

(1996) 05 DEL CK 0001

In the Delhi High Court

Case No : Letters Patent Appeal No's. 20 and 27 of 1995 and 106 and 113 of 1996, Civil Writ Appeal No's. 950 and 953 of 1996 and Contempt Civil Petition No. 391 of 1995

Union of India

APPELLANT

Vs

Eider Electronics Industries Ltd.

RESPONDENT

Date of Decision : 28-05-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1996) 5 AD 736 : (1996) 63 DLT 330 : (1996) 39 DRJ 721

Hon'ble Judges : M. Jagannadha Rao, C.J.; Dalveer Bhandari, J

Bench : Division Bench

Advocate : M.C. Sekharan, Meera Bhatia, Arun Jaitley, Kum Kum Sen, Vikash Dhawan, K.K. Venugopal, R.K. Kapur, R.K. Garg, P. Verma, S.K. Srivastava, Neeta Aggarwal and Shanti Bhushan, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) These are a batch of cases. The 10 LPAs arise-out of judgment of learned Single Judge dated 2.3.1995 in two writ petitions, C.W. 3774/92 and C.W. 924/93. There is one contempt case and again 4 writ petitions of 1996.

(2) The question raised in the writ petitions C.W. 3774/922 and C.W. 924/93 was whether the omission to "short-list" the writ petitioner (1st respondent) was arbitrary and illegal and violative of Article 14 of the Constitution of India. While 19 others (imp. led as respondents 6 to 24 in the CWP) were short listed by the Union of India for the purpose of enabling them to make their financial bids, the Tender Evaluation Committee introduced additional criteria for eligibility and omitted the writ petitioners in the above two writ petitions from the list for not satisfying the fresh "eligibility" conditions so introduced. The learned Single Judge held that the authorities could not, after the tenders were called for, introduce fresh conditions which made certain tenderers basically "ineligible". He held that all applicants who satisfied the initial tender conditions for eligibility

were to be considered and no fresh conditions could be introduced for purposes of basic eligibility. This was the view of the learned Single Judge. He directed the two writ petitioners. Eider Electronics and Eider Telecommunications, to be short listed and partly allowed the two writ petitions.

(3) The learned Single Judge, however, did not disturb or quash the second short listing of 19 other companies which later led to 15 companies to make financial bids and to get licences. The learned Judge's directions: Before we proceed to go into the facts in detail. We shall mention in what manner, the learned Single Judge allowed the writ petition in part, or rather the relief actually granted. He held that, having regard to the fact that during the pendency of the writ petition, licences were already issued to 15 out of the 19 applicants for "pagers" in various cities, he was not willing to disturb their "selection". He would however direct the "short listing" of the writ petitioners because the petitioners' omission was arbitrary. The relevant part of the judgment, in so far as the relief portion is concerned -reads as follows:

"THE question now arises as to what relief the petitioners shall be entitled. The other tenderers who were not short-listed have not approached this Court and impugned the action of the Government. The challenge is only made by the petitioners in the present writ petitions. I am quite conscious of the fact that quashing of decisions may impose heavy administrative burden on the Administration and lead to increased and unbudgeted expenditure as correctly analysed by the judgment of the Supreme Court in Tata Cellular's case. I am, Therefore, not inclined to quash the entire selection. The selection will hold good as no challenge has been made to the same except by the petitioners. The petitioners shall, however, be considered for short- listing without taking into account the criteria of 25 per cent equity participation of the foreign partner in the joint venture in the first instance. The respondents shall, however, be at liberty to impose this condition in case the petitioners are held eligible for grant of licence. The writ petition is allowed in the above terms. There will be no order as to costs".

(4) How the 2 writ petitions (now disposed of), 10 Lp Appeals, contempt case and 4 writ petitions came to be filed.

(5) Tenders were invited by Government for grant of Radio Paging Licences. 83 companies were considered as eligible according to tender conditions. Eider Electronics and Eider Telecommunication were among these 83 companies. Thereafter on the basis of additional eligibility conditions imposed by the Tender Evaluation Committee, 19 companies were found eligible and both the above companies, Eider Electronics and Eider Telecommunications, were not included in the second short listing. Questioning the same, Eider Electronics filed Cwp 3774/92 and Eider Tele communications filed Cwp 924/93. These two writ petitions were allowed in part by the learned Single Judge on 2.3.95 by common judgment holding the omission of these two companies and was bad. He did not however disturb the short listing of the 19 other companies. Among the said 19,

- 15 companies were, during pendency of the said writ or thereafter, granted licences. Though two writ petitions were allowed each to the above extent. Union of India filed only one Lpa 27/95 challenging the judgment in so far as it held in favor of Eider Electronics in Cwp 3774/92, with delay of 35 days. (No appeal was preferred by Union of India in Cwp 924/93 filed by Eider Telecommunications). Lpa 20/95 was filed by Eider Electronics to the extent its Cwp 3774/92 was not fully allowed.

(6) Eider Electronics filed Ccp 391/95 as the judgment dated 2.3.95 in Cwp 3774/92 was not implemented. Then Government of India issued letter of intent to Eider Electronics on 24.1.96. Similarly, letter of intent was granted to Eider Telecommunication also in 1996. Questioning them, 4 of the 15 successful companies have filed Cwp 950 to 953 of 1996, impleading Uoi and the two companies. Eider Electronics and Eider Telecommunications as parties.

(7) Long thereafter and, in fact, after the matters were partly heard, the said 4 successful companies out of 15 companies (which got the licences) filed 8 LPAs, - 4 by each of them against Eider Electronics (petitioner in Cwp 3774/92) i.e. LPAs 110 to 113/96 and 4 against Eider Telecommunications petitioner in Cwp 924/93) i.e. LPAs 106 to 109/96.

(8) We have Therefore 10 LPAs, 1 contempt case and 4 writ petitions, in all 15 matters.

(9) We shall first take up the Lp Appeals (LPA 20,27/95) and LPAs 110 to 113/96, all of which concern Union of India, the unsuccessful company (Eider Electronics) and the 4 successful companies out of the 15. Later we shall take up the 4 other appeals LPAs 106 to 109 filed by the 4 successful companies which concern Eider Telecommunications and thereafter C.Ws 950 to 953/96 by the same 4 companies against Union of India & Eider Electronics and Eider Telecommunications. The "eligibility" criteria at the stage of tenders:

(10) Tenders were invited by Department of Tele- Communications, Govt. of India from Indian Companies for providing Radio Paging Services in the country by granting licences to various companies. The tender documents could be obtained between 11.6.1992 to 24.7.1992 and the last date of submission of tenders was 31.7.1992, which was also the date for opening tenders. The date of opening was, however, postponed to 15.7.92 after public notice in newspapers. Petitioner in this case, Eider Electronics, submitted tenders before 15.7.92. in time. The "eligibility" conditions were as follows:

"1. Eligible Bidders: This invitation for bid is open to all the companies registered as Indian Company" up to the date of submission of the bid. A company registered in India under the Companies Act will be eligible to bid. license to run the service will be issued to the bidder company if selected. Following documents are required to be submitted Along with the bid. (a) Copy of the certificate of registration from the Registrar of Companies. (2) Articles and Memorandum of Association of the Indian Company. (3) If any foreign partner is proposed, then

(i) Copy of the agreement between the Indian and the foreign partner. (ii) Approval of Government of India for the Terms of foreign collaboration, if already taken, otherwise copy of the application submitted to the competent authority of Government of India, in this regard together with the proof of submission. (d) Record of the past performance/experience in the service area for which the bid is submitted".

(11) The above basic eligibility conditions could be analysed as follows. Tenders were to be submitted by Indian Companies. For our purpose sub clause (c) and (d) of the eligibility conditions are important.

(12) Condition for having a foreign collaborator under clause (c) was optional and condition for "experience" under clause (d) was mandatory.

(13) Firstly under Clause (c), so far as "foreign partner" was concerned, the words "if any foreign partner is proposed" would show that it was not obligatory to have a foreign collaborator. All that was necessary was that in case there was a foreign collaborator, the applicant was to file a copy of the collaboration agreement between the Indian and foreign partner and it was also necessary to file the approval of the Government of India, if such approval was already taken. Otherwise a copy of the application addressed to the competent authority in Government of India was to be submitted together with proof of submission. Secondly under sub- clause (d), it was necessary that documents relating to the "record of past performance/experience in the service area for which the bid was submitted, be filed. In fact clause (d) plays a more important role in the case.

(14) If the above conditions alone had remained for short listing, the petitioner in these cases Eider Electronics (and Eider Telecommunications) satisfied those conditions. But then there was a second short listing and when the list of companies so short-listed was published in the newspaper (Annexure P12) on 14.10.92, the above names. Eider Electronics and Eider Telecommunications, were found missing. Then the writ petition (CWP 3774 of 1992) was filed by Eider Electronics. Similarly Eider Telecommunications filed C.W.P. 924/93. No stay was granted. Later on, on 30.8.94 and on other dates, during the pendency of the writ petitions or after their disposal on 2.3.1995, licences were granted to some of the 15 successful respondents out of the 19 so short listed. The writ petitions were disposed of on 2.3.95 allowing it partly, (relief portion extracted above) holding that the refusal to short list the petitioners was illegal.

(15) We shall refer to what happened in case of Eider Electronics.

(16) In order to comply with Clause (c) of the tender conditions, the petitioner in C.W.P. 3774//922 submitted names of two foreign partners having experience in paging services, namely. Star Paging Services, Hong Kong, and Samsung , Korea. The collaboration agreements were also filed by the petitioner Along with his application. The Reserve Bank of India approved the foreign collaboration with one of the two collaborators - namely. Star Paging System of Hong Kong. The approval was also enclosed with the tenders. So far as "equity" holding was

concerned, the collaboration agreement filed by the said writ petitioner did not specify the actual percentage of equity to be contributed by the foreign partner. The agreement showed that it was to be finalised by mutual consultations, after issue of licences. Some of the other applicants did mention in their foreign collaboration agreements the equity % as promised to be invested by the foreign collaborator.

(17) The Tender Evaluation Committee's Report introducing fresh criteria for eligibility.

(18) After the 83 applications were received, they were analysed. Some companies did not have foreign collaboration (Of course at the stage of tenders, as already stated, foreign collaboration was not mandatory). Some companies, like Eider Electronics and Eider Telecommunications, merely mentioned that they had foreign collaboration and approval of Rbi or Government of India. Some other companies not only stated they had foreign collaboration but also indicated the % of equity promised to be invested by the foreign collaborator in case the Indian company was successful at the subsequent stage of financial bidding and got licences. Among those in the latter category were some applicants who had also indicated the promise of equity of their foreign collaborator, it was found that the promise extended up to even 51%. As stated below the Tender Evaluation Committee selected 19 Indian companies which had made a promise of foreign equity above 25%.

(19) The Tender Evaluation Committee on Radio Paging Services mentioned in their report that, in view of the fact that a large number of applications were received, the Committee had kept in view the short listing procedure done in Annexure V of the "Cellular Tenders" of 1992. It said:

"THE Committee has adopted the following guidelines laid down in the report of the High Power Selection Committee for evaluation of the Cellular tender (Para 15(1) and 15(ii) of extracts at Annexure V)".

(20) What were the 1992 Cellular guidelines & what are the 1992 fresh Pager guidelines ? (A) 1992 Cellular guidelines evolved by the then Tender Evaluation Committee: The Cellular tender guidelines of 1992 were as follows: "The Committee (i.e. 1992 Cellular) 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 necessarily apply to the foreign collaborator. Also since G.S.M. technology is only new 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 -2,50,000 subscribers). (ii) For the same reasons as above (lack of experience of Indian Companies), the Committee decided to short list those offers which had a firm commitment and tie up in the form of a joint venture with a significant equity participation of the foreign collaborators. (iii) (iv) " The above guidelines of

the 1992 Cellular phones were Therefore made applicable for the present Paging Tender Evaluation, as stated earlier. But while doing so, drastic changes were made by the 1992 Paging Tender Evaluation Committee on 14.8.1992. (B) Fresh legibility conditions laid down by the Pager Tender Evaluation Committee on 14.8.92

"2.3.As regards clause (d) of para 1, Section II, mentioned at para 2.1 above, the Committee has adopted the following criteria taking into consideration the guidelines laid down in the report of the High Power Selection Committee for the evaluation of Cellular tender (para 15(i) and 15(ii) of the extractors at Annexure V). (i) Since none of the Indian companies have experience of operating a Radio Paging Service, this would necessarily apply to the foreign collaborator. Foreign company who have experience of operating a Paging System and who have developed a reasonable sized network would be taken as meeting this criteria. Since a large number of bidders have not indicated the time period since they have been operating the service, the minimum requirement of 5 years of experience has not been considered essential for short listing. (ii) The experience of the foreign collaborator would accrue to the Indian bidder company if there is a firm commitment and tie up by the foreign collaborator in the form. of joint venture with a significant (25% or more) equity participation. and the proof effect fresh conditions touched both clause (c) and (d) of the ten- number of aplenty conditions. Under, clause (c) only those companies which had opinion, open to promise of atleast 25% to be subscribed after licences were issued, introducing fresh court listed for purpose of giving financial bids; under clause (d), if selected on basis oftener promised 25% equity, the experience of that partner was and if the applicants are accrued to the Indian Company. only those who secured much Tender Evaluation Committee introduced fresh con- view. The reduction in the entrance covered by Clause (d) and consequentially only if some more are "elimin.

(24) We shall further analyze the disputed decision of the Tender Evaluation Committee.

(25) Analysing the fresh conditions introduced by the Committee, it will be seen that they noticed that none of the Indian Companies had experience of operating Radio Paging Services. They observed that Therefore the condition as to "experience" would necessarily apply to the foreign collaborator. While minimum requirement of 5 years experience (i.e. as in 1992 Cellular case) was not considered essential for "short listing", the guideline that was adopted was that the experience of the foreign collaborator would accrue to the Indian bidder company, -

"IF there is a firm commitment and tie up by the foreign collaborator in the form of joint venture with a significant (25% or more) equity participation"

(26) In other words, though it was not even obligatory to have a foreign collaborator, the eligible tenderers became ineligible for short listing i.e. second

short listing if they did not. have a foreign collaborator and, in addition, the latter had not, as a fact, specified that the equity it proposed to invest would be above 25%. This condition introduced under the clause (d) relating to "experience", necessarily modified clause (c) also making it retrospectively obligatory to have a "foreign" collaborator and also a 25% equity by the foreign collaborator. Here the petitioner, to start with had a foreign collaborator. Equity percentage was to be finalised later on. But by virtue of the further requirement of a promise of at least 25% equity by the foreign collaborator, applicants like the writ petitioner got excluded at the further short listing made by the Tender Evaluation Committee on 14.8.1992.

(27) The learned Single Judge held that this procedure was illegal and that there was no scope for the Tender Evaluation Committee to impose fresh conditions which would result in a total disqualification from "basic eligibility." According to him, once the eligibility conditions specified at the stage of tender were satisfied, no fresh conditions could be introduced regarding basic eligibility. He distinguished Tata Cellular Vs. Union of India, as a case where introduction of fresh relevant criteria for purpose of assessment of comparative merit was justified. According to him this principle did not apply to the present case because the basic "eligibility" was itself alternate by the Tender Evaluation Committee.

(28) According to Mr.M.Chandrasekharan , Additional Solicitor that the ten India for the Union of India, this short listing by introducing from conditions had to be done because there were 83 applicants are trial Court rebinding companies had experience in radio paging services. It Corporation India to introduce fresh criteria for making a further short-listed a reasonable market experience criterion was dispensed with but it was keeping in view the locarience of the foreign collaborator would accrue to that the property which is the equity by the foreign collaboration was at least 25 Tata Cellular, to say that when Government selects applicants for grant of contracts, there must be "free play in the joints." Union of India says that all that was necessary was that the standards and norms applied must be relevant and rational and not arbitrary, irrational or irrelevant. If the standards to be applied were applied to all tenderers equally, there could no complaint. The principle laid down in Tata Cellular, it is argued, applies not only for purposes of assessing comparative merit of short listed candidates but also for further short listing those already short listed.

(29) Some of the successful companies which were granted licences supported this contention of Union of India through their Counsel , Sri Shanti Bhushan and Sri Arun Jaitley.

(30) Sri K.K. Venugopal argued for supporting the direction given by the learned Single Judge and sought further directions/clarifications in Lpa 20/95.

" ELIGIBILITY", "short listing" and the right to be considered for selection

(31) This brings us to the question as to what is meant by the words "eligibility"

and "short listing".

" ELIGIBILITY" conditions as per invitation for tenders are no doubt basic requirements which every applicant must satisfy to go to the next stage of being considered for assessment of merit or evaluation or selection. If the initial eligibility criteria are satisfied by an applicant, he gets a right to have his application considered. On the other hand, if an applicant does not satisfy the initial conditions of eligibility, he has, under Article 14, no fundamental right to be considered like the other applicants who satisfy the same. Question is whether there could again be a second short listing procedure before the stage of actual consideration on merit. The learned Single Judge held there could not be a further change of basic eligibility conditions.

(32) It is true there are mainly two stages, firstly, the stage of short listing before the actual consideration and secondly the stage of actual consideration. But at the former stage, situations might arise which might indeed require further short listing. If the applications are large (83 here) and time is short and the project is to be implemented fast, then with the object of reducing the number of applicants whose merit could be speedily considered it is, in our opinion, open to the Government to modify the "eligibility" conditions by introducing fresh conditions of eligibility. For example, if candidates are to be selected on basis of marks obtained at (say) Bachelors degree examination, and if the applicants are in thousands, then it would be open to lay down that only those who secured marks above (say) 65% would be called for interview. The reduction in the numbers to be actually considered can happen only if some more are "eliminated" before consideration and such elimination is possible only if fresh criteria of eligibility are imposed at a later stage and before the actual stage of assessment of comparative merit. We do not agree with the view of the learned Single Judge that, at a later stage, it is -not permissible to introduce conditions which affect the basic eligibility conditions notified at the stage of inviting tenders.

(33) Sri K.K. Venugopal, learned counsel for the respondent - (writ petitioner) contended, relying on Tata Cellular case that in that case fresh criteria were introduced and upheld, but they were not for further short listing but for comparative assessment of merit. This was done by awarding marks for each of the new criterion introduced by the Tender Evaluation Committee.

(34) It is true that in the Tata Cellular case, fresh criteria were laid down by the Tender Evaluation Committee not for the purpose of further short listing but for the purpose of assessing comparative merit. But that, in our opinion, is not a point of distinction. It is in our opinion well settled that when eligibility conditions initially imposed result in a large number of applicants be it for awarding contracts, selection of candidates for employment, etc., fresh short listing can be made by introducing new but relevant and rational criteria so as to lessen the burden of the selection authority. All that is required is that the short listing - before the stage of consideration of merit - must be based on relevant and

rational criteria, and uniformly applied to all applicants found initially eligible.

(35) Are the fresh criteria imposed by the Tender Evaluation Committee not relevant or not rational?

(36) The more important question, in our opinion, is as to the "relevancy" or "rationality" of the fresh conditions imposed.

(37) " Admittedly, as found by the said Committee, none of the Indian companies had actual experience. They decided to follow the 1992 Cellular tender guidelines, as per which, experience of operating a cellular system of atleast 5 years and who have developed a reasonable sized network (25,000 - 2,50,000 subscribers); and who had a firm commitment and tie up in the form of a Joint Venture with significant equity participation of the foreign collaborators, was necessary.

(38) But then on 14.8.1992, the Pager Committee dispensed with the 5 years experience rule and introduced a rule of foreign tie up with 25% (or above) equity participation. The Committee stated that experience of a foreign company could be deemed to accrue to the Indian company provided the percentage of equity by the proposed foreign collaborator was at least 25%. A mere agreement by the foreign collaborator to contribute 25% equity after licences were issued - was treated as sufficient. Copy of such an agreeerpent, if filed along with the tender application, was treated as good enough. No actual incorporation of a company with a foreign collaborator nor particular actual investment in equity nor paid up capital was necessary.

(39) The writ petitioner, Eider Electronics, here had filed a tender application showing collaboration with a foreign company. In fact, the petitioner company had applied for approval submitting names of two foreign collaborators Samsung of Korea and Star Paging Services of Hong Kong. The Rbi approved Star Paging Services of Hong Kong. No doubt the other 19, short listed companies at the second stage had specified the % of equity participation (this was above 25%). The only distinction between those 19 companies which were short listed at the second stage and the writ petitioner was that the writ petitioner's collaboration agreement was silent on percentage of foreign equity and stated that the % of equity to be contributed by the foreign collaborator would be finalised after the licences were granted.

(40) Learned counsel for the writ petitioner, Sri K.K. Venugopal submitted that this was a distinction without any rational difference. Once basic criteria for assessing "experience" under clause (d) were given a go bye by the Tender Evaluation Committee because none of the Indian Companies had experience in radio paging services, then to create a fiction that a mere promise by the foreign company to contribute 25% equity or more, will amount to "experience" would be an irrational or irrelevant criterion. There was no difference between those who had a promise of collaboration with a % to be agreed upon in future and those who had, even initially, a fortuitous promise by the foreign collaborator for

a specified % but who, admittedly, did not invest even a single pie in the Indian company. In fact the joint Venture Company itself was not incorporated by any of the parties.

(41) On the other hand, learned Addl. Solicitor General Sri Chandrasekharan and Sri Shanti Bhushan and Sri Arun Jaitley (for the successful bidders) contend that experience factor was not waived but that only the "5 year" period of experience (applied to 1992 Cellular tender) was not insisted. It was implied that every foreign collaborator who had agreed (i.e. gave firm commitment) to contribute equity of 25% or more, - had enough experience falling under Clause (d).

(42) We have considered the points of distinction carefully. We are rather surprised that once the Committee found that none of the Indian Companies had experience in Radio Paging, and the criterion of "5 year" experience which was applied to 1992 Tata Cellular tenders was given up, a criterion of 25% equity which had no direct or proximate bearing on the question of "experience" was introduced" as a fresh mandatory criterion, even though not a pie had been invested by the foreign company as on the date of Tender or even as on the date of the Tender Evaluation Committee's Report on 14.8.1992. There was only a promise to contribute a particular percentage in future, made by the foreign collaborator after licences were actually issued. It is important to note that the criterion of "experience" of the foreign collaborator was not - as per the norms of the Committee - based on either number of years experience or number of lines or subscribers the foreign collaborator had or such similar parameters. In our view, the principle introduced subsequently to measure "experience" was wholly irrational and irrelevant.

(43) In the Tata Cellular case, fresh criteria were introduced for counting experience but the criteria were, in fact, relevant criteria, namely, number of cellular connections given or number of subscribers etc. and various other parameters. Clearly experience could be gauged by number of years or quantum of services rendered or by both. It cannot, in our opinion, be merely judged by the financial power enjoyed by a foreign collaborator who could merely agree to contribute 25% equity in future. The result is that, while assessing experience, for further short listing, relevant criteria (i.e. number of years experience or number of subscribers) were dispensed with and fresh criteria which were neither rational nor relevant (financial capacity of the foreign collaborator i.e. a mere promise to Contribute 25% equity in future was to be treated as "experience") were subsequently introduced.

(44) When the tender documents submitted by the Union of India were examined, then it became further evident that the subsequently imposed condition of 25% foreign equity participation is indeed an irrational and irrelevant criteria. The Union of India has given a chart during the course of hearing which indicates :-

(A) Name of the short listed companies, (b) Name of Foreign Collaborator, (c)

Foreign Equity in percentage, . "Is 1 (d) Foreign investment as per Sia application/ M.O.U. and (e) Foreign paid up capital as on 15.7.1992.

(45) On 15.7.1992 none of the short listed companies who were given licences had any foreign paid up capital. One of the short listed companies, M/s Arya Comm. and Electronics Services, was also granted license had authorised share capital of Rs. 5 lakhs. If 25% equity participation of the said amount is taken into consideration, then it works out to Rs. 1.25 lakhs. Surely the Union of India was not looking only for a firm-commitment of Rs. 1.25 lakhs as foreign investment in a multicore contract. Eider Electronics & Eider Telecommunications were not short listed only for not fulfilling this subsequently imposed condition of 25% equity participation by the foreign collaborator. We fail to understand how the said firm commitment of a paltry sum of Rs. 1.25 lakhs can be a relevant or rational criteria for grant or refusal of the licences in a contract of this magnitude. We also fail to comprehend how a firm commitment of Rs. 1.25 lakhs from a foreign collaborator can be a substitute for experience (which ordinarily should be either number of years or number of subscribers).

(46) It was argued for the successful bidders by Shri Shanti Bhushan that "experience" was not dispensed with altogether and that if a foreign company was prepared to give a firm commitment and tie up Of foreign equity of 25% or more in future, it must necessarily be having experience. This contention ignores the fact that "experience" which is normally measured by number of years or number of subscribers or similar parameters was given up. The contention that only the period i.e. the 5 year rule of experience was given up, cannot be accepted.

(47) It was then argued by Sri Shanti Bhushan that at the stage of tenders it was not necessary to expect a Joint Venture Company to be incorporated and make the foreign collaborator contribute 25% of equity. If ultimately, licences were not issued, this exercise would be futile, it was argued. But, this is, in our view, not an Explanation for not reckoning experience by number of years nor by number of subscribers or like parameters. Further this argument cuts both ways. Learned counsel for the writ petitioner, Sri K.K. Venugopal, while adopting the same line of argument as Sri Shanti Bhushan argued that, at the stage of tenders, when it was indeed not obligatory to have a foreign collaborator nor promise of 25% equity contribution, then the specification of the % of equity - anon-obligatory condition - could not have been made an obligatory condition. If it could not indeed be a measure of the "experience" then, its non-specification should not make his client ineligible. On the other hand, if experience had been measured by number of years or number of subscribers, or like parameters things would have been different.

(48) Reliance is placed by Sri Arun Jaitley on New Horizons Limited and Another Vs. Union of India (UOI) and Others, to say that there can be no comparison between a collaborator who has no stake in the business and one who has a stake and, therefore ,25% equity would be a good parameter. This decision does

not apply firstly because we are here concerned with the question whether "experience" is not to be measured by number of years or by number of subscribers etc. but only by 25% contribution to be made in future. Secondly, the above observations were made in a case where the present contribution of equity by a foreign company in an Indian company was an essential condition as against a future promise. That is not the position here. In that case, the experience of a foreign partner in a Joint Venture Company already formed at stage of tender was held to accrue to the Indian partner.

(49) We are not to be understood as saying that the writ petitioner should have been given opportunity, at the stage of second short listing - to find out if his foreign collaborator would specify its equity. What we are saying is that the petitioner's disqualification was based on an irrelevant or irrational criterion and was an invalid condition. Indigenous Production - Weightage (Commercial Condition): There was also argument by Sri Venugopal for Eider Electronics that the tender documents stated (Section Iii relating to Commercial Conditions) that weightage would be given for indigenous producers of pagers. Reliance was placed on Clause 14 thereof: it says -

"C1.14:Indigenous Production: 14.1: The tenderer will produce the plans for indigenous production of Radio Paging equipment such as Pagers, Base station equipment etc. in India from the date of the grant of the licence. 14.2: The use of indigenously manufactured equipment in the provision of service will be given weightage for issue of licence. If the equipment have to be initially imported their indigenous programs may be clearly indicated."

(50) It is argued that Eider Electronics is perhaps the only Indian Company which has established a factory for production of Pagers after making huge investments and that all the 15 companies now selected, without exception, are using the Pagers produced by Motorola USA. Counsel contends that, Eider Electronics was eliminated without giving any "weightage" for its production and there was no justification for selecting only those companies which were using Pagers produced by Motorola/USA.

(51) In regard to this aspect of the matter - the Tender Evaluation Committee observed as follows:

"THE Committee notes that indigenous production facilities are already being set up by three companies for the Pagers and atleast one company for other components of the system. In addition, the Committee also notes that one more foreign manufacturer has plans to set up indigenous manufacturing facilities. Hence in view of the indigenous production capacity likely to be available, the Committee did not take this parameter as an essential condition for short listing."

(52) We are unable to appreciate this reasoning. Initially, the tenders proposed weightage for indigenous production. The relevancy there of was not disputed. But merely because some other companies had proposals for starting production or were likely to set up units in future, was no ground for discarding the said

parameter while evaluating the petitioner's application. In our view, this is yet another manner of ignoring a relevant and published criterion. For this reason also the omission of Eider Electronics is vitiated.

(53) Learned counsel, Sri Shanti Bhushan argued that "weightage" did not mean "preference". We shall assume so. But there is no valid answer as to why "weightage" for indigenous production was not given. None of the other Indian companies selected had indigenous production. We hope that it is one of our country's policies to encourage indigenous production. Tie up or firm commitment - (fresh conditions)

(54) An argument was also advanced by Sri K.K. Venugopal that "firm commitment" by the foreign collaborator as envisaged by the fresh conditions laid down by the Tender Evaluation Committee did not mean a promise to contribute 25% equity in future and that it meant actual contribution and that the successful bidders were in fact not eligible. In our opinion, this construction is not correct. The above principle of future contribution of 25% equity was adopted from the 1992 Cellular tender guidelines. We have seen the file relating to that case and gone through the Supreme court Judgment connected with those tenders. It was not the understanding of that Committee nor by the present Tender Evaluation Committee that "firm commitment" or "tie up" meant actual investment. This position, in fact, changed when tenders were again called for in 1995 for Cellular Phones and also in the tenders for Basic Telephone Services (See Delhi Science Forum and others Vs. Union of India and another, where actual incorporation of a Joint Venture Company at the time of submitting tenders and actual contribution of foreign equity of not exceeding 49% by the foreign collaborator and 10% net worth were basic conditions of eligibility. The policy in 1992 when Pager & Cellular tenders were called for was different and it merely called for "tie up" and "firm commitment" to contribute equity in future.

(55) But in view of our decision on the question of "relevancy" or "rationality" of the new condition, the rejection of the above submission of Sri Venugopal does not make any difference. Substitution of foreign collaborator by some of the successful bidders:

(56) A contention was advanced by Sri Venugopal that the fact that subsequently- the foreign collaborators for certain companies were allowed to be substituted is a ground for saying that the earlier promise by one collaborator to invest 25% equity - (which promise was accepted) - could not be treated as a "firm commitment" and if that be so. Eider Electronics could have been asked - at the stage of second short listing - to find out if its foreign collaborator could offer 25% contribution.

(57) It was revealed that this substitution occurred after licences were issued to the successful bidders - i.e. after financial bids. Therefore, we are unable to accept this contention of Sri Venugopal. If long after the licences were issued, a

foreign collaborator goes out, then we cannot go back to an earlier point of time and say the offer was not a firm one. The firmness of the foreign collaborator's offer at the time of second short listing was obviously based on the facts and circumstances then obtaining.

(58) Lpa 27/95 of Union of India and LPAs 110 to 113/96 & LPA 20/955 of Eider Electronics:

(59) The reasons given earlier would show that the conclusion of the learned Single Judge in holding that the non-short listing of the two Indian companies along with 19 other companies was bad and violative of Article 14 of the Constitution of India, was correct, though for reasons different from those assigned by the learned Single Judge. Therefore, Lpa 27/95 by the Union of India and the four LPAs 110 to 113/96 by 4 out of the 15 successful companies are liable to be dismissed.

(60) Coming to Lpa 20 of 19995 it was argued by Sri K.K. Venugopal that the learned Single Judge allowed the C.W.P. 3774/92 in part and set aside the non-short listing of Eider Electronics. The selection of 15 other companies for grant of licences (out of 19 companies short listed) was not disturbed. But the learned Single Judge, obviously, did not intend that his order in favor of Eider Electronics (and Eider Telecommunications) should remain a dead letter. He did contemplate grant of licences to the said companies. This contention, in our view, is liable to be accepted. This is clear from the following words in the Judgment:-

"THE petitioners shall, however, be considered for short listing without taking into account the criterion of 25 percent equity participation of the foreign partner in the Joint Venture Company in the first instance. The respondents shall, however, be at liberty to impose this condition in case the petitioners are held eligible for grant of licence".

(61) No doubt, the effect of this direction has been debated before us. Sri Shanti Bhushan would contend that the short listing of all the 19 companies (including the 15 which got the licences) should be set aside (including his clients) and all companies along with Eider Electronics and Eider Telecommunications have to be reconsidered. Or else, the writ petitions should be dismissed. He says that the order in favor of the two companies for fresh short listing, while retaining the short listing of the remaining 19 companies is unworkable. That is his contention.

(62) On the other hand, Sri Venugopal contends that the learned Judge contemplated issue of licences to the two petitioners and in fact, the orders later on issued, granting licences to all the 15 companies clearly stipulated that they were "subject" to the result of the Appeals pending in Delhi High Court and Therefore, licences can now be given to Eider Electronics (and also Eider Telecommunications), and to that extent the licences of the successful parties can be curtailed by this Court in exercise of its powers under Article 226 of the Constitution of India.

(63) In our view, the dismissal of the Appeals of the Union of India and of the 4 companies & Writ Petitions must lead to the consideration for grant of licences in favor of Eider Electronics (and also Eider Telecommunications) eventhough, consequently, it may affect the future clientele or subscribers which these 4 companies may get.

(64) It may be pertinent to mention that all the licences were issued were subject to the orders of the Delhi High Court where the matter was sub-judice. Relevant portion of the license agreement dated 1.5.1995 in the case of Microwave Communications reads as under:-

"IT may kindly be "noted that the case regarding franchising of Radio Paging Service in 27 cities is sub- judice in the High Court of Delhi and decision of the Court will be binding upon you. In case your selection for franchising of Radio Paging Service is set aside by the Court, the liability of the Department of Telecommunications will be solely limited to the amount of license fee deposited with the Department of Telecommunications. The Department will not be responsible for any loss or damage arising out of any such action."

(65) In fact, out of the 15 companies which were granted licences, 11 have not appealed against the Judgment. The 4 other companies - which have filed 4 LPAs against Eider Electronics (and 4 LPAs against Eider Telecommunications) have already enrolled substantial subscribers. It is only that future subscribers (in cities where Eider Electronics and Eider Telecommunications would get licences) of these 4 companies that might get affected to some extent. At the time when licences were offered to these parties with the aforesaid condition, at that time it was open for them, not to accept the licences with the said condition. Having accepted the licences with the condition, and enjoyed its fruits for years these parties now cannot be heard to say that they are now not willing to accommodate Eider Electronics or Eider Telecommunications, these companies according to us have been erroneously not been short listed because of subsequently adopted criteria which were wholly irrelevant and irrational. Majority of subscribers have already purchased Radio Pagers from the existing license holders. The companies, which were wrongly excluded, can only hope to get some business (subscribers) in future along with other existing license holders. The balance of convenience is also not going to be tilted very adversely against, existing license holders, and in any event they have accepted the conditional licences. They would not be now justified in creating obstruction for the grant of licences to Eider Electronics and Eider Telecommunications. But then, the licences given to these 4 companies after the Judgment were, in fact, subject to the result of the appeals. Hence this .Court has power to direct consideration for grant of licences to the 2 writ petitioners, even if it affects the future subscribers of these 4 companies.

(66) Alternatively by allowing Lpa 20/95 filed by Eider Electronics, the Judgment of the learned Single Judge in C.W. -3774/92 directing short listing can be taken to the logical conclusion of consideration for grant of licences.

(67) It is also not necessary to accept the argument of Sri Shanti Bhushan that if the Lpa 20/95 is to be allowed, the entire short listing of all 19 companies should be set aside and the licences given to his 4 clients also be set aside. We are of the view such a prayer which goes even against his clients need not be granted by us. We can mould the relief in a reasonable manner.

(68) Therefore, Lpa 27/95, LPAs 110 to 113/96 are liable to be dismissed and Lpa 20/95 is allowed to the limited extent of consideration for grant of licences. LPAs 106 to 109/96 by 4 successful companies (against C.W.P. 924/93 of Eider Telecommunications):

(69) For the reasons given above and because Union of India having not filed any appeal against Judgment in C.W.P. 924/93, there can be no difficulty in proceeding further beyond the second short listing and directing consideration for issue of licences. Lpa 106 to 109/96 are liable to be dismissed. 4 C.Ws i.e. 950 to 953 of 1996: From out of the 15 successful companies only 4 have filed these writ petitions for quashing the grant of letter of intent to Eider Electronics and Eider Telecommunications in 1996. For the reasons given above, these two latter companies are to be included in the second shortlist and can be considered for issue of licences. This is because the LPAs of these 4 successful companies are liable to be dismissed. Hence the 4 C.W.Ps are liable to be dismissed. CCP: In the contempt case, no orders are necessary" as the letters of intent have now been issued. Relief: Eider Electronics and Eider Telecommunications have applied for grant of licences in some of the cities out of the 25 cities. Government of India had divided cities into three categories, some cities can have 4 licencees, some 3 and some 2. Now if the above said two companies were not short listed at the second stage and the reason Therefore was bad, then they are entitled to be short listed. This has already been done after the Judgment of the learned Single Judge. We have further stated that the learned Single Judge contemplated grant of licences to these companies. We have affirmed the said view though for different reasons. Now the Government of India have also issued letters of intent for these two companies insisting that these two companies must also obtain a promise for 25% equity from their foreign collaborators. These letters of intent are validly issued in view of the reasons given above.

(70) The licences which were granted to the 15 companies in various cities (including the 4 companies for which Mr. Shanti Bhushan appears, who have filed LPAs and fresh C.WPs, and the companies for which Mr. Arun Jaitley appears which have not filed LPAs or fresh C.WPs) have resulted in those companies already enrolling a large number of subscribers. The grant of two further licences to each of these 2 companies would not affect the subscribers already enrolled by the 15 companies. It would only affect the business in regard to enrolling future subscribers. It is true considerable investment has been made by these 15 companies but when they were granted licences they were told it was subject to the cases pending before us. We have stated that the fresh 4 C.Ws filed by 4 out of the 15 companies are liable to be dismissed. Instead of eliminating one

company out of these 15 in each city, we issue the following directions:-

(71) Cities in which there were 4 licencees will now have more than 4, cities in which there were 3 licencees will have more than 3, and cities in which there were 2 licencees will have more than 2 depending upon the cities for which Eider Electronics and Eider Telecommunications have opted. To do this, we have power under Article 226 of the Constitution of India. We can give directions in favor of the two writ petitioners even if the licences go up in the above manner and this power was not disputed. In order to rectify a wrong done to the petitioners, it has become necessary to mould the relief accordingly.

(72) We, Therefore, issue consequential directions, in all the above 15 matters before us that the Government of India can process the letters of intent granted to these 2 companies as per the terms of the letters, provided the writ petitioners satisfy the conditions laid down therein. The fact that such grant will increase the number of licencees in some of the cities will not come in the way of the Government of India.

(73) In the result, Lpa 20/95 is allowed in part, Lpa 27/95, LPAs 106 to 113/96, C.Ws 950 to 953//96 are dismissed, subject to the above directions. No orders are necessary in the CCP. As we have disposed of the matters on merits, we have condoned the delay in the filing of the 8 LPAs, though there was sufficient ground for dismissing the applications for condensation of delay of 401 days. Similarly, we are condoning delay of 35 days in the filing of Lpa 27 of 1995 of the Union of India. No costs.