending that it was proper that the Central Government should be able and authorized to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural justice. The doctrine of necessity would be applicable in a situation of this nature. The doctrine has been elaborated, in Halsbury's Laws of England, 4th edn., page 89, paragraph 73, where it was reiterated that even if all the members of the tribunal competent to determine a matter were subject to disqualification, they might be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent tribunal can be constituted.

154. Therefore, we are unable to accept the contentions of Mr. Soli J Sorabjee and Mr. Harish Salve.

155. We hold Mr. B.R. Nair's involvement did not vitiate the selection on the ground of bias. Since we have reached this conclusion we are not going to the other question argued by Mr. F.S. Nariman whether India Telecom or Tata Cellular could urged this point relating to bias.

Point No. 4 : Whether the Apex Committee has been bypassed?:

156. After finding that only three companies qualified for selection on 8.9.92 the following note was made by Mr. G.T. Naryanan, Adviser (Operations) :

The financial bid which was approved by the apex committee was given to the short-listed bidders and these were received and opened on 17.8.1992. these were evaluated by the Tender Evaluation Committee (TEC). The evaluation report is placed below. The financial evaluation was done based upon the weightages of the various parameters namely, rental, financing, foreign exchange inflow/outflow, financial strength, experience and purchase plants. The rental was given the maximum weightage. The various guidelines made for giving the marks are at Annexure I (page 11, Flag 'A').

So far as the rental and other allied parameters are concerned, there are wide variations of rent, deposit, registration/connection fee. In some cases rent is zero. It was considered by the TEC that these are to be equated to one parameter as 'equated rental' and the method adopted was loading the basic rental and other charges like deposit, interest rate @ 13% per annum. Based upon these assumptions, the gradation for various bidders for each city is at

page 9 of the main report.

The Chairman and Member of the Telecom Commission were consulted in this regard. It was felt that the rate of interest adopted by the TEC was low, and the maximum lending rate of the State Bank of India as on 1.8.1992 viz. 21.75% is more appropriate to adopt both for refundable and non-refundable deposits and non-returnable charges. For the non-refundable charges the monthly amortised value over 5 years at the lending rate viz. 21.75% should be used for loading the rental, to get at the equivalent rental value which represents the actual monthly burden on the subscribers., As per this guideline the TEC gave the fresh calculations on 7.9.1992 and a new gradation list was prepared which is placed at Flag 'B'.

157. After examining the TEC report the following points have come to light-

(i) M/s. Hutchison Max India Ltd. in their bid document (Annexure D) have not given proper and full compliance. The TEC has observed "Compliance to Chapter III (Operative Conditions) and Chapter IV (Financial Conditions) has not been indicated by the bidder". Thus, it clearly shows that they have not complied with these important conditions which form the very basis of the financial bid. It is evident that the bidder has serious reservations about financial conditions and operative conditions and if granted a licence, there is a possibility of litigation.

(ii) Since we require good operators with experience the minimum of 10 marks out of 15 for this parameter is considered a must and those bidders who have scored less than 10 for this parameter should be disqualified. This represents an experience of handling of 1 lakh cellular phones or 80,000 with a GSM licence.

(iii) In accordance with the policy of the Govt. for encouraging foreign exchange investment only those who do foresee the inflow of foreign exchange should be considered. For this parameter the TEC had allocated 5 marks to those bids which were foreign exchange neutral. Those getting more than 5 indicate a net foreign exchange inflow. Thus, 5 marks or above for this parameter is considered essential and those getting below 5 marks deserves to be disqualified.

So with the points listed above taken into account, the following companies qualify city-wise as per the gradation -

Delhi Bombay 1. Bharati Cellular 1. Bharati Cellular 2. BPL Systems & Projects Ltd. 2. BPL Systems & Projects Ltd. 3. Sterling Cellular 3. Sterling Cellular 4. Tata Cellular 4. Tata Cellular Calcutta Madras 1. Bharati Cellular 1. Bharati Cellular 2. Sterling Cellular 2. Sterling Cellular 3. Tata Cellular 3. Tata Cellular (on an exclusive basis) (on an exclusive basis) While making the final selection, it should be borne in mind that sterling Cellular has got a problem which is explained in the notes of DDG(Vig.) placed below. Sterling Computer which is mentioned in the notes of DDG(Vig.) flag C has a tie up with Sterling Cellular from the list of approved operators.

158. Summarizing, the following operators are recommended for giving the

cellular licence -

														Name of
the Equated FE Expe- Over Collaborator Company rental Inflow/ rience all orator														1
Outflow	2	3	4	5	6									
Bombay 1. Bharati 37.3 7 15 78.3 SRF France Cellular 33.2 6 14 76.2 France 2.														
BPL Telecom Systems & Projects Ltd.														Delhi 1.
Bharti 41.0 8 15 83.0 SRF France Cellular 33.8 6 14 76.8 France Telecom 2. BPL														
Systems & Projects Ltd.														Madras
1. Bharti 38.5 8 15 80.0 SRF France Cellular 24.6 10 15 71.6 Bell South 2.														
Skycell														

Calcutta	1.	Bharti	27.1	8	15	69.1	SRF	France	Cellular
----------	----	--------	------	---	----	------	-----	--------	----------

There

is no other bidder who qualifies for giving the licence. Even though Tata Cellular fulfils all the conditions but in bid - document they have based their calculations on single operator concept. However, we may, if approved by Telecom Commission and High Power Committee make a counter offer to operate on a non-exclusive basis.

After the operators are selected, tariff fixation and other licensing terms can be negotiated by the Telecom authorities.

A separate note is being prepared for sending to the High Power Committee based upon the observations that are likely to be made on this note.

For approval, please.

sd/-8.9.92 (G.T. NARAYAN) Adviser (Operations)

Member (Services)

Member (Productions)

Member (Finance)

Chairman (T.C.)

The proposal on pre-page with all the relevant calculation sheets and TEC report, copy of the F.B. document, may please be sent to the high power committee nominated by NOS (C) for its consideration and for making final recommendations to the Govt. Re. selection of the licencees.

sd/- 10.9.92

Adv. (O) - Out of Stn.

DDG (TM)

159. A brief note, copies of TEC report, financial tender document have been sent to the High Power Committee. The Note was shown to Member (S) before dispatch.

(Emphasis supplied)

sd/- 10.9.92

Adv. (O)

sd/-

(G.T. Narayan)

14.9.92

On 10. 9.92 the Chairman (TC) made the following note:

In pursuance of the orders of the MOS(C), a Committee consisting of Principal Secretary to the Prime Minister, in his capacity as chairman, foreign Investment Promotion Board, Secretary Finance, Secretary Electronics and Chairman Telecom Commission was appointed to make recommendations regarding selection of the franchisees to provide Cellular Mobile Telephone Service in the four metro cities. This committee examined the bids received against the tenders floated on the basis of Tender Evaluation Committee report and made recommendations to MOS(C) regarding short-listing of the bidders and the financial bids document. The financial bids from the short-listed bidders have now been received and examined in the Department. The recommendations of the Evaluation Committee are being forwarded to the members of the High Court Level Committee appointed by MOS (C) for examination and making recommendations to the Government regarding final selection of the franchisees.

I spoke to Principal Secretary to the Hon'ble Prime Minister with the request to expedite the process. He indicated that the Committee earlier appointed by MOS(C) stands dissolved and a fresh Committee will have to be nominated for considering the financial bids etc. He also indicated that he proposes to put up the case to the Hon'ble Prime Minister for his clearance. It is, therefore, proposed to issue a letter to the members of the High Level Committee as per draft placed below. The same may please be seen by MOS (C) for approval before issue.

In the draft letter it has been indicated that the same Committee will also examine the bids received for provision of the Paging Service in 27 cities - first for short- listing and finalising the financial bids and the later for selection of the franchisees. The documents relating to short- listing of Paging Service bidders have also been sent separately to the members of the Committee.

sd/- SEPT 10, 1992 (H.P. WAGLE) CHAIRMAN (TC)

MOS(C)

11.9.92

D.O. to Prin. Sec. with copies to F.S./Elec. Sec. may issue

sd/- 14/9

P.S. D.O. issued, pl. sd/-14/9

DDG (TM)

160. However, the D.O. came to be issued in accordance with the note of 10.9.92 dissolving the apex committee. Therefore, it is not correct to contend, as urged by Mr. Harish Salve, that the apex committee had been bypassed. The learned Solicitor General is right in his submission.

Point No.S: Entry of Hidden Criteria - Whether valid?

161. In the original tender document, paragraph 2.2.1 in relation to the Subscriber's Capacity states as follows:

Subscriber Capacity: 1000 with modular expansion upto min. 40,000 subscribers.

162. In Section II of General Condition Clause 1 (d) states:

Copy of the agreement between the Indian and the foreign partner, if any foreign partner is proposed.

163. Chapter II of General Conditions in paragraph 2.4.5 states:

Experience of the Foreign operating partner;

164. On 8.9.92 Mr. G.T. Narayan, Adviser (Operations) in his note in the file inter alia stated as follows:

Since we require good operators with experience the minimum of 10 marks out of 15 for this parameter is considered a must and those bidders who have scored less than 10 for this parameter should be disqualified. This represents an experience of handling of 1 lakh cellular phones or 80,000 with a GSM license.

165. These hidden criteria came to be evolved in the following context:

The Apex Committee indicated the parameters in which it stated that "... the committee decided to consider foreign companies who have experience of operating a cellular system of at least five years and who have developed a reasonable sized network (25,000 subscribers).

166. Inter alia it stated in the report of the Selection Committee for the Cellular Mobile Telephone Service Tender :

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

(i) The experience of the bidding company. Since none of the Indian companies have any experience of operating a cellular service, this would necessary apply to the foreign collaborator. Also since GSM technology is only now beginning to come into commercial operation, the Committee decided to consider foreign

Companies who have experience of operating a cellular system of at least 5 years and who have developed a reasonable sized network (25,000 - 25,000 subscribers).

167. On 2.9.92 the Tender Evaluation Committee made the recommendations. Upon these recommendations Bharti Cellular got three cities, Delhi, Bombay and Madras. Even then BPL Systems and Projects did not feature. Therefore, it was directed that an additional output of gradation of different bidders for the four cities by adopting inter alia the highest lending rate of State Bank of India for 5 years for lending of monthly rental with simple interest on deposits. As per this revised gradation Bharti Cellular got Delhi, Calcutta and Madras. However, it was eliminated from Bombay.

168. On 8.9.92, the criterion of one lakh lines was introduced. It was suggested by Mr. G.T. Narayan, Adviser (Operations) that those who have secured less than 10 marks for this parameter should be disqualified, this is in relation to the experience of handing of one lakh cellular phones or 80,000 with GSM line. It is submitted that criterion of experience of 1 lakh lines helped elimination of Usha Martin in Bombay and created place for BPL Systems and Projects.

169. The criterion of experience was introduced as a ground of disqualification. If the criterion of experience of one lakh lines is a principal condition to qualify for consideration for Bombay and Delhi was introduced uniformly then Bharti Cellular could be disqualified. Thus, a relaxation of 80,000 with the GSM line was introduced. It is important to note the person who evolved this criterion did not consider Talkland as Bharti Cellular's collaborator.

170. As noted above, the learned Solicitor General would submit that as on 31.12.91 Bharti Cellular had experience of 81,085 lines of SFR France and 1,982 lines EMTEL making a total of 83,067 lines. Added to this, Talkland had an experience of 1,70,000 subscribers. The reference to the marks awarded for comparative evaluation in this context is irrelevant. Besides, even assuming that in comparative evaluation the holding of the licence may be given some weight; cannot be made the governing factor in determining the experience of a bidder for the purpose of its eligibility.

171. As a result of 8.9.92 recommendations, Bharti cellular got all the four cities. BPL System and Projects got two out of four cities. Only Skycell got Madras. No fourth party got any city. Having realised that this decision will patently be unacceptable a relaxation was made on 9.10.92 one day before the final decision whether those with less than one lakh lines experience could be considered for Calcutta and Madras. Even, on 9.10.92, Bharti Cellular was evaluated vis-a-vis SRF France and EMTEL Mauritius. There was no mention of Talkland. On 10.10.92, Bharti Cellular was again evaluation vis-a-vis its collaborators SFR France and EMTEL Mauritius. In the affidavit filed in the High Court the Government urged that "one lakh lines carrying 10 points was considered equivalent to 80,000 lines with GSM licence. This, however, had no impact on

Bharti Cellular. Bharti Cellular's collaborators included Talkland which is one of the highest service providers United Kingdoms."

172. The learned Solicitor General submits that the evaluation in the case of Bharti Cellular was correct and in any event, including Talkland, Bharti Cellular was properly considered. The parameter of experience had three components :

1. The number of subscribers
2. The number of countries
3. GSM experience.

173. It is true that during evaluation it was noted that any bidder with less 10 marks out of 15 for experience would stand disqualified. The cut-off of one lakh lines was in the context of minimum experience of 10 marks. Bharti Cellular had a collaborator other than Talkland, namely, SFR France. It was mentioned in Bharti Cellular's bid in its tender on 31.12.91 that the number of SFR France was over 80,000. By 31st December, 1992 it was estimated to be 1, 10,000. In August 1992 when the bids were submitted SFR France line experience could reasonably be expected to be above one lakh lines. In addition, SFR had a GSM Licence. In view of all, it would not be a unreasonable estimate on the part of experts to consider Bharti Cellular as having one lakh having lines' experience.

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

175. A careful perusal of the files shows that the Advisor (Operations) selected Bharti Cellular for franchise, with its foreign collaborators SFR France; EMTel Mauritius. The same was approved by the Chairman in his final proposal which was ultimately approved on 10th October, 1992. Thus, it is clear that at no point of time Talkland ever figured as Bharti Cellular's collaborator. SFR France, the foreign collaborator of Bharti Cellular had GSM Paris area Sept. 23, 1992. As on 31.12.91 it had 81,085 subscribers with no GSM experience. The number of subscribers was estimated to go upto 1,10,000 by 31st December, 1992. On the date of submission of the bid it was expected to cross the one lakh mark. The other collaborator EMTel Mauritius had only an experience of 1,982 lines. In order to make Bharti Cellular qualify Talkland is also included as a foreign collaborator. This is factually wrong, as noted above, because at no point of time Talkland was thought of as foreign collaborator for Bharti Cellular. Even then, as

seen from the file, Talkland is providing marketing, sales, customer care, billing services to both Vodaphone and Cellnet under contracts with both of them. This is evident from the material produced before us. It states :

Talkland's sole foundation is to distribute radiotelephone services. Unlike SFR in France it neither sets up nor manages networks. In the UK these two activities have been separated by the 1984 Telecommunications Act. While two operators develop and manage the networks some 20 marketing companies known as "service providers" deal with the end-user, undertaking marketing after-sales service and billing. This original mode of organization has proved beneficial and has helped to promote the rapid development of radiotelephone in the UK. At the beginning of 1992 there were already some 1.2 million subscribers. This corresponds to a penetration rate of more than 2% of the population, against around 0.7% in France. Talkland, with a market share of about 13%, is one of the foremost service providers. It has 165,000 subscribers and reports annual sales of some FRF 1.4 billion.

(emphasis supplied)

176. In Annexure VII experience of foreign collaborators Item 10 is Bharti Cellular. The number of subscribers that is put against it is 2,53,067. This figure could be reached only by including Talkland. It is necessary to point out that what is required is either experience of handling one lakh cellular phones or 80,000 with the GSM lines. Both the learned Solicitor General and Mr. Kouria would argue that service is relevant. But the nature of service that is contemplated here as per the tender document is found in Section III of Commercial Conditions at para 1.4. That reads as under:

Services refer to the scope of the services defined to be within the licence in para 4 Section IV.

177. Therefore, one has to obviously refer to Para 4 of Section IV which sets out the following:

In the first instance the system should be capable of providing the following services:

- Tele-services Information types services Speech Telephone Emergency calls Data Message handling system 300 bps access Short text Communication of short Alphanumeric messages Graphics Grp. 3 Facsimile - Bearer services Data transmission in Asynchronous duplex circuit mode with PSTN

300 bps (V 21)

1200 bps (V 22)

Data transmission in Synchronous duplex circuit mode with PSTN

1200 bps

2400 bps

Mobile access in the Asynchronous mode to the packet assembler/disassembler of packet switching network

300 bps 1200 bps

Mobile access in the synchronous mode to the packet switching network

2400bps 4800 bps

- Supplementary Services

In the first instance the following supplementary services may be provided:

- * Calling Number Identification Presentation
- * Calling Number Identification Restriction
- * Connected Number Identification Presentation
- * Connected Number Identification Restriction
- * Malicious Call Identification
- * Call Forwarding Unconditional
- * Call Forwarding on Mobile Subscriber Busy
- * Call Forwarding on No Reply
- * Call forwarding on Mobile Subscriber Not Reachable
- * Call Transfer
- * Mobile Access Hunting
- * Call Waiting
- * Call Hold
- * Completion of Call to Busy Subscriber
- * Three Party Service
- * Conference Calling
- * Closed User Group
- * Advice of Charge
- * Freephone Service
- * Reverse Charging (Called or Calling MS)
- * Barring of all Out going Calls
- * Barring of Outgoing International Call except those directed to the Home PLMN Country.

* Barring of all Incoming Calls

* Barring of Incoming Calls when Roaming outside the Home PLMN Country.

178. The reliance placed by Mr. Koura and learned Solicitor General on paragraph 2.1.1. of Section III of Commercial conditions to include services is not correct because that speaks of the obligations of the licensee. That is obvious as seen under :

2.1 Obligations of the Licensee:

2.1.1 The Licensee shall operate and provide and the SERVICES. He will be solely responsible for the installation, networking, operation, treatment of the complaints, issue of bills to his subscribers, collection of his component of the revenue, claims, damages arising out of this operation.

179. In the judgment under appeal the High Court has observed:

Thus, one lakh lines carrying 10 marks was considered equivalent to 80,000 lines with GSM Lines. Even otherwise the respondents say that this had no impact in the case of Bharti as its collaborators included Talkland who was one of the largest service providers in U.K. Experience of providing service was an important consideration and experience of Talkland in computing Bharti's foreign collaborators was correctly included in the computations and, thus, its experience exceeded 2.51 lakh lines. The respondents say that Bharti was treated on this basis and not on the basis of 80,000 lines. In support of this argument Mr. Gupta, learned Solicitor General, submitted that all services were to be provided by the licensee, and though Talkland had no operating experience it was having service experience for rendering service to subscribers which was an important factor. A subscriber is more concerned with the service than as to how the Cellular Telephone operates. The service would be of any type like billing, correction of defects in hand sets, shifting of phones, etc. The operation said service though go hand in hand we do not find anything wrong in taking into account the experience of Talkland which has been done by the respondents.

180. We are unable to support this finding as it clearly ignores that Talkland never figure as a collaborator for Bharti Cellular. Further, ignoring the disjunctive clause, two qualifications were sought to be subsumed to give an undue advantage to Bharti Cellular. Besides, the nature of service is as set out in Para 4 of Section IV as stated in Condition 1.4 of Section III. Thus, we hold, (borrowing the words of Donaldson L.J. *Emma Hotels Ltd. v. Secretary of the State for Environment* [1980] 41 P & CR 255 we could not see on what basis the Committee had reached its conclusion".

181. If, after excluding the experience of Talkland, whether still Bharti Cellular could fulfil the requisite qualification, namely, 80,000 CMS lines and whether SFR France with EMTEL Mauritius had that experience are matters which require to be factually analysed. The Committee may decide this factual aspect as on the date on which the offer was made i.e. 20th January, 1992. If the finding is

rendered in favour of Bharti Cellular it will qualify.

182. The other "hidden criteria" alleged is about the same foreign collaborator. The Chairman, Telecom Commission, in relation to these criteria noted "the element of competition will get vitiated if the two JVs with a common foreign partner were to be selected to provide the service at the same location."

183. Concerning this criterion the attack against BPL Systems and Projects, its foreign collaborator came to be changed in the middle and yet in violation of the conditions laid down in Chapter II, Clause 7 of the General Conditions. Originally, there were the following three foreign collaborators:

1. France Telecom Mobile International France
2. McCaw Cellular Commns. Inc. USA
3. LCC Inc. USA

184. At the second stage of financial bid, the name of the third partner has come to be omitted. This is the argument of Mr. Soli J. Sorabjee and Mr. Harish Salve. The dropping of McCaw resulted in a change of the joint venture which was not permissible. This is answered by Mr. F.S. Nariman, as noted above, that the deficiencies in tender conditions could be condoned. This argument is supported by reference to M/s. G. J. Fernandez Vs. State of Karnataka and others, and M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, . The condition relating to change does not include the dropping out one condition of 2 or 3 collaboratOrs. Further, this condition is not found in the tender documents but only financial bid documents.

185. BPL Systems and Projects submitted its financial bid on 17.8.92. In that bid McCaw was never shown. Inasmuch as the financial bid was received by BPL Systems and Projects only on 31.7.92 Condition No. 7 was inapplicable or impossible of compliance because the dropping was before Condition No. 7 was brought to the notice of BPL Systems and Projects. Where, therefore, the financial bid came to be submitted on 17.8.92 no question of alternation would ever arise. After all the object of the first stage was only to short-list and not to allot the franchise. Therefore, there is nothing wrong in the same.

186. In the financial bid Clause 7 of Chapter II reads as follows:

No change can be made in the Indian or foreign partners already indicated in the first stage bid.

187. It is common case between the parties that originally the foreign collaborators of BPL Systems and Projects were three, as mentioned above.

188. So this is the position at the first stage, on 16.5.92, when the evaluation took place. Clause 7 of Chapter II, quote above, forbids only change.

(Emphasis supplied)

189. On 17.8.92, when it submitted bid, McCaw had been dropped out. It does not amount to a change of foreign collaborator. Still, the original two remained. There is no change in joint venture. This does not violate Clause 7 of Chapter II. (Emphasis supplied) 185. Mr. F.S. Nariman has rightly placed reliance on the abovesaid two rulings relevant passages are quoted as under:

190. In *M/s. G. J. Fernandez Vs. State of Karnataka and others*, this Court *inter alia* observed :

...In the first place, although, as we have explained above, para V cannot but be read with para I and that the supply of some of the documents referred to in para V is indispensable to assess whether the application fulfils the pre-qualifying requirements set out in para I, it will be too extreme to hold that the omission to supply every small detail referred to in VI would affect the eligibility under para I and disqualify the tenderer. The question how far the delayed supply, or omission to supply, any one or more of the details referred to therein will affect any of the pre-qualifying conditions is a matter which it is for the KPC to assess. We have seen that the documents having a direct bearing on para I viz. regarding output of concrete and brick work had been supplied in time. The delay was only in supply the details regarding "hollow cement blocks" and to what extent this lacuna affected the conditions in para I was for the KPC to assess.

Secondly, whatever may be the interpretation that a court may place on the NIT, the way in which the tender documents issued by it has been understood and implemented by the KPC is explained in its "note", makes it clear that the KPC took the view that para I alone incorporated the "minimum prequalifying/eligibility conditions " and the data called for under para V was in the nature "general requirements". It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract. They only decided, in view of the contentions raised by the appellant that para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future NITs that only the fulfillment of pre-qualifying conditions would be mandatory. If a party has been consistently and bona fide interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to

punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines in all in any station but that any deviation, if made, should not result in arbitrariness or discrimination.

191. In *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, , this Court observed :

...As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the conditions. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases.

The High Court observed thus:

We also do not find any error on the part of the respondents in treating the financial bid of BPL in order if at the stage BPL dropped one of its three foreign collaborators (Which were named by it at the technical bid stage) as otherwise financial bid satisfied all the criteria and dropping of one of the collaborators made no difference.

It further observed:

We, therefore, find that stand of the petitioner that any undue preference had been given to some of the companies cannot be upheld. We even otherwise do not find that deviation or relaxation in the standards prescribed has resulted in any arbitrariness or discrimination. (See in this connection *M/s. G. J. Fernandez Vs. State of Karnataka and others*, . We do not think it is necessary for us to go into each and every deficiency as us to go into each and every deficiency as alleged by the petitioner we find that the action of the respondents had been bona fide. Motivation is providing of best possible service to the consumers.

192. We are in agreement with this finding.

193. Yet another attack that is made against BPL Systems and Projects is that it submitted its application for foreign collaborator on 22.4.92 to SIA beyond the cut-off date of 31.3.92. It should not loom large because there was a confusion as to who was competent authority to receive the application. As a matter of fact BPL Systems and Projects did submit its application for foreign collaboration on 31.3.92 to the Reserve Bank of India. When that application was returned on

20th April, 1992 it came to be sent to SIA on 22.4.92. We do not think BPL Systems and Projects could be faulted on this score. Equally, the argument that the memorandum and articles do not mean cellular business does not merit acceptance at our hand. In fact, the High Court has correctly construed the main object, namely, to design, develop, fabricate, manufacture, assemble, exporting from and importing into India by self or otherwise dealing and act as consultants and render services in connection with all kinds of telecommunication equipments as including cellular telephones.

194. Now we go on to Hutchison Max. It came to be rejected by the TEC, Relevant note dated 9.10.92 Inter alia reads as follows :

Hutchison Max : Non-compliance of operative and Financial Conditions laid down in Chapter III at the time of opening of Financial Bids. They have accepted these conditions, through a letter, explaining their earlier non-compliance as typographical error.

Section II, General Conditions, para 3 states as under:

3 Compliance:

Point to point compliance report in respect of Technical, Commercial and views on Financial conditions must be submitted. Deviation, if any, must be separately highlighted. In case compliance report is not enclosed with the offer, the offer shall not be considered.

195. The proforma of the compliance statement is in the following form:

This company hereby agrees to fully comply with all Technical, Commercial and General Conditions of Tender document No. 44-24/91-MMC including amendments/clarifications issued by the Department of Telecom without any deviations and reservations.

This company also hereby agrees to fully comply with all paragraphs of Chapter II General Conditions, Chapter III : Operating Conditions, Chapter IV: Financial Conditions and Chapter V : Tariffs of document number 44-24/91 MMC(FINANCIAL) without any deviations and reservations.

Signature of the authorised signatory of the bidder/operating company

for and on behalf of---

196. The compliance statement, as submitted by (Name of the company)" Hutchison Max Telecom is as under:

Compliance Statement

This company hereby agrees to fully comply with all Technical, Commercial and General conditions of Tender document No. 44-24/91-MMC including amendments/clarifications issued by the Department of Telecom without any deviations and reservations.

This company also hereby agrees to fully comply with all paragraphs of Chapter II: General Conditions and Chapter V: Tariffs of Document number 44-24/91-MMC(FINANCIAL) without any deviations and reservations.

Signature of the authorised signatory of the bidder/operating company.

For and on behalf of HUTCHISON MAX TELECOM PRIVATE LIMITED

Sd/- (ASHWANI WINDLASS) DIRECTOR.

197. In all the four separate tender documents similar compliance statements were filed.

198. Therefore, obviously, there is no reference to either Chapter HI: Operating Conditions or Chapter IV: Financial Conditions. It has already been noted that for the second stage the last date for filing tender document was 17.8.92. On 11.9.92, Hutchison Max wrote a letter to the Minister for State for Communication about the inadvertant error due to a typographical/clerical mistake in not referring to Chapter HI or Chapter IV. It is relevant to note that in the concluding paragraph of that letter it is stated:

We reiterate and reconfirm our unequivocal compliance without any reservations and deviations with the said tender conditions. Accordingly, enclosed herewith is a corrected Compliance Statement duly signed by the authorised signatory of the Company which may kindly be taken on regard.

199. The proper Compliance Statement came to be filed later. Since it had not filed a proper Compliance Statement it had come to be excluded (which knowledge was gained by it) it made representations to the Chairman, Telecom Commission and the Prime Minister. According to Mr. K.K. Venugopal it is an accidental omission amounting to a clerical error. In support of this he cites Moffett Hodgkins & Clarke Company v. City of Rochester 178 US Supreme Court Reports 1108. The Headnote reads:

A mistake in the proposals by a bidder for a contract with a city, which is promptly declared by an agent of the bidder as soon as it is discovered and before the city has done anything to alter its condition, will not bind the bidder by reason of a provision in the city charter that in a bid shall not be withdrawn or canceled until the board shall have let the contract.

At page 1115 it reads:

The compliant is not endeavoring 'to withdraw or cancel a bid or bond.' the bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agrarian or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter

how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth #1,000,000 for #10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground. (82 Fed. Rep. 256)

200. The alternate submission is the question of even clerical error does not arise here because one month before acceptance Hutchison Max had sent the compliance form. Where the matter is purely technical the court should not exercise the power of judicial review. We find great force in this submission. We are clearly of the opinion that the mistake is in relation to a non-essential matter that is in relation to peripheral or collateral matter. There has been every intention to comply with the terms of the bid. For an accidental omission it cannot be punished. We concur with the High Court.

201. Regarding Sterling Cellular the note dated 9.10.92 inter alia states as under:

This J.V. has the Indian partner M/s. Sterling Computers Ltd. which is under investigation by CBI, in respect of their dealings with MTNL for publication of directions. Delhi H.C. has in recent judgment passed strictures on the deal. The Joint Venture has, therefore, been excluded from consideration. CBI report is, however, yet to be received and formal blacklisting proposal in respect of the first has not been initiated so far. Exclusion has therefore to be justified.

Note dated 10.10.92 reads as follows:

MOS (C) further discussed the case with me today, when M(s) was present.

'He indicated that after examining the reasons for elimination of the six short-listed parties from consideration for selection, he is of the opinion that M/s. Sterling Cellular need not be excluded outright, since CBI report has not yet been received. The company may be considered for selection and included in the select list on a provisional basis, if found eligible otherwise. Similarly, M/s. Indian Telecom Ltd. (partner OIC Australia) need not be eliminated just because they have desired exclusive license. We may offer them the license on a non-exclusive basis, if they are found eligible. It is upto them to convey acceptance to the offer. Exclusion of other four companies can stand for reasons indicated.

I have examined the case again. I recommend that if M/s. Sterling Cellular is to be selected on a provisional basis, the company may be allotted Madras for following reasons:

(a) Foreign exchange investment profile submitted by the company indicates that there will be a heavy F.E. outflow over 3 years if the company were to be allotted Bombay or Delhi.

(b) Madras is the least popular of the stations along with Calcutta. Rentals

quoted are high as pointed in our earlier note. M/s. Usha Martin will help bring down the rentals in Calcutta. Allotment of M/s. Sterling to Madras will achieve the same purpose.

(c) Any delay in allotment of license to M/s. Sterling on account of the C.B.I. investigations will have the least adverse effect in Madras for lack of competition to other licensee.

M(S) may kindly examine the again in the light of the observations of MOS(C) and rework out the select list. The case may be put up for approval of MOS(C).

202. Then it came to be selected on the approval of the Minister.

203. The High Court in upholding the selection observed thus:

The case of Sterling Cellular, however, appears to us to be rather strange. There were no strictures against the holding of this company by the name Sterling Computers Ltd. in M&N Publications Limited v. Mahanagar Telephones Nigam Limited and Ors. (1992) 4 DLT 24 by this Court and the strictures were only against MTNL and United India Periodicals Pvt. Ltd. (UPI) and United Database (India Pvt. Ltd. (UDI). M/s. Sterling Computers Ltd. had got associated with UPI/UDI in getting a supplementary agreement for publication of telephone directories for the cities of Bombay & Delhi. This Supplementary agreement was struck down. The Supreme Court in appeal Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, against that judgment also did not appear to have made any strictures. There was nothing on the record of the respondents to suggest that any CBI enquiry was pending against this company. There was no FIR and no preliminary report adverse to the company and we feel the ghost of CBI has been unnecessarily brought into play. The company appears to have been punished for no sin of its. However, since the company has not complained we will leave the matter at that.

204. It is submitted by Mr. Parasaran that as on the date of the judgment no inquiry was pending. It was only after 10th of June, 1993 an FIR was filed by CBI when the High Court of Madras was approached for quashing the FIR u/s 482 Cr. P.C. An order by consent was passed. CBI was allowed to proceed with the investigation and complete the same within one year. It was also ordered that there would be no arrest or harassment. Therefore, as on the date of selection there was no adverse report against Sterling Computers.

205. On the date of consideration by the Technical Evaluation Committee its position was even better. If, therefore, this aspect had been borne in mind it is not for us to reweigh the claims and come to one conclusion or another. So much for selections.

206. A letter dated 27.8.93 by Department of Communications, Telecom Commission was addressed to the appellants as follows :

Department of Telecommunications (Telecom Commission) New Delhi-110001

No. 842-2/92-TM Dated : 27th August, 1993 To:

M/s. Tata Cellular Ltd.

Bombay House,

24, Homi Modi Street, BOMBAY-400001

(Kind attention Shri Z.A.Baig)

Sub. : Tender No.44-21/91-MMC(FIN) for franchise for cellular mobile telephone service for Bombay Delhi, Calcutta and Madras. Kindly refer this office letter of even No. dated 2.10.92 informing your that M/s. Tata Cellular Ltd. were provisionally selected for franchise for providing cellular mobile telephone service at Delhi on a non-exclusive basis.

That matter has been reconsidered in the light of the judgment delivered by the High Court of Delhi in this case and a revised list of provisionally selected bidders in the cities of Bombay, Delhi, Calcutta and Madras has been prepared. The revised list does not include mobile telephone service in any of the four cities, the earlier letter of even No. dated 12.10.92 may therefore be treated as cancelled.

sd/- (S.K.GARG) 27.08.93 DDG (TM-

207. From this letter we are not able to fathom the reason for omission. As seen above, Tata Cellular was originally selected for Delhi. By implementation of the judgment of the High Court it has been left out. Before doing so, as rightly urged by Mr. Soli, J. Sorabjee, this appellant ought to have been heard. Therefore, there is a clear violation of the principle of natural justice. On an overall view we find it has two distinctive qualifications. In that :

1. It has not borrowed from any commercial bank.
2. It has an annual turnover from Indian Parameters of Rs. 12,000 crores and the annual turnover of the foreign parameters, Rs. 51,000 crores. Comparatively speaking, the other companies do not possess such high credentials yet it has been awarded low marks with regard to the reliance on Indian public financial institutions and the financial strength of the parameters/partner companies.

208. These qualifications could have been validly urged had it been heard. Then, we do not know what decision could have been arrived at.

209. Indian Telecomp had been omitted for the following reasons as indicated in note dated 9.10.92:

India Telecom (Partner Telecom Malaysia):

Limited experience. Telecom Malaysia already selected as partner of M/s. Usha Martin ICC Calcutta.

210. We cannot find fault with this reasoning since there can be only one foreign

collaborator. It cannot have Telecom Malaysia as its collaborator since Usha Martin has the same foreign collaborator.

211. In the case of Ashok Leyland, the noting, as seen above, is as under:

In both cases of _ (i) M/s. Ashok Leyland and (ii) M/s. Vam Organic Chemicals Ltd. - a joint venture company has not been formed as stipulated in the tender, and there is no indication of the equity structure or the extent of participation of the foreign collaboratOrs.

212. We cannot interfere with the discretion of the Committee.

213. In the above two cases, we are obliged to interfere on the ground of arbitrariness and violation of the principle of natural justice confining ourselves to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision-making process

(Emphasis supplied)

214. We make it clear that we are not disturbing the other selections since the power of judicial review is not an appeal from the decision. We cannot substitute our decision since we do not have the necessary expertise to review.

215. Lastly, quashing may involve heavy administrative burden and lead to delay, increased and unbudgeted expenditure; more so, in a vital field like telecommunication.

216. In view of the foregoing, we thus reach the conclusion that Bharti Cellular could not claim the experience to Talkland. This conclusion has come to be arrived at on the basis of the parameters we have set out in relation to the scope of judicial review. We may reiterate that it is not our intention to substitute our opinion to that of the experts. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly this Court would interfere.

217. In the result, we hold that Bharti Cellular's claim based on Talkland's experience is incorrect. Talkland's experience will have to be excluded. The matter will have to be reconsidered on a factual basis as on 20th January, 1992, in the light of what we have observed. The claim of Tata Cellular will have to be reconsidered in the light of the above observations. Accordingly, civil appeals arising out of SLP (C) Nos. 14191-94 of 1993 will stand allowed. Civil Appeals arising out of SLP(C) No. 14266 of 1993, SLP(C) No. 17809 of 1993 and T.C. (C) No. 49 of 1993 will stand dismissed with no order as to costs.